ISSN 1195-0226

Ontario Labour Relations Board HIGHLIGHTS

Editors: Voy T. Stelmaszynski, Solicitor
Leonard Marvy, Solicitor

March 2005

Scope Notes

The following are scope notes of some of the decisions issued by the Ontario Labour Relations Board in February of this year. Some of these decisions will appear in the January/February 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.

Certification – Practice And Procedure – Timelines – The Board had to address the timeliness of a Teamsters' certification application in the face of an earlier application by the UFCW that had not been dismissed after a losing vote in accordance with the Board's standard practices (the UFCW file "underwent the human equivalent of falling behind a filing cabinet") – The Board canvassed the history and purpose of the "bar" in certification applications and determined that a purposeful and contextual reading of the Act afforded the Board discretion to determine the effective date of a dismissal – Just as a certification application can be dismissed a day, week or several months after a vote count, so too should the Board have the discretion to render the effective date of a dismissal prior to the release date of the Board's decision – In this case, the Board determined that the effective date of the dismissal fell following the five- day objection period – The application for certification by the Teamsters was untimely – Application dismissed.

ACCESS SECURITY PROFESSIONAL.; RE UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION LOCAL 333; File Nos. 2220-03-R; 2536-04-R; 2686-04-U; Dated February 1, 2005; Panel: Brian McLean (17 pages)

Bargaining unit – Reconsideration – The applicant requested that the Board use its reconsideration powers to rationalize 11 bargaining units containing 146 unionized employees – The Board noted that it has consistently held that once the first collective agreement has been negotiated, the Board's certificate is spent, and thereafter the scope of the bargaining unit is determined by reference to how the parties have defined or redefined it – The Board has left to the parties the responsibility to negotiate changes to their bargaining units and to establish bargaining structures that suit them – Finally, interfering in negotiated bargaining structures would create uncertainty in the labour relations community and the Board should resist creating such uncertainty – Application dismissed

BA INTERNATIONAL INC.; RE IAM, LOCAL 412; GCIU LOCALS 588 AND 41-M; INTERNATIONAL PLATE PRINTERS, DIE STAMPERS AND ENGRAVERS UNION OF NORTH AMERICA, LOCAL 6; IUOE, LOCAL 796; ATU, LOCAL 279, OTTAWA STEEL PLATE FEEDERS AND EXAMINERS, LOCAL #31; File No.1363-04-M; Dated February 28, 2005; Panel: Mary Ellen Cummings (3 pages)

Bargaining Rights – Construction Industry Grievance – Practice and Procedure – Related Employer– The applicant applied for a determination that Cancoil Thermal Corporation ("CTC") and Cancoil Corporation ("CC") are under common control and direction and carry on related activity so that they should be declared related employers under the Act – CTC argued two preliminary motions: (1) that it was prejudiced by the lack of CC's participation in the hearing; and (2) that the Labour Relations Officer made discriminatory comments which tainted the Board's proceedings – The Board dismissed both

motions: CC had been properly served with the application but had apparently chosen not to participate, and any comments of the LRO could not affect the outcome of the hearing because of the different roles played by mediators and adjudicators – The Board found that both corporations have a common Director, President and General Manager and work out of the same premises – Because CC failed to file a response, it was deemed to have accepted all of the union's assertions of fact – The very purpose of section 1(4) is to permit the Board to pierce the corporate veil – All of the human resources and administrative services required by CTC were provided by CC – Employees of CC supervise CTC employees on a daily basis and have significant input into the terms and conditions of their employment – Where one "key man" calls the labour relations shot for each corporation, the two are under common control and direction regardless of their corporate form – A related employer declaration will issue, retrospectively to the date that the grievance was filed

CANCOIL CORPORATION, AND CANCOIL THERMAL CORPORATION; RE UNITED FOOD AND COMMERCIAL WORKERS UNION LOCAL 175; File No. 0717-04-R; Dated February 1, 2005; Panel: Mary Anne McKellar (14 pages)

***Crown Employees Collective Bargaining Act* – Duty to Bargain in Good Faith – Essential Services –** The Crown brought an application requesting an order from the Board that the essential services agreements (ESA) provide that no Correctional Officers and Probation and Parole Officers are necessary to perform the essential services work that must be carried out in the event of a strike or lockout – The union's application alleged that the Crown was bargaining in bad faith as a result of this position – The Board found that s. 32 of CECBA requires that the parties identify what the essential work is, how many bargaining unit employees are required to perform it (without regard to the availability of other persons), and who those employees are – The Board found that the underlying policy goals of Part IV of CECBA are to, as best as possible, replicate free collective bargaining, while ensuring that essential and emergency services continue to be provided in the public interest – Whether the Crown has the discretion under s. 40(1), once the employees are identified in the ESA, to decide it does not wish to use some or all of the employees identified, is an issue over which the parties disagree, and one the Board left unresolved – In light of the Board's interpretation of s. 32, the Board directed the parties to make every effort to bargain in good faith and did not determine whether the Crown had breached s. 31(2)

CROWN IN RIGHT OF ONTARIO, THE; RE ONTARIO PUBLIC SERVICE EMPLOYEES UNION; File Nos.3458-04-M; 3524-04-M; Dated February 10, 2005; Panel: Kevin Whitaker (5 pages)

Employment Standards – Employee – In these applications the main issue turned on whether the worker, a taxi driver, was an employee of the taxi company – The Board determined that the driver was an employee since the company controlled his work, owned the tools and the driver derived 98% of his pay from dispatch calls – The employee argued that he had not been paid minimum wage, vacation pay pr termination pay – The Board looked at the remuneration over a period of months, not on a shift by shift basis – While the employee appeared to have earned over the minimum wage, the employer's policy that he pay for his own gasoline effectively reduced his hourly rate – To the extent that this reduction brought the employee below the statutory minimum wage, it was a violation of the Act – The Board found the applicant to have engaged in wilful misconduct (insubordination) and accordingly he was not entitled to termination pay – Finally, an order to pay vacation pay on wages earned over 6 months previously is valid because vacation pay has special status and does not become due until long after it is earned – Vacation pay was not due until the termination and may be ordered even with respect to wages that fall more than 6 months in the past – The employer must pay vacation pay and top up to minimum wage

FERGUSON SERVICES LTD O/A BRACEBRIDGE TAXI; RE PHILYP KOLYN AND MINISTRY OF LABOUR; File Nos.0336-02-ES; 2543-02-ES; Dated February 14, 2005; Panel: Brian McLean (12 pages)

Adjournment – Charges – Occupational Health and Safety – In an appeal by the employer of several Inspector orders, the Ministry sought an adjournment as it was contemplating the laying of charges against the company – The company opposed the adjournment – The party requesting an adjournment must satisfy the onus of proving a competing objective that would outweigh the Board's policy of expedition – While an employer could demonstrate prejudice in the face of an upcoming prosecution because its testimony at the Board could subsequently be used against it,

the Ministry could not, or at least did not, demonstrate any such prejudice – The Ministry did not prove any competing interest to that of expedition – Request for adjournment denied

HUMBERLINE PACKAGING INC.; RE JOE ZAHER INSPECTOR; File No. 3089-04-HS; Dated February 22, 2005; Panel: David A. McKee (3 pages)

Occupational Health and Safety – An Inspector's orders were predicated on his finding that the appellant was a "constructor" as defined by OHSA – The appellant argued that it was not a constructor and that it was not engaged in a "construction project" – The appellant was engaged (through a sub-contractor) in retrofitting over 1000 light fixtures at a retail store, which involved changing the ballasts – The Ministry argued that the size and scope of the work brought it within the definition of construction project – The Board agreed with the Ministry's position – The definitions of "constructor" and "construction project" must be read together to determine whether a particular activity constitutes construction or industrial work – This work was construction work – The work being done was integral to the building – The magnitude of the project, with several workings using scaffolding and tools, makes it appropriate that it attract the duties and protections of the Construction Regulations – Appeal dismissed

RELAMPING SERVICES CANADA LTD.;RE UNIVERSAL RETROFIT INC. AND FRANK TANCREDI, INSPECTOR; File No. 1393-04-HS; Dated February 9, 2005; Panel: Tanja Wacyk (11 pages)

Employment Standards – Practice and Procedure – Reprisal – The employee appealed an Employment Standards Officer's finding that the Employer had breached section 74 of the ESA 2000 and ordering monetary compensation - The employer voluntarily paid the amount ordered by the Officer; however, when the employee appealed the Officer's order, the employer sought a full *de novo* hearing at the Board in which all issues would be decided anew – The employer argued that in making the voluntary payment it did not give up its right to defend itself on all issues in the event that the applicant sought a review of the assessment – The Board held that the employer merely paid the amount of the assessment and in so doing had not admitted any liability – The employer was entitled to a *de novo* hearing – Hearing to proceed

STORNEL MANAGEMENT INC. (O/A ELITE WINDOW FASHIONS) AND DIRECTOR OF EMPLOYMENT STANDARDS; RE DAGMAR BARTMANN; File No. 0678-04-ES; Dated February 4, 2005; Panel: Mary Ellen Cummings (10 pages)

Court Proceedings

Duty of Fair Representation – Judicial Review – The Applicant applied for judicial review of the Board's decision on the grounds that the Board had failed to give proper consideration to evidence that he presented at the hearing of this duty of fair representation complaint, including a legal opinion that he had submitted to the union – The Divisional Court held that the decision of the Board was supported by the record – The Board was aware of the legal opinion, but agreed that the union always felt the Applicant's case to be weak - An adjudicative tribunal is not required in its reasons to deal with every piece of evidence before it – Application for judicial review dismissed

MCEACHRAN, ALISTAIR; THE ONTARIO LABOUR RELATIONS BOARD, THE SOCIETY OF ENERGY PROFESSIONALS AND ONTARIO POWER GENERATION INC.; File No. 0179-03-U (Court File No. 298/04); Dated February 8, 2005; Panel: Cunningham A.C.J.S.C., Speyer and Jarvis JJ. (2 pages)

******

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
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
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)
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	Pending – March 11, 2005
OPSEU v. PIPS, **The Ottawa Hospital**, OLRB Divisional Court No. 378/04	0372-04-R	Pending
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

Case name & Court File No.	Board File No.	Status
Alistair McEachran v. The Society of Energy Professionals and **Ontario Power Generation Inc.** Divisional Court No. 298/04	0179-03-U	Dismissed - Jan. 19, 2005 (reasons February 8, 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	Pending
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