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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. Some of 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.

Employment Standards – The employer sought review of an employment standards officer's decision awarding the employee severance pay when she refused to relocate with the employer to another city – The employer argued that the employee had been offered a greater right or benefit (longer notice) and an opportunity for reasonable alternative employment – The Board found that a lengthy notice period cannot encompass statutory entitlement to severance pay and, on an objective standard, the transfer from Toronto to Kingston was not a reasonable offer of alternative employment – Application dismissed

ASSURANT GROUP; RE IGNACIA MENOR FILLION AND DIRECTOR OF EMPLOYMENT STANDARDS; File No. 2999-03-ES; Dated July 19, 2004; Panel: Susan Serena (8 pages)

Construction Industry Grievance – Practice and Procedure – The employer acknowledged that it had breached the collective agreement but argued that the union was estopped from asserting its rights because of a material representation on which the employer had relied, to its detriment – When the employer completed its evidence (led first), the union brought a motion asking the Board to find the employer had not proved the estoppel – The Board allowed the union to argue its motion without putting it to an election – The Board found in the union's favour: the discussions between the employer and the trade union regarding on-going jobs at the time of certification were not conclusive; the employer's conduct generally was not consistent with the reliance it sought to make out – Motion succeeds – Matter referred back to parties to seek agreement on damages

CREATIVE DESIGN AND IMPROVEMENT INC. AKA CDI CONTRACTING INC.; RE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 120; File No. 3327-03-G; Dated July 5, 2004; Panel: Mary Ellen Cummings, G. Pickell, A. Haward (8 pages)

***Prima facie* Motion – Related Employer – Sale of Business –** The applicant held bargaining rights for stage hands with the Eaton Auditorium in the late 1970s at which time the 7th floor of College and Yonge "went dark" – Over twenty-five years later the Carlu Corporation rented the facility from a new owner for events, some of which included performances – The Board found that there was nothing to transfer; the premises were empty, unused and unimproved for a lengthy period of time and that the time which had elapsed between the operation of the two businesses was so substantial that it could not reasonably conclude that the union had a reasonable likelihood of establishing any transfer of the one business to the other – Motion granted; no *prima facie* case on section 69

EATONS AUDITORIUM, THE, AND THE CARLU CORPORATION; RE IATSE, LOCAL 58; File No. 0381-03-R; Dated July 22, 2004; Panel: Marilyn Silverman (4 pages)

Certification – Construction Industry – Representation Vote – In this application for certification, the Labourers sought to displace the Carpenters in the employ of the employer in all sectors of the construction industry in the Greater Toronto area – The issue of voter eligibility arose because the employer, bound to the collective agreement between the Heavy Construction Association of Toronto and the Labourers, employed labourers to perform the same work on the Sheppard Subway project as was done on that project by carpenters pursuant to the employer's collective agreement with them – The issue was whether persons dispatched by the Labourers to perform the same work the Carpenters were performing were members of the bargaining unit being raided – The Board acknowledged the occasional overlap of work between bargaining units and held that such an overlap does not affect the scope or composition of the bargaining unit – Only the persons employed pursuant to the Carpenters' project collective agreement with the employer and at work on the application date were employees in the bargaining unit the applicant was seeking to represent – Matter referred to the Manager of Field Services to identify eligible voters and count ballots

ELLIS-DON CONSTRUCTION LTD.; RE UNIVERSAL WORKERS UNION LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 183; RE CARPENTERS AND ALLIED WORKERS LOCAL 27, UBCJA; File No. 3272-00-R; Dated July 21, 2004; Panel: Harry Freedman (10 pages)

Certification – Dependent Contractor – Employee – Status – The applicant applied for a unit of "dependent contractors engaged in the transportation of lumber and co-products" from one of the employer's sawmill operations – The dispute concerned the status of three owner-operators and their degree of dependence on the employer for their livelihood – The Board canvassed the eleven criteria enumerated in *Algonquin Tavern,* [1981] OLRB Rep. August 1057 to inform its analysis and found that the economic reliance of the drivers on this employer favoured a finding of dependency – Ballots ordered to be counted

EXCEL FOREST PRODUCTS LIMITED; RE INDUSTRIAL WOOD AND ALLIED WORKERS OF CANADA (I.W.A. CANADA) LOCAL 2995; File No. 3920-02-R; Dated July 13, 2004; Panel: Patrick Kelly, J.A. Ronson, R.R. Montague (22 pages)

Certification – Construction Industry – Dependent Contractor – Employee – Status – The Board found the circumstances of the individuals at issue, who were performing carpentry work framing new houses on a piecework basis, were closer to the facts in *Camarites Construction Inc.* than to *Carpino Carpentry Ltd.* – There was some evidence of risk of loss and gain, one individual had the power to hire and fire his helper (which he did), and he set his hours of work and rates of pay – Accordingly, the Board was satisfied that neither individual was an employee of the respondent

P.G. ONISTO CONSTRUCTION INC.; RE UNIVERSAL WORKERS UNION, LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 183; File No. 3787-03-R; Dated July 28, 2004; Panel: Caroline Rowan (6 pages)

Related Employer – Sale of a Business – The Plumbers, Boilermakers and Carpenters sought declarations from the Board that a number of companies owned and operating in northern Ontario were either related employers, or the transactions in which they were mutually involved attracted the sale of business provisions of the Act – The basis for these assertions was that the various companies were engaged in construction work and therefore bound by the respective provincial agreements with the trade unions – The Board conducted a protracted hearing and examined many volumes of evidence; the applicants argued that the employers were engaged in construction work, and sought to adduce evidence of intermingling – Ultimately the Board was unable to find that the companies were involved in construction work – While the companies' owners may have held fiduciary duties among the various companies, the Board found there was nothing drained from RLP Machine or transferred to any of the other companies that could amount to an erosion of bargaining rights – Although relatedness was established in some instances, no additional relief was awarded – Order accordingly

RLP MACHINE AND STEEL FABRICATION INC., 910609 ONTARIO LIMITED C.O.B. AS COLUMBIA CHROME; CLOUTIER'S MACHINE SHOP LIMITED; 749496 ONTARIO LIMITED C.O.B. CMS MECHANICAL; 957246 ONTARIO LIMITED C.O.B. AS KAP RENTAL & SUPPLIES; 996529 ONTARIO LIMITED C.O.B. AS K & C POWER HOUSE REPAIR; RE UBCJA, LOCAL

2486; File Nos. 1085-00-R; 1506-00-R; 1507-00-R; Panel: David A. McKee (24 pages)

Duty of Fair Representation – When the employer closed one facility and offered its employees opportunities to bid for work at a second facility and subsequently negotiated seniority provisions into a new collective agreement, a number of employees filed grievances and duty of fair representation complaints about the process – The employer and the trade union recognized that the seniority calculation was fraught with problems and amended the formula in a later collective agreement – The Board found that the trade union had carefully considered the grievances not only on their own merits but also with regard to their impact on the entire bargaining unit – Application dismissed

ROBIN HOOD MULTI-FOODS INC., C.O.B. AS BICK'S PICKLES INC.; RE TAMMY BLAKE, HENRY BERGSMA, CINDY TISDALE, BONNIE FARR, TERESA THORNE AND PAULETTE GARON; RE UFCW, LOCAL 175; File No. 1926-03-U; Dated July 8, 2004; Panel: Tanja Wacyk (14 pages)

Court Proceedings

Certification – *Hospital Labour Disputes Arbitration Act* – Judicial Review – Representation Vote – Stay – The application for judicial review sought a review of the Board's determination that an interest arbitration award was not a "decision" for HLDAA purposes (see July 2004 *Highlights*) – The applicant (intervenor before the Board) sought a stay of the Board's decision ordering the counting of the ballots in this displacement application – The Court held that the applicant did not make out a strong *prima facie* case for judicial review nor was it satisfied the applicant had demonstrated it would suffer irreparable harm if the ballots were counted – Motion for stay dismissed

OTTAWA HOSPITAL, THE; RE THE PROFESSIONAL INSTITUTE OF THE PUBLIC SERVICE OF CANADA; RE OPSEU

PIPSC RE THE OTTAWA HOSPITAL; RE OPSEU; File No. 0372-04-R (Court File No. 378/04); Dated July 9, 2004; Panel: Swinton J. (1 page)

Duty to Bargain in Good Faith – Interference in Employer's Organization – Judicial Review – Remedies – The applicant, an independent employer in the elevator construction industry (and an intervenor in the Board proceeding) sought judicial review of the Board's decision ordering the trade union and the independent employers to forge new collective agreements providing for payment of industry fund to the NEEA (see Board decision at [2003] OLRB Reports March/April 248 – The Court upheld the Board's reasoning and found no fault with the remedy imposed – Application dismissed

June 24, 2004; oral reasons released July 20, 2004, O'Driscoll, Jennings and Swinton, JJ.

THYSSEN ELEVATOR LIMITED CARRYNG ON BUSINESS AS THYSSENKRUPP ELEVATOR; RE NATIONAL ELEVATOR AND ESCALATOR ASSOCIATION INTERNATIONAL UNION OF ELEVATOR CONSTRUCTORS AND OLRB; File No. 2087-01-U (Court File No. 410/03); Dated July 20, 2004; Panel: O'Driscoll, Jennings, Swinton JJ.(13 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
Maurice Leblanc v. TTC, and ATU, Local 113 Divisional Court No. 468/04	2326-00-U	Pending For SEPT HIGHLTS
Autoland Chrysler (1981) Ltd., Michael Leahey v. Teamsters Union, Local 879 Divisional Court No. 463/04	1151-03-R	Pending For SEPT HIGHLTS
Enka Contracting Ltd. v. UBCJA Divisional Court No. 448/04	0176-04-U; 0186-04-G; 0187-04-U	Pending For SEPT HIGHLTS
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 Ctre.** v. Queen in Right of MOL, et al Divisional Court No. 343/04	1721-02-ES	Pending
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
Atyourservice Corp. **Pape Rehabilitation & Wellness Ctre**. v. Victoria Blentzas, et al Divisional Court No. DC-04-002687-00	2801-02-ES	Abandoned June 23, 2004
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	2290-00-U	Pending – Nov. 16/04

Case name & Court File No.	Board File No.	Status
Divisional Court No. 2/04		
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 – 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	Pending – Oct. 7/04
Dawit Tuquabo v. USWA L 9597, Securitas Canada Ltd. Court File No. 03-DV-000935 – OTTAWA	2377-02-U	Pending
Greater Essex County District School Board Divisional Court No. 276/03	3398-00-R	Abandoned Aug.13/04
Windsor-Essex Catholic District School Board Divisional Court No. 277/03	3426-00-R	Abandoned Aug.13/04
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