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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 July of this year. These decisions will appear in the July/August 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.

Discharge for Union Activity – Interim Order – Unfair Labour Practice – The union sought interim reinstatement of a part-time grocery clerk, pending an unfair labour practice complaint which alleged that he was discharged for union activity – The employer claimed that the individual was legitimately terminated for misconduct and that it had no knowledge of an organizing campaign or of the employee's involvement in such a campaign – The Board found and the employer conceded that the discharge occurred during an organizing campaign and that there was a serious issue to be tried – Concerning irreparable harm, however, the Board found that the discharged employee was not instrumental to the success of the campaign and that his absence from the workplace did not effect the momentum of the organizing drive – Accordingly, the Board denied interim relief – Application dismissed

1319557 ONTARIO LIMITED C.O.B. UPPER GAGE PRICE CHOPPER; UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION (UFCW CANADA); File No. 1018-09-M; Dated July 23, 2009; Panel: Patrick Kelly (7 pages)

Employment Standards – The applicant applied for a review of an employment standards officer's refusal to issue an order to pay for unlawful deductions – The issue for the Board was whether there was an employment relationship between the applicant and the alleged employer – The Board found that while there were some characteristics of an employer-employee relationship (work assignment, benefits, a fair degree of economic dependence), the evidence pointed to a conclusion that the applicant was in business for himself: the applicant had earlier incorporated a company for carrying on business; he provided his own vehicle as owner/operator; he was required to provide a second vehicle if his truck happened to break down; he was not restricted to working for the alleged employer – Application dismissed

1391165 ONTARIO INC. O/A WALLACE TRANSPORT AND DIRECTOR OF EMPLOYMENT STANDARDS; RE RASHPAL BINING; File No. 2044-08-ES; Dated July 2, 2009; Panel: Patrick Kelly (6 pages)

Interim Relief – Unfair Labour Practice – The Labourers argued that four employees were not recalled following a seasonal lay-off, and sought reinstatement for each – One employee was unavailable to return to work for health reasons; two were reinstated in accordance with the employer's recall policy – The Board found that the employer failed to provide direct evidence in its declaration and at the consultation to substantiate its conduct with respect to the remaining employee – After the application for certification was filed, and when the union sought to have the employee's name added to the employee list, it would have been clear to the employer that the individual was a union supporter – Failure to recall is not as dramatic as discharge, but it is unusual and leads to a logical inference that there would have been a

connection between union support and the failure to recall – Irreparable harm established – Interim relief granted

ALMON EQUIPMENT LTD.; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL; File No. 0775-09-M; Dated July 9, 2009; Panel: David A. McKee (8 pages)

Bar – Certification – Construction Industry – Project Agreement – The responding parties and intervenors sought dismissal of these applications for certification, arguing that the construction labourers working on the application date were employed pursuant to project agreements that pre-dated the applications – Potential parties to the project agreement had been properly notified and no timely objection was raised -- The applicants argued that s. 163.1 applies only to projects in the industrial, commercial or institutional sectors, and the projects at issue were outside the ICI sector, so they could never be the subject of the agreements – The Board found that paragraph 1 of subsection 163.1(14) establishes that the work performed subject to a project agreement is limited by a trade union's jurisdiction, and not by a sector – Once the objection period to a project agreement has passed and the agreements come into force, sector becomes irrelevant – The project agreements were valid when the applications were made – Applications dismissed

COPE CONSTRUCTION AND CONTRACTING INC.; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL; RE IBEW, LOCAL 530, ET AL; File Nos. 0367-07-R, et al; Dated July 16, 2009; Panel: Harry Freedman (11 pages)

Employment Standards – The employment standards officer found the employer in violation of the Act by failing to pay holiday pay to the claimant employee who packed and wrapped fresh mushrooms on a mushroom farm – The narrow issue before the Board was whether the employee's work was directly related to the primary production of mushrooms, that is, did the exemption in s. 2(2) of Regulation 285 apply – The Board found that work directly related to primary production means "hands on" work which occurs on the farm or place of growing, that deals with the product in its original/raw state – The Board was also unable to rationally reconcile the Director's position that work involved in storing and transporting mushrooms which occurs on the farm but after packing, was work that is directly related to primary production, but the work of packing was not – The Board found the exemption applied and the employer was not required to pay holiday pay – Appeal allowed

HIGHLINE PRODUCE LIMITED, WELLINGTON MUSHROOM FARM; RE TAMMY FLIELER AND DIRECTOR OF EMPLOYMENT STANDARDS; RE ONTARIO FEDERATION OF AGRICULTURE; File No. 1026-07-ES; Dated July 30, 2009; Panel: Kevin Whitaker (6 pages)

Health and Safety – The employer appealed an order requiring it to comply with the Industrial Regulation relating to proper stacking of drums – Lennox argued that its method of staggering two tiers of empty drums was safer than the prescribed insertion of two parallel planks between tiers, and that it met the equivalency criteria set out in s. 2 of the Regulation – The Board found that the Lennox method did not comply with the Regulation: to simply ignore the provision was not a variance – The Board was not satisfied that the health and safety of the workers was ensured with the staggering method – Appeal dismissed

LENNOX DRUM LIMITED; RE JOEY OUIMET AND RONALD LANDRY, INSPECTOR; File Nos. 0111-09-HS, et al; Dated July 10, 2009; Panel: Marilyn Silverman (7 pages)

Certification – Construction Industry – Trade Union – The Board was asked to determine whether the Canadian Construction Workers' Union was a construction trade union within the definition set out in s. 126 of the Act - The Board identified the criteria for the determination as (a) the trade union's constitution; (b) the trade union's history, antecedents and associations; (c) the union's organizational base and collective bargaining practices, including the kinds of employees and bargaining units the union represents; (d) the union's relationship with its parent and other unions; (e) the presence of a hiring hall and/or out-of-work list; (f) whether the union represents one or more trades; (g) whether the union operates welfare, pension or training funds; and (h) whether the union aspires to bargaining rights with more than one employer – The Board held that the key criterion was the union's organizational base and collective agreement practices – The CCWU was able to demonstrate that it has two valid collective agreements and one voluntary recognition agreement – The Board found that CCWU satisfied a clear majority of the criteria – Matter continues

STARLAND CONTRACTING INC.; RE CANADIAN CONSTRUCTION WORKERS'

UNION; UNIVERSAL WORKERS UNION, LIUNA, LOCAL 183; File No. 1575-08-R; Dated July 17, 2009; Panel: Jack J. Slaughter (7 pages)

Bargaining Unit – Certification – Construction Industry – Status – The Carpenters sought to certify employees of Struct-Con - The issue before the Board was whether certain persons should be considered employees for the purposes of determining the number of employees in the bargaining unit - The persons in question were employed by the union to assist in organizing and sought employment with Struct-Con for this purpose – Struct-Con argued that while these persons may be employees for all other purposes, they should not be considered employees for the purpose of the bargaining unit count because their overriding duty to the union (as their employer) precludes them from making a free designation of a representative – Struct-Con also argued that the individuals' employment by the Carpenters constituted undue influence on the part of the union - The Board rejected the employer's argument, holding that it was not the Board's role to assess the motives of anyone in the bargaining unit: under s.128.1(4) the Board is limited in its inquiry to whether the union represents a majority of persons in the bargaining unit on the date of application, regardless of how they got there or how they formed their opinion about being represented by the union – Accordingly, the persons in question were found to be part of the bargaining unit on the date of application – Matter continues

STRUCT-CON CONSTRUCTION LTD.; RE CARPENTERS UNION, CENTRAL ONTARIO REGIONAL COUNCIL, CJA; File No. 1265-08-R; Dated July 16, 2009; Panel: David A. McKee (6 pages)

Construction Industry Grievance – Discharge – The union argued that a union steward's discharge for failing to comply with the employer's safety policy was void *ab initio* because of the employer's failure to contact the union prior to the discharge, in violation of the collective agreement – The Board found that the employer's telephone message to the union regarding "an issue with fall protection" was not clear and definitive enough to alert the union to the imminent discipline; also, the notice to the union was inadequate because it did not occur before the steward was discharged – Furthermore, the collective agreement provided mandatory substantive rights to stewards – The termination of the steward in violation of these rights rendered the discharge void *ab initio* – Grievance allowed

V.K. MASON CONSTRUCTION CO.; IBEW, LOCAL 303; File No. 0239-09-G; Dated July 15, 2009; Panel: Mark J. Lewis (7 pages)

Court Proceedings

Adjournment – Bias – Duty of Fair Representation – Judicial Review – Practice and Procedure – The applicant sought judicial review of a Board decision (and reconsideration) adjourning two DFR applications pending the outcome of a scheduled arbitration – The applicant also brought a motion to have all the respondents' facta dismissed for failing to comply with the timelines in the *Rules of Civil Procedure* – The Court dismissed the motion, finding that there was no prejudice to the applicant, and he had adequate time to prepare his case – On the merits, the Court found there was no basis for the applicant's allegation of an apprehension of bias: it was reasonable for the Board to assign the same Vice-Chair to cases involving similar facts and the same parties – The Board was reasonable in adjourning the matters before it and extending the time for filing of responses – Although none of the respondents raised the issue of prematurity, the Court ruled that it would have dismissed the application on that basis as well – Application dismissed

[*Board decision not reported*]

DR. PETER A. KHAITER; RE YORK UNIVERSITY FACULTY ASSOCIATION; YORK UNIVERSITY AND OLRB; Board File Nos. 0290-08-U; 0338-08-U; (Court File No, 79/09) Dated July 8, 2009; Panel: Swinton, Low and Karakatsanis JJ. (5 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
National Waste Services v. CAW-Canada Divisional Court No. 338/09	0939-07-R	Pending – Stay motion Oct. 14/09
Robert McLaughlin v. Graphite Specialty Products, et al Divisional Court No. 09/191 **LONDON**	2221-07-OH	Pending
Rainbow Concrete v. International Union of Operating Engineers Divisional Court No. 332/09	0116-06-R	Pending
Roy Murad v. Les Ailments Mia Foods Divisional Court No. 291/09	1999-07-ES	Pending
Greater Essex County District School Board v. IBEW, Local 773 et al Divisional Court No. 212/09	1776-04-R et al	Pending
Donald Amodeo v. Ontario Ministry of Labour Divisional Court No. 147/09	2837-07-U 2839-07-OH	Pending
Universal Workers' Union, L.I.U.N.A. Local 183 v. Canadian Construction Workers' Union; OJCR Construction Ltd. Divisional Court No. 111/09	000-08-R	Pending
I.U.P.A.T. Local 1795 et al, v. Cadillac Fairview Corporation et al Divisional Court No. 142/09	1732-06-R	Pending
Dr. Peter A. Khaiter v. OLRB et al Divisional Court No. 79/09	0290-08-U; 0338-08-U	Dismissed - July 8/09; seeking leave to CA
Presteve Foods v. (CAW-CANADA) Local 444 Divisional Court No. 1730/08 **LONDON**	1676-08-U	April 14, 2009 – dismissed; seeking leave to CA
Dr. Peter A. Khaiter v. OLRB et al Divisional Court No. 431/08	4045-06-U et al	Pending
Comfort Hospitality Inc. o/a Days Inn v. Director Employment Standards et al 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
L.I.U.N.A. v. Barclay Construction et al Divisional Court No. 310/08	0837-06-R	Pending
Ottawa Fertility Centre v. ONA et al Divisional Court No. DV-08-1394 **OTTAWA**	1531-06-PS	Heard April 8/09 - reserved
Ottawa-Carleton Public Employees Union (CUPE), Local 503 v. City of Ottawa et al Divisional Court No. DC-09-00001471-0000 **OTTAWA**	1386-06-R	Heard June 10/09; reserved
Jacobs Catalytic Ltd. v. IBEW Local 353 et al Divisional Court No. 117/07 Court of Appeal C49737	3737-05-U	C.A. April 22, 09 - reserved
Janet Kitson v. OLRB et al Divisional Court No. 492/06	4205-02-U	Pending
Mohamed C.Z. Khan v. Royal Alliance Divisional Court No.461/08	2153-01-OH	Leave to appeal to CA dismissed – July 29/09