A MESSAGE FROM THE CHAIRPERSON OF THE MANITOBA LABOUR BOARD

I am pleased to submit the 2010-2011 Annual Report outlining the activities of the Manitoba Labour Board for the period April 1, 2010 to March 31, 2011.

During this reporting period, the Board successfully fulfilled its mandate and met its immediate objectives. The staff of the Board will continue to focus on the strategic priorities which are highlighted in this report.

During this reporting period, the Board issued a number of important decisions under *The Labour Relations Act* and other statues which it administers. This is evident from the decisions which are summarized in this report. The full text of these decisions are posted on the Board's website.

On May 25, 2010, the Board held an informal celebration to acknowledge and honour four board members who had served on the Board for twenty-five years. These members were Ms. Diane Jones, Q.C. who, since 1985, has been a part-time vice-chairperson; and Mr. Denis Sutton; Ms. Betty Black; and Ms. Maureen Morrison who have all served as members of the Board for at least 25 years since their individual appointment dates in 1984 or 1985. In recognition of their significant contributions to the Board over these years, presentations were made to them and appropriate words of appreciation were made by various individuals. We were most pleased that the Minister of Labour and Immigration, the Honourable Jennifer Howard, attended the celebration and expressed her appreciation on behalf of the Government for the dedicated service of these four individuals to the work of the Board.

Finally, there was the welcome re-appointment of Messrs. Blair Graham, Q.C., Gavin Wood, Michael Werier, and Ms. Diane Jones, Q.C. as part-time vice-chairpersons of the Board for five year terms commencing March 1, 2011 and expiring February 29, 2016. The willingness of these most qualified individuals to serve on the Board is most appreciated.

In closing, I take this opportunity to express my thanks to the vice-chairpersons, members and staff for their dedication and service to the Board.

William D. Hamilton
Chairperson

MESSAGE DU PRÉSIDENT DE LA COMMISSION DU TRAVAIL DU MANITOBA

J'ai le plaisir de soumettre le rapport annuel 2010-2011 faisant état des activités de la Commission du travail du Manitoba du 1er avril 2010 au 31 mars 2011.

Au cours de cette période de déclaration, la Commission a respecté son mandat et a rempli ses objectifs immédiats. Le personnel de la Commission continuera de mettre l'accent sur les priorités stratégiques dont il est question dans le présent rapport.

Pendant l'exercice, La Commission a rendu plusieurs décisions importantes en vertu de la *Loi sur les relations du travail* et des autres lois qu'elle administre, comme le montrent les résumés des décisions présentés dans le présent rapport. Le texte complet de ces décisions est affiché sur le site Web de la Commission.

Le 25 mai 2010, dans le cadre d'une célébration informelle, la Commission a rendu hommage à quatre de ses membres qui ont siégé pendant plus de 25 ans. Il s'agit de Mme Diane Jones, c.r., qui exerce les fonctions de vice-présidente à temps partiel depuis 1985; et de M. Denis Sutton, de Mme Betty Black et de Mme Maureen Morrison, nommés en 1984 ou 1985. Leur importante contribution durant toutes ces années a été soulignée par des présentations et des discours élogieux prononcés par diverses personnes. Nous avons été particulièrement sensibles à la présence parmi nous de Mme Jennifer Howard, ministre du Travail et de l'Immigration, qui, au nom du gouvernement, a remercié nos quatre membres pour leurs bons et loyaux services à l'égard de la Commission.

Par ailleurs, je suis heureux d'annoncer le renouvellement pour cinq ans (du 1er mars 2011 au 29 février 2016) du mandat de vice-président à temps partiel de Mme Diane Jones, c.r., et de MM. Blair Graham, c.r., Gavin Wood et Michael Werier.

En conclusion, je tiens à remercier de leurs services et de leur dévouement les vice-présidents, les membres et le personnel de la Commission.

Le président
William D. Hamilton

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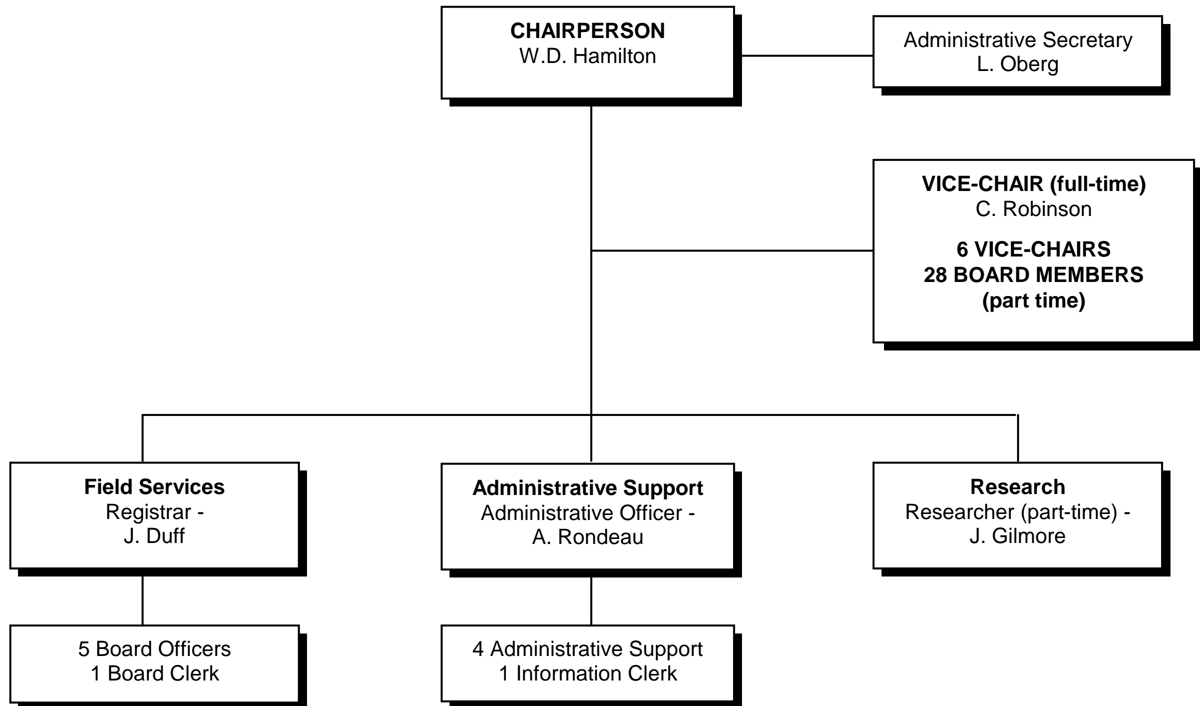
Manitoba Labour Board
Organization Chart
as of March 31, 2011



The Manitoba Labour Board

INTRODUCTION

Report Structure

The Manitoba Labour Board (the Board) annual report is prepared pursuant to Subsection 138(14) of *The Labour Relations Act*:

> "The report shall contain an account of the activities and operations of the board, the full text or summary of significant board and judicial decisions related to the board's responsibilities under this and any other Act of the Legislature, and the full text of any guidelines or practice notes which the board issued during the fiscal year."

Vision and Mission

To further harmonious relations between employers and employees by encouraging the practice and procedure of collective bargaining between employers and unions as the freely designated representatives of employees.

Objectives

- to resolve labour issues fairly and reasonably, and in a manner that is acceptable to both the labour and management community including the expeditious issuance of appropriate orders;
- to assist parties in resolving disputes without the need to proceed to the formal adjudicative process; and
- to provide information to parties and/or the general public regarding their dealings with the Board or about the Board's activities.

Role

The Board is an independent and autonomous specialist tribunal responsible for the fair and efficient administration and adjudication of responsibilities assigned to it under *The Labour Relations Act* and any other *Act* of the Consolidated Statutes of Manitoba.

The majority of the applications are filed under *The Labour Relations Act (L10)* and *The Employment Standards Code (E110).* The Board is also responsible for the administration and/or adjudication of matters arising under certain sections of the following *Act*s:

The Apprenticeship and Certification Act (A110)
The Construction Industry Wages Act (C190)
The Elections Act (E30)
The Essential Services Act (E145)
The Pay Equity Act (P13)
The Public Interest Disclosure (Whistleblower Protection) Act (P217)
The Public Schools Act (P250)
The Remembrance Day Act (R80)
The Victims' Bill of Rights (V55)
The Worker Recruitment and Protection Act (W197)
The Workplace Safety and Health Act (W210)

The Labour Relations Act

The Board receives and processes applications regarding union certification, decertification, amended certificates, alleged unfair labour practices, expedited arbitration, first contracts, board rulings, duty of fair representation, successor rights, religious objectors and other applications pursuant to the *Act.*

The Employment Standards Code

As the wage board appointed pursuant to the *Code*, the Board hears complaints referred to it by the Employment Standards Division regarding wages, statutory holiday pay, vacation pay and wages in lieu of notice, including provisions pursuant to ***The Construction Industry Wages Act*** and ***The Remembrance Day Act***. Until the April 30, 2007 amendment to the *Code*, the Board also handled hours of work exemption requests and applications for exemption from the weekly day of rest.

The Apprenticeship and Certification Act

The person named in a compliance order or required to pay an administrative penalty may appeal the matter to the Board within 14 days after receiving a notice under subsection 36(6) or 37(5) of the *Act*.

The Elections Act

A candidate, election officer, enumerator or an election volunteer for a candidate or a registered political party may file an application relating to requests for leave from employment under Section 24.2 of the *Act*. An employer may apply to the chairperson of the Board to request an exemption from the requirement to grant a leave under Section 24.2 of the *Act,* if the leave would be detrimental to the employer's operations.

The Essential Services Act

The Board receives and processes applications from unions for a variation of the number of employees who must work during a work stoppage in order to maintain essential services.

The Pay Equity Act

If parties fail to reach an agreement on an issue of pay equity, within the time frames stipulated in the *Act*, any party may refer the matter to the Board for adjudication.

The Public Interest Disclosure (Whistleblower Protection) Act

Pursuant to Section 28 of the *Act,* an employee or former employee who alleges that a reprisal has been taken against them may file a written complaint with the Board. If the Board determines that a reprisal has been taken against the complainant contrary to Section 27, the Board may order one or more of the following measures to be taken:

(a) permit the complainant to return to his or her duties;
(b) reinstate the complainant or pay damages to the complainant, if the board considers that the trust relationship between the parties cannot be restored;
(c) pay compensation to the complainant in an amount not greater than the remuneration that the board considers would, but for the reprisal, have been paid to the complainant;
(d) pay an amount to the complainant equal to any expenses and any other financial losses that the complainant has incurred as a direct result of the reprisal;
(e) cease an activity that constitutes the reprisal;
(f) rectify a situation resulting from the reprisal;
(g) do or refrain from doing anything in order to remedy any consequence of the reprisal.

The Public Schools Act

Certain provisions of *The Labour Relations Act* apply to teachers, principals, bargaining agents for units of teachers and school boards.

The Victims' Bill of Rights

Victims of crime may file applications with the Board relating to requests for time off work, without pay, to attend the trial of the person accused of committing the offence, for the purpose of testifying, presenting a victim impact statement or observing any sentencing of the accused person.

The Worker Recruitment and Protection Act

The Director of the Employment Standards Division is empowered, on behalf of a foreign worker, a child performer or family member on behalf of a child performer, to issue orders to recover the amount of any prohibited recruitment fees or costs charged, directly or indirectly, by the employer or a person engaged in recruitment of the foreign worker or child performer and can also, by order, recover from an employer any reduction in wages or recover any reduction/elimination of a benefit or other term or condition of employment where the reduction is made to cover the costs of recruitment , all of which is contrary to Sections 15, 16 and 17 of the *Act.* The Board's jurisdiction is triggered when a person affected by a director's order wishes to appeal an order of the director under any of these provisions. The Board hears the appeals pursuant to the provisions of *The Employment Standards Code*.

The Workplace Safety and Health Act

Any person directly affected by an order or decision of a safety and health officer may appeal the order or decision to the Director of Workplace Safety & Health. The director may decide the matter or refer the matter to the Board for determination. Any person affected by an order or decision of the director of Workplace Safety & Health may also appeal to the Board to have the order or decision set aside or varied.

MANITOBA LABOUR BOARD MEMBERS

In the year under review, the Board consisted of the following members.

Chairperson

William (Bill) D. Hamilton

Appointed as full-time chairperson in 2005, he has been a part-time vice-chairperson since 2002. He holds a Bachelor of Arts degree from the University of Winnipeg and a Bachelor of Laws degree from the University of Manitoba. Mr. Hamilton, for some years, has carried on an active practice as an interest and grievance arbitrator/mediator in Manitoba.

Vice-Chairpersons

A. Blair Graham, Q.C.

Appointed on a part-time basis in 2006, he holds a Bachelor of Arts degree and a Bachelor of Laws degree from the University of Manitoba. Mr. Graham practices law as a partner in the law firm of Thompson Dorfman Sweatman LLP with an emphasis on civil litigation, administrative law and labour arbitration as a chairperson. He was appointed a Queen's Counsel in December 1992, and inducted into the American College of Trial Lawyers in October 2004. He has been active as a chairperson in labour arbitration matters since 1997.

M. Lynne Harrison

Appointed on a part-time basis in 2008, she holds a Bachelor of Arts degree from Laval University, a Secondary Education Teaching Certificate from Laval University and a Bachelor of Laws degree from the University of Manitoba. Ms. Harrison also serves as an adjudicator under *The Human Rights Code* (Manitoba). She practices law as a partner in the law firm of Thompson Dorfman Sweatman LLP.

Diane E. Jones, Q.C.

Appointed on a part-time basis since 1985, she holds a Bachelor of Arts (Honours) degree from the University of Winnipeg and a Bachelor of Laws degree from the University of Manitoba. Ms. Jones is currently active as a chairperson in arbitration matters.

Arne Peltz

Appointed on a part-time basis in 2002, he is a chartered arbitrator and carries on an active practice as an interest and grievance arbitrator/mediator in Manitoba. Mr. Peltz has also served as an adjudicator under *The Human Rights Code* (Manitoba) and *The Canada Labour Code*. He was the director of the Public Interest Law Centre for 21 years and entered private practice in 2003. He now practices with Orle Davidson Giesbrecht Bargen LLP in dispute resolution, aboriginal law and civil litigation.

Colin S. Robinson

Appointed as full-time vice-chairperson in 2003, he holds a Bachelor of Arts (Honours) degree from the University of Manitoba and a Bachelor of Laws degree from Osgoode Hall Law School. Mr. Robinson was called to the Bar in 1995 and practiced primarily in the fields of labour and administrative law. Mr. Robinson is also the vice-president of the Manitoba Council of Administrative Tribunals.

Michael D. Werier

Appointed on a part-time basis in 2006, he is a partner in the Winnipeg law firm of D'Arcy Deacon LLP. Mr. Werier carries on a practice as an arbitrator/mediator in Manitoba and as a civil litigator. He is currently chairperson of the Labour Management Review Committee of the Province of Manitoba and chairperson of the Board of Directors of the Workers Compensation Board of Manitoba.

Gavin M. Wood

Appointed on a part-time basis in 2006, he holds a Bachelor of Laws degree from the University of Manitoba and a Masters of Laws degree from Columbia University in New York City. Mr. Wood is presently practicing as a sole practitioner under the firm name of Gavin Wood Law Office. He is currently active as a chairperson in arbitration matters.

Employer Representatives

Jim H. Baker, C.A.

Appointed in 2000, he is president and CEO of the Manitoba Hotel Association (MHA). Prior to his employment with the MHA, Mr. Baker was a partner in a chartered accountancy firm for 20 years. He is an executive member of the Hotel Association of Canada and past chairperson of the Manitoba Tourism Education Council. He was co-chairperson of the athletes' villages during the 1999 Pan Am Games and has been active as a community volunteer. He currently is the chair of the Friends of the Elmwood Cemetery, a director of the Winnipeg Convention Centre and a member of the Manitoba Employers Council.

Elizabeth M. (Betty) Black

Appointed in 1985, she is a Fellow, Certified Human Resource Professional (FCHRP) and holds a Certificate in Human Resource Management from the University of Manitoba. Ms. Black has over 30 years' experience in senior Human Resource Management roles in the private and public sectors in both union and non-union environments in the areas of manufacturing, hospitality, financial services and consulting. She is a member and past president of the Human Resource Management Association of Manitoba and has instructed in the Human Resource Management Certificate program at the University of Manitoba. She has served in voluntary leadership roles with the YMCA-YWCA of Winnipeg, the United Way of Winnipeg and numerous other community organizations.

Christiane Y. Devlin

Appointed in 2002, she has held senior management positions in human resources, integrating human resources within the business needs of companies in the communication and printing, agriculture, manufacturing, health care, and retail co-operative industries. Ms. Devlin is currently the manager, Human Resources with the Kleysen Group. Ms. Devlin's human resource management experience includes both unionized and non-unionized workplaces.

Robert N. Glass

Appointed in 2008, he is a labour relations/personnel consultant-negotiator with professional qualifications and extensive experience in labour/management relations including negotiation of contracts, collective agreement interpretation and an in-depth knowledge of organized labour, employment policy, hazard control and loss management. Mr. Glass has experience in the communications industry, government, health care and the construction industry. His educational background is from the University of Manitoba, University of Montreal, Safety Leadership Programs and Human Resource Professional Certification.

Colleen Johnston

Appointed in 1993, she is the manager, Human Resources for the Manitoba Liquor Control Commission and the president of Integre Human Resource Consulting. Mrs. Johnston is a graduate of the University of Manitoba with a Bachelor of Education degree and is a Fellow of the Certified Human Resource Professionals. She is a past president of the Human Resource Management Association of Manitoba (HRMAM), a founding director of the Canadian Council of Human Resource Associations and a former member of the Regulatory Review Committee of *The Canada Labour Code* in Ottawa. She has represented Canadian employers at the United Nations in Geneva and is currently an active member of the Designation Review Committee of the HRMAM, a member of the Board of Directors of CAA Manitoba and a member of the HR Advisory Panel at the University of Manitoba.

Paul J. LaBossiere

Appointed in 1999, he is currently president of P.M.L. Maintenance Ltd. Mr. LaBossiere is past co-chair of the Employers Task Force on Workers Compensation, a member of the Winnipeg Chamber of Commerce, parliamentarian government affairs advisor and past president of the Building Owners and Managers Association, a member of the Manitoba Employers Council and is a frequent international speaker on issues pertaining to the maintenance and service industries. He is a past member of the Board of Directors of the Building Services Contractors Association International (37 countries). He is the past board president of the Prairie Theatre Exchange (PTE) and a member of the Board of the PTE Foundation Trust. His past affiliations include vice-chairperson and treasurer of the Winnipeg Chamber of Commerce and on the Advisory Committee for the Continuing Education Department at the University of Manitoba. He is a trustee of Opimian Vineyard Trust.

Chris W. Lorenc, B.A., LL.B.

Appointed in 2003, he is currently president of the Manitoba Heavy Construction Association, president of the Western Canada Roadbuilders and Heavy Construction Association, founding member and chair of the Western Canada Transportation System Strategy Group and member of the Board of CentrePort Canada Inc. He has an extensive background in public policy writing related to trade and transportation, infrastructure, workplace safety and health. A lawyer by background, Mr. Lorenc graduated from the University of Manitoba with Bachelor of Arts and Bachelor of Laws degrees. He is a former Winnipeg city councillor having served for 9 years between 1983 and 1992. During his tenure on Council, he chaired a number of standing committees and held a variety of senior positions. He has also served and continues to serve on a number of boards of business, cultural, community and hospital organizations.

Harvey Miller

Appointed in 2010, he is the executive director of the Merit Contractors Association of Manitoba. He holds a Bachelor of Arts degree from the University of Manitoba and a Master of Arts degree in Psychology from the University of Victoria. Mr. Miller has extensive senior management experience in both public and not for profit agencies, including the Workers Advisory Office and the Workers Compensation Board. He has served on numerous volunteer boards, and is a past president of the Winnipeg Mental Health Association and the Manitoba Biathlon Association.

Yvette Milner

Appointed in 1996, she is a safety and disability management consultant and president of On-Site Safety and Health Management Solutions, a consulting company specializing in assisting companies to manage injury and illness in the workplace. Past experience includes director of Safety and Disability Management with Deloitte; President, Milner Consulting, a company specializing in Safety and Disability Claims Management; human resources coordinator, Manitoba Health; and assistant director of rehabilitation, Workers Compensation Board of Manitoba. Active in the Manitoba business community, Ms. Milner is involved in the Manitoba Employers Council and the Employers Task Force on Workers Compensation.

Maurice D. Steele

Appointed in 1999, he was president of M.D. Steele Construction Ltd. until his retirement in May 1999. Mr. Steele is president of Logan Farms Ltd. and Stradbrook Investments Ltd. both founding partners of the Land Owners Group. He is also vice-president of the AVL Limited Partnership representing lands north and west of Winnipeg James Armstrong Richardson International Airport. He has been involved for a number of years in the construction industry in a managerial capacity. Mr. Steele`s term expired December 2010.

Darcy Strutinsky

Appointed in 2008, he is currently the director of the Winnipeg Regional Health Authority Labour Relations Secretariat, representing health care employers throughout the province in collective bargaining and other labour relations matters. Previously, Mr. Strutinsky was engaged in providing human resource/labour relations services at the Health Sciences Centre, Seven Oaks General Hospital and University of Manitoba. He is a member of the Manitoba Labour Management Review Committee, Arbitration Advisory Sub-Committee and was a founding trustee of the Healthcare Employees Pension Plan.

Denis E. Sutton

Appointed in 1983, he has had extensive training in business administration and human resource management and has extensive experience in labour relations in both the private and public sectors. Mr. Sutton has served as chairperson of the Industrial Relations Committee, Manitoba Branch of the Canadian Manufacturers Association, chairperson of the Western Grain Elevator Association Human Resource Committee, chairperson of the Conference Board of Canada, Council of Human Resource Executives (West) and is an active member of many labour relations committees and associations. Mr. Sutton is presently employed as executive vice president of Human Resources at IMRIS Inc.

Jim Witiuk

Appointed in 2004, he is currently director of Labour Relations for Canada Safeway Limited with responsibility for labour relations matters in Manitoba, Saskatchewan and Ontario. Mr. Witiuk sits on a number of trusteed health and welfare and pension plans as a management trustee and is a member of the International Foundation of Employee Benefit Plans. He is a past member of the Employment and Immigration Board of Referees. He currently serves on the provincial government's Labour Management Review Committee, serves on that group's Arbitration Advisory Sub-Committee and is an active member of the Manitoba Employers Council. He is on the Board of Directors of MEBCO (Multi Employee Benefit Plan Council of Canada). He is a graduate of Carleton University in Ottawa.

Mel V. Wyshynski

Appointed in 2004, he retired from Inco Limited, Manitoba Division in late 2001 after a 40 year career in the mining industry. At the time of his retirement, Mr. Wyshynski was president of the division and had held that position since 1997. He is also past president of the Mining Association of Manitoba Inc. He is actively involved in the Dauphin community where he sits on a number of volunteer boards and is associated with many community initiatives. In addition to this, he is involved with a number of organizations. In 2006, he was appointed a director of Smook Brothers (Thompson) Ltd.

New Member:

Brian Peto

Appointed in 2011, he has over 36 years experience in the human resource field in the retail, manufacturing and financial services sectors. Mr. Peto's experience has been at the senior human resource level and he has served on the board of directors of the Cooperative Superannuation Society, one of Canada's largest defined contribution pension plans. He is a graduate of the University of Winnipeg and Red River Community College. Mr. Peto is a former cabinet member of the United Way of Winnipeg and past president of the Human Resource Management Association of Manitoba.

Employee Representatives

L. Lea Baturin

Appointed in 2007, she has been employed as a national representative with the Communications, Energy & Paperworkers Union of Canada (CEP) since 1995. As a national representative, she deals primarily with grievance arbitration matters, collective bargaining and steward education in the industrial sectors of telecommunications, broadcasting and manufacturing. Ms. Baturin's educational background includes a Bachelor of Arts degree and a Bachelor of Laws degree from the University Manitoba. She received her call to the Manitoba Bar in 1981 and worked as a lawyer at Legal Aid Manitoba and at Myers Weinberg and Associates before joining CEP as staff. Ms. Baturin is a member of the Board of the Manitoba Federation of Labour (MFL) and co-chairperson of the MFL Women's Committee.

Robert P. Bayer

Appointed in 2004, he had been a staff representative with the Manitoba Government and General Employees' Union (MGEU) since 1982. Previously, Mr. Bayer was the executive director of the Institutional Employees' Union (1975-1982), and manager of Human Resources for the Canadian Broadcasting Corporation - Winnipeg (1965-1975). He retired from the MGEU in December 2007.

Beatrice Bruske

Appointed in 2007, she has been employed since 1993 as a union representative for the United Food and Commercial Workers Union, Local No. 832 (UFCW Local 832). Ms. Bruske has worked as a servicing representative dealing with grievances, negotiations and arbitrations. She has been a full-time negotiator since 2004 and in this capacity she prepares and presents briefs on behalf of the members she represents. She represents the UFCW Local 832 on the Manitoba Federation of Labour Executive Council. Ms. Bruske is a member of the UFCW Local 832 Women's Committee. As well, she is a former member of the UFCW's National Women's Committee. She is a trustee on a number of Health & Welfare Benefit Plans. She graduated from the University of Manitoba with an Arts degree in Labour Studies.

Irene Giesbrecht

Appointed in 2002, she was employed by the Manitoba Nurses' Union (MNU) as chief negotiator from 1978 until her retirement in June 2008. Ms. Giesbrecht is a founding member of the Canadian Federation of Nurses Unions. Previous to joining the MNU, she was employed as a registered nurse. She is on the Blue Cross Board of Directors. Ms. Giesbrecht is currently providing health care/labour relations advice on a part-time consulting basis.

Debra Grimaldi

Appointed in 2010, she has been employed as a national servicing representative by the Canadian Union of Public Employees since 2000. As a servicing representative, Ms. Grimaldi is actively involved in grievance processing, collective bargaining, conflict resolution and education of Local Unions. Ms. Grimaldi is a graduate of the Labour College of Canada, class of 1989.

Jan Malanowich

Appointed in 1991, she worked as a staff representative for the Manitoba Government and General Employees' Union from 1981 until her retirement in December 2007. Ms. Malanowich was actively involved in collective bargaining, grievance handling and a multitude of associated activities related to the needs of the membership. Ms. Malanowich is currently appointed as an employee representative on the Employment Insurance Appeal Board of Referees. She is also a founding member of the Workers Memorial Foundation.

John R. Moore

Appointed in 1994, he was employed as the business agent, training coordinator and business manager for the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 254, from 1982-2007 and has been an active member for 42 years. Mr. Moore is also a current representative of the Trades Appeal Board of Manitoba.

Maureen Morrison

Appointed in 1983, she has worked for the Canadian Union of Public Employees (CUPE) for many years, first as a servicing representative and then as equality representative. Ms. Morrison's work is primarily in the areas of pay and employment equity, harassment and discrimination, accommodation issues, and other human rights concerns.

James Murphy

Appointed in 1999, he is the business manager of the International Union of Operating Engineers (IUOE), Local 987, being elected to this position in 1995. Mr. Murphy held the positions of business representative of IUOE from 1987 through to 1995 and training coordinator from 1985 to 1987. He sits on the executive board of the Canadian Conference of Operating Engineers, is currently president of the Manitoba Building and Construction Trades Council and president of the Allied Hydro Council of Manitoba. Prior to 1985, he was a certified crane operator and has been an active member of the IUOE since the late 1960s.

Sandra Oakley

Appointed in 2008, she has been employed by the Canadian Union of Public Employees (CUPE) since 1981. Ms. Oakley has worked as a national servicing representative, dealing with negotiations, grievance arbitrations and other labour relations issues, and as an assistant managing director in the Organizing and Servicing Department of CUPE at its national office in Ottawa. Since October 2002, she has been the regional director for CUPE in Manitoba. Ms. Oakley is a graduate of the University of Manitoba and the Labour College of Canada. She serves on the Board of Directors of the Children’s Rehab Foundation and on the United Way Cabinet as Deputy Chair Labour.

Dale Paterson

Appointed in 1999, he is retired from the Canadian Auto Workers Union where he was the area director. Mr. Paterson serves on the Premier’s Economic Advisory Council. He is also a board member of the Manitoba Public Insurance Corporation and is an employee nominee of the Board of Referees for the Employment Insurance Commission. Mr. Paterson is also a past Winnipeg United Way Campaign Chairperson and currently sits on the Advisory Council of the United Way. Mr. Paterson`s term expired December 2010.

Grant Rodgers

Appointed in 1999, he was employed for 33 years as a staff representative with the Manitoba Government and General Employees' Union (MGEU) and specialized for a number of years in grievance arbitration matters as well as collective bargaining. Mr. Rodgers holds a Bachelor of Commerce (Honours) degree from the University of Manitoba and is a graduate of the Harvard University Trade Union Program. Community involvement has included membership on the Red River College Advisory Board, director of the Winnipeg South Blues Junior "A" Hockey Team, and involvement with Big Brothers of Winnipeg. Mr. Rodgers retired from the MGEU in January 2008 and has since done some part-time labour relations consulting.

Lorraine Sigurdson

Appointed in 1990, prior to her retirement she was employed by the Canadian Union of Public Employees (CUPE) for 20 years. Ms. Sigurdson's last position was education representative where her duties included organizing and delivering leadership training for CUPE members in areas such as collective bargaining, grievance handling, health and safety, equality issues and communications. Previously she worked for many years with health care workers, first as an activist and as a negotiator of provincial collective agreements, assisting Locals with grievance handling and Local administration. She was executive vice-president of the Manitoba Federation of Labour and was a board member of the Winnipeg Regional Health Authority for 6 years. She is a graduate of the Labour College of Canada. Ms. Sigurdson`s term expired December 2010.

Sonia Taylor

Appointed in 2005, she has been employed since 1991 as a union representative with the United Food and Commercial Workers Union, Local No. 832. Ms. Taylor is actively involved in grievance handling, negotiations, arbitrations and organizing.

New Members:

Tom Murphy

Appointed in 2011, he became part of the Canadian Auto Workers' (CAW) local union leadership in 1980 while employed at Bombardier in Thunder Bay. Mr. Murphy became involved in collective bargaining in 1984, became the local union unit chairperson and vice-president in 1985, president of the local in 1992, appointed to CAW staff as a national representative in 1998 and appointed as the Area Director of Manitoba/Saskatchewan/Northern Ontario in 2007. Mr. Murphy deals with grievance arbitration matters and collective bargaining.

Rik A. Panciera

Appointed in 2011, he is currently employed as a National Staff representative for the Canadian Union of Public Employees where he has served for the past fourteen years. As a staff representative, Mr. Panciera deals with daily grievance and labour/management issues, as well as negotiates collective agreements. Mr. Panciera also represents his peers as a Regional Vice-President for the Canadian Staff Union and he has recently been appointed as director of the Canadian Labour Congress Kids Kamp.

OPERATIONAL OVERVIEW

Adjudication

During 2010/11, the Board was comprised of a full-time chairperson, 1 full-time vice-chairperson, 6 part-time vice-chairpersons and 28 board members with an equal number of employer and employee representatives. Part-time vice-chairpersons and board members are appointed by Order in Council and are paid in accordance with the number of meetings/hearings held throughout the year. The Board does not retain legal counsel on staff; legal services are provided through Civil Legal Services of the Department of Justice.

Field Services

Field Services is comprised of the registrar, 4 labour relations officers, 1 board officer and 1 board clerk. Reporting to the chairperson, the registrar is the official responsible for the supervision of the day-to-day field activities of the Board. The primary responsibility of the registrar is the development and execution of the administrative workload as it relates to the various acts under which the Board derives its adjudicative powers. The registrar, in conjunction with the chairperson, vice chairpersons and panel members, is involved in the establishment of Board practice and policy. Applications filed with the Board are processed through the registrar's office, which ensures each application is processed efficiently, with hearings scheduled in a timely manner and in accordance with the *Manitoba Labour Board Rules of Procedure* and Board practice. The registrar, together with the board officers, communicates with all parties and with the public regarding Board policies, procedures and jurisprudence.

Reporting to the registrar are 4 "labour relations" board officers who are responsible for dealing with various cases and conducting investigations pertaining to the applications filed with the Board, under the varying statutes. They can be appointed to act as Board representatives in an endeavour to effect settlement between parties, reducing the need for costly hearings. The board officers act as returning officers in Board conducted representation votes, attend hearings and assist the registrar in the processing of various applications. They also play a conciliatory role when assisting parties in concluding a first or subsequent collective agreement and they act as mediators during the dispute resolution process. Also reporting to the registrar is a board officer, primarily responsible for processing all referrals from the Director of the Employment Standards Division and who is involved in mediation efforts in an attempt to resolve the issues. The board clerk is primarily responsible for the processing of expedited arbitration referrals, and maintaining the Board's library of collective agreements and union constitution and by-laws files. Both the board officer and board clerk also attend Board hearings.

Administrative Services

The staff of the administrative services and field services works closely to ensure the expeditious processing of applications. Administrative services is comprised of the administrative officer and 5 administrative support staff. Reporting to the chairperson, the administrative officer is responsible for the day-to-day administrative support of the Board, fiscal control and accountability of operational expenditures and the development and monitoring of office systems and procedures to ensure departmental and government policies are implemented.

Reporting to the administrative officer are 4 administrative secretaries responsible for the processing of documentation. Also reporting to the administrative officer is the information clerk who is responsible for the case management system and files and responds to information requests from legal counsel, educators and the labour community for name searches, collective agreements and certificates.

Research Services

Reporting to the chairperson, the researcher is responsible for providing reports, statistical data, jurisprudence from other provincial jurisdictions and undertaking other research projects as required by the Board. The researcher summarizes and indexes Written Reasons for Decision and Substantive Orders issued by the Board and compiles the *Index of Written Reasons for Decision.*

Library Collection

Copies of these documents can be viewed by the public in the Board's office or made available in accordance with the fee schedule.

- Texts, journals, reports and other publications dealing with industrial relations and labour law in Manitoba and other Canadian jurisdictions
- Arbitration awards
- Collective agreements
- Certificates
- Unions' constitution & by-laws
- Written Reasons for Decision and Substantive Orders
- Board orders and decisions

Publications Issued

- *Manitoba Labour Board Annual Report* - a publication disclosing the Board's staffing and membership as well as highlights of significant Board and court decisions and statistics of the various matters dealt with during the reporting period. This publication may be obtained directly from the Board.
- *Index of Written Reasons for Decision* - a publication containing an index of Written Reasons for Decision and Substantive Orders categorized by topic, employer and section of the *Act* and is available on a subscription basis from Statutory Publications. The Index is updated semi-annually with the updates covering the periods of January - June and July - December.

The Board distributes full-text copies of Written Reasons for Decision, Substantive Orders and arbitration awards to various publishers for selection and reprinting in their publications or on their websites.

Copies of the various statutes and regulations are available for purchase from Statutory Publications, 200 Vaughan Street, Winnipeg, Manitoba or may be viewed on their website www.gov.mb.ca/laws.

Website Contents **http://www.gov.mb.ca/labour/labbrd**

*link to French version available

- Board Members* (list and biographies)
- Forms*
- Library* (hours)
- Publications* (list and links for convenient access, including previous annual reports)
- "Guide to *The Labour Relations Act*"* (explanations in lay persons' terms of the various provisions of the *Act* and the role of the Board and Conciliation & Mediation Services)
- Information Bulletins* (listing and full text)
- Manitoba Labour Board's Arbitrators List* (list of arbitrators maintained pursuant to Section 117(2) of *The Labour Relations Act*)
- Written Reasons for Decision and Substantive Orders (full text, English only, from January 2007 to present, with key word search capability)
- *The Labour Relations Act**
- Regulations* (including *The Manitoba Labour Board Rules of Procedure*)
- Contact Us* (information and links to the Government of Manitoba Home Page*, other Department of Labour and Immigration* divisions, LexisNexis Quicklaw and Statutory Publications*)

E-mail **mlb@gov.mb.ca**

E-mail service is available for general enquiries and requests for information.
NOTE: The Board does not accept applications or correspondence by e-mail.

If you wish to file an application, contact:

Manitoba Labour Board
Suite 500, 5th Floor
175 Hargrave Street
Winnipeg, Manitoba, Canada R3C 3R8
Telephone: (204) 945-2089 Fax: (204) 945-1296

Information Bulletins

The Board produces Information Bulletins regarding its practice and procedure. The bulletins are published in the Manitoba Labour Board's Index of Written Reasons for Decision and on the Board's website.
The following is a list of the current Information Bulletins.

1 - Review and Reconsideration
2 - *Manitoba Labour Board Rules of Procedure* – Regulation 184/87 R - Rule 28 (Part V – Rules of Board Practice)
3 - The Certification Process
4 - Financial Disclosure
5 - Fee Schedule
6 - Arbitrators List
7 - Filing of Collective Agreements
8 - Process for the Settlement of a First Collective Agreement
9 - Objections on Applications for Certification
#10 - *The Employment Standards Code* - Appeal Hearings
#11 - Reduction of Deposits on Referrals to the Manitoba Labour Board under *The Employment Standards Code*
#12 - Exemption to Requests for Leave under *The Elections Act*
#13 - Extension of Time to File Documentation, Notice of Hearing and Request for Adjournment
#14 - Bargaining Agent's Duty of Fair Representation
#15 - Disclosure of Personal Information

In April 2010, the Board issued Information Bulletin #15 – Disclosure of Personal Information. The full text, in both English and French, follows.

MANITOBA LABOUR BOARD
Suite 500, 5th Floor, 175 Hargrave Street, Winnipeg MB R3C 3R8
T 204 945-2089 **F** 204 945-1296
www.manitoba.ca/labour/labbrd

April 21, 2010

MANITOBA LABOUR BOARD
INFORMATION BULLETIN NO. 15
DISCLOSURE OF PERSONAL INFORMATION

When filing any application with the Manitoba Labour Board (“the Board”), all information included in the application is provided to the other party or parties named as respondents or interested parties. Further, such information may be referred to in the order or reasons issued by the Board at the conclusion of the case, on the Board’s website and in print and online reporting services that may publish the Board’s decision.

This Bulletin does not apply to Applications for Certification as these applications are governed by separate Board Rules respecting the confidentiality of membership information provided to the Board.

A copy of ***The Labour Relations Act***, C.C.S.M. c. L10, and the ***Manitoba Labour Board Rules of Procedure***, ***Regulation 184/87 R***, may be obtained from Statutory Publications, 200 Vaughan Street, Winnipeg MB R3C 1T5, Telephone: (204) 945-3101.

If you require additional information, please contact the Board's office at 945-2089.

Manitoba

COMMISSION DU TRAVAIL DU MANITOBA
175, rue Hargrave, 5e étage, bureau 500, Winnipeg (Manitoba) R3C 3R8
Tél. : 204 945-2089   **Téléc. :** 204 945-1296
www.gov.mb.ca/labour/labbrd/index.fr.html

Le 21 avril 2010

COMMISSION DU TRAVAIL DU MANITOBA
BULLETIN D'INFORMATION No 15
DIVULGATION DES RENSEIGNEMENTS PERSONNELS

Lorsque vous remplissez une demande auprès de la Commission du travail du Manitoba (la « Commission »), toute l'information contenue dans la demande est fournie aux autres parties nommées comme intimées ou parties intéressées. De plus, il est possible que l'on fasse référence à cette information dans l'ordonnance rendue ou les motifs énoncés par la Commission à la fin d'une cause, sur le site Web de la Commission ainsi que dans les rapports, imprimés ou en ligne, du service de communication, qui peut publier la décision de la Commission.

Le présent bulletin ne s'applique pas aux demandes d'accréditation. Celles-ci sont régies par des règles distinctes de la Commission se rapportant à la confidentialité des renseignements sur l'adhésion fournis à la Commission.

Il est possible d'obtenir une copie de la ***Loi sur les relations du travail***, C.P.L.M. c. L10, et du ***Règlement sur les règles de procédure de la Commission du travail***, R.M. 184/87 R, à la Section des publications officielles, 200, rue Vaughan, Winnipeg (Manitoba) R3C 1T5, téléphone : 204 945-3101.

Pour de plus amples renseignements, communiquez avec le bureau de la Commission au 945-2089.

Le 21 avril 2010

Major Accomplishments in the Reporting Period

- 445 cases before the Board (pending from previous period plus new applications);
- 71% of cases disposed of/closed;
- 156 applications scheduled for hearing;
- 101 hearing dates proceeded;
- Resolved 60% of disputes through the mediation process in cases where a board officer was formally appointed or assisted the parties informally in reaching a settlement. Of those cases not settled, the issues to be heard by the Board were narrowed;
- Met statutory time requirements for 17 Board conducted votes, excluding cases granted "extenuating circumstances";
- Continued to partner with the Department's Information and Technology Services Division to develop a comprehensive automated case management system;
- Issued 7 Written Reasons for Decision and 48 Substantive Orders;
- Updated the "Index of Written Reasons for Decision" for subscribers;
- Issued an Information Bulletin regarding the Disclosure of Personal Information; and,
- Maintained the previous year's median processing time for applications received under *The Labour Relations Act.*

Ongoing Activities and Strategic Priorities

- Update and issue Information Bulletins;
- Develop succession plan for key positions;
- Promote learning plans for staff;
- Conduct seminar for Vice-chairpersons and Board Members - scheduled for May 2011;
- Implement automated case management system;
- Increase appointments of Board Officers to a mediator role to effect successful dispute resolutions without the need for formal hearings;
- Evaluate forms and amend as necessary to meet *The Freedom of Information and Protection of Privacy Act* (FIPPA) requirements and to meet the French language services concept of "Active Offer";
- Improve practices and procedures and to increase efficiencies;
- Expand information available on the website for ready access by the labour relations community, legal practitioners, educators and the public;
- Maintain accountability for allocated budget; and,
- Reduce median processing times.

Principales réalisations au cours de l’exercice

- 445 cas ont été portés devant la Commission (demandes en instance depuis l’exercice précédent et nouvelles demandes).
- 71 % des cas portés devant la Commission ont été réglés ou classés.
- Une date d’audience a été fixée pour 156 demandes.
- 101 audiences ont été tenues.
- Règlement de 60% des différends par le processus de médiation pour les cas où un agent de la Commission a été désigné officiellement ou a aidé informellement les parties à convenir d’un règlement. Parmi les cas non réglés, les questions dont la Commission était saisie ont été circonscrites.
- À l’exception des cas associés à des « circonstances exceptionnelles », les délais prévus par la loi ont été respectés pour les 17 votes tenus par la Commission.
- La Commission a continué de s’associer à la Direction des services d’information et de technologie de Travail et Immigration Manitoba pour élaborer un système informatisé et intégré de gestion des cas.
- Publication de 7 motifs écrits de décision et de 48 ordonnances importantes.
- L’*Index of Written Reasons for Decision* a été mis à jour à l’intention des abonnés.
- Publication d’un bulletin d’information sur la divulgation des renseignements personnels.
- Maintien au même niveau que l’an dernier du délai moyen de traitement des demandes reçues en vertu de la *Loi sur les relations du travail*.

Activités en cours et priorités stratégiques

- Mise à jour et publication des bulletins d’information.
- Élaboration d’un plan de relève pour des postes de premier plan.
- Promotion de plans d’apprentissage à l’intention du personnel.
- Organisation d’un colloque à l’intention des vice-présidents et des membres de la Commission (prévu en mai 2011).
- Mise en œuvre du système informatisé de gestion des cas.
- Assignation d’agents supplémentaires au rôle de médiateurs afin de régler des différends sans avoir à recourir à des audiences officielles.
- Évaluation des formulaires et modification selon les besoins de manière à satisfaire aux exigences de la *Loi sur l'accès à l'information et la protection de la vie privée* (*LAIPVP*) et au concept d’« offre active » pour les services en français.
- Amélioration des pratiques et des procédures et accroissement des économies.
- Élargissement de l’information accessible sur le site Web afin d’en faciliter la consultation par les intervenants du secteur des relations du travail, les juristes, les éducateurs et le public.
- Maintien de la responsabilité pour le budget alloué.
- Réduction des délais moyens de traitement.

SUSTAINABLE DEVELOPMENT

The Board strives to achieve the goals set out in the Sustainable Development Action Plan. In compliance with *The Sustainable Development Act,* the Manitoba Labour Board is committed to ensuring that its activities conform to the principles of sustainable development. The Board promoted sustainable development through various activities including recycling, paper management, use of environmentally preferable products and duplex copying.

FINANCIAL INFORMATION

Expenditures by Sub-Appropriation	Actual 2010/11 ($000s)	Estimate 2010/11 FTE	Estimate 2010/11 $(000s)	Variance Over/(Under) ($000s)	Expl. No.
Total Salaries	1,259	16.50	1,316	(57)	1
Total Other Expenditures	464		497	(33)	2
Total Expenditures	1,723	16.50	1,813	(90)	

Explanation Number:

1. *Under-expenditure reflects savings due to vacancies, net staff turnover, VRW days and per diems, partially offset by vacation payouts due to staff resignations.*
2. *Under-expenditure reflects savings due to reduced legal fees for appeals, reduced training and travel costs for Board members and reduction in operating supplies and physical asset purchases, partially offset by casual labour costs and minor renovations.*

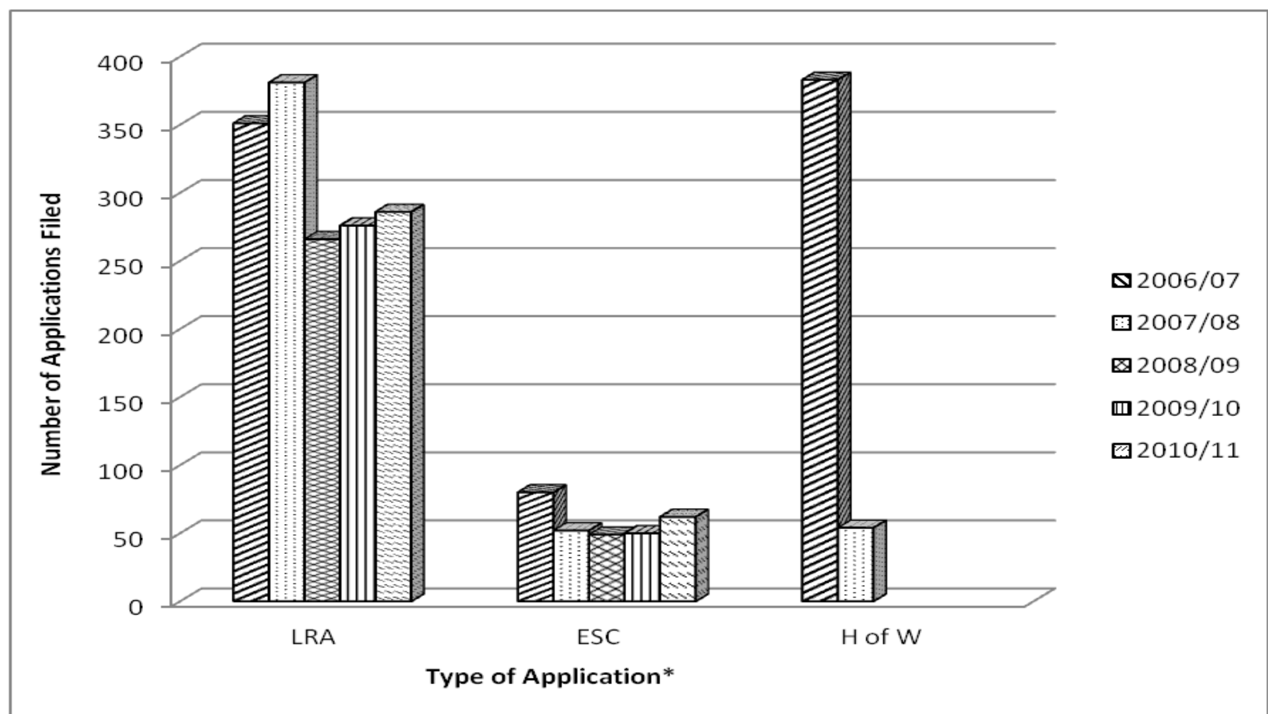
PERFORMANCE REPORTING

Summary of Performance

The Manitoba Labour Board adjudicated employer-employee disputes referred to it under various provincial statutes and its decisions established policy, procedures and precedent and provided for a more sound, harmonious labour relations environment. The Board conducted formal hearings; however, a significant portion of the Board's workload was administrative in nature. When possible, the Board encouraged the settlement of disputes in an informal manner by appointing one of its Board Officers to mediate outstanding issues and complaints. The Board monitored its internal processes to improve efficiencies and expedite processing of applications or referrals.

The number of applications filed with the Manitoba Labour Board during the past 5 years (for the period April 1 to March 31) is indicated in the chart below, with hours of work applications shown separately from *The Employment Standards Code.*

Manitoba Labour Board
Number of Applications Filed



***Types of Applications**	
LRA	Labour Relations Act
ESC	Employment Standards Code
H of W	Hours of Work Exemptions

The Employment Standards Code amendments effective April 2007 eliminated applications to the Board for hours of work exemptions.

Detailed statistical tables and summaries of significant Board decisions can be found beginning on pages 75 and 33 respectively.

Program Performance Measurements

During the past reporting year, the Board continued its initiative to measure service activities and client responsiveness.

Program Performance Measurements
April 1 - March 31

Indicator	Actual 2009/10	Actual 2010/11
Percentage of Cases disposed of	79%	71%
Number of hearings scheduled	280	303
Percentage of hearings that proceeded	38%	33%
Number of votes conducted	13	17
Median processing time (calendar days):		
The Labour Relations Act:	47	47
The Workplace Safety & Health Act[1]	349	189
The Essential Services Act	105	NA
The Elections Act	NA	NA
The Employment Standards Code	98	124

"NA" - No applications processed in reporting period

[1] - The median processing time for applications filed under *The Workplace Safety and Health Act* in both fiscal years was based on the processing of three cases. The processing times are not necessarily indicative of the normal median processing times of the Board.

In addition to applications filed, and pursuant to *The Labour Relations Act*, the Board also received and filed copies of collective agreements and arbitration awards. In addition to the 3,069 collective agreements on file, there are 2,225 arbitration awards and 856 Written Reasons for Decision and Substantive Orders in the Board's collection (increases of 2.3%, 2.3% and 5.7% respectively from the previous reporting period). Copies of collective agreements, arbitration awards and written reasons are available upon request and in accordance with the Board's fee schedule. Copies of Written Reasons for Decision and Substantive Orders issued since January 2007 are posted on the Board's website.

THE PUBLIC INTEREST DISCLOSURE (WHISTLEBLOWER PROTECTION) ACT

The Public Interest Disclosure (Whistleblower Protection) Act came into effect in April 2007. This law gives employees a clear process for disclosing concerns about significant and serious matters (wrongdoing) in the Manitoba public service, and strengthens protection from reprisal. The *Act* builds on protections already in place under other statutes, as well as collective bargaining rights, policies, practices and processes in the Manitoba public service.

Wrongdoing under the *Act* may be: contravention of federal or provincial legislation; an act or omission that endangers public safety, public health or the environment; gross mismanagement; or, knowingly directing or counselling a person to commit a wrongdoing. The *Act* is not intended to deal with routine operational or administrative matters.

A disclosure made by an employee in good faith, in accordance with the *Act*, and with a reasonable belief that wrongdoing has been or is about to be committed is considered to be a disclosure under the *Act*, whether or not the subject matter constitutes wrongdoing. All disclosures receive careful and thorough review to determine if action is required under the *Act*, and must be reported in a department's annual report in accordance with Section 18 of the *Act*.

The following is a summary of disclosures received by the Manitoba Labour Board for fiscal year 2010-2011.

Information Reported Annually (per Section 18 of The *Act*)	**Fiscal Year 2010-2011**
The number of disclosures received, and the number acted on and not acted on. *Subsection 18(2)(a)*	**NIL**
The number of investigations commenced as a result of disclosure. *Subsection 18(2)(b)*	**NIL**

SUMMARIES OF SIGNIFICANT BOARD DECISIONS

During the reporting period, the Board issued 7 Written Reasons for Decision and 48 Substantive Orders.

The full text of the Written Reasons and the Substantive Orders issued since January 2007 are available on the Board's website (http://www.gov.mb.ca/labour/labbrd/decisions/index.html) or from the Board's office, upon payment of the applicable copying fee.

Pursuant to *The Labour Relations Act*

Government of Manitoba, Family Services and Housing - and - Manitoba Government and General Employees' Union
Case No. 218/09/LRA
January 8, 2010

APPLICATION FOR CERTIFICATION – APPROPRIATE BARGAINING UNIT – EMPLOYEE - Casual Employee – Automatic – Employee Wishes - Employer submitted employees in proposed bargaining unit hired on casual basis and worked "as, if and when" needed on an "on call" arrangement and did not work on regular recurring basis week by week – Board held requirements of Rule 28 of *Manitoba Labour Board Rules of Procedure* satisfied by virtue that majority of affected employees appear on an "on-call" work schedule and have actually performed tasks during the scope of that schedule by reference to date of filing of application - Employees who did not regularly appear on "on-call" schedule or who did not work at all during relevant period by reference to date of filing of application did not meet criteria of Rule 28 and were excluded from Board's consideration for determining employee support – Substantive Order.

The Sharon Home - and - Manitoba Government and General Employees' Union Local 96 and Manitoba Government and General Employees' Union - and - L.C.
Case No. 22/10/LRA
April 7, 2010

DUTY OF FAIR REPRESENTATION - TIMELINESS - Failure to Refer Grievance to Arbitration - Employee filed duty of fair representation application alleging that, to her knowledge, Union did not file grievance - Held Employee's statements did not reconcile with statements made in application or with objective facts disclosed by Union - Application contained written submission filed before Board of Referees (Employment Insurance) which recorded dismissal was grieved but was not successful - Therefore, Board found grievance filed to Employee's knowledge - Board found Employee participated in Union's internal appeal procedures and was advised by letter Union would not be advancing grievance to arbitration decision which was reaffirmed at meeting with Union representative - Application filed twenty months after Employee had knowledge of Union's decision not to proceed to arbitration - Delay of twenty months in filing application constituted undue delay for which Employee did not provide satisfactory explanation - Application dismissed - Substantive Order.

Vale INCO Limited - and - United Steelworkers, Local 6166
Case No. 15/10/LRA
May 7, 2010

HOT GOODS – Employer operated mine in Thompson, Manitoba – Employer anticipated receiving nickel concentrate for processing from its wholly-owned subsidiary in Newfoundland, employees of which were on strike – Board determined that Newfoundland operation was not "another employer" for purposes of Section 15(1) of *The Labour Relations Act* to allow employees in Thompson to refuse

to perform work which would directly facilitate the operation or business of another employer whose employees were on strike.

The Employer, Vale INCO, mined and processed nickel in Thompson, Manitoba. Vale INCO Newfoundland & Labrador (VINL) was a wholly-owned subsidiary of the Employer. Nickel concentrate from VINL was shipped to the operations in Thompson for processing. United Steelworkers, Local 9508 represented a group of VINL employees. At the time of the application, those employees were on strike. Further shipments of nickel concentrate would be received from VINL. In order to maintain harmonious labour relations, the parties jointly applied for a Board determination as to whether VINL was "another employer" for the purposes of Section 15(1) of *The Labour Relations Act.*

Held: Section 15(1) of the *Act* provides "An employee who is in a unit of employees of an employer in respect of which there is a collective agreement in force and who refuses to perform work which would directly facilitate the operation or business of another employer whose employees within Canada are locked out or on a legal strike is not by reason of that refusal in breach of the collective agreement or of any term or condition of his employment and is not, by reason of that refusal, subject to any disciplinary action by the employer or the bargaining agent that is a party to the collective agreement." The Board was satisfied that Vale Inco Newfoundland & Labrador Limited was not "another employer" for the purposes of subsection 15(1) of the *Act*.

Winnipeg School Division - and - Canadian Union of Public Employees, Local 110 - and - I.H.
Case No. 18/09/LRA
May 31, 2010

DUTY OF FAIR REPRESENTATION – PRACTICE AND PROCEDURE – Res Judicata - Current application touched upon matters Employee raised in prior applications withdrawn or dismissed by Board – Prior applications disposed of matters with finality and matters could not be raised under current application.

DUTY OF FAIR REPRESENTATION – Contract Administration – Failure to Refer Grievance to Arbitration - Employee submitted Union failed in duty of fair representation over number of years and final act was at Union membership meeting where his grievance was discussed - Employee was given 30 minutes to present his grievance prior to membership vote and while a union member made inappropriate comments during meeting, Union president cautioned that member – Board found Union communicated with Employee verbally and in writing; provided him with opportunity to put forward his case to Employer; retained counsel with whom Employee met; filed termination grievance and offered to negotiate settlement; obtained written legal opinion by experienced labour law counsel; and gave Employee opportunity to speak to Union's membership - Board satisfied Union competent and prudent in representation of Employee - Employee disagreeing with Union's decision not to pursue grievance did not in and of itself constitute breach of duty – Application dismissed.

The Employee filed a duty of fair representation complaint against the Union. The application touched upon five previous applications that the Employee had filed. He had withdrawn two of the applications and the Board subsequently dismissed two others and declined to take further action with respect to the fifth. In the application in question, the Employee noted that his complaint was "a continuation of a Workplace Mobbing Campaign that began in November 2001." He further stated that the Union's "final act of bad faith, arbitrary behaviour and failure to take reasonable care" was at the membership meeting where his discharge grievance was discussed.

Held: The previous withdrawals and dismissals disposed of the matters raised in the previous applications with finality and they could not be raised under the ambit of the application. The only exception would be certain matters arising out of his termination. The Board was satisfied that there was no evidence that sufficiently supported the Employee's allegations that the Union acted in a manner that was arbitrary, discriminatory or in bad faith. During the termination process, the Union represented the Employee and communicated with him verbally and in writing; provided him with the opportunity to put forward his case to the

Employer; retained counsel with whom the Employee met; filed a grievance concerning the termination; offered to negotiate a settlement of the grievance; obtained a written legal opinion provided by an experienced labour law counsel; and put forward the Employee's case to the Union's membership and gave the Employee the opportunity to speak to the membership. The Employee acknowledged he was given thirty minutes to present his case and while comments made during the meeting by a union member may have been inappropriate, the Union president cautioned that member and the Employee was permitted to address the issue of his grievance prior to the membership vote. None of those actions indicated that the Union failed to exercise reasonable care in representing the Employee and the Board was satisfied that the Union was competent and prudent in its representation of the Employee. The Employee felt that he had a case that should have gone to arbitration; however, the Board has no jurisdiction to assess the merits of a grievance. The Employee disagreeing with the decision of the Union not to pursue his grievance to arbitration did not in and of itself constitute a breach of Section 20 of *The Labour Relations Act* since the Union had the discretion whether to refer a grievance to arbitration and to rely on legal advice in making that determination. The Board dismissed the application.

Victoria Inn / Hotel & Convention Centre, S.P.- and - UNITE HERE-Manitoba Joint Council - and - C.P.
Case No. 93/10/LRA
June 15, 2010

UNFAIR LABOUR PRACTICE – Discharge – Exercising Legislative Rights - Employee dismissed during probationary period alleged dismissal on basis he made complaint or filed application under Act of Legislature or Parliament – Board noted application must contain more than mere allegation or assertion - No facts pleaded that Employee filed complaint or application under any act which could be reason or motive for his discharge - Application itself did not constitute complaint or application within Section 7(d) of *The Labour Relations Act* – Employee feeling dismissal unfair, management behaved improperly or falsely accused him, or dismissal simply unjust did not fall within remedial jurisdiction of Board under Section 7 - Application dismissed as Employee failed to establish *prima facie* case – Substantive Order.

The Employee filed an unfair labour practice application under Section 7(d) of *The Labour Relations Act*. He alleged that he was discharged from employment, refused employment or discriminated in regard to his employment on the basis that he made a complaint or filed an application under *the Act* or any other Act of the Legislature or of Parliament.

Held: The application contained no facts which, even if proven and not rebutted or contradicted, would support a conclusion that the Employer breached Section 7(d) of the *Act*. There were no facts pleaded that the Applicant had exercised a statutory right by filing a complaint or an application under the *Act* or any other act of the Manitoba Legislature or of Parliament, and which could be said, even by inference, to be an underlying reason or motive for his discharge. The Board noted that the application itself did not constitute a "complaint or … an application" within the meaning of Section 7(d) of the *Act*. Accordingly, the Applicant failed to establish a *prima facie* case. When making this assessment, there must be more than a mere allegation or assertion. There were no facts pleaded in the application to establish a *prima facie* claim that the decision to dismiss the Applicant during the probationary period was linked to or tainted by or in any way influenced by any application or complaint filed by the Applicant, under a statutory provision, as contemplated by Section 7(d). That section is focused in its intent and it is not a "catch-all" to remedy dismissals from employment in the general sense. The fact that an employee feels that a dismissal was unfair, that management behaved improperly or falsely accused the employee, or that a dismissal was simply unjust did not fall within the remedial jurisdiction of the Board under Section 7 of the *Act*. The Board did not function as a surrogate arbitration board in respect of all employment disputes. Application was dismissed as the Employee failed to establish a *prima facie* case under Section 7(d) of the *Act*.

Club Regent Casino - and - Teamsters Union - and - G.K.
Case No. 63/10/LRA
June 28, 2010

DUTY OF FAIR REPRESENTATION – Contract Administration – Settlement of Grievance - Employee alleged Union failed to properly investigate circumstances relating to her alleged disability and acted in bad faith by refusing to file a grievance contesting actions of Employer – Held parties concluded final and binding settlement agreement in which Employee received severance package - Employee second guessing settlement to which she agreed and under which she had taken benefits cannot be basis of Section 20 application - Application dismissed - Substantive Order.

DUTY OF FAIR REPRESENTATION – Employer – Scope of Duty – Employee alleged Employer acted contrary to Section 20 of *The Labour Relations Act* by failing to take steps to preserve her employment - Section 20 imposes duty of fair representation on bargaining agents and does not impose any duty on employers - Claims that Employer breached Section 20 not sustainable - Substantive Order.

DUTY OF FAIR REPRESENTATION - REMEDY – Employee sought reinstatement as remedial relief in duty of fair representation application - Board does not function as surrogate arbitration board - In any event, reinstatement not available remedy under a Section 20 application - Substantive Order.

The Employee filed a duty of fair representation application alleging the Union failed to properly investigate her circumstances relating to an alleged disability and acted in bad faith by refusing to file a grievance on her behalf contesting the actions of the Employer. She also alleged that the Employer acted contrary to Section 20 of *The Labour Relations Act* by failing to take certain steps to preserve her employment. As to remedial relief, she sought reinstatement. The Union asserted that the Employee never asked it to file a grievance on her behalf, on account of the fact that the Union, with her concurrence, negotiated a settlement agreement. The Employee accepted a severance package in return for a resignation on her part.

Held: The application was brought under Section 20 of the *Act.* That section only imposes a duty of fair representation on a bargaining agent and does not impose any duty on an employer. Therefore, the claim that the Employer breached Section 20 was not sustainable. As to the Employee's claim that she be given her job back as the form of remedial relief, the Board does not function as a surrogate arbitration board and such a remedy was not available to the Employee in any event under a Section 20 application. The Board accepted that the parties concluded a final and binding settlement agreement, and that in exchange for payments made to and other benefits made available to the Employee, she submitted a written resignation. There was no reasonable basis for the Employee to allege that the Union breached any of its obligations under Section 20 of the *Act.* The fact that the Employee second guessed or disagreed with the settlement to which she previously agreed and under which she had taken benefits cannot be the basis of a Section 20 application. The Board ruled that the application had no merit within the meaning of Section 140 (8) of the *Act* and the Employee had not disclosed a *prima facie* case.

Grandview Personal Care Home - and - Manitoba Government and General Employees' Union - and - W.H.
Case No. 92/10/LRA
July 9, 2010

DUTY OF FAIR REPRESENTATION – Contract Administration – Failure to Process Grievance – Employee alleged Union failed to assist with a number of grievances over two year period – Board found Union recently filed grievances respecting denied promotions and Employee did not specify what he requested Union to do on his behalf or how it failed to comply with its duties under Section 20 of *The Labour Relations Act* - Given Union's continuing representation of Employee, allegation Union had failed to properly represent him was premature – Application dismissed - Substantive Order.

The Employee filed an application Seeking Remedy for Alleged Unfair Labour Practice contrary to Section 20 of *The Labour Relations Act*. He asserted that he had been waiting for the Union to assist him with his various grievances but that "nothing has been done". Specifically, he said that "about 2 years ago" he encountered an issue regarding shifts being taken away from him; however, the Union allegedly failed to assist him as he requested. He further alleged that he applied for two "recent" postings but was denied the positions. He also complained that heavy lifting in the workplace was left for him to complete. The Union asserted that all of the Employee's grievances had been "investigated thoroughly" and that it, at the time of the application, "continues to represent the Employee on the selection grievance in addition to the myriad of other complaints as the Employee raises them".

Held: None of the allegations advanced by the Employee were sufficient to sustain the conclusion that the Union acted in a manner which was arbitrary, discriminatory or in bad faith contrary to Section 20(b) of the *Act.* Further, the Union had filed grievances on behalf of the Employee respecting his assertion that he was improperly denied two positions. The Employee did not specify what he requested the Union to do on his behalf or how it failed to comply with its duties under Section 20 of the *Act.* Given the Union's continuing representation of the Employee, his allegation that the Union had failed to properly represent him regarding the two job postings was, at best, premature.

Tolko - and - Communications Energy and Paperworkers of Canada, Local 1403 - and - M.E.
Case No. 113/10/LRA
July 12, 2010

DUTY OF FAIR REPRESENTATION – Scope of Duty - Employee alleged Employer conspired with Union to deprive him of Union retirement gift he was entitled to receive pursuant to Union's Constitution and Bylaws – Section 20 of *The Labour Relations Act* imposes duty on bargaining agents in representing rights of employees under collective agreement - Alleged acts or omissions by Union under Bylaws and Constitution did not constitute representation of Employee's rights under collective agreement - Employee failed to establish *prima facie* violation by Union of Section 20 – Also, Section 20 does not impose obligations upon employers and, as such, there can be no breach of provision by Employer – Substantive Order.

DUTY OF FAIR REPRESENTATION – TIMELINESS – Undue Delay - Employee unduly delayed filing application as he knew of allegations giving rise to application 28 months prior to date of filing –Board has interpreted undue delay to mean periods of as little as six months – Application dismissed - Substantive Order.

The Employee filed an Application Seeking Remedy for Alleged Unfair Labour Practice contrary to Section 20 of *The Labour Relations Act*. He did not receive the Union retirement gift to which he alleged he was entitled pursuant to Article 10, Section 4 of the Union's Constitution and Bylaws. The Employee further alleged that the Employer conspired with the Union to deprive him of this benefit.

Held: Section 20 of the *Act* imposes a duty of fair representation upon bargaining agents "in representing the rights of any employee under the collective agreement". The Employee's allegations concerned an entitlement which he believed was owed to him under the Union's Bylaws and Constitution. This was not a right under the collective agreement. As such, the alleged acts or omissions by the Union did not constitute the representation of the Employee's rights under the collective agreement. Accordingly, the Employee failed to satisfy the Board that there was a *prima facie* violation of Section 20 of the *Act.* Moreover, Section 30(2) of the *Act* provides that the Board may refuse to accept a complaint where its filing has been unduly delayed. Undue delay has been interpreted by the Board to mean periods of as little as six months in duration. The Board was satisfied that the allegations giving rise to the application were known to the Employee 28 months prior to the date he filed the application and that the filing of the application had been unduly delayed. Section 20 does not impose obligations upon employers and, as such, there can be no breach of the provision by the Employer.

The Manitoba Teachers' Society - and - General Teamsters, Local Union No. 979 - and - B.A.
Case No. 81/10/LRA
July 21, 2010

UNFAIR LABOUR PRACTICE – Discharge – Exercising Legislative Rights - Union alleged Employee terminated for exercising right to file Statement of Claim for outstanding benefits in Court of Queen's Bench, naming Employer as Defendant in civil action – Held commencement of civil action in Court of Queen's Bench seeking to enforce an alleged private contract did not fall within Section 7 or 17 of *The Labour Relations Act* as *The Queen's Bench Act* did not create any statutory right, duty or obligation in employment context - Filing of claim under *The Queen's Bench Act* did not constitute proceeding or exercising of rights under any Act of Legislature because Employee was not seeking to enforce, against Employer, a right, duty, or obligation established by statute – Application dismissed - Substantive Order.

The Union filed an unfair labour practice application alleging that the Employee was terminated for pursuing his claim for outstanding benefits and exercising his right to pursue his claim by filing a Statement of Claim in the Court of Queen's Bench, naming the Employer as the Defendant in the civil action. In suing his employer, the Employer stated that the Employee breached his duties of fidelity and loyalty, as an employee, and that his actions constituted just cause for dismissal.

Held: The Board was satisfied that the provisions of Sections 7 and 17 of *The Labour Relations Act* were restricted to those situations where an employee sought to enforce a right or participated in a proceeding under another public statute which created a specific public right for the benefit of and/or protection of employees in respect of the workplace or the employment relationship. The Board was satisfied that the commencement of the civil action in the Court of Queen's Bench seeking to enforce an alleged private contract did not fall within the ambit of either Section 7 or 17 of the *Act*. The filing of the Statement of Claim under *The Queen's Bench Act* did not constitute either "…a proceeding under any other Act of the Legislature…" or was it the "…exercising of his rights under this or any Act of the Legislature", because the Employee was not seeking to enforce, against the Employer, a right, duty, or obligation established by statute. *The Queen's Bench Act* itself did not create any statutory right, duty or obligation in the employment context. In addition, the Board was satisfied that the questions which the Union brought before it were concurrently scheduled to be heard by an arbitrator under the Collective Agreement. The relief sought from the Board was essentially identical to the relief available through arbitration. It was not the role of the Board to function as a surrogate arbitrator in respect of a matter that can be adequately determined under the provisions of a collective agreement for the final settlement of disputes between the parties to a collective bargaining regime. As a result, the Board determined that the application did not disclose a *prima facie* case that the Employer violated Sections 7(e), (g) or (h) or Section 17(b)(iii) of the *Act*. The application was dismissed.

Jeld-Wen Windows And Doors - and - CAW.TCA Local 3003 - and - E.T.
Case No. 140/10/LRA
July 23, 2010

DUTY OF FAIR REPRESENTATION - Employee alleged Union acted in bad faith when it refused to refer grievance to arbitration - Union advanced grievance through Steps 1 and 2 of grievance procedure but determined it lacked merit as Employer had not violated collective agreement - Held bargaining agent has discretion to determine whether or not to refer grievance to arbitration with or without consent of Employee - Provided discretion exercised in manner which was not inconsistent with provisions of *The Labour Relations Act,* Board will not interfere with Union's decision - Employee disagreeing with Union not to pursue grievance to arbitration did not, in itself, constitute breach of Section 20 of the *Act* - Application dismissed for failure to establish *prima facie* case - Substantive Order.

The Employee's position was eliminated in accordance with the collective agreement and he was reassigned to another position at a corresponding reduction in pay. When he became aware that some employees retained their previous wage rates, the Union filed a grievance on his behalf. The Employer denied the

grievance at Step 1 of the grievance procedure. The Union advanced the Employee's grievance to Step 2. The Employer rejected the grievance. However, it noted that it intended to create a full-time position. Following receipt of the Employer's Step 2 grievance reply, the Union advised the Employee of its decision not to proceed with the grievance on the basis that the collective agreement had not been violated. The Employee appealed the Union's decision at a General Membership meeting. The appeal was denied and, accordingly, the grievance was not advanced to arbitration. The Employee filed an unfair labour practice application alleging that the Union breached Section 20 of *The Labour Relations Act* by acting in "bad faith" when it refused to proceed to arbitration with his grievance.

Held: The allegations the Employee advanced were not sufficient to sustain the conclusion that the Union acted in a manner which was arbitrary, discriminatory or in bad faith contrary to Section 20(b) of the *Act*. The Union filed a grievance and advanced it through Steps 1 and 2 of the grievance procedure. It determined that the grievance lacked merit as the Employer had not violated the collective agreement. Bargaining agents have the discretion to determine whether or not a grievance shall be filed, referred to arbitration, or ultimately withdrawn or settled with or without the consent of the employee concerned. Provided that this discretion was exercised in a manner which was not inconsistent with the provisions of the *Act*, principally Section 20, the Board will not interfere with a Union's decision. The fact that an employee disagreed with the decision of the Union not to pursue a grievance to arbitration did not, in itself, constitute a breach of Section 20 of the *Act*. Applicant failed to establish a *prima facie* case. The application was dismissed.

Jeld-Wen Windows And Doors - and - CAW.TCA Local 3003 - and - E.S.
Case No. 141/10/LRA
July 23, 2010

DUTY OF FAIR REPRESENTATION - Employee alleged Union acted in bad faith when it refused to refer grievance to arbitration - Union advanced grievance through Steps 1 and 2 of grievance procedure but determined it lacked merit as Employer had not violated collective agreement - Held bargaining agent has discretion to determine whether or not to refer grievance to arbitration with or without consent of Employee - Provided discretion exercised in manner which was not inconsistent with provisions of *The Labour Relations Act* Board will not interfere with Union's decision - Employee disagreeing with Union not to pursue grievance to arbitration did not, in itself, constitute breach of Section 20 of the *Act* - Application dismissed for failure to establish *prima facie* case - Substantive Order.

The Employee's position was eliminated in accordance with the collective agreement and he was reassigned to another position at a corresponding reduction in pay. When he became aware that some employees retained their previous wage rates, the Union filed a grievance on his behalf. The Employer denied the grievance at Step 1 of the grievance procedure. The Union advanced the Employee's grievance to Step 2. The Employer rejected the grievance. However, it noted that it intended to create a full-time position. Following receipt of the Employer's Step 2 grievance reply, the Union advised the Employee of its decision not to proceed with the grievance on the basis that the collective agreement had not been violated. The Employee appealed the Union's decision at a General Membership meeting. The appeal was denied and, accordingly, the grievance was not advanced to arbitration. The Employee filed an unfair labour practice application alleging that the Union breached Section 20 of *The Labour Relations Act* by acting in "bad faith" when it refused to proceed to arbitration with his grievance.

Held: The allegations the Employee advanced were not sufficient to sustain the conclusion that the Union acted in a manner which was arbitrary, discriminatory or in bad faith contrary to Section 20(b) of the *Act*. The Union filed a grievance and advanced it through Steps 1 and 2 of the grievance procedure. It determined that the grievance lacked merit as the Employer had not violated the collective agreement. Bargaining agents have the discretion to determine whether or not a grievance shall be filed, referred to arbitration, or ultimately withdrawn or settled with or without the consent of the employee concerned. Provided that this discretion was exercised in a manner which was not inconsistent with the provisions of the *Act*, principally Section 20, the Board will not interfere with a Union's decision. The fact that an employee disagreed with the decision of the Union not to pursue a grievance to arbitration did not, in itself, constitute a breach of Section 20 of the *Act*. Applicant failed to establish a *prima facie* case. The application was dismissed.

Jeld-Wen Windows And Doors - and - CAW.TCA Local 3003 - and - A.E.
Case No. 142/10/LRA
July 23, 2010

DUTY OF FAIR REPRESENTATION - Employee alleged Union acted in bad faith when it refused to refer grievance to arbitration - Union advanced grievance through Steps 1 and 2 of grievance procedure but determined it lacked merit as Employer had not violated collective agreement - Held bargaining agent has discretion to determine whether or not to refer grievance to arbitration with or without consent of Employee - Provided discretion exercised in manner which was not inconsistent with provisions of *The Labour Relations Act,* Board will not interfere with Union's decision - Employee disagreeing with Union not to pursue grievance to arbitration did not, in itself, constitute breach of Section 20 of the *Act* - Application dismissed for failure to establish *prima facie* case - Substantive Order.

The Employee's position was eliminated in accordance with the collective agreement and he was reassigned to another position at a corresponding reduction in pay. When he became aware that some employees retained their previous wage rates, the Union filed a grievance on his behalf. The Employer denied the grievance at Step 1 of the grievance procedure. The Union advanced the Employee's grievance to Step 2. The Employer rejected the grievance. However, it noted that it intended to create a full-time position. Following receipt of the Employer's Step 2 grievance reply, the Union advised the Employee of its decision not to proceed with the grievance on the basis that the collective agreement had not been violated. The Employee appealed the Union's decision at a General Membership meeting. The appeal was denied and, accordingly, the grievance was not advanced to arbitration. The Employee filed an unfair labour practice application alleging that the Union breached Section 20 of *The Labour Relations Act* by acting in "bad faith" when it refused to proceed to arbitration with his grievance.

Held: The allegations the Employee advanced were not sufficient to sustain the conclusion that the Union acted in a manner which was arbitrary, discriminatory or in bad faith contrary to Section 20(b) of the *Act*. The Union filed a grievance and advanced it through Steps 1 and 2 of the grievance procedure. It determined that the grievance lacked merit as the Employer had not violated the collective agreement. Bargaining agents have the discretion to determine whether or not a grievance shall be filed, referred to arbitration, or ultimately withdrawn or settled with or without the consent of the employee concerned. Provided that this discretion was exercised in a manner which was not inconsistent with the provisions of the *Act*, principally Section 20, the Board will not interfere with a Union's decision. The fact that an employee disagreed with the decision of the Union not to pursue a grievance to arbitration did not, in itself, constitute a breach of Section 20 of the *Act*. Applicant failed to establish a *prima facie* case. The application was dismissed.

Transcontinental LGM-Coronet - and - Communications, Energy and Paperworkers Union of Canada, Local 191 - and - I.J.B.
Case No. 273/09/LRA
July 29, 2010

DUTY OF FAIR REPRESENTATION - Union met with Employer to negotiate terms of Employee's layoff and to discuss bumping rights - Employee asserted Union acted arbitrarily when it altered its position at meeting and agreed to his being laid off; was reckless by failing to secure legal advice regarding bumping rights prior to meeting; and, when legal opinion was that he had bumping rights, acted in bad faith by failing to inform him of its mistake – Union filed grievance regarding bumping rights but arbitrator concluded dispute resolved by enforceable settlement – Held Union's interpretation re bumping rights not unreasonable to conclude Union made error; Union's failure to obtain legal opinion prior to meeting not unreasonable and not breach of Section 20(b) of *The Labour Relations Act* – Union's lack of communication unfortunate but did not amount to bad faith conduct under Section 20(b) – Application dismissed - Substantive Order.

The Employee was notified that he was being laid off. He spoke with the Union contending he should have been offered the right to bump. The Union met with the Employer and they could not see any bumping rights

in the Collective Agreement. After the meeting, the Employer emailed the Union summarizing the meeting and asking for confirmation the email accurately captured the discussion and the agreement between the parties. The Union replied agreeing with the summary and added that it considered the matter closed. After the Employee was advised of the outcome of the meeting, he told the Union he was still dissatisfied. The Union arranged for legal counsel to review the matter. As a result of legal opinion received, the Union contacted the Employer to advise that the Employee had the right to bump. The Employer responded that the discussions and the email exchange constituted an agreement. The Union then filed a grievance. An arbitration award was issued in which the arbitrator concluded that the dispute relating to the layoff was resolved by an enforceable settlement agreement and that the Union was estopped from proceeding with the grievance. The Employee then filed an application under Section 20 of *The Labour Relations Act* asserting that the Union acted arbitrarily in advocating and negotiating his layoff and waiving his rights to bump. He stated the Union went into a meeting with the Employer to discuss whether he had the skills and abilities for a particular position, completely altered its position and left with an agreement that he would be laid off. He asserted the Union was reckless in failing to investigate the facts and to secure legal advice. He also asserted that the Union acted in bad faith as it failed to inform him fully of its mistake with respect to his bumping rights. The Union's attempts to backtrack and to pursue a grievance did not take away from its breach of Section 20.

Held: The Board was satisfied that the evidence did not support a finding that the Union acted in an arbitrary manner. In preparation for meeting with the Employer, the Union representatives reviewed and considered the provisions of the Collective Agreement and were unable to identify any bumping rights for the Employee. Although the Union subsequently obtained a legal opinion that the Employee did have bumping rights, that issue was not considered at the arbitration hearing. It was not for the Board to assume the role of a surrogate arbitrator and decide that issue. The question for the Board was whether the Union's interpretation was one that reasonably could have been made in the circumstances. The Board was satisfied that the interpretation was not so completely outrageous, perverse or unreasonable as to justify a conclusion that it was a flagrant error or the Union failing or refusing to direct its mind to the issues. The Union's failure to obtain a legal opinion prior to its meeting with the Employer was not unreasonable and did not constitute a breach of Section 20(b). There was no evidence of hostility on the part of the Union towards the Employee or of the Union attempting to deceive the Employee or to knowingly misrepresent matters to him. There was some evidence of a lack of communication by the Union. While that lack of communication was unfortunate and cannot be condoned, in the circumstances of the case it did not amount to bad faith conduct under Section 20(b). As a result, the Board dismissed the application.

Rural Municipality of Springfield - and - Manitoba Government and General Employees' Union
Case No. 107/10/LRA
September 10, 2010

APPLICATION FOR CERTIFICATION – APPROPRIATE BARGAINING UNIT – EMPLOYEE - Casual Firefighters - Union applied for certification of firefighters employed by Municipality – Held bargaining unit of firefighters shared community of interest and appropriate unit for collective bargaining - Board could not deny certification of employees appropriate for collective bargaining because they may exercise statutory right to strike - Rule 28 of Board's *Rules of Procedure* modified to include those firefighters paid for at least one attendance at an accident or fire scene in each month during twelve week period preceding date of application - Applying modified formula under Rule 28, more than 65% of employees wished to have Union represent them – Certification granted.

The Union filed an application for certification for a unit covering all employees employed as firefighters by the Municipality. Relying on Rule 28 of the Board's Rules of Procedure, the Municipality asserted that the firefighters covered by the application worked on a voluntary, casual or part-time basis and therefore did not meet the definition of employee under *The Labour Relations Act* (the *Act)* because they did not work on a regular schedule week by week, but, rather worked sporadically. It submitted that pursuant to Section 39(2) of the *Act*, the Board ought to find the proposed unit to be inappropriate because certifying the unit would confer the right to strike on the firefighters contrary to the public policy evident in *The Firefighters and Paramedics Arbitration Act* which prohibited employees of a municipality employed full time as a member of a fire fighting department from striking.

Held: The firefighters in the proposed unit were, in essence, casual employees but they were expected to respond to a defined percentage of calls received on their pagers and that they would attend a defined percentage of mandatory training sessions for which they received remuneration. The Board accepted that municipalities were not employers as defined in *The Essential Services Act*, and therefore, were not covered by that legislation nor was the Municipality covered by *The Firefighters and Paramedics Arbitration Act* as that legislation only covered employees of a municipality employed full time as a member of a fire fighting department. A bargaining unit comprised of firefighters, all of whom are subject to common terms and conditions of employment for the purpose of fulfilling the mandate and goals of the Fire Service, shared a distinct community of interest and thereby constituted an appropriate unit for collective bargaining. The Board could not deny an entire group of employees who otherwise comprise a unit appropriate for collective bargaining the right to engage in collective bargaining with their employer because they may exercise their statutory right to strike under the *Act*. Having determined the firefighters shared a community of interest and that the proposed unit was appropriate for collective bargaining, the Board was satisfied that Rule 28 should be modified to include only those firefighters who had been paid for at least one attendance at an accident or fire scene in each month during the twelve week period preceding the date of the application. Applying the modified formula under Rule 28, the requirements of Section 40(1)1 of the *Act* had been met in that more than 65% of the employees in the unit found to be appropriate wished to have the Union represent them as their bargaining agent. Therefore, the Board granted certification.

Hudson Bay Mining and Smelting - and - International Brotherhood of Electrical Workers, Local 1405 - and - K.W.
Case No. 73/10/LRA
April 27, 2010

JURISDICTION – Employee filed application seeking remedy for unfair labour practice contrary to Section 20 of *The Labour Relations Act* - Pursuant to *Act Respecting Hudson Bay Mining and Smelting Co., Limited*, the works and undertaking of Employer deemed "works for the advantage of two or more provinces" and Union certified under *Canada Labour Code* - Board determined it did not have jurisdiction to deal with application because Employer was subject to federal jurisdiction - Application dismissed – Substantive Order.

University of Manitoba - and - National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada), Local 3007
Case No. 253/10/LRA
October 29, 2010

UNFAIR LABOUR PRACTICE – Employer breached Section 6(1) of *The Labour Relations Act* – Ordered to provide bargaining agent with names, home addresses and telephone numbers of all employees in the bargaining unit - Substantive Order – Reasons not issued.

Rural Municipality of Springfield - and - Manitoba Government and General Employees' Union
Case No. 257/10/LRA
November 1, 2010

REVIEW AND RECONSIDERATION - Employer filed application seeking review of certificate and reasons for Board's finding that "substantial employment connection" existed between this case and a prior certification decision involving different parties - Board did not accept Employer's assertion that Board refused to exercise its jurisdiction and erred in law by failing to accept Employer's argument that Sections 39(1) and 39(2)(b) of *The Labour Relations Act* allow Board to find proposed bargaining unit inappropriate on grounds advanced by Employer - As to consideration of prior case, Board's determinations reflected unique circumstances of case before it which was assessed in its own circumstances - Substantive Order.

PRACTICE AND PROCEDURE - TIMELINESS - Union asserted that Employer's review application and request for reasons both untimely as application for review cannot be filed after more than ten days have elapsed following date of decision - Review application was filed on tenth day following receipt of original decision - Board granted leave pursuant to Sections 4(4) which allowed enlargement of time for filing of review application - Substantive Order.

The Board certified the Union as the bargaining agent for all employees employed as firefighters by the Employer. The Employer filed an application seeking review of the decision to issue the certificate. It also requested the Board provide reasons regarding its finding that a "substantial employment connection" existed based on remarks made by the Board in *Portage la Prairie Teachers' Association of the Manitoba Teachers' Society* v. *Portage la Prairie School Division* (the *MTS case)* concerning the certification of a bargaining unit of substitute teachers. The Union asserted that the review application and the request for reasons were both untimely relying on Section 17(2) of the *Manitoba Labour Board Rules of Procedure* where an application for review cannot be filed after more than ten days have elapsed following the date of the decision. The Employer submitted the Board should enlarge the time for filing of the review application pursuant to Section 4(4) of the *Rules*.

Held: The review application was filed on the tenth day following the receipt of the original decision. Accordingly, the Board granted leave, pursuant to Sections 4(4) and 17(2) of the *Rules*, to file both the review application and the request for reasons. As to the request for reasons, the Board was satisfied that the certificate adequately distilled the Board's rationale and reasoning for its decision. Accordingly, the request for additional reasons was denied. The review application stood to be tested under Section 17(1)(c) of the *Rules*, which provided "in the absence of any new evidence, file a concise statement showing cause why the board should review or reconsider the original decision." The Board did not accept the Employer's assertion that the Board refused to exercise its jurisdiction and erred in law by failing to accept the Employer's argument that Sections 39(1) and 39(2)(b) of the *Act* allow the Board to apply those provisions in such a manner so as to find the proposed bargaining unit inappropriate on the policy grounds advanced by the Employer. As to consideration of the *MTS* case, the Board's determinations did reflect the unique circumstances of the case before it and the case was assessed in light of its own particular circumstances. In the result, the review application did not reveal sufficient cause why the Board should review or reconsider its original decision either on a principle of law or on a matter of policy. Therefore, the Board dismissed the application for review and reconsideration.

Grace Hospital - and - Canadian Union of Public Employees, Local 1599 - and - A.M.
Case No. 236/10/LRA
November 16, 2010

DUTY OF FAIR REPRESENTATION – Employer - Proper Party - *Prima facie* – Employee filed application complaining of alleged discriminatory and disrespectful treatment by management and co-workers, perceived problems in the workplace, or criticisms of policies and practices of Employer – Held complaints of that nature not proper focus of duty of fair representation application purpose of which is to impose standards of conduct on bargaining agent, not employer – As to complaint Union did not proceed to arbitration, it filed grievance at earliest opportunity, advanced grievance through highest level short of arbitration, made determination on likelihood of success at arbitration through review of Employee's total record and applicable legal principles, and Employee given notice of her right to appear before Union's Executive to state her case – Application did not recite any material facts, acts or omissions by Union to find it acted on basis of hostility, ill-will or dishonesty - Employee failed to establish *prima facie* case - Application dismissed.

The Employee filed an application alleging that the Union represented her in bad faith when it decided not to refer her termination grievance to arbitration. She submitted a number of concerns with actions taken by the Employer or with the policies of the Employer and which concerns were ignored by management and the Union. She asserted that those concerns resulted in discrimination, harassment and unfair treatment of her.

<u>Held</u>: The Employee made reference to numerous complaints and/or policies which were primarily related to her allegations that she has been subject to discriminatory and disrespectful treatment by management. Complaints about fellow employees, members of management, perceived problems in the workplace, or criticisms of the policies and practices of an employer were not the proper focus of an application under Section 20 of *The Labour Relations Act*, the purpose of which is to impose standards of conduct on a bargaining agent, not an employer. In the context of the decision of the Union not to proceed to arbitration, the application did not recite any material facts, acts or omissions on the part of the Union, or its representatives, which, if proven, would result in a finding that the Union acted on the basis of hostility, ill-will or dishonesty, that it attempted to deceive the Employee or that it refused to process the grievance for sinister purposes. The Employee disagreeing with the decision of the Union not to pursue the grievance to arbitration, standing alone, did not constitute a breach of Section 20 of the *Act.* The Union filed the grievance at the earliest opportunity to protect the Employee's interests; it advanced the grievance through the grievance procedure to the highest level short of arbitration; it obtained an extension of time for a referral to arbitration to allow the Union time to make a determination on the likelihood of success at arbitration; an opinion on the merits of proceeding, inclusive of a review of the Employee's total record and applicable legal principles, was obtained and shared with the Employee; and the Employee was given advance notice of her right to appear before the Union's Executive to state her case. None of this discloses "bad faith". The Board determined that the Employee failed to establish a *prima facie* case that the Union acted in bad faith and, accordingly, the application was without merit and dismissed the application.

<u>Sonoco Flexible Packaging - and - M.T., Communications, Energy and Paperworkers Union, Local 830 - and - C.J.B.</u>
Case No. 231/10/LRA
November 30, 2010

DUTY OF FAIR REPRESENTATION – Employee, terminated for violating conditions of Return to Work Agreement, agreed not to grieve second termination on basis that Record of Employment be amended to assist with benefits – Subsequently, he alleged Union violated Section 20 of *Labour Relations Act* for failing to follow up on issues associated with terminations and for settling first grievance one day prior to arbitration – Held Employee freely entered into settlement agreement after receiving advice from Union and its counsel - Employee second guessing settlement which he had agreed to and had benefitted from cannot be basis of Section 20 application – Union clearly justified in not filing grievance regarding second termination - Board noted unions often resolve grievances prior to proceeding to arbitration – Application dismissed - Substantive Order.

The Union settled the Employee's termination grievance one day prior to the arbitration date. The Return to Work Agreement provided that any improper conduct would result in termination. After the Union and its legal counsel met with the Employee to review the Agreement, he agreed to and signed the document. A few weeks after he returned to work, he was involved in a workplace altercation which resulted in his termination. The Employee requested that the Union inquire with the Employer whether it would agree to change the wording on the Record of Employment to assist with Employment Insurance Benefits. The Employer agreed on the condition that no grievance regarding the second termination would be filed. The Employee told the Union that he would agree to the condition. The Union did not file a grievance regarding the second termination. Subsequently, the Employee filed an application for Unfair Labour Practice contrary to Section 20 of *The Labour Relations Act* claiming the Union violated Section 20 when it failed to make inquiries or to follow up on facts and issues associated with the terminations of his employment. He further alleged that it was bad faith to settle one day prior to the arbitration.

<u>Held</u>: The Employee freely entered into the settlement agreement having had the opportunity to receive advice from the Union and its counsel. The fact an employee second guesses or disagrees with the settlement to which he had agreed and under which he had taken benefits cannot be the basis of a Section 20 application. Unions often resolve grievances prior to proceeding to arbitration. Moreover, unions may seek reinstatement to employment following termination on the basis of conditions like those set out in the Agreement. Throughout the process, the Union sought legal advice and counsel's opinion was that the Employee had breached his Agreement and further advised that a grievance would have no reasonable

chance of success. It is well-established that the reliance upon and decision to follow the advice of legal counsel is strong evidence that a union has not acted in violation of Section 20. With respect to the second termination, the Union provided a representative to him during the investigation meeting and it received an opinion from legal counsel that a grievance would have no reasonable chance of success. The Employee agreed not to grieve his termination on the basis that the Employer would amend his Record of Employment. In the circumstances, the Union was clearly justified in not filing a grievance regarding the second termination. The Union did not act in a manner which was arbitrary, discriminatory or in bad faith, nor did it fail to take reasonable care to represent the interests of the Employee with respect to his first or second termination. The Board was satisfied the Union did not violate Section 20 of the *Act* as alleged or at all. The Board determined the application was without merit and dismissed the application.

Quality Glass & Aluminum Ltd. - and - International Union of Painters and Allied Trades International, Local 739 - and - E.H.
Case No. 232/10/LRA
November 30, 2010

UNFAIR LABOUR PRACTICE – PRACTICE AND PROCEDURE - Undue delay – Employee filed complaint more than eight months following date he alleged Employer contravened *The Labour Relations Act* – Employee's reason for delay in filing was that he needed to check with various government and other entities prior to filing with Board - Attempts to file claims with other entities not acceptable explanation for delay - Board previously held "undue delay" means delays of six months - Application dismissed for undue delay - Substantive Order.

The Employee's employment was terminated November 2009. In August 2010, he filed an application Seeking Remedy for Alleged Unfair Labour Practice contrary to Section 7(h) of *The Labour Relations Act*. He alleged that on or about May 2009 and November 2009, the Employer committed an unfair labour practice contrary to Section 7(h) of the *Act*. He claimed that the Employer knowingly neglected his claims of injury so that their company record would not be tarnished. He further claimed that the Employer incorrectly completed his "separation papers".

Held: Section 30(2) of *The Labour Relations Act* provides that the Board may refuse to accept a complaint where its filing has been unduly delayed. In previous decisions, the Board has concluded that "undue delay" means delays of as little as six months in duration. In the present case, the Board was satisfied that the application was filed long after the Employee knew all of the facts and circumstances in support of his position that the Employer committed an unfair labour practice. The delay in filing the complaint was greater than eight months following the date upon which he alleged contraventions of the *Act*. The Applicant stated that the reason for his delay in filing the application was that he believed "all resources needed to be checked before sending my complaint" to the Board and that he did check with various entities, government and otherwise, prior to filing the present application. As the Board has noted in previous decisions, attempts to file claims with other entities was not an acceptable explanation for delay. Therefore, the Board determined the Employee unduly delayed in filing his application. Accordingly, pursuant to section 30(2) of the *Act*, the application was dismissed.

Quality Glass & Aluminum Ltd. - and - International Union of Painters and Allied Trades International, Local 739 - and - E.H.
Case No. 233/10/LRA
November 30, 2010

DUTY OF FAIR REPRESENTATION – PRACTICE AND PROCEDURE - Undue delay – Employee filed complaint more than eight months following his termination and more than a year after he became aware of alleged contraventions of *The Labour Relations Act* by Union – Employee's reason for delay in filing was that he needed to check with various government and other entities prior to filing with Board - Attempts to file claims with other entities not acceptable explanation for delay - Board previously held "undue delay" means delays of six months - Application dismissed for undue delay - Substantive Order.

The Employee's employment was terminated November 2009. In August 2010, he filed an application Seeking Remedy for Alleged Unfair Labour Practice contrary to Section 20 of *The Labour Relations Act*. He alleged he first became aware of the Union's alleged violation of Section 20 in May 2009. The Employee claimed that the Union failed to take reasonable care by not representing his interests regarding incidents that occurred at the work site and how his "separation papers" were incorrectly filled out by the Employer. He further claimed that the Union did not adequately represent him with respect to the termination of his employment.

Held: Section 30(2) of the *Act* provides that the Board may refuse to accept a complaint where its filing has been unduly delayed. In previous decisions, the Board has concluded that "undue delay" means delays of as little as six months in duration. In the present case, the Board was satisfied that the application was filed long after the Employee knew all of the facts and circumstances in support of his position that the Union committed an unfair labour practice. The delay in filing the complaint was greater than eight months following the date which he was terminated and more than a year after he stated he first became aware of the alleged contraventions of the *Act.* The Applicant stated that the reason for his delay in filing the application was that he believed "all resources needed to be checked before sending my complaint" to the Board and that he did check with various entities, government and otherwise, prior to filing the present application. As the Board has noted in previous decisions, attempts to file claims with other entities was not an acceptable explanation for delay. Therefore, the Board determined the Employee unduly delayed in filing his application. Accordingly, pursuant to section 30(2) of the *Act*, the application was dismissed.

CITY OF WINNIPEG - and - Canadian Union of Public Employees, Local 500 - and - R.B.
Case No. 279/10/LRA
December 9, 2010

DUTY OF FAIR REPRESENTATION – Discharge - Employee's duty of fair representation application did not plead or disclose concise statement of material facts, actions or omissions upon which he relied and which facts, if proven, would result in finding that Union acted in arbitrary or discriminatory manner under Section 20 of *The Labour Relations Act* - Union's Reply, including detailed written opinion, confirmed decision not to proceed to arbitration was made after Union interviewed Employee and potential witnesses and after affording Employee right to avail himself of internal appeal procedures - Therefore, Board determined Employee failed to establish *prima facie* case - Application dismissed - Substantive Order

The Employee filed a duty of fair representation application alleging that the Union failed to represent him regarding his termination. A National Representative of the Union prepared a detailed written opinion detailing the facts of the case; the Employee's previous disciplinary record; the position advanced by both parties; a review of applicable jurisprudence; and, an observation that the two witnesses to whom the Representative had been referred to by the Employee did not corroborate the Employee's version of events. The opinion concluded the case would have little chance of succeeding before an arbitrator. The Union asserted that it properly considered the merits of the case and reached a considered opinion that a grievance would not likely succeed at arbitration and that this decision was arrived at following the conclusion of the internal appeal procedures of the Union in which the Employee participated.

Held: The Employee's application did not plead or disclose a concise statement of the material facts, actions or omissions upon which he relied and which facts, if proven, would result in a finding that the Union acted in an "arbitrary" or "discriminatory" manner under Section 20 or would establish that the Union made its decision not to proceed with the arbitration on the basis of irrelevant factors or that the Union, through its officers or its Executive, displayed an attitude which can be characterized as indifferent, or capricious or that it acted in a non-caring or perfunctory manner. There were no facts pleaded in the application which, if proven, would result in a finding that the Union acted on the basis of hostility, ill-will or dishonesty or that it attempted to deceive the Employee or refused to process the grievance for sinister purposes. The Union's Reply, including the detailed written opinion, confirmed that its decision not to proceed to arbitration was made after the Employee and potential witnesses were interviewed by the Union and after affording the Employee the right to avail himself of the internal appeal procedures of the Union. Therefore, the Board determined that the Employee had failed to establish a *prima facie* case and that the application was dismissed.

O'Connell Nielsen EBC - and - B.S., United Brotherhood of Carpenters and Joiners, L. 343 - and - A.D.
Case No. 266/10/LRA
December 13, 2010

DUTY OF FAIR REPRESENTATION – Timeliness – Undue delay – Employee filed application eleven months after Union informed him grievance would not be pursued - Employee explained he was waiting for decision regarding complaint filed with Employment Standards Division – Filing complaint under *The Employment Standards Code* unrelated to application pursuant to Section 20 of *The Labour Relations Act* – Also, bare allegation Employee suffered depression within period of delay did not constitute adequate explanation for overall delay - Eleven-month delay in filing application constituted undue delay within Section 30(2) of the *Act* – Application dismissed for undue delay - Substantive Order.

The same day the Employee was dismissed from his employment, the Union filed a grievance claiming that he had been unjustly terminated. The Union asserted that after the filing of the grievance and subsequent to an investigation, the Employee was informed that the grievance would not be pursued in light of the facts disclosed to the Union during its investigation. Eleven months later, the Employee filed a duty of fair representation application alleging that the Union failed to process his grievance.

Held: Undue delay has been interpreted by the Board to mean periods of as little as six months in duration. In the leading case of Kepron v. Brandon University Faculty Association (2004), 103 C.L.R.B.R. (2d) 102, the Board comprehensively reviewed Section 30(2) of *The Labour Relations Act* and a number of the Board's decisions relating thereto. The principles enunciated in Kepron have been consistently applied by the Board in many of its subsequent decisions. In this case, the application was filed some eleven months after the Employee had knowledge of the Union's decision not to proceed with the grievance. The reasons advanced by the Employee did not constitute legitimate explanations for the delay in filing the application. The Employee asserted that he was waiting for a decision regarding the complaint he filed with the Employment Standards Division. Filing a complaint under *The Employment Standards Code* against one's employer was unrelated to an application filed pursuant to Section 20 of the *Act* against a bargaining agent for an alleged failure to represent an employee. Lastly, the bare allegation that the Employee suffered from a depression for a few months within the period of the delay did not constitute an adequate explanation for the overall delay. The Board determined that a delay of approximately eleven months in filing the application constituted undue delay within the meaning of Section 30(2) of the *Act*, as determined by the jurisprudence of the Board. The Employee had not provided a satisfactory explanation for the undue delay. As a result, the application was dismissed.

Manitoba Lotteries Corporation - and - General Teamsters Local Union No. 979 (Intervenor/Applicant) - and - National Automobile, Aerospace, Transportation & General Workers of Canada (CAW)
Case No. 248/10/LRA
December 17, 2010

REVIEW - PRACTICE AND PROCEDURE – EVIDENCE – Witness – Board issued Letter of Direction in which scope of hearing limited to specific allegations contained in Particulars in respect of three named employees - Union asserted Letter too restrictive and it ought to be allowed to adduce evidence beyond the three named employees - Board amended Letter indentifying other individuals eligible to be called as witnesses and ruled parties were free to call other witnesses provided that evidence directly related to scope of issues defined in Letter - Substantive Order.

The Board issued a Letter of Direction in which it determined that the scope of the hearing into the Teamsters' allegations of fraud by the CAW was limited to specific allegations contained in the Particulars furnished by the Teamsters in respect of three employees named in Paragraph 2 of the Letter. The Board found that the objections of three other employees did not allege that the CAW engaged in or committed acts of fraud, intimidation, coercion, or threatened to impose a pecuniary or other penalty. Accordingly, they had no further status in the proceedings. The Teamsters filed an application seeking review of the Letter asserting that it was too restrictive and that it ought to be allowed to adduce evidence beyond the three named employees.

The CAW's Reply to the application contained a section entitled "Additional Disclosure" in which a person was identified who witnessed some of the membership cards. The Teamsters submitted that based on the “additional disclosure”, the Application for Certification should be dismissed at that time on the basis that fraud, or at least irregular conduct, had been acknowledged by the CAW in its Reply; in the alternative, the hearing should be expanded to allow the Teamsters and the Board to determine whether other incidents of (alleged) misconduct had occurred; that the Teamsters should be allowed to call further evidence from persons who may have been misled; the Board should conduct its own investigation to satisfy itself that the obtaining of membership cards by the CAW was proper and that all cards were properly witnessed at the time the cards were signed by any applicant for membership; and counsel for the Teamsters also referred to specific individuals who should be available to testify, based on facts disclosed in the “additional disclosure” portion of the CAW Reply.

Held: The Board dismissed the request that the Application for Certification be dismissed as that was a question that may be raised at the conclusion of the hearing based on the submissions of the parties. It dismissed the request that the Board undertake its own investigation into the circumstances surrounding the obtaining of membership cards by the CAW. The Board affirmed its ruling regarding the three employees it originally ruled had no further status in the proceedings as the Teamsters did not rely on any new evidence, within the meaning of Section 17(1)(a) and (b) of the *Manitoba Labour Board Rules of Procedure*, in respect of this ruling of the Board. As well, the review application did not reveal sufficient cause, on either a principle of law or on a matter of policy, why the Board should review or reconsider its original decision because that determination reflected the long-standing standard practice and policy of the Board regarding objections of that nature. In light of the additional disclosure in the CAW Reply, the Board amended the Letter by indentifying other individuals that were eligible to be called as a witness and re-affirmed its ruling that the parties were free to call any witness they may choose to call, provided that the evidence to be given by that witness directly related to the scope of the issues defined by the Board in Paragraph 2 of the Letter as amended.

Manitoba Government and General Employees’ Union - and - Manitoba Human Rights Commission - and - V.S.
Case Nos. 26/09/LRA & 27/09/LRA
December 20, 2010

UNFAIR LABOUR PRACTICE – Discrimination - Employee alleged Employer discriminated against him for filing human rights complaint by subjecting him to demeaning and discriminatory change in supervision arrangements and by requiring him to undergo psychiatric evaluation – Held Employee considered workplace to be toxic prior to filing complaint and no credible evidence he was treated better or worse following filing of complaint - Executive Director reasonably and appropriately determined Supervisor should not have to supervise employee who filed complaint against her except to limited extent required - While mandatory medical examination may not necessarily be discriminatory, restriction from Employee attending work constituted *prima facie* discrimination in context of Section 7 of *The Labour Relations Act* – However, Employer’s decision based solely upon concerns about Employee's mental stability, his worsening conduct and evidence supported those concerns pre-dated filing of complaint – Individual who gave ultimate approval for evaluation, lacked knowledge of complaint at material time and not motivated by improper considerations - Application dismissed.

EMPLOYER – Employee filed unfair labour practice application naming Manitoba Human Rights Commission as employer - Commission denied being employer as it was not responsible for actions of Treasury Board and that Province of Manitoba employed Employee - While it would have been prudent for Employee to amend application by naming “Her Majesty the Queen in Right of the Province of Manitoba” as respondent, having regard to broad definition of employer in *The Labour Relations Act,* employment relationship existed between Employee and Commission.

DUTY OF FAIR REPRESENTATION – Scope of Duty - Employee claimed due to Union's alleged failures with handling accommodation grievance, he was forced to retire and involuntary retirement constituted constructive dismissal under Section 20(a) of *The Labour Relations Act* - Board interpreted dismissal to mean termination of employment for culpable conduct or innocent absenteeism – Retirement not dismissal in normal and ordinary meaning of term - Section 20(a) of *Act* not applicable and standard to be applied set out in Section 20(b).

DUTY OF FAIR REPRESENTATION – UNION - Internal Union Affairs – Failure to Refer Grievance to Arbitration - Employee complained Union Director and not Screening Committee made ultimate determination not to proceed to arbitration – Held Director's decision based on legal advice from experienced counsel and reliance upon advice not superficial, capricious, cursory, grossly negligent, implausible or flagrant and did not constitute breach of duty of fair representation – Fact that Director made determination not breach of statute and not violation of Union's internal policy – Board does not dictate sort of meetings or appeal processes unions must adopt.

EVIDENCE – Witness - Employee who filed duty of fair representation and unfair labour practice applications not credible witness as his evidence frequently in disharmony with preponderance of probabilities - Employee evasive in answering questions, had selective recall, favoured information that confirmed his views and hypotheses while minimizing, discounting, or ignoring information not consistent with his beliefs.

DUTY OF FAIR REPRESENTATION – Employee alleged Union failed to conduct itself in proactive manner involving worker with disability; assigned his case to Union Representative with little knowledge of matter while his usual representative was on vacation; did not proceed in timely manner with his accommodation grievance; and did not properly advise him of decision not to advance grievance to arbitration – Duty may require union to assist disabled employee obtain medical reports but Employee, an experienced human rights investigator, uniquely well-suited and competent to obtain medical reports - Union being content to have him continue to correspond with his doctors did not indicate uncaring or indifferent attitude - Union's failure to seek information from other doctors or experts not arbitrary, discriminatory or in bad faith as Union reasonably concluded if pre-eminent specialist unwilling to provide sufficient medical support for accommodation, then little sense in writing to anyone else – Union did not violate *Act* when it refused to comply with Employee's post-retirement suggestion to contact doctor - Board did not agree Union Rep had little knowledge of case and no steps were taken to protect Employee's interests - Employee did not request back to work meeting be deferred until usual Union Rep returned - While alternate Union Rep did not review file or medical reports before meeting, given he received advice and information from Union's Counsel and he met with Employee prior to the meeting, his being assigned to case did not constitute violation of Section 20(b) - Board found suggestion of half-time work with a half caseload good faith attempt to assist Employee who consented to proposal being presented - When Employee attempted to repudiate agreement, Union Rep immediately requested Employer to work out solution and did not violate Section 20(b) - Thereafter Union's Counsel provided sound advice to Employee to attend at work as directed and clearly and unconditionally indicated that if Employee elected to retire, Union would not grieve because circumstances did not constitute constructive dismissal - Counsel, an experienced labour lawyer, acted reasonably and conscientiously in making him aware of consequences - Counsel's advice not being in writing was of no consequence and did not constitute violation of Section 20(b) - As to not proceeding in timely manner, delay resulted from Union waiting for Employee to provide medical information which was reasonable as doctor determined Employee's condition was mild and did not indicate that he required accommodation - Union delay in deciding to withdraw grievance when medical information did not support accommodation, but waiting for outcome of human rights complaint in hindsight, arguably ill-advised, but was not arbitrary, discriminatory or bad faith and did not constitute violation of Section 20 - Employee complained Union failed to utilize human rights investigator's Case Analysis Report to take action with Employer - Board noted report not product of formal hearing process and did not represent Human Rights Commission's findings or ultimate determination - Union's decision not to take further action on basis

of report cannot be characterized as arbitrary, discriminatory or in bad faith – Board found Union's representation not perfect, particularly communication with Employee, but was satisfied Union did not act in manner which was arbitrary, discriminatory or in bad faith and therefore, did not violate Section 20(b) of the *Act* - Application dismissed.

Between 2005 and 2008, the Commission was of the opinion that the Employee exhibited an inability to control his temper; focused unduly on his medical condition; exercised poor judgement respecting publications he posted on websites that contained violent and disturbing thoughts or constituted unprofessional conduct; and exhibited escalating anger towards his Supervisor for what he perceived as her failure to address his health issues. In 2008, he filed a complaint under *The Human Rights Code* alleging the Employer failed to reasonably accommodate his disabilities and took reprisals against him for requesting accommodation. After he filed the complaint, a supervisory change was made regarding review of his reports. However, his Supervisor continued to assign him cases. Concerned over the Employee's mental state, the Commission initiated the process that led to Treasury Board approving that he undergo a mandatory psychiatric assessment. Beginning in 2006, the Union provided continuous assistance and advice to the Employee. It filed grievances regarding a written warning, a suspension and the failure to accommodate the Employee's disability. A back to work meeting was held to discuss the accommodation grievance. As his Union Rep was on vacation, another representative was assigned to attend the meeting. A settlement was reached at the meeting to accommodate the Employee by permitting him to work half-time. Against the advice of the Union, he decided to retire having determined later that the accommodation was not to his satisfaction.

The Employee filed an unfair labour practice application alleging the Employer contravened Section 7(d) and (g) of *The Labour Relations Act* by discriminating against him for filing a human rights complaint, by subjecting him to a demeaning and discriminatory change in his supervision arrangements and further, by requiring him to undergo a psychiatric evaluation without a proper basis for doing so. The Commission denied that it was the employer and that the "Province of Manitoba" employed him. Second, he filed an application alleging the Union failed to comply with the duty of fair representation claiming that it did not proceed in a timely manner with his accommodation grievance and did not properly advise him of its decision not to advance the grievance to arbitration. Also he claimed the Union failed to conduct itself in a proactive manner involving a worker with a disability. As a result of the Union's alleged failures, the Employee asserted he was forced to retire and the involuntary retirement constituted a constructive dismissal within the meaning of Section 20(a) of the *Act.* He complained that no attempt was made to defer the back to work meeting until his Union rep returned from vacation and that the other Union rep, who had little knowledge of his case, proposed a solution which involved no accommodation. The Commission and the Union assailed the Employee's credibility submitting that he was either deceptive or delusional and an evasive witness whose evidence was at times entirely inconsistent with credible witnesses whose testimony was supported by detailed notes and documentary evidence.

<u>Held:</u> The Board found that the Employee's evidence was frequently in disharmony with the preponderance of probabilities. He had selective recall and favoured information that confirmed his views and hypotheses while minimizing, discounting, or ignoring information that was not consistent with his beliefs. At other times he was evasive in answering questions. On the whole, the Board found he was not a believable or credible witness.

<u>Employer contravention of Section 7 of *The Labour Relations Act*</u>
The Employee filed an application under the *Code* and therefore he was participating in a proceeding under that legislation. However, the Commission submitted it was not the employer and it was not responsible for the actions of Treasury Board. The Board held that, while it would have been prudent for the application to be amended by naming "Her Majesty the Queen in Right of the Province of Manitoba" as a respondent, having regard to the broad definition of "employer" in the *Act,* the Board accepted that an employment relationship existed between the Employee and the Commission. With regards to the supervisory responsibility of the Employee being divided, the Board noted no other employee was subject to a similar arrangement. However, the Executive Director reasonably and appropriately determined that the Supervisor should not have to supervise an employee who filed a human rights complaint against her, except to the limited extent that was absolutely required. The Board was satisfied that the change in Employee's supervision did not have the effect of imposing burdens, obligations or disadvantages upon him or limiting his access to opportunities, benefits and advantages available to others. The Employee also suggested that the workplace became

chilled following the filing of his complaint. The evidence indicated that the Employee considered the workplace to be toxic prior to filing complaint. There was no credible evidence that he was treated any better or any worse following the filing of the complaint. With regards to the mandatory psychiatric assessment, the Employee was not allowed to return to work until the assessment was completed. While the direction that he undergo a mandatory medical examination may not necessarily be discriminatory, the direction to attend the examination and the restriction upon him from attending work constituted *prima facie* discrimination in the context of Section 7 of the *Act* for the purpose of shifting the onus to the Commission. The Board was satisfied that the Commission's decision was based solely upon substantial concerns it had about the Employee's mental stability which was a legitimate motivation. Considerable evidence supported the Commission's concerns which pre-dated filing of the human rights complaint. Further, his conduct worsened in 2008. The Board was satisfied the Treasury Board official, who gave the ultimate approval for the assessment, lacked any knowledge of the complaint at the material time and therefore could not have been motivated by any improper considerations. The mandatory medical assessment policy did not appear to obligate the employer to consider lesser steps. Therefore, the Employee's application alleging a breach of Section 7 of *Act* was dismissed.

Section 20 Complaint

The Board has interpreted dismissal to mean termination of employment for either culpable conduct or by innocent absenteeism. Therefore, retirement was not a dismissal in the normal and ordinary meaning of that term. Section 20(a) of the *Act* was not applicable and the standard to be applied was set out in Section 20(b). Union Counsel clearly and unconditionally indicated to the Employee that if he elected to retire, it would not grieve because the circumstances did not constitute a constructive dismissal. Counsel, an experienced labour lawyer, acted reasonably and conscientiously in making him aware of the consequences of his actions. Counsel's advice not being in writing was of no consequence and did not constitute a violation of Section 20(b).

As to the Union not proceeding in a timely manner, the Board found the Union secured an early date for the Employee to meet with the Screening Committee regarding the accommodation grievance and wisely elected to wait for the Employee to provide further medical information if the grievance was to succeed. The delay was reasonable as the doctor determined his hypertension was mild and did not indicate that he required accommodation. The fact that the Union elected not to withdraw the grievance when the medical information did not support accommodation, but instead kept the case alive pending the human rights complaint can hardly be characterized as arbitrary, discriminatory or bad faith. While delaying the decision was, in hindsight, arguably ill-advised, it did not constitute a violation of Section 20. The Employee complained that the Union's Director of Legal and Rural Services, and not the Screening Committee, made the ultimate determination not to proceed to arbitration. The Director's decision was based on clear and cogent legal advice from experienced counsel. His reliance upon that advice was not superficial, capricious, cursory, grossly negligent, implausible or flagrant and did not constitute a breach of the duty of fair representation. Moreover, the fact that the Director and not the Screening Committee made the determination did not breach the statute and did not violate the Union's internal policy. In any event, the Board has previously determined that it does not dictate the sorts of meetings or appeal processes unions must adopt.

The duty of fair representation may require a union to assist an employee obtain medical reports where the employee is not expected to be able to secure such reports on their own. As an experienced human rights investigator, the Employee was uniquely well-suited and competent to obtain the medical reports. The Union being content to have the Employee continue to correspond with the doctors did not indicate, as alleged, an uncaring or indifferent attitude. In addition, the Employee's complaint that the Union violated the *Act* when it refused to comply with his July 2008 suggestion that his doctor be contacted again was without merit as by that time the Employee had retired. The Union's failure to seek information from any other doctors or experts was not arbitrary, discriminatory or in bad faith. The Union, based upon the assessment of experienced legal counsel, reasonably concluded that the specialist treating the Employee was the pre-eminent hypertension specialist in Manitoba and that if he was unwilling to provide sufficient medical support for the accommodation, then there was little sense in writing to anyone else.

The Board did not agree with the Employee's allegation that a Union representative with little knowledge of his case was assigned to his case and no steps were taken to protect his interests. The Employee did not

request the meeting be deferred until his usual Union Rep returned. While the alternate Union Rep did not review the file or medical reports before the meeting, given he received advice and information from Union's Counsel in advance of the meeting and that he met with the Employee prior to the meeting, the Board found that his being assigned to the case did not constitute a violation of Section 20(b). As to the complaints about the back to work meeting, the Board found the suggestion of half-time work with a half caseload was a good faith attempt to assist the Employee who endorsed and consented to the proposal being presented. Furthermore, when the Employee attempted to repudiate the agreement, the Union Rep immediately requested time from the Employer to attempt to work out a solution and did not violate Section 20(b) of the *Act*. Thereafter, Union's Counsel provided sound advice to the Employee to attend at work as directed. However, the Employee elected to retire that day. Counsel's actions were clearly not arbitrary, discriminatory or taken with any trace of bad faith.

Following the Employee's retirement, the human rights investigator assigned to his case issued a Case Analysis Report. The Employee complained that the Union failed to utilize the report to take action with the employer or provide him with any assistance. The Union reviewed the report and Counsel concluded the report did not constitute findings and was unshaken in his view that Employee's accommodation grievance did not have merit. The report was not the product of a formal hearing process, but merely an investigation and did not represent the Commission's findings or ultimate determination. The Union's decision not to take further action on the basis of the report cannot be characterized as arbitrary, discriminatory or in bad faith.

The duty of fair representation does not impose perfection as the standard in defining the duty of diligence assumed by the Union. The Union's representation was certainly not perfect, particularly with respect to how it communicated with the Employee. However, the Board was satisfied that the Union represented the Employee in a manner which complied with the obligations set out in Section 20(b) of the *Act.* As a result, the Board determined the Union did not act in a manner which was arbitrary, discriminatory or in bad faith in representing the rights of the Employee under the collective agreement and, therefore, did not violate Section 20(b) of the *Act* as alleged or at all. Accordingly, the duty of fair representation application was dismissed.

<u>Tuxedo Villa Nursing Home - Extendicare - and - Canadian Union of Public Employees, Local 2180 - and - H.A.A.</u>
Case No. 300/10/LRA
January 5, 2011

DUTY OF FAIR REPRESENTATION – Employee submitted Union Executive ignored her presentation why her grievance should proceed to arbitration – Submission based on Union's letter in which only three sentences explained their decision but did not include points she presented - Employee did not dispute she met with Union Representative; that she received Representative's lengthy written opinion recommending not proceeding to arbitration; and she appeared before Union Executive and stated case for proceeding to arbitration – Board held given sensitive nature of evidence Union Executive prudent to not provide details in letter - That manner of communicating decision did not disclose *prima facie* breach of Section 20 of *The Labour Relations Act* - Steps taken by Union in assessing whether it would proceed to arbitration reflected degree of care which a person of ordinary prudence and competence would exercise - Employee failed to establish *prima facie* case - Application dismissed - Substantive Order.

The Employee filed an application under Section 20 of *The Labour Relations Act* alleging that the Union failed to represent her regarding the termination of her employment. In her written submission with the application, the Employee did not dispute that she met with the Union's International Representative; that she received his lengthy written opinion recommending not proceeding to arbitration; and that she appeared before the Local Executive of the Union and stated her case for proceeding to arbitration. She asserted that the Union failed to accept her explanation of circumstances surrounding her termination of employment. She submitted that the Local Executive degraded her case and ignored her presentation. Her evidence for this was based on their response letter in which they only wrote three sentences which explained their decision, but did not include the points she presented for further consideration.

Held: Given the sensitive nature of the evidence relating to the case, it was prudent for the Local Executive not to provide factual and other details in the communication of its decision to the Employee. That manner of communicating the decision did not disclose a *prima facie* breach of Section 20. The Employee disagreeing with the decision of the Union not to proceed to arbitration with the Grievance, standing alone, did not constitute a breach of Section 20. A union is entitled to decide not to file a grievance; not pursue a grievance to arbitration; or to settle a grievance without an employee's agreement as long as the union is not arbitrary, discriminatory, or acts in bad faith or, in the case of a dismissal, fails to take reasonable care to represent the employee's interests. The Board noted that the Employee attached a copy of the written opinion to the application and that the opinion recited the background to the case, the steps which the Union undertook on the Employee's behalf and the result of interviews with the Employee. The material before the Board revealed that the decision not to proceed to arbitration was made after affording the Employee the right to avail herself of the internal appeal procedures of the Union. In the Board's view, all of the objective steps taken by the Union in assessing whether it would proceed to arbitration reflected the degree of care which a person of ordinary prudence and competence would exercise in the same circumstances. As a result, the Board determined that the Employee failed to establish a *prima facie* case and that the application was without merit and was dismissed.

City of Winnipeg - and - Canadian Union of Public Employees, Local 500 - and - R.B.
Case No. 329/10/LRA
February 2, 2011

REVIEW – New Evidence - Employee submitted co-worker's signed statement constituted new evidence for Board to review and reconsider Dismissal Order - Board satisfied witness upon whose statement Employee relied was interviewed twice by Union Representative prior to Union's decision not pursue Employee's grievance to arbitration - Union considered interviews in developing written opinion regarding whether or not to proceed with Employee's grievance and interviews were known to Union Executive – Held co-worker's statement not "new evidence" within the meaning of Section 17(1)(b) of the *Manitoba Labour Board Rules of Procedure* as it was available prior to filing of original application - Review application did not reveal sufficient cause, on principle of law or on matter of policy, pursuant to Section 17(1)(c) of the *Rules,* why Board should review or reconsider original decision - Substantive Order.

The Employee filed an application seeking review and reconsideration of the Board's Order dismissing his duty of fair representation application. The Employee relied on a statement signed by a fellow employee which the Employee submitted constituted new evidence which changed the situation such that the Board ought to review and reconsider the Order. The Employee asserted that the fellow employee's statement amounted to lack of review from the Union and lack of advice to himself. The Union submitted that it was aware of the evidence, investigated it, and made a determination that it would not be of assistance regarding the Employee's grievance. It asserted that the alleged new evidence did not differ significantly from the facts revealed in its Reply to the original application, meaning that the evidence was available prior to the filing of the original application.

Held: The Board was satisfied that the witness, upon whose brief statement the Employee relied, was interviewed twice by the Union Representative prior to the Union's decision that it would not pursue the Employee's grievance to arbitration. Those interviews were considered by the Union Representative in developing the written opinion regarding whether or not to proceed with the Employee's grievance and the results of those interviews were known to the Executive of the Union. Accordingly, the Board was satisfied that what was placed before it on the review application was not "new evidence" within the meaning of Section 17(1)(b) of the *Manitoba Labour Board Rules of Procedure* as it was available prior to the filing of the original application. In reaching this conclusion, the Board reaffirmed that its assessment of a Section 20 application was not in the nature of an appeal on the merits of a bargaining agent's decision. Rather, the Board assesses whether or not the decision reached by the Union reflected arbitrary, discriminatory or bad faith conduct, or in the case of a dismissal, reflected a failure to take reasonable care to represent an employee's interest. Based on those criteria, the review application did not reveal sufficient grounds for the Board to rescind, amend, alter or vary its original decision in the Order. The review application did not reveal sufficient cause, on either a

principle of law or on a matter of policy, pursuant to Section 17(1)(c) of the *Rules,* why the Board should review or reconsider its original decision. As a result, the Board dismissed the review application.

E.H. Price Ltd. - and - Sheet Metal Workers' International, Local Union No. 511 - and - Q.N.
Case No. 338/10/LRA
February 7, 2011

DUTY OF FAIR REPRESENTATION – Discharge – *Prima Facie* – Employee's application recited employment history ending with his termination for violating Last Chance Agreement – Union asserted Employee never requested grievance be filed - Held application did not contain any assertions or allegations that Employee ever requested Union to represent his interests; to file a grievance; or to pursue a settlement with Employer nor any facts relied on by Employee to support assertion Union acted in arbitrary, discriminatory or bad faith manner or failed to take reasonable steps to represent interests of Employee - Employee failed to establish *prima facie* case – Application dismissed - Substantive Order.

The Employee filed a duty of fair representation application. His application recited the history of his employment which ultimately led to his termination. The Union asserted the Employee was terminated for violating a Last Chance Agreement but he never requested that a grievance be filed on his behalf.

Held: The application did not include any allegation or facts recited that the Employee ever contacted the Union to represent him, nor were there any facts relied on by the Employee to support an arguable assertion that the Union acted in an arbitrary, discriminatory or bad faith manner or that it, in any way, failed to take reasonable steps to represent the interests of the Employee. While the application recited the Employee's employment history with the Employer, including his agreeing to the Last Chance Agreement, the application did not contain any assertions or allegations that the Employee ever requested the Union to represent his interests; to file a grievance; or to pursue a settlement in accommodation with the Employer. As the application contained no allegations or particulars of alleged misconduct of the part of the Union nor did it allege that the Employee ever requested the Union to act on his behalf, the Board determined that the Employee failed to establish a *prima facie* case that the Union acted contrary to Section 20 of the *Act*. The Board determined that the application was without merit and dismissed the application.

Winnipeg Free Press - and - Communications, Energy & Paperworkers Union of Canada, Local 191 - and - M.S.
Case No. 228/10/LRA
February 18, 2011

EMPLOYEE – INDEPENDENT CONTRACTOR – Freelance – Board ruled alleged Employee was freelance columnist performing services as person in business on own account and was independent contractor not "employee" within the meaning of *The Labour Relations Act;* Employee not included in bargaining unit; and, was not a person on whose behalf a collective agreement was entered into - Substantive Order.

The Union filed an Application Seeking Board Determination pursuant to Section 142(5) and 142(5)(a), (d), and (e) of *The Labour Relations Act*. The Employer submitting that the Alleged Employee was engaged by the Employer as a freelancer, pursuant to a Freelance Agreement, and she was not an employee for the purposes of *The Labour Relations Act*.

Held: The Board ruled that the Employee was not an "employee" within the meaning of the *Act.* She was a "freelancer" performing the services at issue as a person in business on her own account and, as such, was an independent contractor. The relationship between the Employee and the Employer was clearly distinct from that of the columnists and staff reporters who were employees and were included in the bargaining unit. It also ruled the Employee was not included in the bargaining unit for which the Union had been certified and was not a person on whose behalf a collective agreement was entered into.

Manitoba Lotteries Corporation - and - General Teamsters Local Union No. 979 (Intervenor) - and - National Automobile, Aerospace, Transportation & General Workers of Canada (CAW)
Case No. 178/10/LRA
February 22, 2011

RAID – Incumbent bargaining agent objected to Union's Application for Certification and alleged Union committed fraud in obtaining membership support of seven employees – Evidence did not disclose fraud by Union for signing of first employee's card – Second employee's evidence of misrepresentation of nature of membership card stood uncontradicted – Some concerns surrounded signing of third employee's card, but his evidence, standing alone, did not objectively reveal Union representative knowingly misrepresented nature of membership card – Witnessing of membership cards for four other employees raised concerns not of technical irregularities but of negligence or carelessness - Even if membership evidence of employees were not counted, Union met threshold level of support for certification - Proper remedy for irregularities disclosed was to count ballots cast of previously conducted Representation Vote – Substantive Order.

The CAW filed a displacement application for certification. The incumbent bargaining agent, the Teamsters, objected to the application. The Board conducted a representation vote to determine which of the CAW or Teamsters would represent the affected employees. The ballot box was sealed pending a decision on the Teamsters' allegations of fraud by CAW. The scope of the hearing was limited to specific allegations in respect to three employees who also filed individual objections.

Held: The evidence did not disclose that there was any fraud by CAW or a responsible official or organizer of CAW concerning the signing of the first employee's card. The Board accepted the second employee's evidence that a CAW organizer did misrepresent the nature of the membership card as her evidence on the material facts stood uncontradicted. While the Board had concerns in respect of the circumstances surrounding the signing of the third employee's card, it was satisfied that the employee's evidence, standing alone, did not objectively reveal that a representative of CAW made any knowing misrepresentation of the truth regarding the nature of the membership card or concealed material fact regarding the nature of the card. However, the findings of the Board in respect of the three employees did not sustain a ruling that there be an automatic dismissal of the application. While the disclosures made by CAW regarding the witnessing of membership cards from four other employees raised serious concerns and which could not be characterized as technical irregularities, the Board determined that the proper characterization reflected negligence or carelessness but did not constitute fraudulent conduct from the perspective that there was a knowingly false or misrepresentation of the truth to the Board in the filing of the application. The Board therefore determined that it ought not reject all of the membership evidence and that the proper remedy for the irregularities disclosed was that a vote be conducted pursuant to Section 45(4)(c) of *The Labour Relations Act* to determine the wishes of the employees. Even if the membership evidence filed on behalf of the employees were not counted for the purpose of determining support for the application, the CAW still met the threshold of 45% or more as required by Section 40(2) of the *Act*. Therefore, the ballots cast in the Representation Vote already conducted by the Board were to be counted.

Rural Municipality of East St. Paul - and - Canadian Union of Public Employees, Local 500 - and - J.K.
Case No. 28/11/LRA
February 25, 2011

DECERTIFICATION – TIMELINESS - Employees - One month after effective date of collective agreement, Employee filed application seeking cancellation of certificate – Employee relied on Section 49(3) of *The Labour Relations Act* submitting he would incur losses over next six months by having to continue to remit union dues pursuant to Collective Agreement - Board satisfied application untimely pursuant to Section 35(2) and 49(2) of the *Act* and reasons advanced in respect of Section 49(3) of the *Act* did not constitute "substantial and irremediable damage or loss" within the meaning of Section 49(3) - Application dismissed - Substantive Order – Reasons not issued.

Winpak Ltd. - and - J.A.
Case No. 12/11/LRA
March 17, 2011

UNFAIR LABOUR PRACTICE – Discharge – Exercising legislated rights - Employee alleged Employer acted contrary to various subsections of Section 7 of *The Labour Relations Act* by wrongfully terminating her employment as consequence of her filing harassment complaint – Held essence of Employee's complaint was Employer failed to properly apply internal harassment policy - Such contentions do not fall within Section 7 - Employee failed to establish *prima facie* case - Application dismissed - Substantive Order.

The Employee filed an application for an alleged unfair labour practice committed by the Employer contrary to subsections 7(d), (e), (f), (g), and (h) of *The Labour Relations Act*. The Employee alleged that she was wrongfully terminated from her employment without cause as a consequence of her filing a harassment complaint against her Supervisor and that the manner in which she was dealt with by the Employer was contrary to the Employer's own internal harassment policies.

Held: In determining whether the Employee established a *prima facie* case under subsections 7(d), (e), (f), (g) and (h) of the *Act*, the Employee must establish two elements, namely:

(i) that the Employer, as an objective fact, discharged the Employee. This first element was established by the Employee in that she was discharged on August 24, 2010; and
(ii) that, in relation to the Employer's action described in (i) above, the Employee was engaged in one or more of the activities or forms of conduct described in subsections 7(d), (e), (f), (g) and (h) of the *Act*. The onus was on the Employee to establish that a *prima facie* case existed on the balance of probabilities.

Based on the application, the Board was satisfied that there were no facts contained in the application which, even if proven and not rebutted and contradicted, would support a conclusion that the Employer breached any of the subsections of Section 7 of the *Act*. The Board assessed whether a *prima facie* case existed in respect of the particular statutory provisions relied upon by the Employee and, when making that assessment, there must be more than a mere allegation or assertion. Rather, there must be a sufficient factual foundation evident in the application itself in order to enable the Board to draw reasonable conclusions therefrom and which, at a minimum, would call for an answer from the Respondent. The specific provisions in Section 7 of the *Act* are focused in their intent and they are not a "catch all" to remedy dismissals from employment in the general sense. In this case, the essence of the Employee's complaint is that the Employer failed to properly apply its own internal harassment policy to the complaint filed by the Employee and that it was in breach of its own policy or policies and, as a consequence, treated the Employee unfairly. Such contentions do not fall within the purview of Section 7 of the *Act*. Accordingly, the Board found that the Employee has failed to establish a *prima facie* case under Section 7 of the *Act* and, in the result, the application was dismissed.

TC Industries of Canada Company West - and - USW DISTRICT 3, Local 9074 - and - S.W.F.
Case No. 92/09/LRA
March 17, 2011

DUTY OF FAIR REPRESENTATION – Scope of Duty - Employee unable to work resulting from workplace injury - Union not obligated by Section 20 of *The Labour Relations Act* to assist Employee with Workers Compensation claim or appeal as statutory Workers Compensation benefits not rights under collective agreement - Portion of duty of fair representation complaint relating to Union's failure to assist with WCB claim and related appeal dismissed - When Union was contacted, it provided timely and appropriate representation to reasonable and practicable extent given Employee's failure to seek Union's assistance in timely manner and his further failure to reasonably cooperate with Union with respect to its attempts to represent him - Employee failed to satisfy onus that Union acted contrary to Section 20 of the *Act* - Application dismissed - Substantive Order.

As a result of a workplace injury sustained in August 2007, the Employee was no longer able to work. He filed a claim for Workers Compensation benefits which was initially rejected. The Employee received weekly indemnity benefits until the benefits were terminated by the insurer about December 31, 2007. He claimed he made numerous attempts to contact the Union. In November 2008, officials of the Union met with him. He demanded assistance with his WCB claim and to get his job back. However, he refused to provide the Union with a copy of his WCB file at that meeting. The November meeting was first occasion that the Union was advised the Employee's employment had been terminated. Following the meeting, the Union met with the Employer which was unwilling to reinstate the Employee. The Union determined the time for filing a grievance was well beyond the time limits set forth in the collective agreement. Accordingly, the Union concluded that a grievance regarding the termination was untimely and would not be successful. The Employee did not contact the Union between November 2008 and April 1, 2009 at which time he filed a duty of fair representation application with the Board.

Held: Statutory Workers Compensation benefits are not "rights of an employee under a collective agreement" and bargaining agents are not obligated by section 20 of *The Labour Relations Act* to assist employees with their WCB claims or appeals. Accordingly, the portion of the Employee's complaint relating to the Union failing to assist him with his WCB claim and the related appeal was dismissed. The Board determined that the Employee failed to contact the Union in a timely fashion with respect to his workplace issues, including the termination of his employment. When the Union was contacted, it provided timely and appropriate representation to the Employee to the extent that was reasonable and practicable given all of the circumstances including the Employee's failure to appropriately seek the Union's assistance in a timely manner and the further failure of the Employee to reasonably cooperate with and assist the Union with respect to its attempts to represent him. The Board determined that the Employee failed to satisfy the onus to establish that the Union acted contrary to section 20 of the *Act* as alleged or at all. Accordingly, the application was dismissed.

Pursuant to *The Employment Standards Code*

Ashique Enterprises Inc. t/a Central Chiropractic Centre - and - T.D.
Case No. 280/09/ESC
April 16, 2010

EMPLOYEE - INDEPENDENT CONTRACTOR — Chiropractor filed claim for wages owing submitting she was an employee as Employer became increasingly controlling - Board concluded Employer did exert some control over Chiropractor's activities with goal for her to increase volume of services but was not overly involved in prescribing methods result was to be achieved – Board determined Chiropractor was an independent contractor – Claim for wages dismissed - Substantive Order.

EMPLOYEE - INDEPENDENT CONTRACTOR – EVIDENCE – Decision of Courts - In support of its position that Chiropractor was independent contractor, Employer submitted appeal decision of Tax Court of Canada that established Employee was not an employee under *Employment Insurance Act* - Board noted judgment of Tax Court was not conclusive of issue before it because tests applicable under *Employment Insurance Act* may be different than tests applied by Board, and because judgment was on consent and matter was determined without full hearing and without specific factual determinations being made on issues.

The alleged Employee, who was a chiropractor, filed a claim for wages owing. The Employer argued the Employee was a self-employed independent contractor. In support of the Employer's position, the Board noted that for a period during the relationship between the parties, the Employee considered herself to be an independent contractor. In addition, she had keys to the premises and was able to access files as required to perform her chiropractic services. She had purchased a significant piece of equipment worth $7,000, which she used to provide services to clients and which she retained when her relationship with the Employer terminated. She was paid on a commission basis and therefore had the opportunity to increase her income by increasing the number of clients. She paid her own premiums for her professional liability insurance, disability

insurance and also paid any professional dues. Also, the Employer was successful in an appeal to the Tax Court of Canada in establishing that the Employee was not an employee under the *Employment Insurance Act.* In support of the Employee's position, the Board noted that her clients belonged solely to the Centre. Upon termination of the Agreement, the client records remained the property of the Centre. The Agreement contained a non-competition provision effectively preventing her from working elsewhere. Finally, the Employee submitted that the Employer became increasingly controlling and sought to direct her in many aspects of her work.

Held: As to the judgment of the Tax Court, the Board noted it was not conclusive of the issue before it, because the tests applicable under the *Employment Insurance Act* may be different than the tests applied by the Board, and because the judgment was on consent, and the matter was therefore determined without a full hearing and without specific factual determinations being made on all of the issues. The Board considered the contradictory evidence, the arguments presented, the definition of "employee" and "employer" in the *Code*, and the legal tests which have been adopted by the courts and the Board. When assessing the degree of control, the Board concluded that the Employer was frustrated by what he regarded as the low volume of services she was providing and was actively attempting to increase that volume, but was not overly involved in prescribing the specific methods by which that result was to be achieved. The Board was satisfied that the essential nature of the relationship between the parties was that the Employer was purchasing the labour and services of the Employee as an independent contractor. Therefore, the Board determine an employer/employee relationship did not exist between the parties and her claim for wages or vacation wages was dismissed.

Greencut Environmental Services t/a 3422640 Manitoba Ltd. - and - P.K.
Case No. 33/10/ESC
April 28, 2010

WAGES – Overtime – Vacation Pay/Holiday Pay - Employer disputed Order of Employment Standards Division (ESD) to pay Employee $486.33 in wages owing – Employer did not satisfy Board, on the balance of probabilities, that Employee did not work 12.75 hours of overtime and accepted ESD's recording of hours for Employee – Further, consistent with *Employment Standards Code,* Board did not accept Employer's submission that vacation pay and general holiday pay was included in the regular hourly rate paid to Employee – Employer ordered to pay wages as ordered by ESD – Substantive Order.

Greencut Environmental Services t/a 3422640 Manitoba Ltd. - and - J.K.
Case No. 35/10/ESC
April 28, 2010

WAGES – Overtime - Entitlement - Employer disputed Order of Employment Standards Division (ESD) to pay Employee $230.36 in wages owing – Board found among other items that during pay period in question, Employee not entitled to overtime as she did not work more than 50 hours in any individual week - Board accepted Employer's evidence Employee only to receive $15 per hour for that work – Board orders Employer to pay Employee $189.38 – Substantive Order.

WAGES – Vacation Pay/Holiday Pay – Rate of Pay - Employer disputed Order of Employment Standards Division (ESD) to pay Employee $230.36 in wages owing – Consistent with *Employment Standards Code*, Board did not accept Employer's submission that vacation pay and general holiday pay was included in the regular hourly rates paid to the Employee - Board orders Employer to pay Employee $189.38 – Substantive Order.

WAGES – Pay Advance - Employer disputed Order of Employment Standards Division (ESD) to pay Employee $230.36 in wages owing – Among other items, Employer credited with $40 advance given to Employee – Board orders Employer to pay Employee $189.38 – Substantive Order.

<u>Knights of Columbus - and - C.B.</u>
Case No. 397/08/ESC
June 23, 2010

INDEPENDENT CONTRACTOR – Employer appealed General Agent's claim for wages submitting he was independent contractor – Requirement to work exclusively for Employer and receipt of benefits suggested employer/employee relationship – However, employment agreement clearly provided employee/employer relationship specifically not contemplated - Other factors led Board to conclude General Agent was independent contractor: he operated profitable business on his own account in which he had control over hours worked and manner in which work was done; his business expenses were within his control and indicative of significant financial risk; he personally leased office space, provided office furniture and equipment, an automobile, and certain office supplies; he hired an office assistant and recruited and managed Field Agents to maximize profit for his agency - Although he was restricted as to product sold, how it was advertised, to whom it was sold and rates of insurance products, such limits indicative of control by insurance regulators and compliance with provincial rules in tightly regulated field - Board satisfied, on balance, control factor favoured conclusion General Agent was not an employee.

INDEPENDENT CONTRACTOR – EVIDENCE – Relevance - Employer appeals General Agent's claim for wages submitting he was independent contractor – Employee alleged Supreme Director responded to question by Field Agents if they were self-employed to which he responded they were employees - Board noted English was not Supreme Director's first language and he may have said opposite to what he intended - Regardless, he had no authority to bind insurance arm of Company by unilaterally changing terms of the agents' agreements and his comment irrelevant to outcome of case before Board – In addition, Board considered Employee filed income tax on basis that he was independent contractor but manner in which an individual filed income tax not determinative of status for purposes of employment standards legislation.

The Employer sold insurance products and the alleged Employee was its General Agent responsible for Manitoba. As General Agent, he recruited, trained, supervised and motivated Field Agents. His contract was ended because of insufficient business and lack of production. The Employee filed a claim for wages, general holiday wages, and vacation wages. The Employer's position was that the General Agent was an independent contractor. It submitted that restrictions which the Employee submitted as evidence of control and direction by the Company were merely a reflection of the legislative reality with which the parties were obliged to comply.

<u>Held:</u> The central question to be answered in resolving disputes concerning whether an individual is an employee or an independent contractor is "whether the person who has been engaged to perform the services is performing them as a person in business on his own account". Resolution of that question in the context of the present case involves consideration of a number of factors including:

1. the level of control over the individual's activities;
2. the provision by the individual of his or her own equipment;
3. the hiring by the individual of his or her own helpers;
4. the degree of financial risk taken by the individual;
5. the individual's degree of responsibility for investment and management;
6. the individual's opportunity for profit or risk of loss;
7. other factors.

The employment contract requirement that the Employee devote his full time and energy to the services under the agreement and the fact that he received certain benefits from the Company suggested he was an employee. However, jurisprudence does not suggest that exclusivity trumps all other considerations. In reviewing the relationship as a whole, the Board was satisfied that those factors did not tip the scales towards the finding of an employee/employer relationship. The agreement provided that nothing therein was to be "construed to create the relationship of employer and employee between the Order and the General Agent or between the General Agent and his Field and District Agents." The Employee presented as evidence comments attributed to a Supreme Director of the Company in response to a question he was asked at an

informal company meeting. The Supreme Director allegedly said that the Field Agents were not self-employed, they were employees of the Company and he made no distinction between Field Agents and the General Agent. The Board noted that English was not his first language and he may have actually said the opposite to what he intended or believed he said. Regardless, he had no authority to bind the insurance arm of the Company by unilaterally changing the terms of the agents' agreements and his comment was irrelevant to the outcome of the case. The Board considered that the Employee filed his income tax on the basis that he was an independent contractor but the manner in which an individual filed income tax was not determinative of his status for the purposes of employment standards legislation. The quantum of the Employee's business expenses, which ranged between $84,896 and $54,840 per annum, was overwhelmingly within his control and indicative of significant financial risk by the Employee. He was also contractually responsible to repay to the Employer any draw given to a Field Agent that exceeded the Field Agent's commissions. The assumption of such significant financial risks suggested that the Employee was a person in business on his own account exercising business judgement and entrepreneurial initiative in managing risks. He also had an opportunity to profit from sound management in the performance of his activities which favoured a conclusion that he was an independent contractor. While the Employer provided a computer loaded with proprietary software and its membership list, the Board noted the ownership of equipment supported the finding the Employee was an independent contractor. He personally leased office space, provided office furniture and equipment, an automobile, and certain office supplies. He hired an office assistant and recruited, managed a group of Field Agents so as to maximize profit for his agency. The Employee could set his own hours, determine his own priorities, and, within the context of a highly regulated industry, generally determine how he would deliver his services. Although he was restricted as to the product sold and how it was advertised, to whom it was sold and the rates of the insurance products, such limits were indicative that the Company was subject to control by insurance regulators and the organization must comply with provincial rules in a tightly regulated field. The requirement to report and to produce satisfactory results was not indicative of the Company exercising control. Accordingly, the Board was satisfied that, on balance, the control factor favoured the conclusion that Employee was not an employee. Rather, he was running a consistently profitable business in which he had control over the hours he worked and, generally speaking, the manner in which the work was to be done.

Krevco Lifestyles Inc. - and - G.H.
Case No. 11/10/ESC
July 26, 2010

NOTICE – DISCHARGE – Employee allowed terminated co-worker access to office and to remove files despite Employer's directive that co-worker not allowed on premises – Employee terminated for dishonesty as per employment agreement – Held Employee not entitled to receive wages in lieu of notice - Substantive Order.

WAGES – Overtime – Entitlement – Seven months after commencing employment, Employer advised Employee that extra unauthorized hours were appreciated but were not required – Overtime claim allowed for period prior to notification but disallowed after Employee received written directive from management not to work extra hours – Claim for overtime wages adjusted to reflect standard 7.5 hours per day or hours actually worked whichever hours were less - Substantive Order.

WAGES – Bonus – Calculation – Employee filed claim for incentive bonus to be calculated as pro-rated share of yearly team/store bonus of 1% of gross sales distributed to employees in accordance with allocation formula as determined by management – Employer decided not to pay bonus to any employee for the fiscal year in question because division not profitable – Held plain and ordinary meaning of "gross sales" could not be equated to "net income", "net profit" or " profitability" as terms distinct concepts in commercial and accounting sense - However, other conditions affected entitlement – Allowing Employee's claim for bonus, would call for Board to make speculative judgments regarding meaning of term "yearly team/store bonus" and would require Board to abrogate to itself express discretion reserved to senior management and determine the allocation formula and the criteria relating to it – Claim for bonus dismissed - Substantive Order.

The Employee, his brother and their business partner entered into an employment agreement with the Employer after it purchased their business. For the first seven months, the Employee submitted his hours on the Employer's payroll forms based on the daily hours he recorded. He was not paid overtime notwithstanding that, for a majority of the days, his own recorded hours of work exceeded 7.5 hours per day. On October 16, 2007, management advised him that under his contract extra hours were appreciated but he was not required to work them. In August 2007, the brother's employment had been terminated. He was not allowed on the Employer's premises and this was known to the Employee. In November 2007, the Employee allowed his brother into the office when other employees were not present and allowed him to take files home. The Employee admitted that he never sought approval from the Employer to allow his brother to access the documents nor did he ever advise the Employer of the request. The Employee's employment was terminated without notice on November 19, 2007 for dishonesty as per Article 3.2 of the employment agreement. He filed a claim for wages owing. The Director of the Employment Standards Division ordered the Employer pay $3,293.83 in overtime wages to the Employee for the period May 17, 2007 to November 18, 2007. The Employee disputed the Order contending that the amount of overtime was not accurate, he was not awarded 30 days wages in lieu of notice and the Order did not award him a pro-rata share of a bonus incentive.

Held: The Board was satisfied that the Employee's record of hours was substantially correct and was the basis for calculating his entitlement to overtime for the period May 22, 2007 to October 16, 2007. As to overtime hours after October 16, 2007, the Board disallowed the claim because, at that time, the Employee received a written directive from management not to work extra hours. Therefore, the hours of work for the Employee were adjusted to reflect 7.5 hours per day or the hours actually worked by the Employee for the period October 17, 2007 to November 19, 2007, whichever hours were the lesser for the days falling within that period.

By allowing his brother access to the Employer's premises and files, the Board determined that the Employee was in breach of Articles 3.2 of the agreement. Therefore, he was not entitled to receive wages in lieu of notice and that portion of his claim was dismissed.

Article 2.2 of the agreement provided that a share of the yearly team/store bonus of 1% of gross sales would be distributed to employees pro rata quarterly in accordance with an allocation formula as determined by management. The Board accepted the Employer's evidence that no bonus was paid to any employee for the fiscal year ending November 30, 2007 because the Employer decided that bonuses would not be paid as the division was not profitable. In accordance with the plain and ordinary meaning to be given to the words used in the agreement, the phrase "gross sales" could not be equated to the terms "net income", "net profit" or "profitability". The latter terms are distinct concepts in the commercial and accounting sense. However, recognizing the difference in meaning did not answer the Employee's claim for a share of a bonus based on gross sales because other conditions affecting entitlement to part of a bonus did not point to that conclusion. To allow the Employee's claim for a bonus, would call for the Board to make speculative judgments regarding the meaning and scope of the terms "yearly team/store bonus" and would require the Board to abrogate to itself the express discretion reserved to senior management and determine the allocation formula and the criteria relating to it. In the result, the Employee had not satisfied the Board that he is entitled to receive bonus wages and that portion of his claim was dismissed.

3726615 Manitoba Inc. t/a L & L Catering - and - J.D.
Case No. 77/10/ESC
July 28, 2010

NOTICE – Cash Advances - Employer acknowledged Employee entitled to wages in lieu of notice but asserted amount owing covered by wage advances - Employee argued advances repaid under arrangement where Employer would underreport her hours worked – Held no corroborative documentation submitted regarding alleged manner of repayment including any records kept by Employee tracking hours deducted from payroll which would have reflected decreasing outstanding balance – By Section 19(2), Rule 7 of *The Employment Standards Regulation*, Employer entitled to deduct cash advances from wages owing - Substantive Order.

WAGES – Record Keeping – Holiday Pay - Employer disputed owing Employee for general holidays asserting general holiday pay included in global hours – From review of payroll records, Board not satisfied Employer discharged its onus that Employee received general holiday pay to which she was entitled - Board confirmed Employment Standards Division's Order for wages owed for general holiday pay and wages in lieu of notice – Substantive Order.

The Employment Standards Division ordered the Employer to pay $1,917.73 for wages owing to the Employee. The Employer disputed that it owed any amount for general holidays asserting that holiday pay was included in the global hours recorded on its payroll records. It acknowledged that the payroll records and the related payroll information provided to the Employee did not reveal that a separate payment had been made for general holiday pay. The Employer acknowledged that the Employee was entitled to wages in lieu of notice but asserted that any amount owing was more than covered by advances she had received and which had not been repaid at the time of termination. The Employee admitted that she received and cashed three advances totaling $1,900 against future wages. She stated the advances were repaid under an arrangement whereby the Employer underreported her hours of work when submitting her hours to the payroll service. The Employer replied that no such arrangement was made.

Held: No written corroborative documentation was submitted regarding the alleged manner of repayment including any records kept by the Employee for the purpose of keeping track of the number of hours deducted from any payroll period and which would have reflected a decreasing amount on the outstanding balance. After reviewing the payroll and hours recorded on payroll records, the Board was not satisfied that the Employer had discharged its onus that the Employee received general holiday pay to which she was entitled. Therefore, the Board confirmed that the Employment Standards Division's Order correctly recorded wages owed to the Employee on account of general holiday pay and wages in lieu of notice. However, on the balance of probabilities, it found that the advances had not been repaid, in whole or in part as the Board preferred the evidence of the Employer to the evidence of the Employee. In the absence of any corroborative evidence from the Employee regarding the alleged manner in which the advances were repaid, the Board found that the evidence of the Employer was in harmony with the preponderance of probabilities which a practical and informed person would have recognized as reasonable in that place and in those conditions. Pursuant to Section 19(2), Rule 7 of *The Employment Standards Regulation*, the Employer was entitled to deduct cash advances from the wages owing which left a balance of $17.73 owing to the Employee.

Houston Recruiting Services Ltd. - and - M.G.
Case No. 64/10/ESC
August 10, 2010

EMPLOYER – NOTICE - Employee submitted he was not employee of temporary staffing agency but of Client and therefore Client ought to have given him notice – Also submitted that "temporary period" in sub-clause 62(1)(e) of *The Employment Standards Code* limited to period of less than 30 days because that tied in with 30-day exception in 62(1)(a) – Held exceptions found in sub-clauses of Section 62(1) stood independently – "Thirty days" referred to in sub-clause (a) cannot be read as a limitation on words "temporary period" in sub-clause (e) - Board concluded temporary staffing agency was employer - Fact that Employee worked at Client's in excess of 30 days did not change that employment was of temporary nature – Appeal dismissed.

PRACTICE AND PROCEDURE – Employee of temporary staffing agency submitted 62(1)(e) of *The Employment Standards Code* may lead to abuse and allow agency to act as "interloper" between real employer and employee - Board obliged to assess each case on facts - Circumstances of hypothetical nature not before Board could not be fulcrum upon which individual appeal decided.

The Employer operated a temporary staffing agency. The Employee was hired for a four-week assignment with the Client. The Employment Standards Division disallowed his claim for one week's wages in lieu of notice. He was not owed notice pursuant to Section 62(1)(e) of *The Employment Standards Code,* because he was "employed under an arrangement by which the employee may choose to work or not to work for a

temporary period when requested to work by the employer." The Employee asserted that Section 62(1)(e) was not intended to allow an employer to evade responsibility for notice simply by using a temporary help agency as its *de facto* payroll service. The basic contentions of the Employee's appeal were that he was not an employee of the Employer, and therefore, it was the Client which ought to have given him notice; and, reference to "a temporary period" in 62(1)(e) must be limited to a period of less than thirty days because that tied in with the 30 day exception in 62(1)(a).

<u>Held:</u> Each of the exceptions found in the sub-clauses in Section 62(1) stood independently. Accordingly, the Employee's assertion that the "30 days" referred to in sub-clause (a) ought to be read as a temporal limitation, either expressly or by implication, on the words "temporary period" in sub-clause (e) could not be accepted, for to do so would add words of limitation which the Legislature did not use. The Employee submitted that sub-clause (e) may lead to abuse and allow a temporary payroll or employment agency to act as an "interloper" between the real employer and an employee. The Board was obliged to assess each case on its own facts. Circumstances of a hypothetical nature which were not before the Board could not be the fulcrum upon which the Board decided an individual appeal brought before it. The Board was satisfied that the Client requested a temporary employee and the assignment was not for any improper purpose designed to avoid obligations under the *Code*. The Employee was only actively at work for the Client from on or about June 19, 2009 to July 20, 2009 which clearly fell within the parameters of what would reasonably constitute a "temporary period". The Board concluded that: the temporary staffing agency was the employer of the Employee; the Employee was assigned to work with the Client for a temporary period; the fact that the employee may have been engaged in his tasks at the Client's for a period in excess of 30 days did not change that the employment was intended to be of a temporary nature. In the result, the Board dismissed the Employee's appeal.

<u>North Star Construction Ltd. - and - W.M.</u>
Case No. 30/10/ESC
September 1, 2010

NOTICE – WAGES – Calculation – Record Keeping - Employer maintained Employee not entitled to overtime as he inflated hours recorded on daily worksheets and challenged whether Employee could have worked that many extra hours but was unable to provide any evidence beyond his suspicions – Board not able to conclude time recordings inflated based on speculation alone, particularly when Employer had accepted and relied upon those recordings without any prior challenge – Claim for wages allowed as calculated.

WAGES – Overtime – Entitlement - Employer maintained Employee agreed to accept time off in lieu of overtime - Employee denied any such agreement and no evidence presented he was given time off in lieu – Claim for wages allowed as calculated.

NOTICE – Employer argued Employee had not provided appropriate notice - Board accepted Employee left phone message at Employer's apartment - Employer could not say message not left but rather only that he did not receive it – Held notice was provided.
EVIDENCE - WAGES – Deductions – Standard of proof - Board did not accept Employer's allegation that Employee stole tools - Accusation of theft required proof beyond general claim made by Employer - Claim for wages allowed.

The Employment Standards Division ordered the Employer to pay the Employee $9,371.02 for wages owing. The Employer disputed the Order maintaining the Employee inflated the hours that he worked on his daily worksheets, and as a result the bi-weekly time records were incorrect and he was not entitled to overtime. The time records showed the Employee working in excess of 8 hours for 3 and 4 days in a row. The Employer challenged as to whether the Employee could have worked that many extra hours but was unable to provide any evidence beyond his suspicions. The Employer believed that the Employee visited his wife who was hospitalized during times he had recorded himself as working. The Employer also maintained that the Employee had not given proper notice of termination of his employment. Finally, the Employer suggested that the Employee took tools and equipment. If the Employee was entitled to any additional wages that amount should be discounted by the amount for tools and equipment it claimed he had taken.

Held: The Board was not able to reach a conclusion that the time recordings were inflated based on speculation alone, particularly when the Employer always had accepted and relied upon those recordings without any challenge. The Employee testified his time recordings were accurate and presented his testimony in a direct and straightforward manner. It followed that the Division was correct in relying on those time records and on the spread sheets it compiled. The Employer asked the Board to overturn the Division's calculation of the wages owing maintaining that the Employee had agreed to accept time off in lieu of overtime. The Employee denied categorically there was any such agreement and no evidence was presented that he was ever given time off in lieu of all the extra hours he regularly worked throughout the period in question. As to the Employer's argument that the Employee had not provided appropriate notice, the Board found the Employee was a credible witness and accepted that he had left a message at the Employer's apartment. The Employer could not say that this message was not left, but rather only that he did not receive it. Therefore, the Board found that notice was provided. The Board did not accept the allegation that the Employee took the tools as an accusation of theft required proof beyond such a general claim by the Employer. As a result of its findings, the Board was satisfied that the Employer owed the Employee wages as calculated by the Division.

Polar Window of Canada - and - D.S.
Case No. 247/09/ESC
September 30, 2010

DEPENDENT CONTRACTOR – Term "dependent contractor" not defined in *The Employment Standards Code* nor expressly included in definition of "employee" in Section 1 of the *Code* - Substantive Order.

REMEMDY – Jurisdiction – Employee requested severance package, paid employment counseling services, vacation pay for final year of service, and compensation for wrongful dismissal and hardship – Board only deals with claim for wages, general holiday wages, vacation wages, and wages in lieu of notice - Board does not have statutory jurisdiction to entertain other claims - Substantive Order.

INDEPENDENT CONTRACTOR - Sales Agent filed tax returns as independent contractor and claimed business expenses; controlled expenses, operated and developed business as he saw fit; hired employees; and owned customer list which he sold for profit without approval of Employer - Any control by Employer was for monitoring overall success of agency rather than how tasks carried out – Sales Agent in business where his actions and decisions determined chance of profit and risk of loss - Board determined he was independent contractor - Claim for wages dismissed - Substantive Order.

The Employment Standards Division dismissed the claim for wages of the alleged Employee because it determined that he was an independent contractor and *The Employment Standards Code* did not apply to an independent contractor. The matter was referred to the Board. The Employee, who was a sales agent of the Employer, requested that the Board award him a fair severance package, paid employment counseling services, vacation pay for his final year of service, and compensation for wrongful dismissal and hardship.

Held: The Board, as a statutory tribunal, can only deal with claim for wages, general holiday wages, vacation wages, and wages in lieu of notice in accordance with the specific provisions of *The Employment Standards Code*. The Board did not have the statutory jurisdiction to entertain the other claims which would have to be pursued in another forum. The Board did not accept the Employee`s alternative submission that he was a "dependent contractor" and that the definition of "employee" in the Code, included "dependent contractor" status. The term "dependent contractor" was not defined in the Code nor was it expressly included in the definition of "employee" in Section 1 of the Code. As to the merits of the case, the Board considered that the Employee filed his tax returns over the years on the basis he was an independent contractor rather than an employee and claimed business expenses. This fact was not, in and of itself, determinative of the issue, it was nevertheless a relevant factor. A critical factor supporting the conclusion that he was an independent contractor was that he owned his customer list and was entitled to and, in fact, did sell his business to a third party for valuable consideration without the prior approval of the Employer. Further, he could have expanded his client list by purchasing all or part of another selling agent's list, thereby expanding his chance of profit

through his own entrepreneurial skills and business judgment. While there was an element of "control" on the part of the Employer, the Board was satisfied that any such control was for the purpose of monitoring the overall success of the agency rather than controlling when and how the Employee carried out any particular tasks. The Employee was free to develop his own business, control his own expenses, operate his business when he saw fit, hire his own employees, and, at the end of the day, sell his business and retain the sale proceeds for himself. All of the relevant factors point to the fact that the Employee was a person in business on his own account where his own actions and decisions determined his chance of profit and/or risk of loss. As a result, the Board determined that the alleged Employee was not an employee, but rather was an independent contractor. The claim for wages dismissed.

Brousseau Bros. Ltd. t/a Super Lube - and - P.G.
Case No. 136/10/ESC
September 30, 2010

WAGES – Overtime – Entitlement – Employee agreed to hours of work and bi-weekly salary at time of hire – In 4½ years he was employed, he never filed claim for overtime wages – Board satisfied on basis of hours worked and total salary paid that Employee fully compensated - Accordingly, he was not entitled to receive any wages from Employer and his claim was dismissed - Substantive Order.

The Employment Standards Division ordered the Employer pay the Employee $6,663.75 for wages owing. The Employer disputed the payment and the matter was referred to the Board. The Employee was employed as a manager from February 2005 to September 2009. In February 2005, the Employer and Employee discussed the terms of employment including hours to be worked which were Monday, Tuesday, Thursday and Friday (8:00 a.m. to 6:00 p.m.) and Saturday (8:00 a.m. to 5:00 p.m.). The Employee agreed to these hours and $1,400 in wages paid every two weeks.

Held: The Board noted that, from February 2005 to September 2009, the Employee never sought payment for any overtime hours. The Board was satisfied on the basis of hours worked and total salary paid that the Employee has been fully compensated. Accordingly, he was not entitled to receive any wages from the Employer and his claim was dismissed. The appeal of the Employer was therefore allowed.

AAR-Auto List of Canada (1999) Inc. - and - Director, Employment Standards Division
Case No. 78/10/ESC
November 10, 2010

ADMINISTRATIVE PENALTY – Deposit Reduction - Employer ordered to pay $9,500 Administrative Penalty - It disputed penalty and requested reduction of deposit claiming it suffered prejudice as penalty far exceeded overtime owed and no individual orders issued ordering payment – Held Board has no discretion as to amount of Penalty as its jurisdiction limited to confirming or revoking penalty - Right to issue Penalty not affected by employee not filing complaint or Division not issuing specific order - Board did not accept Employer suffered prejudice resulting from penalty far exceeding overtime owed - Purpose of administrative penalty to ensure compliance with statutory obligations - Employer had not filed objective financial data to establish payment of full deposit would create undue financial hardship – While payment inconvenient that was consequence of normal deposit requirements - Grounds for appeal raised factual issues to be addressed at hearing on its merits - Inappropriate for Chairperson to comment further as Chairperson expressly prohibited from hearing appeal as he heard application to reduce the deposit - Application to reduce deposit dismissed.

PRACTICE AND PROCEDURE – Board denied Employer's request to adjourn proceedings noting hearing had already been adjourned to accommodate Employer's prior request and parties mutually agreed to resultant date months earlier - Substantive Order.

The Employer was given notice to comply with Section 86(1) of *The Employment Standards Code* which required wages to be paid within 10 working days after the expiration of the pay period. Following an audit six months later, the Director of the Employment Standards Division issued a Notice of Administrative Penalty for $9,500 comprising 19 separate incidents for failure to pay overtime. The penalties prescribed for a failure to comply with Section 86(1) was $500 and as per Section 138.1(3) of the *Code,* an incident of non-compliance relating to more than one employee may be treated as separate incidents. The Employer disputed the administrative penalty and also requested that the Chairperson of the Board reduce the amount of the deposit required by Section 138.2(3) which required that the deposit be an amount equal to the penalty being appealed. The Employer submitted that is suffered prejudice because the amount of the penalty imposed far exceeded the $607.81 of overtime, particularly when no individual orders were issued ordering payment. At the commencement of the proceedings, the Employer requested an adjournment of the hearing to gather additional correspondence.

Held: The Board denied the request to adjourn the proceedings noting that the date originally set for the hearing had already been adjourned to accommodate the Employer's specific request that the hearing be set at a later date. Further, the parties had mutually agreed to the resultant date and they had known about it for many months. The Board had no discretion as to the amount of the Administrative Penalty. Under 138.2(6) of the *Code*, the jurisdiction of the Board was limited in that the Board "must confirm or revoke the penalty." The fact that an individual employee had not filed a complaint or that the Division has not issued a specific order for unpaid wages did not affect the right to issue a Notice of Administrative Penalty. The jurisprudence had long established that the Director may proceed on his own under provisions of the *Code*. The Board did not accept the Employer suffered prejudice resulting from the penalty exceeding the overtime. The purpose of an administrative penalty is to ensure compliance with statutory obligations. The Employer had not filed objective financial data to establish that payment of the full deposit would create an undue financial hardship. While the payment may be inconvenient that was an inevitable consequence of the normal deposit requirements. Most of the grounds for appeal raised factual issues which would have to be addressed by the Board at the hearing of the appeal on its merits. The application for reduction of the deposit was dismissed.

Autotown Sales Corporation - and - K.F.
Case No. 207/10/ESC-R
November 10, 2010

PRACTICE AND PROCEDURE – Reduction of Deposit - Given Employer's admission of liability for holiday pay and vacation pay, Chairperson determined appeal did not raise any important or unique principle of law regarding general holiday pay to reduce deposit owing – However, given Employer disputed amount owing for wages in lieu of notice, Chairperson reduced portion of deposit related to notice from $11,627.39 to $5,000 – Section 111(2) of *The Employment Standards Code* considered - Substantive Order.

The Director of the Employment Standards Division ordered the Employer to pay the Employee $19,043.63 for wages owing and further required $1,000 payment for the administrative fee. The Employer disputed the payment and requested a referral pursuant to Section 110(1) of *The Employment Standards Code* and requested that the Chairperson, pursuant to Section 111(2), reduce the amount of the deposit required as a condition of referral.

Held: In addressing the Employer's request under Section 111(2) of the *Code*, the Chairperson considered that the Employer admitted liability for general holiday pay and related vacation pay covering the period in question. The Employer failed to satisfy its onus that being required to deposit the full amount of $7,416.24 determined to be owing for general holiday pay and vacation pay would either prejudice it or create an undue financial hardship. Further, given the general admission of the Employer on liability, subject only to addressing unspecified calculation errors, the appeal did not raise any important or unique principle of law regarding general holiday pay. The remainder of the wages determined to be owing were $11,627.39 for wages in lieu of notice. The Chairperson noted that the Employer disputed that wages in lieu of notice were owing on account of its position the Employee engaged in alleged wilful misconduct under Section 62(1)(h) of the *Code*. In addition, the Chairperson was satisfied that requiring the Employer to deposit a further $5,000 was not

unfair or unreasonable and neither prejudiced it nor created an undue financial hardship. Therefore, the Chairperson allowed the Employer's request, in part, and reduced the amount of the deposit required to $12,416.24.

U-Haul Co. (Canada) Ltd. - and - M.R.
November 15, 2010
Case No. 341/09/ESC

EXCLUSION – WAGES – Management functions primarily – Overtime – General Manager (GM) of branch location paid monthly salary and at time of hire was told job may entail up to sixty hours per week – He filed claim for overtime – Held GM ultimately responsible to Marketing President at main office, but GM was day-to-day managerial presence at branch - GM possessed independent authority to operate and manage branch within parameters of monthly budget - As to his own hours of work, he scheduled himself to work every day but was not told to do so by President – Ruled GM performed management functions primarily within meaning of Section 2(4)(a) of *The Employment Standards Code* - Claim for overtime dismissed - Substantive Order.

The Employee was employed as the General Manager for one of the Employer's Moving Centres. He was paid a monthly salary and at time of hire was told the job may entail up to sixty hours per week. He filed a claim for $7,653.32 for overtime wages owing. The Employer disputed the payment submitting that, in accordance with Section 2(4) of *The Employment Standards Code*, the Employee performed management functions primarily and, therefore, standard hours of work and overtime did not apply to him.

Held: The Board noted that each Moving Centre was run by a General Manager, who reported to the Marketing Company President (President) at the main office. While the main office was advised of the particulars regarding any new hire for payroll and other standard purposes, the Board was satisfied that the effective decision to hire an employee for a Centre was made by the on-site General Manager, without any involvement from the President in the evaluative or interview process. Within the parameters of the company's wage scale, the General Manager had the authority to determine the wage rate at which a new employee would start. The General Manager was also responsible for evaluating a new hire during the initial three month probationary period. He possessed the effective authority to evaluate and discipline employees without needing to obtain approval from the President. He was responsible for and had final authority to schedule the hours of work and vacation for employees at the Centre. The Employer would calculate a bonus for each Centre and the General Manager had the unilateral right to distribute this bonus to the employees in such proportion as he saw fit, including the right to allocate some or all of the bonus to himself. The Employee was responsible for operating the Centre within the monthly budget given to him and had the authority to staff the Centre within the limits set by the budget. As to his own hours of work, he acknowledged that he scheduled himself to work every day and he was not told to do so by the President. While the Employee was ultimately responsible to the President for the overall operation of the Centre, the President was not at each Moving Centre on a day-to-day basis and the General Manager was the day-to-day managerial presence at the Centre. In fulfilling the key responsibilities associated with his status, the Board was satisfied that the Employee possessed the independent authority to operate and manage the Centre. The Board was satisfied that the Employer had met its onus of proof, on the balance of probabilities, that the Employee performed management functions primarily within the meaning of Section 2(4)(a) of *The Employment Standards Code.* In the result, the Employee's claim for overtime was dismissed.

U-Haul Co. (Canada) Ltd. - and - B.G.
Case No. 342/09/ESC
November 15, 2010

EXCLUSION – WAGES – Management functions primarily – Overtime – General Manager (GM) of branch location paid monthly salary and at time of hire was told job may entail up to sixty hours per week – She filed claim for overtime – Held GM ultimately responsible to Marketing President at main office, but GM was day-to-day managerial presence at branch - GM possessed independent authority

to operate and manage branch within parameters of monthly budget - Ruled GM performed management functions primarily within meaning of Section 2(4)(a) of *The Employment Standards Code* - Claim for overtime dismissed - Substantive Order.

The Employee was employed as the General Manager for one of the Employer's Moving Centres. She was paid a monthly salary and at time of hire was told the job may entail up to sixty hours per week. She filed a claim for $13,102.15 for overtime wages owing. The Employer disputed the payment submitting that, in accordance with Section 2(4) of *The Employment Standards Code*, the Employee performed management functions primarily and, therefore, standard hours of work and overtime did not apply to her.

Held: The Board noted that each Moving Centre was run by a General Manager, who reported to the Marketing Company President (President) at the main office. The General Manager had the effective and independent authority to hire the employees and she exercised that authority. She admitted that she and the President would not discuss her assessment of a candidate. The involvement of Head Office in the process was essentially for the placement of a new hire on the payroll system. She was responsible for evaluating new hires during the initial three month probationary period. She possessed the authority to evaluate and discipline employees working at the Centre. She was responsible for and had final authority to schedule the hours of work and vacation for employees at the Centre. The Employer would calculate a bonus for each Centre and the General Manager had the unilateral right to distribute this bonus to the employees in such proportion as she saw fit, including the right to allocate some or all of the bonus to herself. The Employee was responsible for operating the Centre within the monthly budget given to her and had the authority to staff the Centre within the limits set by the budget. While the Employee was ultimately responsible to the President for the overall operation of the Centre, the President was not at each Moving Centre on a day-to-day basis and the General Manager was the day-to-day managerial presence at the Centre. In fulfilling the key responsibilities associated with her status, the Board was satisfied that the Employee possessed the independent authority to operate and manage the Centre. The Board was satisfied that the Employer had met its onus of proof, on the balance of probabilities, that the Employee performed management functions primarily within the meaning of Section 2(4)(a) of *The Employment Standards Code.* In the result, the Employee's claim for overtime was dismissed.

7-Eleven Canada, Inc. - and - A.V.
Case No. 157/10/ESC
November 15, 2010

NOTICE – DISCHARGE – Employee terminated after second violation of company I.D. policy for selling tobacco to mystery shopper under age of 30 without asking for identification – Board observed shopper at hearing and could not find objectively reasonable basis for Employee's view shopper appeared over 30 – Basing age assessment on subjectivity of employee would make policy unenforceable as every employee could rely on opinion regardless of reasonableness - Held Employee acted voluntarily, intentionally and knowingly – Her actions were not unthinking, careless, neglectful or inadvertent - Employer met onus to establish Employee's actions constituted disobedience and wilful neglect of duty within Section 62(1)(h) of *The Employment Standards Code* – Claim for wages in lieu of notice dismissed – Substantive Order.

The Employee failed a mystery shop when she sold tobacco to a person under the age of 30 without asking for the appropriate identification in violation of the Company I.D. Zone Policy. A few months later, the mystery shopper attended the store again and the Employee sold her cigarettes without requesting any ID. The Employee was terminated for the second failed mystery shop. The Director of the Employment Standards Division ordered the Employer to pay the Employee $4,368 for 8 weeks wages in lieu of notice. The Employer disputed the payment submitting that notice or pay in lieu of notice was not payable to the Employee as her employment was terminated based on conduct which constituted wilful misconduct, disobedience and wilful neglect of duty by failing to comply with its policy.

Held: The Board was satisfied that the Employee had undergone regular training by periodically completing an I.D. Zone Control Log. The Board found that the Employee was fully aware of the I.D. Zone Policy, its purpose and also that two violations of that Policy could lead to a termination of employment without notice. The Board, having observed the mystery shopper at the hearing, did not accept that there was an objectively reasonable basis for the Employee's view that the shopper appeared to be over 30. As to making an age assessment, the Board was guided by the principles outlined by Justice Spivak in *Salkeld v. 7-Eleven Canada Inc.* 2010 MBQB157, in that total subjectivity on the part of an employee was not the test and would make the policy unenforceable "as every employee could simply rely on their opinion regardless of how reasonable or not that may be." Therefore, the Employee violated the I.D. Zone Policy on two occasions, the second which followed retraining completed after the first failed shop. The Board was satisfied that the Employee consciously and deliberately chose not to do what she knew was specifically required of her by the Employer, after having been warned that any further violation of the Policy would result in termination without notice. The actions of the Employee were undertaken voluntarily, intentionally and knowingly and cannot be characterized as unthinking, careless, neglectful or inadvertent. Therefore, the Employer had met its onus, on the balance of probabilities, to establish that the Employee's actions constituted disobedience and a wilful (in the sense of an intentional or knowing) neglect of duty within the meaning of Section 62(1)(h) of *The Employment Standards Code.* As a consequence, the Employee is not entitled to receive wages in lieu of notice from the Employer.

Brousseau Bros. Ltd. t/a Super Lube - and - C.J.
Case No. 137/10/ESC
December 17, 2010

WAGES - EXCLUSIONS - Overtime - Management - Employee did not perform management functions primarily – Therefore, he was not exempted from standard hours of work and overtime provisions of *The Employment Standards Code* on basis of Section 2(4) of the *Code* – Board ruled he was entitled to receive wages, overtime wages, general holiday wages and wages in lieu of notice - Substantive Order.

Director of the Employment Standards Division ordered the Employer to pay to the Employee $5,384.79 for wages owing. The Employer and Employee disputed the payment and the matter was referred to the Board.

Held: The Board determined that the Employee did not perform management functions primarily. As such, he was not exempted from the standard hours of work and overtime provisions of *The Employment Standards Code* on the basis of Section 2(4) of the *Code*; that the Employer and Employee had an agreement that the Employee would be paid a bi-weekly salary in the amount of $1,375.00 based on 93 hours every 2 weeks (or Forty-six and One-Half (46.5) hours per week) plus bonuses; that in accordance with Section 18(3)(c) of *The Employment Standards Regulation,* the Board was satisfied that the bonus was tied directly to the worker's performance and was not payable at the Employer's discretion. The Employer terminated the Employee's employment and he was entitled to receive wages, overtime wages, general holiday wages and wages in lieu of notice in the amount of $7,067.85. The Employer's appeal was dismissed.

3526861 Manitoba Ltd. t/a Rene's Courier - and - J. S.
Case No. 97/10/ESC
January 5, 2011

INDEPENDENT CONTRACTOR – Bicycle courier – Employee used and maintained own bicycle which supported independent contractor status – However, chance of profit or loss beyond Employee's control as rates set by Employer, number of calls received depended on dispatcher offering him calls, and he was not allowed to work for other companies - Bonus offer for attracting new accounts more consistent with services being provided by employee to promote the employer's business - Board gave little weight to fact Employee filed Workers Compensation Board claim as "owner operator" or that he was responsible for statutory deductions and could write off expenses - Income tax return or WCB claim standards different from those applied under employment standards legislation, therefore,

not determinative of Employee's status under *The Employment Standards Code* - Held Employee not performing services as person in business on own account - Relationship properly characterized as an employer-employee relationship.

NOTICE – DISCHARGE – Just cause vs. wilful misconduct - Employer argued no notice required for Bicycle Courier terminated for cause for losing Client's bank deposit on street - Conduct amounting to "cause" or "just cause" for dismissal at common law or under collective bargaining not necessarily same as conduct justifying termination without notice under *The Employment Standards Code* - Section 62(1)(h) sets out exception to notice if employee acted in manner not condoned by employer and that constituted wilful misconduct, disobedience or wilful neglect of duty - "Wilful" interpreted as being "deliberate", "malicious" or "intentional" - Loss of bank deposit an accident, and Employee made concerted effort to find it – Also, evidence did not support finding that he acted "wilfully" in a verbal exchange with client - Board concluded exception to providing notice did not apply - Employee entitled to wages in lieu of notice.

The Employment Standards Division determined that the Employee, who worked as a bicycle courier for the Employer, was owed general holiday wages, vacation wages and wages in lieu of notice. The Employer disputed the Order contending that the Employee was an independent contractor and was not entitled to the wages. The Employer relied on a Workers Compensation Board (WCB) claim made by the Employee in which he indicated he was an owner operator. The Employee indicated that he was directed to respond that way, and having just been injured, was more concerned with getting the paperwork done. The Employer also argued that no notice was required as the Employee's contract was terminated for cause for losing the Client's bank deposit on the way to the bank when it fell out of the deposit bag. Instead of taking responsibility for what had happened, he went back to the Client's office and got into an argument with the secretary for not zipping up the bag.

<u>Held:</u> The Board noted that the Employer would not allow drivers to work for other companies. Work was assigned to couriers through the dispatcher, but the Employee could refuse to do deliveries. While the Employer did not dictate the order in which deliveries had to be made or the route that had to be taken, it did require that its couriers complete their deliveries within the service limits which it had established. The Employee did not have any set time for lunch or other breaks, but the daily and weekly work hours were set by the Employer. The Employee was required to provide notice of intention to take time off for vacations, extended leaves of absence and personal appointments. With respect to the ownership of tools and equipment, the Employee used and maintained his own bicycle which supported the position that he was an independent contractor. If the Employee's bicycle was not available, he would not have received any assistance from the Employer with respect to his transportation needs. The Employer provided a radio at no charge, but the Employee used his own backpack and messenger bag. The chance of profit or risk of loss was largely beyond the Employee's control. The Employee could earn extra money by taking more calls, but this would very much depend on whether the calls were assigned or offered to him by the dispatcher. The rates which were charged to customers were within the control of the Employer. While the Employee could earn a bonus for attracting new accounts, the bonus offer was more consistent with services being provided by an employee to promote the employer's business and for the employer's benefit. The Board considered that the Employee was responsible for statutory deductions and could write off expenses, which was more consistent with his being an independent contractor. However, the manner in which an individual files an income tax return was not determinative of his status for the purposes of the *Code*. As to the WCB claim, the meaning of the term "owner operator" in that context, and the applicable standard under *The Workers Compensation Act*, may be different from those applied under employment standards legislation, and could not be determinative of the Employee's status under the *Code*. The Board was satisfied that little weight ought to be accorded to the WCB report. In consideration of the totality of the evidence, the Board was satisfied that the Employee was not performing services as a person in business on his own account. The Board concluded that the relationship was properly characterized as an employer-employee relationship.

Having determined that the Employee was an employee within the meaning of the *Code*, the Board then considered the issue of wages in lieu of notice. Conduct which amounts to "cause" or "just cause" for dismissal at common law or under collective bargaining was not necessarily the same as conduct that justified termination without notice under the *Code*. Section 62(1)(h) sets out an exception to the notice requirement if

the employee acted in a manner that was not condoned by the employer and that constituted wilful misconduct, disobedience or wilful neglect of duty. “Wilful” has been interpreted as being synonymous with words such as “deliberate”, “malicious” or “intentional”, as opposed to “unthinking” or “spur of the moment”. The evidence which was adduced at the hearing did not support the conclusion that the Employee’s conduct at the time of that incident was deliberate, malicious or intentional. The loss of the bank deposit was clearly an accident, and the Employee made a concerted effort to try to find it and to resolve the situation. While it was alleged that he engaged in a verbal exchange with the customer, the evidence did not support a finding that he acted “wilfully” in a verbal exchange with the secretary. Therefore, the Board concluded that the exception to providing notice did not apply in this case and that the Employee was therefore entitled to receive $1,768.30 wages in lieu of notice.

5220459 Manitoba Inc. t/a Shogun Japanese Restaurant - and - M.L.
Case No. 198/09/ESC
January 27, 2011

EVIDENCE - WAGES - Record Keeping – Overtime – Entitlement – Employer disputed Employee's overtime claim submitting parties had verbal employment contract where Employee paid salary for working up to 55 hours per week – Held no requirement, statutory or otherwise, employment agreement providing for salary inclusive of overtime must be in writing – However, evidence fell short of demonstrating parties had agreement salary was payment for up to 55 hours per week - Board determined salary included payment for standard 40 hours per week and he was entitled to overtime for hours worked in excess of standard - No evidence Employer made application under section 13 of *The Employment Standards Code* for permit to increase standard hours - Board found Employee's records of estimated hours worked not accurate or reliable - Records were produced after his employment concluded and he testified he had difficulty recollecting actual hours worked - Sizeable amount of disputed overtime related to Employee’s claim he was required to remain on premises and work when restaurant was closed between lunch and dinner - Board accepted Employee on break while restaurant closed - Pursuant to section 17(2) of the *Code*, overtime did not include time employer provided as a break - Employee entitled to $8,999.75 in overtime wages.

The Employee filed a claim for overtime wages. The Employer disputed the claim submitting that the parties entered into a verbal employment contract whereby the Employee was paid a salary in exchange for working up to 55 hours per week, and that the Employee did not, or was not authorized to, work more than the 55 hours per week. In the alternative, the Employee did not work all of the hours claimed and his claim for overtime was accordingly inflated and wrong.

Held: There was no requirement, statutory or otherwise, that an employment agreement providing for a salary inclusive of payment for a specific amount of overtime must be in writing. If parties agreed that the employee’s salary was to include payment for overtime, the employment agreement, be it oral or written, must clearly set forth the specific maximum hours of work that were expected of the employee. In this case, the evidence fell far short of demonstrating the parties had an agreement that the Employee’s salary was inclusive of payment for up to 55 hours per week. Accordingly, the Board determined the Employee’s salary included payment for the standard 40 hours per week and he was entitled to payment for overtime for all hours worked in excess of the standard. There was no evidence that the Employer made application to the Director of the Employment Standards Division under section 13 of the *Code* for a permit to increase the standard hours of work nor did the exemptions to paying overtime set out in section 2(4) of the *Code* apply to the Employee. The Board found the Employee's estimate of hours worked as submitted in monthly calendar entries did not provide an accurate or reliable record of the hours worked. The records were produced after his employment concluded and he testified that he had difficulty recollecting his actual hours of work at the time he produced that record. A sizeable amount of the disputed overtime related to the Employee’s claim that he was required to remain on the business premises and work during the period when the restaurant was closed between lunch and dinner. The Board accepted that the Employee was considered to be on break while the restaurant was closed. Pursuant to section 17(2) of the *Code*, overtime does not include time that an employer provides as a break. Therefore, the Board determined that the Employee was entitled to receive $8,999.75 in overtime wages.

The Great-West Life Assurance Company - and - M.A., D.B. and D.T.
Cases No. 189/10/ESC, 190/10/ESC, 191/10/ESC
March 17, 2011

WAGES - Reporting For Work – Less than three hours - Director of Employment Standards Division dismissed the Employees' complaints against Employer - Employees disputed Dismissal Order and matter referred to Board - Board agreed Employees reporting to work for a scheduled period of less than three hours and were paid all wages owing in accordance with the provisions of Section 51(2) of the *Code* – Appeals dismissed - Substantive Order.

Pursuant to *The Workplace Safety and Health Act*

Capitol Steel Corporation - and - P.W.
Case No. 277/09/WSH
April 15, 2010

HEALTH AND SAFETY – REMEDY - Discriminatory Action – Interference - Employee who raised concerns to Employer's Safety Officer told to wait while management consulted - Safety Officer did not return and this contributed to angry exchange between Employee and management which resulted in him being sent home for two days – On his return to work, he was assigned snow shoveling duties and was permanently laid off two days later - Workplace Safety & Health issued Order determining Employer discriminated against Employee for raising health and safety concerns, by assigning Employee task of snow shoveling and then laying him off - Employer appealed Order - Board noted an improper motive does not have to be dominant motive or reason for Section 42.1(4) of *The Workplace Safety and Health Act* to be applied – However, Board accepted decision to lay-off based on *bona fide* assessment of staffing requirements, criteria used in determining lay-offs were not reflective of an "anti-safety" animus and decision made prior to time Employee raised safety concerns - Snow shoveling fell within scope of normal duties and Employee suffered no reduction in pay so duties not "discriminatory action" - Order rescinded and Employee not entitled to reinstatement - However, decisions to send Employee home on days in question and issuing Disciplinary Action Notice influenced in part for raising health and safety concerns - Employee compensated for loss of earnings and $1,000 for damages for interference with Employee's exercise of rights under the *Act* – Substantive Order.

SUMMARIES OF SIGNIFICANT COURT DECISIONS

Knights of Columbus - and - C.B.
Court of Appeal of Manitoba
MLB Case No. 397/08/ESC
Docket No. AI 10-30-07400
Heard by Chief Justice Scott
Delivered November 10, 2010

The Board concluded that the Applicant was not an employee but an independent contractor operating a business on his own account in a regulated industry selling the products of a fraternal insurer. The Applicant applied for leave to appeal from the decision of the Board.

Held: The Board conducted a lengthy hearing and issued extensive reasons for decision. After an extensive review of authorities, the Board took its guidance from the decision of the Supreme Court of Canada in *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.* in which it was stated that "…there is no one conclusive test which can be universally applied to determine whether a person is an employee or an independent contractor. … The central question is whether the person who has been engaged to perform the services is performing them as a person in business on his own account." The decision whether someone is an employee or an independent contractor will depend on its own particular facts. The decision of the Board was entitled to considerable deference and that the standard of review was reasonableness. The Board was an experienced expert tribunal and the question fell squarely within the area of its expertise. The Applicant argued that the Board committed three errors of law. First, counsel asserted that the Board failed to properly analyze its own statute; in particular, the meaning of the words "employee" and "employer. Given the lack of a definition of "independent contractor" in the *Code*, the Board was required to look at common law tests, which it did. The Board committed no error in moving expeditiously to the question before it rather than specifically addressing every detail of the Applicant's argument. Second, the Applicant invoked the *audi alteram partem* doctrine, arguing that the Board erred in law by relying upon legal authorities that were not referred to it by either party or contained in the various materials. No tribunal or court is bound to rely strictly on the law as presented by the parties unless a principle of law was introduced that was not raised by either party expressly or by necessary implication, or had taken the case on a substantially new and different analytical path. That did not happen in this case. Therefore, the Applicant failed to identify an arguable ground of appeal with respect to the second issue. Third, the Applicant submitted that the Board erred in law in relying on the general approach discussed in *Sagaz* rather than basing its analysis on the tests adopted in a trilogy of cases that created a refined and specialized test for commissioned sales agents in the specific context of the insurance industry. The Court did not agree that there was a mandated occupation-specific test for insurance agents and that it was an error in law not to slavishly apply it. The Board was quite right, relying on *Sagaz*, and made no error in accepting that no one test could be universally applied to determine whether a worker fell into the category of "employee" or "independent contractor." There was no arguable issue of law that the Board followed the wrong legal path in arriving at its conclusion. Thus, none of the three issues identified by the Applicant raised arguable points of law. Alternatively, with respect to the third ground of appeal, even if a question of law had been identified, there was no reasonable prospect that the Applicant could succeed. The application for leave to appeal was dismissed.

Houston Recruiting Services Ltd. - and - M.G.
Court of Appeal of Manitoba
MLB Case No. 64/10/ESC
Docket No. AI 10-30-07390
Heard by Justice Beard
Delivered February 4, 2011

The Employer operated a temporary placement service and hired the Employee for a temporary assignment for the Client. At the time that he was hired, the Employee signed a waiver which stated in part that he was exempt from the notice of termination provisions laid out in Section 61(2) of *The Employment Standards Code.*

The Employee's employment lasted 32 days and he was not paid any wages after that. The Board upheld the decision of the Employment Standards Division to disallow his claim for one week's wages in lieu of notice on the basis that the exemptions in Section 62(1)(e) of the *Code* applied. The Employee applied for leave to appeal the decision of the Board. He raised four issues on the leave application. First, the Board erred in concluding that the Employer, and not the Client, was the employer. Second, the Board erred in not applying section 134 of the *Code* to find that the Employer and the Client were engaged in the joint operation of the business and declared them to be a single employer. Third, the Board erred in ascribing significance to the waiver given the provisions of Section 4 of the *Code.* Fourth, the Board erred in its interpretation of Subsection 62(1)(a) and (e) of the *Code*.

<u>Held:</u> The Board referred to all of the circumstances of the employment in coming to the conclusion that the Employer was the employer. This was a finding of mixed fact and law and there was no right to appeal such a finding. The second issue was not raised before the Board. A proper determination of the issue would require that factual findings be made as to the relationship between the two corporations. The proper forum to raise the issue was before the Board, where evidence could have been called and arguments made. The issue could not be raised for the first time on appeal. With respect to the Board referring to the waiver, it did not base its decision on the fact that the employee had signed a waiver but referred to other evidence as well to conclude that s. 62(1)(e) applied. While the exemption in s. 62(1)(e) was less beneficial to the employee than s. 61, it was specifically permitted by the *Code.* Section 4 does not prevent an employer from relying on every agreement, only those terms of an agreement that are contrary to or less beneficial to the employee than what is required in the *Code*. Section 4 does not require that the provision of the *Code* that is most beneficial to the employee must be applied, only that the terms of the *Code* must be applied. The interpretation of 62(1)(a) and (e) of the *Code* was a question of law. The Board is an experienced tribunal and its decision fell squarely within the area of its expertise. Therefore, the standard of review was reasonableness. The Board stated that one of the two basic contentions underlying the employee's appeal was that the reference to a temporary period in clause (e) must be limited to less than 30 days because that tied in with the 30-day exception in clause (a). The Court agreed with the Board that, based on the wording of s. 62(1), clauses (a) and (e) must be read as being separate and distinct and no words linked the two provisions. Further, had the legislature intended to limit the exemption in clause (e) it could have said so, as it did in clause (a). In any case, Section 62(1)(a) did not apply because the period of employment was longer than 30 days. Finally, the Board found, on the facts, that s. 62(1)(e) did apply. That was a question of mixed law and fact, and was not open to appeal. The arguments of the employee regarding the findings of the Board on the issues did not raise an arguable case of substance and there was no reasonable prospect of success on appeal. Therefore, the application for leave was dismissed.

The Court considered new positions the Employee advanced in his brief. First, he argued that the Board erred in finding that the employment was intended to be of a temporary nature based only on the length of the employment. That finding was one of fact or mixed law and fact. The Board's decision was not open to appeal. Second, he argued that s. 62(1)(e) did not grant employers an exemption from s. 61 based on the temporary nature of the employment; rather, it states that there must exist an arrangement whereby the employee is free to accept or not accept work assignments for a temporary period. The phrase "for a temporary period" referred to the duration of the work and not to the hypothetical period when the employee may choose to decline an assignment from the employer. The argument for both positions did not raise an arguable case of substance on which to grant leave to appeal and there was no reasonable prospect of success if it proceeded to appeal. Finally, the employee argued that, in order to find that s. 62(1)(e) applied and that s. 62(1)(a) did not, the Board had to argue that s. 62(1)(a)(ii) applied only in cases where the employee was on probation with an implied promise of permanent employment pending successful conclusion of the probationary period. It is possible for more than one exemption in s. 62(1) to apply to a specific situation. Therefore, the Board did not need to find that the employment in this case fell exclusively within any particular exemption and did not have to exclude either clauses (a) or (e) in order for the other to apply.

STATISTICAL TABLES

TABLE 1
STATISTICS RELATING TO THE ADMINISTRATION OF *THE LABOUR RELATIONS ACT*
(April 1, 2010 – March 31, 2011)

	Cases Carried Over	Cases Filed	Total	Disposition of Cases: Granted	Dismissed	Withdrawn	Did Not Proceed	Declined to Review	Number of Cases Disposed	Number of Cases Pending
Application for Certification	4	42	46	22	2	8	0	0	32	14
Application for Revocation	2	9	11	6	2	0	0	0	8	3
Application for Amended Certificate	6	15	21	18	0	3	0	0	21	0
Application for Unfair Labour Practice	10	40	50	1	6	18	0	0	25	25
Application for Board Ruling	24	11	35	5	0	8	0	0	13	22
Application for Review and Reconsideration	3	9	12	1	6	1	0	0	8	4
Application for Successor Rights	1	2	3	1	0	1	0	0	2	1
Application for Termination of Barg. Rights	0	0	0	0	0	0	0	0	0	0
Application pursuant to Section 10(1) [1]	0	0	0	0	0	0	0	0	0	0
Application pursuant to Section 10(3) [2]	1	7	8	8	0	0	0	0	8	0
Application pursuant to Section 20 [3]	8	18	26	0	18	4	0	0	22	4
Application pursuant to Section 21(2) [4]	0	0	0	0	0	0	0	0	0	0
Application pursuant to Section 22 [5]	0	2	2	0	0	1	0	0	1	1
Application pursuant to Section 58.1 [6]	0	0	0	0	0	0	0	0	0	0
Application pursuant to Section 69, 70 [7]	0	0	0	0	0	0	0	0	0	0
Application pursuant to Section 76(3) [8]	0	6	6	5	0	0	0	0	5	1
Application pursuant to Section 87(1) [9]	0	5	5	2	0	3	0	0	5	0
Application pursuant to Section 87.1(1) [10]	0	1	1	1	0	0	0	0	1	0
Application pursuant to Section 115(5) [11]	1	9	10	4	3	2	0	0	9	1
Application pursuant to Section 130(10.1) [12]	0	1	1	1	0	0	0	0	1	0
Application pursuant to Section 132.1 [13]	1	0	1	0	0	1	0	0	1	0
Referral for Expedited Arbitration [**]	11	109	120	-	-	-	-	-	100	20
Totals	72	286	358	75	37	50	0	0	262	96

1 When an Application for Certification if filed with the Board, changes in conditions of employment cannot be made without the Board's consent until the Application is disposed of.
2 Within the first 90 days following certification of a union as a bargaining agent, strikes and lockouts are prohibited, and changes in conditions of employment cannot be made without the consent of the bargaining agent. Applications under this section are for an extension of this period of up to 90 days.
3 Duty of Fair Representation
4 Permit for Union to visit on Employer's property
5 Access Agreements
6 Business coming under provincial law is bound by collective agreement
7 Complaint re ratification vote
8 Religious Objector
9 First Collective Agreement
10 Subsequent agreement to first collective agreement
11 Request for the Board to appoint arbitrators
12 Extension of Time Limit for expedited decisions
13 Disclosure of information by unions
** See Table 3

TABLE 2
STATISTICS RELATING TO THE ADMINISTRATION OF *THE LABOUR RELATIONS ACT* RESPECTING REPRESENTATION VOTES
(April 1, 2010 – March 31, 2011)

TYPE OF APPLICATION INVOLVING VOTE	Number of Votes Conducted	Number of Employees Affected by Votes	Applications GRANTED After Vote	Applications DISMISSED After Vote	Applications Withdrawn After Vote	Outcome Pending	Vote Conducted but not counted
Certification	11	564	5	1	0	5	0
Revocation	5	394	3	0	0	2	0
Displacement	1	1008	1	0	0	0	0

TABLE 3
STATISTICS RELATING TO THE ADMINISTRATION OF *THE LABOUR RELATIONS ACT* RESPECTING REFERRALS FOR EXPEDITED ARBITRATION
(April 1, 2010 – March 31, 2011)

Cases Carried Over	Number of Referrals Filed	TOTAL	Number of Cases Mediator Appointed	Disposition of Cases					Number of Cases Disposed	Number of Cases Pending
				Settled by Mediation	Settled by Parties	Settled by Arbitration	Declined to Review	Withdrawn		
11	109	120	57	39	2	11	2	46	100	20

TABLE 4
STATISTICS RELATING TO THE ADMINISTRATION OF *THE EMPLOYMENT STANDARDS CODE*
(April 1, 2010 – March 31, 2011)

Cases Carried Over	Number of Applications Filed	TOTAL	Orders Issued by the Board	Applications Withdrawn	Not Proceeded with by Applicant	Number of Cases Disposed of	Number of Cases Pending
20	62	82	38	11	2	51	31

TABLE 5
STATISTICS RELATING TO THE ADMINISTRATION OF *THE WORKPLACE SAFETY AND HEALTH ACT*
APPLICATION FOR APPEAL OF DIRECTOR'S ORDER
(April 1, 2010 – March 31, 2011)

Cases Carried Over	Number of Applications Filed	TOTAL	Decisions/Orders Issued by the Board	Applications Withdrawn	Number of Cases Disposed	Number of Cases Pending
2	3	5	1	2	3	2

TABLE 6
STATISTICS RELATING TO THE ADMINISTRATION OF *THE ESSENTIAL SERVICES ACT*
(April 1, 2010 – March 31, 2011)

Cases Carried Over	Number of Applications Filed	TOTAL	Orders Issued by the Board	Applications Withdrawn	Not Proceeded with by Applicant	Number of Cases Disposed of	Number of Cases Pending
0	0	0	0	0	0	0	0

TABLE 7
STATISTICS RELATING TO THE ADMINISTRATION OF *THE ELECTIONS ACT*
(April 1, 2010 – March 31, 2011)

Cases Carried Over	Number of Applications Filed	TOTAL	Orders Issued by the Board	Applications Withdrawn	Not Proceeded with by Applicant	Number of Cases Disposed of	Number of Cases Pending
0	0	0	0	0	0	0	0

TABLE 8
STATISTICS RELATING TO BOARD HEARINGS
(April 1, 2010 – March 31, 2011)

During the reporting period matters were heard involving applications or cases.[1]	Scheduled Hearings	Actual Hearings	Percentage of Actual to Scheduled
Number of hearings [2]	303	101	33%

1 A "matter" may deal with one or more applications. For example, a matter could involve one application for unfair labour practice or a matter could involve an unfair labour practice and a related application for certification.

2 A hearing can be either a full or half day.

TABLE 9
FIRST AGREEMENT LEGISLATION REVIEW OF CASES FILED
(April 1, 2010 – March 31, 2011)

Union	Employer	Date of Application	Outcome of Application	Status as at March 31
Pending from Previous Reporting Period				
Nil				
New Applications from Current Reporting Period				
United Food & Commercial Workers, Local 832	G4S Security Services Canada	April 28, 2010	Withdrawn	
United Food & Commercial Workers, Local 832	Granny's Poultry Cooperative (Manitoba)	May 11, 2010	Withdrawn	
International Union of Operating Engineers, Local 987	Lockerbie and Hole Eastern	July 26, 2010	Board imposed first collective agreement	Expiry September 21, 2011
United Food & Commercial Workers, Local 832	Granny's Poultry Cooperative (Manitoba)	August 9, 2010	Board imposed first collective agreement	Expiry October 3, 2011
International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators, Local 63	Keystone Entertainment Group	September 22, 2010	Withdrawn	