

*H*IGHLIGHTS

Ontario Labour Relations Board

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Scope Notes

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

Sector Determination – The Board was asked to ascertain the appropriate sector for the construction of a landfill gas management system – The Board determined it would not subdivide the work in dispute but would assess it as a package of work since it was a unique project and bid as such – The employer argued that the work fell into the sewer and watermain sector; the OE and the Labourers suggested it was ICI work or, alternatively, in the pipeline sector – Applying the criteria identified in *Sault Ste. Marie* [2002] OLRB Rep. September/October 870, the Board examined: (1) bargaining patterns (neutral); (2) an overall assessment of factors relevant to work characteristics, which led to the conclusion that problems and solutions, skills, trade and employee relations favour the ICI sector; materials and specifications are neutral; (3) end use is industrial, thus favouring the ICI sector – The Board concluded that the landfill gas management system falls within the ICI sector

AVERY CONSTRUCTION LIMITED TRANSPORTATION SERVICES; RE INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 793, LIUNA, LOCAL 1036, LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL; IBEW CONSTRUCTION COUNCIL OF ONTARIO; File No. 1458-10-M; Dated January 30, 2012; Panel: Jack J. Slaughter (10 pages)

Ambulance Services Collective Bargaining Act – Essential Services Agreement – The City of Toronto applied to the Board for a determination of the appropriate number of essential ambulance workers in the event of a lock-out – Local 416 was prepared to have 100% of the paramedics declared essential if the City would agree to interest arbitration – The City would not agree – The parties presented data to demonstrate there has been an increase in ambulance call volumes, changes in the mix of ambulance services provided over the past ten years (since the last ESA determination), a minimal increase in the paramedic complement, and a significant increase in service times per call – The Board noted that there had to be a difference between normal emergency cases (“business as usual”) and essential ambulance services, otherwise there would be no need for the legislation – The legislation is intended to reconcile the competing policy interests of protecting free collective bargaining in an environment where essential ambulance services must be maintained during any labour disruption – Having considered the submissions of the parties, the relevant data, and the purposes of the ASCBA, the Board made determinations regarding the

percentages of paramedic staff deemed essential – Order accordingly

THE CORPORATION OF THE CITY OF TORONTO; RE TORONTO CIVIC EMPLOYEES UNION, LOCAL 416; File No. 2331-11-M; Dated January 12, 2012; Panel: James Hayes (19 pages)

Employment Standards – Discharge – In this employer application for review of an Employment Standards Officer's determination awarding the employee four weeks' termination pay, the employer argued that it was not liable to pay termination pay as the employee had quit her employment – After a heated discussion between the employee and one of the directors of the applicant corporation, the employee punched out on the employee time clock and left the office – Approximately ten minutes later, after calling her husband to relay what had happened, the employee went back to the office to talk the situation over with the employer – She resumed her duties despite being told by the employer that she had already quit and had to leave – The employer called police and had the employee escorted off the premises – The Board found it unnecessary to determine exactly whether the employee said the words "I quit" – The Board stated that even if she initially gave the impression that she was quitting in a fit of anger, within ten minutes she was back, calm and prepared to resume her work – Thus, the employee clearly did not wish to sever her employment relationship – The Board distinguished the case at hand from *Creative Hair Design* [2000] OLRB Rep. January/February 35, where it had found the actions of the employee constituted a true resignation as the employee formed the subjective intention to quit, and objectively conveyed her intention to the employer – In that case, the Board stated, it was the employee's calm and cool communication of her intent to quit once she had gotten over her fit of pique that gave the employer the right to presume she had resigned – Application dismissed

DELUXE TAXI (BARRIE) LTD.; RE LILIANA LUPO AND DIRECTOR OF EMPLOYMENT STANDARDS; File No. 1611-11-ES; Dated January 16, 2012; Panel: Patrick Kelly (4 pages)

Certification – Construction Industry – Employee – Practice and Procedure – Status –

The Board examined the status of two individuals engaged to do drywall taping work – Although the union could not find the individuals in question to testify about their work relationship, and the employer alleged consequent prejudice, the Board ruled that there was no right to cross-examine a person whose status is in dispute if the person need not be called as a witness because the relevant facts are either agreed to or not in dispute – The principal individual was hired at an hourly rate to perform taping work; he (and a helper) supplied only their labour and personal protective equipment – Gold Star argued the individual was an entrepreneur – The Board disagreed, finding that the individuals were dependent contractors – Matter continues

GOLD STAR DEVELOPMENT INC. O/A GOLD STAR DRYWALL SERVICES; RE THE INTERNATIONAL UNION OF PAINTERS AND ALLIED TRADES, LOCAL UNION 1891; File No. 1343-11-R; Dated January 30, 2012; Panel: Harry Freedman (12 pages)

Certification – Employee – CUPE sought to organize the post-doctoral fellows (PDFs) at the University of Toronto – The employer asserted that the relationship of the PDFs to their faculty member (as principal investigator) and to the University was predominantly educational and not as employees – The Board examined the funding of the PDF positions, the nature of their collaborative research, including time commitment, and the requirement that PDFs adhere to university guidelines (e.g. Code of Behaviour) – The Board distinguished past decisions relating to the employment status of graduate students and equally found that rulings of the Tax Court of Canada were of no assistance – The Board found the PDFs perform work in the university's labs, using the university's equipment and materials, produce something of value (research) and receive compensation for the work performed – These are all hallmarks of an employment relationship – Matter remitted to parties to resolve outstanding issues

GOVERNING COUNCIL OF THE UNIVERSITY OF TORONTO; RE CUPE; File No. 1286-09-R; Dated January 20, 2012; Panel: Ian Anderson (22 pages)

Intimidation and Coercion – Unfair Labour Practice – The union alleged that during its organizing drive the employer threatened the job security of its employees in letters addressed to them from the CEO, in newspaper articles directed at the employees, and in staff meetings – The Board found that the CEO's attendance at and conduct of a sales department meeting was intended to intimidate the employees in response to their union activity – Furthermore, sudden, unannounced and stunningly high wage increases were implemented just days after the application for certification was filed – The Board found the raises were completed hastily, inconsistent with instructions from just two months earlier, and out of line with the economic climate – In addition, lay-offs following certification were clearly tied to the union's successful campaign, both in terms of motivation and the identity of individuals let go – Application allowed; declarations made, including reinstatement, damages and posted Notice to Employees

MING PAO NEWSPAPERS (CANADA) LTD.; RE COMMUNICATIONS, ENERGY AND PAPERWORKERS UNION OF CANADA, LOCAL 87-M SOUTHERN ONTARIO NEWSMEDIA GUILD; File Nos. 1831-10-U; 2071-10-U; 0695-11-U; Dated January 30, 2012; Panel: Brian McLean (24 pages)

Court Proceedings

Non-Construction Employer – Judicial Review

– The employer sought judicial review of two Board decisions: the '2005 decision' relating to an application under s. 127.2 of the LRA to terminate the bargaining rights of the respondent unions; and the '2009 decision' in which the application was dismissed as the applicant did not satisfy the definition of "non-construction employer" under s. 126(1) of the Act – The applicant raised two issues before the Court: (1) whether the Board erred in the 2005 decision in holding that it was not bound by a previous determination that the applicant was a "non-construction employer" under s. 126(1) of the Act; and (2) whether the Board erred in the 2009 decision in determining that the applicant was not a "non-construction employer" under s. 127.2 – The Court held that in interpreting its home statute, the Board is not engaged in statutory interpretation in a broad sense, and that interpretation of the impugned sections fell within the expertise of

the Board – The standard of review is reasonableness – With respect to the 2005 decision, the Court held that the Board was reasonable in finding that it was not bound by earlier decisions which held that the applicant was a "non-construction employer" – With respect to the 2009 decision, the applicant argued that as a 'school board', it cannot be engaged in the construction industry as the definition of the term under the Act references 'businesses' – The Court held that the Board was alive to the applicant's position in relation to its status, and the Board was reasonable in concluding, consistent with its jurisprudence, that an "employer" continues to be governed by the construction industry provisions of the Act as long as the employer is doing any construction work for an unrelated person from whom it expects compensation – The Court further rejected the applicant's submission that the work of "construction management" is not "work in the construction industry" within the meaning of s. 126(1) of the Act – Finally, the Court rejected the applicant's argument that the compensation paid to the applicant was not from unrelated persons – Application dismissed

GREATER ESSEX COUNTY DISTRICT SCHOOL BOARD; RE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 773; THE INTERNATIONAL UNIONS OF BRICKLAYERS AND ALLIED CRAFTSMEN, LOCAL 6; UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, LOCAL 552; THE INTERNATIONAL UNIONS OF PAINTERS AND ALLIED TRADES, LOCAL 1494; LIUNA LOCAL 625 AND OLRB; Board File Nos. 1776-04-R; 1778-04-R; 1794-04-R; 1796-04-R; 1797-04-R (Court File No. 212/09); Dated January 12, 2012; Panel: Leitch, Swinton and Hoy JJ. (12 pages)

Judicial Review – Status – Trade Union – SEIU

sought review of a Board decision finding that OWU was a trade union within the meaning of the Act – The Court held the Board was reasonable in concluding first that a trade union did not have to be an organization of employees *only*; and second, that the founding members of the OWU could unanimously agree to waive, suspend or vary the provisions of their contract (constitution) – The OWU was clearly viable for collective bargaining in the

relevant sense – Application for judicial review dismissed

**HUMBER RIVER REGIONAL HOSPITAL;
ONTARIO WORKERS' UNION AND OLRB; RE
SEIU, LOCAL 1 CANADA; Board File Nos. 1092-
09-R; 1131-09-R; 1132-09-R; 1133-09-R (Court
File No. 101/11); Dated January 26, 2012;
Panel: Jennings, Swinton and Penny 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
Landmart Building Corp. Divisional Court No. DC 12-346JR Hamilton	2519-11-R	Pending
Total Mechanical Systems Divisional Court No. 17/12	4053-10-R	Pending
Aragon (Hockley) Development (Ontario) Corporation Divisional Court No. 595/11	2781-09-R	Pending
C.W. Smith Crane Services v. IUOE Local 793 Divisional Court No. 513/11	3894-09-G	Pending
Erie St. Clair Community Care Divisional Court No. 504/11	0144-09-PS	Pending
Swift Railroad Contractors Divisional Court No. 400/11	0039-06-U 0139-06-R	Pending
René Gagné v. Algoma University College Faculty Divisional Court No. 11-1764 Ottawa	0460-10-U	Pending
Greater Essex County District S.B. Divisional Court No. 403/11	1004-08-M	Pending
Sanford Pensler, A Director of Korex Don Valley ULC et al v. CEP L. 132 et al Divisional Court No. 328/11	0598-10-ES	April 17, 2012
John McCredie v. OLRB et al Divisional Court No. 1890/11	1155-10-U	Pending
Classic POS Inc. Divisional Court No. 301/11	4059-10-ES	Pending
Ineke Sutherland o/a Designworks Divisional Court No. 238/11	4061-10-ES	Pending
Dr. Peter A. Khaiteer v. OLRB et al Divisional Court No. 213/11	0816-10-U 0817-10-U	Pending
Humber River Regional Hospital v. SEIU Divisional Court No. 101/11	1092-09-R 1132-09-R 1133-09-R	Dismissed December 20, 2011; Reasons January 26/12
Dean Warren v. National Hockey League Divisional Court No. 587/10	2473-08-U	March 7, 2012 (motion)
Richard Hotta (Proteus Craftworks) v. Mahamad Badiuzzaman, et al Divisional Court No. 613/10	1953-07-ES	Pending
Mr. Shah Islam v. J. Ennis Fabrics Divisional Court No. 506/10	1786-09-ES	June 4, 2012
Greater Essex Catholic District S.B. Divisional Court No. 462/10	3122-04-G	Granted Oct. 7/11 Seeking leave to appeal to C.A.
John McKenney v. Upper Canada District S.B. Divisional Court No. 10-DV-1652 Ottawa	2687-08-U	February 2, 2012
Dr. Peter A. Khaiteer v. OLRB et al Divisional Court No. 383/10	0290-08-U 0338-08-U	Pending
Independent Electricity System Operator v. Canadian Union of Skilled Workers, LIUNA et al Divisional Court No. 78/10 Court of Appeal No. C53992	3322-03-R 2118-04-R	Feb. 14 & 15, 2012
Pro Pipe Construction v. Norfab Metal and Machine Divisional Court No. 408/09	2574-04-R	Pending

Case name & Court File No.	Board File No.	Status
Blue Mountain Resorts v. MOL Divisional Court No. 373/09 Court of Appeal No. C54427	1048-07-HS 0255-08-HS	Pending
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	Dismissed January 12/12; seeking leave to C.A.
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