

*A MESSAGE FROM THE CHAIRPERSON
OF THE
MANITOBA LABOUR BOARD*

I am pleased to submit the 2006-2007 Annual Report outlining the activities of the Manitoba Labour Board for the period April 1, 2006, to March 31, 2007.

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 activities and 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***. This is evident from the decisions which are summarized in this Report.

Improvements were made to the Board's premises. Ergonomic workstations were installed for the Staff. New computer terminals and screens were also installed. These changes were not only intended to enhance the Board's efficiencies but were also designed with the future relocation of the Board in mind. Efforts continued throughout this reporting period to find an acceptable central location for new premises.

In order to provide better communication to the labour relations community, the Board posted ***The Guide to The Labour Relations Act*** on its website. The Board continued to develop plans to make better use of the website in the future. In this regard, the Board will be posting all Reasons for Decision and Substantive Orders on the website.

In September 2006, Colin Robinson and I attended the Annual Labour Relations Boards' Chairpersons Conference, which was hosted jointly by the Canada Industrial Relations Board and the Ontario Labour Relations Board. The Conference was most useful in providing us with an opportunity to share experiences and ideas with other jurisdictions.

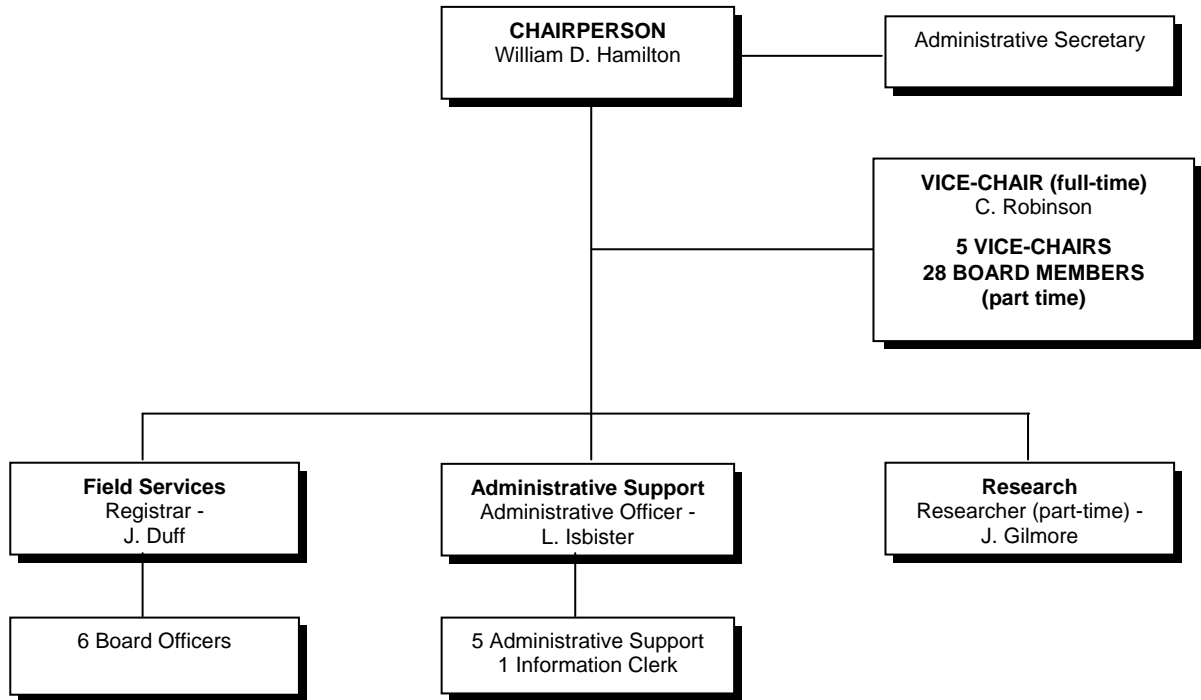
I would like to express my appreciation and gratitude to the Vice-Chairpersons, Members and Staff for their dedication and service to the Board. We all look forward to maintaining and improving our service to the labour relations community.

William D. Hamilton,
Chairperson

Table of Contents

Minister's Letter of Transmittal	
Chairperson's Letter of Transmittal	
Message from the Chairperson	4
Organization Chart	6
Introduction	
Report Structure	7
Role, Objectives and Mandate	7
Manitoba Labour Board Members	9
Operational Overview	
Adjudication	14
Field Services	14
Administrative Services	14
Research Services	14
Library	15
Publications	15
Web Site & Email Address	15
Information Bulletins	15
Major Accomplishments	16
Ongoing Activities	16
Financial Information	
Expenditures	17
Performance Report	
Summary of Performance	18
Performance Indicators	19
Performance Measurements	20
Summaries of Significant Board Decisions	
Pursuant to <i>The Labour Relations Act</i>	21
Pursuant to <i>The Employment Standards Code</i>	38
Pursuant to <i>The Workplace Safety & Health Act</i>	43
Summaries of Significant Court Decisions	44
Statistical Tables	46

**Manitoba Labour Board
Organization Chart
as of March 31, 2007**



The Manitoba Labour Board

INTRODUCTION

Report Structure

The Manitoba Labour 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."

Role

The Manitoba Labour Board (the Board) was established "in the public interest of the Province of Manitoba 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". 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 also adjudicates matters arising under certain sections of the following Acts:

The Construction Industry Wages Act (C190)
The Elections Act (E30)
The Essential Services Act (E145)
The Pay Equity Act (P13)
The Public Schools Act (P250)
The Remembrance Day Act (R80)
The Victims' Bill of Rights (V55)
The Workplace Safety and Health Act (W210)

Objectives

The main objectives of the Manitoba Labour Board are 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;
- assist parties in resolving disputes without the need to proceed to the formal adjudicative process; and
- provide information to parties and/or the general public regarding their dealings with the Board or about the Board's activities.

Mandate

The Board is responsible for the administration and/or adjudication of issues arising under the following statutes:

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***. The Board also handles hours of work exemption requests from employers seeking variation from the standard hours of work, and applications for exemption from the weekly day of rest.

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 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 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 and labour and commercial 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.

Diane E. Jones, Q.C.

Appointed on a part-time basis since 1985, she holds a Bachelor of Arts degree (Honours) 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 *Manitoba Human Rights Code* and the *Canada Labour Code*. He was the director of the Public Interest Law Centre for 21 years and entered private practice in 2003 as counsel to the firm of Gange Goodman & French, with an emphasis on aboriginal law and civil litigation.

Colin Robinson

Appointed to the Board 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.

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 is a sessional lecturer in employment law at the University of Manitoba Law School.

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 Law 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 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 a past executive member of the Hotel Association of Canada and past chair of the Manitoba Tourism Education Council. He was co-chair of the athletes' villages during the 1999 Pan Am Games and has been active as a community volunteer.

Victor W. Becker

Appointed in 2006, he had been vice president of Empire Iron Works Ltd. for 20 years and had worked in the steel industry for 38 years with Dominion Bridge and Empire Iron. Mr. Becker graduated from the University of Manitoba with a Bachelor of Science degree in Civil Engineering and is a member of the Association of Professional Engineers and Geoscientists of Manitoba. He is presently on the board of directors for the Construction Labour Relations Association of Manitoba and has been past chairman of the Manitoba Erectors Association. Mr. Becker had been on the board of directors of the Canadian Institute of Steel Construction for 28 years and on its executive committee for 20 years.

Elizabeth M. (Betty) Black

Appointed in 1985, she is a Fellow, Certified Human Resource Professional and holds a Certificate from the University of Manitoba in Human Resource Management. Ms. Black has been employed in senior human resource management positions in a variety of organizations since 1972. She is a member of the Human Resources Management Association of Manitoba and has served as president and chair of the Strategic Advisory Council. She has also instructed in the Human Resource Management Certificate Program at the University of Manitoba.

Christiane Devlin

Appointed in 2002, she has held senior management positions in which she integrated human resource management with business needs including communication and printing, agriculture, manufacturing, health care retail and co-operatives businesses. Ms. Devlin's human resource management experience includes both unionized and non-unionized workplaces.

Colleen Johnston

Appointed in 1993, she is the manager of 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 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 as well as a member of the National Professional Practice Examination Committee.

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's policy panels for civic affairs and taxation policy, parliamentarian 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 member of the Prairie Theatre Exchange Foundation Trust. His past affiliations include vice-chair and treasurer of the Winnipeg Chamber of Commerce and on the Advisory Committee for the Continuing Education Department at the University of Manitoba.

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

Appointed in 2003, he is currently president of the Manitoba Heavy Construction Association, president of the Infrastructure Council of Manitoba, president of the Western Canada Roadbuilders and Heavy Construction Association and founding member and chair of the Western Canada Transportation Systems Strategy Group. He has an extensive background in public policy writing related to trade and transportation, infrastructure, workplace safety and compensation. A lawyer by background, Mr. Lorenc graduated from the University of Manitoba with Bachelor of Arts and LL.B (law) degrees. He is a former Winnipeg city councilor 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.

Yvette Milner

Appointed in 1996, she is president of On-Site Safety & Health Management Solutions, a consulting company specializing in assisting companies to manage the risk associated with injury and illness in the workplace. Ms. Milner has expertise and experience in human resources, safety and disability management with past work experience in the public and private sectors. Prior to her current consulting business, she led the Safety and Disability Management practice in the Winnipeg office of Deloitte & Touche. Active in the Winnipeg

business community, Ms. Milner is involved in the Manitoba Employers Council and Employers Task Force on Workplace Safety and Workers Compensation. She is a board member of the Manitoba Chamber of Commerce and holds memberships in the Human Resource Management Association of Manitoba and the Manitoba Safety Council.

Clifford O. Olson

Appointed in 2005, he had been executive vice president of Special Projects, Western Canada for Comstock Canada Ltd., for 25 years and had worked for Comstock since 1955 in many other capacities. Mr. Olson is past president of the Winnipeg Construction Association and past chairman of the Construction Labour Relations Association of Manitoba. Since his retirement, he has been consulting on a part-time basis.

David Rich

Appointed in 2005, he has been employed at Richlu Manufacturing for 39 years and is currently the president and CEO. Mr. Rich is the president of the Garment Manufacturers Association of Western Canada and has been the chairman of the negotiating committee for 15 years.

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.

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 senior 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 trustee 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 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.

Employee Representatives

Bernie Atamanchuk

Appointed in 1985, he had worked with the United Food and Commercial Workers Union (UFCW) from 1964 until his retirement in 2001. During his 36 years of service with the UFCW Local No. 832, Mr. Atamanchuk held various positions including trustee of the Manitoba Food and Commercial Workers Dental Plan, director of Organizing, director of Servicing and executive assistant to the president. Mr. Atamanchuk's term expired in December 2006.

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 BA and Law 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.

Robert P. Bayer

Appointed in 2004, he has been a staff representative with the Manitoba Government and General Employees' Union 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).

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. She has been active on her union's Plant Closure and Lay-off Committees. 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 graduate of the University of Manitoba where she attained an Arts Degree in Labour Studies.

Lalah Casselman

Appointed in 2004, she was the assistant business manager for the International Brotherhood of Electrical Workers, Local Union 2034. Duties in this capacity included negotiating and administration of collective agreements and labour relations activities from grievances to arbitration. Ms. Casselman was an experienced and valuable Board member and it is with regret that we advise she passed away in 2006.

Clive Derham

Appointed in 1990, he was formerly employed with the City of Winnipeg. Until his retirement, Mr. Derham was employed as a staff representative with the Canadian Union of Public Employees, with primary emphasis being in the health care sector.

Irene Giesbrecht

Appointed in 2002, she has been employed by the Manitoba Nurses' Union since 1978 and is currently director of negotiations and chief negotiator. Previous to joining the Manitoba Nurses' Union, Ms. Giesbrecht was employed in the health care sector as a registered nurse. She is chairperson of the Manitoba Council of Health Care Unions and is a member of various organizations including the Manitoba Nursing Advisory Council, Union Centre Board of Directors, Manitoba Patient Access Network and on the Blue Cross Board of Directors.

Jan Malanowich

Appointed in 1991, she has been employed since 1981 as a staff representative for the Manitoba Government and General Employees' Union. Ms. Malanowich is actively involved in collective bargaining, grievance handling and a multitude of associated activities related to the needs of the membership.

Douglas R. McFarland

First sat as a Board member from 1988 to 1996, he was reappointed in 2000. Mr. McFarland has been actively involved in labour relations and is currently employed as a staff representative with the Manitoba Government and General Employees' Union.

John R. Moore

Appointed in 1994, he was employed as the Business Manager and Training Coordinator for the United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States and Canada, Local 254. In this capacity, Mr. Moore was also a representative of the Manitoba Apprenticeship Board. He also is President of the Manitoba Building and Construction Trades Council and Vice-President for the Construction Industry for the Manitoba Federation of Labour.

Maureen Morrison

Appointed in 1983, she has a Bachelor of Arts degree from McGill University and has also completed several courses in labour relations studies. In 1980, Ms. Morrison was hired as a staff representative with the Canadian Union of Public Employees (CUPE) and, since 1987, has been employed as an equality representative with CUPE. Her work is primarily in the areas of pay equity, employment equity, respectful workplace training and other human rights issues.

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 co-ordinator from 1985 to 1987. He sits on the executive board of the Canadian Conference of Operating Engineers, is currently vice-president of the Manitoba Building and Construction Trades Council and vice-president of the Manitoba Federation of Labour. Prior to 1985, he was a certified crane operator and has been an active member of the IUOE since the late 1960s.

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 board of Destination Winnipeg and is the chair of the board of the Community Unemployed Help Centre. He is also a board member of the Manitoba Public Insurance Corporation.

Grant Rodgers

Appointed in 1999, he is currently a staff representative with the Manitoba Government and General Employees' Union and has specialized for a number of years in grievance arbitration matters as well as collective bargaining. Mr. Rodgers holds a B. Comm. (Honours) 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, Big Brothers of Winnipeg and a director of the Winnipeg South Blues Junior "A" Hockey Club.

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.

Sonia Taylor

Appointed in 2005, she has been employed since 1991 at a staff representative with the United Food and Commercial Workers Union, Local No. 832. Ms. Taylor is actively involved in grievance handling and represents the needs of the membership in industrial and retail sectors.

OPERATIONAL OVERVIEW

Adjudication

During 2006/2007, the Board was comprised of a full-time Chairperson, 1 full-time Vice-Chairperson, 5 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 supported by the Registrar and 6 Board Officers. The Registrar oversees the day-to-day field activities of the Board. Applications filed with the Board are processed through the Registrar's office who determines the hearing dates where required and ensures that each application is processed efficiently and in accordance with Board practice.

Reporting to the Registrar are 4 "labour relations" Board Officers responsible for processing various cases and conducting investigations pertaining to the applications filed with the Board. They can be appointed to act as Board Representatives in an endeavour to effect a settlement between parties where there has been, and not limited to, an allegation of an unfair labour practice. The resolution of complaints through this dispute resolution process reduces the need for costly hearings. The Board Officers act as Returning Officers in Board-conducted votes, attend hearings and assist the Registrar in the processing of applications. The Board Officers communicate with all parties and with the public regarding information on Board policies, procedures and jurisprudence as it relates to a specific issue or case. They play a conciliatory role when assisting parties to conclude a first collective agreements and subsequent agreements. They are mediators during the dispute resolution process.

Also reporting to the Registrar are 2 "employment standards" Board Officers responsible for processing all referrals from the Director of the Employment Standards Division, requests for hours of work and weekly day of rest exemption requests. They also process expedited arbitration referrals and assist the Board and parties with any issues that might arise during hearings. They may also be involved in mediation efforts in an attempt to resolve the issues.

Administrative Services

Administrative Services is supported by the Administrative Officer and 6 administrative support staff. The Administrative Officer is responsible for the administrative support of the Board including 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 5 administrative secretaries responsible for the processing of documentation. The staff of the Administrative Services and Field Services work closely to ensure the expeditious processing of applications. Also reporting to the Administrative Officer is the Information Clerk who responds to information requests from legal counsel, educators and the labour community for name searches, collective agreements and certificates.

The administrative support team, including the Board's Researcher, continue to work on upgrading and maintaining the Board's automated database and are involved in the development of the Board's case management system.

Research Services

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 issued by the Board and compiles the *Index of Written Reasons For Decision*. The Researcher has been extensively involved with the development of the Board's automated case management system.

Library

The Board maintains a collection of texts, journals, reports and other publications dealing with industrial relations and labour law in Manitoba and other Canadian jurisdictions. Pursuant to 1985 amendments to *The Labour Relations Act*, all arbitration awards and collective agreements in the province must be filed with the Board. Copies of these documents are maintained in the Board's Library and can be viewed by the public in the Board's office or copies made available in accordance with the fee schedule.

Publications

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 web site www.gov.mb.ca/laws. Publications produced by the Board are:

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 quarterly publication containing an index of written reasons categorized by topic, employer and section of the *Act* and is available on a subscription basis from Statutory Publications.

The Board distributes copies of *Written Reasons for Decision* relating to certain Board decisions. As noted above, a subscription service for the *Index of Written Reasons for Decision* is available. In addition, the Board provides copies of *Written Reasons for Decision* and arbitration awards to various publishers for selection and reprinting in their publications. *Written Reasons for Decision* and arbitration awards can also be accessed through LexisNexis Quicklaw.

Web Site & Email Address

The Board's web site at <http://www.gov.mb.ca/labour/labbrd> provides information about the Board and links to other departmental divisions, LexisNexis Quicklaw and Statutory Publications. To provide greater access to the Board and to enhance its delivery in providing timely information, the Board may also be contacted at its email address mlb@gov.mb.ca

Information Bulletins

The Board also produces *Information Bulletins* regarding the Board's practice and procedure. The Board did not issue any new information bulletins during the reporting period. Copies of the information bulletins may be obtained by contacting the Board office by phone, in writing or by visiting the Board's web site. The following is a list of the current information bulletins.

- #1 Review and Reconsideration
- #2 Rule 28 – *Manitoba Labour Board Rules of Procedure*
- #3 Adjournments Affecting Continuation of Proceeding
- #4 The Certification Process
- #5 Streamlining of Manitoba Labour Board Orders
- #6 Financial Disclosure
- #7 Fee Schedule
- #8 Arbitrators' List
- #9 Filing of Collective Agreements
- #10 **Rescinded** April 2007 (formerly Steps to follow in applying for an Hours of Work Exemption Order)
- #11 **Rescinded** April 2007 (formerly Steps to follow in applying for a Meal Break Reduction)
- #12 **Rescinded** April 2007 (formerly Steps to follow in applying for a Permit to be exempted from Weekly Day of Rest)
- #13 Process for the settlement of a First Collective Agreement
- #14 Objections on Applications for Certification
- #15 Manitoba Labour Board's decision respecting Bargaining Unit Restructuring in the Urban Health Care Sector

Major Accomplishments

There were 995 cases before the Board in this reporting period, an increase of 7% from the previous year (pending from previous period plus new applications).

During the reporting period, 83% of cases before the Board were disposed of/closed.

The Board heard 183 matters, involving 226 applications and 150 hearing days. The remainder of the cases dealt with were either administrative in nature or were resolved through successful mediation by the Board's officers.

The "Guide to The Labour Relations Act" became available on the Board's web site in English and French. Through a question and answer format, the Guide explains the provisions of The Labour Relations Act and the roles of the Manitoba Labour Board and Conciliation & Mediation Services.

Testing of a comprehensive automated case management system is progressing, with implementation scheduled for 2007-2008.

The Board issued 12 Written Reasons for Decision.

The Board issued 39 substantive orders.

Desks for staff were replaced with more efficient and ergonomic workstations.

Computer equipment was upgraded and obsolete monitors replaced.

To increase public awareness and improve understanding of its role, the Board continued its public education initiatives by speaking to various organizations and at educational institutions.

A new statistical database was introduced which compiled statistics on mediative settlements by Board Officers. The data reflected the success of the Board's mediative services in meeting its objective to resolve disputes without the need to proceed to the formal adjudicative process.

Excluding those cases granted "extenuating circumstances", statutory time requirements were met for all Board conducted votes.

The Chairperson and Vice-Chairperson represented the Board at the annual Conference of Labour Board Chairs held September 2006 in Montebello, Quebec.

The Vice-Chairperson also attended the Canadian Conference of Canadian Labour Board Law held May 2006 in Toronto, Ontario and participated as a workshop panellist.

Ongoing Activities and Strategic Priorities

The Board's management team will be considering options to relocate to space more functionally appropriate for the Board's program activities. The Board will continue to pursue alternative space options identified by the Department of Infrastructure and Transportation. In conjunction with relocation would also be the acquisition of suitable hearing room furniture and sound system.

A succession plan for key staff that are approaching retirement will be developed to ensure continuity and consistency.

A seminar for Vice-chairpersons and Board Members is scheduled for May 2007 to provide a forum for discussion of imminent changes to legislation and to review recent substantive decisions issued by the Board. This is an integral facet of Board Members' training, particularly as orientation for newly appointed Board Members.

Testing of a new comprehensive automated case management system will be completed in 2007 and implementation will be phased in commencing 2008.

The new **Public Interest Disclosure (Whistleblower Protection) Act** is expected to be enacted in the next reporting period. An employee or officer in the Manitoba public service who believes a reprisal has been taken may file a written complaint with the Board. Complaints filed pursuant to the new legislation will be monitored to assess the impact on the adjudicative and administrative procedures of the Board.

Amendments effective April 2007 to the *Employment Standards Code* will terminate the Board's role in granting hours of work exemptions, with responsibility to be transferred to the Employment Standards Division. After the transfer transition period, the Board will be re-priorizing its activities.

An increase in mediative settlements is anticipated once a new Board Officer is recruited to fill a current vacancy. With the return to a full Board Officer complement, there will be a corresponding increase in the Board's ability to appoint officers to the mediator role in order to affect successful dispute resolutions without the need for timely and costly formal hearings.

The Information Bulletins will be reviewed and updated to reflect the Board's current policies and procedures.

Applications forms will be evaluated and amended as necessary to meet *The Freedom of Information and Personal Privacy Act* (FIPPA) requirements.

Written Reasons for Decision and substantive orders issued by the Board will be posted on the Board's website for ready access by the labour relations community, legal practitioners, educators and the public.

The Board will be seeking bilingual board members to add to its existing complement by canvassing the designated representatives from the labour and management community.

The Board will continue to review its practices and procedures and to make improvements to increase efficiencies, eliminate duplication and reduce expenses.

In order to expeditiously process applications, the Board will continue to examine methods to reduce median processing times. Statistics about median processing times can be viewed within the "Performance Indicators" section found later in this report.

2(e) Manitoba Labour Board Financial Information

Expenditures by Sub-Appropriation	Actual 2006/07 (\$000s)	Estimate 2006/07 FTE	Estimate 2006/07 \$(000s)	Variance Over/(Under) (\$000s)	Expl. No.
Total Salaries	1,205.6	17.50	1,308.5	(102.9)	1.
Total Other Expenditures	455.3		367.0	88.3	2.
Total Expenditures	1,660.9	17.50	1,675.5	(14.6)	

Explanation Number:

1. *Under-expenditure reflects implementation of vacancy management strategies, which included reducing total per diems for part-time Board Members, maintaining a staff vacancy, net staff turnover costs and savings due to the voluntary reduced work week program partially offset by reclassification of an employee and vacation payout for an employee who resigned.*
2. *Over-expenditure reflects purchases of computer hardware and workstations in anticipation of the relocation to new premises, the billing of information and communication technology services from Science, Technology, Energy and Mines for design and implementation of the Case Management System, under budgeted payments of The Law Society of Manitoba fees for the Chairperson and permanent Vice-Chairperson and an unbudgeted out-of-province trip. These over-expenditures were partially offset by implementation of expenditure management strategies, which resulted in reductions in legal fees due to fewer appeals, Annual Report production and translation costs due to payment from a central budget,*

mailing costs due to new system, equipment rentals, operating supplies, computer related charges and telephone charges.

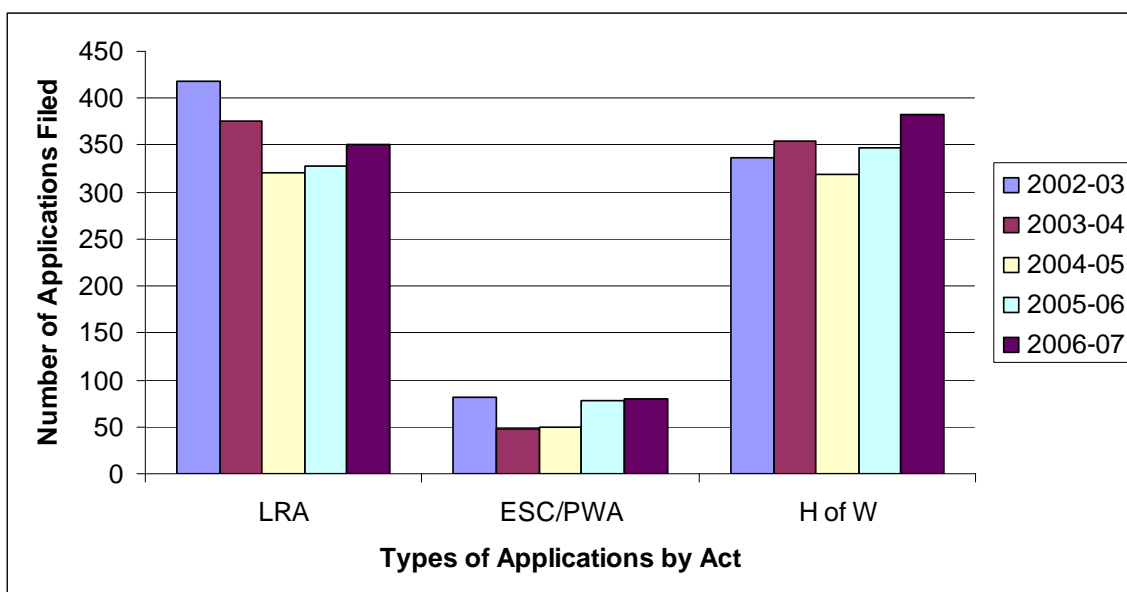
SUMMARY OF PERFORMANCE

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. In an effort to strengthen communications within the labour relations community, the Board held and will continue to hold consultation and information sessions on specific issues, as it deems advisable.

The Board monitored its internal processes to improve efficiencies and expedite processing of applications or referrals. 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 conducted formal hearings, however, a significant portion of the Board's workload was administrative in nature.

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

**Manitoba Labour Board
Number of Applications Filed**



During the reporting year the Board continued to receive a high volume of applications and complaints. Cases have increased in complexity and in the number of hearing days scheduled. *The Employment Standards Code* amendments scheduled to take effect April 2007 will eliminate applications to the Board for hours of work exemptions.

Detailed statistical tables and summaries of significant Board decisions can be found later in this report.

Performance Indicators

What are we measuring and how?	Why is it important to measure this?	What is the most recent available value for this indicator?	What is the trend over time for this indicator?	Comments/ recent actions/report links
1. We are measuring the Board's caseload by looking at the number of cases filed.	A key element in measuring the Board's workload volume is the number of applications made to the Board.	For 2006/2007, the total number of applications filed was 816. Labour Relations - 351 Employment Standards - 463 Workplace Safety & Health - 1 Elections Act - 1	<i>Increasing.</i> There was an 8% increase from the previous reporting period in the volume of cases filed.	The volume of applications filed has a direct impact on the medium processing days as the Board's staff resources are stretched to absorb increased activity.
2. We are measuring the level of activity by looking at the percentage of cases disposed of.	The Board's objective to handle matters before it in a fair and expeditious manner can be measured by the number of cases processed and closed.	For 2006/2007, the Board disposed of 83% of its caseload.	<i>Improving.</i> There was a 2% increase from the previous reporting period in the number of cases processed which is significant considering the increase in caseload and 1 vacant Board Officer position.	The Board plans to fill a current Board Officer vacancy and as a result, the resolution rate may increase in the next reporting period depending upon the number and type of applications filed.
3. We are measuring cases that are adjudicated by looking at the number of scheduled and actual hearing days.	As mandated by <i>The Labour Relations Act</i> for the fair and efficient administration and adjudication of responsibilities, the number of adjudicated matters is indicative of the Board's responsiveness in resolving disputes by providing decisions that enable a stable labour relations environment.	For 2006/2007 there were: 427 hearing dates scheduled, with 150 dates that proceeded.	<i>No trend yet established.</i> (Note: The criteria as to which meetings were classified as hearings were revised in 2006/2007, therefore the hearing statistics that were reporting in the 2005/2006 annual report differ from those reported in this table.) In 2005/2006 there were 368 hearing dates scheduled, with 128 dates that proceeded (adjusted for revised criteria). The level of adjudication is conditional upon the number of cases disposed of without the need of the formal adjudicative process. Applications may be withdrawn by the parties, resolved through mediation, or processed administratively.	This indicator helps the Board assess disputes resolved with the assistance of mediation by Board Officers or with the issuance of substantive orders which illustrates the Board's progress against a desired outcome.
4. We are measuring the expeditious processing of applications by looking at the number of median processing days.	The number of median processing days is indicative of the complexity in the various types of applications dealt with by the Board.	For 2006/2007 the median processing days were: Labour Relations - 50 days Employment Standards - 7 days, during a period with 1 Board Officer vacancy.	<i>Stable.</i> For 2005/2006, the median processing days were: Labour Relations - 48 days Employment Standards - 7 days	Processing days for certain types of applications will vary due to circumstances beyond the Board's control. (e.g. legislative amendments, settlement discussions between the parties). See following page for more detailed processing times.

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

Program Performance Measurements of the Manitoba Labour Board

April 1 - March 31

Indicator	Actual 2004-2005	Actual 2005-2006	Actual 2006-2007
Percentage of Cases disposed of	79%	81%	83%
Number of Hearing dates scheduled	508	432	427
Percentage of Hearing dates that proceeded	66%	86%	35%
Number of votes conducted	27	31	20
Median processing time (calendar days):			
<i>Labour Relations Act:</i>	50	47	50
<i>Workplace Safety & Health Act</i>	79	122	498*
<i>Essential Services Act</i>	NA	NA	389*
<i>Elections Act</i>	NA	NA	NA
<i>Employment Standards Code</i>	7	7	7

* The median processing time for applications filed under *The Workplace Safety and Health Act* and *The Essential Services Act* were based on 2 and 1 cases respectively. The processing times are not 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 2,583 collective agreements on file, there are 2,038 arbitration awards and 689 Written Reasons for Decision/substantive orders in the Board's collection (a 3%, 2% and 9% increase 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 and substantive orders issued since January 2007 are posted on the Board's web site.

SUMMARIES OF SIGNIFICANT BOARD DECISIONS PURSUANT TO *THE LABOUR RELATIONS ACT*

Manitoba Lotteries Corporation - and - General Teamsters, Local Union 979 - and -Eugene Kolench
Case No. 91/06/LRA
April 7, 2006

ARBITRATION - UNFAIR LABOUR PRACTICE - PRACTICE AND PROCEDURE - Res judicata - Jurisdiction - Deferral To - Employee's complaints addressed in prior, binding and final disciplinary proceedings through grievance and arbitration provisions - Based on doctrine of *res judicata* or alternatively issue estoppel, Board lacked jurisdiction to consider application - Application dismissed pursuant to Sections 140(7) and 140(8) of *The Labour Relations Act* - Substantive Order.

The Employee filed an unfair labour practice application under Section 7(a) of *The Labour Relations Act*.

Held: The Board was satisfied that the Employee's complaints were addressed in prior, binding and final disciplinary proceedings through the grievance and arbitration provisions of the collective agreement between the parties. Based on the doctrine of *res judicata* or alternatively issue estoppel, the Board lacked jurisdiction to consider the application. To the extent that the Employee may raise new issues, those matters could be adequately determined in pending grievance arbitration proceedings ongoing between the parties. Accordingly, the Board dismissed the application pursuant to Sections 140(7) and 140(8) of *The Labour Relations Act*.

Manitoba Hydro - and - International Brotherhood of Electrical Workers, Local 2034 - and - Gordon Vogel
Case No. 138/06/LRA
May 9, 2006

DUTY OF FAIR REPRESENTATION - Contract Administration - Failure to Process Grievance - Upon review of application and replies filed, Board found Union investigated Employee's issues and obtained legal advice before deciding not to file grievance - Section 20 of *Labour Relations Act* does not require a union to grieve or arbitrate every complaint - Board will not interfere with Union's decision as it was not arbitrary, discriminatory or in bad faith.

PRACTICE AND PROCEDURE - Prima facie - Upon review of application and replies filed, Board found Union investigated Employee's issues and obtained legal advice before deciding not to file grievance - Union did not act arbitrarily, discriminatorily or in bad faith - As per section 140(8) of *The Labour Relations Act*, Board dismissed application without a hearing as application found to be without merit.

The Employee claimed the Union failed to represent him and failed to properly support him with respect to his concerns regarding conditions placed upon him upon his returning to work, as well as his placement on sick leave. The Union submitted that it fully considered the matter and that it had discussed the Employee's concerns with the Employer. The Union concluded that the Employer had acted reasonably. In addition, the Union obtained a legal opinion in which Counsel concluded that the matter should not be grieved.

Held: The application and replies disclosed that the Union investigated the Employee's issues and sought legal advice in making its decision not to file a grievance. While section 20 of *The Labour Relations Act* prohibits bargaining agents from acting in a manner which is arbitrary, discriminatory or in bad faith, it does not require a union to grieve or arbitrate every issue brought forward by employees whom it represents. Unions have the discretion to determine whether or not a grievance will be filed or submitted to arbitration. Provided that this discretion is exercised in a manner which is not inconsistent with the provisions of section 20 of the *Act*, the Board will not interfere with a union's decision. The Board was satisfied that the Union, in determining how to respond to the Applicant's concerns, did not act in a manner which was arbitrary, discriminatory or in bad faith. The fact that the Applicant did not agree with the approach taken by the Union or the legal opinion which it secured did not amount to an unfair labour practice. Section 140(8) of the *Act* permits the Board to dismiss an application at any time if the application is found to be without merit. Upon review of the application and replies thereto, the Board was satisfied that the Application was "without merit". Accordingly, the application was dismissed.

Tolko Industries, Manitoba Solid Wood Division - and - United Steelworkers of America, Local 1-324 - and - Tom Burke-Gaffney, Jory Trucking Ltd., & Conrad Hrapstead, Hrapstead Trucking Ltd.
Case No. 459/05/LRA
May 16, 2006

BARGAINING UNIT - EMPLOYEE - EXCLUSIONS - Owner/Operator - Held truck owner/operators operating through a corporation were not excluded from bargaining unit - Each individual and his corporation were considered as one employee and were entitled to engage in collective bargaining.

DUTY TO BARGAIN IN GOOD FAITH - Non-Negotiable Items - Prior to collective bargaining process, Employer stated it would not negotiate trucking rates - Union stated Employer's position was clear and unlikely to change and sought Board's assistance prior to a single bargaining session taking place - Board found it was premature to intervene when collective bargaining had not even commenced as Employer's positions may change during collective bargaining through Union's use of persuasion, logic, and ultimately the threat of economic pressure.

The Union was the certified bargaining agent for all truck owner/operators who delivered logs to the Employer's mill and whose primary source of income was derived from the Employer. Following receipt of the Certificate, the parties questioned the status of two owner/operators who operated through a corporate structure. The parties jointly requested that the Board determine whether the two trucking Corporations were employees for the purposes of the bargaining certificate, and were members of the Union. The parties also requested that the Board determine whether "trucking rates" were a "term and condition of employment" that the Employer was obligated to negotiate during collective bargaining.

Held: The Board has long held that an individual using a business name or operating through a corporation was not automatically excluded from a bargaining unit. By piercing the corporate veil, an individual was not prevented from being considered an "employee", as that term is defined in the legislation, simply because they have chosen to organize their affairs by way of a corporate structure. The fact that the individual and the corporation are effectively interchangeable does not expand the unit to include the individual and the corporation as separate entities each having employee status. Accordingly, each individual and his corporation were for all purposes considered as one employee. The individual principals of those corporations were the employees and were entitled to engage in collective bargaining.

As to the Employer's obligation to negotiate "trucking rates", the Board noted the certificate in question expressly referred to "truck owners/operators". Matters associated with the ownership of a truck may be discussed during collective bargaining. However, the position of the Union anticipated a breach of the statute and sought the Board's assistance prior to a single bargaining session taking place. The Board was not prepared to issue the declarations sought by the Union in advance of collective bargaining on an application seeking a Board Ruling. Although the Union stated the Employer's position was clear and unlikely to change, the Union could use persuasion, logic, and ultimately the threat of economic pressure to persuade the Employer to change its position during collective bargaining. Therefore, the Board found it was premature to intervene when collective bargaining had not even commenced.

B & M Land Company JV - and - International Brotherhood of Electrical Workers, Local 2085
Case No. 351/06/LRA
June 9, 2006

APPROPRIATE BARGAINING UNIT - CONSTRUCTION INDUSTRY - Apprentices - Possibility of apprentices employed on date of application for certification not being "registered apprentices" within the meaning of *The Apprenticeship and Trades Qualification Act* did not, in and of itself, render the bargaining unit inappropriate - Substantive Order.

APPROPRIATE BARGAINING UNIT - CONSTRUCTION INDUSTRY - Certified Bargaining Unit included Electrician-Welders among other classifications - Employer did not employ any Electrician-Welders on date of filing of application for certification - Fact that there may be no employees in one or more classifications covered by the certificate did not render the bargaining unit inappropriate - Substantive Order.

APPLICATION FOR CERTIFICATION - REVIEW - BARGAINING UNIT - Fact that an employer may not employ any employees in a bargaining unit after the Board issues a certificate does not affect validity of certificate - Certificate continues to be operative in event employer does employ employees falling within scope of bargaining unit - Substantive Order.

The Board certified the Union as the properly chosen bargaining agent for a bargaining unit described as: “*All Journeymen Electricians, Electrician-Welders and registered Apprentices, employed by B & M Land Company JV doing all electrical work related to installation, service and maintenance of all electrical equipment, in the Province of Manitoba, save and except those excluded by the Act.*” The Employer filed an application for Review and Reconsideration of the certificate issued.

Held: The Board determined to its satisfaction that the bargaining unit was appropriate for collective bargaining in that it was a unit which the Board had consistently certified in respect of applications for certification filed by the Union. The fact that there may be no employees in one or more classifications covered by the certificate did not render the bargaining unit inappropriate. The fact that the Employer did not employ any Electrician-Welders on the date of the filing of the application for certification did not affect the Employer's concurrence to the bargaining unit described by the Union in its application. The fact that the apprentices employed by the Employer on the date of the application for certification may not have been or were not “registered apprentices” within the meaning of *The Apprenticeship and Trades Qualification Act* did not, in and of itself, render the bargaining unit inappropriate. The Union accepted that the apprentices should not have been considered in the Board's determination of support within the bargaining unit on the date of the filing of the application for certification because they were not “registered apprentices”. Then the nominal roll should only have disclosed that the Employer employed 4 Journeymen Electricians at that time. At the time the application for certification was filed, 65% or more of the 4 Journeymen Electricians wished to have the Applicant represent them as their bargaining agent; meaning that the requirement of Section 40(1)1 of the *Act* had been met, regardless of the status of the apprentices. The fact that an employer may not employ any employees in a bargaining unit after the Board issued a certificate did not affect the validity of the certificate and the certificate continued to be operative in the event the employer does employ employees falling within the scope of the bargaining unit. The Board dismissed the application for review and reconsideration and affirmed the validity of the certificate.

Melet Plastics Inc. - and - Clifton James Starr
Case No. 194/06/LRA
August 1, 2006

UNFAIR LABOUR PRACTICE - PRACTICE AND PROCEDURE - Delay - Employer refused Employee's request to re-hire him two months after he voluntarily resigned - Held Employee's request for a Board order directing Employer to re-hire him was without merit due to seven week delay which elapsed after Employee quit his employment and prior to his asking to be re-hired - Application dismissed - Substantive Order.

UNFAIR LABOUR PRACTICE - PRACTICE AND PROCEDURE - Discrimination - Prima Facie - Employer refused Employee's request to re-hire him two months after he voluntarily resigned - Subsequently, Employee filed a complaint with Manitoba Human Rights Commission and an unfair labour practice application based on Human Rights complaint - Employee failed to establish *prima facie* case that Employer violated Section 7 of the *Act* because Employer's refusal to hire Employee occurred two weeks prior to filing complaint with the Commission - Substantive Order.

Two months after the Employee had quit his employment with the Employer, he asked to be re-hired. The Employer refused to re-hire him. Four days later, the Employee advised the Employer by letter that he intended to file a complaint with the Manitoba Human Rights Commission based on his assertion that he was discriminated against as defined in Section 14 of the *Human Rights Code*. The Employee also advised the Employer that he intended to file a complaint with the Manitoba Labour Board under Section 7 of *The Labour Relations Act*. Twelve days later, the Applicant filed a complaint with the Commission alleging that the Employer contravened Section 14 of the *Code* because it had discriminated against him, based on ancestry, without reasonable cause during his employment after he had filed an internal complaint of discrimination with the Employer, and that the Employer failed to take reasonable steps to terminate the discrimination. That same day, he filed an application seeking various remedies for an alleged unfair labour practice contrary to

Section 7(d)(e)(f)(g) and (h) of *The Labour Relations Act* alleging that the Employer refused to hire him based on a complaint he had filed with the Human Rights Commission.

Held: The Board was satisfied that the Employee voluntarily resigned from his employment. His request for an order of the Board directing the Employer to re-hire him was without merit, when that claim for relief was assessed in the context of the seven week delay which elapsed after the Employee had quit his employment and prior to his asking to be re-hired. The Board determined that the Employee had failed to establish a *prima facie* case that the Employer violated Section 7 of the *Act* because the Employer's refusal to hire the Employee occurred two weeks prior to the Employee actually filing a complaint with the Commission. Accordingly, the Board dismissed the application without a hearing pursuant to Section 140(8) of the *Act*.

Peerless Garments - and - UNITE HERE, Manitoba Joint Council, Local 459 - and - "Laid-Off" Employees of Peerless Garments, N. Ocampo, R. Felipe, E. Del Rosario, M. Oro, M. Espiritu

Case No. 95/05/LRA

September 27, 2006

DUTY OF FAIR REPRESENTATION - Failure to Process Grievance - Sewing Machine Operators laid off by departmental seniority believed lay-offs should be on a plant or bargaining unit wide basis - Union considered provisions of Collective Agreement that lay-offs were to be on departmental basis and made objective and rational judgment regarding likelihood of succeeding at arbitration - Employees did not establish that Union acted arbitrarily or in bad faith - Application dismissed - Substantive Order.

The Employees, who were sewing machine operators, received notice of lay-off on account of the Employer's decision to close the Leather Department on a permanent basis due to a shortage of work. No employee junior to any of the Employees was retained in the Leather Department. The Applicants believed a lay-off by departmental seniority was unfair and that lay-offs ought to be done on a plant or bargaining unit wide basis because the Employer ran one operation. Article 12.01 of the Collective Agreement provided that "whenever lay-offs are necessary they are to be put into effect on a departmental or sectional seniority basis." The Union Representative advised the Employees that, in its view, the lay-off had been conducted in accordance with the provisions of the Collective Agreement because the lay-off had been done on a departmental basis and, further, that no bumping between/among departments was allowed under the Collective Agreement. The Representative obtained legal advice that the lay-offs were implemented in accordance with the Collective Agreement and that there was no reasonable basis to file a grievance. The Employees filed applications pursuant to Section 20(b) of *The Labour Relations Act* alleging that the Union had acted in a manner which was arbitrary and/or in bad faith.

Held: The fact that the Employees disagreed with the decision of the Union not to pursue the grievance to arbitration or that they disagreed with the Union's interpretation of the collective agreement and the legal advice received did not constitute a breach of Section 20(b). When deciding whether to file a grievance on behalf of the Employees, it was reasonable for the Union to consider the applicable provisions of the Collective Agreement and to consider how the advancement of an interpretation, contrary to the Union's view of what the applicable provision in the Collective Agreement actually meant would impact on other employees in the bargaining unit as a whole. Based on the underlying facts, the Union's decision that there was no basis to grieve was a reasonable one and it is not the role of the Board to assume the role of a surrogate arbitrator and decide whether the Employee would have succeeded at arbitration. The Union directed its mind to the merits of the lay-offs in the context of the Collective Agreement and inquired into the seniority standing of the employees who were laid off in the Leather Department. The Union's decision was not made on the basis of irrelevant factors or principles and the Union Representative, did not display an attitude which can be characterized as "... indifferent and summary, or capricious and non-caring or perfunctory." The Union did not act on the basis of hostility, ill-will or dishonesty or that it attempted to deceive the Employees or refuse to process a grievance for sinister purposes. The Union addressed the merits of the Employees' concerns regarding the lay-offs; it considered relevant factors, including the provisions of the Collective Agreement and legal advice received; and made an objective and rational judgment regarding the likelihood of succeeding at arbitration. The Board determined that the Employees did not establish on the balance of probabilities that the Union acted in a manner that was arbitrary or in bad faith. In the result, the Application was dismissed.

St. Boniface General Hospital - and - St. Boniface Nurses, Local 5 of the Manitoba Nurses' Union
Case No. 536/06/LRA
October 23, 2006

UNFAIR LABOUR PRACTICE - ARBITRATION - Deferral to - Union filed an unfair labour practice application alleging Employer interfered with Union's right and ability to represent bargaining unit members due to Employer's plan to make French language proficiency a required job qualification for many nursing positions - Board declined to hear application because matters raised in the Application could be raised in grievance and arbitration procedure - Application dismissed and matter deferred to arbitration process pursuant to Section 140(7) of *The Labour Relations Act* - Substantive Order.

The Union filed an unfair labour practice application alleging that the Employer interfered with the Union's right and ability to represent the bargaining unit members due to the Employer's plan to make French language proficiency a required job qualification for many nursing positions. The Employer admitted that it intended to impose a bilingualism qualification for a limited number of nursing positions but asserted that, as the employer, it has the right to set reasonable qualifications for any nursing positions and that the Union has the right to challenge any qualification selected by the employer through the grievance and arbitration procedure contained in the Collective Agreement.

Held: The Board determined the concerns raised in the Application regarding the manner in which the Union's members may be adversely affected should the Employer establish a bilingual qualification for any position could be raised in the grievance and arbitration procedure under the existing Collective Agreement between the parties. It was not the role of the Board to function as a surrogate arbitration board 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. The Board declined to hear the Application and deferred the matter to the grievance and arbitration provisions of the Collective Agreement between the parties pursuant to Section 140(7) of *The Labour Relations Act*.

Health Sciences Centre, Dept. Of Psych Health (WRHA) - and - Canadian Union of Public Employees, Local 1550 - and - Sheldon Peters
Case No. 606/06/LRA
November 1, 2006

DUTY OF FAIR REPRESENTATION - Failure to Refer Grievance to Arbitration - Employee contended Union committed unfair labour practice when it did not follow through with grievance steps - Union made reasonable decision not to proceed to arbitration based on legal advice - Employee had opportunity to state his case before Grievance Screening Panel and Union's Executive Committee - Employee's disagreement with legal advice received does not constitute a breach of Section 20(b) - Employee failed to establish a *prima facie* - Application dismissed - Substantive Order.

The Employer terminated the Employee's term appointment as Unit Assistant in the Mental Health Program. As a result of the termination, the Union filed a grievance on behalf of the Employee. The Union sought and obtained legal advice which recommended settling the grievance. The Employer and the Union met to discuss a potential settlement of the matter. The Union advised the Employee of the new terms of settlement and of the nature of the legal advice which the Union had received from counsel recommending that the matter be settled on the terms proposed by the Employer. The Employee did not agree to the settlement. He appeared before both the Union's Grievance Screening Panel (the GSP) and the Executive Committee to present his case for proceeding to arbitration. Both the GSP and the Executive Committee decided that the Grievance would not proceed to arbitration. The Employee was advised that the Employer would be asked to issue the payment of lost wages offered to the Employee in the settlement and that the Union would then withdraw the Grievance. The Employer paid the settlement monies to the Employee and that the monies were accepted by the Employee. The Employee filed an unfair labour practice under Section 20(b) of *The Labour Relations Act* arising out of his contention that the Union has failed to represent him appropriately.

Held: The fact that the Employee disagreed with the decision of the Union not to pursue the grievance to arbitration or he disagreed with the legal advice received does not constitute a breach of Section 20(b). Based on the legal advice received, the Union's decision that there was no legitimate basis to proceed to arbitration was a reasonable one and it is not the role of the Board to assume the role of a surrogate arbitrator and decide whether the Employee would have succeeded at arbitration. The Application did not recite any acts or

omissions which, if proven, would establish that the Union made its decision on the basis of irrelevant factors or that the Union, through its National Representative, displayed an attitude which can be characterized as "... indifferent and summary, or capricious and non-caring or perfunctory." There were no facts alleged in the Application that the Union acted on the basis of hostility, ill-will or dishonesty or that it attempted to deceive the Employee or refuse to process a grievance for sinister purposes. The Union addressed the merits of the Employee's concerns in the factual circumstances prevailing; it considered relevant factors, including the provisions of the Collective Agreement and legal advice received; and made an objective and rational judgment regarding the likelihood of succeeding at arbitration. The Union afforded the Employee the right to state his case before the GSP and the Executive Committee of the Union. The Board determined that the Employee failed to establish a *prima facie* case and, accordingly the Application was dismissed.

Empire Iron Works Co. Ltd. - and - International Assoc. of Bridge, Structural, Ornamental & Reinforcing Ironworkers, L. 728 - and - Myles Anderson and Chris McLean

Case Nos. 407/06/LRA and 408/06/LRA

November 7, 2006

DUTY OF FAIR REPRESENTATION - Failure to Process Grievance - Hiring Hall - Applicants contend Union dispatched two other union members to job when the Applicants were on recall list - No recall rights in Collective Agreement and Union's Dispatching Policy not part of Collective Agreement - No basis upon which Union could file a grievance as no rights under Collective Agreement had been breached - Application dismissed - Substantive Order.

The Employees, who were Journeyman Structural Ironworkers, were laid off. The Collective Agreement did not provide for any recall rights. The Union did follow a "Dispatching Policy" for the dispatching of members to various job sites of the Employer, but it was not part of the Collective Agreement. A week after the Employees were laid off, the Employer placed a Job Order. The Applicants were not selected as a name hire from the recall list. They raised their concern that they were not selected for the job with the Union. It advised them that there was no basis upon which a grievance could be filed because the Employer had the right to select employees whom it wished and that no recall rights were recognized under the Collective Agreement. The Applicants filed applications seeking various remedies for an alleged unfair labour practice contrary to Section 20 of *The Labour Relations Act* (the "Act") arising out of their contention that the Union dispatched two other union members to the Employer's job at Minnedosa when the Applicants were on a recall list for the Employer.

Held: The procedure followed by the Union, in terms of dispatching union members to the Minnedosa job, was administered in good faith and in accordance with past practice. There was no evidence that the Union or anyone acting on its behalf had acted in bad faith. There were no facts alleged in the Application that the Union acted on the basis of hostility, ill will or dishonesty or that it attempted to deceive the Employees or refused to represent them for sinister purposes. As there was no provision in the Collective Agreement regarding recall rights for individual members and as the Dispatching Policy was not part of the Collective Agreement, there were no rights of the Employees under the Collective Agreement which had been breached by the Employer in the factual circumstances prevailing. There was no basis upon which the Respondent could file a grievance alleging a breach of the Collective Agreement. The fact that the Employees believed that they had a specific right of recall and that the Union failed to pursue that particular right did not constitute a breach of Section 20(b). Neither the evidence nor the Application, on its face, recited any acts or omissions which, if proven, would establish that the Respondent acted in an "arbitrary" or "discriminatory" manner under Section 20(b). The Board determined that the Employees had failed to establish that the Union acted in a manner which was arbitrary, discriminatory or in bad faith in representing any right of the Employees under the Collective Agreement and dismissed the Application.

Assiniboine Regional Health Authority - and - Manitoba Government and General Employees' Union; and Manitoba Nurses' Union

Case No. 474/06/LRA

November 22, 2006

PRACTICE AND PROCEDURE - SUCCESSORSHIP - Amalgamation - Intermingling - Res Judicata - Amalgamation of two health authorities resulted in Home Care Case Co-ordinator classification falling into two bargaining units - Employer requested Board Determination to which bargaining unit classification should be assigned - MGEU raised preliminary objection under principles of res judicata/issue estoppel - Held even where elements of res judicata and issue estoppel exist, Board

retains discretion whether doctrines ought to be applied - In current application, elements had not been met given emergence of new employer and changes to Home Care Case Co-ordinators classification - Matter to proceed to hearing - Substantive Order.

The South Westman Regional Health Authority (the SWRHA) and the Marquette Regional Health Authority (the MRHA) were amalgamated to form the Assiniboine Regional Health Authority (the ARHA). Prior to the formation of the ARHA, the Manitoba Nurses' Union was the certified bargaining agent for all nurses practicing the profession of nursing employed by the two health authorities and the Manitoba Government and General Employees' Union was the certified bargaining agent for all employees employed by the health Authorities in technical/ professional paramedical classifications. As a result of the formation of the ARHA, the Home Care Case Co-ordinators in the former MRHA remained in the MGEU bargaining unit and the Home Care Case Co-ordinators in the former SWRHA remained in the MNU unit. The ARHA encountered significant operational difficulties by having employees employed in the same classification and performing the same job functions in two separate bargaining units, but, at the same time being subject to different terms and conditions of employment. The ARHA filed an application with the Board requesting that the Board act on its own motion pursuant to Section 56(2) of the *Act* and determine to which bargaining unit the classification of Home Care Case Co-ordinator should be assigned. The MGEU raised a preliminary motion that the issue in dispute had already been adjudicated by the Board. In May 2002, the Board ruled, in Case 675/01/LRA, that the classification of Home Care Case Co-ordinator in the MRHA should remain in the Technical/Professional Paramedical bargaining unit. Therefore, the matter could not be litigated again under the principles of *res judicata*/issue estoppel.

Held: Even where the three elements required to apply the doctrines of *res judicata* and issue estoppel are found to exist, the Board retains discretion as to whether these doctrines ought to be applied. This discretion arises from the Board's statutory right to review, reconsider or vary any previous decision under Section 143(3) of the *Act*. However, it was not satisfied that the three elements required to apply *res judicata*/issue estoppel had been met in the circumstances of this case. First, the parties in the proceedings were different. Second, the qualifications required of Home Care Case Co-ordinators by the ARHA had changed since the 2002 decision. Given the emergence of a new employer and the changes which had been made in respect of the Home Care Case Co-ordinators classification, the Board determined that this was a case where it ought to exercise its discretion and proceed to hear the merits, particularly when the parties did not dispute that intermingling within the meaning of Section 56(2)(c) among the Home Care Case Co-ordinators has occurred. The Board dismissed the preliminary motion to apply *res judicata*/issue estoppel to the circumstances of the case. The matter would proceed to hearing to determine into which bargaining unit the Home Care Case Co-ordinator classification fell.

MTS Media Inc. as part of the MTS Group Of Companies - and - Communications, Energy and Paperworkers Union of Canada, Local 7
Case Nos. 742/06/LRA and 743/06/LRA
November 23, 2006

JURISDICTION - Arbitration - Telecommunications - Employer questions whether Board has jurisdiction to appoint arbitrator under Expedited Arbitration Referrals - While Employer had relationship with other corporate entities which fell under federal jurisdiction various provisions in collective agreement between Employer and Union, confirmed, on their face, that the parties had agreed that the operations of Employer fell within provincial jurisdiction - Applications for the two Expedited Arbitration Referrals were specifically limited to the collective agreement between the parties and were within the jurisdiction of the Board.

The Board appointed an arbitrator, pursuant to section 130(5) of ***The Labour Relations Act***, in respect of Expedited Arbitration Referrals which had been filed by the Union. The Employer requested that the Board provide reasons for making these referrals.

Held: In arriving at its decision to appoint an arbitrator, the Board considered a number of factors. While the Employer may have a relationship with other corporate entities which fell under federal jurisdiction, there was one collective agreement between the Employer and the Union. Various provisions in the agreement, confirmed, on their face, that the parties had agreed that the operations of the Employer fell within provincial jurisdiction, and, therefore, the jurisdiction of the Board. Some of the provisions mentioned provincial legislation. As well, the collective agreement provided that the Manitoba Labour Board had jurisdiction to

appoint a chairperson of an arbitration board when the two nominees to a board of arbitration could not agree on a chairperson. As well; new additions to the Wage Rates Schedule could be made by the Employer but the parties had agreed that the Union may apply to the Manitoba Labour Board for review of the Company's decision. The Board was satisfied that the applications for the two Expedited Arbitration Referrals were specifically limited to the Employer and to the collective agreement and were within the jurisdiction of the Board.

4147880 Canada Ltd., t/a as Clarion Hotel & Suites - and - United Food and Commercial Workers Union, Local No. 832 - and - J. Lopez, L. Ocampo, L. Panganiban, A. Cruz, R. Paragas and L. Paragas
Case No. 444/05/LRA
November 30, 2006

APPLICATION FOR CERTIFICATION - UNFAIR LABOUR PRACTICE - Petition - Employer Interference - Union claimed supervisor whose name did not appear on Voter List and who was not eligible to be a union member circulated anti-union petition - Board found she was not a manager or supervisor and she was included on the Voter List under a new surname - Held petition was product of employees and it was not initiated by Employer.

APPLICATION FOR CERTIFICATION - UNFAIR LABOUR PRACTICE - Captive Audience - Freedom of Expression - Reservations Clerk reminded employees to vote and bring identification - Held comments made by Clerk did not amount to an interrogation as per section 25(1) of *The Labour Relations Act* and her comments fell within realm of protected freedom of expression as per section 32(1) - At a second alleged captive meeting, General Manager only made statements of fact which did not constitute unfair labour practice.

UNFAIR LABOUR PRACTICE - EMPLOYEE - Definition - Interference - Employees perception that Housekeeper was their supervisor not sufficient for her to be considered as Employer or a person acting on behalf of Employer as she only had minor supervisory authority - Also, Board found that individual whom Union alleged was Front Desk Manager was a Reservation Clerk - Both individuals found to be "employees" under *The Labour Relations Act* and not management in consideration of unfair labour practice.

EVIDENCE - Witness - Credibility - Where evidence of Union and Employer differed testimony of Employer's witnesses preferred as their evidence was in harmony with the preponderance of probabilities - Union's witnesses' testimony often differed during direct examination and cross-examination - Individuals named in the application did not testify.

UNFAIR LABOUR PRACTICE - Discharge - Union Activity - Employer satisfied onus that terminations were not tainted by anti-union animus - Three housekeepers were discharged because of concerns with quality and speed of their work - Bellman and Housekeeper were discharged due to their involvement in altercations and heated arguments with co-workers - Applications dismissed.

The Union alleged that the Employer engaged in a campaign to undermine support for a union organizing drive and continued to commit unfair labour practices following the submission of its application for certification and at the Representation Vote. Specifically, the Union alleged that the Housekeeper with supervisory duties was involved in a number of conversations with other employees with the intent to discourage them from joining the union or threatening that their employment was in jeopardy due to their involvement with the Union. It also alleged that the "Front Desk Manager" conducted a meeting the day before the Representation Vote during which she allegedly told the employees they would lose benefits if they joined the Union. The General Manager allegedly held captive audience meetings during which he discussed certain hotels and the wages that they paid. The Union alleged that a supervisor who did not appear on any voter list and was not an eligible union member circulated an anti-union petition. Finally, it alleged that a number of employees had been terminated due to their involvement with the Union.

Held: The evidence of the Union and the Employer relating to the allegations differed in a number of material respects. In all cases, the Board found the testimony of the Employer's witnesses to be preferred to the testimony of the Union's witnesses. The Employer's witnesses were credible witnesses whose evidence was in harmony with the preponderance of probabilities. In some cases, the Union's witnesses' testimony

regarding statements allegedly to have been made by the “supervisors” differed during direct examination and cross-examination. An individual who was named on the application as having been involved in a conversation with the “Housekeeping Supervisor” did not testify at the hearing. As well, the Union Representative who signed and swore the allegations contained in the application did not testify.

The Union claimed that the General Manager and his senior managers conspired with and directed the “Housekeeping Supervisor” and others to undermine the Union organizing drive through a series of discussions, threats, petitions and terminations of employment. The Board could not find one iota of evidence that any member of the management team discussed the Union or any related matter with any of the employees.

The Board was satisfied that the Housekeeper possessed only minor supervisory authority. The mere perception of certain employees that she was a supervisor was not sufficient for her to be considered as the employer or a person acting on behalf of an employer. Given the nature of her duties, responsibilities and authority, the Board found she was an “employee” as that term is defined in **The Labour Relations Act**. She should not be considered part of management as far as the unfair labour practice was concerned. In any event, the Board concluded that she did not make all of the comments that were attributed to her. On the balance of probabilities her comments were limited to relatively innocuous questions regarding whether or not certain employees had been approached by the Union, but were not intended to interfere with the employees' decision. Her conduct did not amount to an interrogation into whether they were a member of the Union or applied for membership as defined and prohibited in section 25(1) of the **Act**. Pursuant to subsection 32(1) of the **Act**, she had the right to express her views providing that she did not use intimidation, coercion, threats, undue influence or interfere with the formation or selection of a union. She was an employee whose comments fell within the realm of protected freedom of expression as set out in section 32(1) and did not constitute an unfair labour practice.

The Board accepted the individual the Union referred to as the “Front Desk Manager” was a Reservations Clerk and did not have any managerial duties. Management was not aware that she spoke to the housekeeping employees as alleged and she was not acting on its behalf. Where there was a difference of opinion as to what was said at the meeting, the Board preferred the testimony of the Employer's witness who recalled that the Clerk indicated that employees should vote and bring identification and did not refer to negative changes to policy in the event that the Union won the vote. Debate among employees ought not to be stifled by the Board, providing that it is consistent with the **Act** and, in particular, subsection 32(1). The Board was satisfied that the comments that it determined the Clerk made fell within the ambit of protected free speech set out in the legislation and did not constitute an unfair labour practice.

With respect to the allegations of the captive audience meetings by the General Manager, in cross-examination, the Union's witness conceded that he did not mention the Union at all during the meeting. He simply presented statements of fact reasonably held relating to the hotel. He did not attempt to threaten, intimidate or coerce the employees in relation to the Union or otherwise. This meeting did not constitute an unfair labour practice.

The Union's allegation that an anti-union petition was circulated by a supervisor was factually inaccurate. The Board found she was not a manager or supervisor and she was included on the Voter List. She had changed her surname and that name appeared on the list for the Representation Vote. There was clear uncontradicted evidence that the Employer did not feel that the petition was any of its business. The petition was exclusively the product of employees and it was not initiated by the Employer, nor did the Employer encourage its employees to sign it. Nothing in relation to the petition amounted to an unfair labour practice by the Employer.

The Union also alleged that four Housekeepers and a Bellman/Porter had been terminated contrary to the provisions of the **Act**. The Employer demonstrated that there were justifiable concerns with the quality and speed of the work of three of the Housekeepers. Each of the individuals conceded that they were aware that the Employer was concerned about their performance. The Board accepted that the timing of the decisions to terminate the Housekeepers' employment was related to a drop in occupancy at the hotel. Having satisfied the onus placed upon it to demonstrate that the terminations were not tainted by anti-union animus, the Board determined that the Employer did not commit any unfair labour practice in releasing the three Housekeepers.

The Board did not find that the Employer seized upon a relatively minor altercation to terminate the Bellman. His behaviour in grabbing a co-worker was very serious and was in violation of a clear Employer rule

prohibiting such conduct. The Board does not sit as an arbitration board to determine whether the penalty meted out by an employer was excessive. It examines whether or not an unfair labour practice has been committed. In this case, the Board was satisfied that the decision to terminate was based on entirely legitimate grounds and was not related to his alleged role in attempting to organize the Union.

Similarly, the Board determined that the Employer had satisfied the onus to establish that the termination of the fourth Housekeeper was not related to any of the prohibited grounds set out in the legislation. Rather, the Board was satisfied that the Employer dismissed her owing to her actions when she engaged in a heated argument with a co-worker. That incident was of such a serious nature that at least one hotel guest remarked upon it, two employees from another department attempted to intervene, and another employee was so disturbed that she was left in tears. Moreover, the General Manager had previously warned her that further disruptive behaviour could lead to dismissal. The Board further accepted that the General Manager was not even aware that the Housekeeper was involved in union organizing.

Having considered all of the evidence and arguments presented by the parties, the Board dismissed the Union's application and subsequent amended applications.

Daimler-Chrysler Canada - and - CAW Union Local 144 - and - Theodore M. Stefanik
Case No. 629/06/LRA
December 14, 2006

DUTY OF FAIR REPRESENTATION - Scope of Duty - The complaints raised by the Employee alleging that he did not receive proper legal representation from his own counsel were beyond the scope of Section 20 of the Act - Substantive Order.

DUTY OF FAIR REPRESENTATION - PRACTICE AND PROCEDURE - Undue Delay - Application in October 2006 relied on events which occurred in 2004 and 2005 - Held Employee had unduly delayed filing application - Substantive Order.

DUTY OF FAIR REPRESENTATION - *Prima facie* - Withdrawal of unfair labour practice application was term of final and binding Employment Settlement Agreement - Employee filed second application 20 months later - Allegations relied on events which pre-dated the Settlement Agreement and the withdrawal of first application - Second application without merit as Employee sought to re-litigate matters - Substantive Order.

On January 14, 2005, the Employee filed an application (Case No. 16/05/LRA) with the Board asserting that since late February 2004 the Union had failed to represent him fairly, contrary to Section 20 of the *Act*. On February 14, 2005, the Employee, the Employer and the Union executed the Employment Settlement Agreement. It was a term of the Employment Settlement Agreement that the Employee would withdraw the unfair labour practice application. In October 2006, the Employee filed a second unfair labour practice application contending that the Union failed to represent him, particularly in respect of the Union's alleged errors or omissions in failing to properly conclude a settlement on behalf of the Employee arising out of various allegations made in Case No. 16/05/LRA. The Union asserted that all matters of which the Employee complained had been fully and finally resolved through the Employment Settlement Agreement. The Employer asserted that the Application should be dismissed on account of the "undue delay" of the Employee in filing the Application because the Employee relied on events which occurred in 2004 and 2005. It also asserted that the Application constituted an abuse of process because it recounted allegations made in Case No. 16/05/LRA, which was withdrawn in 2005 when the Employee entered into a binding settlement with the Union and the Employer as a final resolution of all matters arising out of his employment with the Employer.

Held: The Employee's allegations relied on events which pre-dated the Employment Settlement Agreement and the withdrawal of the first application. Further, to the extent the Employee raised new facts or issues, the Board was satisfied that those facts also related to matters which pre-dated the conclusion of the Employment Settlement Agreement. The complaints raised by the Employee alleging that he did not receive proper legal representation from his own counsel were beyond the scope of Section 20 of the *Act*. The Board determined the Employee had unduly delayed the filing of the Application. Notwithstanding the finding of undue delay, the Employee entered into a final and binding settlement on February 14, 2005, in respect of all matters relating to his employment with the Employer and any and all matters arising out of the representation that he received from the Union and, accordingly, to the extent that the Employee sought to re-litigate these matters, the

Application was without merit within the meaning of Section 140(8) of the *Act*; and the Employee had failed to establish a *prima facie* case. Therefore, the Application was dismissed.

St. Adolphe Personal Care Home - and - International Union of Operating Engineers, L. 987 - and - Service Employees International Union, L. 308; Service Employees International Union

Case No. 635/06/LRA

December 21, 2006

PRACTICE AND PROCEDURE - Standing - Intervention - International Union of Operating Engineers granted certification for a unit previously represented by Services Employees' International Union, Local 308 - SEIU Local advised it did not object to application - SEIU "International" applied to be granted Intervenor or Interested Party status, Review and Reconsideration of issuance of certificate for IUOE and withdrawal of consents filed by SEIU Local - Held SEIU Local as previously certified bargaining agent had legal authority to advise it did not oppose application - SEIU International did not represent affected employees on date of application and had no valid ground to intervene or to apply for review and reconsideration - Substantive Order.

The Service Employees' International Union, Local 308 (SEIU 308) was the certified bargaining agent for Certificate No. MLB-5539. The International Union of Operating Engineers (IUOE) filed an application seeking certification as the bargaining agent for the employees represented by the SEIU 308 pursuant to that certificate. The SEIU 308 advised the Board that it did not oppose the application for certification. The Board, noting that the SEIU 308 did not object to the application revoked Certificate No. MLB-5539 and certified IUOE as the properly chosen bargaining agent. The Service Employees' International Union (SEIU International) filed an application for review and reconsideration of the issuance of IUOE's certificate; withdrawal of any consents filed by the SEIU 308 to the application for certification of the IUOE 987; and sought Intervenor/Interested party status.

Held: The SEIU 308, as the previously certified bargaining agent under the *Act*, was served with notice of the application for certification filed by the IUOE 987 in accordance with the *Rules of Procedure* and had the legal authority to respond to the application for certification and to advise the Board that it did not oppose that application. The Board was entitled to and did rely on the communication received from the SEIU 308 for the purposes of Section 40(2) of the *Act*. Also the SEIU International did not represent the affected employees on the date of the IUOE 987's application for certification and it was not entitled to receive notice of that application. Accordingly the Board found that the SEIU International had no valid grounds to intervene in the matter and its request to be granted Intervenor or Interested Party status was denied. As well, SEIU International had no status to seek a Review and Reconsideration

Maple Leaf Fresh Foods - and - United Food and Commercial Workers Union, Local No. 832

Case No. 665/06/LRA

December 27, 2006

ARBITRATION - BARGAINING UNIT - Scope - Deferral to Arbitration - Employer filed Application for Board Determination confirming that cafeteria employees were not within scope of bargaining unit - Parties had referred matter to arbitration and date for hearing had been adjourned - Board refused to hear Application because substantive matter of Application could be adequately determined under arbitration provisions - Matter deferred to arbitration as per Section 140(7) of *The Labour Relations Act* - Substantive Order.

The Employer filed an Application for Board Determination seeking an Order affirming that the cafeteria employees were not within the scope of the bargaining unit represented by the Union. The Union objected to the Application and requested that the Board dismiss the Application and allow the matter to be dealt with at arbitration.

Held: The Board noted that a grievance had been filed by the Union dealing with the issue which was the subject of the Application. The parties had referred the grievance to arbitration under the Collective Agreement and a hearing date had been established by the arbitrator. The agreed-upon date was adjourned by consent on the basis that a new hearing date would be set. The Board refused to hear the Application because the substantive matter raised in the Application could be adequately determined under the grievance and arbitration provisions of the collective agreement between the parties. Therefore, the Board deferred the

matter to the grievance and arbitration provisions of the collective agreement between the parties, pursuant to Section 140(7) of *The Labour Relations Act*.

Tolko Industries Ltd., Manitoba Solid Wood Division - and - United Steelworkers of America, Local 1-324 - and - Tom Burke-Gaffney, Jory Trucking Ltd. and Conrad Hrrapstead, Hrrapstead Trucking Ltd.

Case No. 756/06/LRA

January 2, 2007

DUTY TO BARGAIN IN GOOD FAITH - PRACTICE AND PROCEDURE - Effective date of collective agreement was January 22, 2006 to January 31, 2009 - Union gave notice to commence collective bargaining on August 10, 2006 - Union's notice not within time frames of Section 61 of *The Labour Relations Act* to oblige Employer to commence bargaining - Application dismissed - Substantive Order.

The parties had entered into a collective agreement which had an effective date of January 22, 2006 to January 31, 2009. The Union gave notice to commence collective bargaining on August 10, 2006. On November 16, 2006, the Union filed an unfair labour practice application alleging that the Employer failed to bargain in good faith contrary to Part IV, Section 62 of *The Labour Relations Act*.

Held: The obligation to commence collective bargaining in good faith only arises where proper notice has been given pursuant to Section 60 of *The Labour Relations Act*. Section 61 of *The Labour Relations Act* establishes the time frames in which notice pursuant to Section 60 may be given. The Union's notice to bargain was not timely and the Employer was not then under an obligation to enter into collective bargaining and to bargain in good faith. Accordingly, the application was dismissed.

University Of Manitoba - and - Association of Employees Supporting Education Services

Case No. 394/05/LRA

January 10, 2007

APPROPRIATE BARGAINING UNIT - EXCLUSIONS - Confidential Personnel - Management - Six positions Union claimed should to be included in the bargaining unit were same positions submitted in a previous application that Union and Employer agreed would be excluded - Held changes to organization and to titles of positions were not material and significant changes sufficient to conclude that excluded positions should to be included in bargaining unit - Substantive Order.

APPROPRIATE BARGAINING UNIT - EXCLUSIONS - PRACTICE AND PROCEDURE - Burden of Proof - Where position has historically been excluded from bargaining unit covered by successive collective agreements, onus of proof rests with Union who must satisfy Board that material and significant changes have occurred sufficient to conclude that excluded positions ought to be from then on included in bargaining unit - Substantive Order.

The Union filed an application seeking a Board Determination whether certain positions in Libraries Administration were included in the certified bargaining unit. The Employer advised that except for the Receptionist position, all of the positions named in the Application were excluded by virtue of their status either as managers or as confidential employees.

Held: The Board determined that this was not an exclusion case of first instance in the context of an application for certification. The case was to be assessed in accordance with the long-standing Board principle where a position has historically been excluded from a bargaining unit covered by successive collective agreements negotiated between the two parties, the onus of proof rests with the Union who must satisfy the Board that there have occurred material and significant changes sufficient to sustain the conclusion that the excluded positions ought to be from then on included in the bargaining unit. The Union filed a very similar Application with the Board five years earlier. That case was resolved by the parties who agreed that six positions would remain excluded while two other positions, namely the Receptionist and Executive Secretary (Fundraising) would be included in the bargaining unit. The six positions that the parties agreed would be excluded were the same positions that the Union claimed, in the then current application, ought to be included in the bargaining unit. While there had been organizational changes within the Libraries System and changes to the titles of positions and the individuals who fill the positions at issue, the Board determined that there had

not been material and significant changes sufficient to conclude that the excluded positions ought to be included in the bargaining unit.

St. Boniface General Hospital - and - St. Boniface Nurses Local 5 of the Manitoba Nurses' Union
Case No. 725/06/LRA
February 1, 2007

REVIEW - New Evidence - Union requested review of Board's Order deferring unfair labour practice application regarding Employer's unilateral imposition of bilingual qualification for nursing positions to grievance procedure - Union submitted Employer's failure to bargain "term and condition" of employment was focus of application - In absence of new evidence, Union must show cause why Board should review original decision - Held Union seeking to have Board order that Employer may only impose bilingual qualification for selected positions through collective bargaining was same as requesting Board amend terms of the Collective Agreement contrary to accepted arbitral principles - Request did not support review or reconsideration of the original decision - Substantive Order.

The Board declined to hear the Application of the Union seeking various remedies for an alleged unfair labour practice and deferred the matter to the grievance and arbitration provisions of the Collective Agreement. The Union filed a Request for Review and Reconsideration of the Board's Order. While the Union acknowledged that the evidence submitted to an arbitrator and the Board would be similar in respect of the right of the Employer to impose a bilingual qualification and that an arbitrator would be entitled to assess the reasonableness of any such qualification in respect of a specific nursing position, the Union contended that the Employer could not impose such a qualification without bargaining the right to do so with the Union. It was the failure to bargain that "term and condition" of employment which was the focus of the Application.

Held: The Request must be assessed against Section 17(1)(c) of the *Manitoba Labour Board Rules of Procedure* because, in the absence of new evidence, the Union must show cause why the Board should review or reconsider its original decision. The core issue raised in the Application and the Request was one that was normally dealt with by third party arbitration. The Union, in seeking to have the Board, pursuant to an application filed under Section 6 of the Act, issue a mandatory order that the Employer may only impose a bilingual qualification for selected positions through collective bargaining and the mutual agreement of the parties was the same as requesting that the Board amend the terms of the Collective Agreement by adding a "mutual agreement" requirement, contrary to accepted arbitral principles. The Request did not demonstrate any cause to support a review or reconsideration of the original decision. The Board dismissed the Request for Review and Reconsideration.

Buhler Manufacturing - and - United Steelworkers of America, Local 7292
Case No. 107/06/LRA
February 2, 2007

UNION - UNFAIR LABOUR PRACTICE - Interference - Employer refuses to release names, home addresses, postal codes and telephone numbers of all employees in the bargaining unit to Union citing privacy concerns - Union as exclusive bargaining agent for all of the employees in the bargaining unit occupied a unique role in relation to the employees which creates a "claim of right" to the information - Board orders Employer to provide information to the Union and to provide updates every six months.

The Union filed an application alleging that the Employer committed an unfair labour practice by refusing to provide the home addresses and telephone numbers of all of the employees in the bargaining unit. By refusing to provide this information, the Union said that the Employer had interfered with its ability to communicate with and its capacity to adequately represent the individuals in the bargaining unit. The Employer submitted that the collective agreement did not contain any provision requiring or permitting the Employer to release the requested information to the Union or anyone else. In addition, the collective agreement provided for bulletin boards that the Union may use to post notices and that the Union also received updated seniority lists. The Employer emphasized that it had received "unsolicited specific instructions" from six employees who indicated that they did not consent to the information being disclosed to the Union. The Employer further requested that the Board consider that *The Privacy Act* established that a person who "substantially, unreasonably, and without claim of right, violates the privacy of another person, commits a tort against that other person."

Held: It is well established in labour relations board jurisprudence that employers who refuse to provide employees' names, addresses and telephone numbers to their bargaining agents are violating the representation rights of unions. Labour relations boards have consistently ordered that such information be provided and have uniformly rejected arguments that information could not or should not be supplied to a union by an employer due to privacy concerns. The Board did not agree that **The Privacy Act** was applicable. The provision of an employee's name, address and telephone number did not constitute a "substantial" or "unreasonable" violation of that employee's privacy. The Union as exclusive bargaining agent for all of the employees in the bargaining unit occupied a unique role in relation to the employees which creates a "claim of right" to the information. The Board was not satisfied that the Employer has advanced a sound business purpose for withholding the information sufficient to counterbalance the significant adverse impact upon the Union's capacity to represent the employees in the bargaining unit. Therefore, the Board ordered the Employer to provide the Union with the information requested.

Health Sciences Centre - and - Manitoba Nurses' Union, Local 10 - and - John Awuyah
Case No. 677/06/LRA
February 8, 2007

DUTY OF FAIR REPRESENTATION - REMEDY - Ordering Employer to provide letters of references and matters arising from what may have transpired with other prospective employers did not fall within ambit of Section 20 of *The Labour Relations Act* - Substantive Order.

DUTY OF FAIR REPRESENTATION - Scope - Employee claimed Union breached its duty under Section 20 of *The Labour Relations Act* between February and October of 2006 - Complaints regarding matters which pre-dated that period were not properly within the scope of the Application - Substantive Order.

DUTY OF FAIR REPRESENTATION - Employee filed Application claiming Union failed to file grievance relating to written warning, leave of absence without pay and abandonment of position - Employer did pay Employee for shifts which he would have been scheduled to work due to Union's intervention so Employee had no valid basis to assert Union breached its duty - Decision not to file grievance for portion of unpaid leave of absence for which Employee was unable to work for medical reasons was legitimate exercise of Union's discretion - Union told Employee to contact it if he wanted representation on abandonment issue but he had not done so - Employee failed to establish *prima facie* case - Application dismissed - Substantive Order.

The Employee filed an unfair labour practice application claiming that the Union breached its duty under Section 20 of *The Labour Relations Act*. He alleged that the Union failed to file grievances on his behalf relating to the position taken by the Employer that he had abandoned his position on account of his failure to attend a scheduled meeting with the Union and the Employer. The Employee sought an order that the Union pay for any legal representation on his behalf; that the Employer and/or any associated party refrain from damaging his employability; that the Employer provide him with a generic reference letter and, further, provide references whenever requested; and that the Employer pay for refusing to schedule him for shifts in September. Two weeks after filing the Application with the Board, the Employee requested that the Union file a grievance relating to a written warning, leave of absence without pay and the abandonment of position/termination of employment matter. The Union took the position that the unwillingness of the Employee to participate in rescheduled meetings showed a lack of cooperation and prevented it from taking any additional action on his behalf. As well, the Union invited the Employee to contact it if he wanted it to represent him with respect to the termination issue but he had not yet done so.

Held: Ordering the Employer to provide letters of references and matters arising from what may have transpired with other prospective employers did not fall within the ambit of Section 20 of the *Act*. The Employee claimed that, between February and October of 2006, the Union breached its duty under Section 20 of the *Act*. His complaints regarding matters which pre-dated that period were not properly within the scope of the Application. The fact that the Employee disagreed with the Union's decision not to pursue a grievance to arbitration did not constitute a breach of Section 20. As a result of the intervention of the Union, the Employer did pay him for the period in September for shifts which he would have been scheduled to work. Having achieved this result, the Employee had no valid basis upon which he could assert the Union breached its duty to him by failing to file a grievance claiming pay for that period. The Union's decision not to file a grievance with respect to the Employer placing the Employee on an unpaid leave of absence was a legitimate exercise of discretion on the part of the Union because the Employee himself filed medical evidence that he was unable to

work for medical reasons for the period and his sick leave had been exhausted. The decision not to grieve the warning was based upon investigation by the Union which disclosed there were grounds for some discipline, in the judgment of the Union. The Union's position that it was critical for the Employee to co-operate and attend a meeting with the Employer was a reasonable one. It is not the role of the Board to assume the role of a surrogate arbitrator and decide whether the Employee would have succeeded at arbitration. The Union addressed the merits of the Employee's concerns in the factual circumstances prevailing; it considered relevant factors, and then made an objective and rational judgment regarding the likelihood of the grievances being successful. The Union had invited the Employee to contact it if he wished the Union to represent him regarding the deemed abandonment-resignation. The Employee had not availed himself of that offer as of the date of filing the Union's Reply and, therefore, it cannot be said that, as of November 3, 2006, the Union has breached any duty it owes to the Employee under Section 20 of the *Act* in respect of that matter. The Board determined that the Employee failed to establish a *prima facie* case in respect of matters as existed on November 3, 2006. Accordingly the Application was dismissed.

Health Sciences Centre - and - Manitoba Nurses Union, Local 10 - and - John Awuyah
Case No. 832/06/LRA
February 8, 2007

DUTY OF FAIR REPRESENTATION - PRACTICE AND PROCEDURE - Failure to Process Grievance - Employee filed unfair labour practice application during which time the Union was in contact with Employee's counsel to facilitate signing of grievance - Grievance was filed as soon as Grievor signed form - Application premature as grievance/arbitration procedure not exhausted - Substantive Order.

DUTY OF FAIR REPRESENTATION - PRACTICE AND PROCEDURE - Res Judicata - Issues raised in unfair labour practice application that were raised in a prior application were improperly before the Board - Substantive Order.

On December 20, 2006, the Employee wrote to the Union reminding it of its obligation to file a grievance on his behalf and he complained that he had not received any confirmation that that step had been undertaken by the Union. Also on December 20th, the Employee filed an unfair labour practice application under Section 20 of *The Labour Relations Act* alleging that the Union refused to file a grievance on his behalf against the Employer for wrongful termination of his employment. He sought remedies which had previously been claimed in another unfair labour practice application he had filed on October 18, 2006. The Union claimed that the current application was frivolous and an abuse of process because it revisited and repeated matters raised in the first application.

Held: The Board had dismissed the first application. Many issues raised in the current application were raised in the first and, as such, those matters were improperly before the Board. In its Reply to the Board, the Union stated that on or around December 20, 2006, the Employee retained counsel and the Union corresponded with counsel for the Employee to facilitate the filing of Step II of the wrongful dismissal grievance. On January 17th, 2007, a Step II grievance was filed by the Union as the Employee had finally signed the Step II grievance. The Board found that the Union had, to the knowledge of the Employee, filed a grievance challenging the termination of his employment. As the grievance/arbitration procedure had not been exhausted, the Application was premature and was dismissed on that basis.

Winnipeg Fire Paramedic Service - and - Professional Paramedic Association of Winnipeg - and - Darla Caligiuri nee Krupa
Case No. 414/06/LRA
February 26, 2007

DUTY OF FAIR REPRESENTATION - Employee's application included allegations for which a concise statement of material facts was not provided, included allegations which were untimely, and included allegations that were not related to rights under a collective agreement - Board determined that application was "without merit" and Union did not breach the duty of fair representation.

DUTY OF FAIR REPRESENTATION - Application asserted both Union and Employer breached duty of fair representation - Section 20 of *The Labour Relations Act* does not impose any duties upon employers - Application without merit against the Employer.

The Employee filed an unfair labour practice application asserting that the Union and the Employer breached subsections 20(a) and (b) of **The Labour Relations Act** having allegedly acted in a manner which was arbitrary, discriminatory and in bad faith. The specific remedies requested were sought only against the Union.

Held: Section 20 of the **Act** does not impose any duties upon employers. Accordingly, the application was clearly “without merit” against the Employer.

The Board noted that the application was untimely with respect to certain allegations. The Employee submitted that the Union provided “incorrect legal advice with respect to signing a last chance agreement without independent legal advice” and misrepresented the consequences of signing that document. The agreement and the first grievance referred to by the Employee arose in 2002. The current application was not filed until June 2, 2006. This constitutes extreme delay. The Board’s practice is not to entertain unfair labour practice complaints which are filed more than six months beyond the facts complained of.

The Employee alleged the Union failed to refer two grievances to arbitration and failed to forward grievances in a timely fashion. The first grievance was filed promptly following the imposition of the suspension. The Union sought and received legal advice regarding the Terms of Settlement and Release (which effectively resolved the first grievance.) The merits of the second grievance were reviewed in the second legal opinion, which was a remarkably detailed analysis of the situation and provided clear direction to the Union that the second grievance would not be upheld at arbitration. Labour relations boards, including the Board, have consistently held that a union’s decision to follow legal advice provided by counsel is a potent defence to a duty of fair representation complaint. It was abundantly clear that the Union did not act in violation of the statutory duty of fair representation when it abided by its counsel’s advice and refused to proceed with the Employee’s grievances.

The Employee submitted that the Union failed to keep her apprised of actions taken or meetings attended in relation to her grievance, failed to “respond to any of her communications”, and met with the Employer without her knowledge or consent. Unions can meet with management to discuss grievances and other labour relations issues without individual grievors or affected employees in attendance. To do so was not a *prima facie* violation of the duty of fair representation. While a union may not wilfully conceal information from an employee or ignore communications in a manner which constitutes bad faith, arbitrariness or discrimination, the Employee has failed to provide any facts which establish a violation of the **Act** in this regard.

The Employee made allegations that the Board found were not rights “under a collective agreement” and were not reviewable by the Board. Specifically, these allegations were that the Union’s failed to “properly educate” its “chairman of grievances” or shop stewards; the Union failed to honour a commitment to her that she would receive “independent legal advice”, a commitment the Union denied making; and, the Union failed to allow her to address the Union membership regarding her grievance.

The Employee alleged that she was the subject of “discriminatory, prejudicial comments made with open hostility at executive meetings.” She also alleged that the Union failed to forward to the Employer certain unspecified “complaints about discriminatory conduct of other employees.” The Board held that the Employee failed to provide details upon which these allegations were based. Therefore, the Board was not satisfied that the Union has breached the duty of fair representation based upon these unsupported allegations.

The Board determined that the application was “without merit” and ought to be dismissed as it failed to provide a concise statement of material facts in support of certain allegations, it was untimely with respect to certain allegations, and it included circumstances which were not related to rights under a collective agreement. On the basis of the application and Replies, the Board was satisfied the Union did not breach the duty of fair representation.

Integra Castings Inc. - and - Winkler Foundry Employees Association - and - Chad Taks,
Case No. 448/06/LRA
March 13, 2007

UNFAIR LABOUR PRACTICE - Discharge - Exercising Legislative Rights under *Workers Compensation Act* - Employee on layoff for medical reasons was discharged for overstaying a leave of absence - Employee's evidence of his communications with his supervisor effectively rebutted allegation by Employer that he had failed to report to work as expected and had neglected to contact the Employer - Employer ordered to reinstate Employee.

REMEDY - Board not satisfied that Employer did not discharge Employee because he was exercising his rights to receive benefits under *The Workers' Compensation Act* - Employer ordered to reinstate Employee and to compensate him for lost income, less earned income from alternate employment he worked since being discharged.

The Employee had been employed as a grinder. In December 2005, he advised the Employer of problems with his hands and wrists. The Employer was prepared to give him a "layoff for medical reasons" with the expectation that he would return to work on January 16th, 2006. According to the Employer, the Employee did not return to work on January 16th, nor did he call in or show up for work for five consecutive days. The Employer decided to terminate the Employee's services because he had breached at least two of the Employer's Rules and Regulations, being prohibitions against "overstaying a leave of absence" and "not showing up or calling in to work for three consecutive scheduled shifts". The Employee filed an unfair labour practice application claiming that the Employer improperly discharged him because he had exercised his rights under *The Workers Compensation Act*.

Held: On January 16th, the Employee advised his supervisor that because of his ongoing hand and wrist problem he would be absent from work that week. On January 20th he delivered a medical note dated January 19th to his supervisor which effectively indicated that the Employee's hand and wrist problems would either require an extended absence from work for recovery, or an extended period during which he would perform modified duties. The evidence established that the Employer's decision to discharge the Employee from his employment was made on or shortly before January 23rd, 2006. The Employee's evidence of his communications with his supervisor effectively rebutted the allegation by the Employer that the Employee had failed to report to work as expected and had neglected to contact the Employer at all that week. In the result, the Employer had not discharged the onus upon it, and had not satisfied the Board that it did not discharge the Employee from his employment because he was exercising his rights to receive benefits under *The Workers' Compensation Act*. The Board ordered the Employer to reinstate the Employee and to compensate him for lost income, less earned income from alternate employment he worked since being discharged.

Red River College - and - Manitoba Government and General Employees' Union - and - Tom Harrigan, on behalf of a Group of Employees
Case No. 65/07/LRA
March 14, 2007

VOTE - PRACTICE AND PROCEDURE - Vote Complaint - Group of employees filed complaint under Section 70 of *The Labour Relations Act* - Held Union complied with the requirements of Section 69 and 93 of the *Act* as it gave reasonable notice to the employees of ratification/strike vote and its dual purpose; and employees had reasonable opportunity to cast votes by secret ballots on voting day - Application dismissed - Substantive Order.

A group of employees filed a complaint with the Board pursuant to Section 70 of *The Labour Relations Act*. The Union and the Employer raised a preliminary objection that the complaint was untimely pursuant to Section 70(4) of the *Act*.

Held: The Board was satisfied that under either Section 69(2) or Section 93(3) of the *Act* the Union gave reasonable notice to the employees in the affected bargaining unit of the ratification/strike vote and its dual purpose. Specifically, the Board noted that no complaint was made regarding the reasonableness of the notice given to the employees. As well, the Board was satisfied that the affected employees had a reasonable opportunity to cast votes by secret ballots on the scheduled voting day. Therefore, the Board was satisfied

there was compliance with the specific requirements of Section 69 and 93 of the *Act* and dismissed the application.

Griffin Canada Inc., a Division of Amstad Canada Inc. - and - Griffin Skilled Trades Association - and - National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) and its Local 144 ("Union")

Case Nos. 646/06/LRA and 649/06/LRA

March 28, 2007

APPLICATION FOR CERTIFICATION - Carve Out - Fragmentation - Skilled Trades employees dissatisfaction and frustration with Union regarding handling of collective bargaining, ratification, and grievances, did not demonstrate inadequate or ineffective representation or reasons sufficient to justify "carving out" of a smaller skilled trades unit from the larger integrated production and skilled trades unit - Application for Certification dismissed.

The Union was the certified bargaining agent for a unit that included production and skilled trades employees. Of the 150 employees in the unit, approximately 35 were skilled trades. The Union provided the skilled trades employees with a separate collective agreement ratification procedure so that their view of the acceptability of a proposed collective agreement could be established. During a ratification vote, the skilled trades employees voted to reject the proposed collective agreement due to the wages and pension improvements being offered. Witnesses testified that the National Skilled Trades Representative made a profanity laced comment calling the skilled trade employees greedy. The Representative informed the skilled trades employees that their issues of concern leading to the rejection of the proposed settlement were not specific to skilled trades. As such, the ratification votes of the skilled trades employees were combined with the rest of the bargaining unit employees' votes. The result of the combined vote was that the collective agreement was ratified. The decision to combine the skilled trades employees' ratification ballots with those of the rest of the employees was contentious. The skilled trades employees requested that the Union grant them a separate local. However their request had not been accepted. As a result, the Association filed an Application for Certification for a bargaining unit to include all those employees in skilled trades position such as welders, electricians, machinists, heavy duty mechanics, millwrights and apprentices.

Held: The skilled trades employees received the highest pay and benefits in the bargaining unit and enjoyed a number of exclusive provisions in the collective agreement. This minority had been, at a minimum, reasonably well looked after in terms of collective bargaining, ratification procedures, representation on union committees (including the bargaining committee), and grievances. While the witnesses expressed some dissatisfaction and frustration with the Union regarding the handling of collective bargaining, ratification, and grievances, the evidence did not demonstrate inadequate or ineffective representation or that there were sound collective bargaining reasons sufficient to justify "carving out" the smaller unit as proposed. In addition, the Bargaining Agent's refusal to grant skilled trades employees a separate unit nor the National Skilled Trades Representative's ill conceived and poorly timed comment did not persuade the Board that the proposed "carved out" unit was appropriate. Moreover, a unit such as the one proposed by the Association would have the effect of creating undue fragmentation in a workplace in which there was a high degree of integration between production and skilled trades employees. Therefore, the Board dismissed the application.

SUMMARIES OF SIGNIFICANT BOARD DECISIONS

PURSUANT TO *THE EMPLOYMENT STANDARDS CODE* and *THE PAYMENT OF WAGES ACT*

Solar Solutions Renewable Energy and Conservation Devices Inc. - and - Adrian Baquiran

Case No. 565/05/ESC

April 11, 2006

PAYROLL RECORDS - WAGES - Frequency of pay - Pay Statements - Inadequate, sporadic cash payments and Employer's failure to provide pay statements to the Employee violated sections 86 and 135 of the *Code* - Employer's position that wages promised to the Employee were contingent upon it receiving a government grant was inadequate response to claim for wages owing - Employee entitled to unpaid wages less amount for failure to provide sufficient notice.

The Employee testified he was promised an annual salary and additional payments for overtime worked. He submitted that the Employer failed to pay him regularly as required by **The Employment Standards Code**. Despite commencing employment in August 2004, the Employee testified that he was first paid on October 15, 2004, when the Employer provided him with \$500. He was provided with further payments on five subsequent dates. The Employee also noted that the Employer failed to provide any pay statement indicating regular and overtime hours paid, the rate of pay, deductions made or the net amount owing. The Employee resigned his employment without notice in January 2005. The Employee filed a claim for \$6,896.53 in wages owing. In support of his claim, the Employee recorded his hours each day and used that information to produce a document to the Board which showed the dates and hours which he had worked for the Employer. He did not agree that he failed to give sufficient notice of termination to the Employer as, he argued, he was on probation at the time he severed the employment relationship. The Employer testified that the wages promised to the Employee were contingent upon it receiving a government grant. The Employer was ultimately told in December 2004 that the grant would not be provided. The Employer did not want to "break the rules" by formally paying the Employee in advance of the grant being approved. The Employer also testified that the Employee did not commence working in August and was simply volunteering his time at that point. The Employer did not contest that the Employee was entitled to overtime however, he claimed that the Employee did not fill in the appropriate documentation to claim overtime.

Held: The Board was satisfied that the Employee was an "employee" engaged in "work" as defined in the **Code** and worked the hours which he documented and that he was entitled to wages, overtime wages, general holiday wages and vacation wages. This amount included payment for hours worked in August. The hours worked by the Employee during his employment, including overtime hours, were authorized by the Employer and that the Employee was entitled to be compensated as set out in the **Code**. The sporadic cash payments and failure to provide pay statements violated sections 86 and 135 of the **Code's** respecting frequency of pay and pay statements. The Employer also failed to properly record the Employee's regular and overtime hours and to pay him the amounts owing in respect thereof. The position that the company did not have sufficient resources to hire the Employee in the absence of a government grant was an entirely inadequate response to the Employee's claim. The Board determined that the Employee was entitled to \$6,896.53 in unpaid wages but that the Employer was entitled to \$1,076.80 given the Employee's failure to provide sufficient notice.

Rodney Allan Shier, being a Director of Bissett Gold Mining Company - and - Felix Abraham et al.
Case No. 414/02/PWA
April 20, 2006

GROUP TERMINATION - OFFICER/DIRECTOR - Liability - Effectiveness of Resignation - Director tendered resignation 45 minutes after head office notified local manager to shut down operations but hours before last workers' shift ended - Legislation in effect at the time did not refer to "intent to terminate" but only of an employer who "terminates" - Resignation letter received in company's registered office hours before first employees were terminated, which the Board found was the end of the work shift since the employees were working and were paid for that work - Director not liable to pay \$3.3 million for termination wages owing.

EVIDENCE - Recalling witness - Counsel opposed request to recall a witness who had testified in October 2002 - Board held alternate position taken by counsel was not articulated until after it had opened its case in April 2003- Witness to be recalled as her evidence was relevant.

The Bissett mining operation in Manitoba was in serious financial difficulty. The Director submitted his written resignation as a director of Bissett at 9:26 p.m. on December 15, 1997 at the head office in Vancouver. His resignation was signed for by the solicitor for the parent company who carried the letter to the registered office by 10:45 p.m. Forty-five minutes earlier, the local manager at Bissett had been asked to shut the mine down. Management decided to allow the workers to finish their shift. At 3:30 a.m. on December 16th, the employees were told of the mine's closure. The Employment Standards Division (ESD) ordered the Director to pay \$3,343,915.51 for wages owing. The Director disputed the payment arguing that he was only liable for unpaid wages during his tenure as a director. He had resigned before the employees were terminated and he was, therefore, not liable under section 5 of **The Payment of Wages Act**, and section 40 of **The Employment Standards Act**. ESD argued that the Director had not resigned when the employees were terminated. In the alternative, it argued that the resignation letter was not effective. The relevant legislation provided that a resignation becomes effective when delivered to the registered office of the company or the time specified in

the resignation, which ever was later.

Held: This matter was heard over a number of days from October 2002 to September 2003. In April 2003, counsel for the Director wanted to recall the solicitor on the issue of the effectiveness of the resignation. Counsel for ESD opposed this request as the solicitor had testified in October 2002. The Board noted that the position taken by ESD with respect to the effectiveness of the resignation was not articulated until ESD opened its case in April 2003. The Board ruled that the solicitor's evidence was relevant and she should be recalled to determine when the resignation letter was delivered to the registered office.

For the Director to be liable, he must be a director when the employees were terminated. Under the **Employment Standards Act**, which was in effect at the time, there was no reference to "intends to terminate", but only of an employer who "terminates." It was not sufficient that the directors intended to shut down the mine. What was determinative was when the first employees were terminated, which the Board found was 3:30 a.m. on December 16th since they were working and were paid for that work. The Board did not accept that termination took place when the mine manager was phoned at 10:00 p.m. The Board found as fact that the resignation was at the registered office of the company by 10:45 p.m. Therefore, at the time the employees were terminated, the Director was not a director of Bissett and was not liable for termination wages under section 40 of the **Act**. The Board did find that he was liable for vacation wages earned on production bonuses during his tenure as director.

Leonard W. Carlson, trading as Len's Auto Service - and - Richard Stickles
Case No. 86/06/ESC
May 11, 2006

NOTICE - Exceptions - "wilful misconduct" - Mechanic terminated without notice for uttering abusive comments about Employer - Outburst constituted "just cause" but remark made on spur of the moment and did not reach level of intention or malice inherent in the word "wilful" to allow Employer to rely on exception to avoid minimum notice requirements of the Code.

On the day in question, the Employee, who was a mechanic, had an emotional outburst in the shop. He made a loud abusive comment about the Employer to a co-worker. At the end of that work day, the Employer told the Employee not to return to work. The Employee filed a claim with the Employment Standards Division for two weeks' wages in lieu of notice. The Employment Standards Officer dismissed his claim finding that his employment was terminated in accordance with Section 62(h) of the Employment Standards Code as he acted "in a manner that constitutes wilful misconduct or disobedience or wilful neglect of duty that is not condoned by the employer". The Employee disputed the Order. He acknowledged making the comment but submitted that type of language was used frequently in the shop and it was a momentary outburst.

Held: As per Sections 62(h) and (p), the standard notice requirement does not apply if "the employee acts in a manner that constitutes wilful misconduct ..." or "in the case of termination by an employer, the employee acts in a manner that is insubordinate or violent toward the employer or dishonest in the course of the employment". The Employee's outburst would constitute "just cause" for some discipline. However, the critical issue was not whether "just cause" existed but rather whether his conduct could be characterized as "wilful" under section 62(h) of the **Code**. In the Board's view, his remarks reflected a spur of the moment outburst and did not reach the level of intention or malice inherent in the word "wilful", which would allow the Employer to rely on this specific exception to avoid the minimum notice requirements in section 61 of the **Code**. While the Employer had the right to terminate the employment relationship, it had not met its burden to establish, on the balance of probabilities, that the Employee's conduct fell within the statutory exceptions embodied in either Section 62(h) and/or (p). The Board ruled that the employee was entitled to two weeks' wages in lieu of notice.

Saint John's Aqua Kings Swim Club Inc. trading as Winnipeg Wave Swim Club - and - Robert Novak
Case No. 488/05/ESC
May 18, 2006

WAGES - Calculation - Employer argued it did not owe Employee any wages as he wrongfully claimed for time not worked - Held Employer cannot seek an order authorizing Board to deduct or offset from wages owing amounts which Employee has not consented to and which represent Employer's unilateral determination of liability - However Board uses Employer's calculations of hours worked to

determine wages owing as those numbers more accurately reflected hours actually worked by Employee - Substantive Order.

The Director of the Employment Standards Division ordered the Employer to pay \$1,357.63 for wages owing to the Employee during the period of June 7, 2004 and July 4, 2004. The Employer did not dispute that the Employee worked during that period. However, it submitted that the Employee worked 64.75 hours rather than 96.5 hours he claimed that he worked. The Employer argued that it did not owe any wages for the period in question because the Employee had inflated his hours during the proceeding 9 months and had therefore wrongfully claimed for time not worked.

Held: In accordance with well accepted law, the Employer cannot seek an order authorizing it to deduct and/or offset from the wages otherwise due to the Employee, amounts which have not been specifically consented to by the Employee and which therefore represent the Employer's unilateral determination of liability. The Board was satisfied that the Employer's calculations more accurately reflected, on the balance of probabilities, the hours actually worked by the Employee. The Board used this figure when determining the wages owing to the Employee. Therefore, the Board ordered the Employer to pay \$933.10 less statutory deductions to the Employee.

Alias Autobody Limited - and - Serhiy Osipov
Case No. 110/06/ESC
July 11, 2006

WAGES - Unauthorized Deductions - Damage to Property - Employer cannot seek an order authorizing it to deduct and/or offset from wages otherwise due to the Employee, amounts which have not been specifically consented to by the Employee and which therefore represent the Employer's unilateral determination of liability - Substantive Order.

The Director of the Employment Standards Division ordered the Employer to pay \$4,010.84 for wages owing to the Employee. The Employer disputed the payment. It acknowledged owing the Employee \$725.84 in vacation wages. However, the Employer argued that it did not owe the Employee any wages for the period of August 8, 2005 to October 18, 2005, because the Employee had damaged property which belonged to the Employer. The Employee disputed that he had agreed to pay an unspecified sum. He did acknowledge owing the Employer \$745.17 for the purchase of a vehicle and parts he bought from the Employer for personal use.

Held: In accordance with well accepted law, the Employer cannot seek an order authorizing it to deduct and/or offset from the wages otherwise due to the Employee, amounts which have not been specifically consented to by the Employee and which therefore represent the Employer's unilateral determination of liability. The Board ruled that the Employee was entitled to receive \$4,010.84 for wages, vacation wages and wages in lieu of notice less \$745.17 which the Employee admitted owing.

Inajit Ventures Ltd. - and - Jennifer Zaber
Case No. 347/06/ESC
July 31, 2006

REMEDY - JURISDICTION - Employee acknowledged she owed Employer an amount in excess of her total wage claim - Board does not have jurisdiction to award Employer an amount greater than the amount owing to Employee for wages, overtime wages, general holiday wages and vacation wages - Substantive Order.

The Director of the Employment Standards Division ordered that the Employer pay \$693.29 in wages to the Employee. The Employer disputed the payment.

Held: The Employee acknowledged that she owed the Employer an amount in excess of her total wage claim. Following consideration of material filed, evidence and argument presented, the Board was satisfied that the Employee's claim for wages, overtime wages, general holiday wages and vacation wages should be forfeited to the Employer respecting monies owing to the Employer as acknowledged by the Employee. As well, the Board was satisfied that the Employee's claim for wages, overtime wages, general holiday wages and vacation wages should be dismissed. However, the Board did not have the jurisdiction to award to the

Employer an amount greater than the amount otherwise owing to the Employee for wages, overtime wages, general holiday wages and vacation wages.

Daniel Carter McGonigal being a Director of 4225732 Manitoba Ltd. - and - John Jablonski
Case No. 502/06/ESC
December 8, 2006

NOTICE - Wilful Misconduct - Employer terminated Employee without notice for refusing to accept offer of employment from prospective purchaser of Employer's business causing business deal to fail - Board held Employee not under legal obligation to take employment with new employer - Failure to reach an agreement did not constitute a breach of either Section 62(h) or (j) of *The Employment Standards Code* - Employee entitled to wages in lieu of notice - Substantive Order.

The Director of the Employment Standards Division ordered the Employer to pay \$1,527.88 in wages owing to the Employee. The Employer disputed the payment. It submitted that it was entitled to terminate the employment of the Employee without notice because he unreasonably refused to accept an offer of employment from the prospective purchaser of the Employer's business, and caused the business deal to fail. Therefore, the Employer asserted that the Employee had acted in a manner that constituted wilful misconduct or wilful neglect of duty contrary to Section 62(h) of *The Employment Standards Code*. It also asserted that the Employee refused to accept an offer of reasonable alternate work made available by the Employer, contrary to Section 62(j) of the *Code*.

Held: The Employee was not under a legal obligation to take employment with a new employer and was entitled to negotiate terms and conditions of employment with the prospective purchaser that was acceptable to him. The failure to reach an agreement did not constitute a breach of either Section 62(h) or (j) of the *Code*. Therefore, the Board ordered the Employer to pay the Employee wages in lieu of notice.

3422640 Manitoba Ltd. t/a Hofer Enterprise - and - Oliver Munroe
Case No. 738/06/ESC
February 23, 2007

WAGES - Employee cashing cheque representing "final payment" did not prevent him from seeking all amounts owed to him pursuant to the legislation - Substantive Order - Reasons not issued.

The Director of the Employment Standards Division ordered the Employer pay \$468.90 in wages to the Employee. The Employer disputed the payment.

Held: The Board found that the work done by the Employer/Employee was heavy construction and pursuant to the Manitoba Heavy Construction Wage Rates and Employment Conditions under *The Construction Industry Wages Act*, the Employee was entitled to receive an hourly rate of \$13.30 per hour. The fact that the Employee cashed a cheque purportedly representing "final payment" did not prevent him from seeking all amounts owed to him pursuant to the legislation. The Board ruled that the Employee was entitled to receive wages, general holiday wages and vacation wages as per the Statement of Adjustment prepared by the Employment Standards Division.

Manitoba Business Magazine(1996) Ltd. - and - Cara McCarron
Case No. 409/06/ESC
March 20, 2007

WAGES - Commission - Work performed - Employer claimed advertising sales representative not entitled to commission on "house ads" of long-standing clients as little work was required - Sales Representative held negotiations and meetings to secure the ads and was never advised she would not received compensation for "house ads"- Employer not allowed to set off or deduct from wages perceived losses due to the employee's allegedly neglectful or substandard work - Employee was entitled to commission.

PRACTICE AND PROCEDURE - Hearing - In camera - Employer did not assert that intimate personal or financial matters may potentially be disclosed but took issue with representatives of the Employment Standards Division being present - Board determined hearing ought to be public.

The Employee was an advertising sales representative. The dispute between the parties concerned the payment of commission on four accounts. In addition, the Employee raised the issue of non-payment of commission on three other accounts for the first time at the hearing before the Board. The Employer testified that the four advertisements at issue were "house ads" and that the Employee was not entitled to any commission on those sales. His view was that the businesses concerned have a long-standing relationship with his publication and that the Employee did little, if any, work on those accounts. The Employee testified that she had never seen anything in writing nor heard anything about the term "house ads" during her employment with the Employer. At the commencement of the hearing, the Employer indicated that he wished to have the hearing held in camera owing to the presence in the hearing room of two employees of the Employment Standards Division

Held: Section 140(3) of *The Labour Relations Act* provides that the Board may hold a hearing in camera where the Board is of the opinion that intimate financial or personal matters may be disclosed during the hearing. The Employer did not assert that intimate personal or financial matters may potentially be disclosed. Rather, he took issue with representatives of the Employment Standards Division being present. The Board determined that the hearing ought to be public.

The Board did not allow the Employee's new claim for commissions for the three accounts that were not provided to Employment Standards. In relation to the other four accounts, the Employee clearly performed work for the Employer. She described the negotiations and meetings that she held in order to secure these advertisements for the publication. She was never advised that accounts were "house ads" on which she was not entitled to compensation. The only reference to "house ads" in the documentary evidence submitted by the parties appeared in a document that covered a period which followed the Employee's termination. In addition, an employer is not allowed to set off or deduct from an employee's wages its perceived losses due to the employee's allegedly neglectful or otherwise substandard work. The Board was satisfied that the Employee was entitled to commission on the four accounts. Therefore, the Board dismissed the Employer's appeal and confirmed the Order of the Employment Standards Division.

SUMMARIES OF SIGNIFICANT BOARD DECISIONS PURSUANT TO THE WORKPLACE SAFETY AND HEALTH ACT

Shaw Laboratories - and - Director, Workplace Safety and Health
Case No. 314/07/WSH
July 24, 2007

PRACTICE AND PROCEDURE - JURISDICTION - Health and Safety - Hearings - Oral Hearing - Employer appealed penalties received for failure to comply with Improvement Orders - Director of Workplace Safety and Health requested Board dismiss appeal without oral hearing - As per Sections 53.1(8) and 53.1(9) of *The Workplace Safety and Health Act* Board could only exercise its jurisdiction following the hearing of an appeal - Substantive Order.

The Employer filed an application seeking an appeal from a Decision of the Director, Workplace Safety and Health pursuant to Section 53.1 of *The Workplace Safety and Health Act* with respect to five administrative penalties it received for failure to comply with five Improvement Orders issued under the *Act*. The Director submitted that the Board should confirm the administrative penalties and dismiss the appeal without the necessity of an oral hearing.

Held: The Board advised the parties that, pursuant to Sections 53.1(8) and 53.1(9) of the *Act*, the Board could only exercise its jurisdiction following the hearing of an appeal. The Board conducted a hearing following which it determined that the Employer failed to comply with the five Improvement Orders which were subject to administrative penalties. The Board was satisfied that the penalties imposed were established in accordance with the *Administrative Penalty Regulation 62/2003*. Therefore, the Board confirmed the administrative penalties and dismissed the appeal.

SUMMARIES OF SIGNIFICANT COURT DECISIONS

Kildonan Ventures Ltd. t/a Kildonan Auto & Truck Parts - and - Gordon MacKenzie and Shawn McAllister

Court of Appeal of Manitoba
Manitoba Labour Board Cases No. 585/05/ESC and 624/05/ESC
Docket Nos. AI 06-30-06350 & AI 06-30-06351
Heard by Justice Freedman
Delivered May 23, 2006

The Manitoba Labour Board issued two Orders upholding the decision of the Employment Standards Division. Very shortly after the date of the Orders, the president of the company underwent surgery. Twenty-four days after the Orders were issued, the Employer wrote to the court to confirm a conversation with an unidentified court official that it intended to appeal the orders. The letter referred to the president's understanding, which was a misunderstanding, that nothing further needed to be done until the president was well enough to attend to make a motion for leave to appeal. The Employer requested confirmation of the conversation, but none was given by the court. On that same date, the Employer wrote to the Board sending it a copy of its letter to the court and a cheque to cover the wages, stating in the letter that the monies were "to be retained until the appeal has been heard." The Board faxed a letter to the Employer, with a copy to the Employment Standards Division, in which the Board reminded the Employer that an application for leave to appeal had to be made within 30 days of the day of the order or within such further time as a judge may allow. The Employment Standards Division wrote the Employer acknowledging receipt of the correspondence and the cheque stating the cheque has been deposited to the Manitoba Wage Trust Account pending the outcome with the Court of Appeal. Subsequently, the employees requested the amount owed to them. The Division's Officer checked with the court and found that the Employer had not filed any application for leave to appeal. Then, it faxed a letter to the Employer advising that the monies were being released. Two days later, the Employer filed notices of motion seeking (i) an extension of time to file leave applications, and (ii) leave to appeal each order.

Held: Three criteria must be satisfied before an extension of time for the filing of a notice of appeal or a notice of motion seeking leave to appeal will be granted. The applicant must demonstrate continuous intention to seek leave to appeal within the time period when the leave should be filed; must offer a reasonable explanation for the delay; and, must establish that it has an arguable ground of appeal. The Employer's correspondence showed that it had a continuous intention to appeal from well before the expiry of the 30-day time limit. The president's personal explanation for the delay was reasonable. However, the corporation had at least one other person dealing with matters during his absence. The delay was also less reasonable given the clear written statements by the Board on two occasions referring to the statutory time limit. However, the Employer appeared to have misunderstood that simply asking a court official over the telephone for an extension of time was not sufficient. Moreover, the letter from the Division officer that the cheque has been deposited "pending the outcome with the Court of Appeal," was ambiguous, and could be misunderstood by a lay person. Taking all these factors into account, the Court concluded that the Employer advanced a reasonable explanation for the delay, thus satisfying the second part of the test. The ground of appeal sought to be argued was that the Board erred "by not allowing evidence to be introduced that was pertinent to the case." The Employer did not explain the nature of the evidence the Board apparently declined to hear. On the material and submissions before it, the court was unable to assess whether the rejection of evidence could possibly lead to an error of law. Therefore the Employer failed to meet one of the three essential criteria for the granting of an extension of time. The extension of time sought by the Employer was denied.

Leonard W. Carlson, trading as Len's Auto Service - and - Richard Stickles

Court of Appeal of Manitoba
MLB Cases No. 86/06/ESC
Docket Nos. AI 06-30-06359
Heard by Justice Monnin
Delivered June 16, 2006

The Employer terminated the employee for challenging his authority following an argument at his place of business while a customer was in attendance. The Employee filed a claim for wages in lieu of notice under *The Employment Standards Code*. The Board was not satisfied that the Employer had met its burden to establish that the Employee's conduct fell within the statutory exceptions embodied in 62(h) of the Code. In its view, the Employee's conduct was not "wilful" within the meaning contemplated by that section of the Code. The Employer then filed an application for leave to appeal from the decision of the Board. It argued that the Board erred in its interpretation of the word "wilful".

Held: The Board considered the definition of "wilful" in the context of the facts that were before it. That placed the issue which the applicant wished to litigate in the context of mixed fact and law. Leave to appeal can only

be obtained on a question of law or jurisdiction and not on a question of mixed fact and law. In addition, the definition ascribed to the word "wifful" by the Board was sufficiently acceptable that a review of that definition was not of sufficient importance in law to allow the application for leave to appeal from the Board's decision.

Nygaard International Partnership Associates - and - Sharon Michalowski

Court of Appeal of Manitoba

MLB Cases No. 735/03/ESC

Docket Nos. AI 04-30-06024

Heard by Justices Freedman and Twaddle

Delivered October 12, 2006

The Manitoba Labour Board decided that parts of the employment agreement between the Employer and the Employee, a Retail Merchandise Supervisor, violated *The Employment Standards Code*. The Board had ordered the Employer to pay to the Employee overtime pay and an amount in lieu of notice. The Employee had signed an employment agreement that provided that her salary was inclusive of all hours required to be worked to fulfill her duties. The Board found that in the last six months of her employment, she had worked 284.25 hours in excess of the *Code's* standard hours. The Employee resigned her employment giving one month's notice as required in the employment agreement. The Employer accelerated her departure by exercising its right in the employment agreement to accept her termination immediately without further remuneration. The Board found that the Employee was an "employee" for the purposes of the *Code*, and that employees paid on a salary basis may still be entitled to overtime depending on the circumstances. The Board concluded that the agreement, in stipulating a salary "inclusive of all hours required to be worked," violated the *Code* and was an attempt to contract out of the statutory provisions which prevailed over the agreement. The Board found that the provision in the agreement permitting the Employer to accelerate the resignation without remuneration was null and void. The Employer obtained leave to appeal from the Board's order on the grounds of whether: the Board erred in law when it decided that an employment contract that provides a salary "inclusive of all hours required to be worked" is inconsistent with the *Code*?; whether the Board erred in law when it decided that a termination notice period established by an agreement between an employer and an employee pursuant to section 62(b) of the *Code* must apply equally to both parties and that the parties had established a notice period of 30 days?; and, whether the Board erred in law in admitting extrinsic evidence "to alter the overtime provision" in the written employment contract?

Held: Section 130(2) of the *Code* permits appeals, with leave, only on a question of law or jurisdiction. On the first two issues, the Board's decision was entitled to a measure of deference, the appropriate standard of which was reasonableness. At the heart of the Board's reasoning was its view that an employment agreement subject to the *Code* that established a rate of pay for all hours worked inclusive of all hours over the standard violated the *Code*. The Board concluded that one must be able to determine on an ongoing basis, and not simply after the employment ends, the rate of pay and the overtime rate, and to do that one needs to know the number of hours to be worked. This was a reasonable conclusion based on the clear requirements in s. 135(1)(c), obliging an employer to keep records for each employee of his or her regular wage rate and overtime wage rate, from the time employment starts, and which required the employer to record changes in such rates as they occur. Section 135(1)(d) also required a record of regular hours of work and of overtime, recorded daily, except for employees who are paid by the week or month, in which case s. 135(2) permits the keeping of a record of standard hours, and which still required a daily record of overtime. These provisions can be read such that they rationally support the Board's reasoning. The Board reasonably construed the *Code* to entitle the Employee to overtime pay. The Board reasonably construed the agreement deprived her of overtime pay and thus to be an agreement to work for standards less than provided in the *Code*, contrary to s. 4. The Board's line of analysis for both the overtime and notice issues was coherent. The Board's reasoning, based on the *Code*, was both tenable and rational, and could logically support its decision that, on the overtime and notice issue, the Agreement was inconsistent with the *Code*. The evidentiary issue raised a question of mixed fact and law. The evidentiary issue was inextricably linked with matters of fact and conclusions on credibility. As it did not raise a question of law alone, the court should not resolve it simply because leave was granted. Therefore, the court concluded not to set aside the Board's decisions on the overtime issue and the notice issue and to decline to answer the question on the evidentiary issue. The appeal was dismissed.

TABLE 1

Statistics Relating to the Administration of *The Labour Relations Act* by the Manitoba Labour Board

(April 1, 2006 – March 31, 2007)

	Cases Carried Over	Cases Filed	Total	Disposition of Cases					Number of Cases Disposed	Number of Cases Pending
				Granted	Dismissed	Withdrawn	Did Not Proceed	Declined to Review		
Application for Certification	19	56	75	43	9	10	0	0	62	13
Application for Revocation	1	11	12	9	1	1	0	0	11	1
Application for Amended Certificate	9	24	33	27	1	0	1	0	29	4
Application for Unfair Labour Practice	26	38	64	4	16	27	2	1	50	14
Application for Board Ruling	51	15	66	10	2	8	0	1	21	45
Application for Review and Reconsideration	2	27	29	0	21	0	0	0	21	8
Application for Successor Rights	2	2	4	2	0	0	0	0	2	2
Application for Termination of Barg. Rights	1	2	3	0	1	1	0	0	2	1
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	3	4	3	0	0	0	0	3	1
Application pursuant to Section 20 ³	8	36	44	0	29	3	0	1	33	11
Application pursuant to Section 22 ⁴	0	0	0	0	0	0	0	0	0	0
Application pursuant to Section 53(2) ⁵	0	0	0	0	0	0	0	0	0	0
Application pursuant to Section 58.1 ⁶	1	0	1	0	0	0	0	0	0	1
Application pursuant to Section 69, 70 ⁷	0	2	2	0	1	0	0	0	1	1
Application pursuant to Section 76(3) ⁸	0	11	11	9	1	0	0	0	10	1
Application pursuant to Section 87(1) ⁹	1	8	9	3	0	5	0	0	8	1
Application pursuant to Section 87.1(1) ¹⁰	1	1	2	0	0	1	0	0	1	1
Application pursuant to Section 115(5) ¹¹	4	14	18	6	5	7	0	0	18	0
Application pursuant to Section 130(10.1) ¹²	0	13	13	10	0	3	0	0	13	0
Application pursuant to Section 132.1 ¹³	0	1	1	0	0	0	0	0	0	1
Application pursuant to Section 146(1) ¹⁴	0	0	0	0	0	0	0	0	0	0
Referral for Expedited Arbitration ^{**}	7	87	94	-	-	-	-	-	78	16
Totals	134	351	485	126	87	66	3	3	363	122

1 When an Application for Certification is 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 Access Agreements

5 Employer request for investigation whether bargaining agent failed to exercise bargaining rights

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

14 Prosecution of employer's organization or union

** See Table 3

TABLE 2

STATISTICS RELATING TO THE ADMINISTRATION OF *THE LABOUR RELATIONS ACT* RESPECTING REPRESENTATION VOTES

(April 1, 2006 – March 31, 2007)

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	18	594	5	4	0	4	5
Revocation	1	10	1	0	0	0	0
Board Ruling	1	108	1	0	0	0	0

TABLE 3

STATISTICS RELATING TO THE ADMINISTRATION OF *THE LABOUR RELATIONS ACT* RESPECTING REFERRALS FOR EXPEDITED ARBITRATION

(April 1, 2006 – March 31, 2007)

Cases Carried Over	Number of Referrals Filed	Number of Cases Mediator Appointed	Disposition of Cases					Number of Cases Disposed	Number of Cases Pending	
			TOTAL	Settled by Mediation	Settled by Parties	Settled by Arbitration	Declined to Review			Withdrawn
7	87	39	94	24	21	10	2	21	78	16

TABLE 4

STATISTICS RELATING TO HOURS OF WORK EXEMPTION REQUESTS PURSUANT TO *THE EMPLOYMENT STANDARDS CODE*

(April 1, 2006 – March 31, 2007)

Cases Carried Over	Number of Applications Filed	TOTAL	Rulings Made	Applications Withdrawn	Not Proceeded with by Applicant	Number of Cases Disposed of	Number of Cases Pending
6	384	390	368	1	7	376	14

TABLE 5
STATISTICS RELATING TO THE ADMINISTRATION OF *THE PAYMENT OF WAGES ACT*
 (April 1, 2006 – March 31, 2007)

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
1	0	1	0	0	0	0	1

TABLE 6
STATISTICS RELATING TO THE ADMINISTRATION OF *THE EMPLOYMENT STANDARDS CODE*
 (April 1, 2006 – March 31, 2007)

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
35	79	114	53	31	0	84	30

TABLE 7
STATISTICS RELATING TO THE ADMINISTRATION OF *THE WORKPLACE SAFETY & HEALTH ACT* BY THE MANITOBA LABOUR BOARD
APPLICATION FOR APPEAL OF DIRECTOR'S ORDER
 (April 1, 2006 – March 31, 2007)

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	1	3	0	2	2	1

TABLE 8

STATISTICS RELATING TO THE ADMINISTRATION OF THE *ESSENTIAL SERVICES ACT* BY THE MANITOBA LABOUR BOARD

(April 1, 2006 – March 31, 2007)

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
1	0	1	0	1	0	1	0

TABLE 9

STATISTICS RELATING TO THE ADMINISTRATION OF *THE ELECTIONS ACT* BY THE MANITOBA LABOUR BOARD

(April 1, 2006 – March 31, 2007)

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	1	1	0	0	0	0	1

TABLE 10
FIRST AGREEMENT LEGISLATION REVIEW OF CASES FILED
(April 1st, 2006 - March 31st, 2007)

Union	Employer	Date of Application	Outcome of Application	Status as at March 31
Pending from Previous Reporting Period:				
International Union of Operating Engineers, L. 987	Zenith Paving	February 14, 2006	Withdrawn	
New Applications this Reporting Period				
United Food and Commercial Workers Union Local 832	Intelicom Security Service	April 26, 2006	Withdrawn	
General Teamsters Local Union 979	Praxair Canada	April 28, 2006	Board imposed first collective agreement	Expiry June 29, 2007
International Brotherhood of Electrical Workers Local 2085	DC Electric (2002)	May 4, 2006	Board imposed first collective agreement	Expiry June 30, 2007
Canadian Union of Public Employees, Local 500	Gateway Recreation Centre	August 18, 2006	Withdrawn	
United Food and Commercial Workers Union Local 832	Impact Security (Invicta Security Group)	October 11, 2006	Withdrawn	
International Union of Operating Engineers, Local 987	Town of Shoal Lake	October 16, 2006	Withdrawn	
United Food and Commercial Workers Union Local 832	Amber Meadow Retirement Residence (Winnipeg Retirement Group)	November 8, 2006	Withdrawn	
Manitoba Nurses Union	Lions Personal Care Centre (LHC Personal Care Home)	March 14, 2007	Pending	