

H *Ontario Labour Relations Board* **HIGHLIGHTS**

Editors: Voy Stelmaszynski, Solicitor
Leonard Marvy, Solicitor

April 2007

Scope Notes

The following are scope notes of some of the decisions issued by the Ontario Labour Relations Board in March 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 – Practice and Procedure – Related Employer – Remedies – Unfair Labour Practice – The Labourers filed an application to represent the employees of Postma, seeking remedial certification as well as a declaration that Postma and Specific are a single employer – As a further remedy for Postma's alleged unfair labour practice (one of Postma's owners had advocated a preference for CLAC over the Labourers in the days prior to the representation vote), the Labourers asked the Board to terminate CLAC's bargaining rights with Specific – The Board held that the revocation of a union's bargaining rights is an extreme remedy, to be invoked only in the most serious cases of wrongdoing – In the instant case, the Labourers were asking the Board to revoke CLAC's bargaining rights in the absence of any suggestion of wrongdoing by CLAC; CLAC was the innocent beneficiary of wrongdoing committed by Postma – The Board made a preliminary determination that it would not order the termination of CLAC's bargaining rights with Specific – Matter continues

1614818 ONTARIO INC c.o.b. POSTMA CONCRETE FORMING; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL; RE CONSTRUCTION WORKERS LOCAL 53 AFFILIATED WITH CHRISTIAN LABOUR ASSOCIATION OF CANADA; File Nos. 2358-06-R; 3135-06-U; 3134-06-R; Dated March 21, 2007;

Panel: Mary Ellen Cummings; John Tomlinson; Richard Baxter (3 pages)

Certification – Construction Industry – Employer – The Board had to determine the identity of the employer in this application for certification – Wallworks obtained a contract to install fabric wall panels - ACTT bid on the installation of the panels at the behest of Wallworks, but was not awarded the contract because the work had to be performed by a union sub-contractor – Wallworks retained the services of Fabric Interior, who hired T, the president of ACTT to train and supervise the work – T invoiced Fabric on an hourly basis for his time, and for the ACTT equipment used on the project – T contacted the hiring hall and supervised the employees for the duration of the project – Employee cheques were paid by Fabric, and ROEs were issued by Wallworks - The Board found, applying the criteria from *York Condominium*, that the fundamental control over the employees was held by ACTT, so it was their employer – Certification granted

ACTT INSTALLATION LTD.; RE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 93; File No. 1884-06-R; Dated March 9, 2007; Panel: Marilyn Silverman (6 pages)

Bargaining Unit – Certification – Construction Industry – Employee – The Board was asked to determine whether the employees of the responding party in this application for certification were exempt from the Act pursuant to s. 3(c) because the employees were "employed in horticulture" and the "primary business" of the employer is agriculture or horticulture – The responding party was subcontracted by a road

construction contractor to perform landscaping work adjacent to the construction of a new roadway – The Board held that spreading topsoil in preparation for the installation of sod and hydro seeding as part of a road building project was horticulture and work in the construction industry – However, an examination of the employer's primary business revealed that a significant majority of its business was either landscaping or operation of a sod farm, and therefore fell within the definition of agriculture or horticulture – Application dismissed

CHRIS TRANBERG & SON LTD. ; RE LIUNA, PROVINCIAL DISTRICT COUNCIL ; File No. 2389-06-R; Dated March 5, 2007; Panel: Harry Freedman; John Tomlinson; Alan Haward (9 pages)

Construction Industry Grievance – Evidence –

The Labourers grieved the lay-off of the entire complement of "referred members" on a job-site, that left only "name-hires" as part of the employer's work crew – The Board examined the language of the collective agreement which advocated a 50/50 rule – The Board found the employer had no explanation (reasonable or otherwise) for the manner in which it laid off the employees, therefore it had violated the lay-off provision of the collective agreement – With respect to the subsequent recall of one employee, the Board held that a "name-hire" or "referred employee" retains his or her status for the period in the collective agreement during which the employee can be recalled (i.e., a referred employee cannot be laid off and then re-hired within the relevant period as a name-hire) – Grievance allowed, matter remitted to parties to fashion appropriate remedy

E.S. FOX CONSTRUCTION LTD. ; RE LIUNA, LOCAL 506 ; File No. 3296-06-G ; Dated March 22, 2007 ; Panel : David. A. McKee; G. Pickell; A. Haward (7 pages)

Duty of Fair Representation – The applicant complained that his trade union (OSSTF) violated s. 74 of the Act when it failed to provide him with a lawyer in his disciplinary proceeding before the Ontario College of Teachers – The Board held that a union's duty of fair representation is restricted to those matters arising out of the collective agreement, where the union enjoys exclusive bargaining rights *vis à vis* the employer – A hearing before the applicant's professional disciplinary body is not a matter that involves either the union or the employer; it is strictly between the individual and his/her governing body – Even when the union elects to represent the

individual in such a proceeding, the union's conduct does not fall under the Board's scrutiny pursuant to s. 74 – Application dismissed

GILBERT MCINTYRE; RE OSSTF, DISTRICT 12; File No. 0400-06-U; Dated March 12, 2007; Panel: Brian McLean (5 pages)

Project Agreement – Sector Determination – Standing –

The Board found that the Greenfield Energy Centre project agreement came into force by operation of the *Labour Relations Act, 1995* when no valid objections to the proponent were filed with the Board – The Canadian Union of Skilled Workers filed a sector determination, challenging the project agreement and arguing it falls within the electrical power systems sector, as opposed to the ICI sector – The Board found that the CUSW has no standing to utilize the sector determination provisions of the Act to challenge the project agreement because it is not a bargaining agent bound to a provincial collective agreement – Furthermore, CUSW has no direct interest in the work of the project at present, and any future connection is purely speculative – Application for sector determination dismissed

GREENFIELD ENERGY CENTRE LP AND BURNS AND ROE ENTERPRISES, INC.; RE ONTARIO PIPE TRADES COUNCIL AND UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, LOCAL 663; File Nos. 1182-06-PR; 1465-06-M; 1635-06-PR; Dated March 21, 2007; Panel: Mary Ellen Cummings (5 pages)

Conciliation – Reference – The Minister of Labour asked the Board to consider whether he had the authority to appoint a conciliation officer pursuant to section 18 of the Act – With respect to the parties' relationship in one specific Board area, the parties agreed that notice to bargain had been given and there was no subsisting collective agreement between them, so the Board confirmed that the Minister had the authority to appoint a conciliation officer for the parties' dispute in that Board area – With regard to the EPSCA bargaining unit, there was agreement between the parties that the Minister had the authority to appoint a conciliation officer, but they did not agree on the existence of a current collective agreement – The Labourers argued that they had given notice to bargain on more than one occasion after the IESO was established following the 1999 dissolution of Ontario Hydro – The Board held that the communication between the parties in 2003 did not constitute "bargaining" that

would have prevented automatic renewal of the existing collective agreement – A letter from a mediator confirming his acceptance of an appointment to mediate cannot be construed as a written notice from one party to the other of its desire to terminate, revise or modify a collective agreement – Similarly, the filing of an application with the Board seeking recognition of bargaining rights and a declaration regarding the applicant's rights does not amount to written notice to the other party of a desire to bargain a renewal agreement – The Board found that the only valid notice to bargain was issued in September 2006, and it would only operate to prevent the renewal of the collective agreement set to expire on April 30, 2008 – The Board rejected the Labourers' contention that the agreement ceased to operate as a matter of law because the responding party refused to recognize the union's bargaining rights – Minister has authority to appoint conciliation officer

INDEPENDENT ELECTRICITY SYSTEM OPERATOR; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL AND LIUNA, LOCAL 1059; File No. 2720-06-M; Dated March 5, 2007; Panel: Caroline Rowan (11 pages)

Construction Industry Grievance – Settlement

– Following a Board ruling that found the employer related to another unionized company and, thereby, bound by the provincial ICI agreement, the union filed two grievances respecting the assignment of work to its members; the employer filed its own grievance, complaining that the union would not accept its existing employees into membership; all three grievances were dealt with by the Labour Management Relations Committee of the grievance procedure, with the union succeeding on all counts – The issues were referred to the Board with the union arguing the LMRC's decision was a settlement enforceable by a Board decision, and the employer stating the LMRC did not issue a decision but if it did, it could not and should not be enforced – The Board held that the actions of the LMRC did constitute a decision, the issue to be determined being its enforceability – The Board examined the language of the iterations of the collective agreement dating back to 1992 (when an LMRC decision was in dispute) and found significance in the changes in wording referring to "parties to the collective agreement" as opposed to "parties to the grievance" – The greater precision in identifying whose rights are at stake in the LMRC decision caused the Board to reject the union's preliminary motion that the decision was enforceable as a settlement – Matter continues

INDUSTRIAL REDI-WORKS INC.; RE MILLWRIGHT REGIONAL COUNCIL OF ONTARIO AND ITS LOCAL 1916; File Nos. 3232-06-G; 3233-06-G; 3275-06-G; Dated March 13, 2007; Panel: Mark J. Lewis; G. Pickell; R. Baxter (9 pages)

Duty of Fair Representation – Health and Safety – Practice and Procedure

– The Board found that these two applications arose from similar facts at the workplace, and directed that they be heard together; further, the Board held that rulings made in the first application that pertain to the same facts or legal issues would be binding on the parties in the second application – The applicant alleged that he raised serious health and safety concerns about his workplace with his employer, his union and the Ministry of Labour, and that the responses and results arising from his complaints were unsatisfactory – The Board found that the union had acted properly: it participated in his reassignment when he invoked a work refusal; it took an active role in the Ministry investigations of air quality in the workplace, and it filed a grievance on the applicant's behalf when he was denied short-term assistance – Application dismissed – Second matter to be scheduled for hearing

JEREMY WOODCOCK; RE UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION (UNITED STEELWORKERS) ON BEHALF OF ITS LOCAL 6571; RE RONALD GOODCHILD; RE GERDAU AMERISTEEL INC.; File Nos. 0678-06-U; 1977-06-U; Dated March 5, 2007; Panel: Peter F. Chauvin (6 pages)

Certification – Construction Industry – Employee – Membership Evidence – Practice and Procedure – Reconsideration

– In a request for reconsideration of a successful certification application where the employer had provided the Board with affidavit evidence from employees who swore they had not signed membership cards, the Board allowed the trade union to have the employees' signatures subjected to forensic analysis – The handwriting expert determined that it was highly probable that the person who signed the affidavit had also earlier signed the membership evidence – The responding party submitted that the employee in question admitted that the signature on the membership card was his – Request for reconsideration withdrawn

LES BURCH & SON CONTRACTING ; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL ; File No. 2386-06-R; Dated March 2, 2007; Panel: Harry Freedman (1 page)

Bargaining Unit – Certification – Conflict of Interest – Employee – The union applied for and was successful in a representation vote for a bargaining unit of security guards in the gaming area of Georgian Downs, a horse racetrack – The employer and the racetrack argued that the bargaining unit could not be appropriate because the guards monitored other employees, some of whom were in a different bargaining unit held by the same union – The Board examined the duties of the guards, their surveillance and security functions, their interaction with other employees, as well as the union's activities, bargaining rights and constitution, and found there would be no conflict or compromise in the guards' employment duties and their union responsibilities – Certification granted, subject to gaming registration

OLG SLOTS AT GEORGIAN DOWNS; RE PUBLIC SERVICE ALLIANCE OF CANADA; File No. 1880-06-R; Dated March 13, 2007; Panel: Patrick Kelly (13 pages)

Certification – Practice and Procedure – A dispute arose with respect to the status of certain individuals in this certification application – The parties had refused to sign the Certification Worksheet following the Regional Certification meeting - The Board outlined the importance of recording parties' agreement at various points in the certification process, and its expectation that parties will affix their signatures to the worksheet in recognition of their confirmed positions – The absence of a signature on the worksheet will not preserve a unilateral right to later change or add to a position – Submissions directed

PACE ENTERPRISES (1998) INC.; RE CENTRAL ONTARIO REGIONAL COUNCIL OF CARPENTERS DRYWALL AND ALLIED WORKERS UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA; File No. 3285-06-R; Dated March 26, 2007; Panel: Mary Ellen Cummings (2 pages)

Certification – Construction Industry – Status – Trade Union – The Board provided reasons for granting the Canadian Construction Workers' Union trade union status in the construction industry – After the Board rejected (in other previous decisions) the requests from various

trade unions to intervene in the certification application, only the Painters and Carpenters were left to challenge the CCWU – The CCWU had altered its bargaining unit description to include only construction labourers working in the residential sector in Board Area 8 – The evidence established that the work being performed by the employees was concrete chipping and clean-up – The objections raised by the Painters and Carpenters were dismissed because their dispute was of a jurisdictional nature, rather than a challenge to bargaining rights for their particular crafts – The Board found that the CCWU had taken all necessary steps to establish itself as a trade union, and that it provided adequate evidence to meet the threshold that would identify it as a trade union pertaining to the construction industry – Certificate granted

PBS GENERAL CONTRACTORS INC. ; RE CANADIAN CONSTRUCTION WORKERS' UNION; File Nos. 3156-06-R et al; Dated March 23, 2007; Panel: David A. McKee; John Tomlinson; A. Haward (7 pages)

Jurisdictional Dispute – Reconsideration – The Operating Engineers sought reconsideration of a Board decision confirming the assignment of the demolition of a highway overpass to the Labourers – The IUOE argued that members of a different Labourers local (than the one named in the JD) performed the work in dispute, and consequently the Operating Engineers were unfairly prejudiced in the Board's examination of employer and area practice – The Board held that it traditionally looks at the tradespeople performing the craft, not at representation rights – Similarly, the Board does not assess the skills and experience of individual workers assigned to a project, but looks to the propriety of the work assignment to the particular craft – Finally, the Board held that it was appropriate to consider the same project from both the employer practice and the area practice perspectives; these are different questions, and often the answers to them are not the same – Reconsideration denied

PRIESTLY DEMOLITION INC.; RE LIUNA, LOCAL 837; RE IUOE, LOCAL 793; RE ONTARIO ASSOCIATION OF DEMOLITION CONTRACTORS INC.; File No. 2930-04-JD; Dated March 2, 2007; Panel: Mary Ellen Cummings (3 pages)

Court Proceedings

Certification – Construction Industry – Judicial Review – The Board certified the Painters' union

in this card-based application when the employer failed to file a response in a timely fashion pursuant to s. 128.1(3) – In its request for reconsideration of the Board's decision certifying the union, the responding party relied on the fact that it had delivered its response to the union in a timely manner but, through inadvertence, had failed to file the response with the Board – Relying on *Air-Kool*, the Board held that it had no discretion to extend the time to accept the response – On judicial review, the court held the Board to a standard of correctness and found the Board had erred in interpreting s. 128.1(3) as a limit on its ability to accept a late filing – The word "shall" in the provision was a directory imperative, but aimed only at the employer, not the Board – Application for judicial review granted

(Board decision reported at [2006] OLRB Rep. November/December 848)

RICHARD WEISS AS TRUSTEE FOR LOCAL 183; RE ONTARIO LABOUR RELATIONS BOARD; RE ANTONIO DIONISIO AND JOHN DIAS; File Nos. 2049-03-U et al; Dated: March 21, 2007; Panel: Ferrier, Howden and Himel, JJ.

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.

(Board decision not reported)

MAYSTAR GENERAL, CONTRACTORS INC.; RE IUPAT, LOCAL 1819; RE ONTARIO LABOUR RELATIONS BOARD; File No. 0812-06-R (Court File No. 481/06); Dated March 20, 2007; Panel: Cunningham, A.C.J.S.C., Lane and Smith, JJ.

Conflict of Interest – Judicial Review – Trusteeship – In the ongoing dispute involving LIUNA, Local 183 and two of its pre-trusteeship executives, the Board was asked to rule on the conflict of interest of counsel for the two former executives because of his firm's access to or knowledge of confidential information relating to Local 183 – The Board held there was no conflict because the firm possessed no knowledge outside of what it had learned from its clients to support the litigation, and there had been no change in positions or movement of any lawyers from one side of the litigation to the other - On judicial review, on a standard of correctness, the Divisional Court quashed the Board decision, stating that the prejudice to Local 183 must be "approached on an objective basis of perception by a reasonably informed member of the public, as well as within the context of the continuing importance of the duty of client loyalty and confidence of all parties and the public in the administration of justice" – In the Court's view, all the information held by the law firm related to the trusteeship and its litigation – Although no lawyers had changed sides in the dispute, Local 183's stance shifted from opposition to LIUNA to a position allied in interest with the parent – Citing the Supreme Court of Canada in *MacDonald Estate*, the Court held that a "lawyer who has relevant confidential information cannot act against his client or former client" – Application for judicial review allowed

Pending Court Proceedings

Case name & Court File No.	Board File No.	Status
Jacobs Catalytic Ltd. v. IBEW Local 353 et al Divisional Court No. 117/07	3737-05-U	Pending
Dana Horochowski v. OECTA; York Catholic DSB Divisional Court No. 93/07	1115-04-U	Pending
Stephane Verreault v. UA Local 787 & Teamsters Local 419 Divisional Court No.71/07	0840-05-U	June 20, 2007
Hurley Corporation v. OLRB; SEIU L. 2.on Divisional Court No. 23/07	2915-06-R	Pending
Comstock Canada et al v. United Association of Journeymen and Apprentices in the Plumbing and Pipefitting Industry of the United States and Canada, Local 527 Divisional Court No. 522/06	2558-03-JD	Pending
Janet Kitson v. OLRB et al Divisional Court No. 492/06	4205-02-U	Pending
Johnson Controls Ltd. v. Brookfield Lepage Divisional Court No. 406/06	1634-04-R	Pending May 7, 2007
TTC v. Amalgamated Transit Union Divisional Court No. 261/06	0618-06-U; 0620-06-U	March 21, 2007 (reserved)
Abduraham, Abdoulrab v. Novaquest Finishing Divisional Court No. 327/06	2222-04-ES, 2223-04-ES, 2224-04-ES	June 4, 2007
City of Hamilton v. Carpenters, Local 18 Divisional Court No. 209/06	1785-05-R	Pending
Guild Electric Limited et al v. IBEW, Local 1739 Divisional Court No. 202/06	4179-05-U; 4307-05-M	January 10, 2007 (reserved)
Elena, De Monelli Foerster v. Toronto Catholic District School Board (Civil Suit) Divisional Court No. 06-CV-310231PD1	1373-04-U	Dismissed March 20, 2007
Bricklayers Local 7 v. 921879 Ontario Ltd. et al Divisional Court No. 06-DV-1209 OTTAWA	3261-04-JD; 3504-04-JD	April 3, 2007
Gus Nedelkopoulos v. OLRB Divisional Court No. 78978/06 NEWMARKET	1838-05-U 2644-05-U	Pending
Greater Essex County District School Board v. International Brotherhood of Electrical Workers, Local 773 et al Divisional Court No. 126/06	1702-04-R; 3120-04-R; 3172-04-R; 3173-04-R; 3174-04-R	Dismissed – Jan. 22/07 Seeking leave to appeal
Mississaugas of Scugog Island First Nation v. Great Blue Heron et al Divisional Court No. 10/04	1271-03-U; 1336-03-M; 1414-03-M	Court of Appeal – Oct. 9, 10, 11, 2007
Grantley Howell v. OLRB Divisional Court No. 04/178 HAMILTON	0933-01-U; 1273-01-U 3552-00-U	Dismissed – April 3, 2006, seeking leave to appeal to C.A.
Scaduto, Frank Divisional Court No. 382/05	1798-03-U; 4338-02-U	Pending