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Ontario Labour Relations Board HIGHLIGHTS

Editors: Voy Stelmaszynski, Solicitor
Leonard Marvy, Solicitor

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Recent Appointments

The Board is pleased to welcome:

James Hayes, as a full-time Vice-Chair. A founding member of Cavalluzzo Hayes Shilton, Mr. Hayes practised before the Board for over 35 years. He is a graduate of the U of T Law School and the Industrial and Labour Relations School at Cornell University. He is certified as a specialist in labour law by the Law Society of Upper Canada and is a past Chair of the Labour Law Section of the Canadian Bar Association, Ontario.

Theodore (Ted) McDermott, as a part-time Vice-Chair. Mr. McDermott was a senior partner at Osler Hoskin & Harcourt prior to his retirement from the firm in 2009, when he became a mediator and arbitrator. In practice, he represented numerous private and public sector employers before various labour relations tribunals, arbitration boards, government committees and in the courts. He served as Chair of the Provincial and National Labour Sections of the Canadian Bar Association.

Roy O'Rourke, as full-time Board Member. Mr O'Rourke joins the OLRB as a management-side Board Member. He had a long career at the Construction Safety Association of Ontario, where he was most recently the CEO and General Manager.

Scope Notes

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

Employment Standards – The employee sought to overturn the findings of an ESO disentitling her to a wage differential based on inadequate notice of a change in her pay rate – The employee had been employed with the employer for a period exceeding ten years; the notice of pay reduction took effect three weeks after its issuance; the employee argued the notice period should have been eight weeks, and wanted the difference; she argued that the reduction in pay constituted constructive dismissal; she did not resign from employment – The Board held that the employee would have been entitled to termination pay at her original rate if she had resigned in the face of the pay reduction – By not resigning, she forfeited any entitlement to notice or equivalent pay – Application dismissed for not making out a case for the orders or remedies requested

ADITYA BIRLA MINACS WORLDWIDE INC. o/a ADITYA BIRLA MINACS AND DIRECTOR OF EMPLOYMENT STANDARDS; RE MARCELLE SHAYDA; File No. 2000-10-ES; Dated May 16, 2011; Panel: Ian Anderson (4 pages)

Duty to Bargain in Good Faith – Unfair Labour Practice – OPSEU alleged that during bargaining the Art Gallery of Ontario did not disclose all information pertaining to funding for the reconstruction of the Gallery's Learning Centre and how that funding could lead to layoffs in the bargaining unit – OPSEU also claimed that the AGO accelerated the timing of layoffs after the union objected to the layoffs taking place during bargaining – The AGO denied any violation of the Act and asked the Board to exercise its discretion not to inquire into the complaint – The Board held there was no labour relations rationale to inquire into the first part of the complaint: the parties had reached a collective agreement in spite of OPSEU's suspicions, they had relatively stable labour relations, and they were not likely to face another expansion project as collective bargaining was, or was about, to take place – On the second issue, the Board found that there was labour relations rationale for inquiring into OPSEU's allegation of the accelerated layoffs – The Board found that OPSEU's allegations made out a *prima facie* case of a violation of section 70 of the Act – Because the first phase of the layoff schedule was implemented before the collective agreement was reached and because ten employees suffered lost work opportunities as a result of the accelerated layoffs, this portion of the complaint would warrant further inquiry by the Board – Matter continues

ART GALLERY OF ONTARIO; RE OPSEU; File No. 3975-09-U; Dated May 5, 2011; Panel: Patrick Kelly, P. LeMay, S. McManus (7 pages)

Evidence – Health and Safety – The responding parties brought a motion to strike certain pleadings of the applicants which relied on transcripts of recordings, surreptitiously taped telephone conversations between some of the individual responding parties – The applicants argued there should be no reasonable expectation of privacy because the conversations took place over a public line and in addition were or could have been overheard by third parties standing near one of the conversants – The Board held that the evidence sought to be adduced was relevant and, subject to any claims about authenticity, the best evidence as to what was said – Illegally obtained evidence is not, per se, inadmissible – Motion denied – Matter continues

BRIGHTON COURT APARTMENTS c/o REALSTAR MANAGEMENT, BRUCE MAKI, WENDY NASON MAKI, PAUL HALOWATY AND DEBORAH WARREN LOGAR; RE SHAWN MARC AMERLINCK AND MICHAEL-JOHN KNOBLAUCH; File No. 1169-10-OH; Dated May 24, 2011; Panel: Ian Anderson (8 pages)

Construction Industry Grievance – Employer – Health and Safety – The union alleged the responding party violated the collective agreement when it barred the union's representatives from attending at its job site – The responding party acknowledged barring the representatives because the union refused to provide it with an approved registration as required by the *Occupational Health and Safety Act* – The responding party argued that the union is an "employer" and its representatives attend the job sites as "workers" – Although the collective agreement provides that representatives shall have access to working areas, the responding party argued that complying with the contract would violate a direct order of a health and safety inspector – The Board found that the registration form related to "constructors" and "employers engaged in construction" – The union representatives, like others authorized by law to access the site (police, firefighters, municipal or health and safety inspectors), are not there at the behest of the constructor, nor under the constructor's direction or control – These "employers" are not bound to complete the OHSA form – Grievance allowed

CANTRETROT INVESTMENT LIMITED; H & R DEVELOPMENTS AND/OR; RE UNIVERSAL WORKERS UNION, LIUNA, LOCAL 183; RE TORONTO RESIDENTIAL CONSTRUCTION LABOUR BUREAU; File No. 0268-11-G; Dated May 11, 2011; Panel: Harry Freedman, John Tomlinson, Alan Haward (6 pages)

Duty to Bargain in Good Faith – Order for Productions – Unfair Labour Practice – AMAPCEO alleged that the Crown had violated s. 17 of the Act when it failed to disclose to AMAPCEO a "secret" agreement to compensate OPSEU bargaining unit members in addition to the amounts published in the parties' signed collective agreement – During the course of the hearing, a confidentiality order was made relating to documents produced – The Crown sought a further permanent confidentiality order with respect to two letters that spelled out the "confidential compensation agreement" and were marked as exhibits in the proceeding – The Crown and OPSEU both argued that the absence of a permanent confidentiality order for the two documents would cause significant labour relations harm – The Board weighed the request for confidentiality against the open court principle – Having already ruled that the allegations of fact, if proven, would constitute a case for some remedial relief, the Board saw no reason to restrict AMAPCEO's ability to refer to the

documents publicly – Request denied; matter continues

CROWN IN RIGHT OF ONTARIO (AS REPRESENTED BY THE MINISTRY OF GOVERNMENT SERVICES); RE ASSOCIATION OF MANAGEMENT, ADMINSTRATIVE AND PROFESSIONAL CROWN EMPLOYEES OF ONTARIO; RE OPSEU; File No. 3711-09-U; Dated May 3, 2011; Panel: Diane L. Gee (14 pages)

Certification Where Act Contravened – Intimidation and Coercion – The union alleged that the responding employer and named individuals violated sections 70, 72, and 76 of the Act – The union requested relief under section 11 of the Act – The union asserted that the employer fired eight employees after the employer learned that the union was obtaining signed membership cards – The employer denied that it had violated the Act and claimed that the layoffs were due to a shortage of work – The Board found that the employer violated the Act when it laid off the employees for exercising protected rights under the Act and it hindered the employees' right to select or be represented by a trade union – The Board ordered the certification of the union under section 11 of the Act, as no other remedy would sufficiently counter the effects of the violation – The Board added that it would remain seized to determine any compensation to employees and ordered the employer to post copies of the decision and a Notice to Employees about the decision in the workplace

FINN WAY GENERAL CONTRACTORS INC., DAVID KARIMI, JEFF BEDARD, PAT OUELETTE AND FRANK BISIGNANO**;** RE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 1669; File Nos. 0816-09-R; 0819-09-U; Dated May 19, 2011; Panel: Marilyn Silverman (19 pages)

Employment Standards – The employer applied to review an Employment Standards Officer's order for compensation for violation of the post-pregnancy reinstatement provisions – The employer led evidence to show that it was bound by the settlement of other litigation to eliminate the complainant's position – The Board held that the Act does not require the termination of another person's employment in order to comply with the obligation to reinstate to comparable employment – The Act is designed to protect employees on leave, not to provide greater rights to employees who go on leave than to other employees – Application allowed; order rescinded

JUST ENERGY CORP.; RE BALDEESH (LISA) DHILLON AND DIRECTOR OF EMPLOYMENT STANDARDS; File No. 0893-10-ES; Dated May 19, 2011; Panel: Brian McLean (4 pages)

Employment Standards – The employer sought review of an order for wages and compensation, the employment standards officer having found that the employee was entitled to overtime and was victim of a reprisal – The evidence revealed that the employee and his co-workers were dissatisfied with their wage rate and working conditions, and staged a work refusal to demand their rectification – The Board was persuaded that no overtime was owing to the employees – The Board held further that engaging in (or orchestrating) a work stoppage was wilful misconduct or wilful neglect of duty, and not an exercise of rights under the Act – Application allowed; orders rescinded

ONTARIO LINE CLEARING & TREE SERVICES LIMITED O/A ONTARIO LINE CLEARING & TREE SERVICE; RE GYULA BOGNAR AND DIRECTOR OF EMPLOYMENT STANDARDS; File No. 1531-10-ES; Dated May 19, 2011; Panel: Patrick Kelly (8 pages)

Health and Safety – The employer appealed an order from a health and safety inspector requiring it to comply with the training programs for surface mine operations – The employer grows, harvests and processes sedge-grass peat – The employer and the Ministry were at odds regarding the compass of the definition of "surface mine" – The Board found that the operation of the employer had no relation to the supply of material for construction, industrial or manufacturing purposes, therefore it could not be captured by the impugned definition – Appeal allowed; orders rescinded

ZEPHYR PEAT LAND HARVESTING; RE JAMES MILNE, INSPECTOR; File No. 2841-09-HS; Dated May 4, 2011; Panel: Lee Shouldice (4 pages)

Court Proceedings

Health and Safety – Judicial Review – Blue Mountain sought review of a Board decision finding that the employer had violated the *Occupational Health and Safety Act* by failing to report the death of a guest who drowned in an unsupervised swimming pool at the resort – The Board had upheld the health and safety inspector's finding that a "person" included a guest and a "workplace" included the pool – On review, the Court agreed that the word "person" should be construed in its ordinary meaning and encompasses more than just workers – Conditions and hazards that result in the death of a non-worker could cause similar harm to workers – The Court held, however, that the Board's interpretation of "workplace" was unnecessarily broad and conflated the proprietary interests of the applicant with the statutory definition of workplace – Overall, the Board's decision was not unreasonable – Application dismissed

Board decision reported at [2009] OLRB Rep. March/April 203

BLUE MOUNTAIN RESORTS LIMITED; RE RICHARD DEN BOK, THE MINISTRY OF LABOUR AND THE OLRB; RE CONSERVATION ONTARIO; OLRB File Nos. 1047-07-HS; 0255-08-HS (Court File No. 373/09); Dated May 18, 2011; Panel: J. Wilson, Swinton and Low JJ. (7 pages)

Duty of Fair Representation – Judicial Review – The applicant sought judicial review of the Board's decision (and reconsideration) dismissing her s. 74 complaint – The Court found that the applicant was merging two issues: the university's decision to terminate her and the union's conduct in failing to adequately challenge the discharge – The Court held that the Board's finding that the union met its statutory obligation was reasonable – Further, there was no denial of natural justice or procedural fairness – Application dismissed

ELZBIETA OLSZEWSKA; RE UNITED STEEL, PAPER AND FORESTRY, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION LOCAL 1998, AND THE GOVERNING COUNCIL OF THE UNIVERSITY OF TORONTO AND OLRB; OLRB File No. 0870-09-U (Court File No. 494/10); Dated May 9, 2011; Panel: Jennings, Ferrier and Aston JJ. (4 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
Ineke Sutherland o/a Designworks Divisional Court No. 238/11	4061-10-ES	Pending
Dr. Peter A. Khaiter v. OLRB et al Divisional Court No. 213/11	0816-10-U 0817-10-U	Pending
Humber River Regional Hospital v. SEIU Divisional Court No. 101/11	1092-09-R 1132-09-R 1133-09-R	Pending
SNC-Lavalin Divisional Court No. 78/11	1405-03-R	October 25, 2011
Promark-Telecon Inc. v. Universal Workers Union, L. 183 Divisional Court No. 600/10	0745-09-R 0754-00-R 0765-09-R 0782-09-R	Pending
Dean Warren v. National Hockey League Divisional Court No. 587/10	2473-08-U	Pending
Roni Excavating Limited, et al v. IUOE, Local 793 Divisional Court No. 580/10	1991-10-R	June 13, 2011
Richard Hotta (Proteus Craftworks) v. Mahamad Badiuzzaman, et al Divisional Court No. 613/10	1953-07-ES	Pending
Pharma Plus Drugmarts Divisional Court No. 551/10	0579-08-R 0580-08-R 1662-09-R	June 30, 2011
SNC-Lavalin Divisional Court No. 482/10	2442-07-R 2936-07-R	October 14, 2011
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	Dismissed May 9, 2011
Greater Essex Catholic District S.B. Divisional Court No. 462/10	3122-04-G	June 2, & 3, 2011
Rainbow Concrete (Mark Corner) Divisional Court No. 437/10	2904-09-U 2905-09-FC 3292-09-M	Sept. 12 & 13, 2011
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	3292-09-M	Sept. 12 & 13, 2011
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	2904-09-U 2905-09-FC	Sept. 12 & 13, 2011
Independent Electricity System Operator v. Canadian Union of Skilled Workers, LIUNA et al Divisional Court No. 78/10	3322-03-R 2118-04-R	Granted – Feb. 18, 2011 Seeking leave to appeal to C.A.
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	Dismissed May 18, 2011 Seeking leave to appeal to C.A.

Case name & Court File No.	Board File No.	Status
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	November 9, 2011
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