

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

Editors: Voy Stelmaszynski, Solicitor
Leonard Marvy, Solicitor

January 2008

CHANGE TO APPLICATION PROCESS UNDER THE *EMPLOYMENT STANDARDS ACT, 2000*

Effective January 1, 2008, the Board has amended its Rules of Procedure for the handling of applications for review under the *Employment Standards Act, 2000*. An applicant will first have to deliver its completed application and supporting documents to the other workplace party(ies) and the Director of Employment Standards prior to filing them with the Board. This change streamlines the Board's administrative tasks, and aligns ESA processes with all other Board applications that rely on self-delivery by parties.

GST REDUCTION

Parties to construction industry grievance referrals should bear in mind the federal government's reduction in the Goods and Services Tax, effective January 1, 2008. Board Forms and payment requirements have been adjusted accordingly.

Scope Notes

The following are scope notes of some of the decisions issued by the Ontario Labour Relations Board in December 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 – Where the responding party makes specific allegations about improper statements having been made by the applicant's

representatives during the collection of membership evidence, the Board's Rules require that the applicant be advised of the dates, places and times the alleged statements were made, but the disclosure of the names of the people to whom the alleged statements were made was not required to be produced – Application continues

HILLSIDE SOD LTD.; RE UNIVERSAL WORKERS UNION, LIUNA, LOCAL 183; File No. 1966-07-R; Dated December 5, 2007; Panel: Harry Freedman (3 pages)

Certification – Construction Industry – Membership Evidence – *Prima facie* motion – Practice and Procedure – Representation Vote – Unfair Labour Practice – The Company alleged that when employees signed membership cards they were confused and/or misled and did not realize what they were signing nor what the membership cards would be used for – First, the Board found that the allegations, even if true, do not breach s. 5 (the section cannot be violated); s. 15 (no particulars of employer domination); s. 70 (a union is not a "person" and was not acting as an "employer", hence it cannot violate the provision); or s. 76 (there was no "intimidation or coercion") – Accordingly, the Board dismissed the s. 96 complaint – Second, the Board found that these circumstances could give rise to the exercise of the Board's discretion to order a vote under s. 128.1(13)(b), even where the Union has more than 55% membership evidence, and accordingly, it dismissed the union's *prima facie* motion on this issue – Finally the Board refused to order disclosure of employee statements since the statements were covered by litigation privilege (collection of information by Company's counsel concerning what employees were doing on the

date of application), and the balancing of competing interests also led to that conclusion – That is, since the information recorded in the statements would be given little, if any, weight (they were collected three to five weeks after the date of application), the potential undermining of the adversarial litigation process (by ordering the disclosure) outweighed any potential value that these statements had – Unfair Labour Practice complaint dismissed – Certification application continues

PEDERSEN CONSTRUCTION INC.; RE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 2486; File Nos. 2539-06-R; 2648-06-U; Dated December 4, 2007; Panel: Mark J. Lewis (13 pages)

Dependent Contractor – Employee – Employment Standards – The applicant sought a review of a refusal to issue an Order to Pay arguing that he was an employee of the company, not a subcontractor –The Board found the commercial subcontract agreement between the applicant and the employer was not proof of their true relationship: all the applicant brought to the relationship was his labour as a janitor; he engaged in no promotion to secure the job; he had virtually no say in setting the terms and conditions (including the non-negotiable monthly pay) set out in the agreement; and he did not provide his own equipment or supplies – In distinguishing *Clara-Ester Cleaning Services* the Board found the Act was intended to protect a person such as the applicant—one who lacked bargaining power and was economically dependent upon the employer – The Board held that the applicant was an employee as defined by the Employment Standards Act – Application allowed

SUPERIOR-1 CLEANING SERVICES LTD.; RE HOSSEIN MOHAMMADI and THE DIRECTOR OF EMPLOYMENT STANDARDS; File No. 0109-07-ES; Dated December 6, 2007; Panel: Patrick Kelly (7 pages)

Bargaining Rights – Construction Industry – Employer Initiation – Termination – The employer was certified in both the ICI and non-ICI sectors of the construction industry – The employer acknowledged that employees may have heard him express his disappointment with the union – Two applications for the termination of bargaining rights were filed by an employee – The first was filed 5 months after the union was

certified; the second, exactly 6 months after the union was certified – The union alleged that both applications were influenced by the employer under section 63(16) of the Act – The Board noted, relying on *Tenaquip Ltd.* that circumstantial evidence may be sufficient to lead to an inference of improper employer involvement – The Board found that the employer influenced the first application for the termination of bargaining rights because the employer: 1) expressed his disappointment with the union to its employees; 2) informed the employees that a decertification application could be filed; 3) signed the petition filed with the first application; and 4) may have even been involved in circulating the petition – The Board also considered the fact that the employees were paid for the time they took to mail the application – The Board further found that the employer influenced the second application for the termination of bargaining rights because the employee could not explain: 1) how the application and the second petition were drafted; 2) how the application was sent to the union and to the Board; and 3) the reason the application was sent so close to the first and untimely application – Applications dismissed

SWING N SCAFF INC.; RE CARON, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 93; File Nos. 0003-07-R; 0399-07-R; Dated December 11, 2007; Panel: Caroline Rowan (11 pages)

Accreditation – Construction Industry – Intervenor – Standing – In this application for accreditation for all employers of employees engaged in concrete forming construction, the parties to the Carpenters' ICI collective agreement, which also engage in concrete forming construction, sought status as intervenors – The Board found that the intervenors could not be legally affected by the accreditation proceeding since the accreditation order is limited to the employers with whom the responding party has a collective agreement relationship; and where an employer is bound by both the intervenors' ICI agreement and the applicants' and respondents' agreement an accreditation order would neither detract from the bargaining rights held by the intervenors, nor expand the bargaining rights of the responding party – The Board also found nothing special or unique about this accreditation proceeding that would warrant the Board's exercise of its discretion to grant intervention by parties without a legal interest in the matter – Standing denied – Applicants' motion granted

THE ONTARIO FORMWORK ASSOCIATION; RE THE FORMWORK COUNCIL OF ONTARIO; RE CARPENTERS EMPLOYER BARGAINING

AGENCY; RE CARPENTERS' DISTRICT COUNCIL OF ONTARIO, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA; File No. 0848-07-R; Dated December 4, 2007; Panel: Harry Freedman (10 pages)

Employment Standards – Settlement – The employee (one of three co-defendants in a civil action by the employer alleging breach of contract, conspiracy and theft) signed an affidavit in support of a motion in the civil action referring to the fact that the employer had stopped payment on her last pay cheque – The employee's *ESA* complaint was known to the parties when the lawsuit was settled and all three defendants entered into a standard release "from any and all claims" with respect to the court file – The employer submitted that the employee was barred from filing the claim pursuant to s. 98 and because she had already received a benefit under the settlement – First the Board found that an interlocutory motion by a defendant in a civil action is not the commencement of a civil proceeding and accordingly does not bar her claim under s. 98 – Second, the release did not specifically reference the *ESA*, and it easily could have, given the parties' knowledge of the claim – Accordingly, the release was no impediment to the employee's claim – Application dismissed, order to pay confirmed

TOTAL DEBT FREEDOM INC.; RE REBECCA DAVIS AND DIRECTOR OF EMPLOYMENT STANDARDS; File No. 1434-07-ES; Dated December 20, 2007; Panel: Patrick Kelly (4 pages)

Bargaining Unit – Certification – Employee – The union sought to certify all registered graduate students employed pursuant to a Graduate Research Assistantship (GRA) – GRAs are a form of funding provided to some graduate students – Graduate students who received a GRA are required to work with a faculty member on a specific research project for not more than 10 hours per week – The employer argued that GRA work had educational value and was no different than thesis work, whereas the union argued that GRA work, not directed to a graduate student's own thesis, provides value to Western and is employment – The Board found that there was no difference between the activities and tasks a graduate student normally undertakes for GRA work and what they do when performing other graduate studies related work – Finally, the Board noted that while graduate students may be employed by Western with respect to the performance of some work, GRA work does not

create an employment relationship – Bargaining unit was not appropriate – Matter continues

UNIVERSITY OF WESTERN ONTARIO; RE PUBLIC SERVICE ALLIANCE; File No. 0413-06-R; Dated December 6, 2007; Panel: Ian Anderson (13 pages)

Certification – Construction Industry – Practice and Procedure – In a card-based certification application the employer responded over two weeks late, giving as a reason that the owner's first language was not English and that he did not understand the documents – The Board exercised its discretion to permit the employer's late filed information concerning one issue (whether two persons were independent contractors), but refused to grant it with respect to the other (whether the employer may add someone to the list) – On the first issue the Board found the delay would not significantly prejudice the union since the information—nature of the relationship—was not time sensitive; whereas the latter point, whether someone was at work on the day of application, would cause significant prejudice to the union given the company's delay – Matter continues

VICTOR CHADI o/a VICTOR HUGO DRYWALL; RE DRYWALL ACOUSTIC LATHING AND INSULATION LOCAL 675, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA; File No. 1343-07-R; Dated December 3, 2007; Panel: Mark J. Lewis (6 pages)

Discharge for Union Activity – Interim Relief – Unfair Labour Practice – The employer laid off 45 of the most junior employees due to a reduction in demand from its sole customer – The employer initially told its employees that they would be recalled by seniority – The employer then told its employees that the lay off would be permanent – Approximately eight months later, the employer recalled three employees – The union argued that one of the laid off employees, a known union organizer, was not recalled according to seniority – The union sought interim reinstatement pursuant to s. 98 of the Act for the 45 laid off employees, according to their seniority and the employer's need – The employer argued that the lay off lasted longer than 13 weeks and the three individuals were new hires – The Board relied on the fact that the union was not actively soliciting support in the form of membership cards and that there was no impending representation vote – The Board held that the union was not in a particularly vulnerable point in its campaign to establish bargaining rights – The Board was not

persuaded that the relief was necessary to prevent irreparable harm and accordingly, the union's application did not meet the condition in clause 3 of s. 98(2) of the Act – Interim Relief denied

**INTERNATIONAL UNION UNITED
AUTOMOBILE, AEROSPACE AND
AGRICULTURAL IMPLEMENT WORKERS OF
AMERICA (UAW-CLC); RE WALLACEBURG
PREFERRED PARTNERS CORP.; File No. 2008-
07-M; Dated December 3, 2007; Panel: Ian
Anderson (5 pages)**

Court Proceedings

Judicial Review – Employment Standards –

The Board found that the employee was not guilty of wilful misconduct, disobedience or wilful neglect of duty – After a change of supervisors which brought about a change in company policy, the employee believed he still could sell used, non-warranty catalytic converters for his own benefit – The Board found his discharge was caused by a misunderstanding, granted the employee's appeal, and ordered the employer to pay termination pay – On judicial review the Court found the Board was entitled to come to the conclusion on the evidence – Application dismissed

**ONTARIO LIMITED o/a OAKVILLE HONDA; RE
CREYOS BATCHELOR AND OLRB; File No.
0784-06-ES; (Court File No. 152/07); Dated
December 3, 2007; Panel: Carnwath, Pierce and
Hackland JJ (1 page)**

Duty of Fair Representation – Judicial Review

– Leave to Appeal Refused

**STEPHANE VERREAULT; RE OLRB; RE
TEAMSTERS LOCAL UNION 419, UA LOCAL
787; File No. 0840-05-U (Court File No. M35292)
Dated December 5, 2007; Panel: Blair; Juriansz
and LaForme JJ (1 page)**

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
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
1257707 Ont. Ltd. o/a Oakville Honda v. Creyos Batchelor & OLRB Divisional Court No. 152/07	0784-06-ES	Dismissed – Dec. 3/07
Jacobs Catalytic Ltd. v. IBEW Local 353 et al Divisional Court No. 117/07	3737-05-U	January 10, 2008
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	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	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
Stephane Verreault v. UA Local 787 & Teamsters Local 419 Divisional Court No. 71/07 Motion to Leave No. M35292	0840-05-U	Leave to Appeal – Dismissed – Dec. 5, 2007