

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 October of this year. These decisions will appear in the September/October 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.

Holiday Schedule Season Board

Please see the attached Notice to the Community.

Bargaining Rights – Membership Evidence – Practice and Procedure – Termination – In response to a termination application, the union made an unfair labour practice complaint based, in part, on the status of two disputed employees and their role in the termination application process – The UFCW requested production of all communications and correspondence between the employer, the two employees and their legal counsel, including information relating to payment of their legal fees – The Board noted that the Supreme Court in *Maranda v. Richer* found that legal accounts were subject to presumptive solicitor-client privilege in the criminal context, and that the Ontario Superior Court of Justice has appeared to apply *Maranda* in a non-criminal context – The union was unable to establish the disclosure requested would not violate the confidentiality relationship, and accordingly the Board declined to order production – Matter continues

1646419 ONTARIO INC. C.O.B. AS BEST WESTERN MARIPOSA INN & CONFERENCE CENTRE; RE UFCW LOCAL 1000A; RE STEVE WEEKS AND KATHLEEN O'BRIEN; File Nos. 1445-09-R and 1472-09-U; Dated October 21, 2009; Panel: Ian Anderson, J.A. Rundle and C. Phillips (5 pages)

Certification – Status – Trade Union – The sole outstanding issue concerned a determination as to whether NOW was a trade union under the Act – Submissions were provided to the Board on the issue of whether NOW had any members as of the date of the application – NOW's constitution did not have a mechanism for accepting individuals into membership – However, all who were present at the foundational meeting of NOW: appeared to have signed membership cards; unanimously agreed to accept those signing membership cards as members; unanimously adopted the constitution; and unanimously confirmed those who had signed cards as members – The Board applied the factors from *Canadian Labour Congress v. University of Toronto* and found that all four were met: NOW had membership; the members and officers were bound by a formal set of rules; NOW was formed to regulate relations between employees and employers; NOW is capable of acting through its elected officers – The Board found that NOW was a trade union within the meaning of the Act – Certificate issued

ABC CLIMATE CONTROL SYSTEMS INC.; RE NATIONAL ORGANIZED WORKERS; File No. 1463-09-R; Dated October 19, 2009; Panel: Ian Anderson (5 pages)

Conflict of Interest – Duty of Fair Representation – Remedies – The employer sought the union's agreement to eliminate a class

of positions and reclassify it to a new position in a higher salary grade – The employer suggested the persons occupying the former position be moved to the new position – Two employees wrote to the union claiming that the new positions were vacancies and ought to have been posted – The employees were qualified for the former position and more senior than some of the employees moved to the new position – The union relied on the collective agreement and past practices of reclassification to support its decision not to file the applicants' grievance – The Board found the examples of past practice not to be similar and questioned the interpretation of the collective agreement – More significantly, the Board agreed with the applicants that the union's process was flawed and breached s.74 of the Act in that the union's executive was in a conflict of interest – Two of the union's officers were part of the group of persons that benefited from the reclassification to the new position and were less senior than the two applicants – These officers were members of the union's committee who determine whether grievances are to be filed and taken to arbitration – The committee reached a decision by consensus and did not vote – The Board noted this to be of critical importance and found that the two officers in a conflict of interest were part of the consensus even if they did not orally participate in the meeting – The Board found the union's decision was arbitrary in that it was based on irrelevant factors, namely the interests of these two officers and that the union dealt with the applicants' concerns in a perfunctory way – The Board ordered the union to file a grievance on behalf of the applicants and pay independent counsel selected by the applicants to represent them at the arbitration hearing – Application allowed

ARLENE DANOS AND TRACEY MACLEOD; RE CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 1750; File No. 1411-08-U; Dated October 15, 2009; Panel: Brian McLean (7 pages)

Bar – Certification – Public Sector Labour Relations Transition Act – SEIU applied for certification for a bargaining unit that included employees in the bargaining unit for which the intervening union, ONA, had already applied for an order under s. 22 of the *PSLRTA* – The Board found SEIU's application was a breach of s. 28 (a prohibition against applications for certification from 10 days after a s. 22 request until its disposition) of the *PSLRTA* – The Board also exercised its discretion under the LRA to bar SEIU from reapplying until the Board determines the *PSLRTA* application – Application dismissed

BAYSHORE HEALTHCARE LTD. (C.O.B. AS BAYSHORE HOME HEALTH), SARNIA; RE SEIU LOCAL 1 CANADA; RE ONA; File No. 0888-09-R; Dated October 15, 2009; Panel: Brian McLean (3 pages)

Bargaining Unit – Certification – Trade Union – Local 2003 applied for a craft bargaining unit of operating engineers and the employer took the position that Local 2003 did not have craft union status and accordingly the bargaining unit applied for was not appropriate – The core issue turned on the effect of a merger between CUOE, which had craft union status, and CEP in 2003 – The Board found that Local 2003 was a craft union for three reasons: first, by the time it had applied for certification it had a four year history of bargaining for the craft; second, the history of CUOE was relevant to the determination, including its craft status which the Board found can flow to a successor union under s. 68 of the Act; and third, Local 2003's representation of exclusively operating engineers bargaining units was not so watered down that it was no longer a craft union – Certificate issued

GREENFIELD ETHANOL INC.; RE CEP, LOCAL 2003; File No. 2112-07-R; Dated October 27, 2009; Panel: Brian McLean (8 pages)

Health and Safety – The employer sought suspension of an inspector's order requiring it to comply with the Industrial Regulation relating to overhead protection on rack tunnels where openings could allow falling materials to endanger workers passing under them – The trade union took no position on the suspension – The Board found the suspension would not threaten the health and safety of workers given the following undisputed facts: that the rack tunnels are in relatively low traffic areas; the high quality of the pallets used; the installation of safety bars making it impossible for skids to fall through the openings; the plastic wrapping of the pallets and product; the training and inspection duties; the racks meeting CSA requirements; and the 14-year no accident record from falling material involving a racking tunnel – Additionally, the operational prejudice could be significant and the Regulation left open to interpretation whether the employer's precautions will qualify as compliance with the requirements of the Regulation – Order Suspended – Appeal to be heard

LOBLAW COMPANIES LIMITED; RE UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, LOCAL 1000A AND SHELA MIRZA, INSPECTOR; File Nos. 1718-09-

HS; 1720-09-HS; Dated October 7, 2009; Panel: John D. Lewis (5 pages)

Certification – Construction Industry – Practice and Procedure – The Applicant union delivered the certification package to the registered corporate address of M3C which was the former residence of the President of M3C – Although M3C was conducting business from another residential address, the Applicant union was not aware of the new operating address and M3C had not changed its address as listed on the Ministry of Consumer and Business Services Corporation Profile Report – The Board found that the union effected proper delivery – M3C failed to provide the requisite information within the time stipulated by subsection 128.1(3) of the Act, and failed to file its response within the time stipulated by Rule 25.5 of the Board's Rules of Procedure – On the basis of only the information provided in the application the Board held that it should certify the applicant – Certificate issued

M3C DEMOLITION LTD.; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL; File No. 1087-09-R; Dated October 23, 2009; Panel: John D. Lewis (14 pages)

Change in Working Conditions – Construction Industry – Unfair Labour Practice – The work at issue (installation of a complete ice and water shield on three cottages) occurred during the time period established by s. 86(1) of the Act – The employer refused to pay the collective agreement rates arguing that those rates did not apply since the work was not bargaining unit work and it was not covered by the collective agreement in any event – The Board found that s. 86(1) freezes "not simply the rights and obligations established by a collective agreement but also *privileges* and *duties* which are beyond parties' strict legal rights and obligations" – The Board found that in this context (low-rise residential) where roofers were assigned to do work, and not advised that the collective agreement rates would not apply, the parties' reasonable expectations were that the collective agreement rates would apply – Accordingly the employer's failure to establish a different rate before the work started, "represents the removal of a privilege that these roofers have as a result of past conduct and which is therefore preserved by the provisions of s. 86(1)" – Application granted, in part; damages awarded

TRUDEL & SONS ROOFING LTD.; RE SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, LOCAL 51; File No. 0643-09-U; Dated October 19, 2009; Panel: Mark J. Lewis (7 pages)

Court Proceedings

Construction Industry Grievance –Judicial Review – Natural Justice – The Board found that fire restoration work, performed by IBEW members, was regulated under the Provincial Agreement, rather than the GPMA, since the work was repair rather than maintenance – The Board also found that estoppel did not apply – At the request of the Union, the successful party, the Board issued further reasons – Divisional Court found the Board had the jurisdiction to issue supplementary reasons, and a majority of the panel found the supplementary reasons to be sufficient and dismissed the application [see [2008] OLRB Rep. May/June 466] – On appeal, in concurring judgements, the Court of Appeal found the issuance of supplementary reasons in these circumstances to be a breach of procedural fairness – Epstein and Blair, J.J.A. found the Board had the power to reconsider the merits of its decision, but that there was no statutory provision giving the Board the power to issue supplementary reasons designed to repair deficiencies in an earlier set of reasons – They found the doctrine of *functus officio* applied in these circumstances and that the Board's actions created unfairness – Simmons, J.A. found the question was not one of jurisdiction as the absence of specific statutory authority did not preclude the Board from delivering supplementary reasons and that the *functus officio* doctrine did not deprive the Board of jurisdiction – The question was one of fairness and should be determined by using the principles set out in *Teskey* – Simmons, J.A. found that several features of this case were sufficient to demonstrate that a reasonable person would believe that the Board's supplementary reasons reflect after-the-fact result driven reasons rather than a true reflection of the reasoning process that led to the decision – Given that the first set of reasons was inadequate, and the delivery of the second set was unfair, the Appeal was allowed and matter remitted to a differently constituted panel of the Board

JACOBS CATALYTIC LTD.; RE IBEW, LOCAL 353; THE ELECTRICAL TRADE BARGAINING AGENCY OF THE ELECTRICAL CONTRACTORS ASSOCIATION OF ONTARIO, GENERAL PRESIDENTS' MAINTENANCE COMMITTEE FOR CANADA AND THE OLRB; File No. 3737-05-G (Court File No. C49737); Dated October 29, 2009; Panel: Simmons, Blair and Epstein J.J.A. (39 pages)

Certification – Employer – Judicial Review – Stay – National Waste brought an application to stay the Board's order pending a hearing of its application for judicial review of the Board's decision finding it was the true employer of employees involved in a certification application – The Court considered whether or not the appropriate first branch of the test was the "serious issue to be tried" (advanced by the Employer and supported by the decision in *RJR MacDonald*) or a "strong *prima facie*" case (proposed by the union and supported by *Sobeys* and *Ellis-Don*) – The court followed the strong *prima facie* case as the first branch of the test – The case did not raise a constitutional issue and the Court found that the factual dispute in question fell squarely within the expertise of the Board – The Employer failed to meet the threshold that there was a strong *prima facie* case, as well as the other two branches necessary for a stay – Request denied

NATIONAL WASTE SERVICES INC.: RE CAW CANADA AND OLRB; OLRB File No. 0939-07-R (Court File No. 338/09); Dated October 14, 2009; Panel: Justice Jennings (6 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
Lennox Drum Limited v. Joseph Ah-hone Divisional Court No. 465/09	0657-08-HS	Pending
Greenfield Ethanol v. CEPUC Divisional Court No. 450/09	1307-070-R 2112-07-R	Withdrawn
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
National Waste Services v. CAW-Canada Divisional Court No. 338/09	0939-07-R	Stay dismissed; hearing Jan. 26, 2010
Robert McLaughlin v. Graphite Specialty Products, et al Divisional Court No. 09/191 LONDON	2221-07-OH	Pending
Rainbow Concrete v. International Union of Operating Engineers Divisional Court No. 332/09	0116-06-R	January 28, 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	Pending
Donald Amodeo v. Ontario Ministry of Labour Divisional Court No. 147/09	2837-07-U 2839-07-OH	Pending
I.U.P.A.T. Local 1795 et al , v. Cadillac Fairview Corporation et al Divisional Court No. 142/09	1732-06-R	December 2, 2009
Dr. Peter A. Khaiteer v. OLRB et al Divisional Court No. 79/09	0290-08-U; 0338-08-U	Dismissed - July 8/09; seeking leave to CA
Presteve Foods v. (CAW-CANADA) Local 444 Divisional Court No. 1730/08 LONDON	1676-08-U	Leave to CA dismissed October 16, 2009
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
Govin Misir v. S. Lalgudi Vaidyanathan et al Divisional Court No. 566/07	2966-03-ES; 3389-03-ES; 3390-03-ES	Pending
L.I.U.N.A. v. Barclay Construction et al Divisional Court No. 310/08	0837-06-R	Pending
Ottawa-Carleton Public Employees Union (CUPE), Local 503 v. City of Ottawa et al Divisional Court No. DC-09-00001471-0000 OTTAWA	1386-06-R	Heard June 10/09; reserved

Case name & Court File No.	Board File No.	Status
Jacobs Catalytic Ltd. v IBEW Local 33 et al Divisional Court No. 117/07 Court of Appeal C49737	3737-05-U	C.A. granted Oct. 29/09
Janet Kitson v. OLRB et al Divisional Court No. 492/06	4205-02-U	Pending

November 10, 2009

NOTICE TO THE COMMUNITY

Please be advised that the Ontario Labour Relations Board will neither schedule nor hold hearings between **December 21, 2009 and January 4, 2010** inclusive. Matters of an urgent nature, however, may be scheduled on an expedited basis as determined by the Board, during this period. Applications will be processed in the usual manner on the dates that the Board is open for business, including: December 21, 22, 23, 24, 29, 30, 31 2009 and January 4, 2010.

Please note the default dates and hearing schedule for s. 133 grievance referrals over the holiday season.

Thank you for your attention to the above. Please have a safe and very happy Holiday Season.

DATE REFERRAL FILED

HEARING DATE

December 7, 2009	January 5, 2010
December 8	January 6
December 9	January 7
December 10	January 7
December 11	January 8
December 14	January 8
December 15	January 11
December 16	January 11
December 17	January 12
December 18	January 12
December 21	January 13
December 22	January 13
December 23	January 14
December 24	January 14
December 29	January 15
December 30	January 15
December 31	January 18
January 4, 2010	January 18