

H Ontario Labour Relations Board **HIGHLIGHTS**

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New OLRB Chair

The Board welcomes **Bernard Fishbein** as its new Chair. Mr. Fishbein brings over 30 years of experience as a labour lawyer in Ontario. After graduating from the University of Toronto with a law degree and a master's degree from Harvard University, he began his law career articling at the Ontario Labour Relations Board before joining Koskie Minsky LLP.

Along with appearing at the OLRB for more than 30 years, Mr. Fishbein has taught employment and labour arbitration law at the University of Toronto. He is also a former member of the Ontario Grievance Settlement Board and former Chair of the Labour Law Section of the Canadian Bar Association.

Administrative Changes

Peter Gallus has been appointed Acting Director/Registrar. **Catherine Gilbert** has been named Acting Deputy Registrar. **William Jackson** is Acting Manager of Field Services.

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.

Construction Industry – Jurisdictional Dispute

– The work in this dispute fell within the heavy engineering sector of the construction industry and consisted of carpentry forming work performed at the East Hamilton Recreational Trail and Waterfront Link Pedestrian Bridge – The City of Hamilton, which had previously recognized the Carpenters in the ICI sector, let a contract for the construction of the bridge with a special provision that required bidders to perform heavy engineering sector work covered under the Carpenters' collective agreement in accordance with that agreement – Dufferin was the successful bidder but was not bound to the Carpenters in the heavy engineering sector – Dufferin subcontracted to Alliance which was bound to both the Carpenters and Labourers – Alliance assigned the work in dispute to the Carpenters and the non-concrete forming work to the Labourers – The Labourers filed a grievance and a jurisdictional dispute against Alliance – A primary issue was the identity of the employer, and which party's work assignment practices should be considered – The Board found that where the owner of a project had one or more relevant collective bargaining obligations and contracted the work in dispute to a general contractor, those collective bargaining obligations are factors that the Board would consider in jurisdictional disputes – As a result the Board considered the work assignment practices of Alliance, Dufferin and the City – In determining the jurisdictional dispute, the Board focused on three critical factors; collective bargaining relationships, employer practice and area practice – The practice evidence of the City, Dufferin and Alliance weighed in favour of the assignment of work in dispute to the Labourers – The area practice very strongly favoured the assignment of the disputed work to the Labourers – Both collective agreements covered the work in dispute

– The Board determined that the work should have been assigned to the Labourers and the existence of a collective agreement between the Carpenters and the City was insufficient on its own to outweigh the employer and area practices which strongly favoured the Labourers – Application allowed

ALLIANCE VERDI CIVIL INC., UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 18, DUFFERIN CONSTRUCTION COMPANY AND THE CITY OF HAMILTON; RE LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 837; File No. 0649-10-JD; Dated January 11, 2011; Panel: Lee Shouldice (10 pages)

Heath and Safety – Reprisal – An employee brought an application alleging that his employer took unlawful reprisals against him contrary to s. 50 of the OHS Act for refusing to perform work in unsafe circumstances – The employer does steel fabrication work and provides painting and other related services – The employee alleged that his safety mask, used to protect him from inhaling the fumes of paint he applied, was defective – He was discharged – He sought compensation for lost wages; for being sent home for refusing to perform painting work; and as a result of a suspension imposed for committing errors on the job and for insubordination – The Board found the employer did not raise any doubt about the reasonableness of the employee's concerns about the mask – Notwithstanding any contribution on the employee's part to the deterioration of the mask, the Board found that the employee's work refusal was justified – The Board considered the shortness of time between the work refusal and the discipline, and the length of time between the alleged misconduct and the penalty imposed as factors indicating a reprisal took place – Because the employer was under no responsibility to pay the employee for hours missed as a result of the work refusal (as no evidence was provided to demonstrate other work was available), the Board did not award the employee lost wages for being sent home until a new mask arrived – However, the Board did award him compensation for the two weeks of lost wages he incurred as a result of the suspension – Application granted

CAMERON STEEL INC.; RE NEIL HAINES; File No. 1691-10-OH; Dated January 19, 2011; Panel: Corinne F. Murray, (10 pages)

Employment Standards – The employer sought review of an order to pay termination pay to the employee, but did not dispute wages and vacation

pay owed – The Board found that the employer had established wilful misconduct in relation to theft of buns, goods intended for sale to the public, disintitling him to notice of termination or termination pay – The Board found the employer's testimony stating that she did not authorize the employee to take the buns to be more detailed and credible than the employee's vague and inconsistent testimony describing the circumstances and frequency with which he was given the product – It is unlikely that the employer would undertake secret surveillance of staff engaging in acts of theft if she authorized the employee to take the buns – The employee's claim that he was terminated because he was Muslim was improbable and not supported by the evidence – Application succeeds in part

GLENDAL BAKERY & DELI INC.; RE NEZDET KASUM AND DIRECTOR OF EMPLOYMENT STANDARDS; File No. 0998-10-ES; Dated December 31, 2010; Panel: Patrick Kelly (4 pages)

Construction Industry – Standing – Unfair Labour Practice – The IUOE argued that Graham had no standing to advance allegations that the union had contravened the Act and, as a consequence, the membership evidence provided in the certification application did not reflect the true wishes of the employees in the bargaining unit – The impugned conduct suggested intimidation, misrepresentation and/or coercion – Distinguishing earlier jurisprudence, the Board held that an employer does have a legal interest in whether membership evidence that a union relied on to attain certification is a free expression of the employees' wishes – Matter continues

GRAHAM BROS. CONSTRUCTION LIMITED; RE LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, ONTARIO PROVINCIAL DISTRICT COUNCIL AND INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 793; File No. 0736-09-U; Dated January 14, 2011; Panel: Diane L. Gee (11 pages)

Grievance – Construction Industry – Evidence – Collective Agreement – During the life of a collective agreement OPG engaged in a construction project that included an electrical portion that made up between 55% to 60% of the total trades work performed – The electrical portion was contracted to a contractor that did not employ the applicant's members – The dispute centred around the meaning of the phrase "predominantly electrical" in Letter of Understanding No. 2 of the collective agreement – Letter of Understanding No. 2 required that

“predominantly electrical” work be performed by the applicant’s members – To determine the ambiguous meaning of the phrase, the Board permitted the parties to call extrinsic evidence to establish the context within which “predominantly electrical” was negotiated – The Board found that Letter of Understanding No. 2 was intended to provide the applicant with a guaranteed number of hours when the respondent engaged in electrical projects – Initially, the respondent proposed the phrase “exclusively electrical” as a condition of the guarantee, however the applicant rejected this language on the basis that it was too under-inclusive – “Predominantly electrical” was ultimately agreed upon instead – After reviewing the extrinsic evidence, the Board determined that the respondent interpreted the phrase “predominantly electrical” to mean the same thing as “exclusively electrical”, effectively a purely electrical project with some very minimal support by other trades – However, the Board was not satisfied that the applicant shared this interpretation and found that in fact, there was no mutual agreement between the parties with respect to the meaning of the phrase – The Board applied the common interpretive principle that words of a collective agreement must be given their plain and ordinary meaning unless the context of the particular provision or the collective agreement read as a whole suggests that a different meaning is intended – The Board found that there was no evidence of context that the parties intended “predominantly electrical” to have a special or different meaning – As a result, the Board found that the words must be given their plain and ordinary meaning – The Board determined that the plain and ordinary meaning of the words “predominantly electrical” was that trades work on the construction project must consist of at least 50% electrical work – The Board found that since the project consisted of 55% –60% electrical work, the electrical work on the project should have been performed by

impossible to ascertain who the “true” employer is – KAS also argued it was unreasonable for the Board to invoke s. 1(4) in the absence of any identifiable labour relations mischief – The Court held the Board’s reasons as a whole gave appropriate consideration to the criteria for the operation of s. 1(4), and indeed identified three different forms of labour relations mischief – Application dismissed

KAS GROUP OF COMPANIES; RE TEAMSTERS LOCAL UNION NO. 419, METRO WASTE PAPER RECOVERY INC., c.o.b. METRO MUNICIPAL RECYCLING SERVICES INC.; OLRB; File Nos. 0723-08-R, 1037-09-R (Court File No. 611/09; Dated January 12, 2011; Panel: Ferrier, Molloy and Sachs, 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.

members of the applicant – Application allowed

ONTARIO POWER GENERATION INC.; RE CANADIAN UNION OF SKILLED WORKERS; File No. 1591-08-G; Dated January 17, 2011; Panel: Lee Shouldice (19 pages)

Court Proceedings

Certification – Judicial Review – Related Employer – KAS sought judicial review of the Board’s decision declaring KAS and Metro Waste a related employer – KAS argued it was unreasonable for the Board to proceed with a s. 1(4) analysis without having first concluded it was

Pending Court Proceedings

Case name & Court File No.	Board File No.	Status
Promark-Telecon Inc. v. Universal Workers Union, L. 183 Divisional Court No. 600/10	0745-09-R 0754-00-R 0765-09-R 0782-09-R	Pending
Dean Warren v. National Hockey League Divisional Court No. 587/10	2473-08-U	Pending
Roni Excavating Limited, et al v. IUOE, Local 793 Divisional Court No. 580/10	1991-10-R	Pending
Richard Hotta (Proteus Craftworks) v. Mahamad Badiuzzaman, et al Divisional Court No. 613/10	1953-07-ES	Pending
Pharma Plus Drugmarts Divisional Court No. 551/10	0579-08-R 0580-08-R 1662-09-R	Pending
SNC-Lavalin Divisional Court No. 482/10	2442-07-R 2936-07-R	Pending
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	May 9, 2011
Greater Essex Catholic District S.B. Divisional Court No. 462/10	3122-04-G	June 2, & 3, 2011
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	April 18, 2011
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	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	2904-09-U 2905-09-FC	Pending
Mr. Todor Pandeliev v. OLRB Divisional Court No. 10-DC-1594 Ottawa	3279-08-ES	Pending
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
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	1048-07-HS 0255-08-HS	April 20, 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>

Case name & Court File No.	Board File No.	Status
Dr. Peter A. Khaite 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