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Ontario Labour Relations Board HIGHLIGHTS

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HOLIDAY SEASON BOARD SCHEDULE

Please see the Attached Notice to the Community.

Scope Notes

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

Bargaining Rights – Certification – Construction Industry – The Painters applied to certify employees of the respondent pursuant to s.128.1 of the Act – The Respondent and Intervenor sought to have the application dismissed because on the application filing date the Painters still held bargaining rights for the unit of employees – The unit was the subject of a termination application filed during the open period – The ballots in the termination were counted on the date of filing of the application for certification, and the Painters lost the vote – By decision one week later, the Painters' bargaining rights were terminated – The next day, the Board dealt with the instant application for certification, finding that it was appropriate to exercise its discretion pursuant to s. 111(3)(b) of the Act and finding that the application for certification was timely – Certificates were issued – LIUNA subsequently sought reconsideration and intervenor status in the matter – The Board found that LIUNA had the right to intervene, reconsidered its decision and revoked the certificates – The issue before the Board was whether the Painters' application should be dismissed because they still held bargaining rights on the date of application for certification – The Board found that the Painters filed a valid application for certification in the context of knowing that they were shortly to have their bargaining rights terminated, and that the application was properly treated under s. 111(3)(b) of the Act – Matter continues

BIGGS & NARCISO CONSTRUCTION SERVICES INC; RE THE INTERNATIONAL UNION OF PAINTERS AND ALLIED TRADES, LOCAL 1891; RE LIUNA, LOCAL 1059, TIM SCOTT; File No. 1307-10-R; Dated November 18, 2010; Panel: Marilyn Silverman (7 pages)

Certification – Interim Order – ETFO applied to represent a bargaining unit of designated early childhood educators – CUPE intervened in the application, asserting that it represented the DECEs in an all employee unit covered by a subsisting collective agreement – The status of the DECEs was the subject of an on-going grievance between CUPE and the school board in which the arbitrator had denied ETFO status to intervene – The issue for the Board was whether it should determine if the employees affected by the application for certification are covered by a collective agreement, or if an arbitrator should make that decision – ETFO asked for an interim order that would have the Board ask CUPE and the school board to adjourn their grievance pending the outcome of the application for certification – The Board held that its jurisdiction to determine the issue was parallel to the arbitrator's, with neither being superior to the other; the Board is not bound by any arbitration award – A proceeding before the Board best

protects the natural justice rights of all the parties, including the employees, so the Board chose not to defer to arbitration – Interim ordered dismissed; matter continues

DISTRICT SCHOOL BOARD OF NIAGARA; RE ELEMENTARY TEACHERS' FEDERATION OF ONTARIO; RE CUPE; File No. 1958-10-R; Dated November 9, 2010; Panel: Brian McLean (8 pages)

Certification – Construction Industry – Employer – Unfair Labour Practice – In this card-based application for certification, the applicant asserted that three workers were employed by the responding party and two employees were terminated due to union activity – Evaluating employer status through the factors enumerated in *York Condominium Corporation*, the Board held that fundamental control should be determined within an overall context – The Board determined that the respondent did not have control over the workers nor was it responsible for paying them; the workers were employed by a subcontractor – The Board found that the subcontractor was not employed by the respondent, rather that the respondent was just one of the subcontractor's good customers – The subcontractor, like many others in the construction industry, relied heavily upon a principal client – The Board also found that in response to organizing activities the respondent put the subcontractor in a "you or them" situation which led the subcontractor to terminate the employment of two of the employees – Accordingly, the union was successful in proving that the responding party had violated the Act – Ultimately, the Board found the union did not have sufficient membership support; and the application for certification was dismissed

MIMICO GROUP INC; RE INTERNATIONAL UNION OF PAINTERS AND ALLIED TRADES, LOCAL 1891; File No. 3887-07-R; Dated November 17, 2010; Mark J. Lewis (12 pages)

Employment Standards – The Board considered the criteria for establishing wilful misconduct that would disentitle an employ from receiving termination and severance pay – The applicant employee sought review of an ESO's refusal to award him payment, having found that the employee's incarceration was a product of his own misconduct – The employee argued he was absent against his will, and his circumstances prevented him from being able to call-in his absence, a violation of an explicit company rule – The Board rejected the suggestion articulated in the Ministry of Labour's policy manual that the mere failure to follow a company rule was sufficient to deprive the employee of his or her entitlements under the ESA: the failure must be the result of an intentional action, conscious, deliberate and defiant of the employer's authority – Equally, the employment relationship was not frustrated because the employee's failure to comply with the rule did not seriously interfere with his job duties, and neither his absence nor his inability to call-in could be said to be voluntary – Application allowed

REA INTERNATIONAL INC. O/A ATLAS FLUID SYSTEMS AND DIRECTOR OF EMPLOYMENT STANDARDS**;** RE HARPAL SINGH; File No. 2499-09-ES; Dated November 18, 2010; Panel: Ian Anderson (16 pages)

Certification – Practice And Procedure – Representation Vote – In this application for certification, an issue arose regarding whether or not the failure to segregate ballots should cause the Board to exercise its discretion to order a second vote – The applicant failed to provide its scrutineer with a list of challenges at the vote; consequently, the voters' list used did not note the applicant's challenges – The applicant subsequently signed off certifying that the balloting was conducted fairly – At the Regional Certification Meeting, the parties agreed on the status of five individuals whose names appeared on the applicant's list of challenges, but whose ballots had not been segregated; the parties agreed that three of those individuals were not employees in the bargaining unit – The vote was counted at 83 against the applicant and 81 for, meaning the three ballots of the non-employees could be determinative of the application – Second vote ordered

ROYAL VICTORIA HOSPITAL; RE SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 1 CANADA; File No. 2222-10-R; Dated November 23, 2010; Panel: Ian Anderson (7 pages)

Conflict of Interest – Duty of Fair Representation – The applicant claimed that the trade union had breached its duty of fair representation when it refused to pursue her termination grievance to arbitration – Previous to the applicant's discharge, the Local had filed suit against the applicant for defamation in an unrelated incident – The applicant was granted representation by the National union and a favourable legal opinion was prepared – The Local union representative intervened and fresh evidence was acquired which was not shared with the author of the previous legal opinion; instead it

was given to a new author and an unfavourable opinion was produced – All parties were able to address the membership at the grievance arbitration vote but no mention was made by the local rep of the contradictory legal opinion; a vote of the membership was held and it was decided that arbitration was not appropriate given the circumstances – The Board held that there was a conflict of interest between the applicant and the Local union due to the pending law suit and that the Local union had breached their duty of fair representation when there was no mention by the Local union of the legal opinion favourable to the applicant nor were any actions taken to distinguish the two opinions at the membership vote – Application allowed; Board ordered the grievance to arbitration

SHERYL ANNE TOOP; RE CANADIAN UNION OF PUBLIC EMPLOYEES AND CUPE LOCAL 1974; File No. 3581-09-U; Dated November 8, 2010; Panel: Patrick Kelly (7 pages)

Certification – Employer Support – Unfair Labour Practice – The Board was asked to determine whether the employer violated sections of the Act, in particular s. 15, when it made contact with and solicited the advances of the Canadian National Federation of Independent Unions to ensure that the ongoing campaign by the Plumbers did not meet with success – The Board found that the employer violated sections 70, 72 and 76 when it conducted a captive audience meeting with its employees, furnished the employees with the CNFIU's contact information, and spoke disparagingly (and threateningly) about the company's future should the Plumbers succeed – The Board then considered the two lines of authority that its case law had developed regarding the interpretation of s. 15, *viz.* whether knowledge of employer support needed to be imputed to the union to derail an application for certification – The Board held that there need not be evidence of collusion between an employer and trade union – Even absent an awareness of employer support, if an objective assessment of the circumstances allows the Board to conclude that the trade union cannot be reasonably said to be the freely designated representative of the employees, s. 15 will be violated – Declarations granted – Application for certification by CFNIU dismissed – Other matters continue

SUPERIOR BOILER WORKS & WELDING LTD.; RE CANADIAN NATIONAL FEDERATION OF INDEPENDENT UNIONS; RE OPTC; PLUMBERS LOCAL 67 AND LOCAL 787; File No. 1480-08-R; Dated November 25, 2010; Panel: Lee Shouldice (20 pages)

COURT PROCEEDINGS

Construction Industry Grievance – Judicial Review – The union sought review of the Board's interpretation of the term "working conditions" in the collective agreement – The Board found that the employer's requirement that workers wear metatarsal safety boots were an enhanced safety policy and not an "exceptional" working condition – The Court held that the Board's contextual approach to its interpretation of the collective agreement was reasonable – Application dismissed

AECON INDUSTRIAL, A DIVISION OF AECON CONSTRUCTION GROUP INC. AND OLRB; RE IBEW LOCAL 105; OLRB File No. 3626-08-G (Court File No. 87/10); Dated November 19, 2010; Panel: Ferrier, Molloy and Herman 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
Pharma Plus Drugmarts Divisional Court No. 551/10	0579-08-R 0580-08-R 1662-09-R	Pending
SNC-Lavalin Divisional Court No. 482/10	2442-07-R 2936-07-R	Pending
Mr. Shah Islam v. J. Ennis Fabrics Divisional Court No. 506/10	1786-09-ES	Pending
Elzbieta Olszewska Divisional Court No. 494/10	0870-09-U	Pending
Greater Essex Catholic District S.B. Divisional Court No. 462/10	3122-04-G	Pending
Rainbow Concrete (Mark Corner) Divisional Court No. 437/10	2904-09-U 2905-09-FC 3292-09-M	Pending Stay Nov. 25, 2010
Ontario Power Generation Divisional Court No. 322/10	0264-09-G	Pending
John McKenney v. Upper Canada District S.B. Divisional Court No. 10-DV-1652 **Ottawa**	2687-08-U	Pending
Rainbow Concrete Divisional Court No. 856-10 **Sudbury**	3292-09-M	Pending
Dr. Peter A. Khaiter v. OLRB et al Divisional Court No. 383/10	0290-08-U 0338-08-U	Pending
Rainbow Concrete Divisional Court No. 850-10 **Sudbury**	2904-09-U 2905-09-FC	Pending
Mr. Todor Pandeliev v. OLRB Divisional Court No. 10-DC-1594 **Ottawa**	3279-08-ES	Pending
AECON Construction Group v. IBEW, Local 105 Divisional Court No. 87/10	3626-08-G	Dismissed Nov. 19, 2010
Independent Electricity System Operator v. Canadian Union of Skilled Workers, LIUNA et al Divisional Court No. 78/10	3322-03-R 2118-04-R	October 21 & 22, 2010 - Reserved
K.A.S. Group of Companies v. Metro Waste Paper Recovery Divisional Court No. 611/09	0723-08-R 1037-08-R	December 17, 2010
Pro Pipe Construction v. Norfab Metal and Machine Divisional Court No. 408/09	2574-04-R	Pending
Blue Mountain Resorts v. MOL Divisional Court No. 373/09	1048-07-HS 0255-08-HS	April 20, 2011
Roy Murad v. Les Aliments Mia Foods Divisional Court No. 291/09	1999-07-ES	Pending
Greater Essex County District School Board v. IBEW, Local 773 et al Divisional Court No. 212/09	1776-04-R et al	Adjourned *sine die*
Dr. Peter A. Khaiter v. OLRB et al Divisional Court No. 431/08	4045-06-U et al	Pending
Comfort Hospitality Inc. o/a Days Inn v. Director Employment Standards et al Divisional Court No. 344/08	2573-07-ES	Pending
L.I.U.N.A. v. Barclay Construction et al Divisional Court No. 310/08	0837-06-R	Pending
Janet Kitson v. OLRB et al Divisional Court No. 492/06	4205-02-U	Pending