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Ontario Labour Relations Board HIGHLIGHTS

Editors: Voy Stelmaszynski, Solicitor
Leonard Marvy, Solicitor

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Scope Notes

The following are scope notes of some of the decisions issued by the Ontario Labour Relations Board in January of this year. These decisions will appear in the January/February 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 – Employee – Status – The applicant sought review of the Employment Standards Officer's refusal to issue an order for unpaid wages as a result of finding that the applicant was an independent contractor, and not an employee – The Board adopted the approach in *Greco Health Shack* and considered various factors rather than applying a universal test – The following factors indicated the applicant was an employee: (1) the applicant's hourly rate was set by the clinic; (2) the applicant was paid by the clinic after the clinic billed its clients or their insurance companies; (3) the applicant depended on the clinic for referrals as the clients belonged to the clinic; (4) the applicant had no share in the business; (5) the applicant was an integral part of the business as he was the sole provider of certain services; (6) the clinic had oversight of the applicant's appointments; (7) the clinic provided the applicant with equipment – The Board was not persuaded by the fact that the clinic did not withhold and remit income tax and other statutory employment deductions and that the applicant declared his income as self-employed because the Board found the substance of the relationship more important than the structure of compensation – Based on this analysis, the applicant was an employee – Application allowed

1139613 ONTARIO LIMITED O/A ACTIVE THERAPY & SPORTS CLINIC; JINSONG LI; DIRECTOR OF EMPLOYMENT STANDARDS; File No. 2462-11-ES; Dated January 8, 2013; Panel: Kelly Waddingham (7 pages)

Certification – Construction Industry – Employer – When the general contractor on a worksite required employees to perform some deficiency work after the subcontract with a unionized employer had been completed, the unionized employer, who had no employees available to do the work, suggested to the general contractor that he call the hiring hall directly to secure workers – The union applied for certification for the workers employed doing the deficiency work – The Board held that the employer for purposes of the application for certification was the general contractor, notwithstanding that the payments and remittances for the workers were channelled through the subcontractor – Certificate issued

AQUICON CONSTRUCTION CO. LTD.; THE INTERNATIONAL UNION OF PAINTERS AND ALLIED TRADES, LOCAL UNION 1891; File No. 0638-12-R; Dated January 11, 2013; Panel: David A. McKee (11 pages)

Bargaining Unit – Certification - Construction Industry – Employee – Status – The Carpenters applied for certification for a bargaining unit of carpenters and carpenters' apprentices in the employ of Bermingham in the ICI and non-ICI sectors – The Board initially sought to determine whether three individuals, R, P and D, were employees in the bargaining unit on the application date, and therefore should remain on the employer's Schedule A – All three individuals were engaged in "pile driving," work that the parties agreed was in the ICI sector of the construction industry, and work that triggers the application of ministerial designations – Both the Labourers and the Operating Engineers have

jurisdiction for pile driving, but it is also the work of a carpenter – Employee R performed the work pursuant to the IOUE Provincial Agreement – The Board held that it makes no labour relations sense to include on Schedule A individuals employed by an employer pursuant to a collective agreement with another trade union just because the work they were performing could also be performed by members of the applicant – R was removed from the Schedule – D was employed pursuant to a collective agreement between the HAND Association of Sewer, Watermain and Road Contractors and LIUNA; it was not an ICI agreement, so D remains on the employer's Schedule A – Finally, P was properly employed in the ICI sector pursuant to the HCAT Agreement with LIUNA, but he was not a member in good standing of the Labourers for part of the relevant time – Nonetheless, remittances were made to, and accepted by, LIUNA in accordance with the HCAT Agreement, therefore he was working in the bargaining unit on the application date – P was removed from the Schedule – Matter continues

BERMINGHAM CONSTRUCTION LIMITED; THE CARPENTERS' DISTRICT COUNCIL OF ONTARIO; UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA; UNIVERSAL WORKERS' UNION, LABOURERS INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 183; File No. 2916-11-R and 3179-11-U; Dated January 24, 2013; Panel: Lee Shouldice (17 pages)

Collective Agreement – Practice and Procedure – Remedies – Standing – Strike – When the Elementary Teachers' Federation of Ontario ("ETFO") announced its intention to have a "day of protest," the Minister of Education filed an application pursuant to section 11 of the *Putting Students First Act* ("Bill 115"), alleging that ETFO and its President, Sam Hammond, contravened Bill 115, the *Education Act* and the *Labour Relations Act, 1995* by engaging in unlawful activity, and that the application was in the public's interest – The union made several preliminary objections to the application on the basis of the jurisdiction of the Board and the lack of standing by the Minister – Concerning jurisdiction, the Board declined to defer the matter to the courts because Bill 115 envisioned the Board dealing with applications alleging violations of the statute, including unlawful strikes – The union raised arguments concerning the constitutionality of Bill 115, but the Board stated that it was only determining whether a political protest was an illegal strike – The Board held that the Minister had standing to bring the application because if the protest were deemed to be an illegal strike, it would be in contravention of Bill 115 – On the merits of the application, the Board followed well-established jurisprudence that a "political strike" during a collective agreement is still an unlawful strike – The Board was not persuaded that Charter-protected speech outweighed any disruption to the labour relations scheme that would be caused by the strike – Accordingly, the "day of protest" was an illegal strike – The Board made a number of declarations and orders, including a cease and desist order from authorizing, supporting, encouraging or threatening to call or authorize an unlawful strike

ELEMENTARY TEACHERS' FEDERATION OF ONTARIO AND SAM HAMMOND; MINISTER OF EDUCATION; ONTARIO PUBLIC SCHOOL BOARDS'ASSOCIATION;ONTARIO SECONDARY SCHOOL TEACHERS'FEDERATION; File No. 2947-12-U; Dated January 11, 2013; Panel: Bernard Fishbein (4 pages)

Bargaining Unit – Certification - Construction Industry – Employee – Status – LIUNA applied to certify a bargaining unit of employees in all sectors except ICI – The status of three individuals was at stake: were they covered by a subsisting collective agreement? – Three employees were required short-term on a condominium project – One employee, G, had an on-going employment relationship with Maystar; he worked in ICI immediately prior to and after the week in question – Two other employees were engaged through the hiring hall for the non-ICI work – The latter two were easily and indisputably in the applicant's bargaining unit – As for employee G, the parties' agreement that he continue in his ICI employment for the non-ICI work could not withstand scrutiny – The Board held that practice as between parties to a collective agreement may give rise to contractual issues between them, but it cannot impact on the statutory rights of the applicant – All 3 employees were found to be in the bargaining unit for purposes of the application – Certificate issued

MAYSTAR GENERAL CONTRACTORS INC.; UNIVERSAL WORKERS UNION, LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 183; File No. 1938-12-R; Dated January 11, 2013; Panel: David A. McKee (8 pages)

Collective Agreement – Construction Industry Grievance – The union filed two grievances challenging Ontario Power Generation's imposition of a lifetime ban on the grievor that prevented him from working at any OPG facility either as an employee or as a contractor – The union also claimed damages on the basis that Aecon directed and encouraged the misconduct that gave rise to the ban – The grievor was

a general foreman employed by Aecon, who was engaged as a subcontractor by OPG – The grievor falsified OPG training documents for two employees to indicate they were qualified to work as foremen responsible for crews of pipefitters – As a result, Aecon laid off the grievor and OPG subsequently banned him from working at any of its facilities – Regarding the first issue, the union argued that the provision of the collective agreement applicable to the grievance of OPG's decision required OPG to satisfy the "just cause" standard – The Board disagreed, as "just cause" does not apply to an entity that is not the employer of the grievor – The provision containing the language "unjustified" termination or disciplinary action only required OPG to justify or explain the reasons for its decision and that those reasons provide a rational foundation for the decision – The Board held that OPG established a rational basis for its decision because the decision was made after considering the relevant facts, the serious nature of the offence and the importance of accurate training documents – The union was unable to prove that the decision was arbitrary, capricious or made in bad faith; Aecon's disciplinary response was irrelevant to OPG's decision, there was no evidence of widespread fraudulent doctoring of training records or evidence that OPG was aware of, and even encouraged, this practice – OPG met its burden under the provision – On the second issue, the union argued that the grievor was pressured by Aecon management to falsify the records – The Board was not persuaded: it accepted that Aecon was pressuring the grievor to secure qualified employees, not directing him to falsify records – The Board rejected the argument that Aecon improperly laid the grievor off, since a construction subcontractor can lay off an employee who has been prevented by the general contractor from working at a project – Grievances dismissed

ONTARIO POWER GENERATION INC.; RE: UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA; ELECTRICAL POWER SYSTEMS CONSTRUCTION ASSOCIATION; AECON INDUSTRIAL DIVISION OF AECON GROUP INC.**;** File No. 0264-09-G and 0266-09-G; Dated January 31, 2013; Panel: Harry Freedman (24 pages)

Construction Industry Grievance – The union filed three grievances relating to the introduction of "telematics" (technology which provides information about a vehicle's use) in company vehicles, arguing that it was a unilateral change in working conditions and an unwarranted invasion of employees' privacy, with an impact on hours of work and remuneration; a fourth grievance was filed, relating to one employee's suspension for violating the "no personal use" of company vehicles policy – The grievances generally involved personal use of company vehicles, as well as compensation for time spent picking up and dropping off company vehicles by those employees who no longer wanted to take them home – The employer submitted it had a "no personal use" policy, but the union countered that "reasonable" personal use was tacitly accepted – The employer argued that the telematics device was introduced to monitor its assets not to track employees' whereabouts – The Board found that the collective agreement permitted the installation of telematic-like devices for reasons of efficiency and economy, and the employer was permitted to monitor vehicle use at all times – The Board also found that although there were inconsistencies in the application of the "no personal use" rule, with the introduction of telematics, the employer was able to enforce the rule strictly, and had given the union adequate notice of this new enforcement policy; the policy was a reasonable one – If employees choose to drop off/pick up their company vehicle at a location other than their home, the time spent travelling to and from the vehicle is not compensable – Since the communications around personal use were equivocal, the individual employee's two-day suspension was reduced to a written warning – Three grievances dismissed; fourth grievance allowed

OTIS CANADA INC.; INTERNATIONAL UNION OF ELEVATOR CONSTRUCTORS LOCAL 50 AND INTERNATIONAL UNION OF ELEVATOR CONSTRUCTORS, LOCAL 96; File No. 2013-09-G; 2019-09-G; 2020-09-G and 2739-09-G; Dated January 21, 2013; Panel: Marilyn Silverman (29 pages)

Natural Justice – Sale of Business – The Carpenters sought a declaration that RioCan had sold part of its business to RetroCom – Beginning in 1999, the Carpenters and RioCan were involved in lengthy litigation at the Board regarding a sale of properties from Burnac to RioCan – During the course of that litigation, in 2005, RioCan agreed to sell certain properties to RetroCom – When the original dispute involving the Carpenters and RioCan was concluded (2010), the union wrote to RetroCom, grieving that the latter was in violation of the Provincial Collective Agreement – RetroCom claimed that this was the first time it learned of any allegation that it was bound to the Carpenters' agreement (five years after it had purchased the property) – RetroCom moved for dismissal of the current application, claiming a denial of natural justice because it had not been given notice of the Carpenters/RioCan litigation – The Board found that the Carpenters did not have actual notice of the sale until 2010 and was not prepared to impose an

obligation on the union to carry out ongoing searches of title to property that might affect its bargaining rights – Motion dismissed, matter continues

RIOCAN REAL ESTATE; THE CARPENTERS' DISTRICT COUNCIL OF ONTARIO; UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA; File No. 3076-10-R; Dated January 23, 2013; Panel: Robert W. Kitchen (12 pages)

Duty of Fair Representation – The applicant complained that OPSEU lost or abandoned a number of grievances she filed relating to the employer's failure to accommodate her or make efforts to relieve her of alleged harassment in the workplace – The evidence showed that three union representatives (two local presidents and a grievance officer) failed to process grievances and were grossly negligent in failing to return phone calls and email communication with the applicant – Since the employee had retired from the public service, remitting the matter to arbitration was not an option - Application allowed; declaration granted; remedy remitted to parties and Labour Relations Officer

TARA SATNARINE; ONTARIO PUBLIC SERVICE EMPLOYEES UNION; THE CROWN IN RIGHT OF ONTARIO AS REPRESENTED BY THE MINISTRY OF ATTORNEY GENERAL; File 2108-11-U; Dated January 9, 2013; Panel: Kelly Waddingham (7 pages)

Certification – The IBEW sought to certify a bargaining unit of employees engaged in pruning trees and clearing vegetation that could interfere with hydro lines passing over various property within Hydro Ottawa's service area – Tamarack sought to rely on the 1971 Court of Appeal decision in *Cedarvale Tree Services* that workers employed in pruning trees and tree and stump removal were engaged in "horticulture" and thus excluded from the Act – The Board distinguished *Cedarvale*, finding the nature of the two companies' business was very different: Tamarack's work was 95% line clearing (versus *Cedarvale's* 30%) and involved no arboriculture or cultivation – Tamarack did not hold itself out as a company that performs horticultural work, rather its employees were described as "utility arborists" – Adopting a purposive approach, the Board chose to look at the employer's primary business: Tamarack's primary business was not horticulture, nor were any of its employees engaged in horticulture – Certificate issued

TAMARACK TREE CARE; INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 636; File No. 2171-12-R; Dated January 9, 2013; Panel: Maurice A. Green (22 pages)

COURT PROCEEDINGS

Construction Industry – Judicial Review – Practice and Procedure – Stay – The applicant brought a motion for an interim order to stay the decision of the Board pending judicial review – The Court applied the following three-part conjunctive test: (1) a strong *prima facie* case for review on the merits of the application; (2) irreparable harm if the stay is not granted; and (3) the balance of convenience favouring granting the stay – The Court concluded that the applicant failed to establish a strong *prima facie* case for review on the basis of a lack of procedural fairness – The Court held that: (1) there was adequate notice of the hearing; (2) the Board allowed the applicant ample opportunity to explain why the hearing should not commence in Toronto; (3) the Board gave the applicant numerous opportunities to explain why certain documents should not be produced; (4) sections 1(5) and 69(13) dealt with an obligation to produce evidence, not reverse onus, and thus, were not unconstitutional – Regarding irreparable harm, the Court did not find there was sufficient evidence to make this conclusion – The Court did state, however, that the balance of convenience was in favour of granting the stay because there were other applications before the Board based on the decision at issue, which negatively affected the applicant and had no impact on the respondents – Nonetheless, the motion was dismissed

BUR-MET CONTRACTING LTD. ET AL; RE CARPENTERS DISTRICT COUNCIL, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 1669; ONTARIO LABOUR RELATIONS BOARD, ATTORNEY GENERAL OF ONTARIO AND ATTORNEY GENERAL OF CANADA; Court File No. DC-12-010; Dated January 16, 2013; Panel: McCartney J. (6 pages)

Construction Industry Grievance – Judicial Review – The employer brought an application for judicial review challenging the Board's decision on the meaning of the term "manufacturer's rating" in the collective agreement – The Board interpreted the term within the context of the collective agreement to hold that the purpose of the provision was to focus on the maximum capacity, rather than the performance, of the crane – The Divisional Court affirmed that the standard of review is reasonableness as conducting a contextual interpretation of a term in a collective agreement is part of the expertise of a labour arbitrator – The Court found that the Board's decision was reasonable based

on the conclusion and reasons for it – The Board was not required to interpret the term in the same way as similar terms in safety regulations – Application dismissed

C.W. SMITH CRANE SERVICES LTD.; RE INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 793; ONTARIO LABOUR RELATIONS BOARD; Court File No. 513/11; Dated January 21, 2013; Panel: Molloy, Whalen, Swinton JJ. (2 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
Durval Terciera, et al Divisional Court No. 520/12	1475-11-U	June 6, 2013
Defence Contract Management Agency Americas (Canada) Divisional Court No. 513/12	0955-11-R	March 21, 2013
Bur-Met Construction Divisional Court No. DC-12-010 **Thunder Bay**	3893-11-R	Stay Application Dismissed January 14/13
Vito Tarantino Ltd. Divisional Court No. 363/12	0356-12-R	April 17, 2013
OSMWRC, et al Divisional Court No. 363/12	0784-05-G	May 22/13
2130869 Ontario Ltd. Divisional Court No. 359/12	3518-11-R and 3519-11-G	March 24/13
Albert Tsoi v. UNITE HERE Divisional Court No. 330/12	3908-09-U	Pending
Ontario Sheet Metal Workers' and Roofers' Conference, et al (Flynn) Divisional Court No. 325/12	2730-11-JD	Pending
IBEW, Local 894 Divisional Court No. 321/12	3174-09-U	Pending
EllisDon Corporation Divisional Court No. 310/12	0784-05-G	May 22/13
EllisDon Corporation Divisional Court No. 309/12	2076-10-R	Pending
Thomas Fuller Construction et al Divisional Court No. 12-1832 **Ottawa**	1056-11-R	Week of April 8/13
Hassan Hasna Divisional Court No. 83/12	3311-11-ES	Pending
Landmart Building Corp. Divisional Court No. DC 12-346JR **Hamilton**	2519-11-R	Pending
Total Mechanical Systems Divisional Court No. 17/12	4053-10-R	March 15/13
Aragon (Hockley) Development (Ontario) Corporation Divisional Court No. 595/11	2781-09-R	Pending
C.W. Smith Crane Services v. IUOE Local 793 Divisional Court No. 513/11	3894–09–G	Dismissed Reasons January 21/ 13
Greater Essex County District S.B. Court of Appeal No. M41822	1004–08–M	Application for leave Dismissed January 18/13
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	Motion to Dismiss Heard January 25/13 Reserved
Dean Warren v. National Hockey League Divisional Court No. 587/10	2473–08–U	December 7, 2012 Heard, reserved

Case name & Court File No.	Board File No.	Status
Greater Essex Catholic District S.B. Supreme Court No. 34992	3122–04–G	Seeking leave to SCC
Dr. Peter A. Khaiter v. OLRB et al Divisional Court No. 383/10	0290–08–U 0338–08–U	Motion to Dismiss Heard January 25/13 Reserved
Independent Electricity System Operator v. Canadian Union of Skilled Workers, LIUNA et al Supreme Court No. 34915	3322–03–R 2118–04–R	Seeking leave to appeal to SCC
Pro Pipe Construction v. Norfab Metal and Machine Divisional Court No. 408/09	2574–04–R	Pending
Blue Mountain Resorts v. MOL Court of Appeal No. C54427	1048–07–HS 0255–08–HS	September 27, 2012 Heard, reserved
Roy Murad v. Les Aliments Mia Foods Divisional Court No. 291/09	1999–07–ES	February 15/13
Dr. Peter A. Khaiter v. OLRB et al Divisional Court No. 431/08	4045–06–U et al	Motion to Dismiss Heard January 25/13, Reserved