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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 July 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.

Bargaining Unit – Certification – Construction Industry – Employee – The union sought to certify all construction labourers of the employer – The employees in dispute cleaned trailers at the worksite that contained lunchrooms, washrooms and offices – The employer argued its employees were engaged in "cleaning" and not "clean-up" and were performing the same work they would in a private residence or doctor's office – The Board refused to make the distinction urged upon it by the employer, finding that the cleaning of the construction trailers was a necessary support for the various trades on site – Certification granted

646849 ONTARIO LTD. C.O.B. AS MAGIC MAID CLEANING SERVICES; RE LIUNA, LOCAL 1089; File No. 3643-05-R; Dated July 14, 2006; Panel: Marilyn Silverman (5 pages)

Duty of Fair Referral – Unfair Labour Practice – Three members of IUBAC Local 20 complained that BACU, Local 2 (the union administering the relevant collective agreement) violated section 75 of the Act when it refused to investigate or take any action against contractors who encroached on Local 20's jurisdiction with their own crews rather than availing themselves of the hiring hall – BACU and IUBAC were vying for membership at this time, but the Board found no evidence that BACU knew the individuals might be IUBAC supporters – The Board confirmed that a union may take its institutional interests into account when deciding whether to pursue a grievance or seek to enforce a collective agreement – In any event, the complainants were unable to establish that they would have been dispatched to the jobs even if the collective agreement had been enforced – Application dismissed

BRICK AND ALLIED CRAFT UNION OF CANADA, LOCAL 2; RE SHAWN DEVLIN ET AL; File No. 0120-04-U; Dated July 19, 2006; Panel Harry Freedman (11 pages)

Discharge – Employment Standards – The employee applied for review of an employment standards officer's refusal to issue an Order to Pay requiring the respondent employer to pay termination pay to the applicant – There was an allegation that the applicant was fired for drinking on the job: on his lunch break, the employee started to drink a beverage containing 0.5% alcohol he had purchased from the grocery store; he proceeded to finish his beverage after lunch while at work behind the counter – The employer claimed that the consumption of alcohol while on the job constituted wilful misconduct – The Board held that an employee who consumes a beverage that he purchased at a grocery store and which contained 0.5% alcohol is not engaging in an act of wilful misconduct – The Board further held that if the employer had concerns regarding its customers' perception of the consumption of this kind of beverage in the workplace, the employer should regulate or prohibit the behaviour in question, specifying consequences for failing to adhere to the prohibition – There was no evidence that such a rule was in place in this matter and no such policy had been communicated to the employee – Application allowed

BYERS TRACTOR SUPPLY AND DIRECTOR OF EMPLOYMENT STANDARDS; RE BRENT TIPPING File No. 2394-05-ES; Dated July 11, 2006; Panel Mary Anne McKellar (3 pages)

Last Offer Vote – Reference – The Minister of Labour asked the Board to determine whether he had the authority to order a last offer vote, given that the parties had agreed in their collective agreement that at an impasse in negotiations there would be no strike or lock-out and any matters in dispute would be settled by arbitration – Following negotiations which the Board termed "bitter, even toxic" and the issuance of a "no-board" report, the employer asked the Minister to hold the last offer vote – Over the union's objection, the vote was held, the box sealed, and the question referred to the Board; in addition, a Selector (arbitrator) had been agreed to by the parties and a hearing date had been set – The Board considered the policy rationale for last offer votes and focused on the opening words of s. 42 of the Act ("Before or after the commencement of a strike or lock-out…") Relying on earlier case law where disputing parties had no right to strike or lock-out, the Board found in the instant case that since the parties had agreed to no strike/no lock-out, they had foreclosed the operation of s. 42 because a strike or lock-out could never occur – The Minister did not have the authority to direct a last offer vote

CANADIAN NIAGARA HOTELS INC.; RE UNITE HERE LOCAL 75; File Nos. 0176-06-RV; 0238-06-M; Dated July 13, 2006; Panel: Brian McLean (8 pages)

Certification – Collective Agreement – Timeliness – Three applications for certification were set down for hearing to determine whether any collective agreements existed between any of the applicants and Comstock, the responding party, at the intervenor's construction project – Two of the applicants (Millwrights and Carpenters) conceded their applications were untimely – The Labourers argued there was no collective agreement bar to their application – Comstock claimed it was bound by the collective agreement between the Labourers and the intervenor, Brighton Beach Power, because Comstock had signed a document (the Brighton Beach agreement) acknowledging that it had received a copy of the collective agreement between Brighton and the Labourers – The Board held that the agreement between the Labourers and Brighton could not bind the Labourers to Comstock, without notice to the Labourers of an agreement to be bound or acceptance by the Labourers that Comstock was bound – Furthermore, just because Comstock was abiding by the terms and conditions of the collective agreement did not mean it was bound by it where Comstock was not a signatory to that agreement – There was no collective agreement bar to the application for certification by the Labourers – Matter continues

COMSTOCK CANADA LTD.; RE MILLWRIGHT REGIONAL COUNCIL OF ONTARIO; RE BRIGHTON BEACH POWER LTD.; File Nos. 0531-04-R; 0561-04-R; 1534-04-R; Dated July 6, 2006; Panel: Harry Freedman; G. Pickell; A. Haward (7 pages)

Bargaining Unit – Certification – Construction Industry – Employee – Status – The union applied to certify employees of the responding party in all sectors of the construction industry other than ICI – At the outset of the hearing, the parties agreed that the first issue to be dealt with was whether employees performing general landscape maintenance were working in the bargaining unit on the date of application – The employer sought to rely on a standard industry collective agreement which purported to include the work the employees were performing in the definition of construction work – The Board found that routine grounds maintenance at a site where no construction work was being carried out could not constitute "construction industry" work for purposes of the certification application – The Board held it could not look at the expanded definition of construction work in a collective agreement nor at landscaping industry practice to modify the Act or alter the scope of the provision of the Act pertaining to the construction industry – The employees in question were not properly on the list – Matter continues

HANK DEENEN LANDSCAPING LIMITED; RE UNIVERSAL WORKERS UNION, LIUNA, LOCAL 183; File No. 2391-05-R; Dated July 10, 2006; Panel: Susan Serena (7 pages)

Certification – Representation Vote – The employer challenged the Returning Officer's determination that one ballot was spoiled in the representation vote held in this matter – The ballot, although it indicated the voter's preference in the appropriate way, was also marked by what appeared to be initials – The Board surveyed its jurisprudence on spoiled ballots and a majority held that on its face the impugned ballot potentially revealed the identity of the voter and

consequently cast doubt on the voter's preference – The Board held the ballot was a nullity and could not be counted – Certificate issued

INTERNATIONAL COLD STORAGE 2003 INC.; RE TEAMSTERS LOCAL UNION NO. 419; File No. 0486-06-R; Dated July 26, 2006; Panel: Patrick Kelly; D. A. Patterson; P. LeMay, (Dissenting) (6 pages)

Bargaining Unit – Certification – Employer – Representation Vote – In this application for certification, the employer gave numerically significant notice under s, 8.1 of the Act, arguing that workers supplied to it by an employment agency (Manpower) were in fact its employees – The union agreed that if the Manpower workers were found to be employed by Nike, the application would have to be dismissed because the union did not have the support of 40% of the bargaining unit – The Board considered the criteria articulated in *York Condominium* to determine the identity of the employer – The Board found that Nike bears the ultimate burden of remuneration; Nike has the authority to determine whether a temporary employee continues to work for it; although the employees were hired by Manpower, Nike can tell Manpower not to send back an employee; Nike has the power to dismiss; the degree of integration of the workers supplied by Manpower into Nike's business strongly points to Nike being the employer – Ultimately, the Board concluded that it is Nike which exercises fundamental control over the workers supplied by Manpower – Application dismissed under section 8.1(5)7 of the Act

NIKE CANADA LTD.; RE UFCW, LOCAL 1000A; File No. 0197-05-R; Dated July 17, 2006; Panel: Brian McLean (20 pages)

Bargaining Rights – Collective Agreement – Sale of Business – The applicant unions sought a declaration that there has been a sale of business from the former Ontario Hydro to the Independent Electricity System Operator ("IESO") – CUSW sought a declaration that the IESO thereby became bound by the bargaining rights held by CUSW for employees of the former Ontario Hydro and that CUSW is entitled to give notice to bargain to the IESO – LIUNA similarly sought a declaration that the IESO became bound by various collective agreements binding LIUNA and the former Ontario Hydro as a consequence of the sale of business and are therefore entitled to give notice to bargain regarding those collective agreements – The IESO was established by the *Electricity Act (*E.A.*)* as a not-for-profit, non-share capital corporation through re-organizing the former Ontario Hydro – The applicant unions submitted that the IESO acquired the assets, liabilities, responsibilities and functions of the Central Market Operator ("CMO") business unit of the former Ontario Hydro and this unit was responsible for the electricity grid – The unions claim the IESO continued to perform that function, albeit in a different manner, following the enactment of the E.A. – The responding party submitted that the IESO is a brand new organization, which is independently involved in setting the market prices for electricity and also has responsibility to oversee the reliability of the electricity grid in Ontario – With respect to CUSW, the responding party contends that CUSW never had a collective agreement with the former Ontario Hydro or with the IESO and that CUSW made no claim for bargaining rights in a timely fashion – With respect to LIUNA, the responding party contends that LIUNA never sought to engage in collective bargaining with the IESO and that it was not clear to the IESO that LIUNA was asserting bargaining rights until after the mediation meeting – The Board held that, from a review of the E.A. and the Transfer Order there was a transfer or disposition from the former Ontario Hydro to the IESO meeting the first requirement of a "sale of business" – At issue was whether what was transferred to the IESO under the terms of the legislation can be characterized as part of the "business" of the former Ontario Hydro within the meaning of section 69 of the *LRA* – When the Board considered what is meant by "business" or part of a business in section 69, the Board looked at the essential elements of the given undertaking and whether a coherent grouping of those elements had been transferred – The factors the Board considers include; the absence of a hiatus in operations following the transfer, the extent to which the transferee derives its ability to carry on business following that which was transferred, and whether the transferor subsequently ceased to carry on business – The evidence before the Board showed that virtually all the assets and liabilities of the CMO business unit were transferred to the IESO, and there was little that changed in the day-to-day functions of the employees who were transferred to the IESO at the time of the de-merger – The Board held that the fact that the IESO carries out what is substantially the same responsibility in respect of reliability in a somewhat different manner does not imply that there has been a change in the character of the business following the transfer – The Board has recognized that there are inevitable changes in the manner in which a new entity will carry on business, particularly where

only a part of a business of the predecessor has been transferred – The Board rejected the suggestion that, no sale of the business declaration should issue since there was no transfer of the construction part of the business of the former Ontario Hydro to the IESO to which the applicant bargaining rights apply – The Board further recognized that a period of apparent inactivity by a trade union asserting its rights will not necessarily indicate that the union has abandoned its bargaining rights, particularly where that period of inactivity occurs in a period in which there are no employees working in the bargaining unit – The Board found that neither CUSW nor LIUNA abandoned their bargaining rights in respect of the IESO, as alleged – The Board held the bargaining rights of CUSW and LIUNA continue in this new entity and IESO is bound to the collective agreements

ONTARIO ELECTRICITY FINANCIAL CORPORATION AND INDEPENDENT ELECTRICITY SYSTEM OPERATOR; RE CANADIAN UNION OF SKILLED WORKERS; LIUNA, LIUNA ONTARIO PROVINCIAL DISTRICT COUNCIL AND LIUNA, LOCAL 1059; File Nos. 3662-03-R, 3663-03-R; Dated July 31, 2006; Panel: Caroline Rowan (31 pages)

Certification – Bargaining Unit – The union brought an application for certification for all employees at three locations (in three different municipalities) of the responding party – The responding party submitted that there should be a separate bargaining unit for each of its three operations – Relying on the reasoning and criteria set out in *Hospital for Sick Children*, the Board held that the employer did not advance evidence of any serious labour relations problems that would be caused by the Board acceding to the applicant's proposed unit – The majority of the employees at two locations have chosen to be represented by the applicant; the third location, with only one employee, would not be able to be certified without inclusion in the larger unit – With respect to the single employee's right to self-determination, the Board held that the employee's failure to file any representations led the Board to conclude that he was not opposed to union representation or the bargaining unit sought by the applicant – The Board held that the applicant's proposed bargaining unit was appropriate – Certificate issued

TORONTO REDI-MIX LIMITED AND GLOBAL READY MIX CONCRETE LTD.; RE TEAMSTERS LOCAL UNION NO. 230, READY MIX BUILDING SUPPLY, HYDRO AND CONSTRUCTION DRIVERS, WAREHOUSEMEN AND HELPERS; File No. 0343-06-R; Dated July 24, 2006; Panel Mary Anne McKellar; R. O'Connor; S. McManus (6 pages)

COURT PROCEEDINGS

Health and Safety – Judicial Review – Reprisal – The employee sought redress for discipline instituted against him arising out of two separate incidents in the workplace – The Board found there was no anti-safety animus on the earlier event, and the applicant had no objective grounds for engaging in a work refusal in the second occurrence – On judicial review the Court held the Board's findings were not irrational and no reviewable error was made – Application dismissed; Board decision not reported.

ROOKE, JOSEPH; RE STELCO HAMILTON AND THE OLRB; RE THE MINISTRY OF THE ATTORNEY GENERAL FOR ONTARIO; File No. 1584-02-0H; 2647-02-OH (Ct. File No. 404/04); Dated July 14, 2006; Panel: E. Macdonald J.; Epstein J. Cameron JJ. (4 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
TTC v. Amalgamated Transit Union Divisional Court No. 261/06	0618-06-U; 0620-06-U	Pending
Abduraham, Abdoulrab v. Novaquest Finishing Divisional Court No. 327/06	2222-04-ES, 2223-04-ES, 2224-04-ES	Pending
C.M.G. Innovation Co. v. Ontario Pipe Trades Council and United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 819 Divisional Court No. 06-DV-1234 OTTAWA	0652-03-R	Pending
D.M.S. Concrete & General Contracting v. Plasterer's Local 598 (Stated Case) Divisional Court No. 326/06	0330-06-G	Pending
D.M.S. Concrete & General Contracting v. Plasterer's Local 598 (Stated Case) Divisional Court No. 254/06	4212-05-G; 4213-05-G	Pending
Place Mont Roc v. United Steelworkers (Stated Case) Divisional Court No. 233/06	1684-05-U; 3719-05-U	Pending
City of Hamilton v. Carpenters, Local 18 Divisional Court No. 209/06	1785-05-R	Sept./Oct. 2006
Guild Electric Limited et al v. IBEW, Local 1739 Divisional Court No. 202/06	4179-05-U; 4307-05-M	Pending
Elena, De Monelli Foerster v. Toronto Catholic District School Board (Civil Suit) Divisional Court No. 06-CV-310231PD1	1373-04-U	Oct. 31, 2006
Bricklayers Local 7 v. 921879 Ontario Ltd. et al Divisional Court No. 06-DV-1209 OTTAWA	3261-04-JD; 3504-04-JD	Pending
Gus Nedelkopoulos v. OLRB Divisional Court No. 78978/06 NEWMARKET	1838-05-U 2644-05-U	Pending
Greater Essex County District School Board v. International Brotherhood of Electrical Workers, Local 773 et al Divisional Court No. 126/06	1702-04-R; 3120-04-R; 3172-04-R; 3173-04-R; 3174-04-R	August 15, 2006
Kostantinos Iaonnidis v. Amalgamated Transit Union, Local 1572, Corp. of City of Mississauga, Transportation and Works Dept., Transit Division Divisional Court No. DC 0500947400	2287-04-U	August 30, 2006 (motion)
United Brotherhood of Carpenters v. United Brotherhood of Carpenters, Local 93 Divisional Court No. 01/06	2069-05-U; 3055-05-M	Pending
Gus Nedelkopoulos v. OLRB Divisional Court No. 77287/05 NEWMARKET	3704-04-U	Pending
Century Bldg. Restoration Inc. v. Universal Workers Union LIUNA Local 183, et al Divisional Court. No. 76931/05 NEWMARKET	1880-04-G	Pending
1333833 Ontario Inc. v. OLRB, Employment Standards Officer, Norstead Building Products Inc. Divisional Court No. DV-05-236	3559-04-ES	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	Dismissed – May 31, 2006, seeking leave to appeal to C.A.

Case name & Court File No.	Board File No.	Status
Grantley Howell v. OLRB Divisional Court No. 04/178 HAMILTON	0933-01-U; 1273-01-U; 3552-00-U	Dismissed – April 13, 2006, seeking leave to appeal to C.A.
Joseph S. Rooke v. OLRB and Stelco Hamilton Divisional Court No. 404/04	1584-02-OH; 2647-02-OH	Dismissed July 14, 2006
Scaduto, Frank Divisional Court No. 382/05	1798-03-U; 4338-02-U	Pending
Tuquabo, Dawitt Divisional Court No. 03-DV-000935	2377-02-U	Dismissed Feb. 14/05; leave to appeal dismissed Jun 29/05; seeking leave to S.C.C.