

*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.

Construction Industry Grievance – Estoppel – Human Rights Code – The grievance arose from the lay-off of a journeyman electrician over the age of 50 where the Principal Agreement required one in every five journeymen to be “fifty (50) years of age or older, where available” – The Board found that the respondent was not estopped from asserting the section was illegal because the respondent raised the issue in bargaining and rather than taking the issue any further, the parties simply agreed to disagree over whether it was contrary to the Code – The Board found the section required an employer to discriminate among employees with respect to their employment by reason of their age – The Board would not take administrative notice, nor was it persuaded on the evidence, that electricians aged 50 and older constituted a disadvantaged group – The Board concluded that the section at issue did not constitute a special program within the meaning of the *Code* as it found no “rational connection between any restrictions in eligibility and the purpose of the special program itself” – Accordingly, the respondent was not found to have violated the Principal Agreement – Grievance dismissed

BLACK & MCDONALD LIMITED; RE IBEW, LOCAL 353; RE THE ELECTRICAL TRADE BARGAINING AGENCY OF THE ELECTRICAL CONTRACTORS ASSOCIATION OF ONTARIO; RE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS CONSTRUCTION COUNCIL OF ONTARIO; File No. 0069-07-G; Dated October 8, 2010; Panel: Harry Freedman, John Tomlinson, Alan Haward (11 pages)

Duty of Fair Representation – Practice and Procedure – Unfair Labour Practice – After finding that the complainant had not made out a prima facie case, and reviewing eight previous duty of fair representation complaints, the Board found the complainant to be a vexatious litigant on the basis of the following material: he brought multiple proceedings making basically the same allegations; he consistently sought relief the Board would not conceivably grant; he made unjustifiable and unreasonable aspersions against the lawyers representing the Union and its officials and representative, and against the adjudicators and officers of the Board; for the Board to address the series of exaggerated and unsupported allegations was an abuse of public resources and an abuse of process – The applicant was declared a vexatious litigant and not permitted to file a complaint against the union or employer without leave of the Board – Application dismissed

DR. PETER A. KHAITER; RE YORK UNIVERSITY FACULTY ASSOCIATION (YUFA); File Nos. 0816-10-U; 0817-10-U; Dated October 27, 2010; Panel: Diane L. Gee (3 pages)

Construction Industry Grievance – Estoppel –

The union alleged that fire restoration work performed by Jacobs Catalytic was construction work required to be performed under the Principal Agreement – The Board considered, assuming without finding the work to be construction, whether the union was estopped from enforcing the Principal Agreement – First, the Board was persuaded that the past practice evidence of fire restoration work having been performed by union members under the Maintenance Agreement constituted a representation by the union that it would not enforce the Principal Agreement – Second, the Board found no specific action or inaction taken on the part of Jacobs based on the representation – Unlike a previous case, Jacobs did not enter into a contract with Petro-Canada nor negotiate its rates with Petro-Canada based on the representation – Finally, the Board also found that Jacobs would suffer no detriment if the union were permitted to enforce the terms of the Principal Agreement – Accordingly, the union was not estopped from enforcing the Principal Agreement – Matter continues to determine whether any or all of the work is construction

JACOBS CATALYTIC LTD.; RE IBEW, LOCAL 353; THE ELECTRICAL TRADE BARGAINING AGENCY OF THE ELECTRICAL CONTRACTORS ASSOCIATION OF ONTARIO AND GENERAL PRESIDENTS' MAINTENANCE COMMITTEE FOR CANADA; File No. 3737-05-G; Dated October 27, 2010; Panel: Diane L. Gee (15 pages)

Construction Industry – Jurisdictional Dispute

– PCL subcontracted the work in dispute, the forming of walls by insulated concrete formwork (ICF), which is a relatively new building method or technology, to Elite, a subcontractor bound to a collective agreement with the Carpenters – The applicant Locals asserted that the work in dispute represented their respective traditional portion of concrete formwork in the ICI sector of the construction industry, while the responding parties asserted that virtually every aspect of the ICF construction differed from traditional concrete formwork – The Board found that the forming process reflected by ICF technology was not so markedly different than that reflected by traditional concrete forming that the wholesale rejection of area practice evidence with respect to the installation of traditional concrete forms was warranted – Accordingly, the Board found it appropriate to consider the area practice relied upon by the applicant Locals and found it overwhelmingly supported the assignment of work in dispute to the applicants – The totality of the evidence of employer practice also suggested that

the applicants had a better claim to the assignment of work than did the Carpenters – After finding the other factors at best neutral, the Board was satisfied that there were compelling reasons to find in favour of the applicants notwithstanding the absence of a collective agreement relationship between each of them and Elite – The Board found the work in dispute ought to have been assigned to the applicants members

PCL CONSTRUCTORS CANADA LTD. AND ELITE BUILDING GROUP INC.; RE CARPENTERS' DISTRICT COUNCIL OF ONTARIO; RE INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL, ORNAMENTAL AND REINFORCING IRON WORKERS, LOCAL 736; File Nos. 2154-08-JD; 2757-08-JD; 2758-08-JD; 2759-08-JD; Dated October 6, 2010; Panel: Lee Shouldice (24 pages)

Certification – Reconsideration – Timeliness –

In its response to the application for certification the employer indicated its disagreement with both the description of the bargaining unit and the union's estimate of individuals in it; and also checked "no" in response to the question whether it was giving an 8.1 notice – One day after the two day statutory time limit expired, the employer wrote the Board saying the "no" was inadvertent and it had provided the necessary information under 8.1 – The Board found the notice untimely; one week after the vote was taken and counted the employer applied for reconsideration – The Board rejected the employer's first argument that it had complied with the Act and given notice – The Board found the "no" coupled with the employer's failure to answer the supplementary question in addition to the statutory requirement indicated to it that notice was not given – The Board also rejected the alternative argument that it should exercise its discretion to extend the notice, when it found, assuming it had such discretion, that it would only grant relief in the most compelling circumstances, and there were none in these circumstances – Request for reconsideration denied

THE CORPORATION OF THE TOWN OF TECUMSEH; RE CUPE; File No. 1906-10-R; Dated October 28, 2010; Panel: Tanja Wacyk, P. LeMay, S. McManus (6 pages)

Apprehension of Bias – Construction Industry

– Practice and Procedure – The applicant alleged an apprehension of bias in that the Vice-Chair deciding the matter (a dispute that the International violated sections 147 and/or 149) had been retained, in his personal capacity as an arbitrator, by the International (and not the Local) to determine the Carpenters ICI Collective Agreement for 2010-2013 – The Board noted that the parties to the Provincial Collective Agreement (the Carpenters' Employer Bargaining Agency and the Carpenters' District Council of Ontario [CDC]) were different from the parties before the Board (the International and Local 1256) – The Board noted that the degree of institutional impartiality and independence of the Board is well known and not challenged by the applicant – The Board found that while it may envision a situation in which the conduct of an individual may bring such impartiality and independence into question, it was not the case where a person acting as an independent adjudicator in a role that involved related but different parties and that required neutrality and credibility somehow compromises his or her independence and neutrality as a Vice-Chair – The Board concludes that an apprehension of bias was not made out – Matter continues

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA; RE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL UNION 1256; File No. 2922-09-U; Dated October 1, 2010; Panel: David A. McKee (7 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
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	Pending
Greater Essex Catholic District S.B. Divisional Court No. 462/10	3122-04-G	Pending
Rainbow Concrete (Mark Corner) Divisional Court No. 437/10	2904-09-U 2905-09-FC 3292-09-M	Pending
Ontario Power Generation Divisional Court No. 322/10	0264-09-G	Pending
John McKenney v. Upper Canada District S.B. Divisional Court No. 10-DV-1652 Ottawa	2687-08-U	Pending
Rainbow Concrete Divisional Court No. 856-10 Sudbury	3292-09-M	Pending
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 Sudbury	2904-09-U 2905-09-FC	Pending
Mr. Todor Pandeliev v. OLRB Divisional Court No. 10-DC-1594 Ottawa	3279-08-ES	Pending
AECON Construction Group v. IBEW, Local 105 Divisional Court No. 87/10	3626-08-G	November 8, 2010
Independent Electricity System Operator v. Canadian Union of Skilled Workers, LIUNA et al Divisional Court No. 78/10	3322-03-R 2118-04-R	October 21 & 22, 2010 - Reserved
K.A.S. Group of Companies v. Metro Waste Paper Recovery Divisional Court No. 611/09	0723-08-R 1037-08-R	December 17, 2010
Reliable Painters & Decorators Divisional Court No. 620/09	1443-09-R	Abandoned Oct. 7/10
Riverside Mart & Service v. Bilal Jebahi Divisional Court No. 09-DC-1566 Ottawa	1598-09-ES	Dismissed for delay Oct. 6/10
Pro Pipe Construction v. Norfab Metal and Machine Divisional Court No. 408/09	2574-04-R	Pending
Blue Mountain Resorts v. Ontario Ministry of Labour Divisional Court No. 373/09	1048-07-HS 0255-08-HS	February 15, 2011
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