

# *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 December of this year. These decisions will appear in the November/December 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 – Status** – The Board found that the intervening union did not put into issue the question of whether two employees were employers/independent contractors in the manner required by Information Bulletin #9 – Where a party fails to comply with the requirements in Information Bulletin #9 to deliver “detailed statement of facts” supporting its position on status disputes, absent extenuating circumstances (and there were none here), the Board will not permit a party to adduce evidence with respect to facts it has not set out in its written submissions – The Board noted that Information Bulletin #9 is intended to: ensure that there is full disclosure of the information parties need to be able to make informed decisions, prepare their case and proceed efficiently with the hearing; avoid the delay that often results from a party being taken by surprise and give the Board an opportunity to determine in advance of any hearing whether there are sufficient facts to persuade the Board there is a matter that is worth inquiring into – Accordingly the Board has an interest in ensuring compliance with the requirements of the bulletin – The Board found no basis to exercise its discretion to

relieve against the application of the bulletin – Matter continues

**BURNHAMTHORPE ROOFING CO. LTD. (1994);** RE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 27; RE SHEET METAL WORKERS’ INTERNATIONAL ASSOCIATION, LOCAL 51; File No. 3954-09-R; Dated December 13, 2010; Panel: Charles E. Humphrey, John Tomlinson, Alan Haward (6 pages)

**Collective Agreement – Conciliation – Reference** – The Minister sought advice on whether he could appoint a conciliation officer pursuant to s. 18(2) – The evidence established that prior to the termination of the collective agreement (which had an automatic renewal clause) the union representative left voicemail messages advising that they wished to set dates for bargaining and that their only demand was to increase wage rates to a specific amount; and that the employer representative called the union representative back and spoke with him, at which time he reiterated the demand for wage rate increase – As neither party had given written notice to bargain, the critical question was whether the parties had “met and bargained” – The Board, following *Danver Ambulance*, found that the words “met and bargained” did not necessarily mean a face-to-face meeting provided that a person authorized to bargain for one party makes a clear offer on one or more issues to be negotiated to a person authorized to bargain for another party – The Board also noted that given the advancement in technology since *Danver* was written, its reasoning is that much more persuasive today – The Board found that the conditions for the application of s. 18(2) were present – Advice given

**CITY OF HAMILTON; RE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 18; File No. 1509-10-M; Dated December 7, 2010; Panel: Lee Shouldice (5 pages)**

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**Alteration of Jurisdiction – Construction Industry – Intervenor – Practice and Procedure – Standing**

– Local 183 alleged that the responding parties have acted contrary to the Act and in particular s. 149, and a number of preliminary motions were addressed by the Board – In one motion, two members of Local 183's Executive Board, who dissented from the Local's decision to pursue this application sought status as intervenors – The Board found that where a union has, through its internal processes, decided to pursue litigation, to allow those members who disagree to inject their disagreement into the litigation by way of an intervention would undermine the ability of the union to carry out its responsibilities and exercise the powers that it is given under the Act, and that these policy reasons do not change if the members sit on the executive board – In this case however since the reputational interests of the two members were specifically put in issue (namely, they have been loyal to and conspired with the respondents), the Board granted them limited standing to protect their reputational interests – On another issue the Board permitted the late filing of particulars by an individual respondent finding that it was not in the long term interest of any of these parties that facts that are central to deciding the issues in this matter not be available because of non-compliance with procedural requirements, in the absence of any significant prejudice to the applicants – Accordingly a full consideration of the relevant facts was important – Matter continues

**LABOURERS INTERNATIONAL UNION OF NORTH AMERICA; JOSEPH S. MANCINELLI, RONALD A. PINK, Q.C. AND COSMO MANELLA; RE UNIVERSAL WORKERS UNION, LIUNA, LOCAL 183 ON ITS OWN BEHALF AND ON BEHALF OF ITS MEMBERS AND EXECUTIVE BOARD; RE JACK OLIVEIRA AND LUIS CAMARA; File No. 2388-09-U; Dated December 16, 2010; Panel: Charles E. Humphrey (9 pages)**

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**Construction Industry – Jurisdictional Dispute**

– Work in this dispute consisted of carpentry portions of concrete forming work for footings, retaining walls and planter boxes located outside of the building structure at the North Bay Regional Health Centre Project – The general contractor on the project, PCL was bound to both the Carpenters' and the Labourers' ICI agreements –

PCL subcontracted certain concrete forming work to Downsvie, which was not bound to the Carpenters' ICI agreement – Downsvie assigned the concrete forming work to the Labourers – The Carpenters filed a grievance against PCL for violating the subcontracting clause of the ICI agreement – In response, the Labourers filed a jurisdictional dispute – A primary issue was whether the work in dispute fell within the ICI sector or in the roads sector of the construction industry – Considering the usual factors in sector disputes, the Board found that the work in dispute was work that fell within the ICI sector – The Board then proceeded to determine the merits of the jurisdictional dispute and found that the work in dispute ought to have been assigned to the Carpenters rather than to the Labourers – It was ICI work and the Carpenters had a collective agreement covering the work in dispute while the Labourers did not – The area practice evidence favoured the assignment of the work to the Carpenters – The employer practice evidence filed by the Labourers, PCL and Downsvie was not persuasive and the economic and efficiency evidence favouring the Labourers was not sufficient enough to dislodge the significance of the collective agreement obligations owed to the Carpenters – Application allowed

**PCL CONSTRUCTORS CANADA INC.; THE DOWNSVIEW GROUP, GREATER ONTARIO REGIONAL COUNCIL OF CARPENTERS, LOCAL 2486 ET AL; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL; LIUNA, LOCAL 493 AND UNIVERSAL WORKERS' UNION, LIUNA, LOCAL 183; File No. 0593-09-JD; Dated December 30, 2010; Panel: Lee Shouldice (21 Pages)**

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**Discharge for Union Activity – Interim Relief – Unfair Labour Practice**

– The employer terminated an inside organizer for soliciting employees during working hours – The union brought an application for interim reinstatement – The employer maintained the reason underlying the discharge of the employee was the fact of solicitation during working hours (and the previous warning given) and not the subject matter of the solicitation (to join the union) – Given the lack of a no-solicitation policy upon which it could rely and the employer's apparent tolerance shown for other discussions during working time, the Board found it appeared unlikely that the inside organizer would have been terminated had he been soliciting for any other cause – It therefore appeared to the Board that the termination was the result not simply of soliciting during working hours, but at least in part because he was a known and active organizer on behalf of the union – The four criteria under s. 98(2) having been

met, the Board ordered interim reinstatement – Interim Relief granted

**SOBEYS INC.;** RE UNITED FOOD AND COMMERCIAL WORKERS CANADA, LOCAL 1000A; File Nos. 1950-10-U, 2854-10-M; Dated December 17, 2010; Panel: Ian Anderson (13 pages)

**Abandonment – Bargaining Rights – Construction Industry – Delay – Related Employer – Sale of Business**

– The applicant sought a declaration under sections 1(4) and 69 that it held bargaining rights for the employees of Somerville Construction outside the ICI sector of the construction industry and that Somerville Construction was bound by the collective agreement the applicant entered into with ISCL in 1981 – In 1982 ISCL ceased operating and shortly thereafter commenced work as Somerville Construction which has continued for the past 17 years – The Board held that waiting 17 years after Somerville Construction began performing work coming within the scope of the applicant's collective agreement on many high profile public locations before seeking to have their ISCL bargaining rights attached to Somerville Construction work falls in line with what the Board deemed tantamount to an abandonment of bargaining rights – The Board held that Somerville Construction would suffer prejudice if the declaration was granted given that Somerville Construction had operated in such a manner for so long that changing things would no doubt leave Somerville Construction facing numerous sector and jurisdictional disputes – The Board is reluctant to grant discretionary relief where the result would be litigation over work jurisdiction – Having regard to the delay, the lack of an explanation for the delay (especially given the number of public projects completed) and the labour relations prejudice that would result, the Board declined to exercise its discretion under s. 1(4) – Application dismissed

**SOMERVILLE CONSTRUCTION ET AL;** RE UNIVERSAL WORKERS UNION, LIUNA, LOCAL 183; RE CARPENTERS AND ALLIED WORKERS LOCAL 27, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA; File No. 0674-05-R; Dated: December 13, 2010; Panel: Harry Freedman (11 pages)

**Bargaining Rights – Trade Union – Union Successor Rights – Unfair Labour Practice** – The issue to be determined by the Board was whether WUOC was the same entity as, or a successor to, the UHOC – In 2004 UNITE

merged with HERE to form UNITE HERE – The international constitution provided for powers to be exercised jointly by two Presidents, with power vested in the General Executive Board to resolve disputes where the two Presidents could not agree – This international merger affected the UNITE Ontario Council and Local 75 and they agreed to form UHOC, although Local 75 retained its status as a separate union – Difficulties arose between the UNITE side and the HERE side at the international level, and between UHOC and UNITE HERE and Local 75 in Ontario – An intense battle was waged in Ontario between, generally, those who were aligned with UNITE and those aligned with HERE, culminating in an attempt by UHOC to disaffiliate itself from UNITE HERE – The constitutional legitimacy of this disaffiliation was the bottom line issue before the Board – The Board noted that when this issue is raised the Board has not required strict compliance with the constitutional provisions governing the relationship between unions, but rather substantial compliance with the spirit of those constitutional provisions, that is, a substantial degree of “constitutional continuity” – Here the Board found that WUOC had not established that the International constitution permitted the UHOC to unilaterally disaffiliate from UNITE HERE or that any act of the International resulted in the disaffiliation of the UHOC – Given that UHOC had no right to disaffiliate from the International in accordance with its constitution, there was no constitutional continuity which was a prerequisite to a finding that WUOC was the same union as UHOC – Matter continues

**TIERCON CORP.** (FORMERLY 1675386 ONTARIO INC.); RE WORKERS UNITED ONTARIO COUNCIL AND UNITE HERE INTERNATIONAL UNION; File Nos. 0607-09-R, 0678-09-R, 0969-09-U; Dated December 15, 2010; Panel: Lee Shouldice (69 pages)

**Health and Safety** – The Toronto Police Association appealed an inspector's decision that the Toronto Police Services Board had not failed to take every precaution reasonable in the circumstances through the implementation of TPSB's mandatory name tag policy for members, while in uniform – The TPA argued there was an increased risk of psychological and physical harm due to today's electronic environment availability where this information can lead to access to addresses, telephone numbers and other personal information – On reviewing the history of the issue, the legal framework, other ways officers' names become known to the public, and specific incidents, among other matters, the Board determined whether the TPSB had taken every precaution reasonable in the circumstances, given

the particular circumstances of the TPS which includes the fact that policing is an inherently dangerous profession; that during the course of their duties officer's names become known to members of the public in a myriad of ways apart from name tags; and that the presence of name tags has not increased the risk of harm to officers from organized crime; and that neither the frequency nor severity of threats from mentally ill persons has increased as a result of the use of name tags – Given that the evidence did not establish that the wearing of name tags was related to any material increase in risk, the Board dismissed the appeal – Appeal dismissed

**TORONTO POLICE SERVICES BOARD AND CHRISTOPHER LYNCH, INSPECTOR; RE TORONTO POLICE ASSOCIATION;** File No. 3382-06-HS; Dated December 20, 2010; Panel: Ian Anderson (52 pages)

**Accreditation – Construction Industry – Employer – Practice and Procedure** – Section 136 of the Act requires the Board to find a “double majority” – The “employer majority” is satisfied when the applicant is able to demonstrate that it represents a majority of employers on the Final Schedule “E” list – The “employee majority” is satisfied by demonstrating that the applicant represents employers who employed a majority of employees who worked in the period defined by section 136(1)(c) of the Act, namely during the weekly payroll period immediately preceding the filing of the application – The applicant Association filed evidence that it represented 11 of 38 employers on the Preliminary Schedule “E” List – The applicant, responding party union and intervening union all supported the position that where an employer does not make an Employer Filing, it must be removed from Schedule “E” – The Board however found that the lack of an Employer Filing was insufficient to remove an employer from Schedule “E” – The Board noted that no party had suggested that the 27 employers should be removed from Schedule “E” because they employed no one in the bargaining unit during the 12 month period immediately prior to the application date – Finally, the Board found that nothing in its Rules or in the warning to employers that if they do not make an Employer Filing they may be deemed to accept all of the facts in the Application, relieves the applicant from establishing the statutory prerequisites required – Since the applicant filed evidence of representation for 11 employers and the Final Schedule “E” was composed of 38, the applicant failed to establish the “employer majority” set out in s. 136(2)(a) – Application dismissed

**THE UTILITY CONTRACTORS ASSOCIATION OF ONTARIO INCORPORATED;** RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL AND ITS AFFILIATED LOCAL UNIONS 183, 247, 493, ET AL; RE SEWER AND WATERMAIN, CURB, GUTTER AND SIDEWALK CONTRACTORS' SECTION OF THE LONDON AND DISTRICT CONSTRUCTION ASSOCIATION; UNIVERSAL WORKERS UNION, LABOURERS', 183, 625, 1059 AND 1089; File No. 2782-09-R; Dated December 20, 2010; Panel: Lee Shouldice (15 pages)

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## Court Proceedings

**Judicial Review – Natural Justice – Stay** – An employee brought an application to stay a Board decision directing the settlement by arbitration of a first contract between Rainbow and Operating Engineers – The employee had sought judicial review of the Board's (and the Minister's) respective first contract and final offer vote decisions on the basis that the Board and the Minister had violated his rights (and the rights of other employees) to procedural fairness and natural justice, since neither the Board nor the Minister gave the employees notice or an opportunity to participate in the proceedings – The court stated that the only effect of the arbitration proceeding on the applicant would be the imposition of a collective agreement and the applicant had conceded that it was unlikely that he will be adversely affected by the terms of such an agreement – Since the arbitration proceeding would not affect or exacerbate any harm done to the applicant as a result of the alleged denial of rights, the court found that the applicant had failed to establish irreparable harm – Motion dismissed

**MARK CORNER;** RE ONTARIO (MINISTER OF LABOUR); OLRB; INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 793; RAINBOW CONCRETE INDUSTRIES LIMITED; OLRB File Nos. 2904-09-U, 2905-09-FC, 3292-09-M (Court File No. 437/10); Dated December 1, 2010; Panel: Herman, J. (6 pages)

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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>Promark-Telecon Inc.</b> v. Universal Workers Union, L. 183 Divisional Court No. 600/10	0745-09-R 0754-00-R 0765-09-R 0782-09-R	Pending
<b>Dean Warren</b> v. National Hockey League Divisional Court No. 587/10	2473-08-U	Pending
<b>Roni Excavating Limited, et al</b> v. IUOE, Local 793 Divisional Court No. 580/10	1991-10-R	Pending
<b>Richard Hotta (Proteus Craftworks)</b> v. Mahamad Badiuzzaman, et al Divisional Court No. 613/10	1953-07-ES	Pending
<b>Pharma Plus Drugmarts</b> Divisional Court No. 551/10	0579-08-R 0580-08-R 1662-09-R	Pending
<b>SNC-Lavalin</b> Divisional Court No. 482/10	2442-07-R 2936-07-R	Pending
<b>Mr. Shah Islam</b> v. J. Ennis Fabrics Divisional Court No. 506/10	1786-09-ES	Pending
<b>Elzbieta Olszewska</b> Divisional Court No. 494/10	0870-09-U	Pending
<b>Greater Essex Catholic District S.B.</b> Divisional Court No. 462/10	3122-04-G	Pending
<b>Rainbow Concrete (Mark Corner)</b> Divisional Court No. 437/10	2904-09-U 2905-09-FC 3292-09-M	Pending
<b>Ontario Power Generation</b> Divisional Court No. 322/10	0264-09-G	Pending
<b>John McKenney</b> v. Upper Canada District S.B. Divisional Court No. 10-DV-1652 <b>Ottawa</b>	2687-08-U	Pending
<b>Rainbow Concrete</b> Divisional Court No. 856-10	3292-09-M	Pending
<b>Dr. Peter A. Khaiteer</b> v. OLRB et al Divisional Court No. 383/10	0290-08-U 0338-08-U	Pending
<b>Rainbow Concrete</b> Divisional Court No. 850-10	2904-09-U 2905-09-FC	Pending
<b>Mr. Todor Pandeliev</b> v. OLRB Divisional Court No. 10-DC-1594 <b>Ottawa</b>	3279-08-ES	Pending
<b>Independent Electricity System Operator</b> 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
<b>K.A.S. Group of Companies</b> v. Metro Waste Paper Recovery Divisional Court No. 611/09	0723-08-R 1037-08-R	Dismissed December 17, 2010
<b>Pro Pipe Construction</b> v. Norfab Metal and Machine Divisional Court No. 408/09	2574-04-R	Pending
<b>Blue Mountain Resorts</b> v. MOL Divisional Court No. 373/09	1048-07-HS 0255-08-HS	April 20, 2011
<b>Roy Murad</b> v. Les Aliments Mia Foods Divisional Court No. 291/09	1999-07-ES	Pending

Case name & Court File No.	Board File No.	Status
<b>Greater Essex County District School Board</b> v. IBEW, Local 773 et al Divisional Court No. 212/09	1776-04-R et al	Adjourned <i>sine die</i>
<b>Dr. Peter A. Khaiteer</b> v. OLRB et al Divisional Court No. 431/08	4045-06-U et al	Pending
<b>Comfort Hospitality Inc. o/a Days Inn</b> v. Director Employment Standards et al Divisional Court No. 344/08	2573-07-ES	Pending
<b>L.I.U.N.A.</b> v. Barclay Construction et al Divisional Court No. 310/08	0837-06-R	Pending
<b>Janet Kitson</b> v. OLRB et al Divisional Court No. 492/06	4205-02-U	Pending