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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 May of this year. Some of these decisions will appear in the May/June 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.

***Public Sector Labour Relations Transition Act, 1997* – Substantial Restructuring** – This is an application under Bill 136 which arises out of the redesign of children's mental health services in Eastern Ontario – The issue is whether a "substantial restructuring" has occurred among the employer parties to trigger the application of the PSLRTA – The Board found that there had been a significant rationalization of the provision of services and a fairly substantial amount of services were already transferred – These factors combined to attract the provisions of the statue – The Board held further that restructuring need not be completed before a vote can be ordered, but in the instant case the vote would be delayed until more restructuring occurred – Further consultation ordered

CHILDREN'S HOSPITAL OF EASTERN ONTARIO (CHEO); RE ONA; RE CUPE AND ITS LOCALS 942 AND 1976; OPSEU; AND ROYAL OTTAWA HEALTH CARE GROUP/SERVICES DE SANTÉ ROYAL OTTAWA; File No. 3534-02-PS; Dated May 20, 2004; Panel: Brian McLean (12 pages)

***Colleges Collective Bargaining Act* – Unfair Labour Practice –** OPSEU filed a complaint about the proposed contracting out of certain bargaining unit work – The Board echoed the reasoning in *Valdi Inc.* [1980] OLRB Rep. Aug. 1254, holding that since the dispute was essentially contractual in nature, and that an arbitration was already underway which would significantly duplicate the proceeding before the Board, the matter should be deferred to the arbitration panel – The Board would not, however, dismiss the application to ensure that the dispute was resolved promptly, fairly, and in accordance with the Act – Application adjourned *sine die*

CONESTOGA COLLEGE; RE OPSEU, LOCAL 238; File No. 0030-03-U; Dated May 19, 2004; Panel: Mary Ellen Cummings (3 pages)

Employment Standards – This is an employer appeal of an order to pay termination pay – The Board held that the company does not have to prove the employee deliberately set out to compromise the company's relationship with its client – The only proof required is that the employee consciously did something or omitted to do something that can be described as serious and wilful neglect of duty – The employer had a well-established culture of quality in the workplace and the employee had previously been warned of the seriousness of failing to do parts tests as prescribed – The Order to Pay was rescinded

EXETER MACHINE PRODUCTS (1995) LTD.; RE MARK MacDONALD AND DIRECTOR OF EMPLOYMENT STANDARDS; File No.2694-02-ES; Dated May 11, 2004; Panel: Patrick Kelly (4 pages)

Certification – Construction Industry – Practice and Procedure – Reconsideration – Representation Vote – In an application filed as a request for reconsideration, five individuals sought to make post-vote submissions after a certificate had been issued to the applicant – The

Board had originally refused a late filing of a response from the employer (see May 2004 *Highlights*) – The Board held that its notices and communications are clear and straightforward and nothing in the individuals' submissions even addressed their entitlement to cast a ballot in the first place – Reconsideration denied

GHODS BUILDERS INC.; RE UNIVERSAL WORKERS UNION, LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA LOCAL 183; File No. 3765-03-R; Dated May 12, 2004; Panel: David A. McKee (5 pages)

Construction Industry Grievance – *Income Tax Act – Prima facie* motion – The union grieved the employer's failure to deduct and remit income tax from the vacation pay portion of employees' wages – The Board held that the *Income Tax Act* is not an employment-related statute within the meaning of s. 48(12)(j) of the *Labour Relations Act, 1995* – Furthermore, the collective agreement at issue spoke only to the payment of wages to employees – Obligations under this federal legislation fall outside the arbitration regime conferred on the Board – The applicant failed to make out a *prima facie* violation of the collective agreement – Grievance dismissed

KING-CON CONSTRUCTION ONT. LTD.; RE UNIVERSAL WORKERS UNION, LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA LOCAL 183; File No. 3313-01-G; Dated May 3, 2004; Panel: Jack J. Slaughter (13 pages)

Construction Industry – Certification – Practice and Procedure – Representation Vote – Following the representation vote in this displacement application, the intervenor requested that the results of the representation vote be set aside because a number of employees did not have proper notice of the vote – The Board stated that the Intervenor did not allege the notices of vote were not properly posted – The intervenor had the opportunity to bring voters to the polling location, or to raise the issue of why less than 50% of the potential eligible voters actually voted – However, it did neither, but chose to sign an agreement that the applicant should receive a final certificate without the Board inquiring into any further issues – Also, the employees' failure to observe the notice or to take active steps to protect their interests are not reasons to set aside the results of an otherwise valid representation vote - On the representation vote, more than fifty per cent of the ballots cast by the employees in the bargaining unit were cast in favour of the Applicant – Motion dismissed, certificate issued

METRO CONCRETE FLOORS (1990) INC.; RE LIUNA; LOCAL 506; RE OPERATIVE PLASTERERS', CEMENT MASONS', RESTORATION STEEPLEJACKS INTERNATIONAL ASSOCIATION OF THE UNITED STATES AND CANADA, UNION LOCAL 598; File NO. 0286-04-R; Dated May 21, 2004; Panel: Jack J. Slaughter (5 pages)

Employment Standards – This is an employer appeal of a notice of contravention issued by an Employment Standards Officer – Under the Act, the Director of Employment Standards bears the onus of proving that the employer against whom a notice of contravention has been issued contravened the Act – The Board held that there was doubt whether the Ministry had demonstrated on a balance of probabilities that a demand was made of the applicant in the way required by the Act – The Board also stated that a written demand must be sufficiently precise so that the employer can understand what it is supposed to produce – At a minimum, this must include a description of the document(s) and in most cases will include a time period for which the documents are sought – The Board held the employer did not contravene the Act and rescinded the notice of contravention

MIGDAL DAVID RESTAURANT, DAVID HASSAN O/A; RE MARTIN WURSTER AND DIRECTOR OF EMPLOYMENT STANDARDS; File No. 2219-03-ES; Dated May 21, 2004; Panel: Brian McLean (4 pages)

Employment Standards – Reprisal – The applicants applied for review of an Officer's finding that they were not entitled to unpaid wages, termination pay, and compensation for dismissal for exercising their rights under the Act – The responding party, a telemarketing operation, failed to appear at the hearing – The Board heard evidence that one of the applicants was initially employed by another employer but latterly both were employed by the responding party – The Board found the applicants were entitled to all of their claims and awarded compensatory damages including payment of all wages the applicants had lost until they obtained alternate employment – Application allowed

N.A.T. INDUSTRIES INC. AND DIRECTOR OF EMPLOYMENT STANDARDS; RE PATRICIA

BLAKE & LORETTA BLAKE; File No. 1106-03-ES; Dated May 17, 2004; Panel: Brian McLean (4 pages)

Duty of Fair Representation – *Prima Facie* Motion – The applicant complained that the union had violated s. 74 of the Act when it decided not to proceed to arbitration with his discharge grievance – The applicant complained (1) that the union's communications with him were not timely, (2) that the union was remiss in its attempts to discover whether there were any mitigating circumstances for his conduct, (3) that the union initially declined to provide written reasons for its decision not to proceed to arbitration and (4) that the union chose not to proceed with his grievance because of past "bad blood" – The Board (1) rejected the applicant's timeliness argument, (2) found that the union had conducted an appropriate investigation of the discharge, (3) held there was no obligation on the union to provide written reasons for its decision and (4) found no support for the "bad blood" allegation – Union's motion for no *prima facie* case allowed – Application dismissed

PACHECO, JOHN; RE BREWERY, GENERAL & PROFESSIONAL WORKERS' UNION; File No. 4019-03-U; Dated May 26, 2004; Panel: Ian Anderson (7 pages)

Employment Standards – The Board considered the exemption from overtime provision found in subsection 8(b) of O. Reg. 285/01 – The Board found the employee performed non-managerial and non-supervisory work on a regular basis, therefore he was entitled to overtime pay – Application allowed

PLYWOOD AND TRIM CO. LTD. AND DIRECTOR OF EMPLOYMENT STANDARDS; RE FRANK BAARDA; File No. 2358-03-ES; Dated May 26, 2004; Panel: Susan Serena (4 pages)

***Ambulance Services Collective Bargaining Act, 2001* – Interest Arbitrations –** The union sought a determination that the Essential Services Agreement entered into by the parties pursuant to the ASCBA had the effect of depriving ambulance workers of a meaningful right to strike and, consequently, it was appropriate for the Board to make a declaration that the labour dispute between the parties be decided by binding interest arbitration – The Board found that the ESA did indeed preclude the paramedics from engaging in any meaningful job action – All matters remaining in dispute between the union and the employer were referred to an arbitrator for final and binding interest arbitration

ROYAL CITY AMBULANCE SERVICE LTD.; RE OPSEU; File No. 0651-04-M; Dated May 27, 2004; Panel: Mary Ellen Cummings (3 pages)

Construction Industry – Interim Order – Sector Determination – The Labourers applied for a determination that the construction of a hotel complex was in the ICI sector of the construction industry, rather than the residential sector – The Labourers applied for an interim order, seeking to have the construction of the project suspended, arguing that the allegedly improper work assignment deprived its members not only of their wages but of their dignity and livelihood – The Board considered the accepted criteria for interim orders and found that a suspension of the project, which was already underway, would cause irreparable harm to the responding party – Although the Board found that the Labourers had made out a *prima facie* case for their application, it was not satisfied that the balance of convenience favoured the applicant – Request for interim order dismissed

YUKON CONSTRUCTION INC.; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL AND LIUNA, LOCAL 1081; RE IUOE, LOCAL 793; RE INTRAWEST CORPORATION; File No. 0512-04-M; Dated May 28, 2004; Panel: Harry Freedman (6 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
Alistair McEachran v. The Society of Energy Professionals and **Ontario Power Generation Inc.** Divisional Court No. 298/04	0179-03-U	Pending
Atyourservice Corp. **Pape Rehabilitation & Wellness Ctre**. v. Victoria Blentzas, et al Divisional Court No. DC-04-002687-00	2801-02-ES	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	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. 71/04 & 22/04	2320-03-M 2049-03-U	Pending
James Andrew Gerrie v. Ms. Charlotte Budd and Vice-Chair Timothy Sargeant Divisional Court No. 2/04	2290-00-U	Pending – Nov. 16/04
Great Blue Heron v. Mississaugas of Scugog Island First Nation et al Divisional Court 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 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 No. 17/04	0797-01-JD	Pending – Nov. 8 & 9/04
Canadian Pacific Railway Co. v. Milk & Bread Drivers, Dairy Employees, Caterers, Local 647 Divisional Court No. 9/04	2864-03-R	Pending
City of Hamilton v. OPSEU Divisional Court No. 03-156-DV – HAMILTON	0185-03-U	Pending
Cecilia Collier v. TTC Divisional Court 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 No. 679/03	1894-02-G	Pending – Oct. 7/04
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 No. 618/03	2701-00-ES	Dismissed – Mar. 30, 2004 Motion for leave to appeal

Case name & Court File No.	Board File No.	Status
Thyssen Elevator Ltd. cob as Thyssenkrupp Elevator v. National Elevator & Escalator Assoc., Int'l Union of Elevator Constructors Divisional Court No. 410/03	2087-01-U	Pending – June 24/04
Greater Essex County District School Board Divisional Court No. 276/03	3398-00-R	Pending
Windsor-Essex Catholic District School Board Divisional Court No. 277/03	3426-00-R	Pending
William McNaught v. TTC, et al Divisional Court No. 254/02	3616-99-U; 3297-99-OH	Application allowed Nov. 6/03; leave to appeal granted Mar. 26/04 Pending – Oct. 15/04
Tender Choice Foods Inc. v. Mirjana Jazvin Divisional Court No. 454/02	3058-01-ES	Dismissed – Apr. 7, 2004; Applic. for leave to appeal – abandoned May 18/04
Marc. A. Crockford et al v. UFCW et al Divisional Court No. 543/02	1350-99-U; 2809-99-U	Dismissed Sept. 30/03; Applic. for leave to appeal Apr. 28/04