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Ontario Labour Relations Board HIGHLIGHTS

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NEW VICE-CHAIRS

The Board is pleased to welcome the following appointments:

John D. Lewis, as a full-time Vice-Chair. John was called to the Ontario Bar in 1991 and is a graduate of the University of Western Ontario's Law School (LL.B., 1989). He also has a Master of Industrial Relations degree (MIR '85) from Queen's University. Upon being called to the Bar, he commenced his practice with a boutique management-side law firm. Later he acted, for a time, as Senior Policy Advisor to the Minister of Labour. For the past eleven years, John pursued his law practice, which has always specialized in labour, employment and the construction industry with a large, full-service firm, where he was a labour partner.

Lyle Kanee, as a part-time Vice-Chair. Lyle has practised union-side labour law in both Toronto and Edmonton. He has negotiated collective agreements, resolved workplace grievances, and presented cases before labour boards in industrial and construction sectors. His practice also included civil litigation, pension and benefits issues, disability claims, class actions and human rights matters. Lyle has taught labour law and grievance arbitration. In 2008, he was appointed a part-time Vice Chair of the Alberta Labour Relations Board, and began work as an arbitrator and mediator.

Scope Notes

The following are scope notes of some of the decisions issued by the Ontario Labour Relations Board in March of this year. These decisions will appear in the March/April 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.

Certification – Construction Industry – Unfair Labour Practice – Following a Regional Certification Meeting, in what began as a card-based application for certification, the parties entered into Minutes of Settlement in which they agreed to hold a representation vote of eligible individuals – The union complained that during the period between the application date and the vote, the employer had unilaterally given various wage increases to a number of employees – The Board rejected the employer's argument that it had historically provided such raises to employees – The wage increases were found to violate the freeze provisions (s. 86(2)) and to constitute undue influence contrary to ss. 70 and 72 – The Board held that this was not a situation where the results of the vote suggested that the union had lost significant support between the application filing date and the date of the vote – There were no threats to job security and no terminations of union supporters, so the appropriate remedy was to direct a second representation vote – Second vote ordered

AEROSTAR ELECTRICAL SERVICES INC; RE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 353; File Nos. 0660-08-R; 2081-08-U; Dated March 4, 2009; Panel: Susan Serena (13 pages)

Bargaining Unit – Certification – Construction Industry – Local 586 filed a timely application to certify a bargaining unit of employees in non-ICI sectors who made up part of a unit established by the collective agreement between Local 353 and the Employer – Local 586 argued that, notwithstanding the Board's general policy with respect to displacement applications (that the unit applied for should mirror the incumbent unit), s. 158(2) requires the Board to accept the unit applied for by an applicant and effectively removes the Board's discretion to find a different appropriate unit pursuant to s. 128(1) – The Board rejected Local 586's assertion that the Board was constrained to deal only with the unit applied for – The Board held that in certain circumstances (evidence of inadequate representation; an employer's tolerance for limited fragmentation; a presumption of predictability) a smaller unit may be carved out from an existing, larger unit – None of these circumstances obtained in the present application – Application dismissed

AGI TRAFFIC TECHNOLOGY INC; RE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 586 and 353 File No. 0739-08-R; Dated March 17, 2009; Panel: Mark J. Lewis, B. Roberts and A. Haward (10 pages)

Certification – Construction Industry – Membership Evidence – Reconsideration – The employer sought reconsideration of a Board decision granting certification to the applicant – The employer alleged that one membership card filed by the union was forged, thus undermining the credibility and validity of all the union's membership evidence – The union asked the Board for permission to disclose whether the individual had signed a card – The Board held that s. 119(1) of the Act did not preclude a party with knowledge of membership from disclosing it outside the parameters of a Board proceeding – The confidentiality principle established by s. 119(1) is not absolute and when the authenticity of membership evidence is challenged by a specific allegation of forgery and there is no other reasonable or practical method of determining the issue, the Board ought to grant consent to disclose – Following inspection of the membership document, the employer withdrew its request for reconsideration

AVCON CONSTRUCTION INC; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL; File No. 2564-08-R; Dated March 6, 2009; Panel: Harry Freedman (3 pages)

Health and Safety - Blue Mountain Resorts filed two appeals of an Inspector's orders for production of documents relating to guests injured at the Resort and to the Resort's failure to notify the Minister of a fatal injury to a guest under section 51(1) OHSA – On the question of document production, the Board accepted the Resort's argument that the documents regarding injured guests were created in contemplation of litigation and therefore could not be subject to a production order under subsection 54(1) of the OHSA – The orders relating to the production of these documents were rescinded – On the question of section 51(1) notice, the issue was whether the Resort was obliged to notify the Minister that a non-worker was fatally injured at the Resort when, at the time of the injury, no workers were present – The Board determined that the word "people" in section 51(1) includes non-workers – Further, the Resort continued to be considered a "workplace" even at times when there were no workers present – Therefore, the Resort was responsible for reporting the fatality – Appeal of the section 51(1) order was dismissed

BLUE MOUNTAIN RESORTS LIMITED; RE RICHARD DEN BOK; RE MOL; File Nos. 1048-07-HS; 0255-08-HS; Dated March 23, 2009; Panel: Diane L. Gee (17 pages)

Duty of Fair Representation – Ten retired Registered Practical Nurses claimed their union failed to represent them fairly in the negotiated settlement of a pay equity dispute that resulted in a lump sum payment made to RPNs actively employed on the date of the agreement – The Board recognized that bargaining agents are often called upon to make difficult choices during negotiations, sometimes to the advantage of one group of members over another – The pay equity dispute, which was akin to the negotiation of a collective agreement, was settled after ten days of adjudication before the Pay Equity Hearings Tribunal – The outcome of that litigation did not guarantee any benefit to the RPNs, and the agreed-upon lump sum was specifically not characterized as a pay equity adjustment – The

Board was not required to address the issue of standing of the retirees to file a s. 74 complaint, nor the interplay of s. 74 and a trade union's rights or obligations under the *Pay Equity Act* – Application dismissed

CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 145; RE CLARY BIJL, ET AL; WILLIAM OSLER HEALTH CENTRE; File No. 1996-08-U; Dated March 17, 2009; Panel: Mary Anne McKellar (8 pages)

Certification – Construction Industry – Membership Evidence – Both the Labourers and the Operating Engineers applied to certify employees of Graham on the same date (and intervened in each other's applications) – In its responses to each application, Graham filed Schedule As that contained a number of the same names; Graham asserted that, in the time required to file a response, it was unable to determine with certainty which bargaining unit the individuals belonged to – The two unions agreed that thirteen of the individuals at issue should be on the OE list – The OE subsequently withdrew its application – The Labourers argued that since there was an all party agreement with respect to the thirteen individuals, their names could not remain on the employer's list in the LIUNA application: first, parties are not permitted to resile from agreements; secondly, employees in the construction industry cannot be in more than one bargaining unit on any given day – The Board rejected LIUNA's assertions and refused to remove the names from the LIUNA Schedule A – The Board held that Graham had merely proffered a position with respect to the individuals, but had not agreed to their placement on either list – Furthermore, even if there had been an agreement, it became irrelevant when the OE application was withdrawn – Matter continues

GRAHAM BROS. CONSTRUCTION LIMITED; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL; IUOE, LOCAL 793; File No. 2504-08-R; Dated February 24, 2009; Panel: Diane L. Gee (10 pages)

Conciliation – Reference – The Minister asked if he has the authority to appoint a conciliation officer, or if his power to appoint is overridden by a Stay Order issued under the *Companies' Creditors Arrangement Act* – The Board was challenged by the wording of the Court order staying the proceedings "in any court or tribunal" and by the uncertainty relating to the duration of the Stay Order, and its purported extension – On the one hand, the Board found that the appointment of a conciliator is not "a proceeding in a court or tribunal," as described in one paragraph of the Order; on the other hand, a further paragraph in the Order stayed "all rights and remedies" of any entity or government agency – Taking a cautious approach, the Board held that the appointment of a conciliator was a "right or remedy" and was therefore prohibited by the Stay Order – Reference answered in the negative

GUELPH PRODUCTS COLLINS & AIKMAN;RE CAW-CANADA, LOCAL 1917; File No.3083-08-M; Dated March 3, 2009; Panel: Brian McLean (4 pages)

Certification – Construction Industry – Practice and Procedure – Unfair Labour Practice – The union asked the Board to convert its card-based application for certification to a vote-based one so it could seek relief under s. 11 of the Act – Although the union completed the application form using the sections applicable to card-based certification, it was clear from its answer to one of the questions on the form that it was invoking s. 11 – Furthermore, the union filed an unfair labour practice complaint at the same time that it filed its application for certification – The Board found that the erroneous completion of the application was inadvertent, that the union's intent to seek s. 11 relief was evident on the face of the application, and that no steps had been taken in the application that would prejudice the ability of the responding party to mount its defence – The applicant's motion to convert the application was granted – Matter continues

INDUSTRIAL PERFORMANCE SOLUTIONS INC. C.O.B. AS ABACUS ELECTRIC; RE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 894; File Nos. 2931-08-U; 2947-08-R; Dated March 27, 2009; Panel: Jack J. Slaughter (4 pages)

Bargaining Unit – Certification – Employer – Related Employer – The union applied for certification to represent employees in a satellite plant of PPG, and for a declaration under section 1(4) of the Act that PPG was related to two other employers: Liberty Staffing Services Inc. (Liberty), a temporary employment agency sub-contracted by PPG to provide employees at the satellite plant, and the Staffing Edge Inc. (TSE), a company providing human resource services – The Board determined that the pre-conditions

necessary for PPG, Liberty and TSE to be found related employers were satisfied – Although there was no degree of common ownership, PPG, Liberty and TSE were engaged in associated and related activities at the facility – There was joint decision making about employees at a practical level, a shared premises, and joint control of employees – Despite the fact that PPG and Liberty were in a genuine sub-contracting relationship, the Board chose to exercise its discretion to make a s. 1 (4) declaration for PPG and Liberty on the basis that there was an essential community of interest between the companies and bargaining with either one of them alone would be enormously difficult –The application against TSE was dismissed on the basis that it was an employer in name only – Certificate issued

PPG CANADA INC, AND/OR LIBERTY STAFFING SERVICES INC AND THE STAFFING EDGE INC; RE: UNITED FOOD AND COMMERCIAL WORKERS; File Nos. 1755-07-R, 1910-07-R, 1142-07-U; Dated March 27, 2009; Panel: Brian McLean (26 Pages)

Certification – Practice and Procedure – Reconsideration – When Canada Post's Priority Courier left a notice for the employer that there was a package for pick-up at the local post office, the application for certification had not been properly delivered – There was no obligation on the employer to retrieve the package, and when the package was returned to the applicant, it should have become obvious to the applicant that the employer had never received the application – Receipt of a Confirmation of Filing from the Board does not cure the applicant's failure to successfully deliver the application to the responding party – Application dismissed

PRIEST REBAR PLACEMENT INC.; RE CANADIAN CONSTRUCTION WORKERS' UNION; INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL, ORNAMENTAL AND REINFORCING IRONWORKERS, LOCAL 721, ET AL; File No. 0701-08-R; Dated March 17, 2009; Panel: Harry Freedman (5 pages)

Health and Safety – The employer sought suspension of an inspector's orders for production of documents following a critical injury at the workplace – The employer argued that the orders relating to equipment, operating procedures, the employer's health and safety policies, training records, etc., were improperly issued and were an attempt by the Ministry of Labour to "set the employer up" for prosecution – The Board found that all the documents were necessary for the inspector to pursue his inspection and the orders were proper and valid – The production will not breach any confidentiality or compromise any of the employer's privacy rights – Suspension denied

PURITY LIFE HEALTH PRODUCTS, A DIVISION OF SUNOPTA INC.; RE PRICE TEETER; File Nos. 3299-08-HS; 3367-08-HS; Dated March 10, 2009; Panel: Peter F. Chauvin (5 pages)

Bargaining Unit – Certification – Status – The union applied for certification of a bargaining unit of seasonal road maintenance employees – The employees were hired on various individual fixed-term contracts, some as "call-ins," others with "guaranteed hours" – The union sought to exclude two employees who, in the union's view, did not have a sufficient connection to the workplace on the date of application; the employer challenged the status of six individuals whose contracts ended a few days prior to the date of application – The Board considered the employment history of the workplace and found there was a regular pattern of seasonal employment – The employer had a long-term contract with the Province to provide seasonal services, therefore there was a reasonable expectation of a return to work for the six individuals – The Board held that they were part of the bargaining unit and their ballots should be counted – In light of this finding, the Board did not have to rule on the union's challenges – Vote count ordered

TWD ROADS MANAGEMENT INC.; RE INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 793; File No. 0160-07-R; Dated March 4, 2009; Panel: Patrick Kelly, P. LeMay and D.A. Patterson

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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
Graham Brothers Divisional Court No. 122/09	2505-08-R	Pending
Rochon Building Corporation Divisional Court No.127/09	3333-03-R	Pending
Regulvar Canada Divisional Court No. 95/09	3404-06-R	Pending
Cadillac Fairview Divisional Court No. 142/09	1732-06-R	Pending
Dr. Peter Khaiter Divisional Court No. 79/09	0290-08-U; 0338-08-U	Pending
Pre-Steve Foods Divisional Court No. 1730/08 **LONDON**	1676-08-U	April 14, 2009
MacKenzie Construction Group Divisional Court No. 532/08	1096-08-R	Pending
Schuit Plastering & Stucco Divisional Court No. 537/08	0210-08-R	April 14, 2009
Dr. Peter Khaiter Divisional Court No. 431/08	4045-06-U et al	Pending
Christian Labour Association of Canada Divisional Court No. 382/08	3798-05-R; 3958-05-U	May 20, 2009
Lorraine Fraser Divisional Court No. 1719 **LONDON**	0059-06-ES; 0061-06-ES	April 17, 2009
Comfort Hospitality Inc. 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
LIUNA v. Barclay Construction et al Divisional Court No. 310/08	0837-06-R	Pending
LIUNA, Local 183 (PineValley Enterprises) Divisional Court No. 201/08	0910-07-R	Pending
BCC Constructors v. International Union of Painters Divisional Court No. 138/08	3174-06-R	Pending
Ottawa Fertility Centre v. Ontario Nurses Association, OPSEU, CUPE Local 4000, Ottawa Hospital and OLRB Divisional Court No. DV-08-1394 **OTTAWA**	1531-06-PS	Week of April 6/09
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	Week of June 8/09
Jacobs Catalytic Ltd. v. IBEW Local 353 et al Divisional Court No. 117/07 Court of Appeal C49737	3737-05-U	C.A. April 22, 09
Janet Kitson v. OLRB et al Divisional Court No. 492/06	4205-02-U	Pending
Abduraham, Abdoulrab v. Novaquest Finishing Court of Appeal No. C48942	2222-04-ES, 2223-04-ES, 2224-04-ES	Heard January 27, 2009 – reserved
Mohamed Khan Divisional Court No.461/08	2153-01-OH	Seeking leave to C.A