

# *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 August 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](http://www.canlii.org).

### **Certification – Construction Industry – Practice and Procedure – Remedial Certification**

– The union filed an application for certification with less than 40% membership and applied for remedial certification under s. 11 – In its application the applicant failed to identify which certification regime (s. 8 or 128.1) it was choosing – The responding party argued this was fatal – The Board found, based on statements made elsewhere in the application that the applicant had elected to proceed under s. 8 – Additionally, the Board noted that s. 128.1 specifically requires an election and since the applicant had not elected s. 128.1, the application must be dealt with under s. 8 – Matter continues

**ASHBRIDGE ELECTRIC CONTRACTORS LIMITED;** RE IBEW, LOCAL 353; File Nos. 1376-08-R; 1275-08-U; Dated August 8, 2008; Panel: Mark J. Lewis (3 pages)

### **Construction Industry – Evidence – Practice and Procedure – Related Employer – Sale of Business**

– Union sought to have admitted thirty year old documents as “business records,” specifically a letter commenting on the binding nature of a collective agreement – The employer objected arguing that it was caught in an impossible position as it must find the author or another witness to give evidence about

documents that apparently created some 30 years ago have played no role in the corporation’s existence since that time – The Board found the records were not admissible pursuant to s. 35(2) of the *Evidence Act*, in that the record did not meet any of the conditions set out in the subsection – The Board also found that even if s. 111(2)(c) of the *LRA, 1995* created a wider scope than s. 35, it would not admit the record because the documents are expressions of opinion by parties whose source of information and belief cannot be ascertained, and therefore no weight could be placed on them – Additionally, the Board applied the rule in *Browne v. Dunn* and did not admit evidence that contradicted earlier testimony by a witness where the contradiction was not put to the witness during cross examination – Matter continues

**CADILLAC FAIRVIEW CORPORATION LTD., THE, CF/REALTY HOLDINGS INC., QUEENSTON ROAD INVESTMENT INC., EASTGATE SQUARE HOLDINGS INC. AND REDCLIFF REALTY MANAGEMENT INC.;** RE INTERNATIONAL UNION OF PAINTERS AND ALLIED TRADES, LOCAL 1795; File Nos. 1732-06-R; 1811-06-R; 2869-06-R; Dated August 14, 2008; Panel: David A. McKee (10 pages)

### **Practice and Procedure – Ratification and Strike Vote – Strike**

– The union, acting in error (not in bad faith) advised ten employees that they must sign union cards to be eligible to vote for strike action – The Board found as a fact that there were 53 employees in the bargaining unit, 43 of whom voted with 28 voting in favour of strike action – The Board noted that a clear majority of employees voted in favour of strike action, and that while the union may have breached its obligations under s. 79 for the conduct of strike votes and while some remedy might lie against

the union for this conduct, there was no challenge to the validity of those 28 ballots cast in support of strike action – The Board found that no labour relations purpose would be served by declaring any ensuing strike to be unlawful where a majority of employees in the bargaining unit have signalled their support and to preclude such action on these facts would undermine the essential role to be played by strike (or lockout) in the collective bargaining process – Application dismissed

**CANADIAN CORPS OF COMMISSIONAIRES (OTTAWA DIVISION); PUBLIC SERVICE ALLIANCE OF CANADA;** File No. 2525-07-U; Dated August 14, 2008; Panel: Kevin Whitaker (3 pages)

**Health and Safety – Practice and Procedure – Timeliness** – After the inspector reviewed the applicant's complaint at the workplace, the applicant was advised there was no contravention of the Act – The inspector did not issue an Order – The inspector returned to the workplace three days later and provided the employer with a Field Visit report, but did not provide the complainant with the report – There is no provision in the Act requiring the inspector to confirm in writing the refusal to issue an order, nor requiring the inspector to provide the complainant with the Field Visit report until it is asked for – The applicant appealed to the Board within 30 days of having received the Field Visit report, but beyond the 30 days of the Inspector's decision not to issue an order – The Board found the appeal untimely – Appeal dismissed

**CASTONGUAY BLASTING GP AND CLAUDE NADON, INSPECTOR; RE STEVEN MROCZYNSKI;** File No. 0387-08-HS; Dated August 7, 2008; Panel: Susan Serena (3 pages)

**Health and Safety** – The inspector issued orders arising from the school board's refusal to permit a worker member, who was only present at the workplace in question one day a week, to act on the joint health and safety committee (JHSC) – The school board argued that members of the JHSC must have a significant, regular, principal connection to the workplace – The Board found that the Act did not require a worker to have such a connection to the workplace, but rather that he or she must only be employed at the workplace and selected by the workers – The Board declared that the school board's refusal to allow the worker to act on the JHSC was a breach of the Act

**GREATER ESSEX COUNTY DISTRICT SCHOOL BOARD;** RE ONTARIO SECONDARY

**SCHOOL TEACHERS' FEDERATION, DISTRICT 9; CUPE, LOCALS 27 & 1348; ELEMENTARY TEACHERS' FEDERATION OF ONTARIO AND RICK TAGGART, INSPECTOR;** File No. 2730-07-HS; Dated August 25, 2008; Panel: Ian Anderson (8 pages)

**Bargaining Unit – Certification – *Prima Facie* Motion – Reconsideration** – The union applied to consolidate six bargaining units into three – The employer brought a “no *prima facie* case” motion – The Board has the power to reconsider its past decisions, including certification decisions providing bargaining unit descriptions – However, certificates are spent when the parties enter into their first collective agreement – The bargaining units negotiated by the parties supersede the ones described in the Board's certificates – Hence the current bargaining units, as described in the collective agreements negotiated between the parties, supersede any consolidated units that the Board could order through its reconsideration power – The union has not made out a *prima facie* case for consolidating its bargaining units, which was the relief sought – Motion granted; application dismissed

**KINGSTON WHIG STANDARD; RE KINGSTON TYPOGRAPHICAL UNION, LOCAL 30204;** File No. 0670-08-M; Dated August 5, 2008; Panel: Lee Shouldice (10 pages)

**Bargaining Unit – Certification – Practice and Procedure** – Union applied for an all employee unit where the employer had two operations: a nursing home and retirement home – Employer argued that only a two bargaining unit structure was appropriate – After the ballots were counted, a majority of employees in the nursing home voted in the union's favour, while the employees in the retirement home and all employee unit were against the union – The parties then adopted each others' positions – The Board permitted the change of positions, following *Martha's Garden* and *Morrow Transport* and noted that change of position cases are rare and are a natural outcome of the Board's processes which are designed to ensure that certification cases get dealt with quickly, effectively and without the requirement of unnecessary litigation – Finally, the Board found that a two-unit structure was appropriate (particularly given that the employer had argued, albeit at different times, that both an all employee and a two unit structure were appropriate) – Application granted, in part

**NUTRA SERVICES INC.;** RE SEIU LOCAL 1 CANADA; File No. 1113-08-R; Dated August 21,

2008; Panel: Brian McLean, J.A. Rundle, D.A. Patterson (5 pages)

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**Health and Safety** – The Employer, supported by the union, sought suspension of an Order directing it to cease using a device that lifted workers on a platform some 45 feet to work on roofs, until a guard rail system that had been removed was repaired and certified to meet the manufacturer's specifications – The applicant asserted that the fall arrest system it required workers to use, together with its training provided protection at least equal to the protection afforded to workers by the guardrail – The Board found that if the removal of the guardrail system had not raised a concern about the stability of the platform, then the applicant would have demonstrated the fall arrest systems and its training and supervision were sufficient – The Board however found that the applicant had failed to provide any material from the manufacturer to indicate that the removal of the guard rail on one side of the platform would not affect the integrity of the platform or its stability – The absence of such information together with the material filed by the inspector from the manufacturer that modifications should not occur without its consent, led the Board to conclude that the applicant had failed to demonstrate a strong *prima facie* case – Request to suspend dismissed

**TRUDEL & SONS ROOFING LTD.;** CARPENTERS AND ALLIED WORKERS, LOCAL 27, CJA; GORAN BLANUSA, INSPECTOR; File No. 0044-08-HS; Dated August 25, 2008; Panel: Harry Freedman (5 pages)

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**Construction Industry Grievance – Practice and Procedure** – The applicant failed to file and deliver its grievance referral to the responding party in accordance with s. 133 and Rule 34.2 [due to inadvertence in the solicitor's office, it was filed with the Board before being delivered to the employer] – The Board found it had the discretion under s. 133(4) to accept the referral, and, in these circumstances, did so, while also extending the time for the employer to respond – Grievance continues

**VISTA SUDBURY HOTEL;** RE LIUNA, LOCAL 493; File No. 1317-08-G; Dated August 7, 2008; Panel: Harry Freedman (3 pages)

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**Bar – Bargaining Unit – Certification – Judicial Review** – The employer argued on judicial review that the Board must determine whether a bar existed pursuant to s. 10(3), prior to counting the votes – The court held the Board was interpreting its enabling statute; that it addressed labour relations principles in its reasons, including consequences of delay and possible prejudice to both sides; and that the Board was exercising its specialized expertise – The court did not agree that the issue was a threshold jurisdictional issue, but rather a procedural and administrative order, the type the court “should be loath to interfere along the way with” – Application dismissed

**STOCK TRANSPORTATION LTD.;** RE OLRB AND TEAMSTERS LOCAL UNION NO. 938; File No. 0483-08-R (Court File No. 08-CV-00358887); Dated August 20, 2008; Panel: Justice D. Aston (3 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.
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## Court Proceedings

## Pending Court Proceedings

Case name & Court File No.	Board File No.	Status
<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>Stock Transportation</b> Court File No. CV-08-0035887	0483-08-R	Dismissed August 20/08
<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	October 28, 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	Week of October 20, 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