

H Ontario Labour Relations Board **HIGHLIGHTS**

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Scope Notes

The following are scope notes of some of the decisions issued by the Ontario Labour Relations Board in December 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.

Jurisdictional Dispute – CEP, Local 92 challenged the decision of the employer, AbitibiBowater Canada Inc, which assigned work to IAM that involved the operation of a front end loader and fork lift for the purposes of moving biomass fuel – The Board considered the usual factors and held that both unions could claim the work in question under their collective agreements, that they both had operated similar machinery and thus both possessed the required skill set to do the work, so these factors were indeterminate – However, the Board acknowledged that safety, economy and efficiency, and employer preference all favoured IAM – IAM workers had particular and unique knowledge of the Biomass Boiler system that allowed them to make appropriate decisions in event of difficulties – Due to its relative proximity to the site, IAM workers were available on a 24/7 basis as required, while CEP workers were not, since their yard only operated during the day – The employer preference to use IAM was grounded in valid labour relations or operational concerns, since if it was required to use CEP employees to perform the work, they would have to hire 5 more employees to cover all the required shifts, and there would be no duties for these employees half the time

– Assignment of work to IAM upheld – Application dismissed

ABITIBIBOWATER CANADA INC.; AND THE INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, LODGE 771; RE CEP, LOCAL 92; File No. 2041-08-JD; Dated December 16, 2009; Panel: Vice-Chair Ian Anderson (7 pages)

Construction Industry – First Contract Arbitration – The parties had reached a deadlock regarding their positions on pension and benefits contributions – The union proposed that the employer contribute to centralized union pension and welfare plans, a common and fundamental feature of virtually all collective agreements in the construction industry – The employer, which only secures construction work from time to time, maintained a secure workforce by employing its construction workers in a non-construction capacity when construction work was not available – It did not wish to alter its benefits package since its package covered employees in the bargaining unit whether or not they were employed in the construction industry – The Board found that the position taken by the employer on the applicant's pension and benefit contribution proposal clearly reflected a difficulty on the part of the employer to accept the role of the applicant as the exclusive bargaining agent of its construction employees – Concerning the benefits package the employer's position that the employees would be better off with their current package than the one proposed by the union suggests that the employer was advocating on behalf of the members of the bargaining unit – a role which belongs exclusively to the union – A similar concern arose with respect to pension contributions, since the employer was prepared to pay the cost of the pension benefit, as long as

there was no suggestion to any of its other employees that the applicant secured that benefit for the construction labourers employed by the employer – Direction to settle a first collective agreement by arbitration

CONSOLIDATED DRILLING AND BLASTING INC.; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL; File No. 1852-09-FC; Dated December 4, 2009; Panel: Lee Shouldice (19 pages)

Certification – Construction Industry – Employee Status – Membership Evidence – Representation Vote – After determining the status of certain employees, the Board addressed the employer's allegation that there had been misrepresentations in gathering the membership evidence – The Board noted that misrepresentation under s. 128.1(5) of the Act must amount to a fundamental misrepresentation, that is, a deliberate untrue statement(s) on the part of the union (and/or individual collecting the membership evidence) which goes directly to the effect and/or purpose of the membership evidence on which the union is seeking to rely – The Union representative's statement that employees must complete the application form in order to keep working on the premises was accurate given the collective agreement – Employees also claimed they thought they were only signing an information card – The test is objective and assumes employees are reasonable, rational and sentient actors – The card was clear as to purpose and properly completed by employees; some employees had been union members in the past and had experience with completing cards; and employees did not approach onsite Union representative with any questions – Employees' wilful blindness is not sufficient to establish misrepresentation – The Board found the evidence fell short of establishing misrepresentation – The Board went on to address the issue of whether it was appropriate in these circumstances to order a vote – Votes occur only in the most unusual circumstances where the facts, although they do not entirely discredit the membership evidence, give rise to sufficient doubt about the evidence such that a representation vote might be necessary to confirm its overall reliability – Employees understood the full implications of signing; employees had past experience with union applications; and there was no confusion about the identity of the employer – Employees' statements concerning what they allegedly understood amounted to a "change of heart" – The Board is reluctant to give weight to second thoughts without evidence of union misrepresentations – Certification granted

PEDERSEN CONSTRUCTION INC.; RE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 2486; File No. 2539-06-R; Dated December 30, 2009; Panel: Mark J. Lewis (16 pages)

Collective Agreement – Construction Industry Grievance – Ontario Human Rights Code – Remedies – A crane operator, with nineteen years experience and a clean discipline and accident record, reversed his crane into three overhead power lines resulting in an explosion and loss of power in the area – The employer, after an immediate site investigation, was not able to rule out impairment through the use of drugs or alcohol and, in accordance with its policy, directed the grievor to submit to drug and alcohol testing – The grievor refused to submit to the testing on information from his union that such a request violated his human rights – The employer considered his refusal to be a positive test result and, as a result in addition to a ten-day suspension, he was held out of service – First, the Board found the employer's policy—to conduct post incident urinalysis testing in a safety sensitive workplace—was in compliance with the collective agreement (a legitimate exercise of management rights) and the Code – Second, the Board found that the employer did not violate either the collective agreement or the Code by requiring the grievor to submit to the test – Third, the Board found that the employer's treatment of the grievor's refusal as a positive test result was without any consideration of the surrounding factors that may have mitigated against that conclusion: the veracity of the reasons for refusing the test and the long service of the applicant without any discipline or accident – Treating the grievor's refusal to submit to a test as a positive result was an unreasonable exercise of management rights, and discrimination of the grievor on the basis of a perception that he was a substance abuser, respectively amounting to a violation of the collective agreement and s. 5 of the Code – Finally, the Board found that the employer's holding the employee out of service was a violation of the collective agreement and Code which flowed from the above analysis – Declarations and directions made – Grievance allowed

STERLING CRANE – A DIVISION OF PROCRA NE INC.; RE INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 793; File No. 4082-04-G; Dated December 14, 2009; Panel: Norm Jesin (20 pages)

Alteration of Jurisdiction – Construction Industry – Interference with Trade Union –

Local 446 alleged that its parent union, UBCJA, improperly altered its jurisdiction by merging it with another local – The Board addressed the factors set out under s. 147(3) and found that: the process used by UBCJA was acceptable in that it complied with its constitution and comported with the Act; Local 446 was no longer a viable local union, whereas its merger would allow for the pooling of resources; and the merged local would be stronger financially and have more resources to allocate to organizing, training and servicing the increased membership without creating any serious labour relations problems – The Board found that the UBCJA's decision was not only a fair and reasonable one in all the circumstances, but it was fully justified – Application dismissed

CJA; RE CJA, LOCAL 446; GREATER ONTARIO REGIONAL COUNCIL OF CARPENTERS AND DRYWALL & ALLIED WORKERS ON ITS OWN BEHALF AND ON BEHALF OF ITS CONSTITUENT LOCAL UNIONS; File No. 0077-09-U; Dated December 31, 2009; Panel: Jack J. Slaughter (13 pages)

Bargaining Rights – Sector Determination –

Applicants sought a determination under s. 166 as to whether or not the Thorold Project properly fell under the ICI or the electrical power systems sector of the construction industry – The Thorold Project involved the construction of a Co-Generation facility that would generate steam to be used in the operation of the paper mill and in the production of electrical power – After reviewing the Board's history of dealing with the line between the ICI and EPS sectors, the Board considered the end use of the construction, the work characteristics of the project, and the bargaining patterns of the parties on this and similar projects – The Board found that there were two end uses for the facility, to produce steam for use both in paper making (ICI) and the generation of electricity (EPS), neither of which was predominant – The Board found that there were no work characteristics which distinguished the Project overall from those in the ICI or EPS sectors – Finally, the Board noted that the vast majority of similar types of projects had previously been built using Provincial Collective Agreements in the ICI Sector – For these types of projects, there was no new or different bargaining structure created by the parties – Since the first two factors were inconclusive regarding sector, the bargaining pattern was determinative – The Board held that the Thorold Project fell within the ICI sector of the construction industry.

V.K. MASON CONSTRUCTION CO., ET AL; RE ELECTRICAL TRADE BARGAINING AGENCY OF THE ELECTRICAL CONTRACTORS ASSOCIATION OF ONTARIO, ET AL; RE LIUNA; File Nos. 2353-08-M, 0609-09-U, 1441-08-U; Dated December 9, 2009; Panel: David A. McKee (26 pages)

Court Proceedings

Construction Industry – Judicial Review – Related Employer – Sale of a Business –

The union alleged that Cadillac Fairview was bound by the provincial collective agreement because it was related to, or had purchased the business of, Cadco – The Board found that, notwithstanding the numerous amalgamations, Cadillac Fairview continued to assemble and develop land while Cadco continued its existence as a general contractor – As there was no erosion of bargaining rights, the Board exercised its discretion not to grant s. 1(4) relief – The Board also held there was no sale of business because no physical assets or employees were transferred to the employer when Cadco shut down – On judicial review, concerning the single employer application, the court noted there was no identity of existence between the pre- and post-amalgamation corporations, something contemplated by the Amalgamation Agreement and the *Business Corporations Act* – The Board's decision not to exercise its discretion to grant the relief requested was reasonable – The Court also found the Board's finding that there was no sale of business at any time was reasonable – Application dismissed

IUPAT; RE CADILLAC FAIRVIEW CORPORATION LTD., CF/REALTY HOLDINGS INC., ET AL; OLRB File No. 1732-06-R (Court File No. 142/09); Dated December 4, 2009; Panel: Leitch, Dambrot and Swinton JJ. (4 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
K.A.S. Group of Companies v. Metro Waste Paper Recovery Divisional Court No. 611/09	0723-08-R 1037-08-R	Pending
Reliable Painters & Decorators Divisional Court No. 620/09	1443-09-R	Pending
Riverside Mart & Service v. Bilal Jebahi Divisional Court No. 09-DC-1566 Ottawa	1598-09-ES	Pending
Lennox Drum Limited v. Joseph Ah-hone Divisional Court No. 465/09	0657-08-HS	Pending
Pro Pipe Construction v. Norfab Metal and Machine Divisional Court No. 408/09	2574-04-R	Pending
IBEW v. Ellis Don Divisional Court No. 437/09	2836-08-G	Pending
Blue Mountain Resorts v. Ontario Ministry of Labour Divisional Court No. 373/09	1048-07-HS 0255-08-HS	Pending
Julie Desgrosseillers v. North Bay General Hospital Divisional Court No. DV-830-09 SUDBURY	0827-08-U	Pending
National Waste Services v. CAW-Canada Divisional Court No. 338/09	0939-07-R	Withdrawn Dec. 15/09
Robert McLaughlin v. Graphite Specialty Products, et al Divisional Court No. 09/191 LONDON	2221-07-OH	Pending
Rainbow Concrete v. International Union of Operating Engineers Divisional Court No. 332/09	0116-06-R	January 28, 2010
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	Pending
Donald Amodeo v. Ontario Ministry of Labour Divisional Court No. 147/09	2837-07-U 2839-07-OH	March 15, 2010
I.U.P.A.T. Local 1795 et al , v. Cadillac Fairview Corporation et al Divisional Court No. 142/09	1732-06-R	Dismissed Dec. 4/09
Dr. Peter A. Khaiteer v. OLRB et al Divisional Court No. 79/09	0290-08-U; 0338-08-U	Dismissed - July 8/09; seeking leave to CA
Dr. Peter A. Khaiteer 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
Janet Kitson v. OLRB et al Divisional Court No. 492/06	4205-02-U	Pending