

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

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March 2010

Scope Notes

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

Certification Where Act Contravened – Construction Industry – Interference in Trade Unions – Intimidation and Coercion – Remedies – Unfair Labour Practice – The OPDC conducted an organizing blitz which led to numerous encounters between OPDC organizers and the working foremen of Chartrand on the date of application – One encounter led to an altercation in which an organizing team's vehicle was chased on the highway and through downtown Timmins by Chartrand vehicles driven by working foremen, ending with the union organizers' vehicle being trapped between three Chartrand vehicles – A working foreman confronted the organizing team, uttered death threats and damaged their vehicle – That evening, the Union held an organization meeting – No employees attended the meeting, including those who had signed cards earlier that day – The application for certification was filed that evening, after the Union decided that it would not be able to sign any more cards due to Chartrand's actions and threats – The Board found that while there was no evidence that Chartrand had any knowledge of the Union's organizing drive prior to the date of application, following the first encounter between the Union organizers and the working foremen on the date of application,

Chartrand "undoubtedly knew" there was an ongoing organizing drive – Prior to the car chase, there was no evidence of wrongdoing by Chartrand – The car chase, however, involved acts of physical violence and death threats which constituted acts of intimidation and coercion amounting to violations of the Act – The Board found that while the Chartrand brothers did not order or orchestrate the chase, they engaged their working foremen in a "special relationship" which led to the perception that they were part of the management team – Having selected the working foremen as its agents to discourage organization, Chartrand must bear responsibility for their actions – As a result, the Board found that Chartrand had committed acts of intimidation and coercion which interfered with the organization of a trade union in violation of the Act – Chartrand conceded that if the actions taken during the car chase were attributed to the Employer, then remedial certification of the Union would be appropriate – The Board was satisfied that the OPDC's inability to demonstrate support of 40% in the application for certification occurred as a result of the serious violations of the Act committed by Chartrand and since there were no other remedies which would be sufficient to counter the effects of Chartrand's contraventions, it was appropriate to grant remedial certification – The Board found that a declaration, posting order and direct notification to Chartrand's present employees and those employed on the date of application were warranted, but did not order Chartrand to pay for publication of a newspaper notice, nor did it find any need for a cease and desist order, due to its finding that there was no proof of any ongoing misconduct by Chartrand – Certification granted

450477 ONTARIO LTD. CHARTRAND EQUIPMENT; RE LIUNA, Ontario Provincial District Council; File Nos. 1514-06-U; 1516-06-R;

Dated February 17, 2010; Panel: Jack J. Slaughter (17 pages)

Construction Industry – First Contract Arbitration – Practice and Procedure – Reconsideration – Termination – Timeliness

Local 625 was certified as the bargaining agent for the employees of Villa – Following an unsuccessful conciliation meeting, Local 625 filed an application for first contract arbitration – At the hearing, counsel for Villa advised that Villa received an application to terminate with a filing date the day prior to the hearing – An oral decision was issued directing the settlement of a first collective agreement between Villa and Local 625 – The Board also indicated it was prepared to reconsider its decision if the termination application had been filed with the Board prior to the direction – The application was “filed” with the Board by priority courier the day before the oral direction and delivered to Local 625 by priority courier five days after the filing date – Delivery of the application was delayed as a result of counsel for the applicant directing the application to the wrong street address – The Board exercised its discretion to extend the date for delivering the termination application to Local 625 – The Board found nothing inaccurate on the face of the Certificate of Delivery and saw no reason to order a second Certificate of Delivery be filed by the applicant – The Board found that the termination application was properly delivered to Local 625 and that the proceeding should continue – The termination application must be determined before the application for a first contract direction – The oral decision directing that a first contract be determined by way of arbitration was revoked in its entirety – The Board directed a representation vote be held and the ballot box to remain sealed – Matter continues

538203 ONTARIO LTD., O/A VILLA CONSTRUCTION; RE LIUNA, LOCAL 625; File Nos. 2409-09-FC; 2784-09-R; Dated February 2, 2010; Panel: Lee Shouldice (10 pages)

Jurisdictional Dispute – Intervenor – The Millwrights brought two applications in response to grievances filed by the Plumbers – EPSCA intervened in both applications, which relate to the same work in dispute performed at the same worksite – During mark-up meetings required by the collective agreement, to which all parties were bound, the work in dispute was assigned to the Millwrights; however, the work was done by the Plumbers – Both employers state that they did not change the work assignment and when they became aware that the Plumbers had done the work they directed that the work be performed by

the Millwrights – The Plumbers argued that the work was finally assigned to them and that the Millwrights had the onus of demonstrating that the work assigned to the Plumbers should be altered – The Board stated that it would not support efforts by parties to gain advantage by avoiding or ignoring the transparent processes contained in the EPSCA collective agreements – The Board held that the fact that the union to whom the work was not assigned did the work does not mean that there was a change made to the assignment – The Plumbers’ challenge to the assignment of work in dispute came almost a year after they were aware of the assignment – As a result, the Board found it was not necessary to inquire further into the assignments of work – The Board exercised its discretion and was not prepared to consider the Plumbers’ claim to the work in dispute – The assignments were not challenged in a timely manner – Board declares the work in dispute was properly assigned to the Millwrights.

AKER KVAERNER SONGER CANADA, UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, LOCAL 67 AND; RE MILLWRIGHT REGIONAL COUNCIL OF ONTARIO AND ITS LOCAL 1007; RE; EPSCA; File Nos. 1223-09-JD; 1224-09-JD; Dated February 11, 2010; Panel: Charles E. Humphrey (5 pages)

Health and Safety – Interim Relief – The College and two of its unions were unable to come to agreement on the timely and appropriate statutory inspections of the workplace, which occupies approximately 100 acres of land and consists of almost 1,900 rooms or spaces – The Inspector ordered that the physical condition of the workplace be inspected once a month – The College appealed and sought a suspension of the order, asserting that the parties enjoyed a long history of regular and compliant inspections until the end of the last agreement – The Board held that a suspension of the order would not relieve the College of its obligations under the Act; there was no evidence to suggest that a suspension of the order would put employees at risk; a failure to suspend the order would considerably prejudice the employer; and the employer had pleaded a strong *prima facie* case for success on the merits of the appeal – However, the Board concluded although it could suspend the order under appeal, it had no jurisdiction to substitute a second order in the context of a suspension request – After consulting with the parties, the Board issued an interim order directing the parties to conduct inspections in accordance with a proposal

proffered by the College – Suspension granted, appeal to be heard

FANSHAWE COLLEGE OF APPLIED ARTS AND TECHNOLOGY; RE OPSEU, LOCAL 109, OPSEU, LOCAL 110 AND CHRISTOPHER CALAGHAN, INSPECTOR; File Nos. 2903-09-HS, 2906-09-HS; Dated February 1, 2010; Panel: Lee Shouldice (15 pages)

Alteration of Jurisdiction – Construction Industry – Interference with Trade Union – Practice and Procedure – Unfair Labour Practice

– A request for documents by Local 183 was met by the responding parties claiming solicitor-client privilege, informant privilege and that disclosure would create a chilling effect on the willingness of union members to come forward in future cases to assist in investigations – The issue before the Board was whether privilege from disclosure applied and alternatively, if privilege did not apply, whether the Board should exercise its discretion not to require disclosure of certain documents – The responding parties alleged that there was a solicitor-client relationship between Mr. Pink and LIUNA – The Board held that while Mr. Pink was conducting an investigation, he was not acting in the capacity of a solicitor and therefore, the relationship between Mr. Pink and LIUNA did not attract solicitor-client privilege in those circumstances – The Board further held that neither the identity of informants nor the information they provided to Mr. Pink was protected by communication or informant privilege – Protecting the identity of informants in a private investigation under a union constitution cannot be said to give rise to “important social considerations” – The Board did not find that under the circumstances it would be an appropriate exercise of its discretion to prevent disclosure of the identities or of information provided by informants – The Board held that the identity of informants was arguably relevant and it was not prepared to exercise its discretion to prohibit the disclosure of the names of informants or relevant evidence which would allow the names of the informants to be ascertained – The Board ordered disclosure of documents with certain conditions in place to act as safeguards to protect the process and the individuals involved – Matter continues

LIUNA, JOSEPH S. MANCINELLI, RONALD A. PINK, Q.C. AND COSMO MANELLA; RE UNIVERSAL WORKERS UNION, LIUNA, LOCAL 183 ON ITS OWN BEHALF AND ON THE BEHALF OF ITS MEMBERS AND EXECUTIVE BOARD; File No. 2388-09-U; Dated February 22, 2010; Panel: Charles E. Humphrey (16 pages)

Employee – Employer – Health and Safety

– These applications concern the health and safety of paramedics (employees of Essex represented by CUPE) in relation to communications systems which the MOHLTC has the sole and exclusive responsibility to provide and operate – There were six issues over which Essex and CUPE disagreed with the MOHLTC: the need for a second portable radio on an ambulance crew so that both crew members would have a portable radio; testing emergency buttons on the radios; preventative maintenance of the radios; flagging of potentially dangerous addresses; mike to mike functions on cell phones; and information on defects in the system – The Board reviewed the factual context, the hazards faced by paramedics, and the MOHLTC’s role with respect to the provision of ambulance services in Essex – The Board found that while MOHLTC was not the employer of the paramedics, it did have some of the obligations of an employer under the OHSA to the paramedics – The Board found a high level of integration between the communications and dispatch functions performed by the MOHLTC and the service functions performed by Essex – The Board noted that the paramedics were under the constant direction and control of [MOHLTC’s] Central Ambulance Communication Centre from the beginning to the end of their shifts – After an extensive review of the case law, the Board found the integration of these systems was sufficient to impose upon the MOHLTC some of the obligations of an employer in relation to the paramedics—given that the contiguous sphere of operations with Essex meant that MOHLTC’s activities could pose a risk of harm to the paramedics – Alternatively the Board found the MOHLTC, although a non-natural person, could be a supervisor under the Act, and given the authority (complete and exclusive control over the communications system it requires the paramedics to use) it exercised over the paramedics, it was their supervisor – The Board went on to find that the MOHLTC did breach certain obligations with respect to the six issues as an employer (and alternatively as a supervisor) in relation to the paramedics with respect to the communications systems – Declarations, orders and directions made

MINISTRY OF HEALTH AND LONG-TERM CARE, LAND AMBULANCE PROGRAMS; RE CUPE LOCAL 2974.1 AND R. TAGGART, INSPECTOR; RE COUNTY OF ESSEX-WINDSOR; File Nos. 3325-04-HS; 0284-05-HS; Dated February 26, 2010; Panel: Ian Anderson 57 pages)

Construction Industry – Interim Relief – Intervenor – Unfair Labour Practice – Seven individuals were laid off by Percon, one of whom was subsequently recalled – The Labourers sought as interim relief reinstatement of six construction labourers – Percon resisted the interim application, stating that the six individuals were all laid off for legitimate business reasons, without anti-union animus, and in accordance with the lay off provisions of the collective agreement between Percon and Local 52 – The Board found that the allegation that six individuals were laid-off as a result of supporting the organizing campaign is a serious issue to be decided; that a campaign was underway at the relevant time; the immediate reinstatement/recall of the six individuals was necessary to prevent irreparable harm to the Labourers' organizing campaign; and that the economic harm to Percon does not outweigh the irreparable harm and labour relations objectives that will be achieved by granting the interim relief – The Board found that there were significant inconsistencies in the factual assertions which resulted in an appearance that the conduct of Percon may not have been free of anti-union animus – As a result, the Board ordered the reinstatement of the six individuals and directed Percon to refrain from laying them off or changing the terms of their employment until the Board issues its final decision on the unfair labour practice complaint, except with the consent of LIUNA – Relief granted with directions

PERCON CONSTRUCTION INC.; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL; RE CONSTRUCTION WORKERS LOCAL 52, AFFILIATED WITH CLAC; File Nos. 2962-09-M; 2963-09-U; Dated February 1, 2010; Panel: John D. Lewis (18 pages)

Health and Safety – An order was issued requiring Xstrata to have the first aid rooms located at each of two of the employer's mines in the charge of two different first aid attendants – The Board, differently constituted, dismissed Xstrata's application to suspend the operation of the Order pending disposition of this appeal – The Board found that the regulation used the term "readily available" not "immediately available" and there was nothing in the regulation precluding an employer from having two first aid rooms associated with two underground mines in the charge of the same individual when it is unlikely that first aid attendant will be required to administer first aid at the same time in two locations – The Board found that because the mines are not in production and there were relatively few employees working underground, it was unlikely that simultaneous first aid would be required at different mines – The Board found that while the mines remain out of production, Xstrata

is in accord with the regulation by having the two first aid rooms in the charge of the same qualified first aid attendant – Appeal allowed; Order rescinded

XSTRATA CANADA CORPORATION; RE UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL SERVICE WORKERS INTERNATIONAL UNION (UNITED STEELWORKERS), LOCAL 2020; RE RICK KULYSKI, INSPECTOR; AND CANADIAN AUTOWORKERS (CAW) CANADA AND ITS LOCAL 598; File No. 0506-09-HS; Dated February 5, 2010; Panel: Harry Freedman (19 pages)

Court Proceedings

Bargaining unit – Certification – Employee – Judicial Review – Rainbow sought judicial review of two decisions of the Board to exclude certain employees from the bargaining unit and of the Board's decisions denying its requests for reconsideration – The Board applied the "greatest attachment" test and found that the 11 drivers were not working in, at, or out of the Sudbury location and were not employees within the bargaining unit – The Board further found that 15 employees were not in the bargaining unit because the work of those employees was administrative in nature and fell within the office and clerical exception – As a result of those exclusions, ballots of the employees found not to be in the bargaining unit were not counted and Local 793 won the representation vote and was certified – On judicial review, the Court found that it was reasonable for the Board to emphasize the factor of how much time was physically spent in each location and further, that the Board's decision to exclude the drivers falls within a range of acceptable outcomes and is entitled to deference – The Court held that with respect to the clerical workers, given the Board's experience in assessing such matters, the Board's decision was entitled to deference and was reasonable – Application dismissed

Board decisions reported at [2006] OLRB Rep. May/June 409; [2009] O.L.R.D. No. 1096

RAINBOW CONCRETE INDUSTRIES LTD.; RE INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 793 AND ONTARIO LABOUR RELATIONS BOARD; OLRB File No. 0116-06-R (Court File No. 332-09); Dated February 2, 2010; Panel: McCombs, Lederman and Molloy JJ (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
Ellis Don Limited v. Ontario Sheet Metal Workers' and Roofers' Conference Divisional Court No. 92/10	0784-05-G	Pending
AECON Construction Group v. IBEW, Local 105 Divisional Court No. 87/10	3626-08-G	Pending
Independent Electricity System Operator v. Canadian Union of Skilled Workers, LIUNA et al Divisional Court No. 78/10	3322-03-R 2118-04-R	Pending
Christopher Henderson (Proteus Craftworks) v. Director of Employment Standards et al Divisional Court No. 02/10	1953-07-ES	Pending
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
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	Dismissed Feb. 2/10
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	June 14, 2010
Donald Amodeo v. Ontario Ministry of Labour Divisional Court No. 147/09	2837-07-U 2839-07-OH	March 15, 2010
Dr. Peter A. Khaiteer v. OLRB et al Divisional Court No. 79/09	0290-08-U; 0338-08-U	C.A. dismissed Feb. 3/10
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

Case name & Court File No.	Board File No.	Status
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