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Ontario Labour Relations Board HIGHLIGHTS

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NOTICE TO COMMUNITY

Please be advised that the Ontario Labour Relations Board will neither schedule nor hold hearings between **December 23, 2013 and January 3, 2014** inclusive. Matters of an urgent nature, however, may be scheduled on an expedited basis as determined by the Board, during this period. Applications will be processed in the usual manner on the dates that the Board is open for business, including: December 23, 24, 27, 30 and 31 2013 and January 2 and 3, 2014.

Please note the default dates and hearing schedule for s. 133 grievance referrals over the holiday season.

Thank you for your attention to the above. Please have a safe and very happy Holiday Season.

DATE REFERRAL FILED	*HEARING DATE*
December 9, 2013	January 6, 2014
December 10	January 6
December 11	January 7
December 12	January 7
December 13	January 8
December 16	January 8
December 17	January 9
December 18	January 9
December 19	January 10
December 20	January 10
December 23	January 13
December 24	January 13
December 27	January 14
December 30	January 14
December 31	January 15
January 2, 2014	January 16
January 3	January 17

NEW VICE-CHAIR

The Board is pleased to welcome **Eli Gedalof** as a full time Vice Chair of the Board. Eli was appointed to the Board as a full time Vice Chair in November, 2013. Prior to joining the Board, he was a partner in the law firm Sack Goldblatt Mitchell LLP, and was a co-chair of the OLRB Advisory Committee. Since 2005, he has been the contributing editor of the text *Ontario Labour Relations Board Law and Practice*. He graduated from McGill University in 1998 and completed his law degree at the University of Victoria in 2002, before completing a clerkship with the judges of the Ontario Court of Appeal. While in practice, his work focussed on construction industry and OLRB matters.

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 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.

Certification – Construction Industry – Practice and Procedure – Representation Vote – The Board held a three-way vote (IUOE, CLAC and no union) arising from two applications for certification filed on the same day – The vote results were four in favour of the IUOE; two for CLAC; two "No Union"; and one ballot was segregated – Given that a determination of whether to count the segregated ballot would result in another vote in any event (given the Board's long-standing practice not to open a single sealed ballot in situations where it would reveal the voter's choice), the Board decided to have a run-off between the two unions – The Board reasoned that a majority of those who voted were in favour of union representation (six), whereas only two voted for no union – Accordingly pursuant to s. 111(6) the Board eliminated the choice with the fewest votes cast – Matter continues

1187855 ONTARIO INC. O/A CLARIDA CONSTRUCTION & MAINTENANCE; RE: International Union of Operating Engineers, Local 793; Construction Workers Local 52, affiliated with the Christian Labour Association of Canada; OLRB File Nos. 0944-13-R; Dated October 15, 2013; Panel: John D. Lewis (7 pages)

Construction Industry Grievance – Collective Agreement – In the context of a "New Transition Agreement" made up of the amalgam of a Memorandum of Agreement between EPSCA and the Union and the old collective agreement between Hydro and the Union, the parties were disputing whether Hydro One must lay off employees by seniority within the geographic jurisdiction of the affected local union (the Union's position) or whether lay-offs may occur according to the geographic areas of Hydro One's Area Construction Managers (or "by project" defined by Hydro One) – After reviewing the relevant documents and the parties' arguments, the Board noted that none of the documents make any reference to the application of geographical areas assigned to Hydro One Area Construction Managers as the basis for determining seniority for lay off – The Board further noted that these geographic areas could be changed unilaterally by Hydro One at any time effectively rendering seniority nugatory – The Board found no support for Hydro One's position in the language of the relevant documents and also noted that such an interpretation would expose employees to an arbitrary loss of seniority rights due to unilateral actions by an employer which runs contrary to a long line of Canadian arbitral jurisprudence – The Board then addressed Hydro One's alternative argument (basing lay offs on "specific work projects" developed by Hydro One) and noted that the term "project" is not defined in the relevant article and that the term is used loosely in different ways in many different articles – The Board found that it must give the term "project" a meaning that makes labour relations sense and that reflects the intention of the parties as disclosed by the relevant documents and that such a meaning can neither read provisions out of the collective agreement nor operate to restrict seniority in the absence of clear language to the contrary – The Board found it could not adopt an interpretation that would restrict seniority rights in the absence of clear language, which language Hydro One had failed to satisfy the Board existed – Individual grievances to be determined on the merits, if necessary

HYDRO ONE INC.; RE: Labourers' International Union of North America, Local 1059; RE: Electrical Power Systems Construction Association; OLRB File Nos. 3257-10-G; 3408-10-G; 0983-12-G; 1985-12-G; 3281-11-G; 1497-12-g; 1498-12-G; 1500-12-G; 1531-12-G; and 2796-12-G; Dated September 18, 2013; Panel: Jack J. Slaughter (30 pages)

Certification – Construction Industry – Membership Evidence – Local 568 sought to add the names of thirteen individuals to the "Schedule A" list filed by Marcomm – All thirteen individuals were supplied to Marcomm by a third party subcontractor, Poitras Electric – The individuals were referred to Poitras Electric by the IBEW and Poitras Electric employed them in accordance with the IBEW Principal Agreement, to which it was bound – The issue was whether the thirteen individuals can simultaneously be in the Poitras Electric bargaining unit and the proposed bargaining unit of employees of Marcomm for the purposes of a certification application – Local 568 argued that absent a section 1(4) declaration, the Board may invoke the doctrine of "common employer" established at common law to find an individual is employed by two entities at the same time – Local 568 also argued Marcomm was the "true employer" of the individuals and Poitras Electric was merely a sham or front for Marcomm – Marcomm disagreed with this analysis and argued that membership evidence filed on behalf of the thirteen workers cannot be relied upon for the purposes of an application for certification in the construction industry because an individual cannot be in more than one bargaining unit on the application filing date – The Board held that the

names of the thirteen individuals could not be added the Schedule "A" list – The Board's jurisprudence indicates an individual already represented by a trade union and working under the applicable collective agreement on the filing date cannot also, at the same time, be part of a proposed bargaining unit of employees of a different employer – The Board did not find any evidence of a sham to support a derogation from its normal course; Marcomm and Poitras Electric appeared to be engaged in a legitimate subcontracting relationship – Application dismissed

MARCOMM SYSTEMS GROUP INC.; RE: International Brotherhood of Electrical Workers, Local 586; OLRB File No. 3159-12-R; Dated October 23, 2013; Panel: Lee Shouldice (23 pages)

Bar – Conciliation – Remedies – Timeliness – The issue was whether the displacement application, filed three months after the most recent conciliation meeting and twenty-eight months after the appointment of the conciliator, was untimely as a result of section 67(1) of the Act – The Board noted that two purposes of the Act are to facilitate collective bargaining and to allow employees to freely choose their bargaining agent – The Board further commented that the Act does not contain a provision that clearly and unambiguously mandates that the conciliation process must come to an end, however it would be absurd to read the Act as permitting the parties to indefinitely stall the collective bargaining process at a point in time when no collective agreement has been achieved and the employees are unable to either change bargaining agents or terminate the existing bargaining agent – Furthermore such an interpretation is inconsistent with the general scheme of the Act and would undermine two of the most significant, if not the paramount, purposes of the Act – The issue then is how to interpret section 67 of the Act so as to ensure that the conciliation process has an end that is consistent with the purposes of the entire Act – First, the Act contains a number of provisions designed to require the parties to work through the collective bargaining process with dispatch – Second, the bar on displacement and termination applications exists to allow parties to have an opportunity to negotiate a collective agreement without having to fear that an application will be filed that will derail the entire process and also as a mechanism to provide incentive to the parties to get on with the process – Combined, there is a very fine balance built into the Act – Therefore, in order for this application to have been untimely, it must have been reasonable for the parties to have extended the conciliation officer's deadline for reporting to the Minister – However, in this case, it was not reasonable to extend the deadline as the parties had not made any progress towards achieving a collective agreement and there was no reasonable expectation of the parties concluding a collective agreement in the near future – Accordingly, the displacement application was timely – Matter continues

REAL STUCCO INC.; RE: The International Union of Painters and Allied Trades, Local Union 1891; RE: Labourers International Union of North America, Local 183; OLRB File No. 0219-13-R; Dated: October 1, 2013; Panel: Diane L. Gee (19 pages).

Intervenor – Jurisdictional Dispute – Related Employer – Standing

Local 1891 sought intervenor status in an application for a related employer declaration filed with the Board – Rule 40.8 provides that the Board may add a party to any proceeding before it, as the Board considers advisable – In this case, Local 1891 sought intervenor status because it has a collective agreement with the instant employer that covers painters and that the employer has assigned asbestos abatement, mould remediation and lead removal work to members of Local 1891, in accordance with that collective agreement – Therefore, Local 1891 sought to intervene in the interpretation of the scope of the Demolition Agreement between Local 506 and the Ontario Association of Demolition Contractors signed by the instant employer – The applicant disagreed, arguing that the Demolition Agreement is a longstanding collective agreement bargained pursuant to the Ministerial Designation relating to demolition, and that Local 1891 ought not to have standing to challenge the Demolition Agreement merely because it includes an overlap with respect to the performance of asbestos abatement work – The recognition provision of the Demolition Agreement however was an issue because it appeared to encompass more than just construction labourers – Therefore, as section 1(4) of the Act is discretionary, even if all of the statutory prerequisites for a related employer declaration are established, Local 1891 ought to be able to make submissions on whether granting the relief sought would likely result in jurisdictional litigation, a factor the Board may consider in determining whether to grant a section 1(4)

application – As such, the Board granted Local 1891 intervenor status – Matter continues

THE BEARSTAR GROUP INC.; RE: Labourers' International Union of North America, Ontario Provincial District Council; and Labourer's International Union of North America, Local 506; RE: RBG Environmental Inc.; Ron Boyko Group Inc. o/a RBG Inc.; RE: Meridian Construction Inc.; RE: The International Union of Painters and Allied Trades, Local 1891; OLRB File No: 1388-13-R; Dated October 4, 2013; Panel: Lee Shouldice (6 pages)

Certification – Construction Industry – Timeliness – LIUNA sought to certify all construction labourers employed by Valard in all non-ICI sectors in Board Area 8 – CUSW and Valard challenged LIUNA's application as untimely because their collective agreement remained in force and applied to "all employees engaged in construction", including construction labourers – LIUNA had three arguments in response: (1) the CUSW/Valard collective agreement did not contain a construction labourer classification, such that construction labourers were not covered by that agreement; (2) a separate agreement between LIUNA and CUSW precluded CUSW from representing construction labourers, and as a result construction labourers could not be covered by the Valard collective agreement; and (3) when LIUNA referred construction labourers to Valard, a labour requirements provision in the CUSW/Valard collective agreement deemed that the terms and conditions therein would not apply, and this had the effect of removing the referred construction labourers from the CUSW bargaining unit – The Board held that the application was untimely – The Board held that the absence of a construction labourer classification did not result in a finding that construction labourers employed by Valard were not encompassed by the broadly-worded bargaining unit description contained in the CUSW/Valard collective agreement – The Board's jurisprudence also indicated that a private arrangement between two unions could not have any effect on the scope of bargaining rights secured under a collective agreement – The alleged agreement between CUSW and LIUNA, therefore, could not narrow the scope of the bargaining rights CUSW achieved in its collective agreement with Valard – Lastly, the Board held that although the terms and conditions of the CUSW/Valard collective agreement did not apply when the labour requirements provision was triggered, this did not remove construction labourers employed by Valard from the CUSW bargaining unit, it simply made their work subject to the terms and conditions of a different agreement – Application dismissed

VALARD CONSTRUCTION LP; RE: Labourers' International Union of North America, Ontario Provincial District Council; RE: Canadian Union of Skilled Workers; OLRB File Nos. 3073-12-R and 3574-12-U; Dated October 25, 2013; Panel: Harry Freedman (14 pages)

COURT PROCEEDINGS

Employment Standards – Judicial Review – Rainbow sought judicial review of the Board's finding that it had terminated the employment of Lentir in part in reprisal for his assertion of rights under the ESA [*Rainbow Concrete Industries Limited v. Lentir*, 2012 CanLII 58233 (ON LRB)] – The court found it was well within the range of reasonable outcomes for the tribunal to conclude that the termination was, in part, a reprisal – Given that the termination was found not to be a justified response to an unauthorized purchase, it was reasonable for the tribunal to conclude the termination was in part a reprisal – Finally, the damages awarded were also found to be well within the range of reasonable outcomes – Application dismissed

RAINBOW CONCRETE INDUSTRIES LTD.; Claude Lentir; Director of Employment Standards; OLRB File No. 2692-06-ES; (Court File No. 925/13); Dated October 7, 2013; Panel: F.Marrocco, G. Pardu and A. Harvison Young; (5 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
Jefferson Mendonca Divisional Court No. 478/13	2146-10-U 0006-13-R	Pending
DH General Contracting Inc. Divisional Court No. 13-DV-1966	1820-12-R 3025-12-G	Pending
Neivex et al. Divisional Court No. 416/13	0441-13-R	Pending
Merc Electrical Limited Divisional Court No. 437/13	0452-13-G	Pending
Nadalin Electric Company (Ontario) Inc. Divisional Court No. 498/13	0615-13-R	Pending
Sysco Fine Meats of Toronto a division of Sysco Canada Inc Divisional Court No. 414/13	3484-11-R	Pending
Godfred Kwaku Hiamey Divisional Court No. 345/13; 346/13	2906-10-U 3568-10-U	Pending
Gate Gourmet Canada Inc. Divisional Court No. 276/13	3688-11-U	Pending
Charles W. Colhoun Divisional Court No. 293/13	0260-12-U	January 8, 2014
Robert Pardy Divisional Court No. 2004/13 **(London)**	0501-12-ES	November 26, 2013
Signature Contractors Windsor Inc. Divisional Court No. 231/13	3315-12-R 3316-12-R 3317-12-R	Pending
Biggs & Narciso Construction Services Inc. Divisional Court No. 181/13	1307-10-R	January 30, 2014
Weihua Shi Divisional Court No. 158/13	0273-10-ES	November 8, 2013
Rail Cantech Inc. Divisional Court No. 127/13	1506-12-U	November 21, 2013
Durval Terciera, et al Divisional Court No. 520/12	1475-11-U	Allowed (Seeking Leave to CA)
Bur-Met Construction Divisional Court No. DC-12-010	3893-11-R	January 31, 2014
Albert Tsoi v. UNITE HERE Divisional Court No. 330/12	3908-09-U	Pending

IBEW, Local 894 Divisional Court No. 321/12	3174-09-U	December 9, 2013
EllisDon Corporation Divisional Court No. 310/12	0784-05-G	Allowed Seeking Leave to CA
EllisDon Corporation Divisional Court No. 309/12	2076-10-R	Pending
Hassan Hasna Divisional Court No. 83/12	3311-11-ES	Pending
Rainbow Concrete Industries Limited Divisional Court No. 925/13 **(Sudbury)**	2692-06-ES	Dismissed
Landmart Building Corp. Divisional Court No. DC 12-346JR (**Hamilton)**	2519-11-R	Week of February 24, 2014
John McCredie v. OLRB et al Divisional Court No. 1890/11 (**London)**	1155–10–U	Pending
Dr. Peter A. Khaiter v. OLRB et al Divisional Court No. 213/11	0816–10–U 0817–10–U	Dismissed; Seeking Motion to set aside
Dr. Peter A. Khaiter v. OLRB et al Divisional Court No. 383/10	0290–08–U 0338–08–U	See above
Dr. Peter A. Khaiter v. OLRB et al Divisional Court No. 431/08	4045–06–U et al	See above