

## Legal update

### Ontario Labour Relations Board rules it does not have jurisdiction over medical marijuana workers

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#### December 2015 Employment and labour

In a landmark decision that will have a major impact on labour relations in the burgeoning Ontario medical marijuana industry, the Ontario Labour Relations Board (OLRB) recently held that medical marijuana operations do not fall under the jurisdiction of the *Labour Relations Act, 1995* (the *LRA*). Accordingly, employees engaged in producing medical marijuana could not unionize under the *LRA* as they were engaged in agriculture and therefore subject to the *Agricultural Employees Protection Act, 2002* (*AEPA*).

Both the *LRA* and *AEPA* constitute labour relations regimes that have been recognized to respect constitutional rights of freedom of association. However, the *AEPA* differs from the *LRA* in that, among other aspects, it does not provide for a right to strike or lock out employees or require the negotiation of a binding collective agreement.

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#### Facts

MedReleaf is a leading licensed producer of medical marijuana that operates an indoor facility near Toronto that grows, cultivates, harvests and ships its product to authorized individuals. The facility contains tens of thousands of plants and MedReleaf's operations are strictly regulated by Health Canada.

In the spring of 2015, the United Food and Commercial Workers union (UFCW) filed two simultaneous applications for certification – before the OLRB and the Canada Industrial Relations Board (CIRB) – arguing that MedReleaf was a federally regulated employer and alternatively, provincially regulated and subject to the *LRA*. MedReleaf objected to the jurisdiction of both boards to hear the matter on the basis that its employees were agricultural employees and subject to the *AEPA*.

Despite MedReleaf's objections, the OLRB ordered that a vote be held. On June 1, 2015, a vote was held and the majority of MedReleaf's employees voted against unionization. Despite the results of the vote, the UFCW persisted and filed unfair labour practice complaints, arguing for a remedial certification.

Concurrently, MedReleaf objected to the CIRB's jurisdiction and was successful in having the application dismissed.

#### The OLRB decision

MedReleaf argued that its employees were engaged in the growth, cultivation and harvesting of an agricultural product and that accordingly, its employees were exempted from the application of the *LRA* and subject to the *AEPA*.

The UFCW took the position that because the plants were grown in a highly industrialized environment and were subject to strict regulation by Health Canada, MedReleaf's operations were not "agricultural" as defined by the law. The UFCW further argued the board should apply "*Charter values*" in deciding which of the two constitutionally valid labour relations regimes should apply.

The OLRB dismissed all of the UFCW's arguments, finding that the fact medical marijuana was grown in an industrial environment and heavily regulated did not take away from its agricultural nature. In coming to this conclusion, the OLRB drew comparisons to the wine and tobacco industries, both of which are industrialized and highly regulated. With regard to "*Charter values*" argument, the OLRB found that, when faced with two constitutionally valid laws, it could not "pick which statute more or better complies with the *Charter*" as "it was not for the board, under the guise of *Charter Values*, to say that the *LRA* would have been a better choice." Accordingly, the OLRB held that it did not have jurisdiction to hear the certification application or any of the related unfair labour practice complaints.

The UFCW has not yet indicated whether or not it will seek judicial review of this decision.

*In this case and before the CIRB, MedReleaf was represented by Norton Rose Fulbright Canada.*

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