

H *Ontario Labour Relations Board* **HIGHLIGHTS**

Editors: Voy Stelmaszynski, Solicitor
Leonard Marvy, Solicitor

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The Board mourns the tragic passing of our friend and colleague, Rene Montague, who died in a traffic accident on Friday, March 28, 2008. Rene was a great leader both in the trade union movement and at the Board, where he served as a union-side member for over twenty years. Rene was a man of great labour relations wisdom, immense kindness and good humour. He made an exceptional contribution to the work of the Board and his passing leaves a large hole in our workplace and in our hearts.

Scope Notes

The following are scope notes of some of the decisions issued by the Ontario Labour Relations Board in March of this year. These decisions will appear in the March/April 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.

Practice and Procedure – Unfair Labour Practice – The employer moved to strike several allegations in the union's unfair labour practice complaint – The Board held that an altercation between two bargaining unit members that involves no threats to either's job security, and about which the employer has no knowledge, cannot support a complaint regarding employer misconduct – As for the other employer objections (regarding purported intimidation by the employer in conversations with individual employees), the Board ordered the union to particularize the allegations, failing which the company will not be required to adduce any evidence in its defence – Matter continues

921964 ONTARIO LIMITED O/A SCUGOG SIGNS; RE UNIVERSAL WORKERS UNION, LIUNA LOCAL 183; File Nos. 10067-07-R; 0513-07-U-; Dated March 27, 2008; Panel: Patrick Kelly, R. O'Connor, S. McManus (12 pages)

Certification – Construction Industry – Reconsideration – The union sought reconsideration of an earlier Board decision allowing the late filing of a response to one of two applications for certification delivered to the employer on the same day – The Board confirmed that the responding party had a legitimate reason to substantiate the late filing of its response when union counsel's cover letters to the two applications for certification were remarkably similar and the courier packaging of the two applications was virtually identical – The Board further held that the delay caused by the late filing was only two days, and not eleven days as asserted by the applicant: the union could have acted on the late filing as soon as it was received-late on a Friday afternoon of a long weekend-rather than waiting until the following Tuesday – Finally, the Board confirmed that it was not ascribing any responsibility to the applicant for the employer's confusion although it did indicate that had the union been clearer about its delivery of the two application packages, such clarity would have gone a long way to undermining the legitimacy of the employer's excuse for its confusion – Reconsideration request denied

CARMAN CONSTRUCTION INC.; RE IUOE, LOCAL 793; File No. 2082-07-R; Dated March 3, 2008; Panel: Lee Shouldice (12 pages)

Bargaining Unit – Certification – Construction Industry – Practice and Procedure – Status – Unfair Labour Practice – The Board issued a number of preliminary and procedural rulings in these various files: (1) the Board confirmed that it can find an appropriate bargaining unit includes both the ICI sector throughout the province plus an appropriate geographic area outside the ICI sector even though no employees were at work in the ICI sector on the date of application; (2) there was nothing to prevent the Board from determining the bargaining units in each of the construction industry applications and the industrial applications; (3) the Board refused to entertain the late-filed lists of employees provided by the responding party at the regional certification meeting because of the prejudice the applicants would suffer if such lists were accepted after such a delay from the date of application – Some certificates issued; other matters continue

CLEAN WATER WORKS INC.; RE IUOE LOCAL 793; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL; File Nos. 1541-07-R et al ; Dated March 3, 2008; Panel: Lee Shouldice (26 pages)

Certification – Construction Industry – Status – The Board held that three employees performing grading work on gravel roads and surfaces were engaged in maintenance and not repair, and therefore they were excluded from the construction bargaining unit the applicant was seeking – The maintenance work involved fixing potholes and leveling the surfaces on roads, driveways and in a parking lot – No new material was added or taken away, and the surfaces were at all times functional before, during and after the work was performed – Matter continues

ELLWOOD ROBINSON LIMITED; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL; File No. 2362-06-R; Dated March 12, 2008; Panel: Marilyn Silverman (5 pages)

Bargaining Rights – Constitutional Law – Construction Industry – Employer – Termination – The Independent Electricity Market Operator, currently called the Independent Electricity System Operator (IESO), sought a declaration that it was a non-construction employer because it was a consumer of construction services and not a vendor of same – If such a declaration were to issue from the Board, the unions reserved the right to challenge the constitutionality of the non-construction employer provisions – The IESO has two main functions: (1) to ensure the reliable operation of the electrical power system in Ontario; and (2) to

operate the wholesale electricity market in Ontario (including a price-setting function) – The IESO is neither a generator nor a transmitter of electricity; it ensures the reliability of the electrical power system in the province through market rules and operating agreements with various market participants – There was no dispute that the IESO engages contractors from time to time to perform construction work for its own benefit – The Board found that market fees paid to the IESO by market participants are not the kind of compensation contemplated by the definition of a non-construction employer – The Board found the situation in the present case to be similar to government funding provided to a school board that the board uses to pay for construction activity: the funds are not paid in order for construction work to be performed for the benefit of the giver of the funds – Non-construction employer declaration granted – Matter referred to Registrar to schedule constitutional argument

INDEPENDENT ELECTRICITY MARKET OPERATOR.; RE CANADIAN UNION OF SKILLED WORKERS; RE LIUNA; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL AND LIUNA, LOCAL 1059; File Nos. 3322-03-R; 2118-04-R; Dated: March 3, 2008; Panel: Caroline Rowan (23 pages)

Jurisdictional Dispute – The employer sought a declaration that its reassignment of two team leader shifts performed by RNs covered by ONA, to RPNs, covered by CUPE, was appropriate – ONA argued that the reassignment constituted a lay-off of two full time members, contrary to the work protection clause in the collective agreement – No competing claim for jurisdiction arose from the CUPE collective agreement – The employer argued that the collective agreement only protected work done exclusively by the RNs and that since both the RNs and the RPNs acted as team leaders and performed the same functions, a claim for exclusivity could not be made out – The decision turned entirely upon the proper interpretation of the ONA collective agreement – The Board held that while the reassignment gave rise to a jurisdictional dispute in the formal sense, it was inappropriate for the Board to exercise its jurisdiction to confirm the reassignment as it would relieve the employer of its contractual obligation with ONA – The employer was directed to cease assigning team leader work to employees not covered by the terms of ONA's collective agreement.

ONTARIO NURSES' ASSOCIATION; RE GLEBE CENTRE INCORPORATED; RE CUPE AND ITS LOCAL 3302; File No. 0640-07-JD; Dated March 18, 2008; Panel: Ian Anderson (10 pages)

Discharge – Duty of Fair Representation – In this member's complaint against his bargaining agent, the Board found that the union's reliance on Canada Post's tracking system for registered mail to determine when the member received a recall notice did not encompass all the various possible interpretations of when delivery was effected – The union was ordered to obtain a legal opinion on "effective delivery" and to reconsider the member's complaint in light of that opinion – Application allowed in part

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.

VIDAL, DAVID; RE NATIONAL AUTOMOBILE, AEROSPACE TRANSPORTATION AND GENERAL WORKERS UNION OF CANADA (CAW) LOCAL 462; RE BRR LOGISTICS LIMITED; File No. 2412-07-U; Dated March 6, 2008; Panel: Kelly Waddingham (5 pages)

Discharge – Employment Standards – The employee applied for a review of the officer's refusal to award him termination pay – The Board found that the single outburst of profanity directed at a supervisor in this case did not warrant discharge without statutory notice or its monetary equivalent: the employee had an unblemished thirteen-year record with the employer; there was no specific rule or policy against the use of profanity in the workplace; the published policy of due process was not followed – Application allowed

WELSH INDUSTRIAL MANUFACTURING INC.; RE RAVINDRA PATEL AND DIRECTOR OF EMPLOYMENT STANDARDS; File No. 2317-07-ES; Dated March 31, 2008; Panel: Patrick Kelly (6 pages)

Court Proceedings

Certification – Judicial Review – Representation Vote – Stay – The employer sought a stay of the Board's decisions ordering a vote and a ballot count – Request for stay dismissed – Reasons to follow

EDGEWATER GARDENS LONG TERM CARE CENTRE; RE OLRB AND OPSEU; File No. 3166-07-R (Court File No. 08-0015); Dated March 31, 2008; Panel: Carpenter-Dunn, J.

Pending Court Proceedings

Case name & Court File No.	Board File No.	Status
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	3166-07-R	Stay application dismissed March 31, 2008 with reasons to follow
Jacobs Catalytic Ltd. v. IBEW Local 353 Divisional Court No. 66/08	2127-05-G; 3437-05-G	Pending
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
Puri Sons Inc. o/a Tally Ho Manor v. Director of Employment Standards et al Divisional Court No. 30/08	1490-06-ES; 1491-06- ES	Pending
Ottawa-Carleton Public Employees Union (CUPE), Local 503 v. City of Ottawa et al Divisional Court No. 423/07	1386-06-R	Pending
Dev Misir v. Muluneshi F. Agago et al Divisional Court No. 281/07	0769-06-ES	Pending
Dr. Oliver Bajor v. OLRB Divisional Court No. 258/07	0353-06-ES	May 29, 2008
Jacobs Catalytic Ltd. v. IBEW Local 353 et al Divisional Court No. 117/07	3737-05-U	Heard January 10 & 11, 2008, reserved
Dana Horochowski v. OECTA; York Catholic DSB Divisional Court No. 93/07	1115-04-U	Pending
Janet Kitson v. OLRB et al Divisional Court No. 492/06	4205-02-U	Pending
Johnson Controls Ltd. v. Brookfield Lepage Divisional Court No. 406/06	1634-04-R	Adjourned – sine die
Abduraham, Abdoulrab v. Novaquest Finishing Divisional Court No. 327/06	2222-04-ES, 2223-04- ES, 2224-04-ES	Dismissed – August 13/07 Seeking leave to C.A.
City of Hamilton v. Carpenters, Local 18 Divisional Court No. 209/06	1785-05-R	Pending
Gus Nedelkopoulos v. OLRB Divisional Court No. 78978/06 NEWMARKET	1838-05-U 2644-05-U	Heard March 10, 2008 - reserved
Maystar General Contractors Inc. v. IUPAT, Local 1819 Divisional Court No. 481/06 Court of Appeal No. C47489	0812-06-R	Court of Appeal Heard March 25, 2008 and March 29, 2008 - reserved
Mississaugas of Scugog Island v. CAW-Canada SCC No. 32452	1271-03-U; 1336-03-M; 1414-03-M	Seeking leave to SCC