

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

I am pleased to submit the 2008-2009 Annual Report outlining the activities of the Manitoba Labour Board for the period April 1, 2008, to March 31, 2009.

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* and other statutes which it administers. This is evident from the decisions which are summarized in this Report.

The Board has been in its new premises at 175 Hargrave Street for over one year now. During this past year, the final touches were completed in the new premises. The feedback from the labour community concerning the new facilities has been very positive.

Mr. Colin S. Robinson was re-appointed as full-time Vice-Chairperson for a further seven-year term. Mr. Robinson has made significant contributions to the labour jurisprudence of this Province and he has the respect of all of his colleagues on the Board and we welcome his re-appointment. On September 1, 2008, Ms. M. Lynne Harrison was appointed as a part-time Vice-Chairperson of the Board for a term of five years and was also appointed to the Board's Arbitrators List. She is a welcome addition to the Board and brings a breadth of experience to her new role. Ms. Harrison enhances the bilingual capacity of the Board as she is able to conduct hearings in either French or English.

In December 2008, two senior Board Officers attended a mediation training program in Ottawa, conducted by the Canada Industrial Labour Relations Board (CILRB). This program was specifically designed for labour board officers. The CILRB kindly invited other boards to send their officers to this worthwhile session.

In August 2008, the Board Registrar and I attended at the Annual Labour Relation Boards Chairpersons' Conference. The conference was hosted by the Commission des Relations du Travail in Quebec City and provided us with an opportunity to exchange ideas with other jurisdictions on a number of timely topics.

I 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 improving our service to the labour relations community in our new premises.

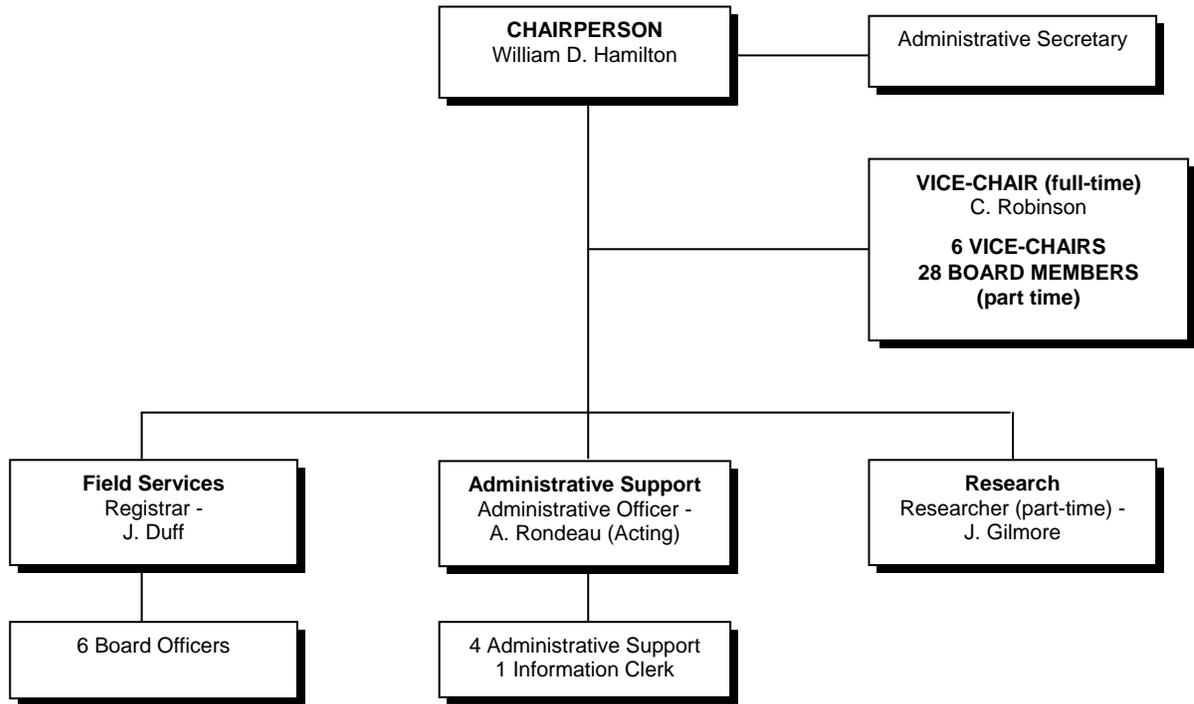
William D. Hamilton,  
Chairperson

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**Manitoba Labour Board  
Organization Chart  
as of March 31, 2009**



# The Manitoba Labour Board

## INTRODUCTION

### Report Structure

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

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

### Vision and Mission

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

### Objectives

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

### Role

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

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

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

### ***The Labour Relations Act***

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

### ***The Employment Standards Code***

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

### ***The Elections Act***

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

### ***The Essential Services Act***

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

### ***The Pay Equity Act***

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

### ***The Public Interest Disclosure (Whistleblower Protection) Act***

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

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

### ***The Public Schools Act***

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

### ***The Victims' Bill of Rights***

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

### ***The 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 <sup>LLP</sup> 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. He now practices with Orle Davidson Giesbrecht Bergen <sup>LLP</sup> in dispute resolution, 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. Mr. Robinson is also the Vice-President of the Manitoba Council of Administrative Tribunals.

#### **Michael D. Werier**

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

#### **Gavin M. Wood**

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

#### **New Member:**

#### **Lynne Harrison**

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

## **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. He currently is the chair of the Friends of the Elmwood Cemetery, a director of the Winnipeg Convention Centre and a member of the Manitoba Employers Council.

### **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. She has recently joined Kleysen Group as the Human Resources Manager. Ms. Devlin's human resource management experience includes both unionized and non-unionized workplaces.

### **Robert N. Glass**

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

### **Colleen Johnston**

Appointed in 1993, she is the Manager, Human Resources for the Manitoba Liquor Control Commission and the president of Integre Human Resource Consulting. Mrs. Johnston is a graduate of the University of Manitoba with a Bachelor of Education 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, parliamentarian government affairs advisor and past president of the Building Owners and Managers Association, a member of the Manitoba Employers Council and is a frequent international speaker on issues pertaining to the maintenance and service industries. He is a member of the Board of Directors of

the Building Services Contractors Association International (37 countries). He is the Past Board President of the Prairie Theatre Exchange (PTE) and a member of the Board of the PTE Foundation Trust. His past affiliations include vice-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, founding member and chair of the Western Canada Transportation System Strategy Group and member of the Board of CentrePort Canada Inc. He has an extensive background in public policy and writing related to trade and transportation, infrastructure, workplace safety and health. A lawyer by background, Mr. Lorenc graduated from the University of Manitoba with Bachelor of Arts and Bachelor of Laws degrees. He is a former Winnipeg city councillor having served for 9 years between 1983 and 1992. During his tenure on Council, he chaired a number of standing committees and held a variety of senior positions. He has also served and continues to serve on a number of boards of business, cultural, community and hospital organizations.

**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.

**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.

**Darcy Strutinsky**

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

**Denis E. Sutton**

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

**Jim Witiuk**

Appointed in 2004, he is currently director of Labour Relations for Canada Safeway Limited with responsibility for labour relations matters in Manitoba, Saskatchewan and Ontario. Mr. Witiuk sits on a number of 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**

### **L. Lea Baturin**

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

### **Robert P. Bayer**

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

### **Beatrice Bruske**

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

### **Irene Giesbrecht**

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

### **Jan Malanowich**

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

### **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. In February 2009, he retired from the position of staff representative with the Manitoba Government and General Employees' Union.

### **John R. Moore**

Appointed in 1994, he was employed as the Business Agent, Training Coordinator and Business Manager for the United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 254, from 1982-2007 and has been an active member for 42 years. Mr. Moore is also a current representative of the Trades Qualification Board of Manitoba.

### **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. Ms. Morrison has worked for the Canadian Union of Public Employees for many years, first as a Servicing Representative and then as Equality Representative. Her work is primarily in the areas of pay and employment equity, harassment and discrimination, accommodation issues, and other human rights concerns.

#### **James Murphy**

Appointed in 1999, he is the business manager of the International Union of Operating Engineers (IUOE), Local 987, being elected to this position in 1995. Mr. Murphy held the positions of business representative of IUOE from 1987 through to 1995 and training co-ordinator from 1985 to 1987. He sits on the executive board of the Canadian Conference of Operating Engineers, is currently president of the Manitoba Building and Construction Trades Council and president of the Allied Hydro Council of Manitoba. Mr. Murphy was appointed in 2008 to the Board of Directors of the International Foundation of Employee Benefit Plans. Prior to 1985, he was a certified crane operator and has been an active member of the IUOE since the late 1960s.

#### **Sandra Oakley**

Appointed in 2008, she has been employed by the Canadian Union of Public Employees (CUPE) since 1981. Ms. Oakley has worked as a National Servicing Representative, dealing with negotiations, grievance arbitrations and other labour relations issues, and as an Assistant Managing Director in the Organizing and Servicing Department of CUPE at its National Office in Ottawa. Since October 2002, she has been the Regional Director for CUPE in Manitoba. Ms. Oakley is a graduate of the University of Manitoba and the Labour College of Canada. She serves on the Board of Directors of the Rehabilitation Centre for Children and on the United Way Cabinet as Deputy Chair Labour.

#### **Dale Paterson**

Appointed in 1999, he is retired from the Canadian Auto Workers Union where he was the area director. Mr. Paterson serves on the Premier's Economic Advisory Council. He is also a board member of the Manitoba Public Insurance Corporation and is an employee nominee of the Board of Referees for the Employment Insurance Commission.

#### **Grant Rodgers**

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

#### **Lorraine Sigurdson**

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

#### **Sonia Taylor**

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

## **OPERATIONAL OVERVIEW**

### **Adjudication**

During 2008/2009, the Board was comprised of a full-time Chairperson, 1 full-time Vice-Chairperson, 6 part-time Vice-Chairpersons and 28 Board Members with an equal number of employer and employee representatives. Part-time Vice-Chairpersons and Board Members are appointed by Order-In-Council and are paid in accordance with the number of meetings/hearings held throughout the year. The Board does not retain legal counsel on staff; legal services are provided through Civil Legal Services of the Department of Justice.

### **Field Services**

Field Services is comprised of the Registrar and 6 Board Officers. Reporting to the Chairperson, 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 the Manitoba Labour Board Rules of Procedure and 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 the Board's policies, procedures and jurisprudence. They play a conciliatory role when assisting parties to conclude a first collective agreement and subsequent agreements and they are mediators during the dispute resolution process. Also reporting to the Registrar are 2 Board Officers responsible for processing all referrals from the Director of the Employment Standards Division. They process expedited arbitration referrals, attend hearings and also may be involved in mediation efforts in an attempt to resolve the issues.

### **Administrative Services**

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

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

### **Research Services**

Reporting to the Chairperson, the Researcher is responsible for providing reports, statistical data, jurisprudence from other provincial jurisdictions and undertaking other research projects as required by the Board. The Researcher summarizes and indexes Written Reasons for Decision and Substantive Orders issued by the Board and compiles the *Index of Written Reasons For Decision*. The Researcher is extensively involved with the development of the Board's automated case management system and website.

## Library Collection

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

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

## Publications Issued

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

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

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

## WebSite Contents:

<http://www.gov.mb.ca/labour/labbrd>

\*link to French version available

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

## E-mail Address:

[mlb@gov.mb.ca](mailto:mlb@gov.mb.ca)

E-mail service is available for general enquiries and requests for information.

**NOTE:** The Board does not accept applications or correspondence by e-mail.  
If you wish to file an application, contact:

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

## Information Bulletins (the Board's practice and procedure)

- #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

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 website.

During the reporting period, the Board initiated the process to review and update its information bulletins. The full-text of the revised bulletins will be published in the 2009-2010 annual report. In addition, the information bulletins will be published in the Manitoba Labour Board's Index of Written Reasons for Decision and on the Board's website.

## Major Accomplishments in the reporting period

- 515 cases before the Board (pending from previous period plus new applications).
- 77% of cases disposed of/closed.
- 157 applications scheduled for hearing.
- 104 hearing dates proceeded.
- Appointed part-time bilingual Vice-chairperson.
- Resolved 83% of disputes through the mediation process in cases where a board officer was formally appointed or assisted the parties informally in reaching a settlement
- Met statutory time requirements for 12 Board conducted votes, excluding cases granted “extenuating circumstances”.
- Continued to partner with the Department’s Information and Technology Services Branch to develop a comprehensive automated case management system scheduled for implementation in 2009;
- Issued 8 Written Reasons for Decision and 21 Substantive Orders.
- Expanded the Board's website. Written Reasons for Decision and Substantive Orders are now posted.
- Updated the “Index of Written Reasons for Decision” for subscribers.
- Conducted or participated in various training and development opportunities for Board members and staff as identified under their individual learning plans including attendance of Board Officers at a mediation training program conducted by the Canada Industrial Relations Board
- Chairperson and Registrar represented the Board at the annual Conference of Labour Board Chairs held August 2008 in Quebec City.
- Successfully completed the relocation to 175 Hargrave Street, Winnipeg improving efficiency in program delivery to clients through office enhancements including sound systems and internet access in hearing rooms, ergonomic furnishings, additional meeting rooms and improved security measures.

## Ongoing Activities and Strategic Priorities

- Update and issue Information Bulletins.
- Develop succession plan for key positions.
- Promote learning plans for staff.
- Conduct seminar for Vice-chairpersons and Board Members - scheduled for May 2009.
- Implement automated case management system.
- Process applications pursuant to *The Public Interest Disclosure (Whistleblower Protection) Act*.
- Increase mediative settlements by Board Officers.
- Evaluate forms and amend as necessary to meet *The Freedom of Information and Personal Privacy Act* (FIPPA) requirements and to meet the French language services concept of “Active Offer”.
- Improve practices and procedures and to increase efficiencies
- Maintain accountability for allocated budget.
- Reduce median processing times.

## Sustainable Development

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

## 2(e) Manitoba Labour Board Financial Information

Expenditures by Sub-Appropriation	Actual 2008/09 (\$000s)	Estimate 2008/09		Variance Over/(Under) (\$000s)	Expl. No.
		FTE	\$(000s)		
Total Salaries	1,212	16.50	1,331	(119)	1
Total Other Expenditures	440		481	(41)	2
Total Expenditures	1,652	16.50	1,812	(160)	

### Explanation Number:

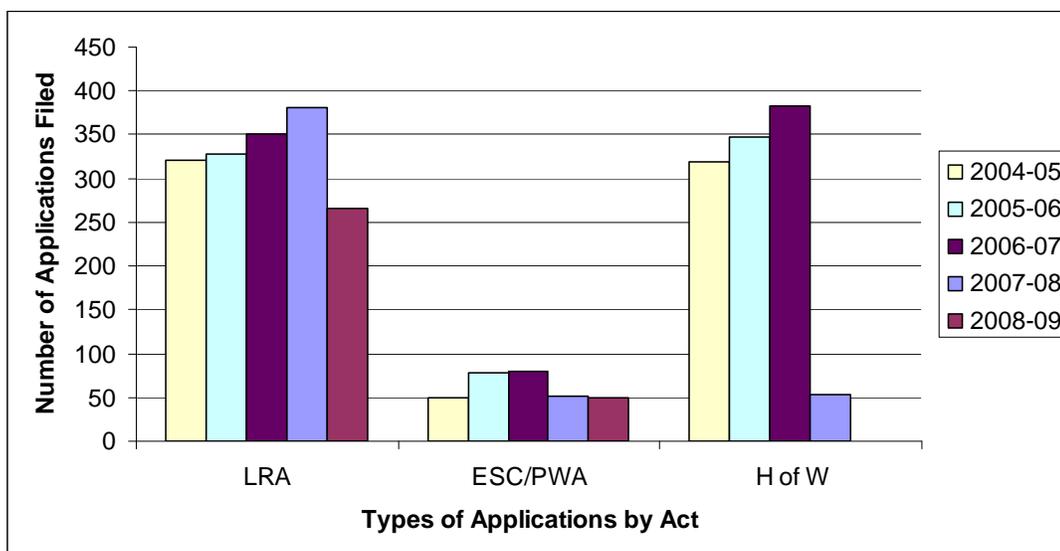
1. Under-expenditure reflects implementation of vacancy management strategies, which included net staff turnover costs, Board member per diems, maintaining a staff vacancy and savings due to the voluntary reduced work week program partially offset by severance and vacation payouts for two employees who retired or resigned, hiring of summer students and General Salary Increases.
2. Under-expenditure reflects reductions in legal fees due to fewer appeals, website development performed internally and decreased travel costs of Board members and officers. These under-expenditures were partially offset by one-time costs related to the relocation to new premises, use of temporary employment services and increased computer related 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. The Board conducted formal hearings, however, a significant portion of the Board's workload was administrative in nature. When possible, the Board encouraged the settlement of disputes in an informal manner by appointing one of its Board Officers to mediate outstanding issues and complaints. The Board monitored its internal processes to improve efficiencies and expedite processing of applications or referrals.

The number of applications filed with the Manitoba Labour Board during the past 5 years (for the period April 1 to March 31) 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**



Cases have increased in complexity. *The Employment Standards Code* amendments effective April 2007 eliminated applications to the Board for hours of work exemptions. Detailed statistical tables and summaries of significant Board decisions can be found later in this report.

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 2007-2008	Actual 2008-2009
Percentage of Cases disposed of	70%	77%
Number of Hearing dates scheduled	373	295
Percentage of Hearing dates that proceeded	29%	35%
Number of votes conducted	24	12
Median processing time (calendar days):		
<i>Labour Relations Act:</i>	57	101
<i>Workplace Safety &amp; Health Act</i>	106	260
<i>Essential Services Act</i>	NA	NA
<i>Elections Act</i>	28	NA
<i>Employment Standards Code</i>	125	92

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 2,960 collective agreements on file, there are 2,139 arbitration awards and 753 Written Reasons for Decision and Substantive Orders in the Board's collection (a 11%, 3% and 4% 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 for Decision and Substantive Orders issued since January 2007 are posted on the Board's website.

## 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 2008/2009, the total number of applications filed was 317.  Labour Relations - 266 Employment Standards - 49 Workplace Safety & Health - 2	<i>Labour Relations was increasing until this reporting period.</i> <i>Employment Standards stabilizing.</i>  30% decrease in Labour Relations; 54% decrease in Employment Standards due to April 2007 amendment to the Code giving responsibility for hours of work applications to the Employment Standards Division.	The volume of applications filed has a direct impact on the medium processing days.  This reporting period saw the first decrease in number of applications filled in the four years of tracking this indicator. There is no indication as to why the number of applications filed was 100 less than the 10 year average. The number filed may be an anomaly. The Board does not seek out applications but reacts to applications brought before it.
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 2008/2009, the Board disposed of 77% of its caseload.	<i>Improving</i>  There was a 7% increase in the number of cases processed. Further, midway through the reporting period a Board Officer position became vacant which impacted the Board's ability to process applications expeditiously.	The Board plans to fill the current Board Officer vacancy. As a result, the resolution rate may increase in the next reporting period. The rate is also dependent upon the number and types 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 2008/2009 there were: 295 hearing dates scheduled, with 104 dates that proceeded.	<i>Stable</i>  Since 2005/2006, the percent of hearings that proceeded ranged from 29% - 35%.	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 2008/2009 the median processing days for Labour Relations was 101 days, during a period with a Board Officer vacancy.	<i>Increased for Labour Relations.</i> For 2007/2008, the median processing days for Labour Relations was 57 days  <i>No trend yet established.</i> Amendments to the <i>Employment Standards Code</i> will impact the number of processing 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 and the complexity of the issues raised by the parties in their applications).

## **The Public Interest Disclosure (Whistleblower Protection) Act**

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

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

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

The following is a summary of disclosures received by the Manitoba Labour Board for fiscal year 2008-2009.

<b>Information Reported Annually (per Section 18 of The Act)</b>	<b>Fiscal Year 2008-2009</b>
The number of disclosures received, and the number acted on and not acted on. <i>Subsection 18(2)(a)</i>	<b>NIL</b>
The number of investigations commenced as a result of disclosure. <i>Subsection 18(2)(b)</i>	<b>NIL</b>

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

### **Betel Home Foundation - and - International Union of Operating Engineers, Local 987D**

Case No. 508/07/LRA

April 15, 2008

**DECERTIFICATION - PRACTICE AND PROCEDURE - Voluntariness - Application - Applicant shown as witness to all signatures on Petition but she did not witness every employee who signed Petition - No other evidence before the Board as to date or place each individual signed Petition and that an individual witnessed an employee signing it - Also number of employees signed Petition under Applicant's mistaken belief that collective agreement would continue for a period of time after any decertification was issued - As well, Employee failed to swear Statutory Declaration before Commissioner of Oaths or other authorized person - Application dismissed as Board not satisfied that 50 percent or more of the employees in the unit supported the Employee - Substantive Order.**

The Employee filed an application for decertification. She arranged a meeting outside the workplace where the Petition filed in support of the application was available for review by employees. While the Employee was shown as being a witness as to all signatures on each page of the Petition, she did not personally witness every employee who actually signed the Petition. She advised employees that the collective agreement then in effect between the Employer and the Union would remain in effect at least until another bargaining agent might apply for certification. At the time of filing of the Application, the Statutory Declaration was blank and the Employee had not signed it before a Commissioner for Oaths. After being advised of the deficiencies on the Statutory Declaration, the Employee filled in the name of the Commissioner for Oaths and then signed the Statutory Declaration. At no time did she attend before a Commissioner for Oaths.

**Held:** The onus is on an employee to satisfy the Board, on the balance of probabilities, that any petition filed represents the voluntary wishes of its signatories. An employee is required to call witnesses to give evidence, based on personal knowledge and observations, relating to the circumstances of the origination and preparation of a petition and, further, the manner in which each signature was obtained. In this case, there was no evidence as to either the date on which or the place where each individual signed the Petition and there was no evidence that a witness was personally present and witnessed an employee actually signing the Petition. As well, the Board was satisfied that a number of employees signed the Petition under the mistaken belief that the collective agreement would continue for a period of time after any decertification was issued. The Board accepted that the Employee, at all times, acted in good faith and never purposely misrepresented the legal consequences of a decertification. However, such a fact may be considered by the Board when assessing whether or not a petition reflected the voluntary wishes of the employees in the bargaining unit. In addition, the failure of the Employee to properly swear the Statutory Declaration constituted a defect in the Application. This defect was more than a technical irregularity. Rule 2(2) of the *Manitoba Labour Board Rules of Procedure* specifically requires that all facts recited in *Form A Memorandum of General Information Required on all Proceedings* and an accompanying application must be verified by statutory declaration. While the Board accepted that the Employee proceeded, at all times, in good faith, it was the cumulative effect of the deficiencies in the Petition itself; the failure of the Employee to swear the Statutory Declaration before an authorized person; and the finding that some employees likely believed that the collective agreement would remain in force after any potential decertification was issued, that resulted in the Board dismissing the application as the Employee had failed, on the balance of probabilities, to satisfy the Board that 50 percent or more of the employees in the unit support the Employee.

### **City of Winnipeg/ Winnipeg Police Service - and - Winnipeg Police Association - and - Peter H. Peters**

Case No. 184/08/LRA

May 21, 2008

**DUTY OF FAIR REPRESENTATION - *Prima facie* - Section 20 of *The Labour Relations Act* imposes a duty upon bargaining agents exclusively with respect to representing rights of any employee under a collective agreement - Union's efforts to assist Employee with Workers Compensation Appeal did not constitute representation of employee's rights under collective agreement - Employee failed to establish *prima facie* violation of Section 20 of *The Labour Relations Act* - Application dismissed - Substantive Order.**

The Employee filed a duty of fair representation application.

**Held:** The duty of fair representation established by Section 20 of *The Labour Relations Act* imposes a duty upon bargaining agents exclusively with respect to “representing the rights of any employee under the collective agreement”. The Union’s effort to assist the Employee with his Workers Compensation Appeal does not constitute the representation of the employee’s rights under the collective agreement. The Employee has failed to establish a *prima facie* violation of Section 20 of the *Act*. Accordingly, the Board determined the application was without merit and dismissed the application.

**City Of Brandon - and - Brandon Police Association, Kevin Loewen and Dallas Lockhart**

Case No 200/08/LRA

June 11, 2008

**UNION - UNFAIR LABOUR PRACTICE - Interference - At labour/management meeting, Employees as members of Union executive raised concerns pertaining to a Staff Sergeant - Employer wrote to Union that it would not tolerate future unsubstantiated claims and such action would be considered subject to disciplinary action - Union filed unfair labour practice application - Board held Employer’s actions did not constitute an interference with rights of Employees to be members of Union; nor with Union administration or representation of Union members - Application dismissed - Substantive Order.**

**UNFAIR LABOUR PRACTICE - ARBITRATION - Deferral to - At labour/management meeting, Employees as members of Union executive raised concerns pertaining to a Staff Sergeant who then filed formal harassment complaint against Union and Employees - Employer investigated complaint and issued a report - Held Association has the right to challenge the propriety of report, particularly as may affect any future investigation or imposition of discipline, however, such concerns could be addressed under grievance procedure - Substantive Order.**

At a labour/management meeting, the Employees raised concerns, which had been brought to their attention by other union members, pertaining to a Staff Sergeant. The Employees had not personally investigated those concerns. Subsequently, the Staff Sergeant filed a formal harassment complaint against the Union and the Employees. The Employer investigated the complaint pursuant to the "Respectful Workplace Policy" and issued a report of its findings. The harassment complaint filed by the Staff Sergeant was not sustained. Further, it was determined that no formal discipline ought to be issued against the Employees in their capacity as employees. As recommended in the report the Employer sent a letter to the Union indicating that it would not tolerate future unsubstantiated claims and such action would be considered as personal attacks on the individual and, therefore, subject to personal disciplinary action. The Union and the Employees filed an unfair labour practice application. They contended that the investigation under the Policy violated Sections 5(1), 5(3), 6(1) and 7 of *The Labour Relations Act* because, at all material times, the Employees were acting in their capacities as members of the Union's executive and that they were pursuing the interests of the Union's members with the Employer through a recognized forum.

**Held:** The Board was satisfied that the actions taken by the Employer, under the Policy, in response to the complaint did not constitute an interference with the rights of the Employees to be members of the Union; nor did such actions interfere with the administration of the Union or the representation of members of the Union. Further, these actions did not constitute, in and of themselves, discrimination in regard to matters relating to employment. The Employees, as members of the Union's executive, were entitled to raise and pursue concerns with the Employer concerning various matters relating to members of the bargaining unit. The Association had the right to challenge the propriety of any conclusion reached in the report, particularly as that conclusion may affect any future investigation or imposition of discipline on an individual based on action taken by the Union. However, such concerns could be addressed under the grievance procedure. Therefore, the Board determined that the Applicants failed to establish a *prima facie* case that Sections 5, 6 or 7 had been breached and the application was dismissed.

**Manitoba Lotteries Corporation - and - Manitoba Government and General Employees' Union - and - Carrie Bauer and Meghan Lisoway, on behalf of a group of Manitoba Food & Beverage Services, McPhillips Street Station and Club Regent Casino**

Case No. 15/08/LRA

June 20, 2008

**DUTY OF FAIR REPRESENTATION - Failure to Refer Grievance to Arbitration - Employees contended Union denied Membership right to appeal grievance steering committee's decision that no merit to policy grievance - Employees disagreeing with Union's decision not to pursue grievance to arbitration and disagreeing with legal advice received did not constitute breach of Section 20(b) *The Labour Relations Act* - Union investigated Employees' concerns in factual circumstances prevailing; it considered relevant factors and legal advice received; and then made an objective judgment of arbitration succeeding - Application dismissed - Substantive Order.**

The Employees filed an application seeking remedies for an alleged unfair labour practice contrary to Section 20(b) of *The Labour Relations Act*. They contended that the Union denied the Membership the right to appeal the grievance steering committee's decision that there was no merit to a particular policy grievance. This resulted in a decision by the Union not to take the Grievance to arbitration and to withdraw it on a without prejudice basis. Further, they contended that the Union did not provide a reason why the grievance had no merit.

**Held:** The Board noted that counsel for the Union undertook to prepare a written legal opinion on the merits of the Grievance. Counsel concluded that the position being advanced by the Employees was not consistent with the written terms of the collective agreement, as confirmed by the positions of the parties during negotiations, as well as the Employer's practice in administering the collective agreement to date. The fact that the Employees disagreed with the decision of the Union not to pursue the Grievance to arbitration and that the Employees disagreed with the legal advice received by the Union did 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 was not the role of the Board to assume the role of surrogate arbitrator and decide whether the Grievance would have succeeded at arbitration. The Application did not provide any particulars as to how the Union acted in an "arbitrary" or "discriminatory" manner under Section 20(b), as those terms have been interpreted by the Board. 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 representative(s) displayed an attitude which could be characterized as "... indifferent and summary, or capricious and non-caring or perfunctory". The Application did not reveal that any decision of the Union or the conduct of its representatives was made 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 any of them or that it refused to process the Grievance for sinister purposes. The material filed revealed that the Union investigated the Employees' concerns in the factual circumstances prevailing; that it considered relevant factors and the legal advice received; and then made an objective judgment regarding the likelihood of succeeding at arbitration, based on legal advice received. Therefore, the Board determined that the Employees failed to establish a *prima facie* case and, accordingly, the Board dismissed the complaint.

**Province of Manitoba - and - Manitoba Government and General Employees' Union - and - Bernard Michael Lemanski**

Case No. 77/08/LRA

June 25, 2008

**DUTY OF FAIR REPRESENTATION - Failure to Refer Grievance to Arbitration - Union negotiated settlement of grievance with the Employer - Employee initially agreed to terms of settlement but changed his mind after settlement concluded - Union's decision that no legitimate basis to proceed to arbitration on basis of settlement was reasonable conclusion - Application dismissed - Substantive Order.**

The Union filed a grievance alleging that the Employee had been terminated without just cause and an arbitration was scheduled to be heard. Settlement discussions ensued between the Union and the Employer. The Employee rejected a first offer, but did accept a second offer. Following the conclusion of the terms of the settlement, the Employee advised the Union that he was not prepared to accept the settlement. The Union

said that the matter could not proceed to arbitration because settlement was concluded with the Employer. The Employee then filed an application seeking retroactive pay and reimbursement for lost sick and holiday time for an alleged unfair labour practice contrary to Section 20 of *The Labour Relations Act* arising out of unspecified allegations that the Union failed to represent him in respect of his termination.

**Held:** The Union's decision that there was no legitimate basis to proceed to arbitration on the basis of a settlement was a reasonable conclusion. In deciding not to take the Grievance to arbitration, the Union did not act in an arbitrary or discriminatory manner. The material revealed that the Union directed its mind to the merits of the Employee's circumstances, in the context of the collective agreement and legal advice received. 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 displayed an attitude which can be characterized as "... indifferent and summary, or capricious and non-caring or perfunctory". In fact, the Union did grieve the Employee's dismissal; proceeded to set the matter down for arbitration; investigated the issues in preparation for the arbitration; and, then, based on its assessment of the case, negotiated a settlement with the Employer. The material terms of that settlement were agreed to by the Employee. The Application did not reveal, on its face, that any decision of the Union or the conduct of its representatives was taken 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 Employee or that it refused to process the Grievance for sinister purposes. Based on the foregoing, the Board determined that the Employee failed to establish a *prima facie* case under Section 20(a) of the *Act* and, accordingly, the Board declined to take any further action on the complaint, pursuant to Subsection 30(3) of the *Act*. In the result, the Application was dismissed.

**Motor Coach Industries - and - International Association of Machinists and Aerospace Workers - and - Mohamed R. Hakim**

Case No. 123/08/LRA

June 30, 2008

**DUTY OF FAIR REPRESENTATION - Contract Administration - Settlement of Grievance - Employee instructed Union to accept settlement offer - Arbitration cancelled based on concluded settlement - Employee later refused to sign settlement documents - Employee failed to establish prima facie case that the Union breached its duty of fair representation - Substantive Order.**

**PRACTICE AND PROCEDURE - DUTY OF FAIR REPRESENTATION - Timeliness - Delay - Employee unduly delayed filing application because core events relied upon in application occurred 33 months prior to date Application filed and arbitration was scheduled to proceed 11 eleven months prior to filing of Application - Substantive Order.**

In July 2005, following an investigation by the Employer, the Employee was suspended for allegedly reporting to work under the influence of alcohol. In April 2008, the Employee filed an application seeking unspecified remedies for an alleged unfair labour practice contrary to Section 20 of *The Labour Relations Act*. He contended that the Union failed to take reasonable care to represent his interests regarding the Employer's investigation and the suspension. The Union stated that it had processed a grievance on the Employee's behalf up to the point of scheduling an arbitration arising out of the action taken by the Employer following the investigation. It also stated that, prior to the commencement of the arbitration, a settlement was concluded with the Employer and that the Employee agreed to the terms of the settlement.

**Held:** The Board found that the Employee had unduly delayed the filing of the application because the core events relied upon in the Application occurred in July 2005. Also, the arbitration was scheduled to proceed on a date which was some eleven months prior to the filing of the Application and this also constituted undue delay within the meaning of Section 30(2) of the *Act*. Notwithstanding the finding of undue delay, the Board accepted that the Union did file a grievance on behalf of the Employee and that the grievance was scheduled to proceed to arbitration. The Board accepted that a settlement of the grievance was concluded prior to the commencement of the arbitration and, further, that the Employee did instruct the Union to accept an offer made by the Employer in exchange for the Employee's resignation from employment. It was not disputed that the arbitration was cancelled on the basis that a settlement had been concluded but the Employee later refused to sign the settlement documents. Therefore, the Board determined that the Employee failed to establish a *prima facie* case that the Union breached any of its obligations under either Sections 20(a) or 20(b) of the *Act*. As a result, the application was dismissed.

**Middlechurch Home of Winnipeg - and - Manitoba Nurses' Union - and - Margaret Doepker**

Case No. 548/07/LRA

July 7, 2008

**DUTY OF FAIR REPRESENTATION - Failure to Refer Grievance to Arbitration - Employee contended Union committed unfair labour practice when it did not take her grievance to arbitration on the alleged failure of Employer to accommodate her return to work from medical leave - Held Union made reasonable decision not to proceed to arbitration based on legal advice - Employee's disagreement with legal advice received does not constitute a breach of Section 20(b) of *The Labour Relations Act* - Also Employee's disagreement to resolve Policy Grievance by mediation was not relevant factor regarding issue of whether Union breached Section 20(b) - Employee failed to establish a *prima facie* case - Application dismissed - Substantive Order.**

The Employee was employed as a supervisor and Clinical Resource Manger. She requested that the Union file a grievance in respect of her assertion that the Employer failed to properly or reasonable accommodate her return to work from a medical leave. Based upon legal opinion, the Union decided that the Employer had accommodated the Grievor and decided not to pursue her grievance. During the same period of time, the Union had filed a Policy Grievance challenging the accuracy of a report commissioned by the Employer on nursing problems at the care home. As a resolution to the Policy Grievance, the Union and the Employer agreed to a mediation process. The Employee, who was the President of the Local Union, was also involved in the process regarding the Policy Grievance. As a result of the Union's decision not to pursue the grievances, the Employee filed a duty of fair representation application.

**Held:** The fact that the Employee disagreed with the decision of the Union not to pursue the grievance to arbitration or she disagreed with the legal advice received does not constitute a breach of Section 20(b) of *The Labour Relations Act*. 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 was 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 representative, displayed an attitude which could be characterized as "... indifferent and summary, or capricious and non-caring or perfunctory." There are 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 fact that the Employee disagreed with the resolution made between the Union and the Employer in respect of the Policy Grievance and took issue with the decision to proceed to mediation on the matters raised in the Policy Grievance was not a relevant factor regarding the issue of whether the Union breached Section 20(b) of the *Act* in not taking a grievance to arbitration on the alleged failure of the Employer to accommodate the Employee. The Policy Grievance was a grievance of a general nature and the Union, as the bargaining agent, had the right to resolve that grievance in the interests of the membership as a whole and the Union was entitled to settle the Policy Grievance in the manner in which it did. The Board determined that the Employee failed to establish a *prima facie* case and dismissed the Application.

**University Of Manitoba - and - Canadian Union of Public Employees, Local 1482 - and - William Roy Hartle**

Case No. 39/08/LRA

July 23, 2008

**DUTY OF FAIR REPRESENTATION - PRACTICE AND PROCEDURE - Union submitted Section 20(a) of *The Labour Relations Act* did not apply as Employee was laid off and not discharged - Where alleged discharge is in guise of layoff, Board may determine that obligation to exercise reasonable care as per Section 20(a)(ii) ought to be applied - Substantive Order.**

**DUTY OF FAIR REPRESENTATION - Union Representative exercised reasonable care in preparing, investigating and evaluating strength of grievance and in preparing legal opinion that grievance would not succeed - Union Executive following legal advice to not refer grievance to arbitration potent defence to claim that it had violated duty of fair representation - Application dismissed - Substantive Order.**

The Employee was a Technician 6 in the Faculty of Engineering. He was given notice of position discontinuance. He believed that the discontinuance was unjustified on the basis of workload. The Union filed

a grievance which stated that the Employee had been discharged without just cause. The Representative, who represented the Employee in relation to his grievance, was an experienced labour lawyer. He questioned the individual who decided to discontinue the position and he concluded that he would be considered a credible witness by an arbitrator. The Representative prepared a written legal opinion which indicated that he did not believe that the grievance would succeed at arbitration. The Executive determined not to refer the grievance to arbitration. The Employee then filed a duty of fair representation application. The parties disagreed as to the specific statutory provision applicable to the facts of the case. The Employee argued that Section 20(a) of *The Labour Relations Act* applied and that in addition to not acting in a manner which was arbitrary, discriminatory or amounting to bad faith, the Union had an obligation to exercise "reasonable care" in representing his rights under the collective agreement. The Union responded that case did not constitute a "dismissal" and was a lay-off. As a consequence, the Union submitted that Section 20(a) did not apply and that the applicable provision was Section 20(b).

**Held:** Where it is alleged that an Employer's action is a discharge in the guise of a layoff, then it is open to the Board to determine that the additional obligation of the Union to exercise reasonable care pursuant to Section 20(a)(ii) of the *Act* ought to be applied. "Reasonable care" is the degree of care which a person of ordinary prudence and competence would exercise in the same or similar circumstances. The Representative exercised reasonable care in meeting with the Employee to review his concerns, preparing the grievance, investigating the facts, making submissions during the grievance procedure, evaluating the strength of the Employer's arguments and potential witnesses, and preparing a legal opinion in light of the evidence, applicable legal principles and the terms of the collective agreement. The Executive reviewed the legal opinion and had an opportunity to ask questions about the matter. It is well-established by the Board that following legal advice is a potent defence to a claim that a Union had violated Section 20 of the *Act*. Unions have the discretion to determine whether or not a grievance shall be filed, referred to arbitration, or ultimately withdrawn or settled with or without the consent of the employee concerned. The Board has no authority to assess the merits of a grievance. The Board's jurisdiction is limited to determining whether or not the Union has breached the statutory obligations in representing the employee pursuant to that provision. The Board determined that the Employee failed to establish that the Union acted in a manner that was arbitrary, discriminatory, or in bad faith or that it failed to take reasonable care in representing his rights under the collective agreement. Therefore, the Application was dismissed.

**Manitoba Lotteries Corporation - and - Manitoba Government and General Employees' Union - and - Meghan Lisoway**

Case No. 259/08/LRA

August 14, 2008

**REVIEW AND RECONSIDERATION - Board considered document that Employee sought to introduce as new evidence - Board held that new evidence did not establish valid basis either for different decision or for convening of a hearing and Review Application did not otherwise show any cause why Board should review or reconsider its original decision on a principle of law or matter of policy - Application for review dismissed - Substantive Order.**

The Employee filed an application on January 14, 2008. The Board dismissed her application on June 20, 2008. The Employee filed an application seeking a review and reconsideration of the Board's dismissal. She asserted that the new evidence she wanted the Board to consider was not available or obtained until after the original application was filed. The Employer and the Union objected to the application.

**Held:** The Employee relied on Clauses (a) and (b) of Section 17(1) of the *Manitoba Labour Board's Rules of Procedure* under which the Board is entitled, in its discretion, to review and reconsider any matter on the basis that new evidence is available, provided that an explanation is given as to when and how the new evidence became available and, if accepted, how new evidence so changes the situation as to call for a different decision. While the new evidence which the Employee requested the Board to consider was in existence in 2003, the Board accepted that it was not discovered by the Employee until April 2008, after which the Employee made attempts to file it with the Board in May 2008. The new evidence consisted of certain statements in the Benefit Plan section of a document entitled, Notice of Contract Ratification. The Board found that the contents of the Notice, as it related to the Benefit Plan issue reflected the wording which was ultimately contained in Section 40 of the 2003-2007 Collective Agreement and which wording was the subject of the legal opinion from counsel for the Union. The Notice did not cast any new perspective on statements allegedly made at the bargaining table and which may have shed light on the meaning of the disputed

language in the Collective Agreement. The evidence did not add anything different or "new" to the facts recited and relied upon by the Board in its Dismissal Order. The new evidence did not disclose any new or different facts, in a prima facie sense or otherwise, that would arguably change the Board's ruling that the decision of the Respondent not to take the grievance to arbitration was arbitrary, discriminatory or made in bad faith. Having determined that the new evidence did not establish a valid basis either for a different decision or for the convening of a hearing, the Application did not otherwise show any cause why the Board should review or reconsider its original decision on a principle of law or matter of policy. Therefore, the Board dismissed the application for Review and Reconsideration.

**Middlechurch Home of Winnipeg - and - Manitoba Nurses' Union - and - Margaret Doepker**

Case No. 265/08/LRA

October 15, 2008

**PRACTICE AND PROCEDURE - REVIEW - As no new evidence filed, application for review of Dismissal Order to be tested under Rule 17(1)(c) of *Manitoba Labour Board Rules of Procedure* - Submissions made by Applicant were re-casting and re-submission of arguments and positions advanced on original application - Further, original decision did not set precedent that amounted to significant policy adjudication warranting review - Application Dismissed - Substantive Order.**

**PRACTICE AND PROCEDURE - EVIDENCE - Employee filed Rebuttal to Employer's and Union's Replies - Board's Rules of Procedure do not contemplate or allow rebuttal or reply to be filed in response to reply of another party - Board exercised its discretion and reviewed the Rebuttal in circumstances of the case - Substantive Order.**

The Employee filed an application seeking a review and reconsideration of the Board's dismissal of the duty of fair representation application she had filed. The Union and the Employer both filed Replies to the Application, asserting, among other grounds, that the Employee had failed to provide any new evidence in the Application that was not previously available to the Board, as required by Rule 17(1) of the Manitoba Labour Board Rules of Procedure and further, that all of the information contained in the Application was previously available at the time the original application was filed and that it was considered by the Board. The Employee filed a Rebuttal to the Replies asserting that, even if no new evidence within the meaning of Rule 17 had been submitted, the requirements of Rule 17(1)(c) had been met. The Employer and the Union submitted that the *Rules* do not permit a rebuttal to be filed and requested that the Rebuttal be removed from the records of the Board and not be considered in its deliberations.

**Held:** Board's Rules do not contemplate or allow a rebuttal or reply to be filed in response to the reply of another party. However, the Board exercised its discretion and reviewed the Rebuttal. The Application did not contain any new evidence within the meaning of Rule 17(1)(a) and (b). In the result, the Application was to be tested under Rule 17(1)(c) which provides that "in the absence of any new evidence, file a concise statement showing cause why the board should review or reconsider the original decision, order, direction, declaration or ruling." The Board found that the submissions made by the Applicant were, in essence, a re-casting and re-submission of arguments and positions she advanced on the original application, all of which the Board considered in arriving at its Dismissal. While the Board accepted that the Applicant strongly disagreed with the findings of the Board, disagreement with conclusions reached do not, standing alone, justify grounds for rescinding a prior order of the Board. As the Application did not claim to file new evidence within the meaning of Rule 17(1)(a) and (b), the Application did not otherwise show cause why the Board should review or reconsider its original decision on a principle of law or on a matter of policy. Further, the original decision did not set a precedent that amounted to a significant policy adjudication warranting a review by the Board. Therefore, the Board dismissed the Application for Review and Reconsideration.

**Garda Security - and - United Food and Commercial Workers Union, Local No. 832 - and - Leonard Leganchuk**

Case No. 272/08/LRA

January 16, 2009

**DUTY OF FAIR REPRESENTATION - Bargaining agent not obligated to file any grievance that an employee wishes in exact language which employee feels appropriate and Union signing grievances on behalf of employee did not constitute breach of Section 20 of *The Labour Relations Act* - Union did not fail to exercise “reasonable care” and acted with prudence and competence in determining grievance would not be advanced to arbitration - Application dismissed - Substantive Order.**

The Employee, who was a security officer, received a written warning for displaying a poor attitude and being insubordinate. The Union filed a grievance alleging that the discipline was unjust but was not prepared to proceed to arbitration. Months later, the Employer alleged that the Employee had again acted inappropriately.

The Employer offered him a Last Chance Agreement which he signed. A week later, the Employee was terminated for allegedly violating the terms of that agreement. While the Union filed a grievance on behalf of the Employee alleging unjust termination, it advised him that it was not prepared to proceed to arbitration. The Employee appealed the decisions not to proceed to arbitration. The President of the Local and the Union's Executive both denied his appeal. The Employee filed an application seeking remedy for an alleged unfair labour practice contrary to Section 20 of *The Labour Relations Act*. The Employee stated that both grievances, as filed, did not reflect his wishes in terms of stating specific sections of the collective agreement he felt had been violated. He further submitted that the Union signed the grievance on his behalf and in so doing, failed to comply with the collective agreement's requirement that all grievances be signed by the employee.

**Held:** The Union investigated the facts, interviewed the Employee and considered the terms of the collective agreement and the Last Chance Agreement prior to deciding not to proceed to arbitration. The Employee utilized the internal appeal process which accorded him an opportunity to make submissions regarding his position. There was no evidence that the decisions not to proceed to arbitration were based on any improper considerations, irrelevant factors, hostility, ill-will, discrimination or any other conduct prohibited by Section 20 of the *Act*. The Board considered that the grievances did not reflect the exact wording the Employee desired and did not refer to all of the sections of the collective agreement which he believed were relevant. Section 20 of the *Act* does not obligate a bargaining agent to file any grievance that an employee wishes in the exact language which the employee feels is appropriate. Moreover, the Union signing the grievances on behalf of the Employee did not constitute a breach of Section 20. The Union did not fail to exercise “reasonable care” as it acted with appropriate prudence and competence in representing the Employee and in determining that his grievance would not be advanced to arbitration. The fact that an employee disagrees with the decision of the Union not to pursue a grievance to arbitration does not, in itself, constitute a breach of Section 20. The Board has no authority to assess the merits of a grievance. As a result, the Board was satisfied that the Employee had failed to establish that the Union acted in a manner which violated Section 20 and dismissed the application.

**Province Of Manitoba - and - Professional Institute of the Public Service of Canada - and - John Arthur**

Case No. 30/08/LRA

February 23, 2009

**UNFAIR LABOUR PRACTICE - Anti-Union Animus - Union alleged that Employee's relocation was due to his recent appointment as Interim Chair of Union Local - Held Employer's actions were not motivated by anti-union animus but by legitimate concerns - Substantive Order.**

The Employee, who was the Regional Water Manager Interlake Region, was appointed Interim Chair of the Union Local. A few months later, the Employer began an investigation into allegations that the Employee made promises without authorization to municipal authorities about drainage projects; that he had made disparaging comments about the abilities of employees to carry out their mandate; and that he entered into contracts for municipal projects without proper authority. No discipline was imposed against the Employee but some of his duties were re-assigned and he was relocated. He was told not to attend his former office without being accompanied by management representatives. The Employer began another investigation into the Employee's complaint that the staff of his previous office was spreading false accusations against him. The Union filed an application seeking remedy for an alleged unfair labour practice, contrary to Section 17 of

*The Labour Relations Act.* The Union raised a number of complaints that showed a pattern of conduct by the Employer designed to intimidate the Employee since he was named as Chair of the Local.

**Held:** The Employee maintained that the Employer allowed character assassinations of him to continue unobstructed after he became Interim Chair of the Local. The Board accepted that the Employer could not simply accept the allegations raised by the Employee without conducting a proper investigation. As to his re-assignment, the Employer had legitimate concerns over the Employee's performance, particularly with respect to alleged unauthorized commitments. The Employer was acting within its management rights in the re-assignment and in directing the Employee, given the investigation that was ongoing, not to attend his former office. Regarding the Employee complaint that he never received his files, neither the Union nor Employer was aware of the location of those files. The Board was satisfied that the Employer did not set out to harm the Union's activities by deliberately denying the Employee possession of those files. The Employee complained that the Employer had not advised others as to the reason for his re-assignment. The Employer's policy was not to reveal the reasons for a re-assignment particularly when there was an ongoing investigation. The Employee also raised concern about the length of the investigation that began at the time of the re-assignment and that was not completed by the last day of the Board hearing. The Employer explained that concerns were continuing to arise. The Employee complained that he had not yet been interviewed by the last day of the Board hearing. The Employer's practice was to forego the interview of the Employee under investigation until all of the information had been compiled. The Board was not prepared to comment on the issue that the investigation was not carried out by an independent party as it did not fall within the considerations arising from the alleged breach of Section 17 of the Act. The Employee was not being singled out when his transportation costs had not been promptly reimbursed as the changes in the reimbursement policy led to a rejection of costs submitted by several employees. As a result, the Board was satisfied that the actions of the Employer were not motivated by anti-union animus but by legitimate concerns. The explanations revealed no improper motivation on the part of the Employer as alleged by the Employee. As a result, the Board was satisfied that the Union failed to establish that the Employer contravened Section 17 of the *Act*.

## **SUMMARIES OF SIGNIFICANT BOARD DECISIONS PURSUANT TO *THE EMPLOYMENT STANDARDS CODE***

### **Dr. Gary Levine Dental Corporation - and - Darlene F. Chimilar**

Case No. 07/08/ESC

April 30, 2008

**NOTICE - Wilful Misconduct - During notice period and after verbal exchange between Employer and Employee, Employer advised Employee that her conduct substantiated dismissal for cause and she would not be paid for balance of notice period - Board was satisfied that Employee's actions did not constitute wilful insubordination or neglect of duty - Employer and Employee were equal participants in verbal exchange - Board ordered Employer to pay \$1,125 wages owed in lieu of notice and dismissed Employee's request to award costs pursuant to Section 125(5) of *The Employment Standards Code* - Substantive Order.**

On April 4, 2007, the Employee provided the Employer with proper notice that she would be leaving her position as an Ortho Assistant on April 27, 2007. On April 19, 2007, the Employer, based upon certain verbal exchanges which transpired between the Employer and the Employee on that day, advised the Employee that she was not to return to work for the balance of her notice period. At the request of the Employee, the Employer provided her with a written memorandum which stated that she had been told not to come back and that she would be paid until the end of the pay period. Following a reconsideration of the events, the Employer wrote to the Employee advising her that her conduct on April 19, 2007 substantiated dismissal for cause, and therefore, she would not be paid for the balance of the notice period and that the previous memo had been issued in error. The Employee filed a claim for wages in lieu of notice.

**Held:** The onus was on the Employer to establish, on the balance of probabilities, that the Employee's conduct fell under one or more of the statutory exceptions listed in Section 62 of *The Employment Standards Code*. The assertion that there was "just cause" for some discipline or dismissal, as may be understood at common law, was not the test that justified termination without notice under the *Code*. As to the events of April 19, 2007, the Board was satisfied that the Employer had not met its onus to establish that the Employee engaged in conduct which constituted an exception within the meaning of either Section 62(h) or (p) of the

*Code*. While there were some exchanges between the Employer and the Employee, the Board was satisfied that the exchanges did not constitute wilful insubordination or neglect of duty on the part of the Employee and, in fact, the Employer and Employee were equal participants regarding the events of that day. The Board ordered the Employer to pay \$1,125 wages owed in lieu of notice. The Board dismissed the Employee's request to award costs to her pursuant to Section 125(5) of the *Code*.

**4819633 Manitoba Ltd. t/a Dylan O'Connor's Irish Pub and Restaurant - and - Landon Wall**

Case No. 19/08/ESC May 7, 2008

**EVIDENCE - WAGES - Vacation Pay - Entitlement - Employer disputed claim he owed vacation wages to Employee as he paid Employee in cash which Employee signed for - Employee asserted signature acknowledging receipt of the cash was not his - Board held that signature was identical not only to Employee's signature on resignation letter but also to his signatures on other documents he signed during his employment - Claim for wages dismissed - Substantive Order.**

**NOTICE - Resignation - Employee asserted he was coerced into signing resignation letter - Board does not accept assertion given that Employee never filed a complaint that he was not paid for any hours worked during last two weeks of employment - Claim for wages dismissed - Substantive Order.**

The Employee filed a claim for wages and vacation wages. The Director of the Employment Standards Division ordered the Employer to pay \$450.09 for wages owing to the Employee. The Employer disputed the amount. The Employee was initially paid the \$450.09 by cheque but the cheque was not honoured as it was drawn on the wrong account of the Employer. After discovering this error, the Employer paid the Employee \$450.09 in cash. The Employee acknowledged, by his own signature, that he was paid in cash. Two days later, the Employee submitted a written resignation in which he specifically acknowledged that all monies owing had been paid to him and, further, that he had received cash for any monies owing to him that was originally paid by cheque but dishonoured due to funds not clearing the account of the Employer.

**Held:** The Board did not accept the Employee's assertion that he was coerced into signing the resignation letter. The Board specifically noted that the Employee never filed a complaint that he was not paid for any hours that he worked during the last two weeks of his employment. While the Employee asserted that the signature acknowledging receipt of the cash was not his signature, the Board was satisfied that that signature was, in fact, his own signature. The signature was identical not only to his signature on the resignation letter but also to his signatures on other documents he had signed during the course of his employment with the Employer. The Board was satisfied that the Employer established, on the balance of probabilities, that the Employee received \$450.09 in cash from the Employer and that the Employee, on two separate occasions, acknowledged, by his own signature, that he had received this payment. Accordingly, the Board found that the appeal of the Employer ought to be allowed. Therefore, the Board dismissed the Employee's claim.

**Wally Welechenko t/a Wally's Island - and - Ken Booth**

Case No. 13/08/ESC

May 23, 2008

**EVIDENCE - PRACTICE AND PROCEDURE - Admissibility - Videotaped Evidence - Employee requested Board accept DVDs into evidence - DVDs would be accepted if Employee provide two copies of all DVDs and if a witness was available to testify from first hand knowledge to the authenticity of all the DVDs - Substantive Order.**

**REMEDY - Original hearing adjourned and rescheduled - Employee failed to appear at second hearing in compliance with Board's letter, receipt of which was confirmed by way of delivery confirmation through courier service - Employee's conduct unreasonable given Employee's failure to comply with terms of adjournment granted by Board and failure to appear at hearing without having requested an adjournment - Board awards costs to Employer for \$100 pursuant to Section 125(5) of *The Employment Standards Code* - Substantive Order .**

The Employee filed a complaint against the Employer. The Board conducted a hearing at which time both parties appeared before the Board. At the commencement of the proceedings, the Employee requested that the Board accept and view certain DVDs which purportedly depicted the Employee's activities while in the

employ of the Employer. The Board heard submissions from the Employee and the Employer regarding the admissibility of the DVDs. The Board advised the parties that the hearing would be adjourned on the basis that the Employee provide two copies of all the DVDs which the Employee obtained from the Workers Compensation Board. As well, the Board advised the Employee that a witness, who could testify to the authenticity of the DVDs from first hand knowledge, must be available for the rescheduled hearing.

The Board reconvened the hearing at which time the Employee failed to appear before the Board in compliance with the Board's letter, receipt of which was confirmed by way of delivery confirmation through the courier service.

**Held:** The Employee's claim for wages was dismissed as he failed to appear before the Board to substantiate his claim. In this particular circumstance, and noting the Employee's failure to comply with the terms of the adjournment granted by the Board and the failure to appear at the hearing without having requested an adjournment, the Board was satisfied that the Employee's conduct before the Board was unreasonable. The Board upheld the Employer's request for costs in the amount of \$100 pursuant to Section 125(5) of *The Employment Standards Code*.

**Lor-No Holdings Inc., trading As Nolan's Home Furnishings - and - Guy Arnott**

Case No. 40/08/ESC

June 6, 2008

**WAGES - Commission - Rate of Pay - Employer disagreed with Salesperson's claim that he was to be paid a 1% commission on in-store sales - Terms and conditions of employment relationship were not in writing - Board determined that agreement that Employee was to receive a fixed guaranteed salary was consistent with Employer's claim that there was no agreement to pay 1% commission on in-store sales - Claim for 1% of total in-store sales commission and vacation wages dismissed - Substantive Order.**

The Employee, who was employed as a salesperson, resigned from his employment. The Employer and Employee had not put the terms and conditions of the employment relationship to writing. The parties did not dispute that the Employer agreed to pay the Employee a guaranteed salary of \$3,000 per month, and that, if the Employee generated out-of-store sales through external contacts, then the Employer would pay 7% commission on those out-of-store sales. The only dispute between the parties was whether they had agreed that the Employee was entitled to be paid a 1% commission on in-store sales. The Employer asserted that there was no agreement to pay this commission while the Employee asserted that there was such an agreement.

**Held:** The Employee did not advance a specific claim for 1% commission on in-store sales that he generated during his last three months of employment. The Board determined that the agreement of the parties was that the Employee was to receive \$3,000 per month as a fixed guaranteed salary was consistent with the Employer's claim that there was no agreement to pay 1% commission on in-store sales. Therefore, the Board was satisfied that the Employer established, on the balance of probabilities, that there was no agreement reached with the Employee that he was to receive 1% sales commission on in-store sales. The Board found that the Employee was not entitled to receive any further wages from the Employer and his claim for 1% of total in-store sales commission and vacation wages was dismissed.

**Girton Management Ltd. - and - Shari Voth**

Case No. 105/08/ESC

June 19, 2008

**WAGES - NOTICE - Intention to Quit - After Employee gave two weeks notice she offered to work part time - Employer did not terminate Employee by not accepting her proposal to continue working for Employer on part-time basis - Employee formed requisite subjective intention to quit and then objectively carried that intention into effect when she arranged for, accepted and commenced employment with new employer - Claim for wages in lieu of notice dismissed - Substantive Order.**

The Employee gave at least two weeks notice of her intention to quit her employment with the Employer. She commenced employment with a new employer the week following her last day of work. The Employee and the Employer discussed a continuation of the employment relationship on limited terms subsequent to her last day of work. The Employer advised the Employee that the arrangement she proposed was not workable because it would adversely affect the scheduling of other employees of the Employer, particularly full-time employees.

**Held:** While it was appropriate for an employer and employee to seek to make a new arrangement on a casual or part-time basis, such discussions did not change the legal characterization of the Employee's intention to quit. In accordance with accepted legal principles relating to "quit", the Employee formed the requisite subjective intention to quit and then objectively carried that intention into effect when she arranged for, accepted and commenced employment with a new employer. The Board was satisfied that the Employer did not initially agree to continue the employment relationship by having the Employee work either Mondays only or Mondays and Tuesdays, as maintained by the Employee, and then later changed its mind on this arrangement, thereby terminating the employment relationship. The Board accepted the Employer's evidence that, for *bona fide* scheduling reasons, it could not meet the part-time schedule of work proposed by the Employee, and in not accepting that proposal the Employer did not terminate the employment of the Employee. The Board determined the Employer had met its onus, on the balance of probabilities, that it did not terminate the employment of the Employee, but that the Employee quit her employment with the Employer by giving notice. Having quit her employment, the Employee was not entitled to receive any further wages from the Employer and, accordingly, her claim for wages in lieu of notice was dismissed.

**Dominion Window & Door Ltd. - and - Gene Kishensky**

Case No. 106/08/ESC

July 8, 2008

**NOTICE - EVIDENCE - Onus of Proof - Employer disputed Order to pay wages in lieu of notice as Employee was guilty of wilful misconduct, disobedience and insubordination - Board inferred from Employee's failure to testify that he could not cast doubt on cogency or validity of Employer's evidence - Held Employer met burden to establish on balance of probabilities that Employee's conduct fell within statutory exceptions in Section 62(h) and (p) of *The Employment Standards Code* - Substantive Order.**

The Director of the Employment Standards Division ordered the Employer to pay the Employee \$4,937.46 for wages in lieu of notice. The Employer disputed the payment arguing that the Employee was not entitled to receive wages in lieu of notice because on the date of his dismissal, the Employee was guilty of "wilful misconduct", "disobedience" or "insubordination."

**Held:** On the Employee's last day of employment, he confronted the Project Manager. Based on the evidence given by the Project Manager, the Board found that the statements, actions and conduct of the Employee constituted wilful misconduct, disobedience and insubordination. The Board was further satisfied that the conduct of the Employee constituted an affront to the Employer's authority in the context of the factual circumstances prevailing and the conduct was wilful, deliberate or intentional. The Employee elected not to testify. Accordingly, the Board drew an adverse inference from the Employee's failure to testify, namely, that what the Employee could have said would not have cast doubt on the cogency or validity of the Employer's evidence. Therefore, the Board found that the Employer met its burden to establish, on the balance of probabilities, that the Employee's conduct fell within the statutory exceptions embodied in Section 62(h) and (p) of *The Employment Standards Code*. Accordingly, the Employee was not entitled to receive any wages in lieu of notice from the Employer and his claim for wages in lieu of notice was dismissed.

**JMJ Fashions Inc. - and - Louisa Espiritu**

Case No. 55/08/ESC

July 8, 2008

**DISCHARGE - NOTICE - Resignation - Company President and Employee on medical leave argue over her return to work - Employee claimed President said if she did not come back immediately he had to "let her go" - On balance of probabilities, Board did not accept Employee's version of events but found she was offended that he would hire someone else - She expressed intention to resign and removed her personal effects from workplace satisfying subjective and objective elements necessary to establish a resignation - Application for wages in lieu of notice denied.**

The Employee was on medical leave. Her absence was having a detrimental effect upon production given she was the Employer's only Pattern Maker. While still under physician's instructions to remain off work, she attended the office. While there, she had a heated conversation with the company President. They had different recollections of the event. The President testified that he urgently required pattern making work to be done. He suggested several options to allow the Employee to work while recognizing the need for her to recover. When the Employee rejected the accommodations he suggested, he told her that he was going to have to hire someone to get the work done if she was unable to come in. He said that she became upset and ran out of his office saying that she would retire if that's what he wanted. He denied that he terminated her. On the other hand, the Employee denied that the President offered various accommodations. She testified that from the start of the meeting, he was yelling at her and told her that she had already been off for a month and stated that if she did not come back to work after the weekend, then he would hire somebody to replace her and that he had no choice but to let her go. The Employee filed a complaint with Employment Standards seeking wages in lieu of notice. The Director of Employment Standards issued an Order requiring the Employer to pay \$6,384.48 for wages in lieu of notice. The Employer filed an appeal asserting that the Employee quit her employment.

**Held:** On the balance of probabilities, the Board did not accept that the President told the Employee that he had no choice but to let her go. He was under pressure given the requirements of production and wanted the Employee to return to work. It was inconceivable that he would have commenced his conversation by yelling at her and telling her that she would be let go if she did not return to work immediately. Rather, the Board was satisfied that she assumed that her employment was in jeopardy given the comment that he would have to hire someone if she could not come in to work. She was deeply offended that he would hire someone else and that she indicated that she was going to retire as a result. While she denied that he made suggestions regarding accommodation, the Board noted that the Cutting Room Manager, who was a reliable witness, testified that he asked the Employee if she had been told she was fired and she responded that she merely assumed that. The Board was satisfied that the President did not directly tell her that she was fired or that she was being let go. Perhaps she assumed that was what he meant, but the Board accepted that the evidence as a whole did not, on the balance of probabilities, lead one to conclude that he uttered those words. While the Employer did hire a replacement, this was done to meet production requirements and it did not lead the Board to conclude that she was terminated. The Board further noted that any confusion as to whether she had been terminated was most certainly resolved on the very next business day when she returned to clean out her desk. The General Manager met with her and specifically asked her to come back to work. She very clearly told him that she would not return having been treated so shabbily by the President. The termination of the employment relationship was very clearly made by the Employee, not the Employer. The Board accepted that the Employee indicated that she was going to retire and thereby expressed an intention to resign. She confirmed that she would not return and she removed her personal effects from the workplace and did not return. These facts sustain the conclusion that she quit her job, having satisfied both the subjective and objective elements necessary to establish a resignation. As the Board determined that the Employee quit her employment, she was not entitled to wages in lieu of notice.

**FCL Enterprises Co-Operative, t/a The Marketplace in North Kildonan - and - Kenneth Bob Mazur**

Case No. 215/08/ESC

August 15, 2008

**NOTICE - Wilful misconduct - While threatening remark Employee made to manager did not constitute "violence in the workplace" within meaning of Section 62(1)(h) of *The Employment Standards Code* when assessed in context of other events it constituted wilful misconduct - Employer met its burden to prove Employee engaged in conduct that was prohibited by Section 62(1)(h) of the Code and it was entitled to dismiss Employee without notice.**

**EVIDENCE - Onus - When employer relies on exceptions in Section 62 of *The Employment Standards Code* employer bears legal onus to bring itself within exception - One incident of wilful misconduct or insubordination would be sufficient to oust requirement to give notice under Section 61 of the Code.**

The Employer dismissed the Employee for allegedly acting aggressively and shouting at the Bakery Manager. He was instructed to leave the premises immediately. He continued to yell at the Bakery Manager and uttered a threat against the Grocery Manager and the Store Manager. The Employee filed a claim for wages in lieu of notice for \$4,460.80. The Employer submitted that the Employee was not entitled to receive wages in lieu of notice because he was guilty of wilful misconduct, disobedience or wilful neglect of duty and,

additionally, acted in a violent manner in the workplace. It argued that the confrontation with the Bakery Manager, standing alone, constituted sufficient grounds for termination but also relied on the past record of the Employee who had been warned and disciplined previously.

**Held:** When an employer relies on one of the exceptions in Section 62 of the Code, the employer bears the legal onus to bring itself within the exception. One incident of wilful misconduct or insubordination would be sufficient to oust the requirement to give notice under Section 61 of the Code. The Employer led evidence respecting a number of past incidents involving the Employee which could not, in and of themselves, constitute a breach of Section 62(1)(h) of the Code. Those events had no timely connection to the day in question. However, that evidence could assist the Board when assessing credibility and could establish that the Employer was concerned with the Employee's conduct over a lengthy period of time. The existence of employer policies and the numerous warnings the Employer made about further unacceptable behaviour revealed that the Employee's conduct was not "condoned" by the Employer and that the Employer's actions did not come "out of the blue." As to the events on the day in question, the Board was satisfied, that the evidence established three violations of Section 62(1)(h) of the Code by the Employee. First, he was disobedient and insubordinate when he refused to remove a pallet at the direction of the Dairy Manager, a person in authority. Second, he was insubordinate when he did not leave the premises immediately as directed. The Board accepted that the Employee did make remarks to the Bakery Manager after he was told to leave the premises. It also accepted that the Employee kicked a door with his steel-toed boots after being told he was suspended on account of the earlier "pallet" incident. Third, the Employee made a threatening comment to the Grocery Manager. In the result, the Board found that the Employee was insubordinate on the day in question. While it was arguable that the threatening remark did not constitute, "violence in the workplace," within the meaning of Section 62(1)(h), the Board did not have to decide that question because the remark, when assessed in the context of the other events, constituted wilful (i.e. intentional or deliberate) misconduct. Therefore, the Employee engaged in conduct that was prohibited by Section 62(1)(h) of the Code. The Employer had met its burden and was entitled to dismiss the Employee without notice.

**Bright Futures Day Care - and - Charlene Filz**

Case No. 108/08/ESC

November 25, 2008

**PRACTICE AND PROCEDURE - WAGES - Overtime - Employee claimed overtime wages for 14 month period - Board ruled claim for overtime wages limited to six month period immediately preceding termination of employment - Substantive Order.**

**EVIDENCE - WAGES - Overtime - Documentation submitted by Employee in support of claim for overtime contained inconsistencies and errors which raised questions regarding reliability - Employer's calculations and payroll records more accurate recording - Board satisfied on balance of probabilities no overtime wages were owing - Claim for overtime dismissed - Substantive Order.**

The Director of the Employment Standards Division dismissed the Employee's claim for overtime wages owing for the period from September 2, 2006 to the date of her termination on November 21, 2007. The Employee disputed the Dismissal Order and referred the matter to the Board.

**Held:** The Employee's claim for overtime wages was limited to the six month period immediately preceding the termination of her employment, pursuant to Section 96(2)(a) of *The Employment Standards Code*. Accordingly, she was only entitled to advance a claim, if upheld, for the period May 21, 2007, to November 21, 2007. The documentation submitted by the Employee in support of her claim for overtime contained many inconsistencies and errors which raised serious questions regarding their reliability. The explanations offered by the Employee in her testimony regarding the hours claimed were not, "... in harmony with the preponderance of probabilities which a practical and informed person would reasonably recognize as reasonable in that place and in those conditions." The Board accepted that the more accurate recording of the hours worked by the Employee were reflected in the calculations made by the Employer and in the payroll records. Therefore, the Employee had not satisfied the Board, on the balance of probabilities, that any overtime wages were owing for the period of May 21, 2007, to November 21, 2007. Her claim for overtime was dismissed.

**Legacy Hotels Corporation trading as Fairmont Winnipeg - and - Colleen Labelle**

Case No. 41/08/ESC

December 15, 2008

**WAGES - EXCLUSIONS - Overtime - Management - Assistant Banquet Manager had supervisory authority and stepped into role of Banquet Manager in his absence but she held junior role and did not perform management functions primarily - Employee entitled to overtime wages - First decision to address managerial exemption under Section 2(4)(b) of *The Employment Standards Code*.**

**PRACTICE AND PROCEDURE - EXCLUSIONS - Management - Res Judicata - Assistant Banquet Manager filed overtime claim - Employer submitted previous Board decision which held individuals in position at similar managerial level found not to be employees under *The Labour Relations Act* - Written Reasons not issued for previous Order so Board could not determine rationale for previous decision.**

After the Employee resigned from the position of Assistant Banquet Manager (ABM), she filed a complaint claiming that the Employer failed to pay her overtime wages. The Employment Standards Division determined that she was entitled to \$1,664.71 in overtime wages. The Employer appealed the Order submitting that the Employee performed "management functions primarily" as per section 2(4) of *The Employment Standards Code* and standard hours of work and overtime provisions were not applicable to her employment.

**Held:** This was the first decision of the Board to address the managerial exemption which came into force on April 30, 2007. Section 2(4)(b) of the *Code* establishes a high threshold for the exclusion of employees from the hours of work and overtime provisions on the basis that they perform "management functions primarily."

The Board addressed the Employer's position regarding a previous decision of the Board in which it was ruled that the individuals in the position of Fairmont Gold Supervisor – Concierge were not employees within the meaning of *The Labour Relations Act*. The Employer said the ABM and the Supervisor – Concierge positions occupied similar managerial levels within the organization and both performed management functions primarily. The Board noted no written reasons accompanied the previous Order and no findings of fact were spelled out therein. As a consequence, this panel of the Board could not determine the rationale for the other panel's decision. While administrative tribunals should endeavour to provide consistency and predictability, the panel had an obligation to consider and apply the facts of the case before it to the applicable statutory provisions.

While the Employee did have supervisory authority, she largely followed standardized corporate policies and guidelines that she did not have a hand in developing. She held a relatively junior role in an organization that employed a number of more senior management levels. The Employee's duties were similar to those of front line supervisors to which the Board has been loathe to apply the managerial exclusion in *The Labour Relations Act*. While the Employee did perform some management duties, she did not do so primarily and the management functions she did perform were largely of the variety that have been considered of relatively less import than significant functions like hiring, firing, promoting, demoting, imposition of major discipline, policy making, budgeting and collective bargaining. The Board did consider that the Employee stepped into the role of Banquet Manager in his absence. Nevertheless, the Board was not satisfied that this was sufficient to sustain the conclusion that the Employee performed management functions primarily. Therefore, the Board confirmed the Order of Employment Standards requiring the Employer to pay overtime wages.

**Maxim Transportation Services Inc. - and - Howard Whatman**

Case No. 434/07/ESC

March 11, 2009

**NOTICE - Statutory Exceptions - Sales Manager deliberately chose not to provide statistical information in the form requested despite Employer giving him numerous verbal and two written warnings - Conduct fell within statutory exceptions in section 62(h) and (p) of *The Employment Standards Code* - Employee not entitled to wages in lieu of notice - Substantive Order.**

The Employer was ordered to pay the Employee \$2,999.58 in wages in lieu of notice. The Employer disputed the payment contending that the Employee, who was the Western Canadian Sales Manager, was not entitled to notice as his termination fell within the exception to notice cited in section 62(h) and (p) of the *Code*. The Employer submitted that the Employee was assigned tasks that he refused or neglected to carry out such that his conduct constituted wilful misconduct, disobedience or, in the alternative, insubordination. The Employee's

responsibilities included providing leadership, coaching, the implementation of the Employer's sales program and the development of the relevant sales statistics and data. The Employer claimed that he ended up planning a sales conference that the Employee should have planned. In addition, the Employer said that the Employee was not managing the statistical side of the business. He repeatedly did not provide information requested within the time frame requested or at all. The Employer warned the Employee, in writing, that his employment was in jeopardy on two occasions. Shortly after the second warning, the Employer met with the Employee. The Employee presented a Sales Performance Plan which the Employer felt did not respond to the requirements outlined in a previous memo. At that point, the Employer terminated the Employee without notice. The Employee filed a claim for wages in lieu of notice.

**Held:** The Employee's refusal to provide the information that was requested in the form and manner requested constituted wilful misconduct or disobedience or wilful neglect of duty that was not condoned by the employer. There was no doubt the Employee knew exactly what was required since it had been communicated to him verbally and in writing. The Employee acknowledged as much when he told the Board he felt no need to redo information that the Employer already had. He also failed to provide sufficient explanation to justify his continuing refusal to do his job as requested. While he may have had difficulty in obtaining some information, he did not adequately address the failure to provide the other information in the format requested. The Board concluded that the Employee deliberately chose not to do what was specifically required of him even after being warned in writing that, termination without notice will occur unless the sales call performance requirements are addressed immediately, to the standard outlined, and a detailed plan be presented. The Board ruled the Employer had met its burden to establish, on the balance of probabilities, that the Employee's conduct fell within the statutory exceptions set out in section 62(h) and (p) of the Code and he was not entitled to receive wages in lieu of notice. Therefore, his claim for wages in lieu of notice was dismissed.

**5614547 Manitoba Ltd. t/a Viking Hotel - and - Pam Isfeld**

Case No. 306/08/ESC

March 17, 2009

**NOTICE - WAGES - Sell of Business - Employee worked for previous owner for 8 years and for new owner for four shifts after which she was not given additional shifts - Where employee is immediately re-employed, purchaser of business is responsible for providing notice if employee is ultimately terminated - Section 5 of *The Employment Standards Code* provides Employee's employment was continuous and uninterrupted and by section 61(2) of the Code she was entitled to six weeks' wages in lieu of notice.**

The former owners of the hotel advised the employees that the Employer had agreed that all employees would be re-hired. According to the Employee, she continued her employment as Night Auditor for four nights under the new ownership after which one of the managers advised her she was being "laid off". Later, she met with the Employer who advised her that her position of Night Auditor was needed for a member of the ownership group but occasional dining room shifts might be available. The Employee was never placed on the schedule nor was she offered any shifts following that meeting. She maintained that she worked for the Employer and that her employment was terminated without notice. The Employer contended that he was not responsible for paying wages in lieu of notice as it did not hire the Employee.

**Held:** The Employer maintained that he had not made an agreement to re-hire the employees in spite of the express wording of the Agreement of Purchase and Sale which stated that "The Purchaser will submit offers of employment to all of the Vendor's Employees, with each such offer of employment to be on the same terms and conditions of employment as is the case between the Vendor and each such employee". He had no reasonable explanation as to the discrepancy between his viva voce evidence and the provision of the Agreement of Purchase and Sale. The Employee testified in a truthful and straightforward manner and the Board accepted her evidence that she continued to work at the hotel following the sale of the business. It further accepted that she was terminated without notice and the vague assertion that there might be occasional dining room shifts available did not amount to a serious or meaningful offer of employment on terms and conditions that were equivalent or superior to those which applied to her prior to the sale of the business. Where the employee is immediately re-employed in the business, the purchaser of the business is responsible for providing notice if the employment of an employee is ultimately terminated. Far from constituting proper notice of termination of employment, the previous owners' notice to all employees confirmed that they would be taken on by new owners. Such a notice is confirmation of continuation rather

than termination of employment. If the Employer wished to terminate an employee who worked for the Employer following the sale of the business, the obligation to provide notice of termination or wages in lieu thereof arose. Section 5 of the *Code* provides that the Employee's employment was continuous and uninterrupted. She worked for the hotel for approximately 8 years which included time both prior to and following the sale of the business. Her employment was terminated by the Employer without notice and pursuant to section 61(2) of the *Code* she was entitled to six weeks' wages in lieu of notice.

## **SUMMARIES OF SIGNIFICANT BOARD DECISIONS PURSUANT TO *THE WORKPLACE SAFETY & HEALTH ACT***

### **Barkman Concrete Ltd. - and - Ben Krahn**

Case No. 27/08/WSH

August 14, 2008

**DISCHARGE - *Prima facie* - Consistent evidence of Employer's witnesses that decision to terminate Employee was not related to complaints over safety issues but Employee's negative attitude and dealings with others - Employee failed to establish prima facie case under Section 42.1(4) of *The Workplace Safety and Health Act* - Appeal dismissed.**

In May 2007, the Employer dismissed the Employee for his ongoing negative attitude taken towards any announcement or issue of company policy. Four months into the notice period, the Employee filed a discriminatory action complaint asserting that he had been terminated contrary to *The Workplace Safety and Health Act*. He alleged that he had been forced to sign a safety book in 2002; that he brought forward an issue relating to unsafe fan blades in 2004; and that he was being accused of calling the Division to send out an Officer in 2006. The Director of Workplace Safety and Health concluded that his termination related to his behaviour at the workplace other than raising the safety and health concern. The Employee appealed the decision to the Board.

**Held:** Section 42.1(4) of the Act is properly characterized as a "reverse onus" provision. Once a worker establishes that the conditions in Clauses (a) and (b) have been met, the onus shifts to the employer or union to prove, on the balance of probabilities, that the decision to take a discriminatory action was not influenced by the worker's conduct under one of the protected grounds listed in Section 42(1). However, the presumption and "reverse onus" only becomes operative when a prima facie case is established in the first instance. A prima facie case is comprised of two elements, namely that a discriminatory action was taken against an employee and that a worker has engaged in one or more of the types of conduct referred in Clauses (a) to (h) of Section 42(1) and a timely link between one of the events described in Section 42(1) and the discriminatory action will likely be evident on the face of the material. In this appeal, the dismissal constituted a discriminatory action. The Employee felt he had been wrongfully accused; that he felt a need to show that the "accusations" made against him were not true. He felt the 2002 event was a key reason underlying the decision to dismiss him. The Board did not accept this contention. It is prudent and common practice for an employer to have employees acknowledge receipt of a published health and safety policy. Having signed the Policy some five years prior to his termination, it cannot reasonably be concluded that this represented a form of conduct within the meaning of Sections 42(1) and 41.1(4) of the Act. The Board accepted that, once the Employee raised the issue of the unguarded fan blade, the Employer immediately rectified the concerns. On cross-examination, the Employee made a number of critical admissions including with the exception of the faulty fan incident in 2004, he never complained about safety matters to Employer. The Employee did not establish that he was objectively engaging in any of the forms of conduct listed in Section 42(1), at or prior to the time he was dismissed. The consistent evidence of the Employer's witnesses was that the decision to terminate the Employee's employment was not related to safety issues at all but to concerns the Employer had with the Employee's attitude and dealings with others. The Board found that the Employee failed to establish a prima facie case under Section 42.1(4) and, accordingly, the appeal was dismissed.

**Integra Castings Inc. - and - Director, Workplace Safety & Health Division**

Case No. 268/08/WSH

November 20, 2008

**PRACTICE AND PROCEDURE - TIMELINESS - Employer filed appeals to Notices of Administrative Penalties beyond the date prescribed by Section 53.1(7) of *The Workplace Safety and Health Act* - Time limits to appeal Administrative Penalty are mandatory - Held appeals were untimely and were dismissed - Substantive Order.**

The Employer filed an appeal from a Decision of the Deputy Minister to issue seven Notices of Administrative Penalties for the failure of the Employer to comply with seven Improvement Orders issued under *The Workplace Safety and Health Act*. Each of the Notices contained the statement that an appeal of the penalty had to be sent to the Manitoba Labour Board within 14 days after being served with the Notice. The Employer filed the appeal 5½ weeks after it had received the Notices. The Director of the Workplace Safety & Health Division raised the preliminary issue of timeliness.

**Held:** The Board determined that the Employer filed the appeals beyond the date prescribed by Section 53.1(7) of the *Act* and, as a result, were untimely. The time limit established by Section 53.1(7) of the *Act* to appeal an Administrative Penalty is mandatory. The Board was satisfied that a failure to comply with this provision goes to its jurisdiction to entertain an appeal. The Board does not have any authority to extend the time limit. Therefore, the Board dismissed the appeals.

**Manitoba Family Services and Housing - and - Director, Workplace Safety and Health - and - Sandra McKenzie**

Case No. 441/07/WSH

November 26, 2008

**DISCHARGE - EVIDENCE - Employee's failure to testify led Board to accept on balance of probabilities that Employer's decision not to offer her further shifts and to reject her on probation was not because she raised safety and health concerns - Employer's Appeal of Order allowed - Substantive Order.**

**REMEDY - Director of Workplace Safety and Health submitted regardless of disposition of appeal, Employee was entitled to monetary benefits had Order been implemented immediately - Held employee was casual and assigned work on case-by-case basis so relief requested would be speculative and inconsistent with determinations of merits of the appeal.**

The Employer appealed an Order of the Workplace Safety and Health Division on the grounds that the Director erred in holding that the Employee was terminated during her probationary period as a result of her raising health and safety concerns rather than for breaches of confidentiality, insubordination, harassment of fellow employees and lack of professionalism. The Director submitted that, regardless of the final disposition made by the Board, the Employee should be entitled to monetary damages at least up to the date of the Board's decision equivalent to the wages and other monetary benefits she would have received had the Order of the Director been implemented immediately.

**Held:** A *prima facie* case existed under Section 42.1(4) of the *Act* because the Employer had taken a discriminatory action by the suspension and by the rejection on probation; and the Employee had raised safety and health concerns, as contemplated by Section 42(1)(f) of the *Act*, regarding the care being provided to a client. When the Employee did not testify, the Board inferred that the evidence that would be given by her would not support her position. The Board was satisfied, on the balance of probabilities, that the Employer's decisions not to offer the Employee any further shifts or work assignments and to reject her on probation were not influenced by the fact she had raised safety and health concerns. The required connection between the discriminatory action and the Employee exercising a right under 42(1)(f) of the *Act* had not been established. Accordingly, the Board allowed the appeal of the Employer and set aside the order of the Director. As to the Director's request that the Board award the Employee monetary damages, the Board found that such relief was not warranted in the circumstances. Monetary redress could only be awarded for the period from the date of filing of the appeal to the date of the Board's Order, and such relief could only be based on the provisions of the Agreement. The Board noted that the employees were casual employees and were assigned work on a case-by-case basis so such an order would not only be speculative but would also be inconsistent with the core determinations of the Board on the merits of the appeal.

## SUMMARIES OF SIGNIFICANT COURT DECISIONS

### Manitoba Lotteries -and - General Teamsters, Local 979 - and - Eugene Kolench

Court of Queen's Bench

MLB Case No. 91/06/LRA & 256/06/LRA

Docket No. CI 06-01-47588

Heard by Justice Clearwater

Delivered July 3, 2008

As a result of an arbitration award, the Employee was reinstated in his employment under the conditions of a Last Chance Agreement. While still under the conditions of that agreement, his employment was terminated. The Union filed a grievance alleging termination without just cause. While the grievance was still pending, the Employee filed an unfair labour practice application with the Board alleging that the Employer discharged him from his employment because he was participating in union activities. The Board dismissed the application, without holding a hearing, concluding that the Employee's complaints were addressed in prior, binding and final disciplinary proceedings through the grievance and arbitration provisions. Based on the doctrine of *res judicata* or issue estoppel, the Board lacked jurisdiction to consider the application. Any new issues raised by the Employee could be adequately determined in grievance arbitration proceedings ongoing between the parties. The Employee then applied for the Board to review its order submitting that the Board would have made a different decision if it had known that the Union did not intend to proceed with the grievance. The Board declined to review and vary its original decision. The Employee then filed an application for judicial review of two decisions of the Board requesting a declaration that the Board erred in failing to observe principles of natural justice in dismissing his unfair labour practice application and his subsequent application for a review of the Board's initial decision. In the alternative, he sought declarations that the Board erred in refusing to exercise its jurisdiction and in concluding it had no jurisdiction in dismissing his applications.

**Held:** The Board was incorrect in the first part of its decision that the doctrines of *res judicata* or issue estoppel precluded it from exercising any jurisdiction. Although the parties before the arbitrator were the same as in the unfair labour practice complaint, the facts and evidence before the arbitrator were not the same that the doctrines of *res judicata* or issue estoppel apply. If this were the sole issue to be determined, the Court would have no hesitation in quashing the decision of the Board. However, the Board did exercise its jurisdiction as regards the complaint of the alleged unfair labour practice by considering the materials filed, assessing same, and declining to take any further action on the complaint. The same evidence which may support a finding of an unfair labour practice was available to be advanced in a grievance. If he felt that he was wrongly dismissed because of his union activities, it was clearly open to him to prosecute a grievance on this basis or, as a minimum, to lead this evidence in the grievance that was pending. If his Union erred in its advice to him as to the merits of his pending grievance he had the right to bring action against the Union for any alleged breach of its duties to him. In applying the "reasonableness" standard of review, the Court was satisfied that Board's decision was reasonable.

TABLE 1

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

(April 1, 2008 – March 31, 2009)

	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	14	38	52	36	5	6	0	0	47	5
Application for Revocation	2	18	20	14	2	2	0	0	18	2
Application for Amended Certificate	4	25	29	13	0	1	0	0	14	15
Application for Unfair Labour Practice	15	30	45	2	5	24	0	0	31	14
Application for Board Ruling	24	9	33	4	0	2	0	0	6	27
Application for Review and Reconsideration	3	10	13	1	8	1	0	0	10	3
Application for Successor Rights	73	2	75	71	0	3	1	0	75	0
Application for Termination of Barg. Rights	0	4	4	1	0	3	0	0	4	0
Application pursuant to Section 10(1) <sup>1</sup>	0	0	0	0	0	0	0	0	0	0
Application pursuant to Section 10(3) <sup>2</sup>	0	3	3	2	0	0	0	0	2	1
Application pursuant to Section 20 <sup>3</sup>	12	15	27	0	17	3	0	1	21	6
Application pursuant to Section 21(2) <sup>4</sup>	1	0	1	0	0	1	0	0	1	0
Application pursuant to Section 22 <sup>5</sup>	1	0	1	0	0	1	0	0	1	0
Application pursuant to Section 58.1 <sup>6</sup>	0	0	0	0	0	0	0	0	0	0
Application pursuant to Section 69, 70 <sup>7</sup>	0	0	0	0	0	0	0	0	0	0
Application pursuant to Section 76(3) <sup>8</sup>	1	7	8	8	0	0	0	0	8	0
Application pursuant to Section 87(1) <sup>9</sup>	0	0	0	0	0	0	0	0	0	0
Application pursuant to Section 87.1(1) <sup>10</sup>	0	0	0	0	0	0	0	0	0	0
Application pursuant to Section 115(5) <sup>11</sup>	2	7	9	9	0	0	0	0	9	0
Application pursuant to Section 130(10.1) <sup>12</sup>	0	1	1	1	0	0	0	0	1	0
Application pursuant to Section 132.1 <sup>13</sup>	0	1	1	0	0	0	0	0	0	1
Referral for Expedited Arbitration **	14	96	110	-	-	-	-	-	86	24
<b>Totals</b>	<b>166</b>	<b>266</b>	<b>432</b>	<b>162</b>	<b>37</b>	<b>47</b>	<b>1</b>	<b>1</b>	<b>334</b>	<b>98</b>

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 Permit for Union to visit on Employer's property

5 Access Agreements

6 Business coming under provincial law is bound by collective agreement

7 Complaint re ratification vote

8 Religious Objector

9 First Collective Agreement

10 Subsequent agreement to first collective agreement

11 Request for the Board to appoint arbitrators

12 Extension of Time Limit for expedited decisions

13 Disclosure of information by unions

\*\* See Table 3

TABLE 2

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

(April 1, 2008 – March 31, 2009)

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	6	282	4	1	0	1	1
Revocation	5	117	3	0	1	1	0
Termination of Bargaining Rights	1	35	1	0	0	0	0
Board Ruling	0	0	0	0	0	0	0

TABLE 3

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

(April 1, 2008 – March 31, 2009)

Cases Carried Over	Number of Referrals Filed	TOTAL	Number of Cases Mediator Appointed	Disposition of Cases				Number of Cases Disposed	Number of Cases Pending	
				Settled by Mediation	Settled by Parties	Settled by Arbitration	Declined to Review			Withdrawn
14	96	110	45	27	33	4	1	21	86	24

TABLE 4

**STATISTICS RELATING TO THE ADMINISTRATION OF *THE EMPLOYMENT STANDARDS CODE***

(April 1, 2008 – March 31, 2009)

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
27	49	76	49	10	1	60	16

TABLE 5  
**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, 2008 – March 31, 2009)

Cases Carried Over	Number of Applications Filed	TOTAL	Decisions/Orders Issued by the Board	Applications Withdrawn	Number of Cases Disposed	Number of Cases Pending
5	2	7	3	1	4	3

TABLE 6  
**STATISTICS RELATING TO THE ADMINISTRATION OF *THE ESSENTIAL SERVICES ACT* BY THE MANITOBA LABOUR BOARD**  
 (April 1, 2008 – March 31, 2009)

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

TABLE 7  
**STATISTICS RELATING TO THE ADMINISTRATION OF *THE ELECTIONS ACT* BY THE MANITOBA LABOUR BOARD**  
 (April 1, 2008 – March 31, 2009)

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

TABLE 8  
**FIRST AGREEMENT LEGISLATION REVIEW OF CASES FILED**  
(April 1, 2008 – March 31, 2009)

Union	Employer	Date of Application	Outcome of Application	Status as at March 31
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Pending from Previous Reporting Period:

No applications were pending

New Applications this Reporting Period:

No new applications were filed