

*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 August 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.

Bargaining Rights – Certification – Construction Industry – Practice and Procedure – Reconsideration – BACU (and BACU & Local 31) applied for certification in respect of bargaining units they already represented – The Board, on its own motion, directed submissions on whether an application made by a trade union that already holds bargaining rights for all of the employees in the bargaining unit for which it seeks certification as bargaining agent is an application for certification within the meaning of section 7 of the Act – The Board found that, other than closing the open period, there was no purpose served by such an application – Given that the trade union would simply acquire exactly what it already has, the Act did not contemplate a trade union displacing itself – The Board further found that an interpretation of s. 7 that allowed a trade union to displace itself would be inconsistent with other provisions of the Act and could lead to absurd results – Finally, the Board found that the purposes of the Act would be undermined if a trade union could apply to be recertified – Applications dismissed

BERNEL MASONRY INC. ET AL; RE BACU; File Nos. 3206-09-R;; 3209-09-R; 3210-09-R; 3225-09-R; 3226-09-R; 3227-09-R; 3228-09-R; 3275-09-R; 3282-09-R; 3284-09-R; 3287-09-R; 3304-09-R; Dated August 26, 2010; Panel: Diane L. Gee (22 pages)

Bargaining Rights – Crown Employees Collective Bargaining Act – Sale of a Business – This application under s. 10 of the *Crown Employees Collective Bargaining Act* (CECBA) and s. 69 of the *Labour Relations Act* (LRA) relates to the Crown's decision to cancel contracts between the Crown and York Detention Centre Ltd. (YDC) resulting in the lay off of members of OPSEU – The issues were (1) whether the termination of the Crown's contract with YDC and the transfer of young offenders to the Roy McMurtry Youth Centre (RMYC) amounted to a transfer of an undertaking for the purposes of CECBA such that s. 69 of the LRA applied to bind the Crown to the YDC Collective Agreement and (2) whether such a transfer would grant YDC employees collective agreement rights at RMYC in Brampton notwithstanding that the geographic scope of the collective agreement is limited to Toronto – The Board found that the right to house young offenders, the obligation to provide them services and the funding necessary to do so as derived from the contract was transferred from YDC back to the Crown at RMYC – These were the essential elements of YDC's undertaking, without which it could not operate its business – Accordingly, the Board found that there had been a transfer of an undertaking within the meaning of CECBA from YDC to the Crown at RMYC such that s. 69 of the LRA applied, binding the Crown to the YDC Collective Agreement – On the second issue, the Board followed the principle found in *Silverwood Dairies* that successor rights

provisions do not operate to extend bargaining rights beyond the geographic scope of the collective agreement binding the predecessor – Accordingly, the Board denied OPSEU's request for orders requiring the Crown to recognize the collective agreement rights of YDC employees at RMYC

THE CROWN IN RIGHT OF ONTARIO AS REPRESENTED BY THE MINISTRY OF CHILDREN AND YOUTH SERVICES, YORK DETENTION CENTRE LTD. AND NORTHERN YOUTH SERVICES INC.; RE OPSEU; File No.: 1810-09-R; Dated August 16, 2010; Panel: Caroline Rowan (22 pages)

Certification – Displacement – Natural Justice – Practice & Procedure – Representation Vote – Trade Union – In a displacement application for certification, Workers United Ontario Council (WUOC), the losing trade union in a close vote, raised an issue concerning the conduct of the representation vote – The vote consisted of two one-hour polls, one in the morning, the other in the evening – During the first fifteen minutes of the evening poll, the building doors were locked barring access to potential voters – Inquiries made by WUOC did not indicate that any individual was prevented from voting due to lack of access – WUOC requested another vote which UNITE HERE opposed – The Board followed the principle that “when an election is conducted in a manner which is substantially fair, any mistake or irregularity which does not affect the result will not invalidate the election” – The Board found that voters are entitled to a high standard of integrity, but not perfection in the conduct of representation votes – The Board concluded that there was no evidence the error prevented anyone from voting, and declined to disregard the outcome of the balloting – Matter continues

NORDIC GAMING CORPORATION; RE WORKERS UNITED ONTARIO COUNCIL; RE UNITE HERE; File No. 0605-10-R; Dated August 11, 2010; Panel: Patrick Kelly, S. McManus J. A. Rundle (dissenting) (4 Pages)

Health and Safety – Trade Union – Trades Qualification and Apprenticeship Act – PCL filed an application under the OHSAA to appeal orders against them – The Labourers, Local 247 intervened in support of PCL; the Sheet Metal Workers and the UA, Local 221 intervened in support of the inspector and his orders – Part of major redevelopment work by Kingston General Hospital (KGH) involved the removal and replacement of selected portions of existing HVAC systems by subcontracted Envirocon

employees – An Inspector visited the areas at the KGH where Envirocon's construction labourers were performing work on the HVAC system – The site visit resulted in the Inspector issuing four orders, which all turned on the main issue in dispute: whether or not the “handling and dismantling of sheet metal” work performed by the Labourers was in fact sheet metal work as defined under Regulation 1077 of the TQAA and, therefore, within the meaning of OHSAA Regulation 572/99 – Regulation 572/99 of the OHSAA is designed to promote health and safety by ensuring workers have the proper and appropriate training achieved by directly incorporating regulations passed under the TQAA – The Board found that the work in question did not call for the specialised and exclusive training which sheet metal workers receive, and was therefore not the “handling and dismantling of sheet metal” within the meaning of Regulation 1077 – Accordingly, the provisions of 572/99 did not require that such work be performed exclusively by sheet metal workers – Inspector's Orders set aside

PCL CONSTRUCTORS CANADA INC.; LIUNA, LOCAL 247, LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL; SHEET METAL WORKERS INTERNATIONAL ASSOCIATION, LOCAL UNION 269; ONTARIO SHEET METAL WORKERS' & ROOFERS' CONFERENCE, AND KEVIN KEALEY, INSPECTOR; File No: 0275-09-HS; Dated August 16, 2010; Panel: Mark J. Lewis (14 pages)

Hospital Labour Disputes Arbitration Act – Reference – Trade Union – The question referred to the Board on a ministerial reference pursuant to section 3(2) of the *Hospital Labour Disputes Arbitration Act* (HLDA) was whether or not bargaining unit employees are covered by HLDA – CUPE took the position that HLDA applied while Rothwell opposed this view – The advice provided by the Board was that the bargaining unit employees of this employer are not covered by HLDA – Rothwell is not an enumerated institution under the definition of “hospital” in HLDA because its employees primarily provide cleaning, and not personal care services – The Board found that the health, safety or well-being of the residents would not be jeopardized by a strike and that Rothwell was not an institution operated for the “care, observation or treatment” of those clients within the meaning of section 3(2) of HLDA – Advice provided

ROTHWELL HEIGHTS LODGE; CUPE AND ITS LOCAL 3317; File No. 2365-09-M; Dated August 11, 2010; Panel: Mary Anne McKellar (15 Pages)

Discharge – Duty to Bargain in Good Faith – Prima facie motion – Strike – Unfair Labour Practice

– The parties settled a strike leaving one outstanding issue: whether Vale's refusal to agree to an arbitration process that could result in the reinstatement of striking employees discharged during the strike violated s. 17 of the Act – The Board noted that USW's interpretation of *Royal Oak* would mean that it would be a breach of the duty to bargain for a party to maintain an objectively unreasonable position to impasse, regardless of the party's motivation for doing so, and that this position would effectively render "illegal *per se*" that which neither any specific provision nor the scheme of the Act as a whole makes illegal – The Board concluded that the fact that Vale maintained to impasse its position of refusing to agree to just cause arbitration for employees discharged during the strike was not sufficient in and of itself to give rise to a breach of the duty to bargain – Next, concerning Vale's position that USW had not pled a *prima facie* case, the Board held that the USW had pled that Vale maintained to impasse a position of refusing to agree to just cause arbitration and that this was unusual and *Royal Oak* provides a basis for arguing that it is objectively unreasonable – Accordingly, the Board dismissed the *prima facie* motion, finding that a reasonable argument could be made on the basis of USW's pleadings which would result in the conclusion that Vale breached its duty to bargain – Finally, the Board found that Vale was entitled to lead the evidence with respect to the reasons it maintained its position – Matter continues

VALE INCO LIMITED; UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION (UNITED STEELWORKERS) ON ITS OWN BEHALF AND ON BEHALF OF ITS LOCAL 6500 AND ITS LOCAL 6200; File No. 3033-09-U; Dated August 12, 2010; Panel: Ian Anderson, P. LeMay, C. Phillips (19 pages)

– The appropriate standard of review was reasonableness – The Divisional Court found that the Board's decision was not only reasonable, but correct – Application dismissed

LENNOX DRUM LIMITED; RE JOSEPH AH-HONE, INDUSTRIAL HEALTH AND SAFETY INSPECTOR AND JOSEPH OUIMET, WORKER MEMBER OF THE LENNOX DRUM LIMITED JOINT HEALTH AND SAFETY COMMITTEE AND THE OLRB; OLRB File No. 0657-08-HS (Court File No. 465/09) Dated August 10, 2010; Panel: J. Wilson J., Swinton J., Nordheimer J. (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.

Court Proceeding

Health and Safety – Judicial Review – Lennox Drum Limited (Lennox) appealed an order requiring it to comply with the Industrial Regulation relating to proper stacking of drums – Lennox argued that its method of stacking two tiers of empty drums met the equivalency criteria set out in section 2 of the Regulation – The Board found that the Lennox method did not comply with the Regulation: to simply ignore the provision was not a variance – Lennox applied for judicial review

Pending Court Proceedings

Case name & Court File No.	Board File No.	Status
Rainbow Concrete Divisional Court No. DU-856-10 Sudbury	3292-09-M	Pending
Dr. Peter A. Khaiteer v. OLRB et al Divisional Court No. 383/10	0290-08-U 0338-08-U	Pending
Rainbow Concrete Divisional Court No. 850-10 Sudbury	2904-09-U 2905-09-FC	Pending
Mr. Todor Pandeliev v. OLRB Divisional Court No. 10-DC-1594 Ottawa	3279-08-ES	Pending
AECON Construction Group v. IBEW, Local 105 Divisional Court No. 87/10	3626-08-G	Jan./Feb. 2011
Independent Electricity System Operator v. Canadian Union of Skilled Workers, LIUNA et al Divisional Court No. 78/10	3322-03-R 2118-04-R	October 21 & 22, 2010
K.A.S. Group of Companies v. Metro Waste Paper Recovery Divisional Court No. 611/09	0723-08-R 1037-08-R	December 17, 2010
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	Dismissed Aug. 10/10
Pro Pipe Construction v. Norfab Metal and Machine Divisional Court No. 408/09	2574-04-R	Pending
Blue Mountain Resorts v. Ontario Ministry of Labour Divisional Court No. 373/09	1048-07-HS 0255-08-HS	Nov./Dec. 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	Adjourned <i>sine die</i>
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