

H **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 July of this year. These decisions will appear in the July/August 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.

Construction Industry – Parties – Termination – Timeliness – The applicant sought to terminate the bargaining rights of LIUNA Local 607 – There was no dispute that the bargaining rights were held by LIUNA, Ontario Provincial District Council – The Board found that the OPDC must have been certified on the basis of the employees' membership in Local 607, since employees can only be members of locals, and not of the council – Local 607 conducted bargaining, drafted collective agreements, and made the application for the appointment of the conciliator – The Board held that given that the OPDC and Local 607 could agree on the transfer of bargaining rights, and given such a widespread practice once a certificate had been issued, it was not unreasonable for the applicant to assume that Local 607 was his bargaining agent – The style of cause was amended to include both Local 607 and the OPDC – On the issue of the timeliness of the application, the Board held that when the application was filed on the same day as a conciliation officer was appointed, the application was timely – Submissions ordered on status issues – Matter continues

A-1 SUPERIOR PAVING AND CONCRETE WORKS COMPANY INC.; RE DANIEL WILSON;

RE LIUNA – CONSTRUCTION AND ALLIED WORKERS, LOCAL 607, AND LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL; File No. 0634-08-R; Dated July 16, 2008; Panel: David A. McKee (4 pages)

Environmental Protection Act – Practice and Procedure – Reprisal – Timeliness – The employer argued that this reprisal application should be dismissed because it is precluded by the doctrines of issue estoppel and abuse of process, in addition to being untimely – The Board found that an arbitration panel in a grievance proceeding had fully considered the issues raised by the applicant in this reprisal complaint, even when the union had withdrawn the reprisal component of the grievance during final argument before the arbitration board – The Board also found that the application was untimely; rather than filing immediately after the impugned conduct, the applicant waited until the decision of the arbitration board to make his claim – Application dismissed

CITY OF OTTAWA; RE TED COOPER; File No. 1452-07-EP; Dated July 11, 2008; Panel: Ian Anderson (4 pages)

Abandonment – Employment Standards – Fraud – Settlement – The two directors agreed to settle the review of orders to pay with 4 of 7 claimants – Irwin paid his portion of the settlement; when Diena failed to make any of the promised payments, the claimants sought to rescind the settlement and reinstate the original Order on grounds of fraud – The Board found that the claimants were fraudulently induced to enter into the settlement because although Diena had the means to pay the settlement, it appears he

had no intention to do so – Diena's failure to attend the hearing was further evidence of his lack of commitment to the settlement – The Board voided the settlement and reinstated the full Order to Pay, less monies already paid by Irwin – As for the other 3 claimants, since Diena failed to appear at the hearing, the Board considered his application against them to be abandoned

DANIEL DIENA A DIRECTOR OF DELES INDUSTRIES LIMITED; RE MICHAEL J. ASHTON, ET AL AND DIRECTOR OF EMPLOYMENT STANDARDS; File Nos. 2474-07-ES; 2718-07-ES; Dated July 7, 2008; Panel: Tanja Wacyk (4 pages)

Construction Industry Grievance – Occupational Health and Safety Act – The union grieved the failure of the responding party to pay employees for specific training in asbestos removal required by a Regulation under the *Occupational Health and Safety Act* – The Board found that the employer had arranged for the training and had directed the employees to attend the three-day course – Pursuant to the provisions of the Regulation as well as the collective agreement, the responding party was responsible for compensating its employees who attended the training – Owners are equally responsible as employers for compliance with the Regulation – Grievance allowed

HIGH POINT ENVIRONMENTAL INC./HPE ENVIRONMENTAL INC.; RE LIUNA, LOCAL 506; File No. 3528-07-G; Dated July 25, 2008; Panel: Marilyn Silverman (8 pages)

Discharge – Interim Order – Unfair Labour Practice – The union sought interim reinstatement of five employees, pending resolution of the main application which alleged that they were discharged for union activity – The employees worked as cleaners in a plant under construction, and were dismissed when the construction was completed – The Board held that the employees appeared to have been dismissed for their earlier union activity, because there was no other reasonable explanation for their dismissal – Although the construction work was over, the employer by its own admission needed many cleaners to work in the finished plant, and these employees were already trained and gave no cause for dismissal – The Board held that the discharges occurred during an organizing campaign; there was a serious issue to be tried; a failure to reinstate the workers would irreparably harm the union; and the reinstatement would not harm the employer – Interim order granted

MARTIN BUILDING MAINTENANCE; RE LIUNA, LOCAL 1059; File No. 0913-08-M; Dated July 17, 2008; Panel: Brian McLean (10 pages)

Construction Industry Grievance – Practice and Procedure – Reconsideration – Settlement

– The applicant sought reconsideration of a default award because the parties failed to advise the Board of a settlement they had reached prior to the issuance of the default decision – The applicant had originally sought a default decision if the responding party did not file an Intent to Defend, and no such filing occurred – The Board reconsidered its decision but admonished the parties for failing to advise the Board of their settlement, causing the Board to expend time and resources to review a file and issue an unnecessary decision – Reconsideration granted; application withdrawn

NORTH ROCK GROUP LTD.; RE UNIVERSAL WORKERS UNION, LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 183; File No. 1193-08-G; Dated July 25, 2008; Panel: Lee Shouldice (2 pages)

Constitutional Law – Employment Standards –

The applicant sought review of an employment standards officer's refusal to issue an order to pay in circumstances where she alleged she was deprived of her position following a pregnancy leave – The Board first determined that the employer, a logistics company that coordinated international and interprovincial transportation of goods, was a provincial undertaking and subject to Ontario laws – On the substantive issue, the Board held that the legislation requires an employee returning from pregnancy leave to be returned to her original position (or if it no longer exists a comparable one), but not necessarily to all the duties and responsibilities that position entailed – The transfer of certain client accounts to other employees was not a penalty under the Act – Application dismissed

PINNACLE FREIGHT SPECIALISTS INC. AND DIRECTOR OF EMPLOYMENT STANDARDS; RE ARDELLE D. STONER; File No. 3777-06-ES; Dated July 28, 2008; Panel: Kelly Waddingham (8 pages)

Constitutional Law – Bargaining Rights – Termination

– An employee in the construction industry applied for termination of bargaining rights – The union argued that on the application date, the applicant's work was within federal jurisdiction – The applicant was installing sensors

to monitor temperature and humidity in computerized offices used by a federal intelligence/security agency, a core federal undertaking – The removal of labour relations from provincial competence is exceptional, and is only appropriate when the subsidiary's work is integral to a core federal undertaking – The Board held that the sensor system was not integral to the core federal undertaking – The construction employer did no work that was directly or indirectly related to the agency's federal purposes in intelligence and security – Therefore, the employer's labour relations were governed by the *Labour Relations Act* and by the Board – Matter continues

RÉGULVAR CANADA INC./RÉGULVAR INC.; RE CHRISTIAN BOURGEOIS; RE THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 586; File No. 3404-06-R; Dated July 14, 2008; Panel: Mary Ellen Cummings (6 pages)

Bar – Bargaining Unit – Certification – The Teamsters sought to certify employees of Stock Transportation in the City of Toronto – The application came on the heels of three earlier applications with similar bargaining unit descriptions – Stock argued that it had no employees in the proposed bargaining unit, or that the application was barred pursuant to s. 10(3) of the Act – A representation vote was ordered and the ballot box was sealed – The Board rejected the employer's "no employees" submission because the application, like the earlier ones, relied on a "City of Toronto" description but implicitly specified municipal addresses – The union could not have intended to apply for a bargaining unit with no employees – The Board held that in counting the ballots, any prejudice to the employer was outweighed by the prejudice to the employees arising from the potential of a longer bar, given that a determination of the bar issue under s. 10(3) or 10(3.1) would require days of hearing – A counting of the ballots, without prejudice to any of the employer's positions, could also mean the end of the matter – Vote count ordered

STOCK TRANSPORTATION LTD.; RE TEAMSTERS LOCAL UNION NO. 938; File No. 0483-08-R; Dated July 11, 2008; Panel: Ian Anderson (9 pages)

Certification – Employee – Status – The parties could not agree on whether certain employees were full-time or part-time – The employees in dispute ("Casual Maintenance Workers/Operators – On Call") were paid for a minimum of

twenty-five hours per week and were required to hold themselves available to the employer for those hours, albeit not at the workplace – The employer argued that these were part-time employees, relying on the Board's jurisprudence ("regularly employed for not more than twenty-fours hours" in four of the last seven weeks leading up to the application for certification) and asserting that the Board should consider "hours worked" as opposed to "hours paid" – The Board held that the disputed employees were required to demonstrate a full-time commitment to the employer and therefore should be included in the full-time bargaining unit – Count ordered

TWD ROADS MANAGEMENT INC.; RE INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 793; File No. 4187-06-R; Dated July 22, 2008; Panel: Brian McLean (9 pages)

Court Proceedings

Employment Standards – Judicial Review – Practice and Procedure – The Applicant sought judicial review of a Board decision upholding an Officer's refusal to issue an order to pay outstanding wages to him – The Board had found that the Applicant was not an employee at the relevant time – On judicial review, the Court held that the Board was correct not to postpone its own proceedings until the Applicant's Tax Court matter on Employment Insurance eligibility was resolved – Employment Insurance proceedings have different statutory schemes, purposes, parties, and available remedies, so their results are inapplicable to *Employment Standards Act* proceedings – Based on the evidence, the Board had reasonably decided that the Applicant was not an employee – Alternatively, the Board had found that no wages were owed to the Applicant, because the Applicant had already been paid substantially more than the minimum wage – Since the Applicant had led no evidence of his actual wage rate, the Board's reliance on the minimum wage was reasonable – The Applicant also complained that the Board's decision was libellous, in that it contained negative assessments of his credibility – The Divisional Court held that Vice-Chairs of the Board are protected from libel and slander claims – Application for judicial review dismissed

DR. OLIVER BAJOR; RE ARBITRAGE RESEARCH AND TRADING LTD., MINISTRY OF LABOUR AND OLRB; File No. 0353-06-ES (Court File No. 258/07) Dated July 28, 2008; Panel: Brockenshire, Lederman and Swinton JJ. (9 pages)

Certification – Judicial Review – Representation Vote – Stay – A request for a stay of a Board decision ordering a vote count was dismissed in March 2008, with reasons to follow – The Court held that the first part of the test for a stay requires that the applicant establish there is a strong *prima facie* case that the Board's decision is unreasonable, rather than that there was a serious issue to be tried – The applicant failed to pass this test, as well as the other criteria (irreparable harm; balance of convenience) – Stay application dismissed

EDGEWATER GARDENS LONG TERM CARE CENTRE; RE OPSEU AND OLRB; File No. 3166-07-R (Court File No. 08-0015); Dated June 18, 2008, released July 18, 2008; Panel: Madam Justice K Carpenter-Gunn (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
Christian Labour Association of Canada Divisional Court No. 382/08	3798-05-R; 3958-05-U	Pending
Lorraine Fraser Divisional Court No. 1719 LONDON	0059-06-ES; 0061-06-ES	Pending
Comfort Hospitality Inc. Divisional Court No. 344/08	2573-07-ES	Pending
Govin Misir v. S. Lalgudi Vaidyanathan et al Divisional Court No. 566/07	2966-03-ES; 3389-03-ES; 3390-03-ES	Pending
LIUNA v. Barclay Construction et al Divisional Court No. 310/08	0837-06-R	Pending
Solid Gold Inn Divisional Court No. 224/08	3823-07-ES	Pending
LIUNA, Local 183 (PineValley Enterprises) Divisional Court No. 201/08	0910-07-R	Pending
LIUNA, Local 183 (Saddlebrook) Divisional Court No. 201/08	3414-06-R et al	Pending
BCC Constructors v. International Union of Painters Divisional Court No. 138/08	3174-06-R	Pending
Edgewater Gardens Long Term v. OPSEU Divisional Court No. 08-0015	3166-07-R	October 20, 2008
Jacobs Catalytic Ltd. v. IBEW Local 353 Divisional Court No. 66/08	2127-05-G; 3437-05-G	Pending
Ottawa Fertility Centre v. Ontario Nurses Association, OPSEU, CUPE Local 4000, Ottawa Hospital and OLRB Divisional Court No. DV-08-1394 OTTAWA	1531-06-PS	Pending
Puri Sons Inc. o/a Tally Ho Manor v. Director of Employment Standards et al Divisional Court No. 30/08	1490-06-ES; 1491-06-ES	Discontinued July 14, 2008
Ottawa-Carleton Public Employees Union (CUPE), Local 503 v. City of Ottawa et al Divisional Court No. 423/07	1386-06-R	Pending
Dev Misir v. Muluneshi F. Agago et al Divisional Court No. 281/07	0769-06-ES	October 2, 2008
Dr. Oliver Bajor v. OLRB Divisional Court No. 258/07	0353-06-ES	Dismissed July 28, 2008
Jacobs Catalytic Ltd. v. IBEW Local 353 et al Divisional Court No. 117/07	3737-05-U	Dismissed – June 4, 2008 Seeking leave to C.A.
Dana Horochowski v. OEETA; York Catholic DSB Divisional Court No. 93/07	1115-04-U	October 20, 2008
Janet Kitson v. OLRB et al Divisional Court No. 492/06	4205-02-U	Pending
Abduraham, Abdoulrab v. Novaquest Finishing Divisional Court No. 327/06	2222-04-ES, 2223-04-ES, 2224-04-ES	Leave to C.A. granted
City of Hamilton v. Carpenters, Local 18 Divisional Court No. 209/06	1785-05-R	November 3, 2008