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Ontario Labour Relations Board HIGHLIGHTS

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Job Posting for LRO's

Information regarding a competition for labour relations specialists is attached to this issue of Highlights. The deadline for applications is Friday, February 6, 2004.

OLRB Reports

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Scope Notes

The following are scope notes of some of the decisions issued by the Ontario Labour Relations Board in December of last year. Some of these decisions will appear in the November/December issue of the OLRB Reports:

Duty of Fair Representation – Interim Relief – Unfair Labour Practice – The applicant, an employee of Loblaws, brought a duty of fair representation complaint against his union, UFCW, Local 1000A, for negotiating mid-term amendments to the collective agreement, in response to Loblaws' requests to open its supercentres in a competitive manner given the "Wal-Mart Challenge" – Local 1000A, at the request of Loblaws, did not consult with, or seek ratification from, the general membership, on the terms of the amendments – The Board found that pursuant to section 58(5) the parties by mutual consent may revise "any provision" of a collective agreement at "any time" (except one relating to its term) – The requirements for a ratification vote under section 44 were not necessary as the mid-term amendments were neither a proposed collective agreement nor a "memorandum of settlement" as contemplated by that section – The Board found the failure of the union to consult with employees not to be a breach of section 74 since there was little or nothing meaningful the employees would have had to offer – Additionally, the Board noted, even if the failure to consult was a breach, consultation is a limited right, and the remedy requested (setting aside the amendments) would not have been granted, assuming the Board had such jurisdiction – Applications dismissed

BLASDELL, BENJAMIN; RE UFCW, LOCAL 1000A; RE LOBLAWS SUPERMARKETS LIMITED; File Nos. 1341-03-U; 1431-03-M; Dated December 8, 2003; Panel: Brian McLean (23 pages)

Bargaining Unit – Certification – In this application for certification, the remaining issue was whether Quality Systems Associates (QSA's) should be included in a bargaining unit made up of paramedical employees of the responding party – QSA's were the auditors or 'police' of workplace procedure, making sure that all paperwork and documents were in compliance with regulations and established procedures, while the unit at issue was composed of the technicians and technologists doing the hands on work – The Board adopted the two-part test (from *Hospital for Sick Children*) for determining the appropriateness of a bargaining unit: 1) is there a

sufficient community of interest among the group of employees sought by the trade union, and 2) does the bargaining unit create serious labour relations problems? – Despite the fact that the QSA's, unlike other paramedical employees, worked mainly in an office environment and had a completely different reporting structure, the Board found that they shared a sufficient community of interest with the paramedical employees – Regarding the second part of the test, the employer argued that there existed the likelihood that a conflict of interest would occur with the QSA's being in the same bargaining unit as the employees whose work they monitored – This concern was discounted by the Board for a number of reasons including the professionalism of the QSA's and the lack of evidence to support any reluctance to report – The Board found that the union's desired bargaining unit would not create serious labour relations problems, and accordingly it would be an appropriate bargaining unit with the QSA's included – Certificate issued

CANADIAN BLOOD SERVICES, HAMILTON BLOOD CENTRE; RE OPSEU; File No. 1967-00-R; Dated December 9, 2003; Panel: Patrick Kelly (11 pages)

Certification – Construction Industry – Reconsideration – The Board dismissed this application for certification in its earlier decision pursuant to section 8.1(5) paragraph 7 following the union's concession that the employer's section 8.1 notice was valid, notwithstanding the employer's purported withdrawal of the notice after the union's concession – The Board decided to reconsider its decision since the issues raised were significant and important – The Board distinguished both *Martha's Gardens* and *Sobeys*, and found that if the Board were to permit an employer to withdraw a section 8.1 notice following a union's concession of all the underlying facts as asserted by the employer, the result in every case would be the dismissal of the certification application and the implementation of the statutory one-year bar – Such a finding would make no labour relations sense as it would force litigation, leading to wasted resources for unions, employers, and the Board – The Board did not vary its earlier decision – Reconsideration dismissed

DAGMAR CONSTRUCTION INC.; RE UNIVERSAL WORKERS UNION, LIUNA, LOCAL 183; File No. 1080-03-R; Panel: Jack J. Slaughter; John Tomlinson; G. McMenemy (6 pages)

Certification – Constitutional Law – Interim Relief – Ministerial Reference – Practice and Procedure – Unfair Labour Practice – In January 2003 the union was certified as bargaining agent for a bargaining unit of employees of a casino operating on the First Nation's reserve land – Subsequent to the union giving the employer notice to bargain, the First Nation Band Council approved a Labour Relations Code purporting to govern labour relations on the reserve – The employer took the position it could not commence bargaining without running afoul of the Code – The First Nation intervened in the three applications before the Board (bargaining in bad faith, a Ministerial reference concerning the authority to appoint a conciliation officer and interim relief to expedite the dispute given the passage of time) raising constitutional questions – After Divisional Court upheld the Board's determination that it had the jurisdiction to address the constitutional question, the Board, after receiving submissions from the parties, directed that the matter proceed in a similar manner procedurally to the litigation of applications under the Rules of Civil Procedure (that is, by way of filing affidavits, cross-examinations on the affidavits and a directed trial, if necessary) – This procedure culminated in the expeditious hearing of argument on the constitutional question – The Board, with reasons to follow, found that the provisions of sections 17, 18, 70 and 96 of the Act applied to the labour relations of the respondent employer and its employees – Accordingly, the Board advised the Minister that he had the jurisdiction to appoint a conciliation officer – Board remains seized with other matters

GREAT BLUE HERON GAMING COMPANY; RE CAW-CANADA AND ITS LOCAL 444; RE MISSISSAUGAS OF SCUGOG ISLAND FIRST NATION; THE ATTORNEY GENERAL OF ONTARIO AND THE ATTORNEY GENERAL OF CANADA; File Nos. 1271-03-U; 1336-03-M; 1414-03-M; Dated December 12, 2003; Panel: Kevin Whitaker (6 pages)

Employment Standards – Reconsideration – Settlement – In this application for a review of an Order to Pay and an Order to Comply, the workplace parties settled the Order to Pay, and the Board issued its standard decision terminating the matter – The Ministry wrote requesting that the Order to Comply continue, and the Board found that the Order to Comply indeed remained outstanding, as that matter can only be settled by the employer and the Director of Employment Standards – The employer sought reconsideration

attempting to rely on certain statements made concerning the Order to Comply by the Labour Relations Officer during the course of mediating the settlement between the workplace parties – The Board clarified that a settlement of an Order to Comply cannot be made without the approval of the Director (s. 120(3)); that settlement discussions are without prejudice; and that the employer's allegations, in any event, fell far short of being able to conclude that there was an agreement with the Director of Employment Standards – Reconsideration dismissed, Order to Comply referred to Registrar for hearing

INTERNATIONAL CLOTHIERS INC.; RE ANNA TUCCI, AND DIRECTOR OF EMPLOYMENT STANDARDS; File No. 1657-03-ES; Dated December 24, 2003; Panel: David A. McKee (4 pages)

Damages – Employment Standards – Remedies – Reprisal – In these reviews, the Employer appealed the Officer's determination that it failed to reinstate the employee to her former position after her pregnancy leave and the employee appealed the amount of damages awarded – The Board concluded that the employer did not establish that it had offered the employee a comparable job and hence it violated section 53 – The Board found that where an employer has failed to reinstate pursuant to the Act, reinstatement, with compensation for loss of wages to the point of reinstatement, should be the first remedial choice – The Board commented on the lack of practice to reinstate by the Employment Standards Branch – The Board made an interim order, and allowed the parties an opportunity to provide submissions on why they believe reinstatement is not appropriate, since that issue was not canvassed at the hearing

KINGSTON INDEPENDENT NYLON WORKERS UNION; RE PATRICIA PAGE AND DIRECTOR, EMPLOYMENT STANDARDS; File Nos. 1363-02-ES; 1484-02-ES; Dated December 18, 2003; Panel: Mary Ellen Cummings (8 pages)

Construction Industry Grievance – The Union dispatched two laid off "Helpers" to Miro, who employed probationary helpers, for the purpose of displacing the probationers with the Helpers – Miro refused to accept the dispatch, claiming that the Union should have first displaced the probationary helpers working elsewhere – The collective agreement gave employers the right to refuse a dispatch so long as its refusal is not unreasonable, while the article authorizing industry wide bumping imposed no obligation on the Union to bump all Probationary Helpers I employed in the industry before bumping Probationary Helpers II – The Union claimed that Miro was unreasonable in refusing to accept the referrals – The Board found that although the Local is not required to displace all Probationary Helpers I in the industry prior to bumping a Probationary Helper II, in this circumstance when the Local referred a Helper to the employer who only had a Probationary Helper II (who will be laid off as a result), and the employer rejected the referral on the grounds that there are other Probationary Helpers I available, there was some rational basis for the decision – As the Local was unable to provide any explanation for its decision, the Board concluded that the Local failed to establish that the employer unreasonably rejected the applicants referral – Grievance dismissed

MIRO ELEVATORS LIMITED; IUEC, LOCAL 50; File No. 2904-01-G; Dated December 10, 2003; Panel: Harry Freedman; J.G. Knight; G. McMenemy (13 pages)

Bargaining Unit – Employees – Replacement Workers – Representation Vote –Termination – At the time of the representation vote on a termination application, a legal strike had lasted over six months, during which time the employer had engaged replacement workers – The Board found that the segregated votes cast by the replacement workers would not be counted, since they were not employees *in the bargaining unit* for the purposes of section 63(5) – The Board noted that the task of determining whether a "bargaining unit" is appropriate for collective bargaining falls to the Board – The Board found that it is not appropriate to include replacement workers in the same bargaining unit as those whom they have replaced since the interests of the replacement workers and the trade union are at odds: the bargaining unit is created by statute for the purposes of collective bargaining; during a legal strike the members of the bargaining unit have decided to collectively withdraw their labour; the trade union does not bargain on behalf of the replacement workers; the terms and conditions of the employment of the replacement workers are not negotiated with the trade union – A decision about whether the trade union should continue to hold the exclusive bargaining rights should be made by those persons the trade union represents, not by those it does not – Application dismissed

RESCARE PREMIER CANADA INC. C.O.B. AS ANAGRAM PREMIER; RE MELINDA JOHNSTON; RE I.W.A. CANADA; File Nos. 1841-02-FC; 1842-02-U; 2107-02-R; Dated December 19, 2003; Panel: Stephen Raymond (4 pages)

Construction Industry – Construction Industry Grievance – Project Agreement – Unfair Labour Practice – The Sheet Metal Workers brought an unfair labour practice complaint and a grievance pursuant to section 133 against Weyerhaeuser, alleging it had breached a project agreement made pursuant to section 163.1 – Weyerhaeuser, a Proponent of the Project Agreement, raised two preliminary motions: first, the Board was without jurisdiction to hear the grievance as Weyerhaeuser was not bound to the ICI agreement and second, section 163.1 is not capable of being violated and accordingly, there would be nothing for the Board to inquire into on a section 96 application – The Board first found that Weyerhaeuser is neither a party to the ICI agreement, nor bound to it – Next the Board, after a purposeful interpretation, found section 163.1(4) capable of being violated, since it requires parties to a project agreement to apply the provisions of the project agreement to the construction work on the project – Accordingly, the grievance was dismissed and the section 96 complaint was referred for hearing

WEYERHAEUSER ENGINEERING SERVICES; RE SMW, LOCAL 397; File Nos. 0396-03-G; 0905-03-U; Dated December 3, 2003; Panel: Jack J. Slaughter (9 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
Elementary School Teachers' Federation v. OSSTF, Dist. 14 Kawartha Pine Ridge DSB et al Divisional Court No. 17/04	0797-01-JD for FEB HIGHLTS	Pending
Canadian Pacific Railway Co. v. Milk & Bread Drivers, Dairy Employees, Caterers, Local 647 Divisional Court No. 9/04	2864-03-R for FEB HIGHLTS	Pending
Labourers' International Union of North America, et al v. **Universal Workers Union**, et al Divisional Court No. 22/04	2320-03-M for FEB HIGHLTS	Pending
City of Hamilton v. OPSEU Divisional Court No. 03-156-DV - HAMILTON	0185-03-U	Pending
Kingsway Electric Co. v. Ray Martin and Byron Gamble Court File No. 753/03	2773-03-U; 2775-03-M; 2776-03-OH	Abandoned Dec. 10/03
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 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**. Court File No. 618/03	2701-00-ES	Pending – Mar/Apr. 2004
Director of Employment Standards v. William Brown**,** **North York Chevrolet Oldsmobile Ltd**.	2235-02-ES	Pending – Apr. 2, 2004
Thyssen Elevator Ltd. cob as Thyssenkrupp Elevator v. National Elevator & Escalator Assoc., Int'l Union of Elevator Constructors Divisional Court File No. 410/03	2087-01-U	Pending
Girotti St. Catharines Ltd. v. Millwrights Union Local 1007 Divisional Court File No. 368/03	3060-02-G	Pending – 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	Pending – Feb. 27, 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

Case name & Court File No.	Board File No.	Status
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	Pending – March 2, 2004
CAW-Canada & its Local 385 v. **Coca-Cola** et al Divisional Court 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 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 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 No. 454/02	3058-01-ES	Pending – April 7, 2004