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Ontario Labour Relations Board HIGHLIGHTS

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November 2011

Peter Gallus, Director/Registrar
Catherine Gilbert, Deputy Director/Registrar

The Board is very pleased to announce that **Peter Gallus** and **Catherine Gilbert** have been permanently appointed, respectively, to their positions as Director/Registrar and Deputy Director/Registrar of the Board.

DUTY OF FAIR REPRESENTATION:
Fire Protection and Prevention Act, 1997

PLEASE TAKE NOTICE that as of December 1, 2011, pursuant to s. 46.1 – 46.5 of the *FPPA, 1997*, duty of fair representation complaints may be made to the Board. Forms A-29 & A-30 and Information Bulletins 11 & 12 will be amended accordingly.

Scope Notes

The following are scope notes of some of the decisions issued by the Ontario Labour Relations Board in October of this year. These decisions will appear in the September / October 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.

Discharge for Union Activity – Interim Relief – Unfair Labour Practice – The union made an application for an interim order for the reinstatement of two employees – It was argued that these employees were discharged because of their involvement in an organizing drive – The employer agreed that the employees in question were involved in the organizing drive, but argued that they were each dismissed for causes unrelated to their union activities – One employee had been chronically late, was not able to use the employer's time clock system properly, did not effectively supervise his workers, and had made a serious error in a customer's order – The other employee had a habit of being unable to follow her work schedule and had been involved in a physical dispute with a customer – The Board noted that despite the possible misconduct of the terminated employees, there appeared to be a causal relationship between the employees' involvement in the union's organizing campaign and their discharge – The Board considered that there had been no serious discipline for the alleged misconduct until the organizing drive – The two employees that had been terminated had signed up 24 of 32 new union members – The Board found that the union may suffer irreparable harm in terms of its organizing campaign and in obtaining a vote that is reflective of the true wishes of the employees if interim relief of reinstatement was not granted – The balance of harm favoured granting the order – The Board reinstated the two individuals pending the resolution of the unfair labour practice complaint and ordered the employer to post a copy of the decision and a Notice to Employees about the decision in the workplace

EUROPEAN QUALITY MEATS AND SAUSAGES; RE UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, LOCAL 175; File No. 2068-11-M; Dated October 12, 2011; Panel: Patrick Kelly (8 pages)

Certification – Construction Industry – Reasonable Apprehension of Bias – Unfair Labour Practice – The Vice-Chair presiding over this strongly contested matter resigned to assume a position as counsel to the Carpenters – Given the lengthy number of days of hearing already having taken place the Chair of the Board authorized the Vice-Chair to continue presiding over the matter pursuant to s. 110(7) of the Act – The employer wrote alleging a reasonable apprehension of bias – The Board set out that historically Vice-Chairs have been drawn almost exclusively from the private practice of labour and employment law and that the mere interchange of Vice-Chairs between private practice and the Board has never been found to form the basis of a reasonable apprehension of bias – The Chair reviewed the fact that Vice-Chairs do not have lifetime appointments (ten years by the Government of Ontario Appointees Directive) and that there has been and is to be expected interchange between the private practice of law and the Board – The Board found that no right-minded person having informed him/herself about labour law in Ontario can reasonably apprehend bias solely because the Vice-Chair comes from and practised in the labour law field, either previous to his or her appointment or because they will return or have returned to that practice subsequent to that appointment – The Board found the employer's argument, that a Vice-Chair who is asked to continue to preside over a hearing would be incapable of fairly adjudicating such a hearing simply because the Vice-Chair works for a trade union as unreasonable and rejected it – The Board noted that s. 110(7) existed for this purpose, there was nothing exceptional about this situation and that the consequences of the employer's position would be unreasonable – Motion dismissed – Matter continues

ISLINGTON NURSERIES LIMITED; RE UNIVERSAL WORKERS UNION, LIUNA LOCAL 183; File Nos. 2567-09-U; 2771-09-R; Dated October 17, 2011; Panel: Bernard Fishbein (5 pages)

Employment Standards – Discharge – The employer applied for review of an Employment Standards Officer's determination that it owed termination pay in lieu of notice – The company policy in place provided for the retention of an employee's seniority and recall rights for eighteen months in the event of layoff – The employee received a letter described as a "required written notice of termination/indefinite layoff" – Nine months later, the employer sent the employee another letter asking the employee to choose whether he would receive his severance pay or defer receiving the payment and maintain his seniority and recall rights – The employee chose to receive his severance pay at that time – This claim was filed two months later – The employer submitted that the initial letter constituted notice of termination and thus no termination or vacation pay was owed – It argued that based on the plain language of the Act, where an employer lays an employee off without specifying a recall date, the layoff is considered to be a termination when it exceeds a "temporary layoff" – The Board found that the employee was terminated pursuant to section 56(1)(c) of the Act, when his layoff lasted longer than the period defined by the Act as a temporary layoff – Furthermore, s. 56(5) of the Act deemed the termination to have occurred on the first day of the lay-off – The Board found that the initial letter given to the employee stated that it was a written notice of termination pursuant to the Act – The Board did not read the Act as precluding non-union employers from "setting off" the notice period in the same circumstances as their unionized counterparts where they give notice of termination prior to a layoff without a recall date or "indefinitely" – The Board found that the initial letter constituted the requisite notice of termination and that the employer did not owe any termination pay – Application granted

MERIDIAN LIGHTWEIGHT TECHNOLOGIES INC.; RE MIKE RADAN AND DIRECTOR OF EMPLOYMENT STANDARDS; File No. 3536-10-ES; Dated October 27, 2011; Panel: Christine Schmidt (9 pages)

***Crown Employees Collective Bargaining Act* – Duty to Bargain in Good Faith – Essential Services –** The parties disagreed about whether a valid essential services agreement (ESA) within the meaning of CECBA existed – The union had requested a no board and the Minister's delegate declined to issue one in circumstances where the parties did not agree that a valid ESA was in place – The Board set out a number of undisputed facts which included, among others: the parties had a collective bargaining relationship of over 30 years; they had executed ESAs on several prior occasions that invariably declared that there were no classifications which would qualify as being "essential services"; the March 11 letter signed by the parties was entitled "Essential Services Agreement (as required by CECBA, 1993) and was identical to the one signed in 2007; the Minister issued a no board without objection from

Metrolinx in 2007; and the concern was not raised until August 30, 2011, the same day the union requested a no board – The Board first noted that it is very difficult to accept that any party should be permitted to justify a fundamental change in position by simply declaring that it signed a foundational labour relations document "with a valid but mistaken belief" in its legitimacy – Secondly, regarding the argument that the parties cannot contract out of the Act, the Board found that the parties had reached a valid ESA – The Board found the March 11 letter could not have been less unambiguous; that it had been reached on several occasions in the past; that there was never a suggestion it was deficient; that its language implicitly included both essential and emergency services; and finally that the ability of the parties to apply under s. 38 of the Act to amend the agreement, while only referring to essential service, must also incorporate "emergency" services, as the opposite conclusion would make no sense – The Board found the parties to be bound to a valid essential services agreement – Declaration made

METROLINX; RE AMALGAMATED TRANSIT UNION, LOCAL 1587; File No. 1955-11-M; Dated October 3, 2011; Panel: James Hayes (12 pages)

Alteration of Jurisdiction – Construction Industry – Practice and Procedure – Reconsideration – Unfair Labour Practice – The Local Union filed a request with the Chair that this matter be reconsidered by a panel of three Vice-Chairs, not including the Vice-Chair who wrote the original decision – The Chair reviewed the principles underlying the Board's reconsideration powers and its jurisprudence, including its policy of having the same panel that decided the matter determine the reconsideration – The Board found this request to be an invitation to a second level of decision-making that was neither consistent with the Board's jurisprudence nor helpful in the advancement of labour relations in the province – The Chair saw no reason to depart from the general jurisprudence because of a bias allegation, which was made one year ago (addressed extensively by the Vice-Chair at that time) and the hearing proceeded on the merits with the bias decision never having been challenged – Finally, the Chair found the bias allegation to be without any merit – Matter referred to the original Vice-Chair for reconsideration

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA; RE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL UNION 1256; File No. 2922-09-U; Dated October 26, 2011; Panel: Bernard Fishbein (6 pages)

Court Proceedings

Construction Industry Grievance – Judicial Review – Timeliness – On judicial review by the School Board of the Board's decision finding the Board could arbitrate a referral to arbitration made beyond the time limits in the collective agreement, the Court found that the applicable standard of review is reasonableness – The Court noted the timelines in this case were extraordinarily long – In 2004, a grievance was filed by the Union 4.5 months after the 14 day deadline for the referral of a matter to arbitration outlined in the governing collective agreement – The Board adjourned the matter *sine die* pending a determination of whether the School Board was a related employer because of an earlier merger with another school board, which had a collective agreement with the Union – A decision in 2006 found the School Board to be a related party and that bargaining rights were preserved within the geographic jurisdiction of the predecessor employer – In 2009, the Board found that the grievance was arbitrable and accepted the referral of the grievance to arbitration – The Board found that although the grievance was clearly untimely in terms of the collective agreement, the matter was arbitrable because the arbitration process was not part of the Grievance Procedure and there were no mandatory time limits that apply to the referral; the arbitration process was integrated with and a part of the Grievance Procedure and thus, subsection 48(16) applied; and because of the discretion given to the Board sitting as arbitrator under subsection 133(1) and (4) of the Act – The Court concluded that the grievance was not arbitrable because of terms found in the parties' collective agreement and the principles found in *Leisureworld* – Specifically, the late filing of the grievance to arbitration exceeded the mandatory time limits stipulated in the governing collective agreement – The Court found that a plain reading of the terms of the collective agreement made the time limits mandatory – As well, the Court found that the provisions respecting referral to arbitration were not directory only – There were clear consequences outlined if the timelines are not met because when the grievance timelines expired, there was nothing to refer to arbitration, and the Board had no jurisdiction to proceed – The Court found that the Board had overstated the principle of when mandatory language may

become directory and disagreed with the Board's statement that the failure to specify a consequence in the collective agreement for non-compliance with a clause will result in an otherwise mandatory clause becoming directive – The Court found that whether a given time limit or procedural requirement is directory or mandatory will "turn on the construction of each agreement" – The Court also found that the alternative interpretation of the Vice-Chair that section 48(16) of the LRA may be employed to extend the time for referring the grievance at issue to arbitration was unreasonable and distinguished the case at hand from *Leisureworld* and *James Bay* – The Court finally found that the interpretation proposed, that s. 133 of the OLRA would also provide the Board with a "superpower" permitting it to override and extend the time for referral of a grievance to arbitration beyond the time frame stipulated in the parties' collective agreement, was unreasonable as it would contradict the principle that direct referral to the Board is meant to promote speedy resolution of disputes – As well, it would be unreasonable as it would be contrary to precedent that allows the Board to shorten time limits in a collective agreement, but not to extend time limits – The Court also concluded that this interpretation would create an uncertain, two-tiered system of arbitration – The Court quashed both the jurisdiction decision and the arbitration decision – Application allowed

GREATER ESSEX COUNTY DISTRICT SCHOOL BOARD; RE UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, LOCAL 552, AND THE ONTARIO LABOUR RELATIONS BOARD; Board File No. 3122-04-G (Court File No. 462/10); Dated October 7, 2011; Panel: Wilson J., Smith J., and Hoy J. (24 pages)

Judicial Review – Intervenor – Natural Justice – Related Employer – The CAW brought an application for judicial review regarding the Board's decision to confirm a settlement between the UFCW and the employers with respect to a related employer application– The settlement recognized Rexall and Pharma Plus as related employers and declared the UFCW the sole collective bargaining agent for all Rexall employees in Ontario – The CAW represented Pharma Plus employees in the Ottawa region and had also attempted to organize Rexall employees in that region – The CAW was not notified of the settlement and requested the Board reconsider its decision – The Board denied the CAW's request on the grounds the CAW had no direct interest in the settlement as it did not represent any Rexall employees at that time – The Board did however allow submissions on reconsideration from employees at a Rexall store in Ottawa and subsequently excluded them from the settlement – The CAW asserted the Board erred in not providing it with notice of the settlement and in finding it had no direct interest in the settlement – The CAW submitted its interest in the settlement stemmed from three facts: (1) it represented Pharma Plus employees in the Ottawa area for many years; (2) its members' rights may be threatened by the expansion of Rexall stores at the expense of existing Pharma Plus stores; and (3) it had entered into a letter of understanding with the employer regarding the terms which would apply if the CAW was successful in organizing at an Rexall store in Ottawa – The Court ultimately held in favour of the CAW and found the Board erred in failing to provide the CAW with notice of the settlement and in its determination the CAW required a direct existing interest to receive such notice – The Court reasoned notice is part of the core of natural justice and the right to notice does not depend on the existence of vested rights – Instead, the potential effect of a legal proceeding on a third party may be sufficient to trigger the right to notice – The Court reviewed the jurisprudence regarding the right to notice within the labour context and found support for these principles – The Court found the CAW was potentially affected by the Board's decision because the settlement limited the CAW's future representation rights and potentially undermined the CAW's existing vested relationships – Such potential effects were deemed sufficient by the Court to warrant the CAW receiving notice and status as an intervener in the Board's proceeding – In the alternative the Court held the letter of understanding between the CAW and the employer was sufficient to establish the CAW's direct vested interest in the settlement – The Court quashed the Board's decision and deemed the settlement between the UFCW and the employer to have no force or effect – Application allowed

PHARMA PLUS DRUGMARTS LTD. ET AL; RE CAW-CANADA; Board File Nos. 0579-08-R; 0580-08-R; 1662-09-R (Court File No. 551/10); Dated October 4, 2011; Panel: Wilson J., Thomas, J., and Ferrier J (18 pages)

Judicial Review – Procedural Fairness – Vale asked the court to quash the Board's ongoing proceeding as, after hearing some evidence

adduced through oral examination and cross examination, the Board directed the parties to file will say statements, and allowed them to expand on the will say statements with a further thirty minutes of examination in chief with cross examination – On the record the court was unable to conclude that the measures adopted by the Board would result in the prospect of a real unfairness – Application dismissed

VALE INCO LIMITED; RE UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, LOCALS 6500 AND 6200 AND THE OLRB; Board File No.3033-09-U (Court File No. 451/11); Dated October 31, 2011; Panel: Pardu, Dambrot and Harvison Young 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
Vale Inco Limited v. United Steelworkers Divisional Court No. 451/11	3033-09-U	Dismissed Oct. 31/11
René Gagné v. Algoma University College Faculty Divisional Court No. 11-1764 **Ottawa**	0460-10-U	Pending
Greater Essex County District S.B. Divisional Court No. 403/11	1004-08-M	Pending
Sanford Pensler, A Director of Korex Don Valley ULC et al v.CEP L. 132 et al Divisional Court No. 328/11	0598-10-ES	Pending
John McCredie v. OLRB et al Divisional Court No. 1890/11	1155-10-U	Pending
Classic POS Inc. Divisional Court No. 301/11	4059-10-ES	Pending
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	December 20, 2011
SNC-Lavalin Divisional Court No. 78/11	1405-03-R	October 25, 2011 reserved
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
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	Granted Oct. 4/11, Seeking leave to appeal to C.A.
SNC-Lavalin Divisional Court No. 482/10	2442-07-R 2936-07-R	October 14, 2011 Dismissed/decision pending
Mr. Shah Islam v. J. Ennis Fabrics Divisional Court No. 506/10	1786-09-ES	Pending
Greater Essex Catholic District S.B. Divisional Court No. 462/10	3122-04-G	Granted Oct. 7/11 Seeking leave to appeal to C.A.
Rainbow Concrete (Mark Corner) Divisional Court No. 437/10	2904-09-U 2905-09-FC 3292-09-M	Sept. 12 & 13, 2011; Reserved
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; Reserved
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; Reserved

Case name & Court File No.	Board File No.	Status
Independent Electricity System Operator v. Canadian Union of Skilled Workers, LIUNA et al Divisional Court No. 78/10 Court of Appeal No. C53992	3322-03-R 2118-04-R	Pending – 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 Court of Appeal No. C54427	1048-07-HS 0255-08-HS	Pending – C.A.
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