

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.

Employee – Final Offer Vote – Reference – On a Ministerial reference the Board was asked for advice on whether two employees (one with recall rights and an active competition grievance, the other with an active discharge grievance) were “employees in the affected bargaining unit” pursuant to s. 42(1) of the Act – Included in the employer’s last offer was a requirement that the union withdraw all outstanding grievances, including the two affecting these employees – Given their interest in the outcome of the vote (possible reinstatement or extinguishment of their potential right to return to work), the Board followed earlier jurisprudence in *Dan Harris [Hall v. Graphic Communications]* and *Satisfied Brake* and advised the Minister that the two individuals’ votes were eligible to be counted – Advice provided

ANISHNAWBE MUSHKIKI HEALTH CENTRE; RE COMMUNICATIONS, ENERGY AND PAPERWORKERS UNION, LOCAL 7-0; File No. 1340-08-M; Dated: October 30, 2008; Panel: Brian McLean (7 pages)

Consent to Prosecute – Crown Employees Collective Bargaining Act – Interim Relief – Sale of Business – Successor Rights – Unfair Labour Practice – AMAPCEO, representing

Crown employees working in the Office of Child and Family Service Advocacy, whose duties and responsibilities were being transferred to the Provincial Advocate for Children and Youth (PACY) pursuant to the *Provincial Advocate for Children and Youth Act, 2007*, applied for a declaration of successor rights under s. 10 of *CECBA* – The Board found there was a transfer of an undertaking: all the components of the predecessor OCFSA were conferred to the successor PACY; all former clients of OCFSA continued as clients of PACY; the same management, supervising and directing the same work force in the same place also continued – The only change was that the employees were no longer Crown employees, but reported to the Legislature – The Board found that PACY failed to meet the onus of establishing that the Legislative privilege it alleged existed was closely and directly connected with the fulfillment of the duties and responsibilities of the Legislature – Board declared PACY to be successor employer; Consent to Prosecute withdrawn, other applications adjourned

THE CROWN IN RIGHT OF ONTARIO AND PROVINCIAL ADVOCATE FOR CHILDREN AND YOUTH; RE ASSOCIATION OF MANAGEMENT, ADMINISTRATIVE AND PROFESSIONAL CROWN EMPLOYEES OF ONTARIO; File Nos. 1899-07-R; 2056-07-U; 2057-07-U; 2121-07-M; Dated October 23, 2008; Panel: Kevin Whitaker (11 pages)

Discharge for Union Activity – Interim Order – Remedies – Unfair Labour Practice – A key inside organizer, a day cleaner in the housekeeping department, was dismissed by the employer for allegedly disclosing to a staff member confidential information discarded by

another employee – There was no dispute that the inside organizer had never been formally disciplined and had received compliments regarding her work, three star ratings from her employer and was employee of the month – There was no dispute between the parties that the circumstances giving rise to the pending proceeding occurred during a campaign and there was a serious issue to be decided – The Board found that although there was another inside organizer, B was key, in that she had collected four times the number of cards as the other organizer and hence her removal would cause the union irreparable harm – Furthermore, the balance of harm favoured the union in that there was little it could do to counter the loss of a key inside organizer, while there were safeguards the employer could put into place to guard against the possibility that B was disclosing information – Finally, the Board found an appearance of a causal connection between B's right to participate in union organizing and her termination: she had no formal discipline and had received commendations; five days after receiving information of her union activities the employer, after receiving some information alleging improper conduct by B, failed to investigate and did not put the allegations to B – Particulars of the alleged improper conduct were not put to B, nor were these provided in the letter of termination – Interim Reinstatement to same position ordered, with other declarations – Main application proceeds

FIVE BROTHERS HOSPITALITY PARTNERSHIP LIMITED C.O.B. HOLIDAY INN ST. CATHARINES; RE UNITE HERE; File Nos. 1904-08-M; 1905-08-U; Dated: October 15, 2008; Panel: Patrick Kelly (8 pages)

Related Employer – Sale of Business – OPSEU, representing therapists, brought an application that OCCAC, Kaymar, VON and COTA were a single employer and/or that there was a sale of business from OCCAC to Kaymar and then to VON and COTA – Therapy services were delivered by OCCAC, until the Ministry of Health and Long Term Care directed the OCCAC, along with all other CCACs, to divest itself of therapy services – Kaymar was awarded the first contract and then VON and COTA were the successful candidates in the 2003 competition – First, the Board found that there was no improper purpose by OCCAC in awarding the contracts to VON and COTA – Second, the Board found that all the contractors (Kaymar, COTA and VON) had to varying degrees, brought their own skills, their own ability to measure and accept risk, and their own managers and infrastructure to the task of providing therapy services as a contractor,

applying their own entrepreneurial energy to meeting the changing landscape – True contracting out relationships had been established – Related employer applications dismissed; Sale of Business applications dismissed, subject to the Kaymar, OPSEU and OCCAC agreement

OTTAWA COMMUNITY CARE ACCESS CENTRE, KAYMAR REHABILITATION INC., OTTAWA-CARLETON BRANCH OF THE VICTORIAN ORDER OF NURSES AND COTA COMPREHENSIVE REHABILITATION AND MENTAL HEALTH SERVICES; RE OPSEU; File No. 0090-04-R; Dated October 27, 2008; Panel: Mary Ellen Cummings (15 pages)

Bargaining unit – Certification – Construction Industry – Settlement – The union applied for a bargaining unit outside the ICI sector that included carpenters and labourers, trades which, to the union's knowledge, were the only unrepresented trades working on the date of application – The Employer's response accepted the Union's proposed bargaining unit and the Board determined the bargaining unit that was appropriate for collective bargaining on that basis – At the Regional Certification Meeting the parties confirmed their agreement with respect to the bargaining unit description and when post-RCM submissions were made, the Employer's challenge to the status of one individual was that he spent the majority of his day doing operating engineer's work – The Board noted, in determining whether to amend the bargaining unit, it must reconcile two completing principles: 1) that parties should be bound to the agreements they make; and 2) that outside the ICI sector, construction trade unions must seek bargaining rights within a Board area either for their own craft or for all unrepresented trades at work on the date of application – The Board found that the first principle must yield to the second for the following reasons: first, the labour relations consequences of abrogating the second principle would create too many jurisdictional disputes; second, the individual in question would be in a position where the individual would be highly unlikely to be represented by a bargaining agent; third, the second principle avoids conflicts over bargaining unit descriptions by maintaining a bright line approach (if a craft union applies for more than their trade, they must take all unrepresented trades) – Finally, the Board concluded that a standard bargaining unit for the non-ICI sectors of the construction industry serves to avoid manoeuvring, gerrymandering, positioning and tactical manipulation in the certification process – Bargaining unit description amended – Matter continues

RAYMAC CUSTOM HOMES AND/OR RAYMAC CORPORATION; RE UNIVERSAL WORKERS UNION, LIUNA LOCAL 183; File No. 3231-07-R; Dated October 22, 2008; Panel: Christopher J. Albertyn (9 pages)

Alteration of Jurisdiction – Construction Industry – Practice and Procedure – Trade Union – After the parent trade union (UBC) assumed supervision over the Local, the Local brought an application to the Board under s. 147 and 149 – Two matters were at issue: the Local's refusal to provide data in a digital format to UBC (ULTRA issue) and the fact that persons were permitted by the Local to work in its area without becoming, or being permitted to become, members of the Local ("permit workers" issue) – The Board noted the underlying tension between UBC and the Local since UBC had reduced the number of locals and required them to join together into two regional councils – Although the parties settled the Ultra issue, the Board noted that the lack of forthrightness on the part of the Local and the lengthy delay in putting forward any sort of explanation was inappropriate – The Board found that the Local failed in its obligation to provide full disclosure to UBC of an issue in which it had a legitimate interest and a right to be informed – Such a refusal gave UBC just cause to restrict the autonomy of the Local by way of supervision but not to the extent of the one that was imposed – The Board made a more limited order addressing the production of information about permit workers from the Local to UBC – Declaration made

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA; RE CJA, LOCAL UNION 1256; RE ARNOLD BONGERS ET AL, AS THE TRUSTEES OF THE CARPENTERS' LOCAL 1256 PENSION PLAN, THE CARPENTERS' LOCAL 1256 VACATION PAY PLAN AND THE CARPENTERS' LOCAL 1256 WELFARE PLAN; File No. 1940-07-R; Dated October 30, 2008; Panel: David A. McKee (24 pages)

Certification – Practice and Procedure – Representation Vote – The bargaining unit proposed by the union in its application for certification lacked any geographic scope clause – A majority of the Board found that s. 8(2) directs that a representation vote be taken where there is an appearance of 40% membership in the bargaining unit proposed by the union – A majority of the Board determined that a representation vote must occur and that the ballot box would be sealed – The appropriateness of the

bargaining unit would be dealt with as part of the s. 8.1 notice – Vote ordered

WESTERN TORONTO INTERNATIONAL TRUCKS INC.; INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS; File No. 1992-08-R; Dated October 3, 2008; Panel: Ian Anderson, J.A. Rundle, S. McManus (4 pages)

Court Proceedings

Duty of Fair Representation – Judicial Review – Practice and Procedure – Procedural Fairness – At the Board the complainant alleged that the union unfairly responded to her removal from the occasional teachers' list – She was removed from the list after refusing the school board's request to not disseminate her views (that there is a conspiracy involving the Catholic Church, the "Black Pope" and the Illuminati) in the classroom – An initial settlement was reached in which the union agreed to investigate whether a grievance could be filed and where the complainant agreed to an assessment from a psychiatrist – The complainant ultimately refused to cooperate, and the Board found the union had met its duty of fair representation – The court found that the Board's decision was reasonable as there was ample evidence to suggest the union's request for a psychiatric assessment was reasonable and that she had failed to cooperate with it – Additionally the Board's use of a "consultation" did not breach procedural fairness as s. 99 allows the Board to determine a matter without a hearing after "consulting with the parties" and the Board consulted meaningfully with both sides – Application dismissed

HOROCHOWSKI, DANA; RE ONTARIO ENGLISH CATHOLIC TEACHERS' ASSOCIATION, YORK CATHOLIC DISTRICT SCHOOL BOARD, OLRB; File No. 1115-04-U (Court File No. 188/07) Dated October 27, 2008; Panel: Lederman, Swinton, Baltman JJ. (4 pages)

Adjournment – Employment Standards – Judicial Review – Natural Justice – The Board had refused to grant an adjournment, given the lack of consent from the respondents and the prejudice to them – The applicant had had sufficient time to seek consent and the request had nothing to do with the lack of a document – The court found, given the lateness of the request, the lack of consent, the inconvenience to the responding parties, and the reason for the request (conflicting hearing dates), the Board's decision was not a denial of natural justice – The Board's decision to proceed on the merits was a reasonable one – Application dismissed

MISIR, DEVENDRANAATH, A.K.A. DEV MISIR;
RE MULUNESH F. AGAGO ET AL; File No.
0769-06-ES (Court File No. 281/07); Dated
October 27, 2008; Panel: Carnwath, Swinton, Ray
JJ. (4 pages)

Employment Standards – Judicial Review –

The Board refused the employer's request to extend the time for a review of an order to pay – Through solicitor's inadvertence the request was made six months after the receipt of the order to pay – The court found that the appropriate standard of review for the Board's discretionary decision was reasonableness – In making its decision the Board looked at the purposes of the Act and presumptive prejudice, but did not assess the merits of the claim – The court noted there was no consistent authority at the Board that the merits of the claim should be considered, and in any event the court assessed the applicant's claim that the ESO was wrong, and found it open to interpretation – The court found the Board's decision reasonable – Application dismissed

SOLID GOLD INN, 848347 ONTARIO LIMITED
O/A; RE CHRISTINE LOWE, MOL AND OLRB;
File No. 3823-07-ES (Court File No. 224/08);
Dated October 17, 2008 (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 th Floor, 505 University Avenue, Toronto.

Pending Court Proceedings

Case name & Court File No.	Board File No.	Status
Mohamed C.Z. Khan Divisional Court No. 461/08	2153-01-OH	Pending
Dr. Peter Khaiteer Divisional Court No. 431/08	4045-06-U et al	Pending
Christian Labour Association of Canada Divisional Court No. 382/08	3798-05-R; 3958-05-U	Pending
Lorraine Fraser Divisional Court No. 1719 LONDON	0059-06-ES; 0061-06-ES	Pending
Comfort Hospitality Inc. Divisional Court No. 344/08	2573-07-ES	Pending
Govin Misir v. S. Lalgudi Vaidyanathan et al Divisional Court No. 566/07	2966-03-ES; 3389-03-ES; 3390-03-ES	Pending
LIUNA v. Barclay Construction et al Divisional Court No. 310/08	0837-06-R	Pending
Solid Gold Inn Divisional Court No. 224/08	3823-07-ES	Dismissed – Oct. 17/08
LIUNA, Local 183 (PineValley Enterprises) Divisional Court No. 201/08	0910-07-R	Pending
LIUNA, Local 183 (Saddlebrook) Divisional Court No. 201/08	3414-06-R et al	December 19, 2008
BCC Constructors v. International Union of Painters Divisional Court No. 138/08	3174-06-R	Pending
Edgewater Gardens Long Term v. OPSEU Divisional Court No. 08-0015 HAMILTON	3166-07-R	October 23, 2008 (Dismissed: Reasons to follow)
Jacobs Catalytic Ltd. v. IBEW Local 353 Divisional Court No. 66/08	2127-05-G; 3437-05-G	Nov./Dec. 2008
Ottawa Fertility Centre v. Ontario Nurses Association, OPSEU, CUPE Local 4000, Ottawa Hospital and OLRB Divisional Court No. DV-08-1394 OTTAWA	1531-06-PS	Pending
Ottawa-Carleton Public Employees Union (CUPE), Local 503 v. City of Ottawa et al Divisional Court No. 423/07	1386-06-R	Pending
Dev Misir v. Muluneshi F. Agago et al Divisional Court No. 281/07	0769-06-ES	Dismissed – Oct. 27/08
Jacobs Catalytic Ltd. v. IBEW Local 353 et al Divisional Court No. 117/07 (M35498)	3737-05-U	Dismissed – June 4, 2008 Seeking leave to C.A.
Dana Horochowski v. OECTA; York Catholic DSB Divisional Court No. 93/07	1115-04-U	Dismissed – Oct.27/08
Janet Kitson v. OLRB et al Divisional Court No. 492/06	4205-02-U	Pending
Abduraham, Abdoulrab v. Novaquest Finishing Court of Appeal No. C48942	2222-04-ES, 2223-04-ES, 2224-04-ES	January 27, 2009
City of Hamilton v. Carpenters, Local 18 Divisional Court No. 209/06	1785-05-R	Dismissed – Nov. 5/08