

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

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May 2008

## **Scope Notes**

The following are scope notes of some of the decisions issued by the Ontario Labour Relations Board in April 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](http://www.canlii.org).

### **Bargaining Rights – Employer Initiation – Evidence – Termination**

– In an application seeking to terminate the bargaining rights of the union, the Board found that although there was very little direct evidence establishing that the employer initiated the application, the union was perfectly entitled to meet its onus through circumstantial evidence – The employee's evidence concerning his motivation for filing the application was not credible – He was not honest regarding how he became aware that a termination application could be filed, when such an application would be timely under the LRA and in describing his alleged motivation for bringing the application – The only natural explanation the Board could draw from his dishonesty was the desire to cover up the fact that his employer initiated the application – Application dismissed

**2890275 CANADA INC. O/A ENER-TECH;** RE PATRICK POISSON RE IBEW, LOCAL 586; File No. 0421-07-R; Dated: April 3, 2008; Panel: Mark J. Lewis (10 pages)

### **Certification – Construction Industry – Sector Determination**

– The first issue to be decided in this application for certification was whether the project (the construction of Goreway Station – a combined cycle gas-powered generation station)

was in the ICI or electrical power systems sector – After reviewing the historical background and case law dealing with the boundaries of the electrical power systems sector, the Board addressed the factors for determining a sector dispute – The Board found that the bargaining patterns pointed strongly to the ICI sector; that work characteristics also indicated that the work fell within the ICI; and finally that end use pointed to the electrical power systems sector (although not as strongly) – The Board concluded that the bulk of the project fell in the ICI, and accordingly the application was untimely – Application dismissed

**BARCLAY CONSTRUCTION GROUP INC.;** RE CARPENTERS & ALLIED WORKERS LOCAL 27, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA; RE IUOE, LOCAL 793; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL; RE SNC-LAVALIN POWER ONTARIO INC.; RE IBEW, CONSTRUCTION COUNCIL OF ONTARIO; IBEW, LOCAL 353; RE GOREWAY STATION PARTNERSHIP; File No. 0837-06-R; Dated April 8, 2008; Panel: David A. McKee (23 pages)

### **Bargaining Unit – Construction Industry**

– Local 183 applied under s. 158(2) [non-ICI] for a bargaining unit of all construction labourers working in Board Areas 9 and 18 – On the application filing date there were two employees working – one in each Area – The responding party argued that the appropriate bargaining unit under section 158(2) must be a single geographic Board Area, and since there was only one employee in each area, the application must be dismissed pursuant to s. 9(1) – The Board found that the reference to a geographic area in s. 158(2) provides for minimal coverage

encompassed in a certificate and does not foreclose the Board from making a determination that a bargaining unit description that goes beyond one geographic area is appropriate – This view is consistent with the requirement under s. 160 to issue one certificate in the ICI and another in relation to all other sectors in the appropriate geographic area or areas – Application proceeds

**HAVENWOOD HOMES;** RE UNIVERSAL WORKERS UNION, LIUNA, LOCAL 183; File No. 3154-07-R; Dated April 24, 2008; Panel: Corinne F. Murray; R. Baxter; B. Roberts (9 pages)

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**Certification – Certification Where Act Contravened – Construction Industry – Remedies – Unfair Labour Practice –** The applicant chose to conduct its organizing drive through salting and by approaching a select number of employees, rather than to undertake a broad based grassroots campaign – The Board found that the employer committed unfair labour practices in two instances: coercive and intimidatory statements made at an office meeting and the improper discharge of a union organizer – Even with the addition of the union organizer, the applicant filed membership evidence on behalf of only 20% of the bargaining unit – In these circumstances, where the trade union had no meaningful contact with over 60% of the members in the bargaining unit at and around the time of the unfair labour practice complaints, the Board could not find that the union's failure to meet the 40% threshold was as a result of the unfair labour practices – The applicant union was not entitled to section 11 relief, however the Board did order reinstatement of the union organizer and other declaratory relief – Certification application dismissed; unfair labour practice remedies granted

**LECOMPTE ELECTRIC INC.;** RE IBEW, LOCAL 586; RE CLAYTON BLOOM; File Nos. 3385-05-R; 3403-05-U; Dated April 15, 2008; Panel: Jack J. Slaughter (24 pages)

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**Employment Standards –** Employers, caring for adult schizophrenics, sought review of an ESO's decision that their employees did not fall within the statutory meaning of "residential care worker" under Regulation 285/01 of the ESA – The Board accepted the definition in *Pacaldo* and the ESA Interpretation Manual that for a person to be found to be developmentally handicapped the handicap must have occurred during the person's formative years (namely, before 18 years) – Given that there was no evidence before the Board suggesting an onset of schizophrenia before the age of 18 with any of the residents, the Board

found that none of the residents met the definition of "developmentally handicapped" and hence the employees were not residential care workers – The Board also noted that the purpose of the ESA and its exemptions is to protect the entitlement of workers to basic working conditions – Application dismissed

**LORRAINE FRASER VISCOUNT RESIDENCE;** RE MS. SHIRLEY COYEA AND DIRECTOR OF EMPLOYMENT; File Nos. 0059-06-ES; 0061-06-ES; Dated April 11, 2008; Panel: Kelly Waddingham (9 pages)

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**Construction Industry Grievance – Intervenor – Parties – Practice and Procedure –** Local 804 sought remedies against the contractor for violating the mobility provisions of the provincial agreement when it employed members of Local 353 to connect and install high voltage cables and transformers at a warehouse project in the geographic jurisdiction of Local 804 – Local 353 sought to intervene – The Board found that while the potential displacement of Local 353's members may not be enough to establish a legal interest in the proceeding, the interpretation of section 17 of the ICI portion of the Principal Agreement, by which Locals 353 and 1687 act as a "clearing house" for line work done in the province of Ontario, does create that legal interest – Objection (to Local 353 participating) dismissed – Matter continues

**PBW HIGH VOLTAGE LTD.;** RE IBEW, LOCAL 894; RE IBEW, LOCAL 353; RE ELECTRICAL TRADE BARGAINING AGENCY OF THE ELECTRICAL CONTRACTORS ASSOCIATION OF ONTARIO; File No. 1639-07-G; Dated April 21, 2008; Panel: Harry Freedman; John Tomlinson; Richard Baxter (9 pages)

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**Certification – Construction Industry – Employer support – Unfair Labour Practice –** The organizing campaigns of the Labourers, Carpenters and CLAC overlapped, and although CLAC's campaign began last, it filed its application first – At one of four sites there was a hostile rejection and restriction of the Labourers' representatives, in contrast to unhindered meetings in the trailer for the CLAC representative – At two other sites, the Board found that the site superintendents assisted the CLAC representative by coordinating the employees' availability after work – The employer is bound by the actions of its agent, the site superintendents – The Board found the support by the superintendents to be in violation of s. 15 as it undermined the necessary arms-length relationship between a bargaining agent and an

employer, and it meant that the Board could not rely on the membership evidence – Application dismissed

**PRE-ENG CONTRACTING LTD.;** RE CONSTRUCTION WORKERS LOCAL 52, AFFILIATED WITH THE CHRISTIAN LABOUR ASSOCIATION OF CANADA; LIUNA, LOCAL 506; RE CARPENTERS UNION, CENTRAL ONTARIO REGIONAL COUNCIL, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA; File Nos. 3798-05-R; 3958-05-U; Dated April 8, 2008; Panel: David A. McKee (11 pages)

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## Court Proceedings

### **Certification – Construction Industry – Judicial Review – Mootness – Practice and Procedure**

**Certification – Construction Industry – Judicial Review** – The Board certified the Painters' union in this card-based application when the employer failed to file a response in a timely fashion pursuant to s. 128.1(3) – In its request for reconsideration of the Board's decision certifying the union, the responding party relied on the fact that it had delivered its response to the union in a timely manner but, through inadvertence, had failed to file the response with the Board – Relying on *Air-Kool*, the Board held that it had no discretion to extend the time to accept the response – On judicial review, the court held the Board to a standard of correctness and found the Board had erred in interpreting s. 128.1(3) as a limit on its ability to accept a late filing – The word "shall" in the provision was a directory imperative, but aimed only at the employer, not the Board – Application for judicial review granted ([2007] OLRB Rep. Mar/Apr 459) – Subsequent to the Divisional Court determining the Board had discretion to consider late-filed information pursuant to s. 128.1(3)), the Board reconsidered and revoked the certificate issued to the union and set the matter down for a Regional Certification meeting as it was unable to determine the number of employees in the bargaining unit – The Court of Appeal found these post-judicial review events rendered the matter before it moot, because the underlying controversy (whether the Board can consider and act on the information) had already been acted upon by the Board – The Court also decided not to exercise its discretion to decide the moot appeal on the merits because a) an adversarial context still existed; and b) while the issues (standard of review and interpretation of the s. 128.1) are important, they do not raise questions of broad social and constitutional importance, and they are not evasive of review – Finally the court

cautioned that the decision was not an affirmation of Divisional Court's finding that the appropriate standard of review was correctness – The court made it clear that deference was owed to the Board on these types of issues – Appeal dismissed

**MAYSTAR GENERAL CONTRACTORS INC.;** RE IUPAT, LOCAL 1819 AND OLRB; File No. 0812-06-R (Court File No. C47489); Dated April 11, 2008; Panel: Gillese; Doherty; G. Epstein (10 pages)

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### **Duty of Fair Representation – Judicial Review – Practice and Procedure – Unfair Labour Practice**

The court held that it is not the function of the Board, in determining a duty of fair representation complaint, to review the merits of an arbitration award or the procedural decisions that the arbitrator made – The Board had no jurisdiction to determine whether the Employer violated the collective agreement or other statutes governing the employment relationship – The decision not to allow the Board proceedings to be recorded is within the Board's discretion pursuant to s. 110(16) provided it gives full opportunity to the parties to present their evidence and to make submissions – The Board did not act improperly or offend the rules of procedural fairness when it refused to permit the reporter – The Board was reasonable in directing that the applicant seek leave of the Board prior to bringing another s. 74 complaint against the Union – The conclusion that the repeated allegations of s. 74 violations against the Union had become an abuse of process was reasonably made in an effort to control the Board's process – Application for Judicial Review dismissed

**GUS NEDELKOPOULOS;** OLRB; RE A.G.S. AUTOMOTIVE OSHAWA AND C.A.W. LOCAL 222; File No. 1838-05-U, 2644-05-U (Court File No. 78978/06); Dated April 16, 2008; Panel: Swinton, Donohue and Hambly JJ. (6 pages)

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**Constitutional Law – Interim Relief – Intervenor – Judicial Review – Reference – Unfair Labour Practice** – Application for leave to appeal to Supreme Court of Canada was dismissed. Board decisions reported at [2003] OLRB Rep. Nov/Dec 1035 and [2004] OLRB Rep. Nov/Dec 1077; Divisional Court decision reported at [2006] OLRB Rep. May/June 450; Court of Appeal decision reported at [2007] OLRB Rep. Nov/Dec 1197.

**MISSISSAUGAS OF SCUGOG ISLAND FIRST NATION;** RE NATIONAL AUTOMOBILE, AEROSPACE, TRANSPORTATION AND

GENERAL WORKERS UNION OF CANADA (CAW-CANADA) AND ITS LOCAL 444, GREAT BLUE HERON GAMING COMPANY AND OLRB, ATTORNEY GENERAL OF CANADA AND ATTORNEY GENERAL OF ONTARIO; File Nos. 1271-03-U et al; (Court File No. 32452); Dated April 24, 2008; Panel: Binne, LeBel and Deschamps JJ (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, 7<sup>th</sup> Floor, 505 University Avenue, Toronto.

## Pending Court Proceedings

| Case name & Court File No.   | Board File No.                         | Status   |
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| <b>LIUNA, Local 183 (PineValley Enterprises)</b><br>Divisional Court No. 201/08  | 0910-07-R                              | Pending  |
| <b>LIUNA, Local 183 (Saddlebrook)</b><br>Divisional Court No. 201/08   | 3414-06-R et al                        | Pending  |
| <b>BCC Constructors v. International Union of Painters</b><br>Divisional Court No. 138/08  | 3174-06-R                              | Pending  |
| <b>Edgewater Gardens Long Term v. OPSEU</b><br>Divisional Court No. 08-0015  | 3166-07-R                              | Stay application dismissed<br>March 31, 2008 with<br>reasons to follow |
| <b>Jacobs Catalytic Ltd. v. IBEW Local 353</b><br>Divisional Court No. 66/08   | 2127-05-G; 3437-05-G                   | Pending  |
| <b>Ottawa Fertility Centre v. Ontario Nurses Association,<br/>OPSEU, CUPE Local 4000, Ottawa Hospital and OLRB</b><br>Divisional Court No. DV-08-1394 OTTAWA | 1531-06-PS                             | Pending  |
| <b>Puri Sons Inc. o/a Tally Ho Manor v. Director of<br/>Employment Standards et al</b><br>Divisional Court No. 30/08   | 1490-06-ES; 1491-06-<br>ES             | Pending  |
| <b>Ottawa-Carleton Public Employees Union (CUPE),<br/>Local 503 v. City of Ottawa et al</b><br>Divisional Court No. 423/07                                   | 1386-06-R                              | Pending  |
| <b>Dev Misir v. Muluneshi F. Agago et al</b><br>Divisional Court No. 281/07  | 0769-06-ES                             | Pending  |
| <b>Dr. Oliver Bajor v. OLRB</b><br>Divisional Court No. 258/07   | 0353-06-ES                             | May 29, 2008   |
| <b>Jacobs Catalytic Ltd. v. IBEW Local 353 et al</b><br>Divisional Court No. 117/07  | 3737-05-U                              | Heard January 10 & 11,<br>2008, reserved                               |
| <b>Dana Horochowski v. OECTA; York Catholic DSB</b><br>Divisional Court No. 93/07  | 1115-04-U                              | Pending  |
| <b>Janet Kitson v. OLRB et al</b><br>Divisional Court No. 492/06   | 4205-02-U                              | Pending  |
| <b>Johnson Controls Ltd. v. Brookfield Lepage</b><br>Divisional Court No. 406/06   | 1634-04-R                              | Adjourned – sine die   |
| <b>Abduraham, Abdoulrab v. Novaquest Finishing</b><br>Divisional Court No. 327/06  | 2222-04-ES, 2223-04-<br>ES, 2224-04-ES | Dismissed – August 13/07<br>Seeking leave to C.A.                      |
| <b>City of Hamilton v. Carpenters, Local 18</b><br>Divisional Court No. 209/06   | 1785-05-R                              | Pending  |
| <b>Gus Nedelkopoulos v. OLRB</b><br>Divisional Court No. 78978/06 NEWMARKET  | 1838-05-U<br>2644-05-U                 | Dismissed April 16, 2008   |
| <b>Maystar General Contractors Inc. v. IUPAT,</b><br>Local 1819<br>Court of Appeal No. C47489  | 0812-06-R                              | Dismissed April 11, 2008   |
| <b>Mississaugas of Scugog Island v. CAW-Canada</b><br>SCC No. 32452  | 1271-03-U; 1336-03-M;<br>1414-03-M     | Leave to SCC dismissed<br>April 24, 2008                               |