

H Ontario Labour Relations Board **HIGHLIGHTS**

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Notices to Community

The Board is preparing to launch email delivery (outgoing only) where all parties are represented by counsel. See the attached announcement.

Please take note of Information Bulletin No. 30 concerning Agreements re Adjournments *Sine Die*

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.

Health and Safety – Settlement – An application was made by an employee pursuant to Section 50 of the *Occupational Health and Safety Act* – An oral agreement in principle was reached – The employee's counsel sent a letter to the Board requesting the scheduled hearing date be adjourned because an "agreement in principle" had been reached – However, the employee disagreed with some of the terms of the drafted settlement and did not sign the Minutes of Settlement – The employee retained new counsel and sought to have the matter re-listed – The employer argued that the matter had been settled – The employee submitted subsection 96(7) of the *Labour Relations Act* required a binding settlement agreement to be in writing and to be signed by the parties or their representatives – The Board found that section 50(3) of the OHSA gives the Board discretion to decline to

inquire into a complaint – This discretion is not qualified by subsection 96(7) of the LRA, which provides an enforcement mechanism for settlements – The Board noted that even an oral settlement may result in the Board declining to inquire further into a complaint – The Board found the matter had been resolved by the parties, as confirmed by the letter sent to the Board by the original counsel for the employee – Counsel can bind a client to a settlement unless the client has limited his or her authority and the opposing side has knowledge of the limitation – There was no reason for the Board to look behind the settlement – The Board exercised its discretion not to inquire further into the complaint because it had been settled – Application denied

ESTÉE LAUDER COSMETICS LIMITED; RE WINSTON H. GREGORY; File No. 3743-10-OH; Dated March 28, 2012; Panel: James Hayes (7 pages)

Health and Safety – The issue under appeal was whether the receptacle portion of a specific solar energy connector was a "convenience receptacle" within the meaning of s. 182 of the Construction Regulations – If not, then only a certified electrician or apprentice could connect the connector – The inspector's order did not require an electrician to perform the task; the IBEW appealed – In the Board's view, the connector was significantly different than a convenience receptacle: both the plug and receptacle are finger safe; an audible clicking noise concludes the connection; once the connection is effected, it is locked, and can be safely immersed in water; and the connector bears a printed warning that it should not be disconnected while under load – The Board found that the specialized skill of an electrician is not required to perform the work safely – Appeal denied

GIL & SONS LIMITED AND FIL SAVOIA, REGIONAL DIRECTOR; RE IBEW LOCAL 530,

FIRST SOLAR DEVELOPMENT (CANADA) INC.; File No. 2642-11-HS; Dated March 30, 2012; Panel: Ian Anderson (9 pages)

Employment Standards – Discharge – Reprisal –

The employee, who sold newspaper subscriptions door-to-door and was paid on a straight commission basis, applied for review of a refusal to issue an order for payment of minimum wage – She had signed a contract that described her as an independent contractor, and was terminated one day after she sought payment of minimum hourly wages – The employer asserted she was terminated for failure to produce adequate sales – The Board considered whether the worker was an independent contractor or an employee – The Board also looked at whether the commissioned salesperson exemption to minimum wage and vacation pay under section 2(1)(h) of Ont. Reg. 285/01 of the *Employment Standards Act, 2000* applied, or if the exception to the exemption for a “route salesperson” applied – It was also determined if a reprisal under section 74(1) of the *Act* had occurred in the circumstances – The worker was found to be an employee, not an independent contractor, because the employer exercised substantial control over her activities: the employee was picked up along with other “team members” each day and dropped off in an assigned neighbourhood; she was given a list of non-subscribers on particular streets in the neighbourhood to solicit; the list was collected by the employer at the end of the week; the employee was given a script of what to say to potential customers; she could not negotiate the percentage of commission she earned, and could not increase her ability to earn by doing work at times or in neighbourhoods other than determined by the employer – The Board also found the employee was a “route salesperson” and not a commissioned salesperson exempt from minimum hourly wage and vacation pay provisions of the *Act* – The Board also determined the employer had not discharged its onus under section 74 of the *Act* and a reprisal had occurred – The employer had terminated the employee’s employment one day after her written request that she be paid minimum wage – In addition to minimum hourly wage pay and vacation pay, the Board awarded the employee two months of pay for the time it took her to find a new job, and one month of wages for loss of reasonable expectation of employment – Application allowed

P & L CORPORATION LTD. AND DIRECTOR OF EMPLOYMENT STANDARDS; RE DEENA SCHILLER; File No. 1444-10-ES; Dated March 13, 2012; Panel: Kelly Waddingham (6 pages)

Employment Standards – The employee sought an order for termination pay – The employer, Student

Media, was in a contractual relationship with Campus Publications to solicit advertising for various university and college publications – Each company had its own employees, payroll, management, etc. – When the relationship between SM and CP soured and CP undertook to do its own solicitation work, SM gave notice to its employees and subsequently laid them off before the notice period had expired – SM argued that the two companies were related, or that there had been a sale of business from SM to CP when CP took over the contract sales, so the two companies, at the very least, were jointly liable for the termination pay – The Board found no evidence of association or relatedness between the companies, and no sale of anything more than assets (if at all) – Application allowed; termination pay ordered

PAUL TIMOTHY BAKER O/A STUDENT MEDIA SERVICES INC. AND DIRECTOR OF EMPLOYMENT STANDARDS; RE JENNIFER POLAK; File No. 1889-11-ES; Dated March 13, 2012; Panel: Lee Shouldice (13 pages)

Construction Industry Grievance – Practice and Procedure –

When a first grievance was dismissed by the Board on the basis of a preliminary motion brought by the responding party (an improper filing contrary to earlier Minutes of Settlement that required the OPDC alone, or the OPDC and a Local to initiate a grievance against the responding party), LIUNA OPDC and Local 183 immediately launched a second grievance – The Board considered whether it should accept the grievance referral – The responding party asserted the grievance ought to be dismissed as an abuse of process or on the basis of the doctrine of *res judicata* because the two applicants had the opportunity to litigate the issues in dispute in the context of the first grievance – The applicants argued that the second grievance is properly before the Board because the parties had not been in agreement in their interpretation of the effect of the Minutes of Settlement; the Board in fact had to make that threshold ruling before the merits of the grievance could be addressed – Since the applicants lost the first grievance on a preliminary motion, the launching of the second grievance could not be said to violate the principles of judicial economy, finality and the integrity of the administration of justice – The Board held that the doctrine of *res judicata* was inapplicable to the circumstances of this proceeding; however the doctrine of abuse of process and the Board’s discretion to accept a grievance referral led the Board to a different conclusion – The Board held that it ought not readily grant a party an opportunity to Cooper up a deficient application in circumstances where the deficiency was one that could have been avoided with due care in the first place – Application dismissed

PNR RAILWORKS INC.; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL WITH ITS AFFILIATED LOCAL UNION, UNIVERSAL WORKERS UNION, L.I.U.N.A. LOCAL 183; File No. 3119-11-G; Dated March 30, 2012; Panel: Lee Shouldice (17 pages)

Constitutional Law – Construction Industry Grievance

– The IBEW referred three grievances to the Board and at the same time challenged the validity of earlier legislation that effectively wiped out longstanding bargaining rights by legislative fiat – The Attorney General of Ontario brought a preliminary motion to have the grievances dismissed because the constitutional challenges were predicated on the impermissible retroactive application of a Supreme Court of Canada decision in 2007 (*Health Sciences*) to legislation that had been spent or repealed long before (in 2001) – The issue concerned the legislation creating province-wide bargaining (1978) and its subsequent “deemed abandonment” (2001) and whether the Board could ascribe the Charter right to collective bargaining to a time *before* the SCC had found such a right to exist – The union sought to argue that the legal fictions created by the legislation (or removed by it) necessarily made court-made changes to the law (i.e., the recognition of the right to collective bargaining) applicable to whatever consequences the fictions created – The Board rejected the union’s arguments and upheld the AG’s preliminary motion – Grievances dismissed

TOM JONES & SONS LIMITED; TOM JONES CORPORATION AND TOM JONES CONSTRUCTION INC.; RE IBEW LOCAL 402; RE ATTORNEY GENERAL OF ONTARIO, LISGAR CONSTRUCTION CO., ET AL; File Nos. 3278-09-G; 3570-09-G; 3590-09-G; Dated March 29, 2012; Panel: Mark J. Lewis (25 pages)

Unfair Labour Practice – Five former executive members of LIUNA Local 183 sought relief from the Board following their ouster from office after a closely-fought election – The roster of incumbents was defeated, and the newly-elected executive expelled the five from membership and discharged another fifty Local 183 employees – A recount and internal review of the election process was conducted, with no findings of impropriety – The Board reviewed the long and storied history of Local 183’s relationship with its parent, the factional disputes, court actions and earlier Board proceedings that document much of the events which underlay the present complaints – The Board gave consideration to the responding parties’ motions for dismissal, including issue estoppel, abuse of process, timeliness and Board discretion – The Board

acknowledged that while there was an arguable case for a finding of a breach of the Act, having regard to the parties’ history, and the nature and utility of the remedy sought by the applicants (including the prospect of resurrecting much of the earlier litigation between the parties), there would be little labour relations purpose served by proceeding with the complaints to completion, especially when the relief sought would become unavailable before the litigation was completed – Application dismissed

DURVAL TERCEIRA, JAIME MELO, MICHAEL O’BRIEN, GAETANO STRAZZANTI AND CESAR DANIEL AVERO; RE LIUNA, UNIVERSAL WORKERS UNION – LIUNA, LOCAL 183; RONALD A. PINK, Q.C.; File No. 1475-11-U; Dated March 30, 2012; Panel: Lee Shouldice (29 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
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	September 25, 2012
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 Court of Appeal No. C54934	3122-04-G	Granted Oct. 7/11 Leave to appeal to C.A. granted May 17, 2012
John McKenney v. Upper Canada District S.B. Divisional Court No. 10-DV-1652 Ottawa	2687-08-U	Dismissed Feb. 2, 2012; Seeking leave to appeal to C.A.
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	Reserved
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 Court of Appeal No. C54427	1048-07-HS 0255-08-HS	September 27, 2012

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 (M40967)	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
Rainbow Concrete Court of Appeal No. C53682	2904-09-U 2905-09-FC 3292-09-M	Leave to C.A. dismissed March 13, 2012

E-MAIL WHERE ALL PARTIES HAVE COUNSEL

DECISIONS, NOTICES OF HEARINGS AND ADJOURNMENTS

PLEASE TAKE NOTICE that, commencing on **June 1, 2012** the Board intends to implement the use of ***outgoing e-mail*** by providing decisions, notices of hearings, responses to adjournment requests and scheduling-related letters in ***all cases where each party is represented by counsel***. Unfortunately, the Board ***is not yet able to receive e-mail*** applications, responses or submissions.

Where all counsel on a case provide the Board with an e-mail address, the Board will provide decisions, notices of hearing, responses to adjournment requests and scheduling-related letters by e-mail. Counsel are urged to provide the Board in any application, response or submission with their e-mail address as well as that of their Assistant. Where the Board is provided with e-mail addresses for both counsel and an assistant, the Board will communicate by e-mail to both.

Presumptively, where counsel represent all parties, the board will communicate with them by e-mail as set out above. Only where counsel indicate in writing that they do not wish to receive correspondence from the Board by e-mail, will e-mail not be used.

Counsel are expected to distribute the Board's communication to their clients, as only counsel and their assistants will be e-mailed. Copies will not be sent or faxed by the Board to any client where the communication has been e-mailed to counsel.

Please note that the above **will take the place of the “e-mail pilot project”** that has been in place for the past 2 years with some law firms that regularly practice before the Board.

April 10, 2012

**ONTARIO LABOUR RELATIONS BOARD
INFORMATION BULLETIN NO. 30**

Agreements re Adjournments *Sine Die**

In a continuing effort to more effectively manage its processes, allocate its limited resources and bring closure to applications in a more expeditious manner, the Board is introducing new guidelines for adjournments *sine die*. Subject to the Board's power to adjourn its proceedings in accordance with Rule 38.3 of the Rules of Procedure, the Board will normally adopt the following timelines when parties agree to adjourn a proceeding *sine die*.

In applications for certification and for declarations terminating bargaining rights, the Board will grant an adjournment *sine die* for a three-month period. Further adjournments will only be granted in compelling circumstances.

In other applications, the Board will grant an adjournment *sine die* for a *nine-month* period. Further adjournments will only be granted in compelling circumstances.

Unless a party requests in writing that the Board proceed with the application within the time period specified in the adjournment decision, the Board will consider the application to have been abandoned by the applicant, without any further action by the Board or notice to the parties.

Where the parties make a request either that hearing dates be set or for a second adjournment, the Board will usually schedule a case management hearing where the Board will decide how the litigation of the matter will proceed, including directions relating to documents and pleadings, preliminary matters, etc., and the specific scheduling of dates to commence the hearing.

Parties can expect the case management hearing to be scheduled within fifteen (15) to forty-five (45) working days of the request to have the matter re-listed or for the second adjournment. The case management hearing will be scheduled on a peremptory basis and will not be adjourned on agreement of the parties. The Board will adjourn the case management hearing in extraordinary circumstances.

*This Information Bulletin does not apply to adjournments of employment standards applications for review or specific cases at the Board's discretion.

Effective date: May 1, 2012

IMPORTANT NOTE

IN ACCORDANCE WITH THE *ACCESSIBILITY FOR ONTARIANS WITH DISABILITIES ACT*, 2005, THE BOARD MAKES EVERY EFFORT TO ENSURE THAT ITS SERVICES ARE PROVIDED IN A MANNER THAT RESPECTS THE DIGNITY AND INDEPENDENCE OF PERSONS WITH DISABILITIES. PLEASE TELL THE BOARD IF YOU REQUIRE ANY ACCOMMODATION TO MEET YOUR INDIVIDUAL NEEDS.