

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

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Annotated Rules of Procedure

The 2008 Annotated Rules of Procedure are now available on the Board's website at www.olrb.gov.on.ca.

Scope Notes

The following are scope notes of some of the decisions issued by the Ontario Labour Relations Board in January of this year. 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.

Practice and Procedure – Construction Industry – Certification – Timeliness – The IUOE asked the Board to refuse to consider the response to its application for certification since the respondent had failed to file within the time limits set out by the Act and the Board's Rules of Procedure – The applicant had contemporaneously filed an industrial application and a construction application for certification – The Board reviewed its jurisprudence on the exercise of its discretion – In the instant case, the Board held that the respondent's error in believing there to be only one application for certification was reasonable in the circumstances – The Board found that the IUOE contributed to the respondent's confusion by simultaneously delivering multiple applications, each with a cover letter on the same letterhead with the same solicitor's file number on it – The Board held that applicant could have alerted the respondent to fact that there were two applications – The Board exercised its discretion and considered the information contained in the late-filed response – Matter continues

CARMAN CONSTRUCTION INC.; RE INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 793; File No. 2082-07-R; Dated January 8, 2008; Panel: Lee Shouldice (9 pages)

Reconsideration – Practice and Procedure – Order for Production – The City sought reconsideration of the Board's decision denying its request for production of certain documents on basis of solicitor-client privilege – The City put the newly-established union to strict proof of union status, requesting drafts and documents relating to the preparation of Minutes from the trade union's founding meeting – The Board held that privilege extends to statements made by a client in furtherance of procuring legal advice – The onus lies on the party requesting disclosure to satisfy the decision-maker that the documents sought are not privileged, based on evidence external to the documents sought – The Board refused to review the documents for which privilege was asserted to discover whether privilege attached – Request for reconsideration denied

CORPORATION OF THE CITY OF WINDSOR; RE CCW-PETU CORPORATION OF THE CITY OF WINDSOR-PROFESSIONAL EMPLOYEES TRADE UNION; File No. 3301-06-R; Dated January 11, 2008; Panel: Ian Anderson (6 pages)

Certification – Construction Industry – Status – Trade Union – The Labourers challenged the CCWU's status as a construction industry trade union in a number of the CCWU's applications for certification – The Board held that a previous

decision granting CCWU status as a trade union in the construction industry, *PBS Construction*, was not binding on the Labourers because they had been denied status to participate in that proceeding – The CCWU's purported collective agreements with three employers in the construction industry were found not to be valid by the Board because the employer signatories to the impugned agreements were not employers under the Act, or (in one instance) because of employer support in the formation or administration of the trade union – Although the Board found that the CCWU had status as a trade union pursuant to s. 1(1), it held that, absent a concluded collective agreement with an employer in the construction industry or other indicia of activity consistent with trade union practice that pertained to the construction industry, the applicant lacked status as trade union in the construction industry pursuant to 126(1) – CCWU's lack of this status was fatal to the present applications for certification in the construction industry – Applications dismissed

EMPIRE CONTINENTAL MANAGEMENT C.O.B. EMPIRE COMMUNITIES AND/OR EMPIRE HOMES; RE CANADIAN CONSTRUCTION WORKERS UNION; RE UNIVERSAL WORKERS UNION, LIUNA, LOCAL 183; File Nos. 3395-06-R; 3414-06-R; 3426-06-R; 3441-06-R; 3502-06-R; 3503-06-R; 3611-06-R; 3685-06-R; 3991-06-R; 0389-07-R; Dated January 29, 2008; Panel: David A. McKee (21 pages)

Certification – Construction Industry – Status

– The Board examined whether five individuals were employees of the responding party on the date of the application for certification, and whether they were properly included in the bargaining unit – During the Labourers' province-wide strike in the ICI sector in June of 2007, five union members were sent to work for the non-union responding party – The work done had previously been sub-contracted to a company who was bound to the provincial ICI agreement and therefore was unable to maintain the contract due to the strike – The work was subsequently done by carpenters after the five labourers, whose status was to be decided in this proceeding, were no longer required – The Board held that two unions doing the same work on different days did not act as a bar to certification so long as both unions' members were performing work falling within their jurisdiction – An application for certification is not the appropriate time to deal with work jurisdiction disputes – The Board found that the five individuals were under the direction of the responding party's representative and were doing work as its employees – The responding party asserted that (1) the employees were unlawfully

working on the date of the application because they were members of the union who were on a province-wide ICI strike; (2) the referral by the union of striking workers constituted an unlawful arrangement under section 162(2) of the Act and, having referred the workers, the union cannot rely on its own misconduct as the basis for a certification application – The Board held that the impugned actions do not frustrate the purpose of section 162(2): the prevention of agreements between a union and a union contractor to keep working through a lawful strike – In the circumstance where the non-union employer sought the referral from the union, voluntarily accepted the employees, acquired the benefit of the work, and thereby contributed to the arrangement, the employer cannot rely on the fact the agreement was otherwise unlawful to defend itself from an application for certification – The status of the individuals was resolved in favour of inclusion in the bargaining unit – Matter continues

HVM HOLDINGS INC.; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL; File No. 0989-07-R; Dated January 11, 2008; Panel: Marilyn Silverman (12 pages)

Employment Standards – Sale of a Business –

The employees sought payment of termination pay when Lamantia transferred a lease for a vendor stall to Ippolito at the Ontario Food Terminal – The Board found that the Court of Appeal had recently rejected the traditional "going concern" model for a sale of business in *Abbott v. Bombardier Inc.*, and had expanded the parameters of a transaction to include the transfer of a bundle of tasks and functions performed by an identifiable group of employees – In this case, the employees continued performing the same work for Ippolito, and Ippolito had in fact expanded its own operations to carry on the business of Lamantia – The Board found there was continuity in the employment of the employees and they were consequently not entitled to termination pay – Application dismissed

LAMANTIA GARCIA PRODUCTS LTD. AND DIRECTOR OF EMPLOYMENT STANDARDS; RE ERWIN REVIN, ANTONIO CARVALHO, JOSE TOSTE AND NAMGYAL KALSANG; RE IPPOLITO PRODUCE LIMITED; File No. 0326-07-ES; Dated January 14, 2008; Panel: Peter F. Chauvin (5 pages)

Construction Industry Grievance – Practice and Procedure – Reconsideration –

The applicant sought reconsideration of the Board's determination to award it only \$2,500 in costs rather than the full indemnity of \$6,000 that it had

requested – The Board held that costs on a “solicitor-and-client” basis do not entitle a party to *carte blanche* repayment of all its expenses – The Board’s practice was that it would consider the reasonableness of the costs being sought; this was the first instance where an applicant’s costs had been seriously challenged by a responding party – The applicant failed to provide the Board with any justification for the amount claimed – Reconsideration request denied

MAN-SHIELD (ONT.) CONSTRUCTION INC. A.K.A. MAN-SHIELD (NWO) CONSTRUCTION INC.; RE CJA, LOCAL 93 ET AL; File No. 1470-04-G; Dated January 22, 2008; Panel: Corinne F. Murray (5 pages)

Certification – Construction Industry – Employer – The Labourers sought certification of a unit of employees the union alleged were employed by one of the Monarch companies – Both Monarch and the intervenor challenged the application, arguing that the real employer was the intervenor, a personnel placement agency – The Board found that the employees were hired by the intervenor and assigned to Monarch; Monarch had no employees of its own working at its sites; disciplinary issues were handled by the intervenor; the intervenor re-assigned employees when they were no longer needed at Monarch; the intervenor bore responsibility for remuneration, paying the employer share of benefits, wages and bonuses – The Board was satisfied that fundamental control over the employees rested with the intervenor – Application dismissed

MONARCH CORPORATION AND MONARCH DEVELOPMENT CORPORATION; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL; RE THE K.A.S. GROUP OF COMPANIES; File No. 3306-06-R; Dated January 28, 2008; Panel: Harry Freedman (10 pages)

Public Sector Labour Relations Transition Act – ONA brought an application for a declaration that a “health services integration” under the *PSLRTA* had occurred – A fertility treatment clinic operated pursuant to a contractual arrangement with the Ottawa Hospital whereby the hospital provided support staff, equipment, laboratory space and facilities – When the clinic was moved to new premises, the employees who followed were only offered employment on the basis that they were new employees; the new clinic did not recognize the bargaining rights that existed in the Hospital setting – The Board held that the Ottawa Hospital and the fertility clinic were “employers” who met the definition of “health services integration” under s.2 of the *PSLRTA* – The Board

took a broad view of health services integration, finding root in the “consequences of changes in how service is delivered, rather than on the cause or authors of the change” – The Board held that a health services integration had occurred and exercised its discretion to declare that the *PSLRTA* applied to the integration – Matter continues

OTTAWA FERTILITY CENTRE INC., THE; RE ONTARIO NURSES’ ASSOCIATION; RE THE OTTAWA HOSPITAL, CUPE AND ITS LOCAL 4000 AND OPSEU; File No. 1531-06-PS; Dated January 10, 2008; Panel: Mary Ellen Cummings (8 pages)

Construction Industry – Reconsideration – Termination – Timeliness – The Board found that an application for termination was timely because it was filed on the first day of the “commencement of the last three months” of the operation of a collective agreement (s. 63(2)(a)) – The union sought reconsideration of the Board’s ruling – The Board confirmed that its calculation was not based on a “measure of time before or after a specified day,” but on a plain reading of the statute, understandable to lay persons, of the moment in time when the three-month period began – Reconsideration allowed in part on other grounds

RÉGULVAR CANADA INC./RÉGULVAR INC.; RE CHRISTIAN BOURGEOIS; THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 586; File No. 3404-06-R; Dated January 4, 2008; Panel: Mary Ellen Cummings (3 pages)

Interim Relief – Trusteeship – Local 1256 filed complaints under section 147 and 149 and sought interim relief seeking to restrain the IU from directly or indirectly interfering with the assets, property, bargaining rights or duties of the Local – The IU had initiated proceedings under its Constitution which were a first step towards the imposition a supervision – The Board held that it was unable to evaluate the appropriate factors underlying the test for interim relief because the facts supporting the application were yet to mature – The Board refused to speculate on the IU's intentions or the foreseeability of supervision absent cogent evidence, whether present or historical, to support the inference that supervision was imminent – Without a demonstration of immediate harm that would accrue to Local 1256 on the surprise imposition of a supervision, the Board refused to offer interim relief because the Local could file a section 149 application which would allow Board to inquire into the cause for supervision – The threat that parties may resort to self-help remedies if the Board does not act is an inappropriate factor to consider in deciding whether to issue an order – Application for interim relief dismissed

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA; RE CJA, LOCAL 1256; File No. 2739-07-M; Dated January 17, 2008; David A. McKee (6 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
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	Pending
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
Hurley Corporation v. OLRB; SEIU L. 2.on Divisional Court No. 23/07	2915-06-R	Dismissed on Consent January 25/08
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	March 10, 2008
Maystar General Contractors Inc. v. IUPAT, Local 1819 Divisional Court No. 481/06 Court of Appeal No. C47489	0812-06-R	Court of Appeal March 25, 2008
Grantley Howell v. USWA SCC No. 32411	3552-00-U; 0933-01-U; 1273-01-U	Seeking leave to SCC
Mississaugas of Scugog Island v. CAW-Canada SCC No. 32452	1271-03-U; 1336-03-M; 1414-03-M	Seeking leave to SCC