

*H*ighlights

Ontario Labour Relations Board

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Bargaining Union Certificates Now Available

The Ontario Workplace Tribunals Library (OWTL) is pleased to announce the [OLRB Certificates database](#). Union Certificates from 2007 to date are available in full text and .pdf format. For older certificates from 1962-2006, please contact [OWTL staff](#) to request a certificate search or any other information request.

Scope Notes

The following are scope notes of some of the decisions issued by the Ontario Labour Relations Board in July of this year. These decisions will appear in the July/August 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.

Employment Standards – The employer appealed an Employment Standards Officer's Compliance Orders for public holiday pay and an order to pay employees at the prescribed minimum wage – The issue was whether servers who served alcohol infrequently at a licensed restaurant should be paid the standard minimum wage of \$10.25 or the liquor server minimum wage of \$8.90 per hour set out in s. 5(1) of Ontario Regulation 285/01 – The lower wage rate applies to an employee who serves liquor "as a regular part of his or her employment" – The Director of Employment Standards (DES) argued that an interpretation of the word *regular* should include the context of the employer's business: if

the sale of liquor is an insignificant part of the business, then the liquor server minimum wage should not apply – The employer countered that the liquor service is a regular part of the servers' employment as the restaurant is licensed and its employees are required to serve alcohol upon request – The Board rejected DES' argument and determined that the volume of liquor sales is irrelevant – The central question for the Board was whether the serving of alcohol was a regular part of the servers' employment – The evidence was that alcohol sales, though low, occurred almost every day – The application was allowed and the Compliance Orders rescinded – The Board ordered DES to return the money paid into trust, including the administrative fee, to the Employer

1180240 ONTARIO INC. O/A JOEY'S ONLY SEAFOOD; RE PENNY WILKS, WILLOW WALKER, ALINE HEIMBUCH, ALICJA DWOZAK, LIA CARRIER, ALLISHA PEEVER, SAMANTHA QUILTY, DENRA SLIPP, ALISSA CROSSLEY, ROSELLE NOORDYK, TRACIE BOONE, KENDRA DEARLOVE, DEANNA WINN; RE DIRECTOR OF EMPLOYMENT STANDARDS; File No. 2541-11-ES and 2929-11-ES; Dated July 11, 2012; Panel: Kelly Waddingham (4 Pages)

Employment Standards – Practice and Procedure – The employer sought leave of the Board to dispense with service of its application on several hundred employees, and permission to make payment of the substantial order in instalments beyond the 30-day limit for filing the appeal – In the circumstances of this case, the Board relieved the employer of the obligation to serve each employee individually, requiring the employer to post its application and the Board's decision in the workplace (subject to personal

delivery to employees no longer part of the employer's workforce) – With respect to the payment of the order into trust, the Board affirmed that historically it has not exercised its discretion to extend the time for filing until the full payment has been made – The Board stated, however, that if the employer paid the full amount of the order in accordance with its proposed schedule, it is likely that the Board will exercise its discretion to extend the time for filing to the date of the final payment – Matter proceeds

450477 ONTARIO LIMITED OPERATING AS CHARTRAND EQUIPMENT; RE JEAN-LOUISE ALBERT, ET AL; File No. 1158-12-ES; Dated July 17, 2012; Panel: Ian Anderson (5 Pages)

Health and Safety – The employer sought suspension of an inspector's order that personal protective equipment be provided for employees of a sleep clinic, many of whose patients suffered from a contagious respiratory condition – The employer relied on documentation relating to cleaning and disinfection but did not explain how that protocol related to the employer's policies or procedures; further, the employer relied on a second document, a peer review assessment, that was four-and-a-half years old and made no mention of the current employer – The Ministry's submissions asserted that the employer had no screening procedures, no infection control measures, nor any personal protective equipment that would deal with potential exposure to the airborne infection – The Board found that the health and safety of the workers might be endangered if the order were suspended, and the employer was unable to show that it would be prejudiced if the order were not suspended – Suspension request denied

ACCQCORP; RE JENNIFER MATTHIE, MARILYNNE MCDONALD, MELANIE WEGLER; File No. 0872-12-HS and 0873-12-HS; Dated July 6, 2012; Panel: Gail Misra (5 Pages)

Jurisdictional Dispute – Conciliation – Bargaining Rights – Reference – Voluntary Recognition – The Minister of Labour asked the Board whether she has the authority to appoint a conciliation officer in this matter, involving a bargaining unit of employees who work at various Dilico Anishinabek Family Care ("Dilico") centres – The Union obtained bargaining rights from the Canada Industrial Relations Board ("CIRB") –

Dilico participated in the CIRB proceedings but always objected to CIRB jurisdiction over its labour relations – The Union issued notice to bargain a second renewal of the collective agreement, followed by a request to the Ontario Ministry of Labour for the appointment of a Conciliation Officer, both of which were objected to by Dilico – Dilico argued that it had never voluntarily recognized the union, that the union was never certified by the Board, and that Dilico had only engaged in bargaining because the Union had previously obtained those rights from the CIRB – The Union argued that Dilico's voluntary recognition for the Union was a product of the first collective agreement and was confirmed by the execution of the second collective agreement – Assuming, without deciding, that the Board has jurisdiction over the labour relations of Dilico, the Board stated that the voluntary recognition provision provides an alternative route to the normal certification procedures and that the language of the statute contemplates intention – Dilico's lack of intention was manifest throughout and their participation in the CIRB proceedings should not be seen as voluntary – Additionally, the Union was never certified by the Board – Accordingly, the Union had no legal right to serve an enforceable notice to bargain, which is a prerequisite to the appointment of a conciliation officer by the Minister – The question referred to the Board is answered in the negative

COMMUNICATIONS, ENERGY AND PAPERWORKERS UNION OF CANADA AND ITS LOCAL 7-0-1; RE DILICO ANISHINABEK FAMILY CARE; File No. 0468-12-M; Dated July 16, 2012; Panel: James Hayes (9 Pages)

Construction industry Grievance – Jurisdictional Dispute – Practice and Procedure – Reconsideration – The Labourers sought reconsideration of a Board decision deferring the adjudication of a grievance pending the outcome of a jurisdictional dispute, arguing that the grievance relating to the sub-contracted work was insufficient to trigger a jurisdictional dispute, or insufficient to allow the jurisdictional dispute to take primacy over the grievance referral and cause it to be deferred – The Board held that its longstanding jurisprudence clearly suggests that a multi-party dispute is much more efficiently and effectively addressed through the jurisdictional dispute process – The Labourers will not be deprived of their collective agreement argument when the underlying issue of the

jurisdictional dispute is heard – Reconsideration denied; briefs ordered

DINEEN CONSTRUCTION LIMITED; RE UNIVERSAL WORKERS UNION, LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 183; RE INTERNATIONAL BROTHERHOOD OF PAINTERS AND ALLIED TRADES, DISTRICT COUNCIL 46; RE MONALT ENVIRONMENTAL INC.; File No. 3052-11-G and 3808-11-JD; Dated July 23, 2012; Panel: Bernard Fishbein (9 Pages)

Unfair Labour Practice – Related Employer – CUPE brought a related employer application and an unfair labour practice complaint arising out of the Hamilton Health Sciences Corporation's ("the Hospital") termination of its contractual arrangements for cleaning services with Sodexo MS Canada Limited ("Sodexo") – The termination of the subcontract resulted in the layoff of Sodexo's cleaning staff who were represented by CUPE – The Union submitted that the responding parties (the Hospital and Sodexo) acted as a single employer or alternatively acted in concert to commit unfair labour practices by terminating the entire bargaining unit for making a lawful wage proposal – The Hospital and Sodexo argued that they ought not to be treated as one employer because they do not carry on associated or related activities or businesses and are not under common control or direction, and that the cancellation of the contract and the resulting layoffs were due to legitimate business decisions – The Board found that although there was cooperation and coordination between the respondents, this was not sufficient to conclude that they are under common control and direction – The Board found that there was no legitimate business rationale for the responding parties' conduct and concluded that this conduct-in-particular the hasty timing of the contract cancellation in concert with earlier efforts to erode employee support for CUPE--constituted anti-union *animus* and were violations of the Act – The issue of remedial relief was remitted to the parties – Related employer application dismissed; unfair labour practices complaint allowed

HAMILTON HEALTH SCIENCES CORPORATION; RE CANADIAN UNION OF PUBLIC EMPLOYEES LOCAL 4800; RE SODEXO MS CANADA LIMITED; File No. 0387-09-R and 0388-09-U; Dated July 18, 2012; Panel: Patrick Kelly (50 Pages)

Construction Industry Grievance – CUSW sought payment for travel time for some of its employees when Hydro One provided transportation for the employees but required one of them to drive the vehicle from the worksite to the agreed-upon assembly point – The Board found no ambiguity in the language of the collective agreement: Hydro One's provision of "transportation" in the form of a vehicle parked for the employees' use, with no one to operate it, meant that one of the employees had to effectively be employed as a driver – Grievance allowed

HYDRO ONE INC.; RE CANADIAN UNION OF SKILLED WORKERS; File No. 4044-11-G; Dated July 19, 2012; Panel: John D. Lewis (12 Pages)

Collective Agreement – First Contract Arbitration – Following a direction from the Board for the settlement of a first collective agreement by arbitration, the parties returned to the Board to have their differences adjudicated – The only outstanding issues for resolution were wage rates and the number of hours required to qualify for benefits coverage – The Board accepted the union's submissions that the Board's role was to effect an agreement that was "fair and reasonable" and would be "comparable to others in the same industry and geographic area," applying an objective standard – The employer, having terminated a contract with a predecessor cleaner company, attempted to introduce reduced wage rates and a higher threshold (minimum hours) of eligibility for benefits coverage – The Board specifically rejected the employer's argument that "ability to pay" should be a consideration – The Board found that the union's proposals reflected the terms of the collective agreement with the predecessor cleaner company when the contract was terminated – Those terms could hardly be described as "breakthrough" – Collective agreement ordered

KLEENWAY BUILDING MAINTENANCE SERVICES INC.; RE LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 1059; File No. 0778-12-FC; Dated July 23, 2012; Panel: Maurice A. Green (8 Pages)

Right of Access - This is an application under section 13 of the *Labour Relations Act* for an access order in the context of an organization drive - Many of the Respondent's employees

reside at a camp owned by a third party – The Applicant was denied access to organize employees on the camp site – The Board can make an access order under section 13 of the Act in one of two situations: (1) the employee must either “reside on the property of the employer” or (2) “on property to which the employer has the right to control access” –The employer argued that the “right to control access” is tantamount to a right in ownership and that access to the camp is controlled by the third party who is the property owner – The Board found that access does not imply ownership and that the right to control access need not be exclusive to one party - The Board found that the Respondent controls access to the camp because the Respondent informs the third party who is, and who is not, to reside at the camp – The Board directed the Respondent to advise the third party that up to two representatives of the Applicant shall be admitted to the camp for the purpose of attempting to persuade the employees to join the Applicant – Right of access granted

LEDCOR CMI LIMITED; RE UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION (UNITED STEELWORKERS); RE CONSTRUCTION WORKERS LOCAL 52 AFFILIATED WITH THE CHRISTIAN LABOUR ASSOCIATION OF CANADA; File No. 0902-12-M; Dated July 9, 2012; Panel: Brian McLean (4 Pages)

Interim Order – Jurisdictional Dispute – The Carpenters sought an interim order in the context of a jurisdictional dispute over the assignment of certain carpentry trim work in the high-rise residential sector that was being performed by the Labourers – The Labourers, in a collective bargaining relationship with Provincial Carpentry, had been doing the trim work for approximately nine months when they were told they were being removed from the project and replaced by members of the Carpenters with a bargaining relationship with Dole Contracting – After one day of an informational picket established by the Labourers in protest of the re-assignment, the work was returned to Provincial and the Labourers – The Carpenters filed the jurisdictional dispute and sought to be placed on the project pending the outcome of the application – The Carpenters argued that the Labourers had engaged in illegal conduct by setting up the picket line and they should not be rewarded for these unlawful self-help efforts – The Labourers, for

their part, denied any illegal conduct and argued that the Carpenters had not objected to the work assignment for nine months, and had not filed a grievance—in fact, could not do so—because they had no bargaining relationship with Provincial; it was only when the work was taken away from the Labourers and given to the Carpenters (and Dole) that the Carpenters were able to assert any rights over the work – The Board found that the Labourers, instead of waiting for the adjudication of its grievance or seeking a resolution to the jurisdictional dispute, intended to and did cause a work stoppage to protest the re-assignment of the work to the Carpenters: the conduct was improper and was not to be condoned – However, in the particular circumstances of this case, where it was not clear why Dole was awarded the work, and why it was being transferred to another contractor with a collective agreement with a different union, after nine months of uninterrupted (and unprotested) work by the Labourers working for Professional, and where a Carpenter win in the jurisdictional dispute would garner it a declaration only (the Board would not direct that the work be assigned to a particular contractor with a bargaining relationship with the Carpenters), the application for interim relief was dismissed

PROFESSIONAL CARPENTRY LTD.; RE THE CARPENTERS' DISTRICT COUNCIL OF ONTARIO; RE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, ON ITS OWN BEHALF AND ON BEHALF OF ITS LOCAL UNION, CARPENTERS AND ALLIED WORKERS, LOCAL 27;; RE UNIVERSAL WORKERS UNION, LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 183; RE ASPEN RIDGE HOMES LTD.; RE DOLE CONTRACTING INC.; File No. 1103-12-M; Dated July 24, 2012; Panel: Lyle Kanee (10 Pages)

Court Proceedings

Construction Industry Grievance – Judicial Review – Timeliness – The Board had originally held that it had the discretion to accept a grievance referral under s. 133 of the Act, notwithstanding the language in the collective agreement that deemed a grievance filed beyond 14 days to be settled – On judicial review, applying a standard of reasonableness, the Divisional Court quashed the Board's determination: [2011] OLRB Rep September/October 629 – On appeal, the Court of Appeal upheld the Divisional Court ruling: the

Board had to apply the terms of the collective agreement which deemed the grievance settled if it was not referred to arbitration within 14 days — The Court said the Board did not have the right to ignore the express terms of the collective agreement that addressed the grievance and arbitration procedures – Appeal dismissed

GREATER ESSEX COUNTY DISTRICT SCHOOL BOARD; RE UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, LOCAL 552; RE ONTARIO LABOUR RELATIONS BOARD; OLRB File No. 3122-04-G (Court File No. C54934); Dated July 10, 2012; Panel: O'Connor ACJO, Feldman and Ducharme, JJA (30 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
OSMWRC, et al Divisional Court No. 363/12	0784-05-G	Pending
2130869 Ontario Ltd. Divisional Court No. 359/12	3518-11-R and 3519-11-G	Pending
Albert Tsoi v. UNITE HERE Divisional Court No. 330/12	3908-09-U	Pending
Ontario Sheet Metal Workers' and Roofers' Conference, et al (Flynn) Divisional Court No. 325/12	2730-11-JD	Pending
IBEW, Local 894 Divisional Court No. 321/12	3174-09-U	Pending
EllisDon Corporation Divisional Court No. 310/12	0784-05-G	Pending
EllisDon Corporation Divisional Court No. 309/12	2076-10-R	Pending
Thomas Fuller Construction et al Divisional Court No. 12-1832 Ottawa	1056-11-R	October 3, 2012
Alliance Environmental Divisional Court No. 200/12	0854-10-R	October 15, 2012
Hassan Hasna Divisional Court No. 83/12	3311-11-ES	Pending
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
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	October 3, 2012
John McCredie v. OLRB et al Divisional Court No. 1890/11 London	1155-10-U	Pending
Classic POS Inc. Divisional Court No. 301/11	4059-10-ES	Dismissed Jul 6/12
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	December 7, 2012
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	Dismissed Jun. 4/12; Reasons to follow
Greater Essex Catholic District S.B. Court of Appeal No. C54934	3122-04-G	Appeal Dismissed July 10, 2012

Case name & Court File No.	Board File No.	Status
John McKenney v. Upper Canada District S.B. Court of Appeal No. M41065 Ottawa	2687-08-U	Dismissed Feb. 3/12; Seeking leave to appeal to C.A.
Dr. Peter A. Khaite 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 Supreme Court No.	3322-03-R 2118-04-R	Seeking leave to appeal to SCC
Pro Pipe Construction v. Norfab Metal and Machine Divisional Court No. 408/09	2574-04-R	Pending
Blue Mountain Resorts v. MOL Court of Appeal No. C54427	1048-07-HS 0255-08-HS	September 27, 2012
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 Court of Appeal No. C55503	1776-04-R et al	November 8, 2012
Dr. Peter A. Khaite v. OLRB et al Divisional Court No. 431/08	4045-06-U et al	Pending