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Ontario Labour Relations Board HIGHLIGHTS

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OLRB Decisions

The Board is pleased to announce that in partnership with CanLII, decisions published in the *OLRB Reports* from 1977 forward are being posted on this free national database (www.canlii.org). Once the posting is complete, the Board plans to develop a searchable database of its "Scope Notes" that will link directly to the full text of decisions on CanLII. We expect the project to be completed by the end of 2010.

New Vice Chair

Charles Humphrey joins the Board as a part-time Vice-Chair. Mr Humphrey practised labour and employment law with Stringer, Brisbin, Humphrey for thirty years prior to his retirement from practice at the end of 2008. While practising law he was active in legal publishing both as a co-author of legal guides on occupational health and safety law and workers' compensation as well as establishing a legal reporting service on OH&S cases. He received his legal education at the Faculty of Law, University of Toronto and his undergraduate education at the University of New Brunswick. Mr. Humphrey has opened an arbitration and mediation practice.

ESA Amendments

Amendments to the *Employment Standards Act, 2000* (Bill 139) come into force on November 6, 2009. These amendments spell out the rights of "assignment employees" and obligations of temporary help agencies and clients of these agencies to "assignment employees." Appeals of rulings by employment standards officers relating to temporary help agencies and their clients may be filed with the Board. Form A-103 and Information Bulletin No. 24 have been amended to address these changes.

Scope Notes

The following are scope notes of some of the decisions issued by the Ontario Labour Relations Board in September of this year. These decisions will appear in the September/October issue of the OLRB Reports. The full text of recent OLRB decisions is now available on-line through the Canadian Legal Information Institute at www.canlii.org.

Employment Standards – The employer, an environmental clean-up operator, sought review of orders to comply with the "hours of work" provisions of the ESA, arguing that its work pertained to construction at the site and therefore it was exempt from the limitations set out in the Act – The employer suggested that its work unclogging systems or removing contaminated spills restored the functionality of its clients' systems and was, therefore repair (i.e., construction) – The Director of Employment Standards' position was that the employer was maintaining the operations it was contracted to service and that only a small portion of its work involved actual construction – The Board found that "remediating the site" of a spill does not restore the functionality of a

system but merely removes the contaminant; similarly, at a traffic accident, the removal of debris from the road cannot be "repairing" or "altering" the site because there is no nexus between the clean-up activity and the road system; and unclogging a pipe does not add or subtract from a system or equipment, however defined; finally, emptying and sanitizing tanks is not repair, but maintenance – Application dismissed; order affirmed

ACCUWORX RE DIRECTOR OF EMPLOYMENT STANDARDS; File No. 3497-07-ES; Dated September 9, 2009; Panel: Christine Schmidt (15 pages)

Employment Standards – The employer sought review of an Order to Pay requiring it to make good on an unauthorized deduction from the employee's last pay cheque – The employer's uncontested evidence at the hearing showed that the employee had previously entered into a series of loan arrangements with his employer, and each had been properly authorized for re-payment – The final loan agreement was made in haste, without written acknowledgement for re-payment – The Board found that the cheque issued to the employee was marked as a "loan" on its face – By endorsing the cheque, the employee had provided written authorization for the re-payment, so the deduction from the employee's final pay was valid – Application granted

A.J. LANZAROTTA RE JAMES BLAIR and DIRECTOR OF EMPLOYMENT STANDARDS; File No. 0390-09-ES; Dated September 30, 2009; Panel: Patrick Kelly (3 pages)

Certification – Construction Industry – Employer – The union sought to certify the employees of Aramark who were at work at a construction site on the date of application – The employer argued that it was not a construction employer and the cleaning of trailers its employees were engaged in for one of its clients (Shell Canada) was not work in the construction industry – Each contractor working on the site during the plant shutdown was required to provide its own trailer and washroom facilities (and was responsible for their cleaning) – The Board found that although there was construction work being carried out at the site, and the Shell-owned trailers were accessible to construction workers, the employer is a janitorial and cleaning contractor and its employees were not performing construction work – Application dismissed

ARAMARK CANADA RE LIUNA OPDC; File No. 2356-06-R; Dated September 23, 2009; Panel: Harry Freedman (15 pages)

Construction Industry Grievance – The union grieved the employer's basis for calculating travel pay for workers dispatched from either Sarnia or Windsor to Sault Ste. Marie – The collective agreement provided for the calculation of travel time as "established in the Canadian Automobile Association maps for the Province of Ontario" – The employer argued that since the CAA maps suggested a shorter route through Michigan, rather than the longer route on exclusively Ontario roadways, travel time was payable for the lesser hours – The Board held that to allow the employer to use the shorter, Michigan route would require a reading out of the words "maps for the Province of Ontario" from the collective agreement – Further, the collective agreement itself had as its scope the "Province of Ontario" and using the Ontario-only calculation would not require consideration of a worker's personal circumstances (i.e. their ability to travel through the U.S.) – Grievance allowed

INSULCANA CONTRACTING LTD. RE International Association of Heat and Frost Insulators and Allied Workers, Local 95, File No. 1438-09-G; Dated September 15, 2009; Panel: Susan Serena (3 pages)

Certification – Construction Industry – Practice and Procedure – In this application for certification, the employer sought to add two names and a second worksite in its submissions following the Regional Certification Meeting – The employer had initially said it had no employees in the bargaining unit, that the individuals in question worked for a sub-contractor – The Board held that it is entirely acceptable for an employer to offer alternative positions in its response to an application for certification, but those positions must be provided within the timeframes set out in the Act – Any additions to an employer's list after the statutory two-day limit are late-filed and may not be considered by the Board – In this case, the new information was seriously prejudicial to the applicant, and would not be accepted – Matter continues

NORLON HOLDINGS RE LIUNA OPDC; File No. 3448-08-R; Dated September 23, 2009; Panel: Mark J. Lewis (12 pages)

Construction Industry Grievance – The union filed grievances on behalf of two workers who were found to have violated the employer's safety rules, the first for failing to wear fall protection, the second for not wearing a hard hat while working in the elevator pit – The workers were re-roping an elevator, and were required to work at times one above the other – The Board found that the first grievor was working on a moving elevator, and the employer's Safety Handbook provided that lanyards should not be connected to moving elevators; the first grievor was absolved of his alleged violation – For the second grievor, while the Board found he had not broken one of the employer's "cardinal rules" of safety, his failure to don a hard hat was an egregious enough violation of an important safety rule to warrant discipline – The Board found just cause for discipline to the second grievor and declared that the two-day suspension was a reasonable penalty – Grievance allowed in part

OTIS CANADA INC. RE IUOE; File No. 0829-08-G; Dated September 17, 2009; Panel: Harry Freedman, J Tomlinson, A Haward; (4 pages)

Certification – Construction Industry – Sector Determination – The Plumbers applied to certify employees of the employer in all sectors excluding ICI – The original application listed a jobsite that involved the construction of cottages at a resort – The union had originally claimed the work as "residential" but altered its position at the regional certification meeting, asserting that the project was ICI (the union was not estopped from changing its position by an earlier Board decision) – The Board considered the financing of the project (the developer had "owners" invest in time shares, rather than providing its own capital); the materials used in the construction of the cottages (typically, to *residential* specifications); the role that the developer proposed to retain once the project was complete (akin to a property management company); and the end use (cottage "owners" were at liberty to rent, sell, bequeath, etc. their share of each cottage) – Notwithstanding that the owners may never inhabit the cottages themselves, the Board found there were no significant commercial aspects to the undertaking, so the construction fell into the residential sector – Matter continues

PLUMBTECH PLUMBING RE PLUMBERS RESIDENTIAL COUNCIL OF ONTARIO; File No, 0956-08-R; Dated September 10, 2009; Panel: Diane Gee (9 pages)

Related Employer – Sun Media restructured some of its operations to establish what it called "Centres of Excellence" to create common content for potential use across the Sun chain – To do so, it took employees from its daily papers to create content; those employees were treated as not falling under any of the existing collective agreements – The union sought a declaration that Sun Media was related to the organized newspapers and asked the Board to order that the work in question be returned to the newspapers – The Board found that the union was able to demonstrate the criteria for a related employer declaration given the significant role the corporate entity plays in labour relations – The union proved that, although Sun Media's motivation for the restructuring may have had legitimate business underpinnings, the result was a diminution of bargaining rights for some individual newspapers – The union should at the very least be allowed to bring Sun Media to the arbitration table to assert its rights under the respective collective agreements – The Board issued the related employer declaration but declined to return the work to the individual newspapers

SUN MEDIA CORPORATION RE CEPUC Local 87-M, File No. 2983-06-R; Dated September 11, 2009; Panel: Brian McLean (10 pages)

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 Ontario Workplace Tribunals Library, 7th Floor, 505 University Avenue, Toronto.

Pending Court Proceedings

Case name & Court File No.	Board File No.	Status
Greenfield Ethanol v. CEPUC	1307-070-R	Pending
Pro Pipe Construction v. Norfab Metal and Machine	2574-04-R	Pending
IBEW v. Ellis Don	1307-07-R	Pending
Blue Mountain Resorts v. Ontario Ministry of Labour Divisional Court No. 373/09	1048-07-HS 0255-08-HS	Pending
Julie Desgrosseillers v. North Bay General Hospital Divisional Court No. DV-830-09 **SUDBURY**	0827-08-U	Pending
National Waste Services v. CAW-Canada Divisional Court No. 338/09	0939-07-R	Pending – Stay motion Oct. 14/09
Robert McLaughlin v. Graphite Specialty Products, et al Divisional Court No. 09/191 **LONDON**	2221-07-OH	Pending
Rainbow Concrete v. International Union of Operating Engineers Divisional Court No. 332/09	0116-06-R	Pending
Roy Murad v. Les Aliments Mia Foods Divisional Court No. 291/09	1999-07-ES	Pending
Greater Essex County District School Board v. IBEW, Local 773 et al Divisional Court No. 212/09	1776-04-R et al	Pending
Donald Amodeo v. Ontario Ministry of Labour Divisional Court No. 147/09	2837-07-U 2839-07-OH	Pending
Universal Workers' Union, L.I.U.N.A. Local 183 v. Canadian Construction Workers' Union; OJCR Construction Ltd. Divisional Court No. 111/09	0050-08-R	Withdrawn – Sept 29/09
I.U.P.A.T. Local 1795 et al, v. Cadillac Fairview Corporation et al Divisional Court No. 142/09	1732-06-R	Dec 2, 2009
Dr. Peter A. Khaiter v. OLRB et al Divisional Court No. 79/09	0290-08-U; 0338-08-U	Dismissed - July 8/09; seeking leave to CA
Presteve Foods v. (CAW-CANADA) Local 444 Divisional Court No. 1730/08 **LONDON**	1676-08-U	April 14, 2009 – dismissed; seeking leave to CA
Dr. Peter A. Khaiter v. OLRB et al Divisional Court No. 431/08	4045-06-U et al	Pending
Comfort Hospitality Inc. o/a Days Inn v. Director Employment Standards et al Divisional Court No. 344/08	2573-07-ES	Pending
Govin Misir v. S. Lalgudi Vaidyanathan et al Divisional Court No. 566/07	2966-03-ES; 3389-03-ES; 3390-03-ES	Pending
L.I.U.N.A. v. Barclay Construction et al Divisional Court No. 310/08	0837-06-R	Pending

Case name & Court File No.	Board File No.	Status
Ottawa-Carleton Public Employees Union (CUPE), Local 503 v. City of Ottawa et al Divisional Court No. DC-09-00001471-0000 **OTTAWA**	1386-06-R	Heard June 10/09; reserved
Jacobs Catalytic Ltd. v IBEW Local 33 et al Divisional Court No. 117/07 Court of Appeal C49737	3737-05-U	C.A. April 22/09 reserved
Janet Kitson v. OLRB et al Divisional Court No. 492/06	4205-02-U	Pending