

# *H* *Ontario Labour Relations Board* **HIGHLIGHTS**

Editors: Voy Stelmaszynski, Solicitor  
Leonard Marvy, Solicitor

October 2008

## **Scope Notes**

The following are scope notes of some of the decisions issued by the Ontario Labour Relations Board in September 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](http://www.canlii.org).

**Discharge – Employment Standards** – The employee sought review of an officer's ruling that he had engaged in wilful misconduct when he refused to follow direction from his supervisor and subsequently would not apologize for his misbehaviour – The Board stated that one way to measure whether an employee's offence is sufficiently serious to disentitle the employee to termination pay is to determine if it would have been unreasonable for the employer to permit the employee to work out his or her notice period – In the instant matter, the employee was insubordinate and showed no remorse when asked to correct his conduct, consequently the employer had no obligation to keep the employee in the workplace for the notice period – Application dismissed

**ARROW GAMES CORPORATION AND DIRECTOR OF EMPLOYMENT STANDARDS; RE RICHARD MARQUIS**; File No. 2116-07-ES; Dated September 25, 2008; Panel: Ian Anderson (6 pages)

**Bargaining Unit – Certification** – The parties sought an interim certificate pending the resolution of the geographic scope (town v. county) by mutual agreement or as determined by the Board – The Board noted that it is most often requested to certify unions on an interim basis when there are outstanding disputes related to certain classifications – In this case, the Board saw no impediment to certifying the bargaining agent on an interim basis where it was clear the outcome of the dispute regarding the geographic scope did not impact on the entitlement to certification – Interim certificate issued for bargaining unit not in dispute (town)

**BFI CANADA INC.; RE TEAMSTERS LOCAL UNION NO. 419**; File No. 1628-08-R; Dated September 18, 2008; Panel: Mary Anne McKellar (2 pages)

**Certification – Construction Industry – Practice and Procedure – Representation Vote – Status** – In light of a s. 8.1 challenge as well as status disputes in two certification applications filed by different unions involving the same employer, the Board ordered that the ballots cast in the representation vote be segregated and the ballot box sealed – Unfortunately, the ballots were not segregated – The Board ordered a second representation vote but ruled that only those individuals who cast ballots in the first vote should be eligible to cast ballots in the second vote – Second vote ordered; submissions directed

**CLEAN WATER WORKS INC.; RE INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 793**; File Nos. 1541-07-R;

1544-07-R; Dated September 8, 2008; Panel: Lee Shouldice, Barry Roberts, Richard Baxter (5 pages)

---

**Employment Standards** – The employer appealed an order for compensation, asserting that the discharged employee had been employed on a fixed term contract – The evidence showed a longstanding employment relationship that evolved from childcare in the employer's home to office work in her dental practice – The Board found that the alleged fixed-term document was not sufficiently clear to specify an end to the employment, nor did the parties' conduct support such an effect – When the employee returned from her pregnancy leave, she was entitled to reinstatement – The Board was not persuaded that there was no position to which the employee could be returned – Application dismissed; quantum varied

**JUDITH BUYS DENTISTRY PROFESSIONAL CORPORATION;** RE TRACY PARKER AND DIRECTOR OF EMPLOYMENT STANDARDS; File No. 3020-07-ES; Dated September 10, 2008; Panel: Mary Anne McKellar (11 pages)

---

**Related Employer – Unfair Labour Practice** – The applicant union alleged that NSCL and UPCL were related employers and that NSCL must have been contemplating the creation of UPCL during its negotiations with the applicant, thereby bargaining in bad faith – The lay-off of NSCL employees was grieved by the union and the question of relatedness was referred by the parties to the Board – NSCL and UPCL conceded that they were two companies under common control, but did not agree that their businesses or activities were related – On the s. 1(4) issue, the Board could find no evidence of erosion of the applicant's bargaining rights, which were limited to one street address in Hamilton; the establishment of a new business outside of Hamilton had, at best, the effect of denying the applicant an accretion to its existing unit – Regarding the unfair labour practice complaint, the Board held that NSCL was not obligated to disclose its plans for an off-site operation when it was not apparent that such plans would have any detrimental effect on the Hamilton bargaining unit – Both applications dismissed

**NATIONAL STEEL CAR LIMITED AND UNIVERSAL PLASMA CUTTING LIMITED;** RE UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS

INTERNATIONAL UNION, LOCAL 7135; File Nos. 3561-06-R; 3562-06-U; Dated September 17, 2008; Panel: Patrick Kelly (16 pages)

---

**Employment Standards – Practice and Procedure – Settlement** – Almost four years after the settlement of this application for review, the employer sought the Board's permission to compel a labour relations officer to testify on its behalf in a wrongful dismissal suit fled by the employee – The employee's assertion in the civil suit was that she could not read English at the time she entered into the settlement; the employer wanted the officer to give evidence about the employee's language abilities and describe the nature of her discussions with the employee – The Board reiterated its long held view regarding the importance of maintaining confidentiality in the mediation process – In addition, in the Board's view, there were other ways in which the employer could ascertain the employee's proficiency in the language; the labour relations officer could not be an expert on this aspect of the case – Request denied

**OCTOBER ENTERPRISES INCORPORATED;** RE RASHIDA (SHEILA) KARMALI AND DIRECTOR OF EMPLOYMENT STANDARDS; File No. 2092-04-ES; Dated September 17, 2008; Panel: Marilyn Silverman (5 pages)

---

**Discharge – Health and Safety – Reprisal** – The applicant alleged he had been penalized by a work transfer and a subsequent discharge for instituting a work refusal when he was assigned to drive a particular model of bus – The Board noted that it is generally not the Board's function to determine whether the applicant had been properly accommodated (under the *Human Rights Code*) or to inquire into his work refusal – The Board's focus is on whether the worker was penalized for "acting in compliance" with or "seeking the enforcement of" the *Occupational Health and Safety Act* – The worker must have had the right to refuse work when he exercised that right – The Board held that the applicant's transitional assignments were not a reprisal under the Act – Similarly, his discharge came about after he had been given ample opportunity to accept a transfer and he still insisted on withdrawing his service – Application dismissed

**TORONTO TRANSIT COMMISSION;** RE ANTHONY JAMES; File No. 0072-05-OH; Dated September 15, 2008; Panel: Caroline Rowan (20 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, 7<sup>th</sup> Floor, 505 University Avenue, Toronto.

## Pending Court Proceedings

Case name & Court File No.	Board File No.	Status
<b>Mohamed C.Z. Khan</b> Divisional Court No. 461/08	2153-01-OH	Pending
<b>Dr. Peter Khaiteer</b> Divisional Court No. 431/08	4045-06-U et al	Pending
<b>Christian Labour Association of Canada</b> Divisional Court No. 382/08	3798-05-R; 3958-05-U	Pending
<b>Lorraine Fraser</b> Divisional Court No. 1719 <b>LONDON</b>	0059-06-ES; 0061-06-ES	Pending
<b>Comfort Hospitality Inc.</b> Divisional Court No. 344/08	2573-07-ES	Pending
<b>Govin Misir v. S. Lalgudi Vaidyanathan et al</b> Divisional Court No. 566/07	2966-03-ES; 3389-03-ES; 3390-03-ES	Pending
<b>LIUNA v. Barclay Construction et al</b> Divisional Court No. 310/08	0837-06-R	Pending
<b>Solid Gold Inn</b> Divisional Court No. 224/08	3823-07-ES	October 14, 2008
<b>LIUNA, Local 183 (PineValley Enterprises)</b> Divisional Court No. 201/08	0910-07-R	Pending
<b>LIUNA, Local 183 (Saddlebrook)</b> Divisional Court No. 201/08	3414-06-R et al	December 19, 2008
<b>BCC Constructors v. International Union of Painters</b> Divisional Court No. 138/08	3174-06-R	Pending
<b>Edgewater Gardens Long Term v. OPSEU</b> Divisional Court No. 08-0015 <b>HAMILTON</b>	3166-07-R	October 23, 2008
<b>Jacobs Catalytic Ltd. v. IBEW Local 353</b> Divisional Court No. 66/08	2127-05-G; 3437-05-G	Pending
<b>Ottawa Fertility Centre v. Ontario Nurses Association, OPSEU, CUPE Local 4000, Ottawa Hospital and OLRB</b> Divisional Court No. DV-08-1394 <b>OTTAWA</b>	1531-06-PS	Pending
<b>Ottawa-Carleton Public Employees Union (CUPE), Local 503 v. City of Ottawa et al</b> Divisional Court No. 423/07	1386-06-R	Pending
<b>Dev Misir v. Muluneshi F. Agago et al</b> Divisional Court No. 281/07	0769-06-ES	October 2, 2008
<b>Jacobs Catalytic Ltd. v. IBEW Local 353 et al</b> Divisional Court No. 117/07 (M35498)	3737-05-U	Dismissed – June 4, 2008 Seeking leave to C.A.
<b>Dana Horochowski v. OECTA; York Catholic DSB</b> Divisional Court No. 93/07	1115-04-U	October 20, 2008
<b>Janet Kitson v. OLRB et al</b> Divisional Court No. 492/06	4205-02-U	Pending
<b>Abduraham, Abdoulrab v. Novaquest Finishing</b> Court of Appeal No. C48942	2222-04-ES, 2223-04-ES, 2224-04-ES	January 27, 2009
<b>City of Hamilton v. Carpenters, Local 18</b> Divisional Court No. 209/06	1785-05-R	November 3, 2008