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Ontario Labour Relations Board HIGHLIGHTS

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Laura Trachuk

Vice-Chair Laura Trachuk has announced her departure from the Board, to pursue private mediation and arbitration. Vice-Chair Trachuk joined the Board in 1993.

OLRB Shoot-Out

The Board will be hosting its 4th annual golf tournament in support of the Ministry of Labour's United Way Campaign on Thursday, June 19, 2003 at the Heron Point Golf Links in Ancaster, Ontario. Information regarding the "OLRB ANNUAL SHOOT-OUT", including registration information, is appended to this issue of **eHighlights**. For further details, please contact Tim Parker at 416-326-7442 or by email at tim.parker@mol.gov.on.ca or visit the Board's website at www.gov.on.ca/lab/olrb/home.htm

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:

Duty of Fair Referral – Practice and Procedure – Shortly before the scheduled hearing date, and nine months after the application was filed, the applicant sought to amend the application to include a violation of section 51 of the Act – The applicant was not relying on any additional facts but sought to expand on his legal argument – The Board permitted the amendment as the union could not identify any prejudice to its conduct of the case or the evidence it would have to call – The union also sought to have the application dismissed for failing to establish a *prima facie* case – The Board held that it is sufficient to plead facts which, if proven, might be found to constitute a violation of the *Act* – The applicant need not refute every possible defence the responding party may seek to allege – While the Board has no intrinsic authority to supervise the conduct of the internal affairs of the trade union, if the action of a trade union officer is entirely without foundation in the constitution of the union or is clearly contrary to the by-laws or constitution, that tends to suggest that bad faith was a motivating factor and a *prima facie* case is established – Further production ordered – Matter set down for hearing

BRICK AND ALLIED CRAFT UNION OF CANADA, LOCAL 2; LORCAN CONSTRUCTION LTD.; RE: DANILLO BUTTAZZONI; File No. 0544-02-U Dated March 10, 2003: Panel: David A. McKee (5 pages)

Bargaining Unit – Sale of Business – Unfair Labour Practice – The employer sought a determination of appropriate bargaining agents following the acquisition of additional operations in other geographical areas, in light of subsisting collective agreements with two different trade unions – The Teamsters argued that there was no intermingling because there was no overlap in the scope clauses, and that no overlap should be found where one operation moves outside the scope of its collective agreement – The Board held that the requirement of an overlap of bargaining units was to ensure that bargaining rights are not extended as a result of the Board's discretion – Parties to a collective agreement should not be discouraged from entering into agreements which, through the exclusion of subsisting collective agreements, prevent

industrial conflict when other operations are acquired – The Labourers, on the other hand, complained that the employer had supported the Teamsters by agreeing not to transfer any employees prior to the determination of this issue by the Board – The Board held that a term agreed to in bargaining could not amount to improper employer assistance – The Board considered that a single, all-encompassing bargaining unit would benefit both the employer and the employees – Vote ordered

CANADIAN WASTE SERVICES INC. RE TEAMSTERS LOCAL UNION NO. 419 AND LIUNA, LOCAL 506; File Nos. 2255-02-R; 3225-02-U; Dated March 18, 2003; Panel: Brian McLean (18 pages)

Construction Industry – Jurisdictional Dispute – The Board considered the assignment of scaffolding work in this, the fourth jurisdictional dispute involving these parties – In an earlier decision, the Board awarded "trade tending" to the carpenters and "general tending" to the labourers, and further held that a labourer must be employed when there is sufficient general tending work to occupy a labourer for at least four hours during a single shift – The labourers applied to have the division of tending work eliminated and to have at least one labourer hired for every job – The Board reviewed its earlier rulings and declined to make any order requiring the employer to assign labourers to tend carpenters because: (i) there is not enough general tending work to employ a labourer to assist carpenter crews, (ii) the employer's past practice was to share the general tending work, and (iii) when the elements of economy, efficiency and employer preference are considered, there is not enough work to direct that the employer regularly employ labourers to tend carpenters – Application dismissed

DOUG CHALMERS CONSTRUCTION LTD. AND UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 1256; RE LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 1089; File No. 0019-01-JD; Dated March 18, 2003; Panel: Mary Ellen Cummings (13 pages)

Evidence – Practice and Procedure – **Witness** – In this application for certification in the construction industry, the applicant in accordance with Board policy was required to call a witness whose status was at issue – The witness gave evidence that was inconsistent with the interests and material facts as presented by the applicant – The applicant sought permission to cross-examine their own witness – The respondents claimed a cross-examination of one's own witness is only permitted where the applicant can establish that the witness was hostile or adverse by proving previous inconsistent statements – The Board held that no party should be strategically disadvantaged by the Board-imposed obligation to produce and call a particular witness in status-related issues – The Board held the applicant was permitted to cross-examine the witness

JASPER CONSTRUCTION CORP.; RE: LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 506; File No. 2907-02-R; Dated March 19, 2003; Panel: Mary Ellen Cummings (4 pages)

Duty to Bargain in Good Faith – Interference in Employer's Organization – Remedies – The applicant employers' organization alleged that the trade union interfered in its statutory obligations to represent all employers in the ICI sector by engaging in selective strikes and by bargaining with non-NEEA members on matters relating to the organization's internal funding – Further, the Association alleged bad faith bargaining when the union initially agreed to send an "industry fund" payment issue to arbitration then immediately entered into agreements by negotiating separately with non-NEEA members outside the ICI sector, counter to its past practices – The Board examined the historical relationship of the parties (specific to the elevator industry) and found that the union's new agreements with non-NEEA members amounted to bad faith bargaining – The Board ordered the trade union to refrain from relying on any of these agreements and to draft a consolidated provincial agreement applicable to all NEEA members and independents

NATIONAL ELEVATOR AND ESCALATOR ASSOCIATION; RE INTERNATIONAL UNION OF ELEVATOR CONSTRUCTORS, AND ITS LOCALS 50, 90 & 96; RE THYSSEN ELEVATORS LIMITED; File No. 2087-01-U; Dated March 21, 2003; Panel: David A. McKee (43 pages)

Bargaining Rights – Certification – Voluntary Recognition – The CAW filed a certification application and challenged an agreement entered into between the CHCW and the employer some time before there were any employees in the workplace – The Board held that a ratification vote

(held three months after the voluntary recognition, once employees had been hired) was not sufficient evidence of employee support at the time the voluntary recognition was entered into – The Board terminated the bargaining rights of the CHCW and declared that the CAW's certification application was timely – Ballot count ordered

OAKWOOD RETIREMENT COMMUNITIES INC. (NURSING HOMES) C.O.B. AS THE VILLAGE OF WENTWORTH HEIGHTS (SERVICE UNIT); RE CAW-CANADA; RE CANADIAN HEALTH CARE WORKERS; File Nos. 2396-01-R; 2399-01-R; Date March 26, 2003; Panel: Marilyn Silverman (11 pages)

Certification – Membership Evidence – Practice and Procedure – Reconsideration – Representation Vote – The employer requested reconsideration of a Board decision ordering a vote, alleging (1) that the applicant's Form A-4 ("Declaration Concerning Membership Evidence") was defective because it had not been signed by the declarant, but by his assistant, and (2) that employees did not have sufficient notice of the representation vote – The Board held that, at first instance, it would have dismissed the application but as this was a reconsideration, different factors would apply – While the A-4 (a form prescribed by the Board's Rules of Procedure, not the Act) is less significant in a vote-based certification system, it still provides corroboration for the membership evidence tendered, and is the only evidence available to the employer – As the applicant filed a subsequent A-4 signed by the declarant, the Board relieved against the strict application of its Rules and admitted the second document – The Board noted that its Notice of Vote was in line with its standard practice and since no employees had objected to the adequacy of the posting, there was no reason to inquire into this issue – Reconsideration request denied

RYERSON UNIVERSITY; RE CUPE; File No. 2533-02-R; Dated March 14, 2003; Panel: Brian McLean (10 pages)

Employment Standards – In this employee appeal of an Officer's refusal to issue an order to pay, the Board considered the applicant's entitlement to an 8% incentive compensation plan ("ICP") payment – The employee signed a contract of employment that contained an ICP payment clause which stipulated that participation in the bonus payment is contingent on being employed at the time of payment – The applicant claimed the entitlement to ICP crystallized at the end of December 2000 – Given the timing of his resignation (February 2001) he should have known he was rendering himself ineligible because he was not employed on the payout date (March 2001) – Application dismissed

SUN LIFE FINANCIAL AND MINISTRY OF LABOUR; RE ANGELO PORTANOVA; File No. 1210-01-ES; Dated March 12, 2003; Panel: Marilyn Silverman (5 pages)

Certification – Construction Industry – The applicant sought a bargaining unit for all carpenters and carpenters' apprentices – While the union claimed there were two people in the bargaining unit, the employer submitted a list of thirteen persons – The union, however, inadvertently failed to include a bargaining unit member's name on the list of employees prior to the vote – On the date of the vote, the union failed to persuade the omitted employee to vote and did not request that the LRO conducting the vote add the name to the list – The union sought to include the employee on the list after the date of the vote – The Board held that the day of the vote will be the last date on which the Board will permit any party to seek to add a previously unidentified name to the list of persons in the bargaining unit – In this case, the need for finality in steps taken during the certification process outweighed the relative lack of prejudice to the responding party – The applicant was not allowed to add another employee to the list of employees in the bargaining unit – The Board sought submissions on other issues

TORCOM CONSTRUCTION INC. RE: CENTRAL ONTARIO REGIONAL COUNCIL OF CARPENTERS, DRYWALL AND ALLIED WORKERS UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA; File Nos. 3146-02-R; 3513-02-U; Dated March 6, 2003; Panel: David A. McKee (6 pages)

Duty of Fair Representation – The Occasional Teachers' Bargaining Unit, which comprised a "committee" or sub-group of the larger secondary school teachers' federation, sought to impose a levy on its membership to help finance a legal action against the federation – The federation refused to support the levy – The Board found that the federation's refusal to endorse the union levy, notwithstanding the apparent merit of the legal action, was a matter internal to the trade

union and did not fall within the ambit of a s. 74 complaint – Application dismissed

TORONTO DISTRICT SCHOOL BOARD; RE OCCASIONAL TEACHERS' BARGAINING UNIT OF THE OSSTF (DISTRICT 12) ON ITS OWN BEHALF & ALL MEMBERS OF THE OCCASIONAL TEACHERS' BARGAINING UNIT OF THE OSSTF (DISTRICT 12); OSSTF & OSSTF, DISTRICT 12; File Nos. 2653-02-U; 2654-02-U; Dated March 13, 2003; Panel: Christopher J. Albertyn (7 pages)

Certification – Practice and Procedure – Representation Vote – As the bargaining unit in this application consisted of employees who might not attend at their workplaces to learn of the proceeding and see a posted Notice of Vote (because of the nature of their employment), the Board directed the Responding Party to provide each employee with notice by regular mail – The vote was delayed past March break and scheduled for one day prior to the end of the semester – Vote ordered

TORONTO DISTRICT SCHOOL BOARD; RE CUPE; File No. 3876-02-R; Dated March 4, 2003; Panel: Patrick Kelly, J.A. Rundle, L. Wood (3 pages)

Employment Standards – Evidence – In this employer application for review, the applicant proffered an affidavit from a medical doctor to contradict information given to the employment standards officer by the claimant – The claimant did not attend the hearing but counsel for the Ministry of Labour objected to the affidavit evidence – The Board learned that the doctor had been subpoenaed two weeks prior to the scheduled hearing but did not attend – The board was not inclined to rule on the weight to be given to the affidavit – The matter was adjourned to a later date and the applicant was directed to reflect on the matter of the doctor's non-attendance under subpoena

UNIMOTOR, DIVISION OF 1222698 ONTARIO LIMITED O/A SMP MOTOR PRODUCTS; RE WENDY PLAIN AND MINISTRY OF LABOUR; File No. 2586-02-ES; Dated March 26, 2003; Panel: Corinne F. Murray (3 pages)

Adjournment – Construction Industry Grievance – The applicant sought an adjournment of the scheduled hearing because the parties were involved in settlement discussions – The registrar adjourned the matter citing agreement of the parties when, in fact, there was no evidence of such an agreement – The Board stated that a responding party's failure to file a Notice of Intent to Defend and Request for Hearing did not absolve the applicant from seeking the responding party's consent to the adjournment

X-ACT CRANE LTD.; RE INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 793; File No. 3823-02-G; Dated March 11, 2003; Panel: Mary Ellen Cummings, J. Tomlinson, A. Haward (2 pages)

Court Proceedings

Judicial Review – Remedies – Settlement – Unfair Labour Practice – The parties settled an unfair labour practice complaint in 1988 – Subsequently, over the next eleven-year period, the applicant attempted, through various court proceedings, to resile from the settlement – Once the applicant had exhausted these attempts, she returned to the Board in 1999 to seek enforcement of the original settlement – The Board dismissed the application – The judicial review of the Board's decision was dismissed for delay and on the merits by the Divisional Court – Leave to appeal was denied by both the Court of Appeal (Carthy, Laskin, Sharpe, JJA on August 14, 2002) and the Supreme Court of Canada (McLachlin, C.J. and Bastarache and Deschamps JJ.) on March 6, 2003

BALANYK, ELIZABETH; RE THE GREATER NIAGARA GENERAL HOSPITAL, ONA AND OLRB; File No. 0074-99-U (SCC File No. 29423), Dated March 6 2003; Panel: McLachlin C.J., Bastarache, Deschamps JJ. (1 page)

Employment Standards – Judicial Review – The employee applied to review an employment standards officer's refusal to award him vacation pay – The adjudicator/referee found that the employee had been paid an annual salary, had worked year round (although the resort was only open May to October) and had not received vacation or vacation pay – On judicial review, the Divisional Court held there was ample evidence to support the adjudicator/referee's decision – Application for judicial review dismissed

663605 ONTARIO LIMITED, OPERATING AS GUARDIAN EAGLE RESORT V. MARTIN LAPPAGE AND THE MINISTRY OF LABOUR;

GUARDIAN EAGLE RESORT, 663605 ONTARIO LIMITED, OPERATING AS; RE MARTIN LAPPAGE AND MINISTRY OF LABOURL; File No. 3742-97-ES (Court File No. 567/2000); Dated March 27, 2003; Panel: Blair R.S.J., Lane, J. MacDonald JJ.

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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
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	Pending
Haimanot Abebe et al v. Distinctive Designs Furniture Divisional Court File No. 30/03	3704-01-ES	Pending
Elizabeth Balanyk v. The Greater Niagara General Hospital et al SCC No. 29423	0074-99-U	Leave to appeal to SCC dismissed March 6, 2003
Ont. Council Int'l Painters & Allied Trades v Blastco Corporation Divisional Court No.711/02	1416-02-G	Pending – May/5/03
UBCJA & its locals & affiliates v. Cadillac Fairview Corporation Divisional Court No. 622/01	0730-99-R	Adjourned
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
CUPE Local 5167 v. City of Hamilton et al Court of Appeal M29220	0587-00-R; 1891-00-U	Settled March 7, 2003
CAW-Canada & its Local 385 v. Coca-Cola et al Divisional Court No. 751/02	0179-01-R; et al	Pending
ATU Local 107 & 1585 v. Corporation City of Hamilton et al Divisional Court No. 448/02	3816-00-PS; 0089-01-PS	Settled March 7, 2003
Marc A. Crockford et al v. UFCW et al Divisional Court No. DV-543/02	1350-99-U; 2809-99-U	Pending
UBCJA v. Great Atlantic and Pacific Co. of Canada Divisional Court No. 686/01	0098-99-R; 0484-01-R	Adjourned
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	Pending – Apr. 24/25/03
IBEW Local 586 v. K2 Contracting et al Divisional Court Nos 01-DV-666; 01-DV-667	0007-96-R; et al	Pending
Northwest Agro-Forestry Services v. CEP et al Divisional Court No. 277/00	0835-99-R	Pending
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	0426-00-U	Pending

Case name & Court File No.	Board File No.	Status
Divisional Court No. 283/01		
IBEW Local 353 v. Quadracon Divisional Court No. 811/00	2560-99-R	Adjourned
Rocco Tassone v ATU Local 113, et al Divisional Court No. 84/02	3527-96-U	Pending – May/1/03
Dervent Thompson v. OLRB Divisional Court No. 314/02	1870-01-U	Dismissed March 31,2003 – reasons to follow
The Shopping Channel v. USWA Divisional Court No. 299/00	1123-99-U; et al	Pending
Rachelle Martin v. AMDAHL Canada Ltd. Divisional Court No. 47/2001	0167-97-OH	Pending
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
663605 Ontario Ltd. o/a Guardian Eagle Resort Divisional Court No. 567/00	3742-97-ES	Dismissed – Mar 12/03
Tender Choice Foods Inc. v. Mirjana Jazvin Divisional Court No. 454/02	3058-01-ES	Pending – Apr. 28/03