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Ontario Labour Relations Board HIGHLIGHTS

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The Board mourns the unexpected passing of Inge Stamp, who died on Sunday, December 12, 2004. Inge spent twenty years at the Board, initially as a management-side member, latterly as a Vice-Chair. She retired in the fall of 2002. Inge touched us all with her warmth, generosity and constant good nature. She will be greatly missed.

Scope Notes

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

Construction Industry – Remedies – Unfair Labour Practice – The Board issued a final decision in this lengthy battle between IUBAC and the breakaway locals which comprise BACU – In light of the success of the BACU locals in recent displacement applications for certification, the Board found it prudent to allow the combating parties, to the extent possible, to fashion their own remedies – In the instance of Local 7 (Ottawa), who refused to enter into an agreement with BACU, the Board issued an order binding it to the agreement – Orders accordingly

BRICK AND ALLIED CRAFT UNION OF CANADA, JERRY COELHO, TOM OLDHAM, KERRY WILSON, JOHN HAGGIS AND LUIGI SCODELLARO; RE INTERNATIONAL UNION OF BRICKLAYERS AND ALLIED CRAFTSMEN, LOCALS 6, 7 AND 25; RE IUBAC LOCALS 1, 2, 4, 10, 12, 20, 23, 28, 29 AND 31; INTERNATIONAL UNION OF BRICKLAYERS AND ALLIED CRAFTWORKERS; MASONRY INDUSTRY EMPLOYERS' COUNCIL OF ONTARIO; TERRAZZO, TILE AND MARBLE GUILD OF ONTARIO INC.; File Nos. 1904-99-U; 3003-00-U; 3331-00-U; 1220-01-U; 3790-03-U; Dated November 30, 2004; Panel: David A. McKee (8 pages)

Duty of Fair Representation – Reconsideration – Standing – Unfair Labour Practice – The applicant sought reconsideration of a decision dismissing allegations of gender discrimination in the concessionary bargaining between the UFCW and Loblaws – The Board found that the actions of the workplace parties were *bona fide,* intended to protect jobs, and did not in any way demonstrate adverse effect discrimination – Had the union acted differently, it might have been found to have engaged in direct discrimination – On a second issue, an alleged violation of section 70 of the Act, the Board assumed, without finding, that the individual applicant had standing to bring the application, but concluded that the union's acceptance of financial compensation from the employer for the concessions did not violate sections 15, 53 or 70 – Reconsideration denied

BLASDELL, BENJAMIN; RE UFCW, LOCAL 1000A; RE LOBLAW SUPERMARKETS LIMITED; File No. 1341-03-U; Dated November 1, 2004; Panel: Brian McLean (11 pages)

Bargaining Unit – Construction Industry – Termination – The trade union challenged the legality of a termination application filed by the sole member of a bargaining unit, arguing that

since certification requires a minimum of two employees, a similar consideration should obtain to terminate bargaining rights – The Board held that in this instance necessity was paramount to ballot secrecy, and a single employee could file a termination application – Ballot count ordered

DTR DRYWALL T-BAR RESTORATION LTD., 4061365 CANADA INC. AND; RE MARK MISCAMPBELL; RE DRYWALL ACOUSTIC LATHING AND INSULATION LOCAL 675, UBCJA AND UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, CARPENTERS' DISTRICT COUNCIL OF ONTARIO, UBCJA; File No. 0436-04-R; Dated November 8, 2004; Panel: Marilyn Silverman (5 pages)

Employment Standards – The employer sought review of an order to pay and a notice of contravention for an alleged violation of the emergency leave provisions of the *Employment Standards Act, 2000* – The Board set out criteria for determining whether a leave has been properly requested: 1) did the employee ask for an emergency leave? 2) did the employer seek evidence from the employee to establish an entitlement to the leave? and 3) was the employee's absence due to an urgent matter? – The employee failed to attend the hearing – The Board found that the employee's termination was not a violation of the Act – Order to pay and notice of contravention rescinded – Application allowed

ELKAY CANADA LTD.; RE GLENN ROACH AND DIRECTOR OF EMPLOYMENT STANDARDS; File No. 4218-03-ES; Dated November 12, 2004; Panel: Peter Chauvin (7 pages)

Occupational Health and Safety Act – This appeal under section 61 of the *Occupational Health and Safety Act* considered whether clauses 9(18)(e) and (f) of the Act permit a designated member representing employees on its Joint Health and Safety Committee (JHSC) to be present at certain annual maintenance activities at the employer's high voltage electrical systems – Clauses 9(18)(e) and (f) respectively provide that the JHSC can obtain information from tests conducted for the purpose of occupational health and safety and that a designated member can be present at the beginning of this testing if the member believes his or her presence is required to ensure that valid testing procedures are used or to ensure that the test results are valid – In interpreting the clauses, the Board held that they confer powers on the JHSC and not the individual designated worker member, that clause (e) is only applicable to tests performed for the purposes of health and safety and, as such, the JSHC does not have a right to information for a purpose other than health and safety – Clause 9(18)(f) only confers a right on a designated worker member to be present (or on a JHSC to have a designated worker member present) where the member's belief is "at a minimum reasonable and *bona fide*" – In determining whether testing is for the purpose of health and safety, the Board held this purpose can be inferred or can be determined by the person who directs the test to be conducted – A test may be so specific in its function that it is essentially only conducted for one purpose, and hence the use of the test by a person will give rise to a strong inference as to his or her purpose – Since maintenance was a purpose for the testing, there was no basis to infer that the purpose of the test was something else – Appeal dismissed

FANSHAWE COLLEGE, AND MINISTRY OF LABOUR; RE OPSEU LOCAL 110; File No. 0635-03-HS; Dated November 10, 2004; Panel: Ian Anderson; J.A. Ronson; H. Peacock (7 pages)

Constitutional Law – Interim Relief – Intervenor – Reference – Unfair Labour Practice – The Board issued reasons for its decision on the constitutional question in this matter, namely whether certain provisions of the *Labour Relations Act, 1995* are of no force and effect by reason of either the enactment of a First Nation Labour Code, aboriginal or treaty rights, or the First Nation's inherent right to self-government – The Board addressed the concept of aboriginal rights and considered the test to be applied in determining whether a right has been established – Citing *Mitchell v. Minister of National Revenue* [2001] 1 S.C.R. 911, the Board held that the First Nation's attempt at organizing labour in general was not integral to an aboriginal right – Similarly, there were no treaty rights that would permit the First Nation to regulate labour relations, or that would entitle the First Nation to self-government – Constitutional question answered in the negative – Employer is obliged to bargain and the Minister may appoint a conciliator

GREAT BLUE HERON GAMING COMPANY; RE NATIONAL AUTOMOBILE, AEROSPACE, TRANSPORTATION AND GENERAL WORKERS UNION OF CANADA (CAW-CANADA) AND ITS LOCAL 444; RE THE ATTORNEY GENERAL OF ONTARO AND THE ATTORNEY GENERAL OF CANADA; File Nos.1271-03-U; 1336-03-M; 1414-

03-M; Dated November 30, 2004; Panel: Kevin Whitaker (15 pages)

Reprisal – Unfair Labour Practice – Witness – The applicant-employee alleged that in appointing him and then removing him from a temporary position on the local's executive, the union was trying to dissuade him from pursuing legal action against the union and ultimately to punish him for not ceasing his legal action – The Board found that the appointment and removal of the applicant from the temporary position did not fall within section 87(2) of the Act because there was no evidence that this action affected the applicant's employment, there was no penalty imposed and the applicant was not coerced or intimidated – The applicant was removed from office following the procedures outlined in the bylaws and under the constitution; to be voted out of office for legitimate concerns cannot be considered a penalty – Application dismissed

HOWELL, GRANTLEY; RE UNITED STEELWORKERS OF AMERICA LOCAL 7135, USWA DISTRICT 6, UNITED STEELWORKERS OF AMERICA; File No. 0672-04-U; Dated November 24, 2004; Panel: Tim Sargeant (5 pages)

Practice and Procedure – Sale of Business – Termination – This termination application was filed on the heels of an alleged sale by Grant to Young – The Board considered the totality of the transaction between Grant and Young and found that a sale occurred on the changeover date rather than the later finalization date – The Board held that, pursuant to section 69(10), a notice to bargain given under section 69(3) has the same effect as a certification under section 10 – Accordingly, the termination application was untimely – Application dismissed

J & S YOUNG MERCHANTS LTD.; RE RANDY DAVIDSON; RE COMMUNICATIONS, ENERGY AND PAPERWORKERS UNION OF CANADA, LOCAL 156-2; File No. 1872-04-R; Dated November 22, 2004; Panel: Peter F. Chauvin; J. Ronson, R.R. Montague (20 pages)

Certification – Construction Industry – Rules of Procedure – In this certification application, the Board considered whether it should exercise its discretion and allow the employer to file a late (by a half day) response, challenging the voting eligibility of three employees – The only situation where the Board has extended the time in these applications is where there has been an assertion by the responding party that there are no employees in the bargaining unit on the date of the application and that the delay in filing the response was of short duration – A dispute over the number of employees in a bargaining unit is distinguishable from the issue of whether there are no employees in a unit – Delay in these cases could cause serious prejudice to the union due to the importance of the information provided in an employer's response – The Employer alleged improper service of the application, however Board concluded that the union had effected proper service when it faxed the application to the employer's sales office rather than its head office – Despite the fact that the employer's delay was of a short duration and that the vote itself was delayed by the weekend, the applicant "was still denied the full period of time to which it was entitled under the Rules…to investigate and assess its application before the vote" – Certificate issued

LIFETIME HOMES; RE CENTRAL ONTARIO REGIONAL COUNCIL OF CARPENTERS, DRYWALL AND ALLIED WORKERS UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA; File No. 0570-04-R; Dated November 9, 2004; Panel: Susan Serena (5 pages)

Health and Safety – The employer applied for suspension of an order requiring it to not use a particular type of scaffolding until the employer complied with the enumerated Regulations – Although the Board found the Ministry's lengthy and tortuous investigation troubling and the inspector's orders so vague as to be virtually impossible of compliance, it could not conclude that there was no risk to worker safety – The request for a suspension was denied but parameters for compliance were suggested

MODU-SCAF INC. RE LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 506, AND AGGREY EMOJOG, INSPECTOR; File Nos. 2390-04-HS; 2389-04-HS; Dated November 3, 2004; Panel: David A. McKee (5 pages)

Construction Industry – Termination – Timeliness – In this application for a declaration terminating the bargaining rights of the union, the

central issue was the timeliness of the application – The union was certified January 22, 2004 for the ICI sector in the province; the termination application was filed three weeks later, during the open period of the province-wide collective agreement – The Board held that since the construction provisions of the Act supersede the general provisions, the collective agreement did not have to operate for a year before the decertification could be filed – Application timely

NICOLINI CONSTRUCTION AND ENGINEERING LTD.; RE PAUL LEMAY; RE LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 527; File No.3619-03-R; Dated November 17, 2004; Panel: Harry Freedman (14 pages)

Bargaining Unit – Certification – The applicant sought a bargaining unit of five retail stores located in three adjacent municipalities – The Board reviewed the relevant factors used to determine the appropriateness of a bargaining unit – One consideration of particular significance was that two of the stores were staffed by a single non-managerial employee; to exclude these locations from a comprehensive unit would deprive the employees of any potential for collective bargaining – One multi-municipality unit was appropriate – The responding party then argued that the views of the employees in the one-member locations should be canvassed to determine if they want to belong to the larger unit – The Board rejected the responding party's argument, accepting the union's view that its application for an all-employee unit suggested that the employees wanted to be included; furthermore, neither employee made any representations or objections to being part of the larger unit – Vote count ordered

SICO INC.; RE UNITED STEELWORKERS OF AMERICA; File No. 1667-04-R; Dated November 23, 2004; Panel: Peter F. Chauvin (13 pages)

Sale of Business – Related Employer – Witness – At the hearing of this matter, the applicants argued that Torbear, one of the responding parties, had failed to satisfy its obligation to adduce all evidence material to the section 69/1(4) allegations – The Board found that Torbear's witness did not have sufficient knowledge of the reasons for the establishment of the company, nor its activities prior to his hire – The Board was persuaded that Torbear needed to adduce further facts but would not acquiesce to the applicants' suggestion that it direct Torbear as to the identity of the appropriate witness – Hearing continues

TORBEAR CONTRACTING INC., MALFAR MECHANICAL INC., TORONTARIO PLUMBING AND HEATING INC., AND CENTRO MECHANICAL INC.; RE ONTARIO PIPE TRADES COUNCIL; File Nos. 0163-02-R; 1058-02-R; Dated November 1, 2004; Panel: Harry Freedman (6 pages)

Certification – Construction Industry – Evidence – Practice and Procedure – Status – Witness – In this certification application in which both parties challenged the eligibility to vote of a number of individuals, the Board was called on to address the restrictions it proposed to place on the use of subpoenaed documents in and outside of these proceedings – The Board proposed a process and circulated a draft order for comments – The trade union objected to the Board's action, alleging a denial of natural justice and the commission of a jurisdictional error – The Board held that since the issue in dispute concerned the employment status of the challenged individuals, it anticipated that many of the documents tendered would relate to activities or matters beyond the relationship with the responding party employer – The Board asserted that it was concerned with fairness to the witnesses, and with an efficient use of hearing time – The union argued that the imposition of restricted use of disclosed documents would undermine the open and public hearing process, and would compromise its right of free expression under the *Canadian Charter of Rights and Freedoms* – The Board rejected the union's arguments and issued orders limiting the use of documents produced by the witnesses – Orders accordingly

TRICIN ELECTRIC LTD.; RE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, CONSTRUCTION COUNCIL OF ONTARIO; File Nos. 0878-04-R; 0487-04-U; 0702-04-U; 1255-04-U; Dated November 10, 2004; Panel: David A. McKee (13 pages)

Court Proceedings

Employment Standards – Judicial Review – The employee sought a review of an employment standards officer's decision that he had quit his job – The Board upheld the officer's decision – The Divisional Court dismissed his application for judicial review – Leave to appeal dismissed –

Leave to appeal to Supreme Court of Canada dismissed

DETCHEV, SLAVTCHO PETROV RE OLRB, THE MINISTRY OF LABOUR – LEGAL SERVICES, CANADIAN FEED SCREWS MFG. LTD.; File No. 2701-00-ES (SCC File No. 30498) Dated November 18, 2004; Panel: Major, Fish, Abella JJ. (1 page)

Duty of Fair Representation – Judicial Review – The applicant, a probationary employee, was not retained by the employer for full-time employment – The trade union initially agreed to pursue a grievance on his behalf, but withdrew the commitment following a meeting with the employer where the employer set out its concerns with the employee's productivity and absence record – The applicant claimed the union had violated section 74 of the Act when it changed its mind about pursuing the grievance – The Board disagreed – The applicant sought a review of the Board's decision - Application for judicial review dismissed

GERRIE, JAMES ANDREW; RE OLRB. ET AL; File No. 2290-00-U (Court File No. 2/04) Dated November 30, 2004; Panel: Lane, Pitt, Molloy JJ. (3 pages)

Construction Industry Grievance – Judicial Review – The Board found that the employer was bound to the collective agreement with the Millwrights by virtue of a letter of agreement signed by the parties in a settlement of an earlier grievance – The Divisional Court dismissed the employer's application for judicial review – Motion for leave to appeal dismissed

GIROTTI ST. CATHARINES LTD.; RE MILLWRIGHTS UNION LOCAL 1007 AND OLRB; File No. 3060-02-G (Court File No. 368/03) Dated November 1, 2004; Panel: Goudge, Feldman, Lang JJA (1 page)

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.

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Pending Court Proceedings

Case name & Court File No.	Board File No.	Status
Gerald Thomas v. SEIU Local 1.ON; Toronto East General & Orthopaedic Hospital Inc. Divisional Court No. 638/04	0281-04-U	Pending
Hardev Kumar v. USWA, Local 13571, et al Divisional Court No. 574/04	0151-04-U	Pending
Naseem Jamal v. OPSEU, et al Divisional Court No. 56704	2464-03-U	Pending
Christopher Kabala v. Attorney General of Canada, Ombudsman Ontario, et al Divisional Court No. 575/04	0458-00-ES	Pending
Premier Fitness Clubs Inc. & 992434 Ontario Inc. v. Hopeton Bailey, et al Divisional Court No. 537/04	0341-03-ES	Pending
Assurant Group v. Ignacia Menor Fillion, et al Divisional Court No. 528/04	2999-03-ES	Pending
Maurice Leblanc v. TTC, and ATU, Local 113 Divisional Court No. 468/04	2326-00-U	Pending
Autoland Chrysler (1981) Ltd., Michael Leahey v. Teamsters Union, Local 879 Divisional Court No. 463/04 Divisional Court No. 554/04	1151-03-R	Pending
Girotti St. Catharines Ltd. v. Millwrights Union Local 1007 – Divisional Court No. 368/03 Motion for Leave to Appeal No. M31292	3060-02-G	Dismissed March 11, 2004 Dismissed Nov. 1, 2004
Joseph S. Rooke v. Stelco Hamilton, OLRB & Ministry of the Attorney General for Ontario Divisional Court No. 404/04	1584-02-OH; 2647-02-OH	Pending
Dr. Nicholas Hawrylyshyn, et al, o/a **Square One Dental Centre.** v. Queen in Right of MOL, et al Divisional Court No. 343/04	1721-02-ES	Pending – March 11, 2005
OPSEU v. PIPS, **The Ottawa Hospital**, OLRB Divisional Court No. 378/04	0372-04-R	Pending Motion to stay dismissed July 9/04
UBCJA, Local 494 v. **Build Force Construction Ltd.**, 1404406 Ontario Ltd., Unicor Construction Inc. (Stated Case) Divisional Court No. 368/04	1190-03-R; 1189-03-G	Pending
Alistair McEachran v. The Society of Energy Professionals and **Ontario Power Generation Inc.** Divisional Court No. 298/04	0179-03-U	Pending - Jan. 19/05

Case name & Court File No.	Board File No.	Status
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	Pending
Vincent Borg v. OPSEU, The Crown in Right of Ontario et al Divisional Court No. 83/04	1208-02-U	Pending
Grantley Howell v. OLRB Divisional Court No. 04/178	0933-01-U; 1273-01-U; 3552-00-U	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 Nos. 22/04	2320-03-M 2049-03-U	Pending – Feb. 7/05
James Andrew Gerrie v. CAW Local 385; Coca-Cola Bottling Ltd. Divisional Court No. 2/04	2290-00-U	Dismissed November 30, 2004
Mississaugas of Scugog Island First Nation v. Great Blue Heron et al Divisional Court No. 10/04	1271-03-U; 1336-03-M; 1414-03-M	Pending – Feb. 23,24,25/05 Motion for stay denied – Jan. 22/04
Elementary School Teachers' Federation v. OSSTF, Dist. 14 Kawartha Pine Ridge DSB et al Divisional Court No. 17/04	0797-01-JD	Pending – Nov. 8 & 9/04; Heard, reserved
Canadian Pacific Railway Co. v. Milk & Bread Drivers, Dairy Employees, Caterers, Local 647 Divisional Court No. 9/04	2864-03-R	Pending
Cecilia Collier v. TTC Divisional Court No. 706/03	0632-02-U	Pending – Dec. 17/04
Electrical Power Systems Construction Association and **Comstock Canada Ltd.** v. Sheet Metal Workers' International Association, Local 30 Divisional Court No. 679/03	1894-02-G	Abandoned January 5, 2005
Dawit Tuquabo v. USWA L 9597, Securitas Canada Ltd. Court File No. 03-DV-000935 – OTTAWA	2377-02-U	Pending – Feb.14/05
William McNaught v. TTC, et al Divisional Court No. 254/02 Court of Appeal No. C41584	3616-99-U; 3297-99-OH	Application allowed Nov. 6/03; leave to appeal granted Mar. 26/04 Pending – Oct. 15/04 Heard, reserved