In circumstances where two trade unions are in a competition for bargaining rights for a group of employees, the Ontario Labour Relations Board accepted Melissa Kronick's argument that the Board should not defer to an arbitrator's award which found that another trade union's collective agreement with the Responding Party/Employer covered the employees whom the applicant trade union sought to represent in its application for certification. Rather, the Board must determine itself whether the application is timely pursuant to section 7(1) of the Act and a finding by an arbitrator concerning the collective agreement's scope clause, cannot preclude or otherwise fetter the Board from making a determination of the timeliness question.

York Region District School Board January 4, 2011; Reconsideration Request dismissed April 5, 2011

ONTARIO LABOUR RELATIONS BOARD

1728-10-R; 2045-10-U Elementary Teachers' Federation of Ontario, Applicant v. **York Region District School Board,** Responding Party v. Canadian Union of Public Employees, Intervenor.

BEFORE: Patrick Kelly, Vice-Chair, and Board Members R. O'Connor and D. A. Patterson.

APPEARANCES: Melissa Kronick, Sara Guillaumant-Fitzgerald and Harold Vigoda for the applicant; John-Paul Alexandrowicz, Adrian DiLullo and Rosemary McCarthy for the responding party; Gavin Leeb, Sarah Kahan, Liz McDonald and Brian Blakely for the intervenor.

DECISION OF VICE-CHAIR PATRICK KELLY AND BOARD MEMBER D. A. PATTERSON: January 4, 2011

1. Board File No. 1728-10-R is an application for certification under the *Labour Relations Act, 1995*, S.O. 1995, c.1, as amended ("the Act"). It was filed with the Board on August 25, 2010.

2. Board File No. 2045-10-U is an unfair labour practice complaint ("the complaint") filed pursuant to section 96 of the Act.

3. The applicant, Elementary Teachers' Federation of Ontario ("ETFO"), is a trade union which represents elementary school teachers employed by various school boards across Ontario. It seeks to represent a bargaining unit of designated Early Childhood Educators ("DECEs") employed by York Region District School Board ("the employer").

4. The province has recently amended the *Education Act* to provide for an early learning program which requires school boards across the province to provide full-day kindergarten for four and five year olds. In accordance with those amendments, the staffing for these classrooms is to be one teacher covered by the relevant ETFO collective agreement partnered with a DECE as defined in the *Education Act*. There is a province-wide contest regarding which union is to represent the large number of new employees required to fill the kindergarten DECE role.

5. Canadian Union of Public Employees ("CUPE"), which intervenes in the application for certification, is a trade union representing support staff employed by various school boards across Ontario, including the employer. CUPE represents employees of the employer in the following bargaining unit, which has a term of January 1, 2009 until August 31, 2012:

> all Office, Clerical, Technical and Educational Assistant employees employed with the York Region District School Board as outlined under the "Position" section in Article B.1 .0 - Rates of Pay of this Collective Agreement, including new bargaining unit positions created during the life of this Agreement.

6. CUPE contends that it represents the DECEs. It filed a policy grievance in April 2010 when the employer posted positions for non-union DECEs. The employer opposed the grievance, and it was ultimately referred to arbitration. The arbitration hearing took place on August 24, 2010 before Arbitrator Bram Herlich. ETFO was not a party. It applied for certification the following day. On August 26, 2010 the arbitration award ("the Herlich award") was issued. Arbitrator Herlich found that the DECEs were in the scope clause of the collective agreement between CUPE and the employer. That determination, say CUPE and the employer, effectively renders the application for certification untimely, given the term of their collective agreement.

7. ETFO contends that the application for certification is timely. It says the DECEs are not covered by CUPE's collective agreement. Furthermore, in the complaint, ETFO says that, among other allegedly unlawful acts by the employer, the employer and CUPE contrived to proceed to arbitration concerning CUPE's policy grievance without informing ETFO and with full knowledge that ETFO was intent on organizing the DECEs and about to file an application for certification to represent them. ETFO contends that the timing of and the alleged secrecy surrounding the arbitration hearing demonstrates the employer's support for CUPE as the DECEs' bargaining agent, and constitutes interference with ETFO's organizing campaign. Moreover, on the eve of the hearing in this matter, ETFO characterized the Herlich award as an invalid voluntary recognition agreement between the employer and CUPE, contrary to section 53 and section 70 of the Act.

8. The hearing in these matters commenced on October 26, 2010. Among other things, the parties made submissions concerning the timeliness of the application for certification. The Board reserved its decision on that issue.

9. On November 9, 2010 a differently constituted panel of the Board issued a decision in Board File No. 1958-10-R and 2481-10-M: see *District School Board of Niagara*, [2010] O.L.R.D. No. 4423. That matter involved the same applicant and intervenor trade unions, and a different School Board employer. As in this case, the applicant brought an application for certification. The intervenor took the position, as in this case, that the application for certification was untimely because it represented the DECE's pursuant to its collective agreement. Unlike the present case, the School Board in the *Niagara* did not agree that the application was not timely. Moreover, though the School Board and the intervenor had referred the issue of the inclusion or exclusion of the DECEs to arbitration, the arbitration hearing had not commenced on the merits by the time the matter came before the Board.

10. One of the issues the Board dealt with in the *Niagara* case was whether or not it would be bound by the Arbitrator's determination concerning the applicability of the intervenor's collective agreement to the DECEs. The Board found that the Arbitrator and the Board exercised parallel jurisdiction over the issue, and that the Board is not bound by the Arbitrator's award.

11. Following receipt of the *Niagara* decision, counsel for the ETFO wrote to the Board and requested that we should come to the same result, that is that the Board is not bound by the Herlich award. We directed the other parties to file submissions in response.

12. This decision deals with the submissions of the parties concerning timeliness of the application for certification made at the hearing on October 26, 2010 as well as the written submissions submitted by the parties concerning the *Niagara* decision.

The positions of the parties

ETFO's position

13. Counsel for ETFO took the position that the application for certification was timely because when it was filed on August 25, 2010, the Herlich award had not issued. Accordingly, there was no collective agreement that bound the DECEs. Furthermore, the Herlich award issued on August 26, 2010 was not specifically retroactive to the date of the CUPE grievance in April 2010, nor did it require the employer to take any action in respect of job postings for DECEs posted as non-union positions around the time preceding the grievance. Therefore, counsel submitted, there was no collective agreement in place on August 25, 2010 binding the DECEs, and accordingly the application was timely pursuant to subsection 7(1) of the Act, which reads:

> 7.(1) Where no trade union has been certified as bargaining agent of the employees of an employer in a unit that a trade union claims to be appropriate for collective bargaining and the employees in the unit are not bound by a collective agreement, a trade union may apply at any time to the Board for certification as bargaining agent of the employees in the unit.

14. Furthermore, counsel argued, there is a sort of dual or overlapping jurisdiction between Arbitrators dealing with scope clauses under collective agreements pursuant to section 48 and the Board dealing with the question of the existence of a binding collective agreement under subsection 7(1) of the Act. Counsel submitted that the Arbitrator's jurisdiction does not impinge upon the Board's jurisdiction under subsection 7(1). Nor, contended counsel, was the Board being asked to overturn the decision of an Arbitrator. In support of this submission, counsel relied, among other decisions, upon *Canadian Union of Public Employees, Local 1394 v. Extendicare Health Services Inc.* (1993) 14 O.R. (3d) 65 (C.A.), as did the employer.

15. As we have indicated, counsel for the applicant also relied upon the *Niagara* decision, and urged the Board to follow it.

The position of the employer

16. The employer takes the position that the facts, issues and context in the *Niagara* decision are very different than in this case. The key difference is that, in the case before us - unlike the *Niagara* decision - there existed an arbitration award by the time the Board hearing commenced into ETFO's application for certification. In *Niagara*, the arbitration board had been constituted, but had not yet heard the merits of the grievance. In the face of the *Niagara* decision, therefore, the employer and CUPE had an opportunity to avoid duplicative litigation and the potential risk of a conflict of decisions. The employer and CUPE do not enjoy that option in this case. They are bound by the Herlich award by virtue of subsection 48(18) of the Act. If the Board were to issue a certificate to ETFO on the basis that the DECEs are, in fact, not in CUPE's bargaining unit, and the application is therefore timely, the employer would face the dilemma of being obligated to apply the CUPE collective agreement to the DECEs and, at the same time, recognizing ETFO as the DECEs' bargaining agent.

17. As a result of this, and other conflicts, the employer submits that the Board "should not inquire into ETFO's challenges to the Herlich Award or permit the relitigation of the issue of the scope of the CUPE collective agreement." It then goes on to submit that the Board's and the Courts' jurisprudence (most of which was before the panel in the *Niagara* case) support this conclusion. Finally, it argues that the reasoning of the *Niagara* panel with respect to the

availability and application of the jurisdictional dispute mechanisms under section 99 of the Act does not apply in this case, and even if section 99 could be utilized, it would necessitate a third hearing to determine an issue already finally decided by Arbitrator Herlich.

CUPE's position

18. For its part, CUPE argues that we need to be mindful of the primary question that was before the panel in *Niagara*, that is whether or not the Board should adjourn ETFO's application for certification and await the outcome of the pending arbitration. In arriving at its conclusion not to defer to the arbitration process, there was no final arbitration award before the Board in that matter. Moreover, as the Board did not have to contend with an arbitration award, CUPE submits that the *Niagara* decision cannot be taken as suggesting that the Board will never be bound by an arbitrator's decision. CUPE acknowledges that the Board and an Arbitrator have separate and distinct functions. CUPE also acknowledges that the role of the Board to determine, among other things, the application of subsection 7(1) of the Act is separate and distinct from the function of an Arbitrator to determine what individuals may fall within or without a scope clause in a collective agreement. However, CUPE submits, citing *Ontario (Ministry of Community Safety and Correctional Services)*, [2009] O.L.R.D. No. 1815, the Board lacks jurisdiction to decide matters settled by the Arbitrator's award.

19. In the alternative, CUPE argues that the *Niagara* decision was wrongly decided for several reasons. First, CUPE says it is incorrect to suggest the Board is not bound by an arbitration award and can reach a different conclusion on a matter settled by the Arbitrator. Secondly, CUPE argues the Board was wrong to suggest that subsection 7(1) of the Act obligates the Board to determine whether the employees affected by an application for certification are bound by a collective agreement, which CUPE says contradicts the Board's finding that the Board and arbitrators exercise parallel jurisdiction over the issue. Thirdly, CUPE says the Board was wrong in suggesting that section 99 of the Act could potentially resolve a conflict arising from different adjudicative decisions, because the Board lacks jurisdiction to decide a matter settled by an Arbitrator. Finally, CUPE submits that the *Niagara* decision undermines the finality of labour relations dispute resolution.

Decision

20. We reject the applicant's submission that, because the Herlich award had not yet issued on the date of ETFO's application for certification, there was no collective agreement applicable to the DECEs and therefore the application was timely. There is nothing in the Herlich award to suggest that the DECEs were covered by the collective agreement as the date of the issue of the award. Rather, the Herlich award determined that the collective agreement's scope clause covered the DECEs. Accordingly, it would appear that the position of DECE was covered by the collective agreement not as of August 26, 2010 and going forward, but from the moment the employer posted the position in the course of the collective agreement's operation.

21. Having said that, we agree with the applicant's submission that the reasoning in the *Niagara* decision should be applied in this application for certification, for the reasons that follow, and that, as a result, the Board should and must come to its own conclusion concerning the timeliness of ETFO's application for certification.

22. While there is a substantial factual difference between the *Niagara* case and this one - in *Niagara* there was no actual arbitration award to contend with - the Board in *Niagara* clearly contemplated the possibility of an arbitration award finding that the DECEs in that case were covered by a subsisting collective agreement and a Board decision coming to the same or different conclusion, without either decision overturning the other.[1] This is so because, as the panel in the *Niagara* decision pointed out, each adjudicative body has a parallel jurisdiction.[2] The arbitrator is required under section 48 of the Act to settle a difference between the parties to a collective agreement, arising from its interpretation, application, administration or alleged violation. In an application for certification, the Board is required to consider, among other things, the application of subsection 7(1) of the Act. (CUPE suggests this conclusion concerning the obligation placed upon the Board is wrong, without providing a rationale.) Subsection 7(1) stipulates when a trade union may apply for certification of employees in a bargaining unit the trade union claims to be appropriate. The application for certification must be timely pursuant to subsection 7(1), and the fact that an Arbitrator has, in resolving a difference between the parties to the collective agreement, made his or her own finding of fact and/or law concerning the collective agreement's scope clause in a collective agreement, cannot prelude or otherwise fetter the Board from making a determination of the timeliness question.

23. The employer and CUPE suggest that such a result is at odds with the Board's case law and Court authorities. We do not accept that submission. The Board's jurisprudence (with the exception of the *Niagara* decision) and the Court cases have not previously dealt with the same factual context that is before us. For example, the *Windsor Western Hospital* case, upon which the employer and CUPE place significant reliance, arose out of a complaint about a trade union's duty of fair representation, and concerned the Board's authority to order the recommencement of an arbitration hearing following the issue of an arbitrator's final award. The *Extendicare Health Services* case involved a decision of the Board dealing with the statutory "freeze" provisions of the Act based upon the Board's interpretation of a collective agreement, and an arbitration award that came to a different conclusion about the meaning of the very same language of the collective agreement upon which the Board had reached its decision. If anything, in our view, the *Extendicare Health Services* decision by the Court of Appeal is consistent with the notion of a parallel jurisdiction, and with the proposition that each adjudicative entity is entitled to make findings of fact and decide questions of law within its allocated sphere, independently of the other entity.

24. A Board decision on the issue of the timeliness of the ETFO application, even if it concluded that there was no collective agreement applicable to the DECEs and that the ETFO application was timely, would not put an end to the Herlich award. It would, no doubt, put the parties bound by the Herlich award, particularly the employer, in a difficult, though not necessarily insurmountable, position. Although the employer and CUPE cast doubt on the efficacy of a jurisdictional dispute application under section 99 of the Act in the circumstances of this case, nevertheless such an application is an option that would be available to them should the

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[1] At paragraph 18, the Board stated: "In the case before me, if both the Arbitrator and the Board make a determination on the issue before them, the Board's decision does not overturn the arbitration decision or affect it in any way. The Board would certainly not overturn the arbitration award or sit in review of the Arbitrator."

[2] For this proposition, the Board in the *Niagara* decision cited the Ontario Court of Appeal decision in *Canadian Union of Public Employees, Local 1394 v. Extendicare Health Services Inc.* (1993) 14 O.R. (3d) 65 (C.A.).

Board reach a different conclusion than did the Herlich award about the existence of a collective agreement covering the DECEs.

25. As the Board pointed out in the *Niagara* decision, the Board has the jurisdiction and the obligation to determine under subsection 7(1) of the Act whether employees in the bargaining unit applied for are bound by a collective agreement. The inquiry by the Board into that issue would permit the participation of all interested parties. The arbitration hearing that resulted in the Herlich award involved only the employer and CUPE, and did not involve a representational contest. Indeed it is the employer's position in the matters before us that ETFO had no right of participation in the arbitration hearing. Our concern with the conclusion reached by our colleague to defer to or simply adopt the findings in the Herlich award is that it effectively deprives ETFO of any meaningful right of participation on a key issue in the application for certification. Moreover, the determination now that the application is not timely because of the existence of a subsisting collective agreement may serve to render moot ETFO's complaint in Board File No. 2045-10-U, without the Board having considered the evidence and legal issues in that matter.

26. For these reasons, we leave open the question of the timeliness of the application for certification for determination by the Board following consideration of the evidence and arguments of the parties in both these matters.

"Patrick Kelly"
Vice-Chair

"D. A. Patterson"
Board Member

DECISION OF BOARD MEMBER R. O'CONNOR: January 4, 2011

27. While I agree with the comments of my colleagues at paragraph 20 above, I respectfully dissent from the remainder of their decision.

28. I agree with the submissions of the employer and CUPE concerning the effect of the Herlich award and its impact in this proceeding. The Herlich award determined the question whether or not the DECEs were in the bargaining unit. The Board's determination under subsection 7(1) must not and cannot directly, indirectly or effectively interfere with the decision of an Arbitrator. That is precisely the position that ETFO's argument puts the Board. ETFO wants the Board to determine that, contrary to the Herlich award finding that the DECEs fall within the CUPE collective agreement's scope clause, the DECEs do not come within that scope clause. This would create an adjudicative conflict over precisely the same legal issue, namely

whether or not the DECEs are covered by the collective agreement. While the Board has the jurisdiction in an application for certification to determine if there is a collective agreement applicable to the employees in the bargaining unit sought by the applicant trade union, and while an Arbitrator cannot usurp that jurisdiction, the Board is precluded from sitting on appeal of an arbitration award. Support for this principle is articulated by the Supreme Court of Canada in *Gendron v. Municipalité de le Baie James*, [1986] 1 S.C.R. 401, as well as in the following passage from *Windsor Western Hospital Center Inc. and Mordowanec et al.* (1986) 56 O.R. (2d) 297 where Eberle J. wrote:

> 57. While recognizing that s. 89 [now s. 116] of the Ontario Act confers wide powers on the O.L.R.B., I am unable to conclude that it authorizes the O.L.R.B. to override a final and binding decision of an arbitration board under s. 44 [now s. 48]. That is an authority given only to the Divisional Court, on an application for judicial review, and is an authority which that Court can exercise only if the arbitration board has exceeded its jurisdiction. The O.L.R.B. does not, in the present case, suggest that the Palmer board did that. In any event, no proceedings have ever been taken to attack the Palmer award by way of judicial review.
>
> 58. There is no express language in s. 89 to found the argument made by the O.L.R.B. in defence of its own jurisdiction -- nothing to suggest that s. 89 overrides s. 44; nothing to suggest that the O.L.R.B. jurisdiction exists notwithstanding the decision of an arbitration board to the contrary.

29. The recent decision of the Board in *Niagara* is distinguishable from the matter before us. In *Niagara*, the Board did not have an arbitration award before it. In fact, the arbitration hearing on the merits had not yet commenced when the case was dealt with by the Board. Accordingly, the school board and the incumbent trade union had options to avoid the possibility of conflicting decisions. In this case, the arbitration award has been issued, and the employer and CUPE (as well as the employees) are bound by it, pursuant to subsection 48(18) of the Act. There is nothing they can do to avoid the possibility of a Board decision that directly conflicts with the Herlich award, and which would also be binding upon them. Therefore, I would not follow the *Niagara* decision.

30. I conclude that, based upon the findings in the Herlich award, there was a collective agreement covering the DECEs at the point in time when ETFO applied for certification. That collective agreement was for a term from January 1, 2009 until August 31, 2012. Accordingly, I would have found that ETFO's application is untimely by virtue of subsection 7(5) of the Act.

"R. O'Connor"
Board Member

ONTARIO LABOUR RELATIONS BOARD

1728-10-R; 2045-10-U Elementary Teachers' Federation of Ontario, Applicant v. **York Region District School Board**, Responding Party v. Canadian Union of Public Employees, Intervenor.

BEFORE: Patrick Kelly, Vice-Chair, and Board Members R. O'Connor and D. A. Patterson.

DECISION OF THE BOARD: April 5, 2011

1. This is a request for reconsideration by Canadian Union of Public Employees ("CUPE") of the majority Board decision dated January 4, 2011, dealing with an application for certification by Elementary Teachers' Federation of Ontario ("ETFO"). In that decision, the Board was confronted with the arguments of CUPE and York Region District School Board ("YRDSB") that ETFO's application for certification ("the ETFO application") was untimely as a result of a previous arbitration award of Arbitrator Bram Herlich ("the Herlich award"). Arbitrator Herlich found that YRDSB's Designated Early Childhood Educators ("DECEs") were covered by the CUPE collective agreement between YRDSB and CUPE. The majority of the Board determined that the Herlich award did not in and of itself render the ETFO application untimely or otherwise preclude the Board from dealing with it.

2. CUPE's arguments in support of its request for reconsideration may be summarized as follows:

- The legal significance to be attributed to an arbitrator's decision is an extremely important issue that gives rise to significant policy considerations;

- The majority of the Board was mistaken in concluding that, if the Board were to determine that the collective agreement did not apply to DECEs - contrary to the conclusion reached in the Herlich award - such a finding would not put an end to the Herlich award. Indeed, the Herlich award would, in such circumstances, be rendered a nullity for all intents and purposes;

- The majority of the Board's statement that the Board may reach a different conclusion than did Arbitrator Herlich is inaccurate and irreconcilable with subsection 48(12) of the *Labour Relations Act, 1995,* S.O. 1995, c.1, as amended (the "Act"), and with Court and Board jurisprudence;

- The majority decision runs directly contrary to the exclusive representation provisions of the Act, by throwing into question which of CUPE and ETFO have the rights and obligations that flow from the designation of exclusive bargaining agent in circumstances where an arbitration award has already effectively determined that CUPE is the exclusive bargaining agent; in addition, ETFO's application triggers the Act's "freeze" provisions thus setting up a potential conflict with CUPE's right to bargain changes to terms and conditions of work; moreover, just because the Board and an

> arbitrator share parallel jurisdiction over the question of whether employees are bound by a collective agreement, the Board need not hold a hearing into the issue but should simply adopt the arbitrator's finding in order to avoid the legal and practical labour relations challenges and potential disputes herein described;
>
> - The Act's jurisdictional dispute provision (section 99) does not grant the Board jurisdiction to resolve conflicting decisions by an arbitrator and the Board.

3. In the majority Board decision of January 4, 2011, the Board described CUPE's arguments against ETFO's application in the following terms[1]:

> 18. For its part, CUPE argues that we need to be mindful of the primary question that was before the panel in *Niagara*, that is whether or not the Board should adjourn ETFO's application for certification and await the outcome of the pending arbitration. In arriving at its conclusion not to defer to the arbitration process, there was no final arbitration award before the Board in that matter. Moreover, as the Board did not have to contend with an arbitration award, CUPE submits that the *Niagara* decision cannot be taken as suggesting that the Board will never be bound by an arbitrator's decision. CUPE acknowledges that the Board and an Arbitrator have separate and distinct functions. CUPE also acknowledges that the role of the Board to determine, among other things, the application of subsection 7(1) of the Act is separate and distinct from the function of an Arbitrator to determine what individuals may fall within or without a scope clause in a collective agreement. However, CUPE submits, citing *Ontario (Ministry of Community Safety and Correctional Services)*, [2009] O.L.R.D. No. 1815, the Board lacks jurisdiction to decide matters settled by the Arbitrator's award.
>
> 19. In the alternative, CUPE argues that the *Niagara* decision was wrongly decided for several reasons. First, CUPE says it is incorrect to suggest the Board is not bound by an arbitration award and can reach a different conclusion on a matter settled by the Arbitrator. Secondly, CUPE argues the Board was wrong to suggest that subsection 7(1) of the Act obligates the Board to determine whether the employees affected by an application for certification are bound by a collective agreement, which CUPE says contradicts the Board's finding that the Board and arbitrators exercise parallel jurisdiction over the issue. Thirdly, CUPE says the Board was wrong in suggesting that section 99 of the Act could potentially resolve a conflict arising from different adjudicative decisions, because the Board lacks jurisdiction to decide a matter settled by an Arbitrator. Finally, CUPE submits that the *Niagara* decision undermines the finality of labour relations dispute resolution.

4. At paragraphs 22 to 26, the majority of the Board offered the following reasons (with footnotes omitted) why it rejected CUPE's and YRDSB's submissions:

> 22. While there is a substantial factual difference between the *Niagara* case and this one - in *Niagara* there was no actual arbitration award to contend with - the Board in *Niagara* clearly contemplated the possibility

[1] The references in the cited passage to *Niagara* are to a decision in *District School Board of Niagara*, [2010] O.L.R.D. No. 4423 in which the Board stated it was not bound by the award of an arbitrator in circumstances that were similar but not identical to those in this matter.

of an arbitration award finding that the DECEs in that case were covered by a subsisting collective agreement and a Board decision coming to the same or different conclusion, without either decision overturning the other. This is so because, as the panel in the *Niagara* decision pointed out, each adjudicative body has a parallel jurisdiction. The arbitrator is required under section 48 of the Act to settle a difference between the parties to a collective agreement, arising from its interpretation, application, administration or alleged violation. In an application for certification, the Board is required to consider, among other things, the application of subsection 7(1) of the Act. (CUPE suggests this conclusion concerning the obligation placed upon the Board is wrong, without providing a rationale.) Subsection 7(1) stipulates when a trade union may apply for certification of employees in a bargaining unit the trade union claims to be appropriate. The application for certification must be timely pursuant to subsection 7(1), and the fact that an Arbitrator has, in resolving a difference between the parties to the collective agreement, made his or her own finding of fact and/or law concerning the collective agreement's scope clause in a collective agreement, cannot prelude or otherwise fetter the Board from making a determination of the timeliness question.

23. The employer and CUPE suggest that such a result is at odds with the Board's case law and Court authorities. We do not accept that submission. The Board's jurisprudence (with the exception of the *Niagara* decision) and the Court cases have not previously dealt with the same factual context that is before us. For example, the *Windsor Western Hospital* case, upon which the employer and CUPE place significant reliance, arose out of a complaint about a trade union's duty of fair representation, and concerned the Board's authority to order the recommencement of an arbitration hearing following the issue of an arbitrator's final award. The *Extendicare Health Services* case involved a decision of the Board dealing with the statutory "freeze" provisions of the Act based upon the Board's interpretation of a collective agreement, and an arbitration award that came to a different conclusion about the meaning of the very same language of the collective agreement upon which the Board had reached its decision. If anything, in our view, the *Extendicare Health Services* decision by the Court of Appeal is consistent with the notion of a parallel jurisdiction, and with the proposition that each adjudicative entity is entitled to make findings of fact and decide questions of law within its allocated sphere, independently of the other entity.

24. A Board decision on the issue of the timeliness of the ETFO application, even if it concluded that there was no collective agreement applicable to the DECEs and that the ETFO application was timely, would not put an end to the Herlich award. It would, no doubt, put the parties bound by the Herlich award, particularly the employer, in a difficult, though not necessarily insurmountable, position. Although the employer and CUPE cast doubt on the efficacy of a jurisdictional dispute application under section 99 of the Act in the circumstances of this case, nevertheless such an application is an option that would be available to them should the Board reach a different conclusion than did the Herlich award about the existence of a collective agreement covering the DECEs.

25. As the Board pointed out in the *Niagara* decision, the Board has the jurisdiction and the obligation to determine under subsection 7(1) of the Act whether employees in the bargaining unit applied for are bound by a collective agreement. The inquiry by the Board into that issue would permit the participation of all interested parties. The arbitration hearing that

> resulted in the Herlich award involved only the employer and CUPE, and did not involve a representational contest. Indeed it is the employer's position in the matters before us that ETFO had no right of participation in the arbitration hearing. Our concern with the conclusion reached by our colleague to defer to or simply adopt the findings in the Herlich award is that it effectively deprives ETFO of any meaningful right of participation on a key issue in the application for certification. Moreover, the determination now that the application is not timely because of the existence of a subsisting collective agreement may serve to render moot ETFO's complaint in Board File No. 2045-10-U, without the Board having considered the evidence and legal issues in that matter.
>
> 26. For these reasons, we leave open the question of the timeliness of the application for certification for determination by the Board following consideration of the evidence and arguments of the parties in both these matters.

5. Some of the points made by CUPE in the request for reconsideration are mere repetition of those made at the hearing which resulted in the Board's decision (for example, the submission concerning section 99 of the Act). The rest constitute an attempt to re-frame CUPE's earlier oral submissions or to advance ostensibly new arguments that CUPE could have made at the hearing, which, we point out, did not include the adducing of any evidence. This is not a proper basis for the Board's exercise of discretion to reconsider a final decision. Typically, the Board will exercise its discretion to reconsider a decision if it contains a clear error, or new evidence comes into the possession of a party that was not previously available to it, which might lead to a different result. The Board will also exercise its discretion in situations where the reconsideration raises important policy considerations which the Board is convinced were wrongly decided. On that point, CUPE says the legal significance to be attributed to an arbitrator's decision is an extremely important issue that gives rise to noteworthy policy considerations. We agree, but it is apparent from the Board's decision of January 4, 2011 that the parties had every opportunity to, and did, canvass those policy considerations. In any event, we are not convinced that the majority decision not to defer to an arbitrator's award on an issue within the Board's core jurisdiction and to make the determination required by the Act (with or without the benefit of the Herlich award) with the participation of all relevant parties, was wrong.

6. For these reasons, we decline to reconsider the Board's decision dated January 4, 2011. Accordingly, the request for reconsideration is dismissed.

"Patrick Kelly"
for the Board