

H 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 November of this year. These decisions will appear in the November/December 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 – Construction Industry – Practice and Procedure – The Board considers whether it can and should accept a late-filed response to an application for certification – Corporate counsel for the responding party wrote to the Board on the due date, asking for an extension so that a labour lawyer could be consulted; the response was filed one day late – The Board analyzes the impact of the Court of Appeal's decision in *Maystar* [2008] OLRB Rep. March/April 306 and holds that because of the concluding paragraphs of that decision, the Divisional Court's ruling on the interpretation of s. 128.1(3) is not binding on the Board – The Board holds, however, that the Divisional Court's interpretation of the impugned section is persuasive: the word "shall" in s. 128.1(3) is directed at the employer, not the Board, and it should be interpreted in a directory and not a mandatory manner – A mandatory approach would lead to unfair results, and would require the Board to treat the various aspects of a late-filed response differently – Accordingly, the Board finds it does have the discretion to consider late-filed information under s. 128.1(3) – In exercising its discretion to accept the delayed response, the Board considers the length of the delay; how compelling the responding party's explanation of its delay is; and the prejudice to the applicant – The Board allows the late-filed response and

refers the matter to a regional certification meeting

CHRISTINA HOMES LTD. AND/OR 1357202 ONTARIO LTD. AND/OR CHRISTINA WEST JOINT VENTURE; RE UNIVERSAL WORKERS UNION, LIUNA, LOCAL 183; Board File No. 1834-08-R; Dated November 20, 2008; Panel: Marilyn Silverman (11 pages)

Employment Standards – The Board found that a six-year employee with a regular work week of thirty-five hours who had his hours reduced to eight per week, with the concomitant diminution in pay, was constructively dismissed – There was no implied term or condition in his employment relationship that suggested or anticipated such a dramatic cut, and this was not a lay-off – The employee's subsequent resignation was found to be a reasonable response initiated within a reasonable time of the implemented changes, in accordance with s. 56(1)(c) of the Act – Application granted

DR. MICHAEL BLACKMORE AND DIRECTOR OF EMPLOYMENT STANDARDS; RE JOHN DANIELS; Board File No. 0618-08-ES; Dated November 20, 2008; Panel: Corinne F. Murray (4 pages)

Health and Safety – Timeliness – The applicant filed a request for suspension of an inspector's order on Form A-67 twenty-nine days after the order was issued, but did not file an appeal of the order within the 30-day time limit set out in s. 61(1) of the *Occupational Health and Safety Act* – The issue before the Board was whether the appeal was timely – The Board found that all the information required to initiate an appeal was

contained in Form A-67, and the Board's Rules of Procedure allow it to relieve against the strict application of the Rules – The Board relieved against the strict application of Rule 22.1 which requires an appeal to be launched on Form A-65 – The late-filed form was viewed as an amendment of the timely appeal filed four days earlier – Matter proceeds

DYNAMIC PROPERTIES INC.; RE RICK CARPENTER, JOSIE ROQUE AND DAVE MACDONALD, INSPECTOR; Board File Nos. 2303-08-HS; 2345-08-HS; Dated November 4, 2008; Panel: Harry Freedman (3 pages)

Certification – Construction Industry – The union sought to withdraw its challenges to the employer's list following a representation vote and requested, in addition, that the Board dismiss the application without a bar, pursuant to the employer's s. 8.1 notice, because the union acknowledged that it had less than 40% support of the individuals in the bargaining unit – The union, however, had already agreed to a bargaining unit that had the support of 41% of the employees in it – The Board held that the union could not invoke s. 8.1 of the Act after it had agreed the number of employees in the bargaining unit was more than 40%, and after a representation vote had been held – The Board determined that the application must be dismissed either under 10(2) or 7(10) of the Act

EXCEL STEEL LTD.; SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION LOCAL 540; Board File No. 1940-08-R; Dated November 20, 2008; Panel: Brian McLean (3 pages)

Conflict of Interest – Practice and Procedure – The Board noted that there has been an increase in the frequency of motions to remove counsel of record from particular applications due to alleged conflicts of interest – The Board held that such allegations are serious challenges to a lawyer's professionalism and should not be treated casually – Assuming a role analogous to the Superior Court in similar circumstances, the Board in the instant case issued a direction and schedule for the exchange and delivery of declarations as to the facts (and supporting documents) on which the parties rely in the motion – Matter continues

GOTHAM STRUCTURAL GROUP INC. AND DUROCAST STRUCTURAL GROUP INC.; RE THE FORMWORK COUNCIL OF ONTARIO; RE CANADIAN CONSTRUCTION WORKERS UNION; Board File No. 0059-08-R; Dated

November 5, 2008; Panel: David A. McKee (5 pages)

Certification – Construction Industry – The OPDC (LIUNA) challenged the timing of CLAC's application on two grounds: (1) there were two earlier applications for certification filed by LIUNA in which there is some overlap in bargaining unit with the present application; and (2) the present application is barred because it relates to the same bargaining unit that was dismissed pursuant to s. 128.1(14)(e) in one of the two earlier applications – The Board allowed the instant application to proceed because the description of the bargaining unit in the earlier "live" application has not yet been determined – Furthermore, the Board found s. 128.1(15) to be analogous to s. 10(3) of the Act in that reference is made to individual employees in the bargaining unit, and not positions in the unit, so a unit with an entirely new complement of employees cannot be barred from proceeding – Matter continues

LOOBY CONSTRUCTION LIMITED; RE CONSTRUCTION WORKERS LOCAL 53 AFFILIATED WITH THE CHRISTIAN LABOUR ASSOCIATION OF CANADA; LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL; Board File No. 1784-08-R; Dated November 25, 2008; Panel: Harry Freedman, John Tomlinson; Richard Baxter (6 pages)

Certification – Construction Industry – The OPDC applied to certify employees of the responding party working on three projects in Board Area 4; the membership evidence was filed on behalf of Local 1081 – The responding party asserted that Local 1059 holds bargaining rights for labourers employed by the responding party in Board Area 3 by virtue of a voluntary recognition agreement, and any of its employees working outside the scope of the Board Area are bound by that agreement – The Board held that, absent a written agreement, it cannot find that a VRA exists – The Board further held that the gratuitous application of terms of a collective agreement does not bind the parties to that agreement – Finally, the Board found that since both Local 1059 and Local 1081 are constituent members of the applicant, the manner in which the applicant collected membership evidence from the employees was irrelevant to the disposition of the application since the employees were already members of the applicant – Certificate issued

PACHECOS CONTRACTORS LTD.; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL; Board File No. 2263-08-R; Dated November 4, 2008; Panel: Harry Freedman (5 pages)

Duty of Fair Representation – Employment Standards

– The employee alleged unfair treatment at the union's hands when it failed to pursue a grievance on his behalf for termination and severance pay – The employee, following a lay-off of 34 weeks, was recalled to work and shortly thereafter elected to take a "preferred lay-off" under the collective agreement and resigned his employment – He then asked the union to assist him in obtaining his entitlements under the *Employment Standards Act* – The union sought advice from the Ministry of Labour as well as its own counsel with respect to the employee's entitlements – Both the ministry and the union's lawyer stated that an employee who elects to take a preferential lay-off cannot use those weeks toward severance entitlements – The applicant was subsequently advised by the ministry that a preferred lay-off did constitute a lay-off under the ESA – The Board, without deciding if the advice the union received and subsequently conveyed to the applicant was correct, found that it was not so wrong as to be arbitrary – Application dismissed

SCOTT WAYLAND; RE THOMPSON PRODUCTS EMPLOYEES' ASSOCIATION; Board File No. 1770-07-U; Dated November 14, 2008; Panel: Brian McLean (5 pages)

Certification – Construction Industry – Practice and Procedure

– The Board provides reasons for the acceptance a late-filed response to an application for certification – The applicant filed two very similar applications for certification with the responding party in close proximity; the responding party asserted that it did not receive the first application, and thought the hard copy material it received was a re-sending of the first application, when in fact it was a second application; nothing on the face of the new material identified for the responding party that this was a fresh application – The Board surveys its own case law, beginning with *Air Kool*, gives consideration to the court decisions in *Maystar*, and surveys other court rulings on the interpretation of "shall" – The Board concludes it is not bound by the Divisional Court's decision in *Maystar* because the Court of Appeal explicitly invited the Board to reconcile its jurisprudence – In considering whether it has the discretion to accept a late-filed response, the Board finds that an interpretation of the word 'shall' as directory in nature: (1) is consistent with and best ensures the attainment of the purposes of the Act; (2) eliminates the unintended consequences that result from concluding that the word is mandatory; (3) is consistent with establishing a common meaning for both the English and French texts of

the Act; and (4) is consistent with the principles of natural justice – The Board finds that the responding party committed an innocent error in not recognizing that the applicant had filed two applications for certification, and the responding party acted promptly in rectifying the error once it learned of the true situation –Late response allowed

WEATHERTECH RESTORATION SERVICES INC.; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL; Board File No. 1967-08-R; Dated November 20, 2008; Panel: Lee Shouldice (26 pages)

Court Proceedings**Certification – Construction Industry – Judicial Review – Reconsideration**

– The City sought judicial review of a Board decision certifying the carpenters, asserting that it never received proper notice of the application for certification because the union's documents were sent to a facsimile machine that was not monitored on a regular basis – The court held that the Board's decision was reasonable – The court specifically rejected the City's argument that there was an obligation on the Board to consider every late-filed response – The Court noted in any event that the Board had offered the City an opportunity to address the notice issue, but the City had failed to respond to the offer – The Board's treatment of two reconsideration requests was also found to be reasonable – Application dismissed

CITY OF HAMILTON; RE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 18 AND OLRB; Board File No. 1785-05-R (Court File No. 209/06); Dated November 5, 2008; Panel: Lederman, Bellamy, Karakatsanis JJ. (5 pages)

Certification – Judicial Review – Representation Vote

– The employer sought judicial review of a Board decision ordering a vote, arguing that it had not been served with the application for certification – The Board had found that the union faxed the application to a number provided to it by a representative of the employer – The court held the Board's decision was reasonable in the circumstances and there was no denial of natural justice – Application for judicial review dismissed

EDGEWATER GARDENS LONG TERM CARE CENTRE; RE OSPEU AND OLRB; Board File No. 3166-07-R (Court File No. 08-0015); Dated November 3, 2008; Panel: Cunningham, Thomson; Hackland (2 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
MacKenzie Construction Group Divisional Court No. 532/08	1096-08-R	Pending
Schuit Plastering & Stucco Divisional Court No. 537/08	0210-08-R	Pending
Mohamed C.Z. Khan Divisional Court No. 461/08	2153-01-OH	January 19, 2009
Dr. Peter Khaiteer Divisional Court No. 431/08	4045-06-U et al	Pending
Christian Labour Association of Canada Divisional Court No. 382/08	3798-05-R; 3958-05-U	Pending
Lorraine Fraser Divisional Court No. 1719 LONDON	0059-06-ES; 0061-06-ES	Pending
Comfort Hospitality Inc. Divisional Court No. 344/08	2573-07-ES	Pending
Govin Misir v. S. Lalgudi Vaidyanathan et al Divisional Court No. 566/07	2966-03-ES; 3389-03-ES; 3390-03-ES	Pending
LIUNA v. Barclay Construction et al Divisional Court No. 310/08	0837-06-R	Pending
LIUNA, Local 183 (PineValley Enterprises) Divisional Court No. 201/08	0910-07-R	Pending
LIUNA, Local 183 (Saddlebrook) Divisional Court No. 201/08	3414-06-R et al	December 19, 2008
BCC Constructors v. International Union of Painters Divisional Court No. 138/08	3174-06-R	Pending
Edgewater Gardens Long Term v. OPSEU Divisional Court No. 08-0015 HAMILTON	3166-07-R	October 23, 2008 Reasons issued Nov 3/08
Jacobs Catalytic Ltd. v. IBEW Local 353 Divisional Court No. 66/08	2127-05-G; 3437-05-G	January 27, 2009
Ottawa Fertility Centre v. Ontario Nurses Association, OPSEU, CUPE Local 4000, Ottawa Hospital and OLRB Divisional Court No. DV-08-1394 OTTAWA	1531-06-PS	Pending
Ottawa-Carleton Public Employees Union (CUPE), Local 503 v. City of Ottawa et al Divisional Court No. 423/07	1386-06-R	Pending
Jacobs Catalytic Ltd. v. IBEW Local 353 et al Divisional Court No. 117/07 (M35498)	3737-05-U	Dismissed – June 4, 2008 Seeking leave to C.A.
Janet Kitson v. OLRB et al Divisional Court No. 492/06	4205-02-U	Pending
Abduraham, Abdoulrab v. Novaquest Finishing Court of Appeal No. C48942	2222-04-ES, 2223-04-ES, 2224-04-ES	January 27, 2009
City of Hamilton v. Carpenters, Local 18 Divisional Court No. 209/06	1785-05-R	Dismissed – Nov. 5/08