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Ontario Labour Relations Board HIGHLIGHTS

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Scope Notes

The following are scope notes of some of the decisions issued by the Ontario Labour Relations Board in November of this year. Some of these decisions will appear in the November/December issue of the OLRB Reports:

Certification – Membership Evidence – The applicant filed certification application #1 (construction) and withdrew it four days later, after a representation vote had been scheduled but not held (no bar imposed) – The applicant filed certification application #2 (industrial) two days after #1 was filed – When the responding party filed a timely s. 8.1 objection and a vote had been ordered, the applicant sought to have the membership evidence from #1 transferred to #2 – The Board rejected the applicant's request because it came at a point when the responding party was statutorily precluded from responding to such an amendment – Further, the transfer would change the foundation on which the representation vote had originally been ordered – Other orders issued by the Board with respect to the conduct of list challenges

ACTON PRECISION MILLWRIGHTS LTD.; RE CJA; File No. 4258-02-R; Dated November 28, 2003; Panel: Mary Anne McKellar, J.A. Ronson, R.R. Montague (5 pages)

Lock-Out – Trade Union – In the year at issue, the Remembrance Day holiday fell on a Tuesday and the employer sought to have it observed instead on the Monday – When the Union refused to move the holiday, the employer advised the Union that there would be a lay-off on the Monday – The employer claimed that this was necessary because it was too expensive to start up the oven used in production twice in one week, the second start-up would lead to production inefficiencies, and there was a surplus of inventory – The Union argued that this was a threatened lock-out meant to compel the Union to agree to moving the holiday – The Board dismissed the application, accepting that the employer's planned suspension of production was motivated by valid business reasons, and not a desire to secure an agreement to observe Remembrance Day on the Monday

AMERICAN STANDARD, DIVISION OF WABCO-STANDARD TRANE CO.; RE USWA ON BEHALF OF ITS LOCAL 2000; File No. 2435-03-U; Dated November 8, 2003; Panel: Harry Freedman (5 pages)

Certification – Construction Industry – In this application for certification, the responding party gave notice under s. 8.1 asserting there were no employees in the bargaining unit – The union accepted that the employees were employed by another entity and conceded there were no employees in the bargaining unit on the application date – The employer withdrew the 8.1 notice – The applicant then sought to rely on the 8.1 notice to prevent the imposition of the statutory bar – The Board found that both parties were incorrectly applying the law: an employer cannot file an 8.1 objection when there are no employees in the unit, and an employer is entitled to withdraw its 8.1 notice at any time; when it does so, an applicant cannot revive it or require

the Board to complete the 8.1 inquiry – Application dismissed

CANNINGTON GROUP, THE; RE IUOE, LOCAL 793; File No. 1740-03-R; Dated November 5, 2003; Panel: David A. McKee (3 pages)

Certification – Construction Industry – Employee – Status – The Board examined the fundamental criteria applicable in determining employee status for purposes of inclusion in a construction bargaining unit – For a dependent contractor/employee finding, both economic dependence and the obligation to perform work are required – In this case, three persons in question were found to be employees and their ballots were ordered to be counted, subject to any objection from the applicant

IDM REFINISHING, IAN DEJORDAN C.O.B.; RE CENTRAL ONTARIO REGIONAL COUNCIL OF CARPENTERS, DRYWALL AND ALLIED WORKERS CJA; File No. 0570-03-R; Dated November 5, 2003; Panel: David A. McKee (9 pages)

Certification – Construction Industry – Remedies – Representation Vote – In this two year old certification application (a vote was held in 2001, the ballot box sealed, the matter adjourned several times, and the employer filed for bankruptcy) when the ballots were finally counted, the Union lost – The Union asserted the employer had committed unfair labour practices which prevented the employees from expressing their true wishes in the representation vote – When neither the employer nor the trustee attended the hearing, the Board found the employer had violated the Act and ordered a second vote on a date to be selected by the applicant (the Union submitted it believed the employer was either still operating or had been resurrected) – The Board ordered the employer to pay the Union's organizing costs but rejected several of the Union's other requested remedies - Second representation vote ordered

NATIONAL EXCAVATING AND GRADING LTD.; RE UNIVERSAL WORKERS UNION, LIUNA, LOCAL 183; File No. 1552-01-R; Dated November 13, 2003; Panel: Laura Trachuk (3 pages)

Employment Standards – Practice and Procedure – Summons to Witness – In this employee application for review, the responding party claimed that the applicant was an independent contractor operating his own business – The responding party sought to summons the records of the independent business in support of its defence of the application – The responding party failed to serve the director of the independent business (the applicant's wife) personally and left the subpoena with the applicant at his home (also the business address of the independent company) – The Board held that a summons issued pursuant to the *Statutory Powers Procedure Act* must be served personally – Further, a "related employer" finding under the *Labour Relations Act* in a separate proceeding cannot be relied upon to effect proper service in these circumstances

RAINBOW GLASS (NIAGARA) LTD., AND DIRECTOR OF EMPLOYMENT STANDARDS; RE JOSEPH BERES; File No. 3019-01-ES; Dated November 17, 2003; Panel: Patrick Kelly (2 pages)

Employment Standards – The applicant requested a review of the ESO's refusal to issue an order for unpaid wages and vacation pay against the Directors of a bankrupt company – The Board held that its jurisdiction to review an ESO's refusal to issue an order is determined by subsection 116(3), and nowhere in that subsection is there authority granted for an employee to seek review of a refusal to issue an Order to Pay against Directors pursuant to section 106 – Application dismissed

SUPERPAC ACQUISITIONS INC. AND DIRECTOR OF EMPLOYMENT STANDARDS; RE NELSON BLOOM; File No. 3829-02-ES; Dated November 5, 2003; Panel: Susan Serena (4 pages)

Certification – Representation Vote – In this application for certification, following a close representation vote, the employer asked the Board to order a second vote because of two incidents: the first incident occurred during the vote when the LRO observed one employee putting a pen in his pocket after having marked his ballot – The LRO told the employee that he could cast a new ballot with the pencil provided, but did not inform any other employee of the chance to cast a second ballot – The second incident occurred after the vote, when the LRO left the unsealed ballot box alone with two union representatives – The Board held that the

representation vote was not so fundamentally flawed that the integrity of the vote was compromised – Regarding the first incident, the Board found that the employee who cast a vote in pen did not spoil his ballot, but cast it in a manner that may have compromised the secrecy of his vote – The LRO's vigilance helped to preserve that secrecy, and did not create an obligation to warn all voters about the availability of a replacement ballot – There must be a balance between efficiency, and giving enough information to employees who are not accustomed to a representation vote in the workplace – Regarding the second incident, the Board found that although the Board's vote processes depend on a high standard of integrity, that high standard is not synonymous with perfection, and in this case there remained in place other safeguards to ensure the integrity of the vote – Also, both parties had agreed that the union representatives would testify that they did not touch the box, and the employer was in no position to challenge them – After addressing other concerns about the vote process raised by individual employees, the Board granted the application for certification

WALTEC ENGINEERING INC.; RE USWA; SCOTT POOLE, RANDY BLAIR, BOB GAUTIER, KEVIN KILBRIDE AND MARK HUSSEN, AND A.J. KNOWLES; File No. 1772-03-R; Dated November 3, 2003; Panel: Mary Ellen Cummings, J.A. Ronson, L. Wood (7 pages)

Court Proceedings

Contempt – Discharge – Health and Safety – Judicial Review – The Board found that the applicant's work refusal was not *bona fide* and that his termination was not a reprisal for acting in compliance with or seeking the enforcement of the *Occupational Health and Safety Act* – The Board also declined to substitute a lesser penalty for the discharge under s. 50(7) of the OHSA – The Board further declined to state a case for contempt to Divisional Court based on the allegation that the applicant had distributed documents received in another Board proceeding, in breach of an implied undertaking that such documents are to be used only in the litigation for which they were produced – On judicial review, the Court held that the Board had denied the applicant's right to a fair hearing when it consolidated the reprisal and contempt matters into one proceeding – Application for judicial review allowed

MCNAUGHT, WILLIAM; RE TTC AND ITS SUPERVISORS, CHIEF GENERAL MANAGER DUCHARME, GENERAL MANAGER G. WEBSTER, S. QUIGLEY, HUMAN RESOURCES DEPARTMENT, D. HAFFERY, HUMAN RESOURCES DEPARTMENT AND SUPERINTENDENT J. HAFFEY, DANFORTH BUS DIVISION AND OLRB; File Nos. 3616-99-U; 3297-99-OH (Court File No. 254/02; Dated November 6, 2003; Panel: Robert A. Blair, R.S.J., Ellen MacDonald, Barry MacDougall JJ. (11 pages)

Duty of Fair Representation – Judicial Review – The applicant had complained that the union had discriminated against him or acted arbitrarily in representing him regarding his welding qualifications with the employer – The Board found no violation of the Act – On judicial review, the Court held that a 4.5 year wait before filing the court proceeding and a further seven-month period to perfect the application, constituted undue delay – Application for judicial review dismissed

TASSONE, ROCCO; RE AMALGAMATED TRANSIT UNION, LOCAL 113, TTC AND OLRB; File No. 3527-96-U (Court File No. 84/02); Dated November 18, 2003; Panel: Cunningham A.C.J., McRae, Epstein JJ. (3 pages)

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Some of the decisions listed in this bulletin will be included in the publication Ontario Labour Relations Board Reports. Copies of advance drafts of the OLRB Reports are available for reference at the Library, now located on the 7th Floor, 505 University Avenue, Toronto.

Pending Court Proceedings

Case name & Court File No.	Board File No.	Status
City of Hamilton v. OPSEU Divisional Court No. 03-156-DV	0185-03-U	pending
Cecilia Collier v. TTC Division Court File No. 706/03	0632-02-U	pending
Electrical Power Systems Construction Association and **Comstock Canada Ltd.** v. Sheet Metal Workers' International Association, Local 30 and OLRB Court File No. 679/03	1894-02-G	pending
Dawit Tuquabo v. USWA L 9597, Securitas Canada Ltd. Court File No. 03-DV-000935 – OTTAWA	2377-02-U	pending
Slavtcho Petrov Detchev v. OLRB, Ministry of Labour, **Canadian Feed Screws Mfg. Ltd**. Court File No. 618/03	2701-00-ES	Pending – March 30, 2004
Mississauga of Scugog Island First Nation v. CAW-Canada & its Local 444, Great Blue Heron Gaming Co. Court File No. 585/03	1271-03-U; 1336-03-M; 1414-03-M	Interim stay granted Sept. 24/03 Motion for stay dismissed Oct.9/03
Director of Employment Standards v. William Brown**, North York Chevrolet Oldsmobile Ltd**.	2235-02-ES	Pending – Mar/Apr. 2004
Thyssen Elevator Ltd. cob as Thyssenkrupp Elevator v. National Elevator & Escalator Assoc., Int'l Union of Elevator Constructors Divisional Court File No. 410/03	2087-01-U	Pending
Girotti St. Catharines Ltd. v. Millwrights Union Local 1007 Divisional Court File No. 368/03	3060-02-G	Pending – Mar. 9, 2004
Teamsters, Chemical, Energy and Allied Workers, Local Union 1880 v. **Dominion Colour Corp**. Divisional Court File No. 391/03	0425-02-U	Pending – Feb. 27, 2004
CAW-Canada v. **National Grocers Co. Ltd**. and UFCW, Locals 1000A, and 175/633 Divisional Court File No. 382/03	0137-02-R; 0139-02-R; 0179-02-R; 0450-02-U	Pending – Apr. 30, 2004
Greater Essex County District School Board Divisional Court File No. 276/03	3398-00-R	Pending
Windsor-Essex Catholic District School Board Divisional Court File No. 277/03	3426-00-R	Pending
OPSEU v. **Ontario Hospital Association** Divisional Court File No. 83/03	3631-02-U	Pending
Canadian Health Care Workers v. CAW-Canada, **Central Park Lodges** et al Divisional Court No. 646/02	1951-01-R; 2179-01-R; et al	Pending – March 2, 2004

Case name & Court File No.	Board File No.	Status
CAW-Canada & its Local 385 v. **Coca-Cola** et al Divisional Court No. 751/02	0179-01-R; et al	Dismissed October 10/03; applic. for leave to appeal Oct 15/03
Ottawa-Carleton Public Employees Union Local 503 – CUPE v. **Ottawa Transition Board**, et al Divisional Court No. 02-DV-723	2353-00-PS	Heard – Nov. 27/03 - Reserved
Rosalina Papa v. HERE Local 75, et al Divisional Court No. 283/01	0426-00-U	Pending
Rocco Tassone v ATU Local 113, et al Divisional Court No. 84/02	3527-96-U	Dismissed November 24/03
William McNaught v. TTC, et al Divisional Court No. 254/02	3616-99-U; 3297-99-OH	Application allowed Nov. 6/03; applic. for leave to appeal Nov. 7, 2003
Tender Choice Foods Inc. v. Mirjana Jazvin Divisional Court No. 454/02	3058-01-ES	Pending – April 7, 2004