

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 November of this year. These decisions will appear in the November/December 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.

Certification – Construction Industry – Sale of a Business – CCWU applied to certify the employees of YYZed – Local 183 also filed an application for certification but equally asserted that there was a sale of a business from Weston to YYZed (Weston and Local 183 were signatories to a collective agreement) – Weston was a corporation incorporated by four individuals who developed a series of high-rise residential projects (each separately incorporated) – After the completion of Weston, the partners went their separate ways and one subsequently incorporated YYZed to develop a new property – The Board held that a key figure may sometimes suggest a relationship or continuity of businesses but in this case the individual in question did not represent the essence or personification of Weston in order for the sale of business application to succeed – Sale of business application dismissed; Local 183's application for certification dismissed – CCWU's application succeeds; parties directed to file submissions on appropriate bargaining unit

2043102 ONTARIO LIMITED O/A YYZed PROJECT MANAGEMENT; RE CANADIAN CONSTRUCTION WORKERS' UNION; RE LIUNA, LOCAL 183; File Nos. 0561-08-R; 1286-08-R; 1519-08-R; Dated November 16, 2009; Panel: David A. McKee (6 pages)

Collective Agreement – Grievance – Related Employer – Termination – The UFCW had a bargaining relationship with Bunzl Canada, and the scope clause in the collective agreement encompassed "all employees" of Bunzl Canada in the Province of Ontario, etc" – Bunzl USA purchased the Kingston and Mississauga locations of Morgan Scott, a non-union company – The UFCW filed a grievance asserting its province-wide bargaining rights pertained to the new acquisition – The UFCW subsequently filed a related employer application – The arbitrator found that the recognition clause gave the UFCW province-wide bargaining rights – In the meantime, the UFCW applied and was certified for the employees at Morgan Scott (Mississauga) – Bargaining proceeded to impasse, a termination application was filed and the UFCW lost bargaining rights – The union then sought to have the related employer application heard and concluded – Bunzl Canada brought a motion to have the s. 1(4) application dismissed – A majority of the Board held that since the UFCW had independently obtained separate bargaining rights for Morgan Scott (Mississauga), and had attempted to negotiate a new collective agreement, it had forgone its right to the related employer application – Application dismissed as it relates to Mississauga location – Status of Kingston location referred to hearing – Allegations of employer influence with regard to the termination application severed – Matter proceeds

BUNZL CANADA INC., 1456944 ONTARIO INC., BUNZL DISTRIBUTION INC., MORGAN SCOTT INC., 1547296 ONTARIO INC. AND 1705375 ONTARIO INC.; RE UNITED FOOD AND COMMERCIAL WORKERS CANADA LOCAL 175; File Nos. 0230-07-R, 1546-09-R; Dated November 18, 2009; Panel: Brian McLean, R. O'Connor, S. McManus (dissenting) (8 pages)

Health and Safety – The employer sought a suspension of orders requiring it to provide its health care workers involved in administering the H1N1 vaccine with respirators and eye protection – The Board found that the workers would be nominally safer if they were furnished with the appropriate respirator; prejudice to the employer would be minimal; there was a *prima facie* case for a successful appeal because of the other precautions and protections in place at the employer's premises – The measures adopted by the employer and the expertise of the workers in identifying ill people gave them substantial protection not available to many other public workers – Since the employer could not satisfy all three criteria for a suspension of the orders, the request was denied

HASTINGS AND PRINCE EDWARD COUNTIES HEALTH UNIT; RE ONTARIO NURSES' ASSOCIATION, CUPE, LORALEE IDLER, INSPECTOR; File No. 2299-09-HS; Dated November 10, 2009; Panel: Brian McLean (4 pages)

Constitutional Law – Non-Construction Employer – Remedies – The Board found that the IESO met the statutory preconditions for a declaration that it is a non-construction employer within the meaning of s. 127.2 of the Act because although it performs construction work from time to time, it does no work in the industry for which it expects compensation from an unrelated person – CUSW and the Labourers challenged the constitutionality of the provision, alleging that subsections 127.2 (1) and (2) violate their members' freedom of association (s. 2(d) of the *Canadian Charter of Rights and Freedoms*) by substantially interfering with their right to organize and bargain collectively – The Unions also challenged the constitutionality of s. 127.2 (3), which contemplates that their respective collective agreements with IESO cease to apply upon the Board's declaration – The Board held that the Supreme Court's decision in *B.C. Health Services* protected the "procedure" known as collective bargaining, rather than the fruits of the bargaining process, and that protection included the notion of association rather than merely the economic rights of the union – The impugned sections of the

Act repudiate past collective bargaining processes relating to all issues negotiated between the parties by nullifying all gains achieved in bargaining to date and also affect future processes by stripping the unions of their right to have their representations considered by the IESO in a process of good faith bargaining – The interference is substantial such that it constitutes a breach of freedom of association and is not justified under s. 1 of the *Charter* – The challenged provisions go well beyond providing a mechanism for movement from one labour relations regime to another; they end the process of collective bargaining altogether and destroy the product of the exercise of the right of the unions' members to engage in the process – S. 127.2 of the Act declared constitutionally inoperative

INDEPENDENT ELECTRICITY MARKET OPERATOR; RE CANADIAN UNION OF SKILLED WORKERS; RE MINISTRY OF THE ATTORNEY GENERAL (ONTARIO); File Nos. 3322-03-R; 2118-04-R; Dated November 23, 2009; Panel: Caroline Rowan (62 pages)

Bargaining Unit – Certification – Conflict of Interest – The union sought to certify full- and part-time security officers in two bargaining units – The University challenged the propriety of having the union represent the guards when it already represented a unit of staff (non-faculty) employees – The Board examined the duties of the security officers and found that the majority of their time is spent staffing parking booths, opening locked doors, dealing with student issues, or monitoring video surveillance cameras that are not generally trained on employees at work; very little time is devoted to dealing with staff in the other bargaining unit – The Board's jurisprudence suggests that s. 14 of the Act has been applied to security officers who monitor other employees or protect an employer's property – While the guards at issue do protect university property, the Board found they do not do so in relation to the activities of other staff, so there would be no conflict of interest in having the applicant represent the guards

LAURENTIAN UNIVERSITY; RE LAURENTIAN UNIVERSITY STAFF UNION; RE UNITED STEELWORKERS; File Nos. 0222-09-R; 0770-09-R; Dated November 6, 2009; Panel: Brian McLean (14 pages)

Estoppel – Unfair Labour Practice – Schneider's Employee Association brought a complaint that Maple Leaf had violated s. 70 of the Act by failing to provide the Association with the names of employees in receipt of weekly

indemnity benefits – The employer brought a preliminary motion for dismissal of the application on the basis of issue estoppel, since the matter had already been decided by an arbitrator – The Board found that the arbitrator had correctly recognized his lack of jurisdiction to decide the issue, since it arose from a breach of the Act rather than a substantive provision in the collective agreement; the arbitrator's "in the alternative" opinion or *obiter dicta* was not dispositive of the complaint – The Board held that it had an obligation to ensure the protection of the rights granted by the Act, and as such had exclusive jurisdiction where a consideration of policy issues was required – The motion for dismissal was denied – Matter set down for hearing.

MAPLE LEAF CONSUMER FOODS INC.; RE SCHNEIDER'S EMPLOYEES ASSOCIATION; File. No. 3369-08-U; Dated November 18, 2009; Panel: Brian McLean; P. LeMay; D.A. Patterson (7 pages)

Bargaining Unit – Certification – Related Employer

– KAS, a long-term employment agency, supplied Metro with employees to operate a plant in Scarborough – Metro contracted out its core functions at the plant to KAS employees – In response to Metro's claim that they had no employees in the proposed bargaining unit, the union launched a related employer application under s. 1(4) of the *Labour Relations Act* – The Board asked which employer had fundamental control over working conditions, and whether or not the two employers were both functionally integrated with respect to the operation of the plant – The Board found that both KAS and Metro exercised direction and control over the employees performing the work, and together facilitated the operation of the plant – There were many examples in the evidence of KAS and Metro sharing decision-making regarding KAS employees – Certificate issued to the applicant – KAS and Metro declared a single employer

METRO WASTE PAPER RECOVERY INC. C.O.B. METRO MUNICIPAL RECYCLING SERVICES INC.; RE TEAMSTERS LOCAL UNION NO. 419; RE THE K.A.S. GROUP OF COMPANIES INC.; File Nos. 0723-08-R, 1037-08-R; 0811-08-U; Dated November 2, 2009; Panel: Brian McLean (24 pages)

Construction Industry Grievance – Settlement

– The employer sought a declaration that it was not required to apply the terms and conditions of the collective agreement between the applicant

and the contractors association to which the employer belonged (the "High Rise Agreement") – The Board found that through a series of earlier applications, including an accreditation and minutes of settlement in a related employer file, the employer became bound to the "Low Rise Agreement" – One of the provisions of the latter agreement required the employer to apply the terms of the High Rise Agreement if its employees performed work on a building captured by that agreement (the "cross-over" clause) – Finding the accreditation irrelevant to the issue before it, the Board held that the employer's signing of the Low Rise Agreement bound the employer to all of its provisions, and one of those provisions required that the employer apply the terms and conditions of the High Rise Agreement in appropriate circumstances – Motion dismissed; matter referred to Manager of Field Services

WASAGA TRIM SUPPLY (2006) INC.; RE CARPENTERS AND ALLIED WORKERS LOCAL 27, CJA; RE THE TRIM ASSOCIATION OF ONTARIO; File No. 0962-09-G; Dated November 6, 2009; Panel: Harry Freedman (7 pages)

Court Proceedings

Judicial Review – Prima Facie Motion – Related Employer – Sale of a Business

– CUPE alleged that the City of Ottawa and the other responding parties were a single employer because a significant portion of the summer season bargaining unit work was being conducted by the companies on contract with the City – On a motion by the City to dismiss for no *prima facie* case, the Board held that the union was unable to identify any bargaining unit members who had lost work opportunities, been laid off or terminated because of the contracting arrangements – The Board further held that the City's existing relationships with CUPE and the contractors permitted contracting out, and any operational control over the work performed by the contractors was to be expected given the City's mandate to provide municipal services – On judicial review, the Court found that CUPE had not been denied natural justice or procedural fairness since a hearing into the motion had been held and the parties were given the opportunity to make full submissions – The Court found the Board's exercise of discretion under s. 1(4) of the Act to be reasonable – Application dismissed

Board decision reported at [2007] OLRB Rep. May/June 516

OTTAWA-CARLETON PUBLIC EMPLOYEES UNION (CUPE), LOCAL 503; RE CITY OF OTTAWA; ET AL; File No. 1386-06-R (Court File

No. 09-DV-1471); Dated November 19, 2009;
Panel: Jennings, G.J. Thomson and R.D. Reilly,
JJ (5 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	1307-07-R 2112-07-R	Abandoned Nov. 12/09
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	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	March 15, 2010
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
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	Abandoned Nov. 19/09
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	Dismissed Nov. 19/09
Janet Kitson v. OLRB et al Divisional Court No. 492/06	4205-02-U	Pending

December 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