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Ontario Labour Relations Board HIGHLIGHTS

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* Notice to Community *

PLEASE TAKE NOTICE of the following changes to the Board's Rules, forms and Information Bulletins, effective March 1, 2009:

A. RULES

21.5 [Amended]
The Director of Employment Standards must file a response to an application to review a compliance order issued under section 108 of the *ESA*, and must file a response to an application to review a Notice of Contravention issued under section 113 of the *ESA*. The response must comply with Rule 7.5 and Rule 21.4 and must be filed with the Board not later than twenty-one (21) calendar days before the hearing that is scheduled in the matter.

[This change moves the date for the Director to respond from 20 days after receipt of Confirmation of the Application from the Board, to 21 days prior to the hearing.]

37.1 [Amended]
A responding party who has filed a Request in compliance with Rules 35.1 and 35.2, must also file a response to the application with the Board not later than two days before the hearing. Before, or at the same time as filing its response, a responding party must deliver a copy of the response to the applicant and to any other responding party who has filed a Request.

[Information Bulletin 20 and Form C-38 are also amended to reflect the change that a response will be due not later than "two days before" the hearing, rather than "9:30 a.m. on the morning of" the hearing.]

B. STATUS DISPUTES IN CARD-BASED CERTIFICATIONS

The identification of individuals in dispute in **card-based certifications in the construction industry** will be processed by the Board as reflected in changes to Information Bulletin # 9 as follows:

Card-based: s. 128.1
Where there is a dispute about the employees listed (or not listed) on Schedule A, the union is usually directed to deliver to the employer and file with the Board its challenges (including any additions) to Schedule A no later than five (5) days from the date of the Board's decision directing a Regional Certification Meeting. The employer is to deliver to the union and file with the Board its position in reply to each of the union's challenges (including any proposed additions) within ten (10) days of that decision. Once the union has responded to Schedule A, neither party will be permitted to add to, or delete from, the list without agreement of the parties or leave of the Board. A Regional Certification Meeting will follow.

C. FORM A-72 RESPONSE TO APPLICATION FOR CERTIFICATION (CONSTRUCTION INDUSTRY)

Form A-72 (Response to Application for Certification - Construction Industry) will be revised effective March 1, 2009 to include the following item: "5a. List all unrepresented trades at work on the Application Filing Date." [see *Raymac Custom Homes* (3231-07-R: December 4, 2008)]

GENERALLY

The Board's Rules of Procedure December 2005 (Revised July 2006; January 1, 2008; March 1, 2009), reflecting the revisions to Rules 21.5 and 37.1, and the already implemented revision to Rule 41.1 [incorporating the *Colleges Collective Bargaining Act, 2008*] are available on-line, as are the Board's **2009 Annotated Rules of Procedure,** as well as the revised forms and information bulletins.

New Board Member

The Board is pleased to announce the appointment of **Carol Phillips** as union-side Board Member. Carol began her labour career as an elected CAW leader in the 1980's then moved through the ranks of CAW staff from a negotiator in various sectors to the Director of three departments to the Assistant to three CAW Presidents. She has served on the Executive of the CLC and OFL. Carol has also been on staff with the CLC, first as Head of the Women's Bureau, later as assistant to CLC President Bob White. Carol served as a senior advisor to Ontario Premier Bob Rae, with special responsibility for Agencies, Boards and Commissions.

Scope Notes

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

Certification – Delay – Employee – Status – The applicant attempted to revive an application for certification after more than three years of dormancy – The responding party pleaded prejudice and asked the Board to terminate the proceeding – The issue in dispute was whether two individuals who cast ballots in favour of the applicant were in fact the employees of the responding party, or another entity – There had been a third-party production order in 2005 that was apparently only partially fulfilled – The Board held that while the responding party was not responsible for and did not contribute to the delay, neither party should be solely accountable for the passage of time – Since the onus lies on the applicant to produce the challenged employees or otherwise prove its case, the delay worked to its detriment – No further production order will issue – Matter listed for hearing

BAY STAR HOMES LIMITED; RE UNIVERSAL WORKERS UNION, LIUNA, LOCAL 183; File No. 0492-04-R; Dated January 7, 2009; Panel: Marilyn Silverman (4 pages)

Construction Industry – Related Employer – Sale of a Business –The union alleged that Cadillac Fairview was bound by the provincial collective agreement because it was related to, or had purchased the business of, Cadco – The Board provided an extensive survey of the history and evolution of the various entities that ultimately became Cadillac Fairview – The Board found that, notwithstanding the numerous amalgamations, Cadillac Fairview continued to assemble and develop land while Cadco continued its existence as a general contractor – As there was no erosion of bargaining rights, the Board exercised its discretion not to grant s. 1(4) relief – No new company was created and no old company was extinguished – The Board also held there was no sale of business because no physical assets or employees were transferred to the employer when Cadco shut down – Applications dismissed

THE CADILLAC FAIRVIEW CORPORATION LTD., CF/REALTY HOLDINGS INC., QUEENSTON ROAD INVESTMENT INC., EASTGATE SQUARE HOLDINGS INC. and REDCLIFF REALTY MANAGEMENT INC.; RE INTERNATIONAL UNION OF PAINTERS AND ALLIED TRADES, LOCAL 1795; RE THE ONTARIO COUNCIL OF THE INTERNATIONAL UNION OF PAINTERS AND ALLIED TRADES AND INTERNATIONAL UNION OF LOCAL PAINTERS AND ALLIED TRADES, LOCAL 557; File Nos. 1732-06-R, 1811-06-R; 2869-06-R; Dated January 20, 2009; Panel: David A. McKee (11 pages)

Bargaining Unit – Certification – Charter of Rights and Freedoms – Certification – The IBEW applied to certify employees in the Facilities Project Management Department, one of eleven departments, of Casino Rama – The Employer objected to the bargaining unit because the Union was not registered under section 4(1.2) of the *Gaming Control Act, 1992*, and because the bargaining unit applied for was inappropriate – A majority of the Board held it did not need to determine the first issue in light of its finding on the appropriateness of the bargaining unit – The Board ruled that its general practice is not to certify departmental bargaining units because fragmentation could cause serious labour relations harm – The proposed bargaining unit employees shared a substantial community of interest with the Employer's other employees in terms of Human Resource Services, orientation, pay, benefits, compensation and benefit adjustments, overtime pay, vacation pay, holiday entitlements, shift and scheduling policies, breaks, meals, attendance management, performance reviews, and training and development – The department's

employees also intermingled with other employees – The majority held that the Union failed to discharge its onus of establishing that the departmental unit was appropriate – Application dismissed

CASINO RAMA SERVICES INC.; RE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS; File No. 0591-08-R; Dated January 13, 2009; Panel: Ian Anderson, and P. LeMay; S. McManus (21 pages)

Employee Status – Unfair Labour Practice – The union complained that the employer's unilateral transfer of its payroll staff out of the bargaining unit violated ss. 17, 70, 72, 73 and 76 of the Act – The employer's position was that the payroll staff were increasingly engaged in grievance administration, collective bargaining and policy development; in addition, the physical move of the Human Resources department to new premises required the entire staff to work together in an open area where privacy could no longer be guaranteed – The Board held that the union's efforts to grieve the employer's actions were not thwarted – Furthermore, the parties were able to bargain a new collective agreement satisfactory to both sides without a labour disruption – Commenting that the issue could have been handled differently by the parties, the Board nonetheless found no violations of the Act – Application dismissed

CITY OF BELLEVILLE; CANADIAN UNION OF PUBLIC EMPLOYEES AND ITS LOCAL 907; File No. 3537-07-U; Dated January 21, 2009; Panel: Patrick Kelly (9 pages)

Bias - Certification – Construction Industry – Membership Evidence – Natural Justice – Reconsideration – The employer sought reconsideration of a decision certifying the union, alleging that the Board had permitted the union to rely on membership evidence that was not submitted to the Board in a manner permitted by the Act or the Board's Rules, and that the Board had denied the employer natural justice when the Board failed to advise the employer of the union's alternative positions with respect to the membership evidence (the union filed two lists, one with 12 names and the other with 6 and said it would rely on the latter evidence if the employer claimed or the Board found that any of these individuals were in the bargaining unit) – The Board held that there is nothing in the Act or Rules that would preclude an applicant union from filing an additional list of persons it believes are not employees, together with membership evidence on their behalf, in case the responding party identified them as working in the bargaining unit on the application date – There was no denial of natural justice because the employer is required to provide a list of employees in the bargaining unit and that list cannot be affected by the union's estimate of the size of the bargaining unit or the quantum of membership evidence it files with its application – Similarly, there was no apprehension of bias – Request for reconsideration dismissed

FOUR SEASONS SITE DEVELOPMENT LTD.; RE UNIVERSAL WORKERS UNION, LIUNA, LOCAL 183; File No. 1804-08-R; Dated January 26, 2009; Panel: Harry Freedman (7 pages)

Certification – Bargaining Unit – Representation Vote – The union applied for certification of the employees in the employer's utilities department – The employer objected to the proposed bargaining unit because it was department-based, but did not propose another bargaining unit and did not provide notice under section 8.1 – The union won the representation vote but the post-vote hearing was adjourned on agreement of the parties when the panel expressed concern about the appropriateness of the bargaining unit – The union filed a second application for certification of the employer's operating engineers – The employer argued that the first application should be dismissed with a bar pursuant to s. 9 because the Board had determined that the bargaining unit was inappropriate – The Board held that applications with fewer than two employees are dismissed under section 9, which requires the Board to have already determined the appropriate bargaining unit – Once section 9 is satisfied, applications can only be dismissed under section 10(2) – The section 10(3) bar only applies to applications dismissed under section 10(2) – The Board held that the first application should not be dismissed at this time: the Board must first determine the appropriate bargaining unit in that application, and must ensure that those employees have the opportunity to vote – Submissions directed

GREENFIELD ETHANOL INC.; RE COMMUNICATIONS, ENERGY AND PAPERWORKERS UNION OF CANADA (CEP); File Nos. 1307-07-R; 2112-07-R; Dated January 15, 2009; Panel: Brian McLean (6 pages)

Bias – Employment Standards – Practice and Procedure – The employer applied to review two Orders to Pay, arguing that the responding parties were independent contractors and not employees – On the first day of hearing, the applicant left the proceeding before cross-examining one of the claimants despite a warning from Vice-Chair that

he did so at his own peril because the claimant was returning to Bermuda and would not be available for cross-examination at a further date – At the next day of hearing, the applicant requested an adjournment because one of the claimants was in Bermuda and unavailable for cross-examination, and because he had only retained counsel three days before the hearing – The Board denied the adjournment request, reminding the Applicant that he had forfeited his right of cross-examination by leaving the hearing early on the previous date; furthermore, the Board found that the Applicant had ample time to retain counsel in a more timely way – Once again the Applicant withdrew from the hearing – The Board concluded the hearing in the Applicant's absence – On the merits of the review, the Board held that both responding parties were employees and enjoyed the protections of the *Employment Standards Act* – One day after the hearing, the Applicant sent a written request for the Vice-Chair to recuse herself – The Board held that a recusal was inappropriate because the Applicant had failed to demonstrate a reasonable apprehension of bias; the grounds for the request involved discretionary procedural rulings or lacked a factual basis – The Board held: (1) the Applicant had not requested the exclusion of witnesses until testimony and cross-examination were completed; (2) as parties, each claimant was entitled to remain in the room during the other claimant's testimony; (3) there was no disadvantage to the Applicant arising from how the hearing was conducted; (4) the Applicant could have challenged witness credibility in argument but withdrew from the hearing – Applications dismissed

DAVID HALPIN; RE MARI-SOPHIA ENCARNACION AND THE DIRECTOR OF EMPLOYMENT STANDARDS; File Nos. 0409-07-ES; 0410-07-ES; Dated January 5, 2009; Panel: Tanya Wacyk (15 pages)

Reconsideration – Related Employer – The union sought reconsideration of a Board decision in which it declined to make a related employer declaration that arose in the context of a grievance before a private arbitrator – The union argued that in its original decision, the Board had characterized the underlying grievance as dealing exclusively with the issue of contracting out, but the Board failed to acknowledge that the grievance also dealt with personnel of the company doing bargaining unit work which resulted in the loss of regularly scheduled working time for bargaining unit employees – The union asserted that, absent a related employer declaration, it would be deprived of the opportunity to make submissions to the arbitrator regarding the loss of work as a potential violation of the collective agreement – Allowing the request for reconsideration, the Board held that where a union makes out the elements for a common employer declaration and demonstrates the mischief that such a declaration was designed to prevent, such a declaration should issue – Original Board decision varied – Related employer declaration made

NATIONAL STEEL CAR LIMITED; RE UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, LOCAL 7135; File Nos. 3561-06-R; 3562-06-U; Dated January 19, 2009; Panel: Patrick Kelly (5 pages)

Certification Where Act Contravened – Construction – Unfair Labour Practice – The Bricklayers and the Labourers both sought automatic certification, alleging that the employer held meetings with its employees and threatened them with job losses in the event the employer was certified – The Board held that equating certification with a loss of employment is a threat to the tenure or security of employment that is inherently coercive and intimidatory – Similarly, subsequent inquiries by the employer regarding contact from the union was part of a process that would lead employees to choose between their employer and continued employment as opposed to the union and unemployment – The Board held that the employer's actions in this case were such that the true wishes of employees could not be ascertained in a second vote – The abrupt end of the organizing campaign, and the content of letters from employees submitted to the Board in response to the unfair labour practice complaints, indicate that the employees made the connection between the union being certified and a loss of their jobs – Applications for certification granted

RIVERSTONE MASONRY INC.; RE BRICK AND ALLIED CRAFT UNION OF CANADA; RE TREVOR LOCKYER; DERRICK VAN DEN BERG; NELSON GOWER; JAMIE RUTTER; J. BRUCE BARCLAY; JASON VELDMAN AND MARK KLEYNL; File Nos. 1446-08-R; 1447-08-R; 1448-08-U; 1449-08-U; Dated January 26, 2008; Panel: David A. McKee (11 pages)

Certification – Constitutional Law – Construction Industry – Non-Construction Employer – LIUNA filed two applications for certification (industrial and construction) – The responding party argued that it was a federal undertaking and therefore governed by the *Canada Labour Code*, that its employees were

performing maintenance and not repair (hence, not construction) and, because of the nature of its work, that it was a non-construction employer under the Act – The Board held that the federal and provincial governments had reached agreement after 1995 for CN and CP to divest themselves of certain shortline, intra-provincial, rail lines; the work of the employer was "to" the rail lines, and did not pertain to the operation of the lines; therefore, the labour relations of the employer was governed by provincial legislation – The Board found further that the work of the employer was intended to "sustain and maintain" the rail system that would enable the system to operate efficiently; there was no breakdown of the system; and, since there was no "addition to" an existing facility, the work was maintenance and not construction – Finally, the Board ruled that it did not need to determine whether the employer was a non-construction employer, since such an application is premised on the existence of a collective bargaining relationship – Industrial certificate issued

SWIFT RAILROAD CONTRACTORS CORPORATION; LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA ONTARIO PROVINCIAL DISTRICT COUNCIL; File Nos. 4237-05-R; 0139-06-R; Dated January 27, 2009; Panel: Lee Shouldice; (26 pages)

Court Proceedings

Construction Industry Grievance – Estoppel – Judicial Review – The IBEW sought judicial review of a Board ruling that dismissed two grievances that alleged that certain work was construction and not maintenance, and had accordingly been performed under the General Presidents' Maintenance Agreement as opposed to the provincial ICI agreement – The Board had found that the union's representative had agreed that the impugned projects would be conducted as maintenance, so the IBEW was estopped from claiming relief for the work the Board found to be construction – On judicial review, the Court found the Board's decision was within the range of reasonableness – Application dismissed

Board decision reported at: [2008] OLRB Rep. November/December 1043

JACOBS CATALYTIC INDUSTRIAL SERVICES LIMITED, ET AL; RE IBEW, LOCAL 353; Board File Nos. 2127-05-G; 3437-05-G (Court File No. 66/08); Dated January 27, 2009; Panel: Jennings, Swinton and Low, JJ. (3 pages)

Health and Safety – Judicial Review - Practice and Procedure – The applicant sought review of a Board decision dismissing his complaint under s. 50 of the *Occupational Health and Safety Act* – The Court found the Board's original decision and its disposition of the applicant's multiple reconsideration requests were eminently reasonable – Further, the Board's ruling on the applicant's adjournment request following opening statements was also a reasonable exercise of the Board's discretion – In addition, the applicant failed to explain his six-year delay in filing the application for judicial review – Application dismissed

Board decision not reported

MOHAMED KHAN; RE ROYAL ALLIANCE AND OLRB; Board File No. 2153-01-OH (Court File No. 461/08); Dated January 21, 2009; Panel: Jennings, Bellamy and Little, JJ. (3 pages)

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 Ontario Workplace Tribunals Library, 7th Floor, 505 University Avenue, Toronto.

Pending Court Proceedings

Case name & Court File No.	Board File No.	Status
Complex Services Divisional Court No. 623/08	4028-06-R	Pending
Pre-Steve Foods Divisional Court No. 1730/08 **LONDON**	1676-08-U	Pending
MacKenzie Construction Group Divisional Court No. 532/08	1096-08-R	Pending
Schuit Plastering & Stucco Divisional Court No. 537/08	0210-08-R	Pending
Mohamed C.Z. Khan Divisional Court No. 461/08	2153-01-OH	Dismissed Jan. 21/09
Dr. Peter Khaiter Divisional Court No. 431/08	4045-06-U et al	Pending
Christian Labour Association of Canada Divisional Court No. 382/08	3798-05-R; 3958-05-U	May 20, 2009
Lorraine Fraser Divisional Court No. 1719 **LONDON**	0059-06-ES; 0061-06-ES	Pending
Comfort Hospitality Inc. Divisional Court No. 344/08	2573-07-ES	Pending
Govin Misir v. S. Lalgudi Vaidyanathan et al Divisional Court No. 566/07	2966-03-ES; 3389-03-ES; 3390-03-ES	Pending
LIUNA v. Barclay Construction et al Divisional Court No. 310/08	0837-06-R	Pending
LIUNA, Local 183 (PineValley Enterprises) Divisional Court No. 201/08	0910-07-R	Pending
BCC Constructors v. International Union of Painters Divisional Court No. 138/08	3174-06-R	Pending
IBEW Local 353 v. Jacobs Catalytic Ltd. Divisional Court No. 66/08	2127-05-G; 3437-05-G	Dismissed Jan. 29/09
Ottawa Fertility Centre v. Ontario Nurses Association, OPSEU, CUPE Local 4000, Ottawa Hospital and OLRB Divisional Court No. DV-08-1394 **OTTAWA**	1531-06-PS	Pending
Ottawa-Carleton Public Employees Union (CUPE), Local 503 v. City of Ottawa et al Divisional Court No. DC-09-00001471-0000 **OTTAWA**	1386-06-R	Pending
Jacobs Catalytic Ltd. v. IBEW Local 353 et al Divisional Court No. 117/07 Court of Appeal C49737	3737-05-U	Dismissed – June 4, 2008; C.A. April 22, 09
Janet Kitson v. OLRB et al Divisional Court No. 492/06	4205-02-U	Pending
Abduraham, Abdoulrab v. Novaquest Finishing Court of Appeal No. C48942	2222-04-ES, 2223-04-ES, 2224-04-ES	Heard January 27, 2009 – reserved