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Ontario Labour Relations Board HIGHLIGHTS

Editors: Voy Stelmaszynski, Solicitor
Leonard Marvy, Solicitor

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SARS Legislation

The *SARS Assistance and Recovery Strategy Act, 2003* (Bill 1) received first, second and third reading on April 30, 2003 and Royal Assent on May 5, 2003. The legislation offers job protection to employees who have been forced to take SARS-related emergency leave. The Act is enforced through the Employment Practices Branch of the Ministry of Labour. Orders issued by Employment Standards Officers pursuant to *SARSARSA* can be appealed to the Ontario Labour Relations Board through s. 116 of the *Employment Standards Act, 2000.*

The Board is not creating new forms to accompany this legislation. Parties wishing to appeal a *SARSARSA* order are directed to use Form A-103.

Scope Notes

The following are scope notes of some of the decisions issued by the Ontario Labour Relations Board in May of this year. Some of these decisions will appear in the May/June issue of the OLRB Reports:

Adjournment – Occupational Health and Safety – Practice and Procedure – The Board adjourned this appeal *sine die,* stating that if neither party sought to re-list it within that time it would be deemed terminated – After one year had elapsed the applicant sought to revive the appeal – The Board held that without a cogent explanation or special circumstances, a party will not be permitted to revive a lapsed application – Appeal dismissed

BATTLE MOUNTAIN GOLD AND MINISTRY OF LABOUR; RE USWA, LOCAL 9364; File No. 2495-00-HS; Dated May 20, 2003; Panel: Laura Trachuk (2 pages)

Practice and Procedure – **Reference –** The Minister asked the Board whether he had the authority to appoint a board of arbitration under section 49 of the Act – Collective bargaining between the trade union and employer had broken down, a no board report was issued, the statutory freeze period expired and a legal strike commenced – When the employer advised the trade union that the Weekly Indemnity Benefits would then be terminated, the union filed a grievance and requested the Minister to appoint an arbitrator – The employer objected – The parties made submissions as to whether the grievance was or was not arbitrable – The Board found that an analysis of arbitrability deflected the focus of the main issue, namely whether there had been a violation of the collective agreement – The Board held that the jurisdiction to determine whether a matter is arbitrable is specifically given to the arbitrator appointed by the Minister and therefore it is not for the Minister to determine whether a matter is properly brought as a grievance – The Board concluded that the Minister has the authority to appoint an arbitrator to deal with the matters arising out of the grievance filed by the trade union, including the employer's objections as to arbitrability

COLUMBIA FOREST PRODUCTS; RE: I.W.A. CANADA, LOCAL 2995; File No. 3704-02-M; Dated May 7, 2003; Panel: Brian McLean (6 pages)

Certification – Representation Vote – Twenty-one employees were given notices of termination on the date this application for certification was filed – The employer challenged the eligibility to

vote of the twenty-one, arguing that they had no relationship of substance with the employer – The Board upheld its long tradition of a "bright line" test for voter eligibility in industrial certification applications: a person working on the date of application or who has an employment relationship on that date is entitled to cast a ballot and have their vote counted – Vote count ordered

CORESLAB STRUCTURES (ONT) INC.; RE USWA; File No. 3820-02-R; Dated May 13, 2003; Panel : Patrick Kelly, D.A. Patterson, J.A. Rundle (Dissenting) 5 pages)

Practice and Procedure – Timeliness – The Board considered whether the applicant was entitled to amend its pleadings – The applicant argued that the amendments were an amplification or clarification of its earlier pleadings, and that no prejudice would result as the parties had not yet adduced any evidence – The responding parties objected on several grounds including delay, failure to comply with the Board's Rules regarding facsimile transmission, the prejudicial impact on the responding parties and an abuse of process by the applicant – The Board held that the Rules should not be used as a weapon to deprive a party of the ability to have its case heard when the other parties affected would not be prejudiced and where the party seeking the relief has demonstrated good reasons for allowing the amendment – The Board was satisfied that much of the amended pleadings contained material that was not new but rather clarified earlier particulars and further that the delay was not so excessive as to warrant the dismissal of the allegations – Motion for leave to amend two applications granted

FEDERATED CONTRACTORS INC. RE: SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, LOCAL 269; SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION; ONTARIO SHEET METAL WORKERS' AND ROOFERS' CONFERENCE; STEVE CRONKRIGHT; JERRY RASO; ANTHONY BAKER; TOM CASHMAN; JOHN CHERESNA; ANDY COWAN; ROGER HOWARD; JOHN McNEIL; MARK MILLER; BRIAN MURPHY; JASON MURRAY; CHARLES ONSTEIN; KNOWLSON RAMSAY; BRIAN VALLEY; PAUL BOUDREAU; P.B. SHEET METAL HEATING & AIR CONDITIONING; LOCKERBIE & HOLE CONTRACTING LIMITED; HARRY HOLE; NEIL PRESTWICH; RICK McGURN; CHRIS SCHOENWANDT and PCL CONSTRUCTORS CANADA INC.; File Nos. 2243-02-U; 2244-02-U; Dated May 2, 2003; Panel: Harry Freedman (6 pages)

Construction Industry Grievance – Practice and Procedure – The applicant filed a grievance on one day but its certificate of delivery indicated it would not be served on the responding party until the following day, contrary to subsection 133(3) of the Act – The Board sought to reconcile recent decisions where a majority of the panel (differently constituted) "deemed" the filing to have occurred on the second day (for good labour relations sense, efficiency and economy) but the dissent found no authority for such "deeming" – The Board invited the applicant to make written submissions as to why the Board should exercise its discretion to accept the referral (s. 133(4)) in the wake of the applicant's failure to comply with the Act – Submissions sought

MODERN RAILINGS & METALCRAFT LTD.; RE INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL, ORNAMENTAL AND REINFORCING IRON WORKERS, LOCAL 721; File No. 0675-03-G; Dated May 29, 2003; Panel: David A. McKee, John Tomlinson, G. McMenemy (3 pages)

Construction Industry Grievance – The Residential Low-Rise Forming Contractors' Association and the Universal Workers' Union, Local 183 jointly grieved the failure of the responding party to post a letter of credit in accordance with the collective agreement – A majority of the Board found that the responding party was bound by the agreement, and the agreement's language was clear and unequivocal – In a concurring opinion, one Board member signalled the apparent unfairness of such a mandatory provision in the collective agreement to small contractors

M-WALL CONCRETE FORMING; RE THE RESIDENTIAL LOW RISE FORMING CONTRACTORS' ASSOCIATION OF METROPOLITAN TORONTO AND VICINITY AND UNIVERSAL WORKERS UNION, LIUNA, LOCAL 183; File No. 1509-02-G; Dated May 9, 2003; Panel: Jack J. Slaughter, John Tomlinson, G. McMenemy (5 pages)

Construction Industry Grievance – The applicant alleged that the employer had failed to make appropriate remittances for welfare, pension and other contributions on behalf of employees

covered by the collective agreement – The parties agreed that an audit should be conducted, who the auditor should be, and what payroll documents should be examined – The only outstanding issue was whether the audit should be restricted to ICI sector work or could encompass an examination of all work performed – The Board held that since the employer was in the unique position of knowing what work was performed by whom, in what manner and in what sector, the audit would extend to all the employer's payroll records – Grievance allowed

NATION DRYWALL CONTRACTORS LTD.; RE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF THE UNITED STATES AND CANADA, LOCAL 2041; File Nos. 0950-01-G; 1587-01-G; Dated May 21, 2003; Panel: Mary Ellen Cummings (4 pages)

Damages – Settlement – The Board considered whether damages should be awarded under Section 96(4) of the *Labour Relations Act, 1995* based on the Board's earlier decision that the responding party had breached the parties' settlement agreement – The applicant sought a "make whole" remedy which included organizing costs, general damages and legal expenses – The Board held that "make whole" remedies are awarded only where the Board has found that there have been serious or egregious violations of the Act, especially where rectification is not possible or feasible – The Board found that certain organizing costs could not be claimed because they were not rationally related to the breach and further declined to award general damages and other organizing costs as its earlier decision had already put the applicant in the position that it would have been if there had been compliance with the settlement agreement – An award of organizing costs and general damages in the circumstances of this case would be contrary to labour relations policy for a number of reasons including: (1) the award would be perceived as punitive; (2) an expansion of the Board's usual approach to damages would likely have unforeseen consequences in other cases, including more time-consuming and costly litigation; (3) the Board has always been reluctant to become involved in a dispute between trade unions; and (4) the award would discourage any hope of future harmonious relations – The Board held that it has no jurisdiction to award legal costs and would not do so even if it did have the jurisdiction – Request for damages dismissed

NATIONAL GROCERS CO. LTD.; RE NATIONAL AUTOMOBILE, AEROSPACE, TRANSPORTATION AND GENERAL WORKERS UNION OF CANADA (CAW-CANADA); RE UFCW LOCAL 1000A; File Nos. 0137-02-R; 0139-02-R; 0179-02-R; 0450-02-U; Dated May 1, 2003; Panel: Laura Trachuk (9 pages)

Employment Standards – Settlement – The parties entered into a settlement agreement for the payment of a certain sum and an adjournment of the proceeding *sine die* for a period not exceeding one year on the condition that the matter would terminate when the parties did what they agreed to do, pursuant to subsection 120(4) of the *Employment Standards Act, 2000* – The employer sought to resile from the settlement, arguing that he had received conflicting advice on the state of the law from various Ministry sources – The Board held that the adjournment to allow parties to effect the terms of the settlement is not an opportunity to renege on or step back from the signed agreement – Settlement upheld

TRANSPORT TRAINING CENTRE OF CANADA AND DIRECTOR OF EMPLOYMENT STANDARDS; RE KIMBERLEY LACROIX; File No. 3833-02-ES; Dated May 28, 2003; Panel: Timothy W. Sargeant (3 pages)

Employment Standards – In this employee appeal, the Board considered the applicant's entitlement to termination pay – The employer argued that the employee had improperly accepted money from a customer, an action which was contrary to company "conflict of interest" policy and subject to immediate discharge – The employee submitted that the money was a "tip" and its acceptance was not wilful misconduct nor subject to company policy – The Board found that the company's policy had been made well-known to all employees, that the employee's actions constituted wilful misconduct and disobedience that was not trivial within the meaning of the Act – Appeal dismissed

UPTOWN COMMUNICATIONS AND DIRECTOR OF EMPLOYMENT STANDARDS; RE: RICHARD SPENCE; File No. 2544-02-ES; Dated May 6, 2003; Panel: Timothy W. Sargeant (6 pages).

COURT PROCEEDINGS

Construction Industry Grievance – Judicial Review – The Painters filed a grievance alleging that the painting of a water tower was construction and should have been assigned to them in

accordance with their collective agreement – The Board accepted the employer's argument that the work was maintenance, not construction – Grievance denied – On judicial review, the Divisional Court found the Board's decision to be not patently unreasonable

BLASTCO CORPORATION, OLRB; RE ONTARIO COUNCIL OF THE INTERNATIONAL UNION OF PAINTERS AND ALLIED TRADES; File No.1416-02-G (Court File No. 711/02); Dated May 20, 2003; Panel: Benotto S.J., Somers, Beaulieu JJ. (4 pages); ONTARIO COUNCIL OF THE INTERNATIONAL UNION OF PAINTERS AND ALLIED TRADES; RE **BLASTCO CORPORATION**, OLRB

Bargaining Rights – Certification – Construction Industry – Judicial Review – Remedies – Trade Union – Unfair Labour Practices – The Board found that BACU had status as a construction industry trade union within the meaning of section 126 of the Act – The Board dismissed applications brought by BACU to displace the Ontario Provincial Conference as the certified employee bargaining agency, finding that BACU did not meet the definition of "employee bargaining agency" – The Board ordered a variety of remedies designed to restrict the right of the International union from interfering in the affairs of the Ontario locals (the Board had earlier found the International union had violated the Act by revoking the charters of the Ontario Provincial Conference and Ontario locals affiliated with the International union) – BACU's application for judicial review was dismissed for delay

THE ONTARIO PROVINCIAL CONFERENCE OF THE INTERNATIONAL UNION OF BRICKLAYERS AND ALLIED CRAFTWORKERS, BAC, LOCALS 1, 2, 4, 5, 10, 12, 20, 23, 28, 29 AND 31, JERRY COELHO, TOM OLDHAM, THE BRICK AND ALLIED CRAFT UNION OF CANADA AND THE BRICK AND ALLIED CRAFT UNION OF CANADA, LOCALS 1, 2, 4, 5, 10, 12, 20, 23, 28, 29 AND 31; v. BAC, JOHN T. JOYCE, JOHN J. FLYNN, FRAN STUPAR AND JAMES BOLAND; File Nos. 1904-99-U; 2532-98-U; 2736-00-R; 2737-00-R (Court File No. 352/01); Dated May 20, 2003; Panel: Lane, Then, Lang JJ. (4 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
Thyssen Elevator Ltd. cob as Thyssenkrupp Elevator v. National Elevator & Escalator Assoc., Int'l Union of Elevator Constructors Divisional Court File No. 410/03	2087-01-U	Pending
Girotti St. Catharines Ltd. v. Millrights Union Local 1007 Divisional Court File No. 368/03	3060-02-G	Pending
Teamsters, Chemical, Energy and Allied Workers, Local Union 1880 v. Dominion Colour Corp. Divisional Court File No. 391/03	0425-02-U	Pending
Greater Essex County District School Board Divisional Court File No. 276/03	3398-00-R	Pending
Windsor-Essex Catholic District School Board Divisional Court File No. 277/03	3426-00-R	Pending
OPSEU v. Ontario Hospital Association Divisional Court File No. 83/03	3631-02-U	Pending
Andy Schollig c.o.b. Tischler Woodworking Divisional Court File No. 44/03	2464-01-G	Abandoned
Haimanot Abebe et al v. Distinctive Designs Furniture Divisional Court File No. 30/03	3704-01-ES	Dismissed June 30/03
Ont. Council Int'l Painters & Allied Trades v Blastco Corporation Divisional Court No.711/02	1416-02-G	Application dismissed, reasons issued May 20, 2003
Canadian Health Care Workers v. CAW-Canada, Central Park Lodges et al Divisional Court No. 646/02	1951-01-R; 2179-01-R; et al	Pending
CAW-Canada & its Local 385 v. Coca-Cola et al Divisional Court No. 751/02	0179-01-R; et al	Pending
Marc A. Crockford et al v. UFCW et al Divisional Court No. DV-543/02	1350-99-U; 2809-99-U	Pending
Ont Prov Conference Int'l Union of Bricklayers v. Int'l Bricklayers and Craftworkers, et al Divisional Court No. 352/01	1904-99-U; 2352-98-U; et al	Application dismissed for delay April 24, 2003 Reasons issued May 20/03
IBEW Local 586 v. K2 Contracting et al Divisional Court Nos 01-DV-666; 01-DV-667	0007-96-R; et al	Dismissed June 23/03
Northwest Agro-Forestry Services v. CEP et al Divisional Court No. 277/00	0835-99-R	Abandoned
Ottawa-Carleton Public Employees Union Local 503 – CUPE v. Ottawa Transition Board, et al Divisional Court No. 02-DV-723	2353-00-PS	Pending
Rosalina Papa v. HERE Local 75, et al Divisional Court No. 283/01	0426-00-U	Pending
Rocco Tassone v ATU Local 113, et al	3527-96-U	Pending – Nov. 18/03

Case name & Court File No.	Board File No.	Status
Divisional Court No. 84/02		
The Shopping Channel v. USWA Divisional Court No. 299/00	1123-99-U; et al	Abandoned
William McNaught v. TTC, et al Divisional Court No. 254/02	3616-99-U; 3297-99-OH	Heard Dec. 12/02; reserved
Dundas Realities Ltd. v. MOL, et al Divisional Court No. 01-5359	3256-99-ES	Pending
Tender Choice Foods Inc. v. Mirjana Jazvin Divisional Court No. 454/02	3058-01-ES	Adjourned