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Ontario Labour Relations Board HIGHLIGHTS

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OLRB Shoot-Out

The Board will be hosting its 4th annual golf tournament in support of the Ministry of Labour's United Way Campaign on Thursday, June 19, 2003 at the Heron Point Golf Links in Ancaster, Ontario. Information regarding the "OLRB ANNUAL SHOOT-OUT", including registration information, is appended to this issue of **eHighlights**. For further details, please contact Tim Parker at 416-326-7442 or by email at tim.parker@mol.gov.on.ca or visit the Board's website at www.gov.on.ca/lab/olrb/home.htm

Scope Notes

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

Related Employer – Sale of a Business – The Board considered whether (1) the two responding parties (the "family business" and the "new business") were a single employer under the Act, and (2) there has been a sale of a business or part of a business from one responding party to the other – One son left the family business to form his own, new business taking some assets and equipment from the family business on very favourable terms to assist in starting up the new business – Operations of the family business were not changed by these events – The two companies did not share premises, equipment or employees – Although the son had had a significant role in the day to day administration of the family business, the Board found that he was not a key man in the family business, because he had no ownership interest, held no office, had limited knowledge of the financial affairs of the business, and had no ability to make significant decisions that would advance or hinder the success of the family business – The Board noted that the legislative purpose behind the sale of a business and related employer provisions in the Act is the protection of bargaining rights where employers seek to leave behind the carapace of a unionized business and emerge in some other shape, without the burden of a collective agreement – Where the mischief for which these provisions were created does not exist, the Board will not intervene – The Board will protect existing bargaining rights, but not extend them – application dismissed

BRANDON CONTRACTORS, NORM BRANDON LIMITED AND 1272054 ONTARIO LIMITED C.O.B. AS; RE UBCJA, LOCAL 1256; File Nos.: 2202-01-R; 2203-01-G; Dated February 3, 2003; Panel: Mary Ellen Cummings, John Tomlinson, A. Haward (5 pages)

Discharge – Duty of Fair Representation – Remedies – Unfair Labour Practice – The applicant, having been terminated for theft after removing a roll of wire from the workplace, claimed that the union had breached its duty of fair representation by: (1) failing to properly investigate the matter, (2) failing to advise the applicant with respect to the progress of the case, (3) deciding not to pursue the applicant's grievance without fully understanding the matter, and (4) refusing to conduct the meeting in which the applicant was interviewed about the theft in French – The Union and employer asserted that the applicant had admitted to the theft in a meeting with all three parties present – At a subsequent private meeting with the union steward, the applicant gave no indication that he had not understood the proceedings and did not

ask to conduct the meeting in French – The union sought and received a legal opinion from a third party – The applicant was not advised of the Union's decision not to pursue the grievance until seven months after the decision was made – The Board held that the Union had not breached its duty of fair representation by failing to properly investigate the matter, by deciding not to pursue the applicant's grievance, or by failing to conduct meetings in French – The Board found, however, that the Union had breached its duty of fair representation with respect to the seven month delay in communication with the applicant – At a minimum, a union owes ongoing timely communication to those it represents with respect to grievances and decisions on their management, particularly with discharge grievances – Application allowed in part – Union ordered to post French and English copies of the decision in the workplace for thirty days – Employer ordered to cooperate

BRUNET, PAUL; RE INDUSTRIAL WOOD AND ALLIED WORKERS OF CANADA, LOCAL 2693; RE DOMTAR INC., DOMTAR FOREST PRODUCTS; File No. 0737-98-U; Dated February 12, 2003; Panel: Mary Ellen Cummings (7 pages)

Employment Standards – Remedies – On review of the Employment Standards Officer's Order to Pay resulting from a finding that the employer had violated the pregnancy leave provisions of the Act, the respondent informed the employer, shortly before the hearing, that she would be seeking reinstatement at the hearing – The Board considered whether it could make an order more onerous (in this case: reinstatement rather than wages) than that ordered by the ESO, and whether it could correct a patent error in the ESO's order to pay – The Board reviewed the case law prior to the 1998 amendments to the Act and found that although previously an employee was required to file a counter appeal to seek relief more generous than that ordered, given the extensive review powers under s. 68(19) & (20) [now s. 119(6) & (7)], the Board can come to a different decision from the Officer and, in doing so, its power to order an appropriate remedy is unrestricted – On the Ministry of Labour's motion to correct the patent error and not allow the applicant to continue with the application until the additional monies are paid into trust, the Board ruled that while it may have the interim power to make such an order, it was not willing to do so – As quantum was a part of the merits of the issue, the Board will address that issue, if necessary, at the conclusion of the case – Hearing continues

COBOURG NISSAN LTD.; RE KRISTY McMURRAY AND MINISTRY OF LABOUR; File No. 3722-01-ES; Dated February 4, 2003; Panel: Christopher J. Albertyn (5 pages)

Construction Industry Grievance – Collective Agreement – The Board considered a provision in the Operating Engineers ICI provincial agreement permitting the employer to avoid paying overtime rates if the employees' work less than five consecutive shifts outside of their normal hours in special cases required by the customer – The Board found that notice was required by the article at issue and that the employer failed to give notice in compliance with the article – The Board further found that when an employer's customer requires work to be done outside the normal hours during a shut down lasting less than five consecutive days, the customer is requiring the employer to provide it with service that is outside the normal work week, or to provide it with "special" service – Grievance allowed

COOPER'S CRANE RENTAL LTD.; RE IUOE, LOCAL 793; File No. 2388-02-G; Dated February 25, 2003; Panel: Harry Freedman (8 pages)

Consent to Prosecute – *Prima Facie* case – Unfair Labour Practice – The Board considered motions by PCL to dismiss one application against it on the ground that the Applicant had failed to plead a *prima facie* case, and to dismiss the other application for a consent to prosecute because of the expiration of the limitation period for prosecution – The Applicant's theory was that PCL's involvement in the resolution of an ongoing conflict at a project, that resulted in the Applicant's removal from the job, condoned the removal of the applicant, which was a facilitation of an illegal strike – The Board dismissed the application for a consent to prosecute because more than six months had passed since the alleged conduct had occurred (and there was no finding of continuing conduct), and because, even if the limitation period in the *Provincial Offences Act* would not preclude a prosecution, the Applicant had not convinced the Board to exercise its discretion to consent to a prosecution given the tests set out in *A.A.S. Telecom* and *Millcroft Inn* – On the *prima facie* motion the Board found that the allegations made by the applicant against PCL did not demonstrate the requisite causal nexus between PCL's alleged conduct and the unlawful strike by the applicant's employees – Motion to dismiss the applications against PCL allowed – Hearing continues

FEDERATED CONTRACTORS INC.; RE SMW, LOCAL 269; SMW; ONTARIO SHEET METAL WORKERS' AND ROOFERS' CONFERENCE; STEVE CRONKRIGHT; JERRY RASO; ANTHONY BAKER; TOM CASHMAN; JOHN CHERESNA; ANDY COWAN; ROGER HOWARD; JOHN McNEIL; MARK MILLER; BRIAN MURPHY; JASON MURRAY; CHARLES ONSTEIN; KNOWLSON RAMSAY; BRIAN VALLEY; PAUL BOUDREAU; P.B. SHEET METAL HEATING & AIR CONDITIONING; LOCKERBIE & HOLE CONTRACTING LIMITED; HARRY HOLE; NEIL PRESTWICH; RICK McGURN; CHRIS SCHOENWANDT; AND PCL CONSTRUCTORS CANADA INC. File Nos. 2243-02-U; 2244-02-U; Dated February 4, 2003; Panel: Harry Freedman (11 pages)

Certification – Construction Industry – Practice and Procedure – Status – The Board considered whether it should exercise its discretion to allow the responding party to raise status disputes notwithstanding that it had not raised those positions in a timely manner – The Board found it would not allow the responding party to raise its alternative position (namely, "voter eligibility" for two individuals), since the prejudice to the union (the prospects of a one year bar), given its lost opportunity to investigate, was too great – On the responding party's primary position, that the employer was not the employer of the employees, the Board followed *New Generation* noting that the concern that strangers to the employer might possibly determine a certification application outweighed the possible prejudice to the union – The Board allowed the employer to advance its primary position although it was over half a day late in its response – Matter referred to Registrar

LEE CONSTRUCTION CORPORATION; RE UNIVERSAL WORKERS UNION, LIUNA, LOCAL 183; File No. 1724-02-R; Dated February 18, 2003; Panel: Caroline Rowan (10 pages)

Bargaining Unit – Certification – *Charter of Rights and Freedoms* – The Board considered the appropriateness of an "all employees" bargaining unit at Metroland Printing which consisted of two departments: sales (commission work) and distribution (hourly wages) – The employer argued that part-time and temporary employees should be in a separate unit, while an individual in the distribution department argued it should be separate – The Board commented on the evolution of the two part test articulated in *Hospital for Sick Children* (sufficient community of interest and no serious labour relations problems for the employer) and noted that the Board's analysis of the determination of the appropriate bargaining unit has recognized that employees share a community of interest simply by being employed by the same employer in the same workplace and that employees with quite different terms and conditions of employment can bargain effectively together – The Board found that the employees had sufficient community of interest, there was no prospect of serious labour relations problems for the employer, and that the employer's proposal would lead to fragmentation, which could create labour relations problems – Finally the Board addressed and dismissed the individual intervenor's assertion that requiring him to belong to a bargaining unit, not of his choice, breached the freedom of association under the *Charter*

METROLAND PRINTING, PUBLISHING AND DISTRIBUTING LTD.; RE CEP LOCAL 87-M SOUTHERN ONTARIO NEWSPAPER GUILD; File No. 1237-02-R; Dated February 19, 2003; Panel: Brian McLean (10 pages)

***Hospital Labour Disputes Arbitration Act* – Strike – Unfair Labour Practice –** In this application by the OHA the Board found that OPSEU's call to its members to support the planned "Emergency Day of Action" was actually an unlawful strike contrary to s. 11 of *HLDAA* – The Board ordered OPSEU to cease and desist from calling, authorizing, encouraging, supporting or threatening an unlawful strike, and recited a list of possible remedies that the employer could seek should the action take place – The Board's full reasons to follow

OPSEU; RE ONTARIO HOSPITAL ASSOCIATION; RE ATTORNEY GENERAL FOR ONTARIO; File No. 3631-02-U; Dated February 11, 2003; Panel: Kevin Whitaker, R. O'Connor, R. Montague (3 pages)

Certification – Representation Vote – The Board considered whether a ballot was spoiled when there was no marking within either blank circle intended for "YES" or "NO", but rather an "X" over the word "YES" and a circle around the word "NO" – The Board found that there was no

reasonable way to determine the intention of the voter – there was no clear indication of the voter's choice – Ballot spoiled – Certificate issued

PICTURE HOMES MILLENNIUM INC.; RE UNIVERSAL WORKERS' UNION, LIUNA, LOCAL 183; File No. 1554-02-R; Dated February 26, 2003; Panel: Marilyn Silverman (3 pages)

Construction Industry Grievance – Collective Agreement – Intervenor – Parties – Practice and Procedure – Two locals of IBEW alleged that the responding party was breaching the travel time provisions under the Local 353 appendix to the ICI Provincial Agreement – The employer hired members from Local 105 as well as members from Local 353 who were entitled to receive travel time pay from Toronto to Hamilton – At issue was whether the pay should be straight time or overtime – The employer objected to Local 105's involvement in the grievance – The Board found that Local 105 may be incidentally or commercially affected by the result, however it had no legal interest in the operation or administration of the Local 353 appendix – Only the immediate parties to the Provincial Agreement (employer and employee bargaining agents, contractor and local union) were the proper parties to a s. 133 dispute – Local 105 had no standing to pursue the grievance – Matter continues

PLAN GROUP INC., THE; RE IBEW, LOCALS 105 AND 353; File No. 3008-02-G; Dated February 25, 2003; Panel: Harry Freedman (8 pages)

***Education Act* – Strike – Unfair Labour Practice –** In this application by the TDSB alleging an unlawful strike by the OSSTF (joined with the Federation's allegation that the TDSB had violated the freeze provisions of the *LRA*), the Board considered whether the Federation's conduct amounted to a "strike" within the meaning of s. 277.2(4) of the *Education Act* – The TDSB initiated a new Position of Responsibility model which the Federation said was a violation of various provisions of the collective agreement and violated the freeze provisions of the Act – The Federation called upon its members, with success, to boycott the POR process by refraining from applying for any of the new PORs – The Board found, among other matters: a) that the collective agreement had provisions dealing with PORs; b) by requiring its members not to apply for the new POR positions which were posted, the Federation intended to limit or interfere with the functioning of the TDSB's school programs and school; and c) that the school board's concerns were not merely speculative, but the impact of the boycott affected the school board's organizational arrangements now – The Board found the boycott constituted a strike – Continuation of hearing depending on the extent to which the parties resolve matters at arbitration

TORONTO DISTRICT SCHOOL BOARD; RE OSSTF, DISTRICT 12, TORONTO, JIM McQUEEN, DOUG JOLLIFFE, WENDY WHITE, BOB BEAMES, AHMED ABDOLELL, CHRIS ASLANIDIS, EARL BURT, JOHN HAWKINS, MARG McPHAIL, LESLIE WOLFE; File Nos. 3258-02-U; 3313-02-U; Dated February 3, 2003; Panel: Christopher J. Albertyn (8 pages)

Employment Standards – Overtime pay – Employer appealed the overtime pay ordered on the grounds that the claimant was a manager or supervisor and not entitled to overtime – The Board considered the applicability of the overtime pay provisions pursuant to subsection 6(b) of Regulation 325 of the *ESA*, R.S.O., 1990 and under subsection 8(b) of Regulation 285/01 under the *ESA, 2000* with respect to the same factual situation covering both acts – The Board found the overtime provisions did not apply under the old Act, but did under the current one – Review allowed in part

TRI-ROC ELECTRIC LTD.; RE KEN BUTLER AND MINISTRY OF LABOUR; File No. 1760-02-ES; Dated February 18, 2003; Panel: Mary Anne McKellar (7 pages)

Employer – Intervenor – *Hospital Labour Disputes Arbitration Act* – Termination – Timeliness – On the morning of the representation vote the responding party trade union took the position that the parties were subject to *HLDAA* and that the application was untimely – The Board proceeded with the vote and sealed the ballot box – The Board considered whether to count the votes and whether it could entertain the intervenor employer's motion that s. 12(1) of *HLDAA* was unconstitutional – Board found the ballot box would remain sealed pending the decision on timeliness – Board found the intervenor had no standing to raise the constitutional issue – Accordingly, given all

parties' agreement that the application was untimely pursuant to *HLDAA*, the application was dismissed

TWIN LAKES TERRACE RETIREMENT HOME, STEEVES & ROZEMA ENTERPRISES LTD. C.O.B.; RE CONNIE GAELER; RE CAW, LOCAL 302; File No. 2810-02-R; Dated February 12, 2003; Panel: Mary Anne McKellar, Richard O'Connor, R.R. Montague (6 pages)

Certification – Representation Vote – Status – Trade Union – The applicant union CEP was organizing representatives in the respondent union, UFCW, Local 1977—The Board considered whether the vote of an individual who, at the time of the application, was seconded to a representative position, while still an elected officer, should be counted – The bargaining unit description specifically excluded elected officers – The Board found that although the individual was working as a representative, he still held the position of an elected official and accordingly his ballot should not count

UFCW, LOCAL 1977; RE COMMUNICATIONS, ENERGY & PAPERWORKERS UNION OF CANADA; File No. 2724-02-R; Dated February 19, 2003; Panel: Timothy W. Sargeant (5 pages)

Court Proceedings

Judicial Review – Sale of a Business – OPSEU brought an application alleging that there had been a sale of a business from Grey Bruce Health Services and Hanover and District Hospital to the City of Owen Sound and it therefore had bargaining rights in respect of paramedics employed by the City – The City countered that there was no sale and in any event the paramedics were firefighters and belonged to the Firefighters Association – A majority of the Board accepted the City's argument that there was an intention to create "firemedics" who would become part of the Association – The majority deemed the paramedics to be firefighters and adjourned the matter for a period of thirty months to allow the City an opportunity to integrate the paramedics into the firefighters' unit – OPSEU applied for judicial review – The Court found the majority's deeming of the paramedics to be firefighters to be patently unreasonable – Application for review allowed – Court of Appeal denied leave to appeal

CITY OF OWEN SOUND, CAW-CANADA, CUPE, LOCAL 443, OWEN SOUND PROFESSIONAL FIRE FIGHTERS ASSOCIATION, LOCAL 531 AND THE OLRB; RE OPSEU; File No. 1192-00-R; (Court of Appeal File No. M29050); Dated February 3, 2002; Panel: Rosenberg, Moldaver, Simmons, JJ. (3 pages); **OPSEU v. CITY OF OWEN SOUND**

Employment Standards Act – Judicial Review – The employer sought review of an order to pay awarded against it when, as a result of a downsizing, it caused an employee to be moved from his original position to a lesser production job – The employee found other work and advised the employer that he was leaving the company – The Board ruled that the employee had quit his employment, consequently it did not inquire into the notion of a constructive dismissal, and rescinded the order to pay – On judicial review, the Divisional Court quashed the Board's decision, holding that quitting and constructive dismissal are not mutually exclusive alternatives – Court of Appeal denied leave to appeal

TENNECO CANADA INC., JERRY F. SCHWARTZ AND OLRB; RE GWEN STAUB, EMPLOYMENT STANDARDS OFFICER; File No. 0935-01-ES (Court of Appeal File No. M29314); Dated February 18, 2003; Panel: Abella, Moldaver, Simmons, JJ.A. (1 page); **GWEN STAUB,** EMPLOYMENT STANDARDS OFFICER; v. TENNECO CANADA INC., JERRY F. SCHWARTZ AND OLRB

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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
OPSEU v. Ontario Hospital Association Divisional Court File No. 83/03	3631-02-U	Pending
Andy Schollig c.o.b. Tischler Woodworking Divisional Court File No. 44/03	2464-01-G	Pending
Haimanot Abebe et al v. Distinctive Designs Furniture Divisional Court File No. 30/03	3704-01-ES	Pending
Elizabeth Balanyk v. The Greater Niagara General Hospital et al SCC No. 29423	0074-99-U	Balanyk seeking leave to appeal to SCC
Ont. Council Int'l Painters & Allied Trades v Blastco Corporation Divisional Court No.711/02	1416-02-G	Pending – May/5/03
UBCJA & its locals & affiliates v. Cadillac Fairview Corporation Divisional Court No. 622/01	0730-99-R	Adjourned
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
CUPE Local 5167 v. City of Hamilton et al Court of Appeal M29220	0587-00-R; 1891-00-U	Leave to appeal granted
OPSEU v. City of Owen Sound et al Court of Appeal No. M29050	1192-00-R	Leave to appeal denied
CAW-Canada & its Local 385 v. Coca-Cola et al Divisional Court No. 751/02	0179-01-R; et al	Pending
ATU Local 107 & 1585 v. Corporation City of Hamilton et al Divisional Court No. 448/02	3816-00-PS; 0089-01-PS	Pending
Marc A. Crockford et al v. UFCW et al Divisional Court No. DV-543/02	1350-99-U; 2809-99-U	Pending
UBCJA v. Great Atlantic and Pacific Co. of Canada Divisional Court No. 686/01	0098-99-R; 0484-01-R	Adjourned
Ont Prov Conference Int'l Union of Bricklayers v. Int'l Bricklayers and Craftworkers, et al Divisional Court No. 352/01	1904-99-U; 2352-98-U; et al	Pending – Apr. 24/25/03
IBEW Local 586 v. K2 Contracting et al Divisional Court Nos 01-DV-666; 01-DV-667	0007-96-R; et al	Pending
Northwest Agro-Forestry Services v. CEP et al Divisional Court No. 277/00	0835-99-R	Pending
Ottawa-Carleton Public Employees Union Local 503 –	2353-00-PS	Pending

Case name & Court File No.	Board File No.	Status
CUPE v. Ottawa Transition Board, et al Divisional Court No. 02-DV-723		
Rosalina Papa v. HERE Local 75, et al Divisional Court No. 283/01	0426-00-U	Pending
IBEW Local 353 v. Quadracon Divisional Court No. 811/00	2560-99-R	Adjourned
Rocco Tassone v ATU Local 113, et al Divisional Court No. 84/02	3527-96-U	Pending – May/1/03
Dervent Thompson v. OLRB Divisional Court No. 314/02	1870-01-U	Pending
The Shopping Channel v. USWA Divisional Court No. 299/00	1123-99-U; et al	Pending
Rachelle Martin v. AMDAHL Canada Ltd. Divisional Court No. 47/2001	0167-97-OH	Pending
William McNaught v. TTC, et al Divisional Court No. 254/02	3616-99-U; 3297-99-OH	Heard Dec. 12/02; reserved
Dundas Realities Ltd. v. MOL, et al Divisional Court No. 01-5359	3256-99-ES	Pending
663605 Ontario Ltd. o/a Guardian Eagle Resort Divisional Court No. 567/00	3742-97-ES	Pending – Mar 12/03
Tender Choice Foods Inc. v. Mirjana Jazvin Divisional Court No. 454/02	3058-01-ES	Pending – Apr. 28/03
Gwen Staub Employment Standards Officer v. Tenneco Canada, et al Divisional Court No. 80/2002	0935-01-ES	Tenneco Ct. of Appeal denied motion for leave to appeal