

*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 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.

Construction Industry Grievance – CUSW referred two grievances to the Board, asserting rights as against AECL although the union only held bargaining rights with Bruce Power (who had a contractual relationship with AECL) – CUSW argued that (1) Bruce was its agent for executing collective agreements with contractors like AECL; and (2) the Board should find there is a collective agreement between CUSW and AECL so the union can reap the third party benefits of the specific agreements between Bruce and the AECL – The Board examined the language of the contracts and collective agreements and found that while there was the *possibility* of creating an agency relationship, none had been explicitly created by these parties – With respect to the third party benefits, the Board held that in the unlikely circumstance that it could fashion a remedy for a third party arising out of a contract not governed by the LRA, it would not be appropriate to do so here – CUSW had already obtained all that it bargained for with Bruce, and nothing in the AECL contract could or would deprive it of those rights – Grievances dismissed

ATOMIC ENERGY OF CANADA LIMITED; RE CANADIAN UNION OF SKILLED WORKERS; File Nos. 2822-06-G; 0445-08-G; Dated March 18, 2010; Panel: David A. McKee (7 pages)

Certification Where Act Contravened – Discharge for Union Activity – Unfair Labour Practice – During the course of CEP's organizing campaign, Boehmer and some of its employees distributed written communications which the union alleged were false and misleading and which implied that unionization would undermine the viability of the enterprise and would therefore compromise employees' job security – CEP lost the representation vote by a large margin, despite obtaining the support of a majority of the employees as of the application date – The Union alleged that literature distributed by, or with the approval of, Boehmer threatened the livelihood of employees and had a chilling effect on the voters – The issue before the Board was whether Boehmer violated the Act and if so, whether CEP was entitled to remedial certification despite having lost the representation vote – A majority of the Board found that a number of events at the workplace did not constitute unfair labour practices; however, the written communications and the links made in those communications between unionization and job security did constitute a violation of the Act – The majority found that neither a second representation vote alone nor the Board's other customary remedies in combination with a second vote would adequately respond to the threats raised by Boehmer's written communications – The union was entitled to remedial certification – Certificate issued

BOEHMER BOX LP; RE CEP; File Nos. 0474-08-R; 0493-08-U; 1866-08-U; Dated March 3, 2010;

Panel: Patrick Kelly, J.A. Rundle (dissenting), S. McManus (24 pages)

Health and Safety – Local 1946 sought a suspension of an order requiring electricians to mount bed locators in hospital rooms at the Victoria Hospital construction project – The Board found that it was more probable than not that the bed locator would be a metal frame fixture containing smaller electrical fixtures and raceways; it was not an electrical fixture within the meaning of the *Trades Qualification and Apprenticeship Act* – Given that, the Board found that Local 1946 demonstrated that it had a strong *prima facie* case for a successful appeal – Local 1946 also established that suspending the order was not likely to create a danger to the health and safety of workers and that it would be prejudiced if the order were not suspended – Since Local 1946 was able to satisfy all three criteria for a suspension of the order, the request was granted pending the disposition of the appeal

ELLISDON CORPORATION; DAN DIGNARD, INSPECTOR; AND IBEW, LOCAL 120; RE UBCJA, LOCAL 1946; File No. 3215-09-HS; Dated March 3, 2010; Panel: Harry Freedman (10 pages)

Employment Standards – The employer sought review of an order requiring it to pay vacation pay to the employee, against whom the employer had a court order for restitution following a conviction for theft – The Board found that the wages were withheld before the conviction and restitution order, and such withholding was in violation of the set-off provisions of the Act – The employer is not allowed to put itself in a better position than another debtor by withholding wages – There was no authorization for the set-off, and the court order only required that the employee make reasonable efforts to comply – Application dismissed

GRAPPLE MARKETING INC. c.o.b. as KWIK KOPY DESIGN AND PRINT CENTRE; RE BONNIELEE HARRISON AND DIRECTOR OF EMPLOYMENT STANDARDS; File No. 1408-09-ES; Dated March 1, 2010; Panel: Brian McLean (3 pages)

Bar – Bargaining Rights – Termination – The Board issued reasons for its earlier “bottom line” determination that the applicant ought to be barred from pursuing a second termination application just two months after a first such application was dismissed when the union won the representation vote – The Board held that the

exercise of its discretion under s. 111(2)(k) involves a careful weighing of competing interests and objectives – The employees had been given the opportunity to determine by secret ballot whether they wanted the union to continue to represent them, and a majority of them voted in favour of continued representation – Once a vote has been taken and counted, there must be a compelling reason to subject the stability of the collective bargaining relationship to the uncertainty of another test of the union’s representation rights – No unusual circumstances were present here – The union should not be distracted from its obligations to bargain by having to defend a second attack on its bargaining rights – Application dismissed

ONTARIO LOTTERY AND GAMING CORPORATION c.o.b. as OLG BRANTFORD CASINO; RE JASON BONNEY; RE SEIU LOCAL 2, BREWERY, GENERAL AND PROFESSIONAL WORKERS’ UNION; File No. 3277-09-R; Dated March 23, 2010; Panel: Patrick Kelly (6 pages)

Construction Industry Grievance – The Board was asked to determine whether OPG’s decision to bar an individual (an employee of Aecon) from its sites is subject to the “just cause” standard established by the collective agreement between the UA and EPSCA – OPG acknowledged that it was a signatory to the EPSCA agreement, but asserted that it was acting as an owner, constructor or licensee, and not as an employer, when it banned the individual – The Board held that OPG was exercising power in respect of the grievor’s employment when it banned him from its sites – The Board found that there is nothing in the Act or the EPSCA Agreement that permits an entity to claim it is not subject to the Agreement when the entity wears an “owner” hat as opposed to an “employer” hat – OPG’s decision to ban the employee was independent of the employment relationship the employee had with Aecon; OPG’s actions come within the scope of the EPSCA Agreement, and it must establish that those actions meet the standard of the Agreement – Matter continues

ONTARIO POWER GENERATION INC., ELECTRICAL POWER SYSTEMS CONSTRUCTION ASSOCIATION AND; RE UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA; File Nos. 0264-09-G; 0266-09-G; Dated March 31, 2010; Panel: Harry Freedman (11 pages)

Discharge for Union Activity – Interim Relief – Practice and Procedure – The SEIU sought an interim order for reinstatement of a probationary employee – A decision had been made by the employee's supervisor that she was not suitable for permanent employment – This decision was not communicated to the employee because she had requested a leave of absence to complete a professional examination – Upon her return, the employee learned of the organizing campaign and began showing her support – She was terminated five days later – SEIU alleged that the discharge effectively halted the union's organizing efforts – Princess Gardens conceded that a campaign to establish bargaining rights was underway and that there was a serious issue to be decided in the pending proceeding – The Board did not find it necessary to determine whether relief was necessary to prevent irreparable harm or to achieve other significant labour relations objectives or whether the balance of harm favoured the granting of the interim relief, because it appeared to the Board that the dismissal was unrelated to the exercise of the employee's rights in support of the union – The Board found that Princess Gardens had a plausible basis for ending the employee's employment and its explanation for the delay in informing her of the dismissal was also plausible – The Board found on a preliminary assessment that the discharge was unrelated to the exercise of rights under the Act by an employee and therefore the Board was prevented from exercising its discretion to reinstate – Application for interim relief dismissed

PRINCESS GARDENS RETIREMENT RESIDENCE; RE SEIU, LOCAL 1 CANADA; File No. 3177-09-M; Dated March 2, 2010; Panel: Patrick Kelly (8 pages)

Certification Where Act Contravened – Construction Industry – Interference with Trade Unions – Remedies – Unfair Labour Practice – The Carpenters commenced an organizing campaign by having an employee of Southend distribute cards – The owner's brother, who was the employee's supervisor, openly expressed his dislike of unions, and burned another employee's union card at the workplace, in front of several other employees – The employer argued that the discharge of the employee who began distributing cards was for excessive absences, and for drinking during lunch – The Board found that the termination of the employee effectively put an end to the organizing campaign – The Board preferred the discharged employee's evidence over that of the employer's witnesses – Although his attendance may have been at issue, it was not the reason for the

discharge – Other employees were reprimanded for drinking at lunch; the inside organizer was terminated – The employer did nothing to distance himself from his brother's anti-union behaviour – The Board was satisfied that a representation vote would not reflect the true wishes of employees – Certificate granted

SOUTHEND DRYWALL & ACOUSTICS LTD.; RE UBCJA, LOCAL 2486; File Nos. 3317-07-R; 3318-07-U; Dated March 17, 2010; Panel: Marilyn Silverman, B. Roberts, R. Baxter (15 pages)

Bargaining Rights – Employee – Status – Termination – IBEW Local 115 held bargaining rights in the ICI sector and in all other sectors in Board Area 12 – In a previous decision, the Board held that the termination application was untimely with respect to the ICI sector, but was timely as it related to all other sectors – On the date of application, the individual applicant performed ICI work for the majority of the day and non-ICI work for a minority of the day – The issue before the Board was whether an employee must spend a majority of his/her work day performing bargaining unit work in order to be an "employee in a bargaining unit" for the purposes of a termination application – The Board found that applying the "majority of time test to sectors" used in certification applications did not make labour relations sense in the context of termination applications – There was no compelling justification to disqualify an individual as an employee of the bargaining unit in circumstances where that individual, on the date of application, performed work within the geographic area of the bargaining unit, within the scope of the bargaining unit and of the type covered by the collective agreement or certificate in the relevant sector, albeit not for the majority of the workday – The Board found that the applicant was an employee in the bargaining unit on the date of application – The Board found that the majority of time principle, as it relates to sectors, was not applicable to termination applications in the construction industry – Ballot to be counted

TERRY SHORTT ELECTRICAL SERVICES LTD.; RE GLYNN SAYEAU; RE IBEW AND THE IBEW CONSTRUCTION COUNCIL OF ONTARIO QUINTE & ST. LAWRENCE ELECTRICAL WORKERS LOCAL UNION 115; File No. 0468-09-R; Dated March 11, 2010; Panel: John D. Lewis, B. Roberts, R. Baxter (12 pages)

Court Proceedings

Delay – Duty of Fair Representation – Health and Safety – Judicial Review – Settlement –

The applicant sought review of two Board decisions, one dismissing a s. 74 complaint, and the second dismissing a s. 50 OHSA application in favour of an ongoing proceeding before the Grievance Settlement Board – The matter was settled at the GSB, and the applicant asked the Court to set aside the Minutes of Settlement (MOS) – The Court found there was no evidence of the applicant's diminished capacity during the GSB proceeding, so the MOS was fatal to his claim – In addition the MOS was not a reviewable decision – The applications for review of the Board rulings were dismissed for delay

(Board decision not reported)

DONALD AMODEO; RE ONTARIO MINISTRY OF LABOUR (HER MAJESTY IN RIGHT OF ONTARIO), ATTORNEY GENERAL OF ONTARIO, GRIEVANCE SETTLEMENT BOARD, OPSEU AND OLRB; OLRB File Nos. 2837-07-U; 2838-07-OH (Court File No. 147/09); Dated March 15, 2010; Panel: Jennings, Lederman and Dambrot, 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
Mr. Todor Pandeliev v. OLRB Divisional Court No. 10-DC-1594 Ottawa	3279-08-ES	Pending
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	August 10, 2010
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	Abandoned Mar. 10/10
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	Dismissed Mar. 15/10
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
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