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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 May/June 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.

Construction Industry – Evidence – Practice and Procedure – Witness – The union sought production of witness notes that were protected by litigation privilege – The Board followed the Court's decision in *Kennedy v. McKenzie* which set out a number of exceptions to the claim of privilege – The Board noted that there did exist another reasonable form of evidence that could provide the information that the union sought, namely, the witness may testify under oath before the Board – The Board also noted that while it had the authority to accept the evidence pursuant to s. 111(2)(e), it chose to exercise its discretion to follow the Court's approach in this instance – The Board declined to order the employer to produce the notes – Matter continues

GRAHAM BROS. CONSTRUCTION LIMITED; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL AND INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 793; File No. 0736-09-U; Dated June 30, 2011; Panel: Diane L. Gee (2 pages)

Construction Industry – Health and Safety – Four different construction contractors filed individual applications pursuant to section 61(1) of the *Occupational Health and Safety Act* (OHSA) involving incidents concerning the operations of tower cranes and subsequent Orders made by various Ministry of Labour Inspectors – In each situation the Inspector required the contractor to produce a report by a professional engineer stating that the equipment, machine or device "was not likely to endanger a worker" pursuant to section 54(1)(k) of the OHSA – Each of the applicants retained an engineering firm who produced reports which were deemed to be unacceptable by the various Inspectors because they did not use the specific phrase "not likely to endanger a worker" – The applicants argued that the engineers' reports should not have to use this specific wording – The Board found that section 54(1)(k) of the OHSA clearly reflects the intent of the Legislature to require the employer to provide a report written by a professional engineer that precisely states that the equipment, machine or device is "not likely to endanger a worker" – The Board stated that these precise words create consistency of assessment and minimize confusion or debate among inspectors as to what benchmark must be reached in the content of an engineer's report – The Board was of the view that it was reasonable for an Inspector to conclude that if a professional engineer's report did not state that the equipment, machine or device was "not likely to endanger a worker", a danger or hazard persisted and a stop work order was necessary – The Board also noted that the Inspectors' decisions in these cases not to lift the stop work orders or non-use restrictions were justified, as many of the conditions which gave rise to the orders were not resolved – In conclusion, the Board found that all four construction contractors in these applications were not in compliance with the Inspectors' Orders and dismissed the applicants' appeals

HARDWALL CONSTRUCTION LTD.; RE, THE CARPENTERS' DISTRICT COUNCIL OF ONTARIO, UNITED BROTHERHOOD OF CARPETERS AND JOINERS OF AMERICA, UNIVERSAL WORKERS UNION L.I.U.N.A. LOCAL 183, THE INTERNATIONAL UNION OF OPPERATING ENGINEERS, LOCAL 793 AND NEIL MARTIN, INSPECTOR; ET AL; File Nos. 1065-08-HS; 1232-08-HS; 1142-08-HS; 1958-09-HS; Dated Jun 14, 2011; Panel: John D. Lewis (29 pages)

Abandonment – Collective Agreement – Construction Industry Grievance – Estoppel – Remedies – To support its position that the employer was bound to the Provincial Agreement the union relied upon a collective agreement signed in 1976 – The employer argued the union had abandoned its bargaining rights and alternatively was estopped from asserting its rights given the passage of 30 years – The Board noted that while it is possible to establish abandonment of provincial bargaining rights in the ICI sector, it is well-established that it is difficult to do so, given that it requires evidence of abandonment by every affiliated bargaining agent and the employee bargaining agency – Here the period of the union's inactivity was approximately two years prior to provincial bargaining and 28 years post – While the Board found it appropriate to consider the union's conduct in the period after provincial bargaining in order to assess whether that conduct was consistent or inconsistent with an earlier abandonment of bargaining rights, the Board was not persuaded that the union's failure (given its reasonable lack of knowledge of the employer's ongoing work) to actively enforce its bargaining rights in the period after provincial bargaining was corroborative of an earlier abandonment – The evidence concerning the period prior to provincial bargaining suggested that the union remained unaware of the employer's activities and was reflective of poor quality representation, but it came short of the unequivocal evidence of the union's intention to abandon bargaining rights – Accordingly the Board found that the union had not abandoned its bargaining rights – The Board found, however, that given the union's thirty years of silence and its failure to police the collective agreement, it would be inequitable for the union to insist on adherence to the Provincial Agreement – The Board found the union was estopped from relying upon its strict legal rights and that the estoppel comes to an end with the issuance of the Board's decision – Declaration made, grievance dismissed

OTTAWA BUSINESS INTERIORS LTD.; RE GREATER ONTARIO REGIONAL COUNCIL OF CARPENTERS, DRYWALL AND ALLIED WORKERS, LOCAL UNION 93; File No. 3015-06-G; Dated June 13, 2011; Panel: Caroline Rowan (13 pages)

Collective Agreement – *Hospital Labour Disputes Arbitration Act* – Interest Arbitrations – Termination – The applicant applied for a declaration that the union no longer represented the employees in its bargaining unit – The union argued that the application was untimely because several clauses of an interest arbitration award that was issued to the parties were still in dispute – The employer claimed that there were no outstanding issues with the arbitration award – Concerning timeliness, the Board considered whether the arbitration award determined a collective agreement under section 12(2) of the *Hospital Labour Disputes Arbitration Act* and s. 63(2) of the Act, and found that it did; the application was therefore timely – The Board noted that the arbitrator's introductory remarks indicated that the agreed-upon items were to be incorporated into the collective agreement and that the arbitrator would only remain seized to address implementation issues – The Board also cited the fact that the arbitrator indicated the term of the collective agreement settled by the award, and the fact that the union had given notice to bargain as evidence that a collective agreement had been determined – The fact that the parties had not signed or prepared a formal collective agreement was inconsequential to the Board's finding that a collective agreement did exist – Termination application continues

PALISADES RETIREMENT RESIDENCE INC.; RE CLAUDETTE BRADSHAW; RE HOSPITALITY & SERVICES TRADES UNION LOCAL 261; File No. 4260-10-R; Dated June 7, 2011; Panel: Brian McLean (7 pages)

Employment Standards – This director's appeal of an order to pay vacation pay to a large number of employees of an insolvent company turned on the interpretation of s. 80(4): whether the exempting clauses under subsection (4) should be read disjunctively or conjunctively – The director relied on a statement in a Court of Appeal case that s. 80(4)(a) provides that Part XX does not apply to directors of corporations "that have been incorporated in another jurisdiction" and secondly, that "and" as used in s. 80(4) is used jointly and severally – The Board found that the Court of Appeal, in its two sentence statement on s. 80(4)(a) alone, did not express an opinion on whether subsection 80(4) as a whole was to be read disjunctively or not, and accordingly did not consider the decision binding – The Board noted that a disjunctive interpretation would not be

consistent with a fair, large and liberal interpretation of the objects of the Act in that it would have the effect of immunizing directors of for-profit corporations not incorporated within Ontario, while directors of for-profit companies incorporated under Ontario law would be exposed to liability – Secondly, a disjunctive interpretation was also in disharmony with Part XX which makes it clear that whether the employer was incorporated in Ontario or not was irrelevant: the factor which determines the applicability of the Act was where the employee performs the work – Furthermore a disjunctive reading would immunize non-profit corporations under clause (c), which is redundant since s. 80(2) already accomplishes that result – Finally, a conjunctive interpretation was in accord with earlier Board jurisprudence – The Board found that paragraphs (a), (b) and (c) of subsection 80(4) were to be read conjunctively – Application dismissed

PENSLER, SANFORD N., a DIRECTOR OF KOREX DON VALLEY ULC; RE TED ADAMS, ET AL AND DIRECTOR OF EMPLOYMENT STANDARDS; File No. 0598-10-ES; Dated June 2, 2011; Panel: Patrick Kelly (9 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
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	June 13, 2011; Reserved
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 Seeking leave to appeal to C.A.
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.

Case name & Court File No.	Board File No.	Status
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