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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 March of this year. Some of 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.

Employer – Employment Standards – Reconsideration – The Director of Employment Standards sought a second reconsideration to have the Board properly identify the employer against whom the Board issued an order to pay – The Board found that it had the employer's correct name before it at the hearing and it would be inappropriate to refuse to amend an inadvertence because no one had taken any notice of it – The style of cause was amended accordingly – Reconsideration granted

1435614 ONTARIO INC. O/A ATLANTIS MARINE CONSTRUCTION; RE STEFAN OVERGAARD AND DIRECTOR OF EMPLOYMENT STANDARDS; File No. 0054-04-ES; Dated March 29, 2005; Panel: Patrick Kelly (2 pages)

Certification – Practice and Procedure – Representation Vote – Following the vote in this certification application, the employer raised a concern about the unavailability of an American Sign Language ("ASL") interpreter at the representation vote – One employee also challenged the results of the vote, raising four issues: (1) the short notice of the vote (2) the lack of an interpreter (3) the removal of Board postings and (4) the assertion that many staff changed their minds after voting in favour of the union – The Board ruled that speedy votes are statutorily mandated, the vote process is not perfect but all the Board's materials were available to the prospective voters in writing, the large turnout indicated a high level of awareness of the application – There were no specific allegations that voters were confused or misdirected – Certificate issued

BOB RUMBALL ASSOCIATION FOR THE DEAF INC.; RE CANADIAN UNION OF PUBLIC EMPLOYEES; File No. 4133-04-R; Panel: Mary Ellen Cummings (3 pages)

Adjournment – Certification – Construction Industry – Reconsideration – This certification application was deemed terminated by the Board after the six-month *sine die* period set out in an earlier decision had expired and neither party had sought to have the matter re-listed during that time – The applicant asked the Board to reconsider its decision well after the deemed termination had expired – The applicant argued that it had relied on the employer's assurance that it would enter into a voluntary recognition agreement with the union – The Board held that the reconsideration request does not raise important policy issues, and the applicant had failed to exercise due diligence either to seek a re-listing of the matter in a timely manner, or to extend the period of the *sine die* adjournment – Reconsideration denied

CANADIAN MINING AND DEVELOPMENT CONTRACTORS INC.; RE LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 493; File No. 2183-03-R; Dated March 3, 2005; Panel: Caroline Rowan (9 pages)

Bargaining Unit – Construction Industry – Termination – The employer and trade union entered into a voluntary recognition agreement ("VRA") which included an addendum purporting to exempt ten existing projects from the operation of the provincial ICI collective agreement – An employee employed on one of the exempted projects sought to terminate the bargaining rights of the trade union; the only work being performed on the date of application was on or related to the exempted projects – The trade union argued that s. 132(2) of the Act permitted the parties to enter into an agreement distinct from the ICI agreement – The applicant and the employer argued (1) that s. 162(2) precludes the VRA from amending the bargaining unit contained in the ICI agreement; and (2) that s. 158(3) provides that a VRA "shall include those employees who would be bound by a provincial agreement" – The Board held that sections 158 and 162 seek to create a level playing field in the ICI sector by requiring the terms and conditions in the provincial agreement to apply to all work in the trade, and the same unit of individuals performing the work, whether bargaining rights were acquired by certification or a VRA – Section 132(2) provides a mechanism to terminate bargaining rights where a trade union has not been certified; insofar as it applies to a first agreement in the ICI sector, this subsection creates a second open period for such an application to be brought, in addition to the open period that arises under subsection 63(2) of the Act – The employees working on the exempted projects who were at work on the application date were members of the bargaining unit and were eligible to initiate an application to terminate bargaining rights – Matter referred to Manager of Field Services

C.I.R. PAINTING AND INDUSTRIAL COATINGS LTD.; RE SCOTT KELLY AND INTERNATIONAL UNION OF PAINTERS AND ALLIED TRADES AND ONTARIO COUNCIL OF THE INTERNATIONAL UNION OF PAINTERS AND ALLIED TRADES; File No. 0121-04-R; Dated March 1, 2005; Panel: Susan Serena (9 pages)

Health and Safety – The City of Sudbury appealed an Inspector's Order stating the "the discharge of air from any exhaust system shall be in such a manner so as to prevent return of contaminants to any workplace" and sought suspension of the order – The *Occupational Health and Safety Act's* ("OHSA") purposes are best served if deference is shown to inspector orders – The Board is not satisfied that the Applicant will suffer harm of a nature required to completely suspend the Order – Accordingly the Board will not suspend the Order relating to the complainant's address – Any aspects of the order relating to any workplace other than the complainant's address are suspended – Applicant has established a *prima facie* case for a successful appeal of the Order – No evidence of danger to worker health and safety other than those at the complainant's address – Suspension granted in part.

CITY OF GREATER SUDBURY; RE W.CAYEN, INSPECTOR; ODDO GROTTOLI HOLDINGS INC.; File No. 3592-04-HS; Dated March 10, 2005; Panel: Susan Serena (3 pages)

Crown Employees Collective Bargaining Act, 1993 – The Crown (employer) asked the Board to designate a significant number of meat inspectors as essential services employees pursuant to s. 40 of CECBA in anticipation of a strike or lock-out between OPSEU and the employer – The Crown sought to keep abattoirs open and have inspections carried out; the union argued that the abattoirs should be closed and that only a reduced number of inspectors be declared essential to monitor the closed operations – Relying on s. 39(1) of CECBA, the Board found that the burden of proof rested with the employer – After reviewing earlier essential services agreements relating to inspecting/monitoring, the Board held that the employer had not met its burden to vary earlier agreed-to arrangements – Monitoring was sufficient to protect the health and safety of the public – Matter referred to parties

THE CROWN IN RIGHT OF ONTARIO; RE ONTARIO PUBLIC SERVICES EMPLOYEES UNION; File No. 3816-04-M; Dated March 30, 2005; Panel: Peter F. Chauvin (12 pages)

Unfair Labour Practice – Duty to Bargain in Good Faith - The union alleged that the employer was bargaining in bad faith when it sought to require that senior union representatives sign confidentiality agreements for the release of the employer's business planning documents – The union asserted it received these documents annually (even in bargaining years) and had not previously been asked for such confidentiality measures – The Board affirmed a duty of disclosure during bargaining but acknowledged that the scope of disclosure remained "thorny," with a distinction drawn between "solicited disclosure" and the employer voluntarily revealing initiatives that might impact on negotiations – The Board found

that OPSEU had met its onus to prove there were documents the employer failed to disclose; the employer's defences regarding the required confidentiality were largely hypothetical and the Board chose to disregard them – The Board ordered the employer to provide OPSEU with the relevant materials and to answer appropriate questions

THE CROWN IN RIGHT OF ONTARIO (MANAGEMENT BOARD SECRETARIAT); RE ONTARIO PUBLIC SERVICE EMPLOYEES UNION; File No. 3038-04-U; Dated March 18, 2005; Panel: Brian McLean (14 pages)

Heath and Safety – Reprisal – Work Refusal – The employer appealed an order from an OHSA inspector – Two employees filed complaints pursuant to s.50 of the Act – When an employer fails to resolve a work refusal dispute, the employer must notify an inspector according to s. 43(6) of the *Occupational Health and Safety Act* – After an employer has resolved previous work refusals with employees, the employer may offer alternative work to the same employees despite the dangerous nature of the original work – For valid *OHSA* work refusals, employees must have reasonable grounds to believe that workplace conditions constitute a threat to their safety – Despite a workplace that did not itself amount to threatening physical conditions, an employee (S) was justified in a work refusal given his fatigue and physical incapacity to perform the new work request – Another employee's (F) belief that the identical work was dangerous did not amount to reasonable grounds for work refusal – (F) lacked (S's) physical limitations therefore his subjective belief was not held reasonably – Reprisal against (S) was set aside – Reprisal against (F) was upheld.

DUFFERIN AGGREGATES; RE LOCAL 266, CEP; MINISTRY OF LABOUR; File No.2163-01-HS; Dated March 11, 2005; Panel: Christopher J. Albertyn, Vice-Chair and Board Members J. Ronson and R.R. Montague

DUFFERIN AGGREGATES; RE CLAYTON FOURNIER File No. 2190-01-OH; Dated March 11, 2005; Panel: Christopher J. Albertyn, Vice-Chair and Board Members J. Ronson and R.R. Montague

DUFFERIN AGREGATES; RE TREVER K.SIMPSON; File No. 2191-01-OH; Dated March 11, 2005; Panel: Christopher J. Albertyn, Vice-Chair and Board Members J. Ronson and R.R. Montague

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Construction Industry – Certification – Timeliness – On April 16, 2004, the Board dismissed a construction industry certification application involving a proposed bargaining unit in Board Area 8 – In respect of the application, the employer agreed that an employee, (P), ought to be included in the union's bargaining unit description – On November 5, 2004, the same applicant filed a second application for certification in Board Area 9, in which all of the responding parties were the same – All parties agreed that (P) was included in the second bargaining unit description – The Board considered whether the second application for certification was barred under subsection 10(3) of the Act – Subsection 10(3.1) allows the Board to exercise discretion in applying the bar to certification provided the position of the employee in the original application is different from their position at the time of the new application and that the employee would not be in the bargaining unit proposed in the new application if they still occupied their original position when the new application is made – A worker's position is informed by the craft which they perform and by their work location – A change in work location will not necessarily result in a change of position, however movement from one Board area to another will result in a change of position – At the time of the second application, (P's) position had changed – In the second application, the employer's request to have the certification application dismissed on account of the bar is denied – Matter referred to Registrar

GREENVILLA HOMES AND/OR GREENVILLA HOMES CORP. AND/OR GREENVILLA DEVELOPMENT GROUP INC. AND/OR GREENVILLA HOMES (GREENVILLA DEVELOPMENT GROUP INC.); RE UNIVERSAL UNION, LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA LOCAL 183;File No.2679-04-R; Dated March 21, 2005; Panel: Christopher J. Albertyn (7 pages)

Employment Standards – Reprisal – Timeliness – An employee filed a late application for review of an Officer's decision not to issue an order for termination pay on her behalf –The applicant claimed she was constructively dismissed because of workplace stress – After she found other employment at the same address as the responding party, she received a letter from her former employer stating that her ex-colleagues 'feel it unfortunate' that her new job is

located in the same building as her previous job – The Board noted the threatening tone in the letter from the former employer and cautioned that its conduct could lead to a finding of a reprisal under the *Employment Standards Act, 2000* -- The Board did not find, however, that the former employer's conduct was reason enough to grant an extension of time for her to appeal the Officer's decision – Application dismissed

HOME BASE NON-PROFIT HOUSING; RE CAROL CHAFE AND DIRECTOR OF EMPLOYMENT STANDARDS; File No. 4394-04-ES; Dated March 23, 2005; Panel: Mary Ellen Cummings (2 pages)

Bargaining Unit – Certification – The trade union applied for an all-municipality bargaining unit of employees – In its response, the employer disputed the count and scope of the applicant's proposed unit, seeking to restrict the bargaining unit to one street address – The employer did not, however, suggest the applicant's unit could not be appropriate – The union subsequently (but prior to the vote) agreed with the employer's proposed unit – The Board had to decide whether the union's purported amendment of the bargaining unit could or should be used in the Board's s. 8.1 determination – The Board held that the amendment was made for a purpose identical to the purpose behind s. 8.1: to ensure the union applied for only those employees it wished to represent and for whom it believed it had sufficient support – The union was not required to file a fresh Form A-4 with its amended bargaining unit – Leave granted to amend application – Matter referred to the Registrar

PROLOGIX; RE TEAMSTERS, LOCAL NO. 419; File No. 3505-04-R; Panel: Brian McLean (9 pages)

Construction Industry Grievance – Employment Standards – In the context of a grievance for unpaid wages and vacation pay the union sought an order against the director of an insolvent company for wages and vacation pay, relying on s. 81 of the *Employment Standards Act, 2000* (directors' liability) – The issue for the Board was whether the director's liability extended beyond the date of receivership or bankruptcy of the defunct company – The Board found that once a receiver is appointed, the members of the trade union cease to be employees of the company; accordingly, the director was liable for the money described in the ESA only until the date of receivership – Grievance allowed in part

ROBERT HUME CONSTRUCTION LTD.; RE INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 793; ROBERT HUME AND LAURA HUME; File Nos. 3277-04-G; 3278-04-G; Dated March 1, 2005; Panel: Susan Serena, G. Pickell and A. Haward (5 pages)

Employment Standards – The applicant sought to review an employment standards officer's refusal to issue her an order for termination and severance pay – The employee was involved in a car accident while on lay-off and her injuries prevented her return to work – The company was sold and while the successor provided the applicant with some benefits, she never received any wages from the new employer – The Board assumed (without finding) that there was an employment relationship between the applicant and the successor – When her doctor advised the employer that the applicant would be unable to work in the foreseeable future, the relationship became frustrated or impossible of performance – Application dismissed

WOODS INDUSTRIES (CANADA) INC.; RE VIOLET VELOVSKI AND DIRECTOR OF EMPLOYMENT STANDARDS; File No. 3750-03-ES; Dated March 21, 2005; Panel: Mary Anne McKellar (3 pages)

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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
1333833 Ontario Inc. v. OLRB, Employment Standards Officer, Norstead Building Products Inc. Divisional Court No. DV-05-236	3559-04-ES	Pending
William McNaught v. Toronto Transit Commission, et.al Supreme Court File No. 30842	3616-99-U,3297-99-OH	Pending – Seeking leave to appeal to SCC – March 29, 2005
Wellington De Oliveira v. L.U.I.N.A 183 Divisional Court No. 51/05	0430-04-R	Pending
Sundial Homes (Bronte) Limited v. R.E.S Real Estate Services Limited., et al (Stated Case) Divisional Court No. 50/05	0846-03-R, 0959-03-R, 1046-03-U	Pending
Wabco Standard Trane Co. v. UA Local 787 Divisional Court No. 11/05	0194-03-G	Pending - Oct 7, 2005
Benjamin Blasdell v. UFCW Local A.F.L.-C.I.O.-C.L.C. Local 1000A; Loblaws Supermarkets Ltd. Divisional Court No. 74010/04 NEWMARKET	1431-03-M; 1341-03-U	Pending
Gerald Thomas v. SEIU Local 1.ON; Toronto East General & Orthopaedic Hospital Inc. Divisional Court No. 638/04	0281-04-U	Pending
Hardev Kumar v. USWA, Local 13571, et al Divisional Court No. 574/04	0151-04-U	Pending – May 25, 2005
Naseem Jamal v. OPSEU, et al Divisional Court No. 56704	2464-03-U	Pending – September 12, 2005
Christopher Kabala v. Attorney General of Canada, Ombudsman Ontario, et al Divisional Court No. 575/04	0458-00-ES	Pending
Premier Fitness Clubs Inc. & 992434 Ontario Inc. v. Hopeton Bailey, et al Divisional Court No. 537/04	0341-03-ES	Pending
Assurant Group v. Ignacia Menor Fillion, et al Divisional Court No. 528/04	2999-03-ES	Pending
Maurice Leblanc v. TTC, and ATU, Local 113 Divisional Court No. 468/04	2326-00-U	Pending
Autoland Chrysler (1981) Ltd., Michael Leahey v. Teamsters Union, Local 879 Divisional Court No. 463/04 Divisional Court No. 554/04	1151-03-R	Pending – June 17, 2005
Joseph S. Rooke v. Stelco Hamilton, OLRB & Ministry of the Attorney General for Ontario Divisional Court No. 404/04	1584-02-OH; 2647-02-OH	Pending – Stay (by order of Bankruptcy court)

Case name & Court File No.	Board File No.	Status
Dr. Nicholas Hawrylyshyn, et al, o/a **Square One Dental Centre.** v. Queen in Right of MOL, et al Divisional Court No. 343/04	1721-02-ES	Heard – March 11, 2005 - Reserved
OPSEU v. PIPS, **The Ottawa Hospital**, OLRB Divisional Court No. 378/04	0372-04-R	Pending – September 28, 2005
UBCJA, Local 494 v. **Build Force Construction Ltd.**, 1404406 Ontario Ltd., Unicor Construction Inc. (Stated Case) Divisional Court No. 368/04	1190-03-R; 1189-03-G	Pending – June 1,2005
Sheet Metal Workers' Int'l Assoc. Local 30 v. **Crossby-Dewar Projects Inc**., Int'l Assoc. Heat & Frost Local 95 Divisional Court No. 144/04	1643-03-JD	Pending
Vincent Borg v. OPSEU, The Crown in Right of Ontario et al Divisional Court No. 83/04	1208-02-U	Pending – June 9/05
Grantley Howell v. OLRB Divisional Court No. 04/178	0933-01-U; 1273-01-U; 3552-00-U	Pending
Association of Professional Ambulance Employees v. City of Toronto, Toronto Emergency Medical Services et al Divisional Court No. 44/04	2456-01-R	Pending
Mississaugas of Scugog Island First Nation v. Great Blue Heron et al Divisional Court No. 10/04	1271-03-U; 1336-03-M; 1414-03-M	Heard – Feb. 23,24,25,28/05 - Reserved
Canadian Pacific Railway Co. v. Milk & Bread Drivers, Dairy Employees, Caterers, Local 647 Divisional Court No. 9/04	2864-03-R	Dismissed for delay – March 24, 2005
Dawit Tuquabo v. USWA L 9597, Securitas Canada Ltd. Court File No. 03-DV-000935 – OTTAWA	2377-02-U	Dismissed – Feb.14/05 Reasons to follow – Seeking leave to appeal to CA – March 29, 2005