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Ontario Labour Relations Board HIGHLIGHTS

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APPOINTMENTS

Larry Steinberg

The Board is very pleased to welcome Larry Steinberg, who has been appointed a part time Vice Chair of the Board effective April 18, 2011. Larry is both a graduate of Dalhousie Law School (where he taught labour law for several years) and the Harvard Law School. He practised labour law for almost 30 years and left private practise at the beginning of this year to pursue a private arbitration and mediation practice. Larry regularly and frequently appeared before the Board, other tribunals and the courts during his career and is known to many in the community.

Scope Notes

The following are scope notes of some of the decisions issued by the Ontario Labour Relations Board in April of this year. These decisions will appear in the March/April 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 – Construction Industry – Practice and Procedure – Related Employer – Unfair Labour Practice – IBEW applied for certification with six cards naming ABC as the responding party – After receiving the response by ABC stating it had no employees, IBEW sought leave to amend its application to change the name of the responding party to ABC Electric – The union filed a second application naming ABC and/or ABC Electric as the responding party – ABC Electric filed a list of six names in its response to both applications – After the Regional Certification Meeting the union requested that the Board issue an interim certificate (pending the resolution of other issues), which the responding parties objected to – Given that each possible outcome of the first and second application could lead to ABC Electric being certified, the Board examined whether it should exercise its discretion to issue an interim certificate – First, the Board decided that even if the first application was dismissed, any bar imposed would not be against ABC Electric; second the Board had no concerns with the two sets of membership cards supplied by the applicant; and finally, the obligation to conclude a collective agreement which flows from the interim certificate does not provide a valid reason for the Board to refuse to exercise its discretion – Interim Certificate Issued – Matter continues

1168768 ONTARIO INC. C.O.B. AS ABC PLUMBING HEATING & ELECTRICAL; RE International Brotherhood of Electrical Workers, Local 586; RE 1702786 Ontario Inc.; File Nos. 3811-10-R; 3930-10-R; 4154-10-R; 3907-10-U; 0041-11-U; Dated April 18, 2011; Panel: Mark Lewis (8 pages)

Certification – Construction Industry – Trade Union – After finding that the Restoration Council of Ontario (RCO) was a council of trade unions within the meaning of sections 1(1) and 126(1) of the Act, the Board addressed the issue of whether a council of trade unions could have individuals as members – The Board first noted that although the Act defines a trade union as an organization of employees, the case law does not require that it must be an organization of only employees, and that the same reasoning ought to be applied when

determining whether an organization is a council of trade unions – The Board went on to find that a council of trade unions once certified is a "trade union" within the meaning of the Act, and that together with s. 12(3) contemplates the possibility of a certified council of trade unions having individuals as members – Finally, if an organization of employees can be a trade union, and an organization of trade unions, once certified, can be a trade union, then surely one entity that encompasses both employees and unions can also be a trade union – Certification granted

A.A.F. CONSTRUCTION; RE The Restoration Council of Ontario; File No. 3948-10-R; Dated April 6, 2011; Panel: Harry Freedman (7 pages)

***Colleges Collective Bargaining Act* – Duty of Fair Representaiton – Practice and Procedure –** The applicant, an employee of the Colleges, made an application under the *Labour Relations Act* asserting that OPSEU had violated s. 74 – OPSEU and the College submitted that the Board had no jurisdiction to hear the complaint since it was filed under the LRA, rather than the CCBA – Pursuant to Rule 40.5 the Board found it advisable to allow the filing to be amended – There was no purpose in dismissing the application: although it was filed on the wrong form, the obligation on the union is the same and the substance of the complaint would have been the same – Furthermore were the complaint dismissed, the applicant could just file again on the proper form and while the time period lapse would be significant, OPSEU and the College could not point to any prejudice, since they would have known the substance of the complaint – Additionally, notwithstanding a long delay (46 months), the Board found the length of the administrative delay and the resulting waning of memories was not the fault of the Board, rather it was a joint effort of the applicant, the College, the union and the Board – The Board noted that it was the College (not the responding party union) bringing the abuse of process motion, and that it, like most responding parties to litigation, was almost certainly of the view that as long as the applicant was not interested in proceeding with the complaint, it was happy to let it languish – Quite simply, if the College wanted the application to proceed it could have simply written to the Board – Matter continues

CENTENNIAL COLLEGE OF APPLIED ARTS AND TECHNOLOGY; RE Adhin Sukhu; Ontario Public Service Employees Union; File No. 2980-07-U; Dated April 5, 2011; Panel: Lee Shouldice (7 pagaes)

Certification – Construction Industry – Employee – Status – On the application filing date the individuals at issue worked less than the majority of the day doing the work of a construction labourer, and the remainder of the day they performed non-construction work for the employer at different sites – The Board first noted that the *Gilvesy* test is used to determine which trade/bargaining unit a worker is in on the application date, if there is a dispute about which trade the employee was working on that date – The Board found that the non-construction work performed by the employees in dispute was covered by separate and distinct provisions of the Act, and that in this particular circumstance there was no more reason to have regard to what the employees in dispute did when they left the construction job site to do non-construction work than there would be in the case of employees who were sent home – The Board found the individuals to be employees in the bargaining unit – Matter continues

JAMWOOD DEVELOPMENTS INC.; CINELLI QUADRA GROUP LTD.; CINELLI, MARIO IN TRUST; CINTREX PROPERTY MANAGEMENT INC.; SURREY CONSTRUCTION INC.; A-MOTION ACCESSIBLE LIFESTYLE SOLUTIONS; A & M WOODWORKING; MAR JAM INVESTMENTS LTD. AND SURREY PLAZA LIMITED; RE Labourers' International Union of North America, Ontario Provincial District Council; File No. 1333-10- R; Dated April 6, 2011; Panel: Charles E. Humphrey (8 pages)

Evidence – Practice and Procedure – Termination – Unfair Labour Practice – The employer sought production of notes, which was resisted by the union on the basis of litigation privilege and confidential relationship privilege, taken by a union representative during a meeting, shortly after Dennee (an individual dismissed by the employer) had a discussion with the employer's principal, Scott – Dennee alleged that Scott told him he could get his job back if he could arrange to get all his friends to vote against the union and Scott denied ever asking Dennee to exercise his influence over the other employees – There was no dispute that the notes could constitute cogent and relevant evidence concerning the issues in dispute – On a review of the principles underlying confidential relationship privilege the Board found the key feature was that the communication occur in the

context of an employee seeking advice from a union representative concerning an issue to which the union is obligated to give serious consideration – While the meeting between Dennee and the union representatives may have involved a discussion of his dismissal and the possibility of a grievance, the employer was not interested in this information and any references to it may be redacted from the notes – Another possible purpose of the meeting may have been to describe what just occurred in Dennee's discussion with Scott – Given that there was no evidence suggesting that Dennee was seeking advice from the union about how his conversation with Scott might assist him in his termination application (or any grievance), the Board could not see how a confidential relationship privilege existed – The Board found no connection between Dennee's dismissal and the application for termination, as they were fundamentally not the same litigation, and accordingly whatever litigation privilege may have existed did not extend to the application for termination of bargaining rights – As neither privilege attached, given the cogency and relevance of the notes, the Board ordered production – Matter continues

LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 247; ONTARIO PROVINCIAL DISTRICT COUNCIL; RE Debbie Gibson; File Nos. 2494-09-R; 2668-09-R; Dated April 11, 2011; Panel: Patrick Kelly (8 pages)

Court Proceedings

Employment Standards – Judicial Review – The Court found the Board's conclusion that the applicant's employment was terminated for wilful disobedience was a reasonable one – Application Dismissed

Todor Pandeliev, RE Ontario Labour Relations Board; Board File No. 3279-08-ES; (Court File No. 10-DC-1594); Dated April 7, 2011; Panel: Hackland R.S.J., Ferrier, and Bryant JJ. (3 pages)

Civil Claim – Rainbow Concrete asserted a tort claim (misfeasance in a public office) for damages against a Vice-Chair of the Board relating to his conduct in a number of proceedings before the Board – One decision had already been the subject of an unsuccessful judicial review by Rainbow Concrete and two more were still pending before Divisional Court – The Court found the claim to be an abuse of process as it was a collateral attack on the Board's decision – The Court also found that the pleadings failed to adequately plead the material facts necessary to support the tort of misfeasance in public office – Finally, the court, while not deciding the matter on this issue, found the defendant's arguments about the extension of judicial immunity to a Vice-Chair, while acting in his or her adjudicative capacity to be persuasive – Statement of Claim was struck without leave to amend

RAINBOW CONCRETE; RE Ian Anderson and International Union of Operating Engineers ; (Court File No. CV-10-409024-0000) Dated April 12, 2011; Panel: Justice Conway (2 pages)

Construction Industry Grievance – Judicial Review – The Board had decided that OPG, although not the direct employer, was exercising power in respect of the grievor's employment when it banned him from its sites, that its actions came within the scope of the EPSCA Agreement, and that it had to establish that those actions met the standard of the Agreement (see [2010] OLRB Rep. March/April 298) – The Court found this was a preliminary ruling on the arbitrability of the grievance, noted that the Court does not generally entertain judicial review of a preliminary ruling while a proceeding is pending before a tribunal and was not persuaded there were any exceptional circumstances to deviate from that in this case – Application was quashed as premature

ONTARIO POWER GENERATION INC.; RE United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada ; Board File No. 0264-09-G (Court File No. 322/10); Dated April 18, 2011; Panel: Low J., J. Wilson J. , and Swinton J. (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
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	Pending
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	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	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
Ontario Power Generation Divisional Court No. 322/10	0264-09-G	Dismissed April 18, 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
Mr. Todor Pandeliev v. OLRB Divisional Court No. 10-DC-1594 **Ottawa**	3279-08-ES	Dismissed April 7, 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	1048-07-HS	April 20, 2011

Case name & Court File No.	Board File No.	Status
Divisional Court No. 373/09	0255-08-HS	
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