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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 June of this year. These decisions will appear in the July/August 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 – Employer Support – Representation Vote – The applicant submitted membership evidence that included a card belonging to the person identified as the principal of the responding party – No response to the application was filed – The Board said it could not be confident that the other individuals who signed cards at the same time as the principal did so free of the principal's influence – Although there was no evidence of threat, intimidation or coercion, the Board was not satisfied that the applicant was the "freely designated representative" of the employees – Vote ordered

EURO-CAN MASONRY; RE Bricklayers, Masons Independent Union of Canada Local 1; File No. 1037-11-R; Dated July 18, 2011; Panel: Lee Shouldice (3 pages)

Interference with Trade Unions – Interim Relief – Remedies – Unfair Labour Practice – Local 183 sought interim relief in an ongoing dispute with its parent union (LIUNA), claiming LIUNA committed unfair labour practices in relation to Executive Board elections contrary to section 149 of the Act – Local 183 sought a Board order suspending the results of the vote –The Board determined that the original officers of Local 183 were the proper parties to bring the application – The Board followed the three-part test set out in *Brick and Allied Craft Union v. Marble Tile and Terrazzo, Local 31* in deciding whether to exercise its discretion to grant interim relief – Although the allegations made by Local 183 present a serious issue to be tried, they represent a weak case for the exercise of the Board's discretion. The Board held that it has no jurisdiction to supervise the internal affairs of trade unions – Although irreparable harm would be caused to Local 183 if the interim relief is not granted, this is greatly outweighed by the more significant harm caused by impeding the current operations of Local 183 and interfering with the democratic rights of its members – The case advanced is not strong enough to support such a serious remedy – Therefore the request that the election results be suspended until the completion of the case is denied – Interim Relief denied

LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA; RE Universal Workers Union, Labourers' International Union of North America, Local 183; on its own behalf and on behalf of its Members and Executive Board; RE Joseph S. Mancinelli; Ronald A. Pink; Cosmo Mannella; RE Jack Oliviera; Luis Camara; File No. 1091-11-M; Dated July 8, 2011; Panel: David McKee (12 pages)

Discharge – Duty of Fair Representation – Grievance – Timeliness – The applicant complained that his trade union failed to refer his grievance to arbitration in a timely way – Although the applicant had been assured on several occasions by union representatives that the grievance had already been referred to arbitration (and the representatives believed that to be the

case), the then union stewart failed to ensure that the grievance was internally processed by the union, which failure did not come to light for two years – The Board found that the unexplained failure to make a timely referral of a termination grievance to arbitration constitutes gross negligence or a flagrant error consistent with a non-caring attitude – Balancing the prejudice suffered by the applicant if he is deprived of a hearing on the merits of his grievance against the prejudice suffered by the employer if it is forced to mount a defence to justify the discharge, the Board held that the applicant's prejudice outweighs the employer's – Applicant's termination grievance is to proceed to arbitration and the employer is to waive any right to object to timeliness

LOUIE SENIA; RE Ontario Public Service Employees Union Local 213; RE Kinark Child and Family Services; File No. 2455-10-U; Dated July 8, 2011; Panel: Patrick Kelly (4 pages)

Employer – Employment Standards – The applicant sought review of an order to pay wages to cab drivers who were found to be employees under the ESA – The facts established that the drivers operate vehicles owned by the applicant by entering into a "lease" agreement (with no set lease fee); answer calls broadcast by a dispatcher; receive T-4 slips at the end of the year; are required to abide by the company's rules; have no authority to set fares or fees – In addition, an Employment Standards Officer had earlier determined that the drivers were employees, and the applicant treated them as such for a time – The Board found that the drivers do not own the most important tools of the business (cab, dispatch equipment, meter, signage); there was very little risk of loss or chance of profit; and the applicant could manipulate terms and conditions of employment – all of which pointed to an employment relationship – Application dismissed

1022239 ONTARIO INC. O/A SEVENTY-FIVE HUNDRED TAXI INC., RE. Director of Employment Standards; RE Jeremy Bond; Mark Brown; Stephan Doyle; Gregg Gapp; Paul Gibson; Don Ingram; Robert McIntomney; Douglas Nethery; William Reid; Douglas Sharrard; Peter Strachan; Timothy Wipp; Robert Horton; Douglas Richard; Gerald Stubbington; John Kendrick; Stephen Walls; Dawson Lisinchuk; Nick Scali; Alice Shymanski; Stephanie Howard; Brad Lacell; Stewart Szostak; Richard Wipp; Jason Whalen; Gord Scott; Sam Foglia; Darren Patry; Jim Wadas; Shaun McKay; Luke Smith; Patricia Squires;Raymond Saylor; Rimas Gasperas; Ed Lay; Mike Supica; Rob Stancati; Harold Duguay; Jeff Couturier; Kerry Barnum; Ron White; Ian Sharpe; Darcy Bartlett; James Grant; Brandon Printess; File No. 0264-10-ES; Dated July 20, 2011; Panel: Brian McLean (12 pages)

Certification – Construction Industry – Termination – Timeliness – The Sheet Metal Workers objected to a displacement application for certification and an application to terminate bargaining rights, arguing that the Board was bound by a finding of a board of arbitration that no collective agreement was in place at the time the applications were filed – The Board had earlier directed that the collective agreement be settled by arbitration pursuant to s. 43 of the Act – The Board found that once it had made the s. 43 direction, the settlement of the collective agreement, including in this case whether or not a collective agreement existed, rested with the board of arbitration – The board of arbitration determined that there was no collective agreement in place when the representation applications were filed, therefore the applications were untimely
– Applications dismissed

TRUDEL & SONS ROOFING LTD.; RE United Brotherhood of Carpenters and Joiners of America, Local 27; RE Sheet Metal Workers' International Association, Local 51; File Nos. 0039-10-R; 0381-10-R; 0451-10-U; 0452-10-U; Dated July 21, 2011; Panel: Marilyn Silverman (6 pages)

Certification – Practice and Procedure – Unfair Labour Practice – UFCW was overwhelmingly defeated in a certification application in March 2005 – The day before the representation vote was held Wal-Mart filed an unfair labour practice complaint primarily concerned with an assault by an employee (who was also a representative of the UFCW) on another employee – The UFCW also filed a ULP on the same day, which did not address the assault, but made various allegations against Wal-Mart – After failed attempts at mediation, then 27 months of neither party contacting the Board, and then further delays, the Board considered Wal-Mart's motion to have this matter dismissed because there was no labour relations purpose to proceed and because of administrative delay – The Board relied on the following factors, among others, to exercise its discretion to dismiss the application on the basis that there was no labour relations purpose to proceed: the Board had already struck between one third and one half of the UFCW's allegations; the ballots were cast over 6 years ago and the

UFCW overwhelmingly lost; the bargaining unit composition had dramatically changed so that two thirds of the current employees were not employed at the time of the incidents; it was not clear that the UFCW could make out a case for the relief it sought; and the cost implications to the parties and the public – Certification application and ULPs dismissed

WAL-MART CANADA CORP.; RE UFCW; File Nos. 4118-04-R; 4200-04-U; 4215-04-U; Dated July 21, 2011; Panel: Bernard Fishbein (21 pages)

Court Proceedings

Certification – Construction Industry – Judicial Review – Practice and Procedure – Timeliness – The employer applied to judicially review a Board decision certifying the trade union without considering a late-filed response to the original application – The Board had found that the employer failed to acknowledge the tardiness of its response and equally failed to ask the Board to exercise its discretion to accept a late filing – The employer argued at Court that it had never been given the opportunity to explain its position regarding the delivery of the application package to it, and that the certificate had been obtained by fraud – The Court found the Board's reconsideration decision fell within a range of reasonable outcomes given the record before it, and there was no breach of procedural fairness – Application for judicial review dismissed

[Board decision not reported]

Roni Excavating Limited and/or 865217 Ontario Inc. o/a Iron Excavating and Grading and/or Niro Bros. Excavating & Grading Inc. and/or Iron Trio Inc. and/or Orin Landscaping, RE International Union of Operating Engineers, Local 793; Board File No. 1991-10-R; (Court File No. 580/10); Dated July 12, 2011; Panel: Jennings, Swinton and Durno, JJ. (7 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
Sanford Pensler, A Director of Korex Don Valley ULC et al v.CEP L. 132 et al Divisional Court No. 328/11	0598-10-ES	Pending
John McCredie v. OLRB et al Divisional Court No. 1890/11	1155-10-U	Pending
Classic POS Inc. Divisional Court No. 301/11	4059-10-ES	Pending
Ineke Sutherland o/a Designworks Divisional Court No. 238/11	4061-10-ES	Pending
Dr. Peter A. Khaiter v. OLRB et al Divisional Court No. 213/11	0816-10-U 0817-10-U	Pending
Humber River Regional Hospital v. SEIU Divisional Court No. 101/11	1092-09-R 1132-09-R 1133-09-R	Pending
SNC-Lavalin Divisional Court No. 78/11	1405-03-R	October 25, 2011
Promark-Telecon Inc. v. Universal Workers Union, L. 183 Divisional Court No. 600/10	0745-09-R 0754-00-R 0765-09-R 0782-09-R	Pending
Dean Warren v. National Hockey League Divisional Court No. 587/10	2473-08-U	Pending
Roni Excavating Limited, et al v. IUOE, Local 793 Divisional Court No. 580/10	1991-10-R	Dismissed July 12, 2011
Richard Hotta (Proteus Craftworks) v. Mahamad Badiuzzaman, et al Divisional Court No. 613/10	1953-07-ES	Pending
Pharma Plus Drugmarts Divisional Court No. 551/10	0579-08-R 0580-08-R 1662-09-R	June 30, 2011; Reserved
SNC-Lavalin Divisional Court No. 482/10	2442-07-R 2936-07-R	October 14, 2011
Mr. Shah Islam v. J. Ennis Fabrics Divisional Court No. 506/10	1786-09-ES	Pending
Greater Essex Catholic District S.B. Divisional Court No. 462/10	3122-04-G	June 2, & 3, 2011; Reserved
Rainbow Concrete (Mark Corner) Divisional Court No. 437/10	2904-09-U 2905-09-FC 3292-09-M	Sept. 12 & 13, 2011
John McKenney v. Upper Canada District S.B. Divisional Court No. 10-DV-1652 **Ottawa**	2687-08-U	Pending
Rainbow Concrete Divisional Court No. 856-10	3292-09-M	Sept. 12 & 13, 2011
Dr. Peter A. Khaiter v. OLRB et al Divisional Court No. 383/10	0290-08-U 0338-08-U	Pending
Rainbow Concrete Divisional Court No. 850-10	2904-09-U 2905-09-FC	Sept. 12 & 13, 2011
Independent Electricity System Operator v. Canadian Union of Skilled Workers, LIUNA et al Divisional Court No. 78/10	3322-03-R 2118-04-R	Granted – Feb. 18, 2011 Pending - CA

Case name & Court File No.	Board File No.	Status
Pro Pipe Construction v. Norfab Metal and Machine Divisional Court No. 408/09	2574-04-R	Pending
Blue Mountain Resorts v. MOL Divisional Court No. 373/09	1048-07-HS 0255-08-HS	Dismissed May 18, 2011 Seeking leave to appeal to C.A.
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	November 9, 2011
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
L.I.U.N.A. v. Barclay Construction et al Divisional Court No. 310/08	0837-06-R	Pending