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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 February of this year. Some of 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.

OLRB Shoot-Out

The Board will be hosting its 5th annual golf tournament in support of the Ministry of Labour's United Way Campaign on Thursday, June 17, 2004 at the Heron Point Golf Links in Ancaster, Ontario. Information regarding the "OLRB ANNUAL SHOOT-OUT", including registration information, is appended to this issue of **eHighlights**. For further details, please contact Tim Parker at 416-326-7442 or by email at tim.parker@mol.gov.on.ca or visit the Board's website at www.gov.on.ca/lab/olrb/home.htm

Bargaining Rights – Ratification and Strike Vote – Representation Vote – Termination – The applicant and employer alleged, on this application for termination of bargaining rights, that the employees were told, prior to a ratification vote, that they would be on strike if they did not sign a collective agreement – The issue before the Board was whether the verbal statements breached section 79.1 of the Act – The Board reviewed the ballot used, which only asked whether the employees were in favour of, or against, the company's offer, and found, after reviewing the legislative history leading up to section 79.1, that the words "no direct or indirect reference" modify the words "a question on the ballot" – Accordingly, even on the applicant's best case, the ratification vote was valid, the collective agreement was properly in force and hence the application was not timely – Application dismissed

AUTOLAND CHRYSLER (1981) LTD.; RE MICHAEL LEAHEY; RE TEAMSTERS UNION LOCAL 879; File No. 1151-03-R; Dated February 20, 2004; Panel: Brian McLean (5 pages)

Bargaining unit – Certification – Construction Industry – Trade union – The UA, Local 787, made two applications for certification with respect to the same employees: one under the construction industry provisions, the other under the general provisions – The parties were in agreement that the employees were all at work on the date of application; that they performed some construction work and some non-construction work that day; that they had been doing this same work before the application date and had a subsisting employment relationship with the employer – The employees perform the work of servicing existing HVAC systems, where it is not possible for the employer to know in advance whether the work required by a service call will be construction or maintenance – Although this group of employees did not fit neatly into the statutory categories of the Act, the Board found nothing in the Act that precluded it from concluding that the employees constituted a single bargaining unit appropriate for collective bargaining – Furthermore, just as the Act requires the bargaining rights for employees to be contained in two certificates pursuant to section 160, in this specific situation the Board concluded that it was appropriate to issue three certificates: two in construction under section 160 and one certificate pursuant to section 10, ensuring the union can bargain terms and conditions for all of the hours worked in a given day – Certificates issued

COMMERCIAL AIR SERVICES INC.; RE UA, LOCAL 787; File Nos. 2832-03-R; 2833-03-R; Dated February 23, 2004; Panel: David A. McKee (8 pages)

Employment Standards – Parties – Practice and Procedure – Strike – Timeliness – Individual applicants, represented by their union, sought review of a refusal to issue an Order to Pay severance pay, based on the Officer's finding that they were disentitled since the discontinuance of the business was caused by the economic consequences of a strike – Six months after the application was filed the applicant union sought leave of the Board to amend the former employees' application to seek termination pay, not for just the forty people who were the original applicants, but for the nearly 300 people employed at the time of closure – The Board found that the two year time limit imposed on Officers should be applied by the Board in assessing whether or not to amend an application to include either a broader claim for wages or a claim on behalf of others – The amendment sought came within two years of the claims made seeking severance and was therefore timely – Finding the Board had jurisdiction, it then addressed the employer's request not to exercise its discretion, in these circumstances – The Board distinguished *Zettel Metalcraft Ltd.* finding that, up until the expiry of the limitation period, a claim could have been brought and there would have been no basis upon which the Employment Standards Branch could have declined to consider the claim – The Board, therefore, found no unfairness or prejudice to the employer in permitting an amendment within the limitation period – Amendments allowed, application continues to merits

DOMINION GENERAL MANUFACTURING LIMITED, AND MOL; RE KAMLA BADHAN, ET. AL; File No. 2847-02-ES; Dated February 12, 2004; Panel: Mary Ellen Cummings (7 pages)

Construction Industry – Employee – Employment Standards – Evidence – The Board found, on the limited evidence available, that the employer, who was engaged in the building of swimming pools, gazebos, decks and patios, fell within the construction industry definition in Regulation 285/01 in that such activity was "constructing" either "buildings" or "structures" – Accordingly the employee was not entitled to termination pay – Application allowed

DUSTY MILLER LANDSCAPING LTD.; RE ELLIS GALLANT AND DIRECTOR OF EMPLOYMENT STANDARDS; File No. 1725-03-ES; Dated February 9, 2004; Panel: Brian McLean (2 pages)

Certification – Employee – Employer – The sole issue in this application for certification was whether Lantic Sugar or the intervenor, Advantage Personnel, was the employer of the employees, who are drivers operating bulk trailers, liquid tanker trucks and vans – The Board reviewed the "tripartite" relationship among the employees, Lantic, and Advantage in light of the Supreme Court's decision in *Pointe-Claire* and the seven criteria for determining the employer listed in *York Condominium* – The Board found that Lantic exercised more daily control over the drivers, played a significant role (along with Advantage) in discipline; subjected drivers to a probationary period after they were hired by Advantage; and the drivers saw the Logistics Manager from Lantic as their boss – Accordingly the Board found that Lantic exercised fundamental control over the drivers for the purposes of the Act and hence was the employer – Certification application continues

LANTIC SUGAR LIMITED; RE TEAMSTERS LOCAL UNION NO. 419; RE ADVANTAGE PERSONNEL; File No. 1559-00-R; Dated February 11, 2004; Panel: Timothy W. Sargeant (23 pages)

Certification – Employee – Employer – The issue on this application for certification was whether Mackie Moving Systems or the intervenor, Adams Services, was the employer of the employees, the majority of whom cast their ballots in favour of the applicant – Mackie, a cross-border, inter-provincial transport business, engaged broker/operators (individual contracts), company drivers (Mackie employees), and service drivers, some of whom (the employees at issue) were engaged in the local transporting of automobile seats produced by Lear Canada in Whitby and Ajax to General Motors in Oshawa – The Board reviewed the "tripartite" relationship among the employees, Mackie and Adams, in light of the Supreme Court's decision in *Pointe-Claire* and the seven criteria for determining the employer listed in *York Condominium* – The Board found that Mackie exercised significant, although not exclusive, control and direction over the employees; that it could influence discipline and discharge decisions where it saw fit; and it

bore the real burden of remunerating drivers – Accordingly the Board found Mackie to be the employer – Certificate issued

MACKIE MOVING SYSTEMS CORPORATION; RE TEAMSTERS LOCAL UNION 938; RE PROFESSIONAL PERSONNEL LTD.; ADAMS SERVICES, A DIVISION OF 1083859 ONTARIO LTD.; File Nos. 3232-99-R; 1206-00-U; 1937-02-U; Dated February 4, 2004; Panel: Patrick Kelly (18 pages)

Interim Relief – Practice and Procedure – Unfair Labour Practice – The union's bargaining relationship with Kaymar involved a contract for services between Kaymar and OCCAC, which was coming to an end – As part of an unfair labour practice complaint the union applied for interim relief, seeking a stay of a request for proposal by the OCCAC in respect of the work being performed by the union's members – The Board found it would have both the ingenuity and statutory tools to remedy any unfair labour practice complaint pleaded and that therefore the stay of the "request for proposal" process was not an intervention necessary to protect the Board's procedural ability to grant effective remedies – Application for interim relief dismissed

OTTAWA COMMUNITY CARE ACCESS CENTRE, KAYMAR REHABILITATION INC. AND MINISTRY OF HEALTH AND LONG TERM CARE; OPSEU; File Nos. 3422-03-M; 3423-03-U; Dated February 10, 2004; Panel: Mary Ellen Cummings (3 pages)

Employment Standards – Remedies – During the applicant's pregnancy leave, the employer, Pape Rehabilitation and Wellness Centre (PRWC) as a creditor, purchased the assets of the applicant's former employer, and proceeded to run the business from the same location, with the same employees, including the replacement employee for the applicant – The employees were all advised that their employment with the former employer was terminated and asked to join the new employer, however PRWC failed to uncover that the applicant was on a pregnancy leave – The Board found that there had been a sale of business from the former employer to PRWC and although PRWC claimed it did not know of the applicant's existence, it ought to have known about her – Accordingly, they continued to "employ" her and when she announced her return, it was unlawful for them to refuse – Application granted and damages awarded

PAPE REHABILITATION AND WELLNESS CENTRE AND DIRECTOR OF EMPLOYMENT STANDARDS; RE VICTORIA BLANTZAS; File No. 2801-02-ES; Dated February 18, 2004; Panel: Patrick Kelly (10 pages)

Certification – Construction Industry – Natural Justice – Practice and Procedure – Reconsideration – Representation Vote – The Board rejected the employer's argument that a second representation vote should be ordered because the seal was damaged and the Returning Officer briefly lowered the envelope containing the ballot out of view of the parties – The Board found the Officers are themselves security features and that the Officer's handling of the ballot did not raise any concerns about its integrity – The Board further found that even if the ballot box seal was damaged, as alleged, the ballots inside were sealed in double envelopes and hence the ballots remained secure – Concerning the employer's request that the Board reconsider its decision to count the votes in the first instance, the Board acknowledged that it had referred to and relied upon a decision of the Board that was released subsequent to the argument in the case – While not deciding that such action is a breach of natural justice, the Board did decide that its "processes are likely to be perceived as more satisfactory if the parties are given an opportunity to make submissions on new cases that are released between the end of argument and the issuing of a decision" – Accordingly, it decided to reconsider its decision and sought additional submissions from the parties

PELL INSULATION LTD.; RE DRYWALL ACOUSTIC LATHING AND INSULATION LOCAL 675, CJA; File No. 1313-02-R; Dated February 18, 2004; Panel: Mary Ellen Cummings (4 pages)

Employment Standards – Employee – Employer – The issue was whether the claimant, who was being trained by the applicant on the skills of day trading, was an employee of the applicant – The Board found that the claimant was not an employee since the six conditions set out in section 1(2) of the Act were met, but more importantly, the definition requires that "an individual receiving training from a person who is an employer is an employee of that person if the skill in which the individual is being trained is a skill used by the person's employees…" – The Board found the applicant employed trainers, not traders and that the claimant was being trained as a trader, not a trainer – Since the claimant was

not being trained in a skill used by the applicant's employees, he was not an employee – Application allowed

SWIFT TRADE SECURITIES TRAINING INC.; RE ANTONIO PACE AND DIRECTOR OF EMPLOYMENT STANDARDS; File No. 1257-03-ES; Dated February 4, 2004, Panel: Mary Anne McKellar (5 pages)

Court Proceedings

Judicial Review – Motion – Having named a specific vice chair and an individual as respondents in an application for judicial review, the applicant sought an order dispensing with service on the individuals of the Notices for Application for Judicial and for summonses – The court found the vice chair immune from such process, removed the other individual as a respondent and ordered that, for the applicant to proceed with his application, the union, the employer and the Board must be named as responding parties

GERRIE, JAMES ANDREW; RE VICE-CHAIR TIMOTHY SARGEANT AND MS. CHARLOTTE BUDD; OLRB File No. 2290-00-U (Court File No. 2/04); Dated February 18, 2004; Panel: O'Driscoll J. (2 pages)

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Some of 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 Library, now located on the 7th Floor, 505 University Avenue, Toronto.

Pending Court Proceedings

Case name & Court File No.	Board File No.	Status
Atyourservice Corp. **Pape Rehabilitation & Wellness Ctre**. v. Victoria Blentzas, et al Divisional Court No. DC-04-002687-00	2801-02-ES April Highlts	Pending
Sheet Metal Workers' Int'l Assoc. Local 30 v. **Crossby-Dewar Projects Inc**., Int'l Assoc. Heat & Frost Local 95 Divisional Court No. 144/04	1643-03-JD April Highlts	Pending
Association of Professional Ambulance Employees v. City of Toronto, Toronto Emergency Medical Services et al Divisional Court No. 44/04	2456-01-R	Pending
Labourers' International Union of North America v. **Universal Workers Union**, et al Divisional Court No. 71/04	2320-03-M	Pending
James Andrew Gerrie v. Ms. Charlotte Budd and Vice-Chair Timothy Sargeant Divisional Court File No. 2/04	2290-00-U	Pending
Great Blue Heron v. Mississaugas of Scugog Island First Nation et al Divisional Court File No. 7/04	1271-03-U; 1336-03-M; 1414-03-M	Pending Motion for stay denied – Jan. 22/04
Mississaugas Scugog Island First Nation v. Great Blue Heron et al Divisional Court File No. 10/04	1271-03-U; 1336-03-M; 1414-03-M	Pending Motion for stay denied – Jan. 22/04
Elementary School Teachers' Federation v. OSSTF, Dist. 14 Kawartha Pine Ridge DSB et al Divisional Court File No. 17/04	0797-01-JD	Pending
Canadian Pacific Railway Co. v. Milk & Bread Drivers, Dairy Employees, Caterers, Local 647 Divisional Court File No. 9/04	2864-03-R	Pending
Labourers' International Union of North America, et al v. **Universal Workers Union**, et al Divisional Court No. 22/04	2320-03-M 2049-03-U	Pending
City of Hamilton v. OPSEU Divisional Court No. 03-156-DV - HAMILTON	0185-03-U	Pending
Cecilia Collier v. TTC Divisional Court File No. 706/03	0632-02-U	Pending
Electrical Power Systems Construction Association and **Comstock Canada Ltd.** v. Sheet Metal Workers' International Association, Local 30 Divisional Court File No. 679/03	1894-02-G	Pending
Dawit Tuquabo v. USWA L 9597, Securitas Canada Ltd. Court File No. 03-DV-000935 – OTTAWA	2377-02-U	Pending
Slavtcho Petrov Detchev v. OLRB, Ministry of Labour, **Canadian Feed Screws Mfg. Ltd**. Divisional Court File No. 618/03	2701-00-ES	Pending – Mar. 30, 2004
Director of Employment Standards v. William Brown**, North York Chevrolet Oldsmobile Ltd**. Divisional Court File No. 559/03	2235-02-ES	Pending – Apr. 2, 2004
Thyssen Elevator Ltd. cob as Thyssenkrupp Elevator v. National Elevator & Escalator Assoc., Int'l Union of	2087-01-U	Pending

Case name & Court File No.	Board File No.	Status
Elevator Constructors Divisional Court File No. 410/03		
Girotti St. Catharines Ltd. v. Millwrights Union Local 1007 Divisional Court File No. 368/03	3060-02-G	Mar. 9, 2004
Teamsters, Chemical, Energy and Allied Workers, Local Union 1880 v. **Dominion Colour Corp**. Divisional Court File No. 391/03	0425-02-U	Withdrawn Feb. 9, 2004
CAW-Canada v. **National Grocers Co. Ltd**. and UFCW, Locals 1000A, and 175/633 Divisional Court File No. 382/03	0137-02-R; 0139-02-R; 0179-02-R; 0450-02-U	Pending – Apr. 30, 2004
Greater Essex County District School Board Divisional Court File No. 276/03	3398-00-R	Pending
Windsor-Essex Catholic District School Board Divisional Court File No. 277/03	3426-00-R	Pending
OPSEU v. **Ontario Hospital Association** Divisional Court File No. 83/03	3631-02-U	Pending
Canadian Health Care Workers v. CAW-Canada, **Central Park Lodges** et al Divisional Court No. 646/02	1951-01-R; 2179-01-R; et al	March 2, 2004
CAW-Canada & its Local 385 v. **Coca-Cola** et al Divisional Court File No. 751/02	0179-01-R; et al	Dismissed October 10/03; applic. for leave to appeal Oct 15/03
Ottawa-Carleton Public Employees Union Local 503 – CUPE v. **Ottawa Transition Board**, et al Divisional Court File No. 02-DV-723	2353-00-PS	Heard – Nov. 27/03 - Reserved
Rosalina Papa v. HERE Local 75, et al Divisional Court No. 283/01	0426-00-U	Pending
William McNaught v. TTC, et al Divisional Court File No. 254/02	3616-99-U; 3297-99-OH	Application allowed Nov. 6/03; applic. for leave to appeal Nov. 7, 2003
Tender Choice Foods Inc. v. Mirjana Jazvin Divisional Court File No. 454/02	3058-01-ES	Pending – April 7, 2004