

Ontario Labour Relation Board

v.

Canada Industrial Relations Board

Three Key Differences

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I. Introduction¹

One of the many challenges for busy labour lawyers is remembering all the specific nuances for the myriad tribunals before which they plead. While some labour lawyers may specialize in cases before just a couple of administrative tribunals, many others plead in multiple fora.

Even a labour lawyer who regularly pleads before one labour board may find cases before its constitutional counterpart somewhat challenging.

This paper will highlight three essential differences between the Ontario Labour Relations Board (OLRB) and the Canada Industrial Relations Board (CIRB).

The three key differences which will be analyzed in this paper are: i) jurisdictional differences; ii) certification practice and iii) oral hearings.

II. Three Key Differences

1. Jurisdictional Differences

a) Overview

While there are generally federal counterparts for most Ontario labour laws, the Ontario Legislator in recent years has provided the OLRB with a far broader jurisdiction than the *Canada Labour Code*,

¹ The authors gratefully acknowledge the assistance of Marie-France Grenier of the CIRB who had the challenging task of incorporating two lawyers' texts, in different formats, into a single comparative paper.

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R.S. 1985, c. L-2 (the *Code*) gives the CIRB. Ontario may also cross-appoint OLRB Vice-Chairs (VCs) to other related tribunals, such as the Ontario Human Rights Tribunal.

By contrast, pursuant to *Code* section 11(1), full-time VCs at the CIRB can hold no other office or employment:

11.(1) The full-time members of the Board must not hold any other employment or office in respect of which they receive any remuneration.

Unlike the longstanding practice at the OLRB, section 11(1) of the *Code* prevents full time CIRB VCs from acting as arbitrators.

b) OLRB

The OLRB currently has jurisdiction under twenty-eight statutes. The vast majority of the OLRB's caseload, however, derives from three statutes: the *Labour Relations Act, 1995 (LRA)*; the *Employment Standards Act, 2000 (ESA, 2000)*; the *Occupational Health and Safety Act (OHSA)*. Although a much smaller part of its case load, the OLRB also exercises jurisdiction over labour relations of Crown employees, deals with reprisal complaints under a number of statutes and also deals with essential service agreements and strike related issues under a number of statutes.

The legislation under which the OLRB has functions are as follows:

- *Ambulance Services Collective Bargaining Act, 2001*, S.O. 2001, c. 10 (*ASCBA, 2001*)
- *Colleges Collective Bargaining Act, R.S.O. 1990*, c. C.15
- *Colleges Collective Bargaining Act, 2008*, S.O. 2008, c. 15 (*CCBA*)
- *Crown Employees Collective Bargaining Act, 1993*, S.O. 1993, c. 38 (*CECBA, 1993*)
- *Education Act, R.S.O. 1990*, c. E.2
- *Employment Protection for Foreign Nationals Act (Live-in Caregivers and Others), 2009*, S.O. 2009, c. 32
- *Employment Standards Act, 2000*, S.O. 2000, c. 41 (*ESA, 2000*)

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- *Environmental Bill of Rights Act, 1993*, S.O. 1993, c. 28
- *Environmental Protection Act*, R.S.O. 1990, c. E.19 which gives the Board jurisdiction under the following legislation:
 - *Environmental Assessment Act*, R.S.O. 1990, c. E.18
 - *Environmental Protection Act*, R.S.O. 1990, c. E.19
 - *Fisheries Act*, R.S.C. 1970, c. F-14
 - *Nutrient Management Act*, 2002, S.O. 2002, c. 4
 - *Ontario Water Resources Act*, R.S.O. 1990, c. O.40
 - *Pesticides Act*, R.S.O. 1990, c. P.11
 - *Safe Drinking Water Act*, 2002, S.O. 2002, c. 32
 - *Toxics Reduction Act*, 2009, S.O. 2002, c. 19
- *Fire Protection and Prevention Act, 1997*, S.O. 1997, c.4
- *Hospital Labour Disputes Arbitration Act*, R.S.O. 1990, c. H.14 (*HLDA*)
- *Labour Relations Act, 1995*, S.O. 1995, c. 1, Sch. A (*LRA*)
- *Local Health System Integration Act, 2006*, S.O. 2006, c. 4 (*LHSIA, 2006*)
- *Long-Term Care Homes Act, 2007*, S.O. 2007, c. 8 (*L-TCHA, 2007*)
- *Occupational Health and Safety Act*, R.S.O. 1990, c. O.7 (*OHSA*)
- *Ontario Provincial Police Collective Bargaining Act, 2006*, S.O. 2006, c. 35, Sch. B
- *Public Inquiries Act, 2009*, S.O. 2009, c. 33, Sch. 6
- *Public Sector Labour Relations Transition Act, 1997*, S.O. 1997, c. 21 (*PSLRTA, 1997*)
- *Public Service of Ontario Act*, R.S.O. 2006, c. P.47
- *Smoke Free Ontario Act*, S.O. 1994, c. 10

Functionally, the OLRB's adjudicative jurisdiction might be described as follows:

Traditional labour relations matters (acquisition, transfer and termination of bargaining rights, jurisdictional disputes and unfair labour practice complaints, including duty of fair representation complaints) with respect to both private sector and public sector employers (*LRA; CCBA; CECBA, 1993*).

Restructuring of bargaining rights (*LRA; PSLRTA, 1997; LHSIA, 2006; L-TCHA, 2007*).

Determinations that collective agreements will be resolved by interest arbitration. (All collective agreements subject to *HLDA*. First contracts, in certain circumstances, under *LRA*).

Determinations in relation to essential services in circumstances in which the right to strike is circumscribed (*ASCBA, 2001; CECBA, 1993*).

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Reprisal complaints (*LRA*, sections 72 and 87; *OHSA*, section 50; *ESA, 2000*, section 74 (which may only come to the OLRB under *ESA, 2000* section 116 as an application for review of a decision of an employment standards officer); many other statutes).

Appeals with respect to employment standards rights (*ESA, 2000*, section 116: see also *ESA, 2000*, sections 101, 121, 122).

Appeals with respect to occupational health and safety matters (*OHSA*, section 61).

Grievance arbitration in the construction sector only: *LRA* section 133.

In the fiscal year April 1, 2009 to March 31, 2010 (the most recent year for which data are available), the OLRB received 4,007 new cases. Those cases fell into the following categories:

<i>Labour Relations Act, 1995</i>		
Certification Applications:	623	
Termination Applications:	140	
Sale of Business / Related Employer Applications:	165	
Jurisdictional Disputes:	60	
Unfair Labour Practice Complaints	658	
Construction Industry Grievances:	1,048	
Ministerial References:	60	
Other:	60	
<i>Employment Standards Act, 2000</i> Appeals (includes reprisals)		896
<i>Occupational Health and Safety Act</i>		
Reprisal Complaints	82	
Appeals	150	
Other Statutes		
Reprisal Complaints	7	
All other matters	48	

In addition, the Pay Equity Hearings Tribunal and the Public Sector Compensation Review Board are currently chaired by the OLRB's Alternate Chair and some VCs hold cross appointments to these tribunals. Both are housed physically within the OLRB and use the OLRB's administrative,

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professional and support staff. The Colleges Relations Commission and the Education Relations Commissions are similarly operated from within the OLRB with members and administrative staff cross-appointed to both. The OLRB's Registrar/Director is also the Registrar/Director of the Pay Equity Hearings Tribunal and the Education and Colleges Relations Commissions.

The OLRB also has connections with other tribunals. Some OLRB Vice-Chairs are cross-appointed to the Human Rights Tribunal of Ontario. The OLRB also shares certain administrative services and physical space with the Workplace Safety and Insurance Appeals Tribunal.

c) CIRB

The *Code* has three Parts. Part I deals with Industrial Relations. Part II covers Occupational Health and Safety, while Part III encompasses Employment Standards.

The Ontario equivalents would be the *LRA*; *OHSA*; and the *ESA, 2000*.

i) Part I—Industrial Relations

Part I of the *Code* provides the CIRB with its main jurisdiction. Part I identifies the types of federal works, undertakings and businesses which come under the CIRB's jurisdiction. Generally, private sector federally-regulated businesses come under the CIRB's jurisdiction. While some laypeople assume the CIRB is the "federal labour board" for all employees, unlike the OLRB, the CIRB has no jurisdiction over the civil service:

6. Except as provided by section 5, this Part does not apply in respect of employment by Her Majesty in right of Canada.

The *Code* establishes the CIRB (sections 9–14). The *Code* gives the CIRB jurisdiction over the usual labour law subjects such as certification (sections 24–34), single employer and sale of business

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declarations (sections 39; 44–46) the duty of fair representation (section 37), the duty to bargain in good faith (section 50), essential services (section 87.4), strikes/lockouts (sections 88–93) and unfair labour practices (section 94).

Part I of the *Code* also governs labour arbitrators' powers and jurisdiction. Certain provisions concerning conciliation and strikes/lockouts often involve decisions made by the Minister of Labour and involve the Federal Mediation and Conciliation Service.

ii) Part II–Occupational Health and Safety

Part II of the *Code* is similar in concept to Ontario's *OHSA*. The Board has a limited Occupational Health and Safety (OHS) role. The Legislator has given Health and Safety Officers (HSO) and others the role of ensuring compliance with Part II obligations. The CIRB only hears reprisal complaints, whether related to the exercise of the right to refuse unsafe work or from seeking the enforcement of Part II of the *Code*.

a) CIRB Jurisdiction

The CIRB's OHS jurisdiction has ebbed and flowed over the years. It has had roles involving both complaints and reviewing whether danger existed. From 1973–1978, the CIRB had no role under Part II for questions of whether a danger existed in the workplace. From 1978–1986, the CIRB had an appellate jurisdiction over HSO decisions regarding the existence of danger. From 1986–2000, the *Code* limited the CIRB's appellate jurisdiction to reviewing HSO's decisions which found that no danger existed.

With the passing of Bill C-12 in 1999, the *Code* took away any CIRB role over HSO's decisions regarding danger. However, the *Code* did expand the scope of the complaints the CIRB could hear.

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The CIRB in *Lewis Rathgeber*, 2010 CIRB 536, described its current reprisal jurisdiction:

[21] Under Part II of the *Code*, the Board adjudicates complaints alleging that an employer has taken disciplinary or other action against employees for allegedly exercising their rights under the *Code*.

[22] Sections 133, 134 and 147 establish the regime. The Board examines whether a reprisal took place in much the same way as it handles unfair labour practice complaints under Part I of the *Code*:

133.(1) An employee, or a person designated by the employee for the purpose, who alleges that an employer has taken action against the employee in contravention of section 147 may, subject to subsection (3), make a complaint in writing to the Board of the alleged contravention.

(2) The complaint shall be made to the Board not later than ninety days after the date on which the complainant knew, or in the Board's opinion ought to have known, of the action or circumstances giving rise to the complaint.

(3) A complaint in respect of the exercise of a right under section 128 or 129 may not be made under this section unless the employee has complied with subsection 128(6) or a health and safety officer has been notified under subsection 128(13), as the case may be, in relation to the matter that is the subjectmatter of the complaint.

(4) Notwithstanding any law or agreement to the contrary, a complaint made under this section may not be referred by an employee to arbitration or adjudication.

(5) On receipt of a complaint made under this section, the Board may assist the parties to the complaint to settle the complaint and shall, if it decides not to so assist the parties or the complaint is not settled within a period considered by the Board to be reasonable in the circumstances, hear and determine the complaint.

(6) A complaint made under this section in respect of the exercise of a right under section 128 or 129 is itself evidence that the contravention actually occurred and, if a party to the complaint proceedings alleges that the contravention did not occur, the burden of proof is on that party.

134. If, under subsection 133(5), the Board determines that an employer has contravened section 147, the Board may, by order, require the employer to cease contravening that section and may, if applicable, by order, require the employer to

- (a) permit any employee who has been affected by the contravention to return to the duties of their employment;

- (b) reinstate any former employee affected by the contravention;

- (c) pay to any employee or former employee affected by the contravention compensation not exceeding the sum that, in the Board's opinion, is equivalent to the remuneration that would, but for the contravention, have been paid by the employer to the employee or former employee; and

- (d) rescind any disciplinary action taken in respect of, and pay compensation to any employee affected by, the contravention, not exceeding the sum that, in the Board's opinion, is equivalent to any financial or other penalty imposed on the employee by the employer.

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...

147. No employer shall dismiss, suspend, lay off or demote an employee, impose a financial or other penalty on an employee, or refuse to pay an employee remuneration in respect of any period that the employee would, but for the exercise of the employee's rights under this Part, have worked, or take any disciplinary action against or threaten to take any such action against an employee because the employee

(a) has testified or is about to testify in a proceeding taken or an inquiry held under this Part;

(b) has provided information to a person engaged in the performance of duties under this Part regarding the conditions of work affecting the health or safety of the employee or of any other employee of the employer; or

(c) has acted in accordance with this Part or has sought the enforcement of any of the provisions of this Part.

[23] The text of section 147, and its heading "Disciplinary Action", confirm the conditions underlying the Board's regime. There must be some form of disciplinary action or retaliation.

[24] In *Tony Aker*, 2009 CIRB 474, the Board described its current Part II jurisdiction and how it applies to two distinct areas. Firstly, the Board examines whether a reprisal took place as a result of a complainant's exercise of the right to refuse unsafe work under section 128 of the *Code*. Section 133(6) of the *Code* creates a reverse onus provision in this specific reprisal situation.

[25] Secondly, the Board also examines alleged reprisals under Part II for other situations described in section 147 which do not involve the right to refuse unsafe work. However, there is no reverse onus provision for this general protection against reprisals.

[26] In *Air Canada*, 2007 CIRB 394, the Board dealt with a complaint concerning the operation of Health and Safety Committees and explained the limits of its jurisdiction:

[59] Part II of the Code does not give the Board any jurisdiction over either the administration or enforcement of any of the provisions relating to the operation of health and safety committees. The present wording of Part II does not give this Board jurisdiction to address the myriad of matters relating to the administration and operation of these committees, that are found in both unionized and nonunionized workplaces. Part II does not give the Board jurisdiction, for example, to determine the amount of training, the level of resources, or the amount of time away from their regular duties that should be provided to committee members at the hundreds, if not thousands, of workplaces falling under federal jurisdiction. **Similarly, it does not give this Board jurisdiction to set the regular rate of pay of employees who perform health and safety work.**

[60] The only jurisdiction the Board has under Part II of the Code is to hear complaints alleging that an employer has punished an employee for exercising the rights spelled out in section 147 of the Code. ...

(emphasis added)

[27] In *George Court*, 2010 CIRB 498, the Board compared its jurisdiction with that of a Health and Safety Officer:

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[79] In *Tony Aker*, 2009 CIRB 474, the Board analyzed how a single incident could produce complaints in different fora. In *Tony Aker*, *supra*, an employee's termination resulted in a reprisal complaint to the Board, a complaint of a Part II contravention to a Safety Officer and an unjust dismissal complaint under Part III of the *Code*.

[80] The Board's jurisdiction under Part II is limited to reprisals: see sections 133 and 147. The *Code* grants a Safety Officer the general authority to investigate contraventions of all other provisions of Part II of the *Code* and issue remedial directives: see, *inter alia*, sections 127.1 and 145(1).

[28] In this case, given the parties' agreement that no reprisal or disciplinary action took place, the Board cannot uphold Mr. Rathgeber's complaint.

In sum, the CIRB's Part II jurisdiction is analogous to its Part I jurisdiction over unfair labour practice complaints. Protection exists for those seeking to exercise their rights under the *Code*.

b) Health and Safety Officer Jurisdiction

Bill C-12 restricted the CIRB's jurisdiction to the area of reprisal complaints. At the same time, the *Code* added procedures to Part II, such as the Internal Complaint Resolution Process (section 127.1), which included an expanded role for HSOs.

Because of the challenges some parties had in understanding the different regimes under Part II, the CIRB in *Lewis Rathgeber*, *supra*, explained its understanding of the role of an HSO under Part II:

[31] Part II of the *Code* encourages parties to resolve their safety disputes themselves. It has been described as an "Internal Responsibility System". If there is a suggestion of a "contravention", then the employee must initially bring that matter up with a supervisor. Section 127.1 of the *Code* sets out the escalating procedure to follow:

127.1(1) An employee who believes on reasonable grounds that there has been a contravention of this Part or that there is likely to be an accident or injury to health arising out of, linked with or occurring in the course of employment shall, before exercising any other recourse available under this Part, except the rights conferred by sections 128, 129 and 132, make a complaint to the employee's supervisor.

(2) The employee and the supervisor shall try to resolve the complaint between themselves as soon as possible.

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(3) The employee or the supervisor may refer an unresolved complaint to a chairperson of the work place committee or to the health and safety representative to be investigated jointly

(a) by an employee member and an employer member of the work place committee; or

(b) by the health and safety representative and a person designated by the employer.

(4) The persons who investigate the complaint shall inform the employee and the employer in writing, in the form and manner prescribed if any is prescribed, of the results of the investigation.

(5) The persons who investigate a complaint may make recommendations to the employer with respect to the situation that gave rise to the complaint, whether or not they conclude that the complaint is justified.

(6) If the persons who investigate the complaint conclude that the complaint is justified, the employer, on being informed of the results of the investigation, shall in writing and without delay inform the persons who investigated the complaint of how and when the employer will resolve the matter, and the employer shall resolve the matter accordingly.

(7) If the persons who investigate the complaint conclude that a danger exists as described in subsection 128(1), the employer shall, on receipt of a written notice, ensure that no employee use or operate the machine or thing, work in the place or perform the activity that constituted the danger until the situation is rectified.

(8) The employee or employer may refer a complaint that there has been a contravention of this Part to a health and safety officer in the following circumstances:

(a) where the employer does not agree with the results of the investigation;

(b) where the employer has failed to inform the persons who investigated the complaint of how and when the employer intends to resolve the matter or has failed to take action to resolve the matter; or

(c) where the persons who investigated the complaint do not agree between themselves as to whether the complaint is justified.

(9) The health and safety officer shall investigate, or cause another health and safety officer to investigate, the complaint referred to the officer under subsection (8).

(10) On completion of the investigation, the health and safety officer

(a) may issue directions to an employer or employee under subsection 145(1);

(b) may, if in the officer's opinion it is appropriate, recommend that the employee and employer resolve the matter between themselves; or

(c) shall, if the officer concludes that a danger exists as described in subsection 128(1), issue directions under subsection 145(2).

(11) For greater certainty, nothing in this section limits a health and safety officer's authority under section 145.

[32] If the internal system does not lead to a resolution, then section 127.1(8) sets out how an employee or employer may refer a complaint to a Health and Safety Officer. This is what

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Mr. Rathgeber did when he completed HRSDC's "Complaint Registration" form and alleged CN had not complied with section 135.1 of the *Code*.

[33] The essential point is to distinguish between reprisals over which the CIRB has jurisdiction and compliance issues that fall within a Health and Safety Officer's jurisdiction. An appeal procedure exists from Health and Safety Officer decisions (section 145.1), but this does not involve the CIRB in any way.

[34] Section 145(1) sets out some of the powers of a Health and Safety Officer, including the ability to issue directions if a contravention of Part II has occurred:

145.(1) A health and safety officer who is of the opinion that a provision of this Part is being contravened or has recently been contravened may direct the employer or employee concerned, or both, to

- (a) terminate the contravention within the time that the officer may specify; and
- (b) take steps, as specified by the officer and within the time that the officer may specify, to ensure that the contravention does not continue or re-occur.

[35] A Health and Safety Officer may examine Mr. Rathgeber's complaint and determine that there is no contravention of section 135.1 and thus not issue a direction. But that is different from advising a complainant like Mr. Rathgeber that HRSDC has no jurisdiction even to consider the issue and that the proper recourse is to the CIRB.

[36] To summarize, Health and Safety Officers deal initially with allegations of Part II contraventions. The Board only deals with reprisals with its limited regime created by sections 133 and 147. One matter could involve both a compliance issue and a reprisal complaint as described in *Tony Aker, supra*. However, the Board has no authority to police alleged Part II substantive contraventions. It is up to HRSDC to determine whether a contravention has taken place.

As *Lewis Rathgeber, supra*, illustrated, it is not always easy for individuals to understand to whom they should direct their Part II concerns.

iii) Part III—Standard Hours, Wages, Vacations and Holidays

The CIRB has no role under Part III of the *Code*, which resembles Ontario's *ESA, 2000*.

For matters like unjust dismissal complaints (*Code* section 240), an independent adjudicator will be appointed by the Minister of Labour to hear the complaint.

2. Certification and Jurisdiction Over Bargaining Unit Descriptions

a) Overview

The CIRB follows a card-based certification system, whereas the OLRB now holds a mandatory vote for every certification application, except in the construction sector.

The CIRB, in following the Quebec tradition for certified bargaining units, retains control over the description of the bargaining certificates it issues. At the OLRB, by contrast, the certificate is often described as “spent” following certification. The parties are free to modify the bargaining unit description as they see fit during collective bargaining.

b) CIRB

i) Certification

The CIRB certifies a trade union to represent a specific bargaining unit if it is satisfied the union enjoys majority support. This is shown usually by way of signed membership cards. While many provinces now have mandatory certification votes, the CIRB will only order a vote in certain situations. For example, under *Code* section 29(2), the CIRB must hold a vote when a trade union’s support is less than 50%, but more than 35%.

The *Code* also provides for voluntary recognition rather than certification. In the event the CIRB dismisses a certification application, a 6 month bar is imposed for subsequent applications: *Regulations*, section 38.

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Up until 2004, the CIRB took on average 170 to 180 days to process certification applications. The Sims' Task Force², which conducted in the mid-90's an in depth review of Part I of the *Code*, had criticized the undue delays and suggested a labour board could complete the certification process in 30–40 days. In 2004, the Board streamlined its certification processing system. As of March 31, 2011, the average processing time had been reduced to 108 days and 49% of applications were processed in less than 50 days.

Several changes took place in the CIRB's internal procedures to give priority to certification applications. The following are just a few of the changes:

a) Use of a fixed schedule

The CIRB now creates a detailed timeline for parties which sets out the exact dates by which they must complete certain steps. Rather than telling parties they have 15 days to complete a step, the CIRB now provides them with the exact due date.

b) No extensions

The Registrar no longer grants extensions beyond two days for the filing of materials in certification applications. Only a CIRB panel, in extreme situations, may grant a further extension. This insistence on respecting a tight schedule is no different from that demanded by the OLRB when it schedules its mandatory certification votes.

Parties can and do respect tight time lines for priority matters. Certification applications fall within this category.

² *Seeking a Balance: Canada Labour Code, Part I, Review* (Ottawa: Human Resources Development Canada, 1995)

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c) Reduced Process

The CIRB's Industrial Relations Officers (IROs) no longer prepare a formal, written "Investigating Officer's Report" summarizing each certification application. They instead send a much shorter "letter of understanding" to the parties. The elimination of a full investigation has allowed the IROs to devote more attention to other areas. One of their prime duties in certification applications remains the verification of membership evidence³.

d) Disputes about inclusions and exclusions

If an applicant has sufficient support, the CIRB will certify a bargaining agent, even if some inclusions and exclusions from the bargaining unit remain outstanding.

The CIRB has produced a new Information Circular on certification⁴. This document informs the parties of the certification process and the updated procedures being followed.

A review of the CIRB process found that enormous effort was being spent preparing reports when ultimately they were not always needed. By eliminating those reports, except for exceptional cases, the speed of the process improved considerably.

ii) Bargaining unit descriptions

Some Ontario counsel are unfamiliar with the CIRB's continuing control over its bargaining unit orders.

³ See *Genesee & Wyoming Inc., cob as Huron Central Railway HCRY*, [2007] CIRB no. 388 where the Board dismissed a certification application after the investigating officer found irregularities in the applicant's membership evidence.

⁴ The document is available on the CIRB's website at www.cirb-ccri.gc.ca

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In Ontario, once the OLRB certifies a bargaining unit, the parties are generally free to modify the unit's description when they negotiate their collective agreements.

The CIRB, however, has followed the traditional Quebec labour law approach and retains its jurisdiction over the description of every bargaining unit it certifies.

In *Garda Cash-In-Transit Limited Partnership*, 2010 CIRB 503, the CIRB described its bargaining unit practice:

[28] The Board, contrary to the practice of many of its provincial counterparts, remains seized of the description and scope of all bargaining units it issues. The Board's model follows that found in Quebec labour law: see generally *Teleglobe Canada* (1979), 32 di 270; [1979] 3 Can LRBR 86; and 80 CLLC 16,025 (partial report) (CLRB no. 198); and *Canadian Pacific Limited* (1984), 57 di 112; 8 CLRBR (NS) 378; and 84 CLLC 16,060 (CLRB no. 482).

[29] While in Ontario parties are generally free to modify their bargaining unit description, and indeed, the original certification is often described as being "spent" after it is issued, parties do not have a similar freedom federally.

[30] Instead, if there are disputes about whether an employee falls within the scope of a bargaining unit, a party can bring that dispute to the Board, as CUPE did in this case, pursuant to section 18 of the *Code*:

18. The Board may review, rescind, amend, alter or vary any order or decision made by it, and may rehear any application before making an order in respect of the application.

[31] Similarly, if a question arises during an arbitration about which employees are bound by an existing collective agreement, the *Code* at section 65 allows the parties to ask the Board to determine the question:

65.(1) Where any question arises in connection with a matter that has been referred to an arbitrator or arbitration board, relating to the existence of a collective agreement or the identification of the parties or employees bound by a collective agreement, the arbitrator or arbitration board, the Minister or any alleged party may refer the question to the Board for determination.

(2) The referral of any question to the Board pursuant to subsection (1) shall not operate to suspend any proceeding before an arbitrator or arbitration board unless the arbitrator or arbitration board decides that the nature of the question warrants a suspension of the proceeding or the Board directs the suspension of the proceeding.

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Accordingly, as workplace situations evolve, the parties to a bargaining unit order can ask the CIRB to determine whether new or modified positions fall within the existing bargaining unit.

If the parties are in agreement about updating a bargaining unit description that has evolved, the CIRB would appreciate a precise draft order for its review. This will help expedite the CIRB process, since the parties have the best understanding of the underlying facts and the specific wording for the order they are requesting. The ultimate decision, however, about the bargaining unit's description remains with the CIRB.

This retained jurisdiction over bargaining units allows the CIRB to rationalize an outdated bargaining structure. For example, if over time there has been a proliferation of bargaining units, a bargaining agent or an employer can apply for a review.

Section 18.1 of the *Code* has codified this longstanding process:

18.1(1) On application by the employer or a bargaining agent, the Board may review the structure of the bargaining units if it is satisfied that the bargaining units are no longer appropriate for collective bargaining.

(2) If the Board reviews, pursuant to subsection (1) or section 35 or 45, the structure of the bargaining units, the Board

(a) must allow the parties to come to an agreement, within a period that the Board considers reasonable, with respect to the determination of bargaining units and any questions arising from the review; and

(b) may make any orders it considers appropriate to implement any agreement.

(3) If the Board is of the opinion that the agreement reached by the parties would not lead to the creation of units appropriate for collective bargaining or if the parties do not agree on certain issues within the period that the Board considers reasonable, the Board determines any question that arises and makes any orders it considers appropriate in the circumstances.

...

The CIRB is not obliged to restructure bargaining units. An applicant requesting a bargaining unit review must convince the CIRB that the existing units are no longer appropriate for collective

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bargaining. This threshold requirement is not needed if the review request flows from a single employer or sale of business declaration.

A rationalization of multiple bargaining units will often lead to a run off vote whereby employees choose which one of several bargaining agents will represent them in the new, larger merged bargaining unit.

c) OLRB

i) Certification

Collective bargaining rights may be obtained as a result of voluntary recognition agreements or by the OLRB certifying a trade union as the bargaining agent for an appropriate unit of employees. Prior to 1995, in certain circumstances the *LRA* permitted the OLRB to certify a union on the basis of membership cards submitted without conducting a vote. In 1995, the *LRA* was amended to require that a vote be held before the OLRB could certify a trade union. The amendments, however, also provided for a expedited vote process. In 2005 the *LRA* was amended to restore the possibility of card-based certification for unions seeking to represent employees of construction employers. This option is not available for unions seeking certification with respect to employees of non-construction employers.

In 2009–10, the median time for the disposition of certification applications by the OLRB was 18 days.

a) Vote Based Certification

A union may apply to the OLRB for certification as the bargaining agent for a unit of an employer's employees under section 7 of the *LRA*.

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Different rules of procedure apply depending on whether the application is in relation to the construction sector or not. For non-construction sector applications, the OLRB's Rules of Procedure require that the union deliver a copy of its application to the employer before or at the same time that the application is filed with the OLRB (Rule 9.3). For construction sector applications, the OLRB's Rules of Procedure require that the union deliver a copy of its application to the employer not later than two (2) days after the application was filed with OLRB (Rule 24.3).

If, based solely on the material included with its application, a union appears to have the support of 40% of the employees in the bargaining unit for which it has applied, section 8(3) requires the OLRB to conduct a vote. If the employer does not agree with the bargaining unit proposed by the union, it must describe the bargaining unit which it proposes. The OLRB will define a voting constituency broad enough to encompass employees in both proposed bargaining units.

Section 8(5) of the *LRA* contemplates that the vote will be held within five days of the date on which the application was filed and virtually all votes are held on the fifth day. The OLRB determines the appropriate bargaining unit (*LRA*, section 9(1)). If more than 50% of the employees voting in the bargaining unit vote in favour, the OLRB must certify the union (*LRA*, section 10(1)). If 50% or less of the employees voting in the bargaining unit vote in favour, the OLRB must dismiss the application (*LRA*, section 10(2)).

Dismissal or, in some circumstances, withdrawal of an application results in a one year bar to a further application for certification (*LRA*, sections 10(3), 7(9.1) and 7(10)). These bars are mandatory and apply not only to the applicant union but to all other unions.

Unlike the CIRB, the OLRB does not "verify" membership evidence. The requirement for a mandatory vote in section 7 applications for certification obviates any need for such a process, as a union which does not actually have support of the individuals on whose behalf it has submitted membership evidence is unlikely to win the representation vote. However, section 8.1 permits an

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employer to give notice of challenge to the union's estimate of the number of employees in the union's proposed bargaining unit. Such notice must be given within two days of the date on which the employer received the application for certification (*LRA*, section 8.1(4)). In most cases, the practical effect of a section 8.1 notice is that at the time of ordering the vote the OLRB checks the cards filed by the union against the list of employees filed by the employer to determine whether or not it still appears that the union has the support of 40% of the employees in the bargaining unit for which it has applied.

If the union does appear to have 40%, the section 8.1 notice is disposed of prior to the vote. If not, the ballot box will be sealed, unless the parties agree otherwise, pending determination of the actual number of employees in the bargaining unit. If, after this determination is made, it appears that the union did not have 40% support at the time of its application, section 8.1 requires that the application be dismissed, irrespective of whether or not the union won the vote. However, dismissal of an application for certification pursuant to section 8.1 means that the mandatory bar provisions of the *LRA* do not apply (*LRA*, section 10(4)). Thus, an employer must consider whether or not to give notice under section 8.1 and, if an employer has done so, a union must consider whether to concede the section 8.1 notice in order to avoid the possibility of a bar.

Information Bulletins disseminated by the OLRB set out the general procedural steps in relation to certification applications. These include up to three meetings or consultations with "vote officers": pre-vote; at the vote; and post vote. Most cases are disposed of without a hearing on the basis of the results of the vote and agreements arrived at during these meetings and recorded on a "Certification Work Sheet" signed by the parties.

b) Card Based Certification (construction sector only)

In the construction sector, a union may elect to file a card-based certification application. Section 128.1 of the *LRA* constitutes a complete code for the processing of such applications. The

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OLRB's experience since the re-introduction of card-based certification in the construction sector has been that virtually all certification applications in that sector have been card-based.

Upon receipt of an application under section 128.1, the OLRB determines the bargaining unit and the percentage of employees in the bargaining unit who are members of the union on the date of application. The OLRB has regard to information filed by the union and by the employer for the purposes of this determination. As with section 7 applications, the OLRB does not "verify" membership evidence with respect to applications under section 128.1. A hearing, however, will be held if necessary to determine this and other issues.

If the OLRB is satisfied that more than 55% of the employees in the bargaining unit are members of the applicant union on the application date, the OLRB may certify the union as the bargaining agent without a vote. If the OLRB is satisfied that at least 40%, but not more than 55%, of the employees in the bargaining unit are members of the union on the application date, the OLRB must direct that a representation vote be taken. If fewer than 40% of the employees in the bargaining unit are members of the union, the application must be dismissed.

Dismissal or, in some circumstances, withdrawal of an application results in a one year bar to a further application for certification. These bars are mandatory and apply not only to the applicant union but to all other unions.

Because of the transient nature of the work and the workforce in the construction sector, the question of whether an individual is an employee in the bargaining unit is determined on the basis of whether the individual was at work on the date of the application and spent the majority of their time on that day performing the work of the trade in the bargaining unit. As a result of this, and the fact that dependent or independent contractor relationships are also prevalent in the construction sector, disputes about the employee status of individuals are more common in applications for certification in the construction sector than in the non-construction sector. Accordingly, the Board has developed

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special procedures applicable to status disputes in the construction sector which are set out in Information Bulletin No. 9. These procedures require the parties to exchange detailed statements of facts in relation to their positions on the employment status of disputed individuals.

ii) Bargaining unit description

The OLRB has jurisdiction to reconsider a decision issuing a certificate for a particular bargaining unit. However, since the OLRB's view is that the certificate is spent once the parties enter a collective agreement it has declined to use that reconsideration power solely for the purpose of amending bargaining unit descriptions: see e.g. *BA International Inc. v. International Assn. of Machinists and Aerospace Workers, Local Lodge 412*, 2005 CanLII 5215 (ON L.R.B.), application for judicial review dismissed 2005 CanLII 45405 (ON SCDC).

The OLRB will, however, amend a bargaining unit description if necessary as part of the remedy in certain types of proceedings. In particular, under the *LRA* the OLRB may amend bargaining unit descriptions within the context of related employer applications (section 1(4)) sale of business applications (section 69), and jurisdictional disputes (section 99). Unlike the CIRB, however, the OLRB has not used this jurisdiction for the purposes of rationalizing bargaining units. Rather, the amendments to the bargaining unit descriptions will generally be as minimal as possible with the overarching goal of preserving existing bargaining rights. See for example *Sun Media Corp.*, [2007] OLRB Rep. May/June 649, [2007] OLRD No. 2871, where on a related employer application the OLRB refused to consolidate existing bargaining units.

The *PSLRTA, 1997* represents, to some extent, a point of departure from the OLRB's general reticence to rationalize bargaining units. *PSLRTA, 1997*, applies to a broad, albeit defined, range of amalgamations, mergers and integrations within the broader public sector. Section 22(1) of *PSLRTA, 1997*, provides:

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Subject to any agreement under section 20 that is in effect, the Board, upon the application of a successor employer or any bargaining agent that has bargaining rights, may by order determine the number and description of bargaining units that are appropriate for the successor employer's operations after the occurrence of an event to which this Act applies.

The reference to “any agreement under section 20 that is in effect” is a reference to an agreement between the parties. Thus, consistent with the OLRB's general approach to bargaining unit descriptions, the *PSLRTA, 1997*, gives primacy to the agreements of the parties. Where there is no such agreement, however, section 22 permits the OLRB to determine the bargaining unit description. *PSLRTA, 1997* section 22(7) directs the OLRB to have regard to the purposes of *PSLRTA, 1997* when making such a determination. Thus, an order amending a bargaining unit description under section 22 of *PSLRTA, 1997* is an opportunity to “rationalize” bargaining units having regard to the operational needs of the employer and the purposes of *PSLRTA, 1997*: see *North Bay General Hospital*, [2011] OLRB Rep. Jan./Feb. 67, 2011 CanLII 9692 (ON LRB).

In part because it does not generally amend bargaining unit descriptions after it has issued a certificate, the OLRB will consider the potential for proliferation of bargaining units in deciding whether a bargaining unit of a small subset of an employer's employees is appropriate: *Casino Rama*, [2009] OLRB Rep. Jan./Feb. 15, 2009 CanLII 3266 (ON LRB).

3. Hearing Process

a) Overview

The *Code* has granted the CIRB a discretion whether to hold a formal oral hearing. The vast majority of CIRB hearings are done in writing, based solely on the parties' written submissions.

While not having the same explicit statutory power, the OLRB, as an administrative tribunal in charge of its own procedure, has the flexibility to tailor its hearings to the particular case before it.

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b) OLRB

Unlike the CIRB, there is no general provision which relieves the OLRB of the obligation to hold a hearing. Nonetheless, the OLRB does not hold a full hearing in a number of cases.

First, many cases are settled with the assistance of the OLRB's labour relations officers, who are professional mediators. In fiscal year 2009–10, 83.8% of cases were disposed of in this way.

Second, Rule 38.6 of the OLRB's Rules of Procedure provides:

The Board may conduct a written hearing in any case before it, as the Board considers advisable. Unless the only purpose of the hearing is to deal with procedural matters, the Board will not conduct a written hearing if a party satisfies the Board that there is good reason for not doing so.

The OLRB frequently decides procedural matters without an oral hearing.

Third, some provisions, notably section 96 of the *LRA*, give the OLRB discretion as to whether or not to inquire into a matter. The OLRB will decline to inquire into a matter when there is no labour relations purpose for doing so. Thus, for example, while breach of a collective agreement is also a breach of the *LRA*, the OLRB will generally decline to inquire into such complaints, deferring instead to the arbitration process which, by statute, every collective agreement must contain. The OLRB will also exercise its discretion not to inquire into a complaint where there has been excessive delay: see *The Corporation of The City of Mississauga*, [1982] OLRB Rep. Mar. 420; and *Dew v. Lakehead University Faculty Assn.*, 2005 CanLII 2641 (ON LRB).

Fourth, many cases are managed in such a way as to give rise to agreements which obviate the need for a hearing, as illustrated by the discussion of certification applications elsewhere in this paper.

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Fifth, some cases may be disposed of without a hearing pursuant to Rule 39.1 of the OLRB's Rules of Procedure on the basis that the applicant's pleadings do not make out a *prima facie* case for the remedies requested. While Rule 39.1 applies to all applications before the OLRB, it is generally most successfully invoked as a means of disposing of duty of fair representation complaints under the *LRA* because of the nature of the legal test applicable to such cases. While the OLRB may on its own motion consider whether an application makes out a *prima facie* case, unlike the CIRB it does not automatically do so in relation to all duty of fair representation applications. Rather, the OLRB responds to requests from the parties.

Sixth, the Chair of the OLRB has authority to make rules expediting proceedings in relation to certain matters. That authority has been exercised in the form of Rule 41 which applies to proceedings under: *ASCBA, 2001*; *PSLRTA, 1997*; section 32 of the *LHSIA, 2006*; Part IV of the *CECBA, 1993*; section 61 (appeals) of the *OHSIA*; section 118(2) (jurisdiction) of the *ESA, 2000*; sections 31, 37, and 71 of the *CCBA*; and sections 8.1 (see discussion under applications for certification), 13 (right of access), 98 (interim orders), 99 (jurisdiction disputes and duty of fair representation complaints), 114(2) (employee status disputes during collective bargaining or under a collective agreement) and 126 to 168 (the construction industry provisions) of the *LRA*. The OLRB's ability to conduct consultations with something less than a formal hearing has received strong judicial endorsement: see *Local 1739 v. IBEW*, (2007) 86 O.R. (3d) 508, [2007] O.J. No. 2460.

Seventh, the OLRB will use expedited hearing processes in cases in which expedition is otherwise called for. See *Amalgamated Transit Union Local 113 v. Ontario Labour Relations Board*, (2007) 88 O.R. (3d) 361 (Div. Ct.); see also *Rainbow Concrete Industries Ltd.* 2010 CanLII 4341 (ON LRB), request for reconsideration denied, 2010 CanLII 11254 (ON LRB); application for judicial review pending.

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c) CIRB

i) Oral Hearings

The CIRB is not required under section 16.1 of the *Code* to hold an oral hearing in every case:

16.1 The Board may decide any matter before it without holding an oral hearing.

There is no absolute right to an oral hearing for cases before the CIRB⁵. The Federal Court of Appeal⁶ has confirmed the CIRB's jurisdiction to decide cases based on the written record:

[11] The scheme of the legislation and Regulations indicates that the Board will decide on the basis of the material filed unless it decides to hold an oral hearing or specifically requests additional evidence. No authority was provided to the Court for the proposition that the Board cannot do so, or that in order to treat the material filed as evidence, the Board must give notice to the parties of this intention.

Similarly, the Court has confirmed that credibility issues do not automatically oblige the CIRB to hold a traditional oral hearing⁷:

[4] Counsel for the applicant, who was not his counsel before the Board, recognizes that the Board enjoys discretion in that regard; however, relying on the decision of our colleague Justice Décarie in *Raymond v. Canadian Union of Postal Workers and Canada Post Corporation*, 2003 FCA 418, he submits that, in exceptional circumstances, it is possible to review the Board's decision to proceed solely on the basis of the evidence in the record, without holding an oral hearing. He referred the Court to paragraph 4 of that decision, which reads as follows:

[4] Section 16.1 of the *Code* provides that the Board may decide any matter before it without holding a an oral hearing. This section was introduced by Chapter 26 of the Statutes of Canada, 1998, which repealed the former subsection 98(2) that allowed for circumstances in which the Board could refuse to hold a hearing on a complaint based on section 37. Therefore, the Board now has greater discretion in

⁵ Parties must request an oral hearing under the *Regulations*: section 10(g)

⁶ *Nav Canada v. International Brotherhood of Electrical Workers*, 2001 FCA 30

⁷ *Nadeau v. United Steelworkers of America (F.T.Q.)*, 2009 FCA 100

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this respect and the Court must henceforth be more respectful of the Board's decisions about holding hearings, which was not the case prior to the statutory amendment of 1998. This is a matter of internal policy that is beyond the scope of judicial review barring exceptional circumstances.

(emphasis added)

[5] Counsel for the applicant submits that, in this case, the exceptional circumstances lie in an issue of the credibility of a witness, specifically, the applicant's mother, who denies having received a telephone call from her son's employer informing her that he had dismissed her son, as claimed by the employer.

[6] With respect, I do not agree that, in the context of a section 37 complaint, credibility issues generally constitute exceptional circumstances requiring the Board to hold an oral hearing and that the failure to do so may be used as a basis for a valid application for judicial review. Credibility issues almost inevitably arise in antagonistic employer-employee relations, such that section 16.1 would then be rendered completely meaningless and deprived of Parliament's intended effect.

The *Code* also allows the CIRB to defer deciding certain cases that come before it. Section 16(1.1) of the *Code* reads:

16. The Board has, in relation to any proceeding before it, power

...

(1.1) to defer deciding any matter, where the Board considers that the matter could be resolved by arbitration or an alternate method of resolution;

The CIRB may exercise this power, for example, where the same question is pending before a labour arbitrator. In *Trevor William Emile Rees*, 2010 CIRB 499, the complainant, who filed duty of fair representation complaint against his trade union for missing the time limit to file a grievance, asked the CIRB to extend that time limit. That same request was already pending before a grievance arbitrator. The CIRB preferred to defer to that process.

The *Code* also allows the CIRB to refuse to determine certain unfair labour practice complaints if the issue could be arbitrated under a collective agreement. Section 98(3) of the *Code* reads:

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98.(3) The Board may refuse to determine any complaint made pursuant to section 97 in respect of a matter that, in the opinion of the Board, could be referred by the complainant pursuant to a collective agreement to an arbitrator or arbitration board.

In *Expertech Network Installation Inc.*, 2009 CIRB 481, the CIRB considered a complaint involving allegations of bargaining in bad faith. The issue concerned whether the collective agreement reflected the understanding the parties had reached at bargaining. An arbitrator had already interpreted the collective agreements behind the dispute and had considered what occurred at bargaining. As a result, the CIRB declined to determine a complaint about essentially the same issue.

ii) *Prima facie* process in duty of fair representation cases

The CIRB has adopted a *prima facie* case analysis for all new duty of fair representation complaints: *James Scot Crispo*, 2010 CIRB 527.

The CIRB requires complainants to plead fully their case, with the assistance of the Board's detailed complaint form, if necessary, so that the CIRB can consider whether a *prima facie* case exists.

Under this process, trade unions and employers will not automatically be required to file responses to every duty of fair representation complaint. Only those matters which establish a *prima facie* case will require a response.

Once the CIRB indicates a response is required, however, a response which simply asks for the matter to be dismissed, but which does not respond to the complainant's factual allegations, can lead to the complaint being accepted without an oral hearing⁸. The CIRB requires a party's factual allegations and reasoning, rather than just the conclusions it seeks.

⁸ *Josée Trudeau*, 2009 CIRB 464, varied *Josée Trudeau*, 2010 CIRB 541

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This requirement for a full explanation parallels somewhat the recent trend where the courts are demanding more of administrative tribunals with regard to their own reasons for decision. The courts have reminded administrative tribunals that they cannot just give conclusions, but must also explain how they reached those conclusions⁹.

Similarly, a respondent in a duty of fair representation complaint must go beyond bald conclusions, and explain the supporting facts.

V. Conclusion

There are many other key differences which exist between the OLRB and the CIRB. The three differences explored in this paper are among the most essential for practising labour lawyers.

Knowing the limits of the jurisdiction of the OLRB and of the CIRB is key. The OLRB exercises jurisdiction under a number of different statutes, but the extent of that jurisdiction varies from statute to statute. In each instance, specific reference should be had to the statute in question. Federally, confusion can exist regarding which tribunal or body has authority over a particular matter. In particular, the CIRB's limited jurisdiction in Part II matters confuses some complainants.

Expedition is important in commencing proceedings before both the OLRB and the CIRB. In particular, both will dismiss unfair labour practice complaints for delay. The OLRB's jurisdiction to do so arises from its discretion as to whether or not to inquire into complaints. At the CIRB, unfair labour practice complaints, including those involving the duty of fair representation, are subject to express limitation periods: section 97(2). While the CIRB has the discretion at section 16(*m.1*) to relieve against these limitation periods, compelling grounds are required to convince the Board to

⁹ See, for example, *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190 at para. 47; and *Clifford v. Ontario (Attorney General)* (2009), 98 O.R. (3d) 210 (Ont. C.A.)

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extend them. Traditionally, the CIRB has not relieved against missed time limits which resulted from pursuing a matter in the wrong forum.

The approaches of the OLRB and the CIRB to bargaining unit descriptions are markedly different. In general, the OLRB's approach is that once the bargaining unit description has been incorporated into a collective agreement, the parties may agree to amend it as they will (although they may not bargain that issue to impasse). There are very limited circumstances in which the OLRB will subsequently intervene to change the bargaining unit description. By contrast, counsel with occasional federally regulated clients may be surprised to learn that their ability to amend their bargaining units, which can be done provincially, will not bind the CIRB. The Code is explicit about the CIRB's continuing role in this area: sections 18 and 18.1.

Finally, knowing about the differences between the OLRB and the CIRB's hearing process is essential. Labour boards are very different from labour arbitrators. Both the OLRB and the CIRB have a statutory duty to move matters along in the public interest. The OLRB has adopted a number of procedures designed to accomplish this goal. If a party does not file full submissions with the CIRB, then surprises may occur when a decision is made based solely on those materials. Unlike at labour arbitration, parties have a significant amount of up front work when filing, or defending, a CIRB case. Detailed written submissions are crucial for several reasons, including to allow the CIRB to decide whether it will hold an oral hearing and, in duty of fair representation cases, to decide whether to ask the respondents to file any response at all.

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