

H Ontario Labour Relations Board **HIGHLIGHTS**

Editors: Voy Stelmaszynski, Solicitor
Leonard Marvy, Solicitor

March 2011

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.

Construction Industry – Employment Standards – The main issue was whether the employee was a “construction employee” and as a result, the employer was exempt from paying termination and severance – The employer was in the road building business and met the definition of an employer in the construction industry – The Board noted however that this did not necessarily mean that all of its employees were “construction employees” – In assessing the employee’s work the Board found he worked the vast majority of his time off-site in the main yard or shop, and when he did work at the site, it was not to repair roads – Accordingly, since he was not employed at the site, he did not fall within the first branch of the “construction employee” definition – The Board also found that the employee did not meet the other branch of the definition as the employer was not able to establish that the employee was commonly associated with the work of either LIUNA or IUOE members – The employer did not satisfy the Board that the employee was regularly or routinely dispatched to the construction site, nor that his principal duty on site was to repair the machinery – Therefore the employee was not a “construction

employee” and was entitled to termination and severance pay – Appeal allowed

COCO PAVING INC. AND DIRECTOR OF EMPLOYMENT STANDARDS; RE DUGAGJIN GJOCAJ; File No. 0054-10-ES; Dated February 4, 2011; Panel: Mary Anne McKellar (8 pages)

Bargaining Unit – Certification – Dependent Contractor – Employee – Trade Union – Application for certification for single plate owner/lessee operators and drivers of cabs employed by Hamilton Cab – Hamilton Cab argued that it had no employment relationship with the drivers, and that the single plate owner/lessee operators, who were independent contractors, were the drivers’ employers – Hamilton Cab argued in the alternative that, if the single plate owner/lessee operators were dependent contractors, s. 9(5) of the Act requires that they be placed in a separate bargaining unit from other employees – The Board found that all single plate owner/lessee operators and drivers for Hamilton Cab were dependent contractors of Hamilton Cab – Hamilton Cab exercised substantial direct control over drivers and owner/lessee operators by enforcing standards through suspension and termination – There was no evidence of significant entrepreneurial activity by the drivers and owner/lessee operators – Hamilton Cab unilaterally changed brokerage fees – Single plate owner/lessee operators are an essential element of Hamilton Cab’s business – That Hamilton Cab did not pay hourly wages, provide benefits or make deductions does not change economic dependency – While the large number of cabs and cabdrivers operating under Hamilton Cab ensured a degree of independence between the drivers and the single plate owner/lessee operators, the relationship of both the drivers and the single plate owner/lessee

operators with Hamilton Cab remained one of economic dependence and control – The Board found that the bargaining unit shall be restricted to dependent contractors pending a vote held pursuant to section 9(1) of the Act – Certificate issued

HAMILTON CAB CO. O/A HAMILTON CAB; RE ONTARIO TAXI WORKERS' UNION; File No. 3184-09-R; Dated February 16, 2011; Panel: Ian Anderson (23 pages)

Bargaining Unit – Public Sector Labour Relations Transition Act – The application arose from the amalgamation of North Bay General Hospital and the Northeast Mental Health Centre to create the North Bay Regional Health Centre – The parties could not agree on whether the Board should maintain the status quo of twelve bargaining units or consolidate them into at least three: service, office and clerical; paramedical; and RN's – The Board found that maintaining the status quo would not be consistent with the purposes of the PSLRTA – The Board noted that the employer's perspective was taken into account unlike certifications in the LRA – The Board also found that amalgamations (in contrast to transfers) create one employer and the prospect of jurisdictional disputes between different bargaining units of employees with similar skills and working in integrated operations would be manifest – The Board was also not persuaded to place the RPNs in a bargaining unit with the RNs for the following reasons: there was no agreement of the parties to do so; the evidence did not establish that the Centre's operational needs would be furthered by such a placement; and it would not be consistent with the purposes of the PSLRTA – The Board determined a number of other issues and ordered a representation vote in relation to the three bargaining units

NORTH EAST MENTAL HEALTH CENTRE ("NEMHC") NORTH BAY GENERAL HOSPITAL ("NBGH"); RE OPSEU, LOCALS 636, 662, 666; ONA LOCALS 2, 20; CUPE LOCALS 139, 1101, 1623, SEIU, LOCAL 1; File No. 2353-10-PS; Dated February 28, 2011; Panel: Ian Anderson (15 pages)

Collective Agreement – Termination – Timeliness – Application for termination of bargaining rights under s. 63 – The responding union submitted that the application was untimely pursuant to ss. 63(2)(a) because it was not filed within the last three months of the operation of the collective agreement – The Board found that the application was timely, as the union and employer

intended to make the collective agreement retroactive to the date of the expiration of the prior collective agreement – The Board based its finding on the express duration clause set out in several places in the collective agreement and the exercise of a number of important entitlements under the collective agreement including the right to grieve – The two purposes of ss. 58(1) are to provide certainty regarding the term of the collective agreement and to provide a minimum year of peace – In examining the duration of a collective agreement in a mature bargaining relationship, an interpretation that respects both purposes of ss. 58(1) is preferable – The Board may consider the pattern and history of the bargaining relationship when determining retroactivity – In a mature bargaining relationship where a pattern of bargaining has evolved and where collective agreements on their face indicate a duration which runs for a minimum of one year from the expiration of the prior collective agreement, there will be a heavy onus on the party claiming otherwise, even if the collective agreement was ratified or executed at a subsequent date – To find otherwise would potentially wreak havoc on the first purpose of ss. 58(1) and increase inquiries by employees or third parties into when an agreement expires – Matter continues

ST. CHARLES VILLAGE LIMITED PARTNERSHIP C.O.B. AS ST. CHARLES VILLAGE; RE JUDY CARRIGAN; SEIU LOCAL 1 CANADA; File No. 2973-10-R; Dated February 25, 2011; Panel: Tanja Wacyk, R. O'Connor, S. McManus (13 pages)

Bargaining Rights – Interim Relief – Intervenor – Practice and Procedure – Trade Union – Union Successor Rights – Unfair Labour Practice – The Board considered 58 separate interim order applications, pursuant to Rule 41.1, for among other things, a declaration that UNITE HERE is the interim exclusive bargaining agent of the employees of various employers – The Board noted that its case law made it clear that the Board will grant interim relief if it is necessary to do so to preserve the integrity of its own processes, including the preservation of its ability to properly and effectively adjudicate any proceedings before it – The Board found that some of the relief sought by UNITE HERE was indeed necessary for such preservation and accordingly the Board had the jurisdiction to issue such relief pursuant to s. 98(1)(a) of the Act – Concerning the merits of the interim relief request, the Board found there was no question that the locus of bargaining rights was a serious issue to be litigated – Next, the Board found that UNITE HERE had established that it will suffer

irreparable harm if interim relief was not granted – The Board found that if it were to find in the main litigation that UNITE HERE was the lawful holder of the bargaining rights and WUOC had, during the course of the litigation, taken advantage of its status as the putative holder of those bargaining rights to establish support amongst those bargaining unit employees and to bring displacement applications to dislodge those very rights, then UNITE HERE would have been denied an effective remedy – Finally in balancing the labour relations harm and the public interest, the Board found that WUOC had no legitimate claim to the bargaining rights in dispute, and that between UNITE HERE and the local unions, both the balance of harm and the public interest favoured UNITE HERE – Declarations granted, including that UNITE HERE is the interim exclusive bargaining agent – Relief granted, in part

TIERCON CORP. (FORMERLY 1675386 ONTARIO INC.), ET AL; RE WORKERS UNITED ONTARIO COUNCIL AND UNITE HERE INTERNATIONAL UNION; File Nos. 0607-09-R et al; Dated February 9, 2011; Panel: Lee Shouldice (54 pages)

Court Proceedings

Charter of Rights and Freedoms – Construction Industry – Judicial Review – Non-Construction Employer – The Board concluded ([2009] OLRB Rep. Nov/Dec 826) that the declarations required by s. 127.2 when an employer is found to be a non-construction employer substantially interfered with the process of collective bargaining, contrary to s. 2(d) of the *Charter*, and the infringement could not be saved by s. 1. – Section 127.2 of the Act was declared constitutionally inoperative in the circumstances of this case – The Court reviewed *Health Services* and determined that the first question to answer was whether s. 127.2, either in its purpose or effect, substantially interfered with the process of collective bargaining – First, the court found that the purpose of the legislation was not to prevent the employees of non-construction employers from bargaining collectively, nor was it meant to “break the Unions” – The Court noted that had the Board granted the declaration sought by IESO, no employee of IESO would have been affected by the termination of the collective agreements and the termination of bargaining rights of the Unions; and based on the evidence, no future employees of the IESO would be denied benefits under these collective agreements – The court found that the effect of the Board’s decision was to protect the collective agreements and acquired bargaining rights of the Unions and their members under the

construction industry provisions – In doing so, the Board protected their access to their preferred bargaining structure and the particular outcomes of bargaining – The Court found this was an error in law “as the guarantee of freedom of association in s. 2(d) of the *Charter* does not extend constitutional protection to a preferred process or a particular substantive outcome, rather, it protects the collective bargaining process from substantial interference” – The court found that the legislation did not constitute a substantial interference with the rights of individuals to engage in the process of collective bargaining, particularly given the facts of this case, where the IESO has never had employees doing construction work – Finally the court found that if there was a breach of s. 2(d) of the *Charter*, s. 127.2 is nevertheless constitutional as it is a reasonable limit within s. 1 of the *Charter* – Application granted – Matter referred back to the Board to issue a declaration in accordance with s. 127.2

INDEPENDENT ELECTRICITY SYSTEM OPERATOR; RE CANADIAN UNION OF SKILLED WORKERS, LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL, LIUNA LOCAL 1059, OLRB AND ATTORNEY GENERAL OF ONTARIO; OLRB File Nos. 3322-03-R; 2118-04-R (Court File No. 78/10), Dated February 18, 2011; Panel: Whalen, Molloy and Swinton JJ. (21 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
UNITE HERE Divisional Court No. 81/11	3333-10-M et al	Pending
UNITE HERE Divisional Court No. 80/11	3333-10-M et al	Pending
SNC-Lavalin Divisional Court No. 78/11	1405-03-R	Pending
Promark-Telecon Inc. v. Universal Workers Union, L. 183 Divisional Court No. 600/10	0745-09-R 0754-00-R 0765-09-R 0782-09-R	Pending
Dean Warren v. National Hockey League Divisional Court No. 587/10	2473-08-U	Pending
Roni Excavating Limited, et al v. IUOE, Local 793 Divisional Court No. 580/10	1991-10-R	June 13, 2011
Richard Hotta (Proteus Craftworks) v. Mahamad Badiuzzaman, et al Divisional Court No. 613/10	1953-07-ES	Pending
Pharma Plus Drugmarts Divisional Court No. 551/10	0579-08-R 0580-08-R 1662-09-R	Pending
SNC-Lavalin Divisional Court No. 482/10	2442-07-R 2936-07-R	Pending
Mr. Shah Islam v. J. Ennis Fabrics Divisional Court No. 506/10	1786-09-ES	Pending
Elzbieta Olszewska Divisional Court No. 494/10	0870-09-U	May 9, 2011
Greater Essex Catholic District S.B. Divisional Court No. 462/10	3122-04-G	June 2, & 3, 2011
Rainbow Concrete (Mark Corner) Divisional Court No. 437/10	2904-09-U 2905-09-FC 3292-09-M	Sept. 12 & 13, 2011
Ontario Power Generation Divisional Court No. 322/10	0264-09-G	April 18, 2011
John McKenney v. Upper Canada District S.B. Ottawa Divisional Court No. 10-DV-1652	2687-08-U	Pending
Rainbow Concrete Divisional Court No. 856-10	3292-09-M	Sept. 12 & 13, 2011
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	2904-09-U 2905-09-FC	Sept. 12 & 13, 2011
Mr. Todor Pandeliev v. OLRB Ottawa Divisional Court No. 10-DC-1594	3279-08-ES	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	Granted – Feb. 18, 2011
Pro Pipe Construction v. Norfab Metal and Machine Divisional Court No. 408/09	2574-04-R	Pending
Blue Mountain Resorts v. MOL Divisional Court No. 373/09	1048-07-HS 0255-08-HS	April 20, 2011

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