TAB 1

CIRB v. OLRB:
Differing Approaches to Collective Bargaining, Similar Approaches to Practice

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The Six-Minute Labour Lawyer 2013

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CIRB *v.* OLRB:
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Introduction[1]

In *Royal Oak Mines Inc. v. Canada (Labour Relations Board)*, [1996] 1 S.C.R. 369 (*Royal Oak*), the Supreme Court of Canada (SCC) emphasized the importance of the statutory framework for collective bargaining (para 44):

> …In order for collective bargaining to be a fair and effective process it is essential that both the employer and the union negotiate within the framework of the rules established by the relevant statutory labour code.

At previous "Six Minute Labour Lawyer" conferences, these "OLRB v. CIRB" papers have examined certain fundamental differences between practices at the Ontario Labour Relations Board (OLRB) and the Canada Industrial Relations Board (CIRB). For example, the CIRB retains control over the description of the bargaining units it creates, whereas the OLRB generally considers that type of order to be "spent" following certification.

The differences between the tribunals may occasionally result from differing interpretations of similar provisions. More often, however, they arise out of a different "framework of the rules", as the SCC phrased it, in either Ontario's *Labour Relations Act, 1995* (*LRA*) or the *Canada Labour Code* (*Code*).

The challenge for legal counsel pleading a case at the OLRB or CIRB is first to identify the tribunal's applicable "framework". That "framework" will impact the theory of the case, the relevant evidence and final argument.

This paper will examine differing approaches to collective bargaining arising from the regimes created by the *LRA* and the *Code*.

The first topic will explore what protections exist for bargaining unit members either before the conclusion of a first collective agreement or after the expiry of an existing collective agreement.

The second topic will examine when, and to what extent, the OLRB and the CIRB intervene in collective bargaining.

[1] The authors would like to thank Lori Straznicky, Chantal Irwin and Emily Shepard for their assistance in finding certain cases for the Professionalism Hours portion of this paper.

Finally, in order to include content towards Professionalism Hours, the paper will address the following practice issues which often arise before labour tribunals: i) civility; ii) lawyer conflict of interest; and iii) document disclosure.

I. What protections exist for trade unions and bargaining unit members either before the conclusion of a first collective agreement or after a collective agreement's expiration?

A. CIRB

Introduction

The *Code* has long provided significant protection to first time bargaining agents which are negotiating their first collective agreement. More recently, the 1999 *Code* amendments added "just cause" protection for employees in newly-certified bargaining units, as well as for those who are no longer protected by the expired collective agreement and statutory freeze.

In addition, the *Code*'s unfair labour practice (ULP) provisions protect trade unions and employees from disciplinary action, if that action is in any way tainted by anti-union animus.

Protection against Revocation Applications

Section 39(2) of the *Code* protects a new bargaining agent from revocation applications during negotiations for a first collective agreement. As long as the bargaining agent has made a reasonable effort to bargain with the employer, then the protection set out in the *Code* will apply:

> 39(2) Where no collective agreement applicable to a bargaining unit is in force, no order shall be made pursuant to paragraph (1)(*a*) in relation to the bargaining agent for the bargaining unit unless the Board is satisfied that the bargaining agent has failed to make a reasonable effort to enter into a collective agreement in relation to the bargaining unit.

The CIRB's predecessor, the Canada Labour Relations Board (CLRB), described in *J. Phillips et al*., 34 di 603; [1978] 1 Can LRBR 168 (*Phillips*) why Parliament would want to place restrictions on employees' freedom of choice in this particular area of revocation:

> Why would Parliament restrict employee freedom of choice under the *Code* to revoke a bargaining agent's certification in these two circumstances: namely, when a bargaining agent has been certified but not concluded a collective

> agreement and when a lawful strike or lockout is permitted? These two times are times of greatest tension for both the employees and the bargaining agent. The bond of trust between the employees and the bargaining agent is either in the early stages of its development or under the strain of impending or actual work stoppage. Employees can be stampeded into decisions at these times and the employer who may stand to benefit the most can often cause these decisions by his posture at the bargaining table or his unwillingness to recognize the bargaining agent. Section 138(2) [now section 39(2)] is a disincentive to employers to hope for, promote or catalyze a revocation application in these two crucial circumstances. ...
> page 612

The CIRB has confirmed this ongoing protection for new bargaining agents in *Genge*, 2007 CIRB 395. It recently described the three-part test it applies in *Butt*, 2012 CIRB 621:

> 12. When the Board applies the facts in the instant case to the three-part test in *Genge 395*, it is clear that the CEP is entitled to the protection found at section 39(2) of the *Code*. The Board will consider each element of the test separately.
>
> ***1. Is this a first collective agreement situation?***
>
> 13. The parties do not dispute that the CEP and XL Digital are negotiating a first collective agreement for this bargaining unit. The parties have not acquired the right to strike or lockout.
>
> ***2. Has the CEP made "a reasonable effort" to negotiate a first collective agreement?***
>
> 14. Section 39(2) requires that a bargaining agent make "a reasonable effort" in order to avoid the revocation of its new certificate. In this case, the CEP has not, following its certification, remained inactive or merely sat on its exclusive right to represent employees in its bargaining unit.
>
> 15. For example, the CEP contested XL Digital's application for judicial review of the Board's finding that it had constitutional jurisdiction over the employees who provided services to customers of Rogers Cable Communications Inc.
>
> 16. Since issuing its certification order, the Board has been called upon to deal with various matters filed by the CEP on behalf of its bargaining unit at XL Digital. These included an allegation that XL Digital had violated the statutory freeze at section 50(b) and had not bargained in good faith under section 50(a). The ultimate resolution of these complaints matters little for this case, but they do demonstrate the CEP's efforts on behalf of its newly certified unit.

17. The pleadings, including those of Mr. Butt, confirm that the CEP has been negotiating with XL Digital for a collective agreement. XL Digital and the CEP have bargained on several occasions. The Minister of Labour appointed a conciliation officer to assist the CEP and XL Digital with their negotiations.

18. Overall, these efforts show that the CEP has made "a reasonable effort" to enter into a collective agreement.

3. Has the CEP kept members of its bargaining unit informed about negotiations?

19. The CEP has also taken steps to keep bargaining unit members informed of its progress. It has created a website they can visit. It has also held meetings, including an August 17, 2011 meeting that Mr. Butt appears to have attended personally.

20. While Mr. Butt disputes the quality of the CEP's efforts, his pleadings nonetheless confirm that the CEP, in various ways, has continuously communicated with bargaining unit members. Some bargaining unit members may be of the opinion that their newly certified bargaining agent could be doing things differently. The Board doubts there is ever unanimity on such matters.

21. But those subjective opinions do not determine whether the bargaining agent has kept bargaining unit members informed of its efforts.

Just cause protection following certification

The 1999 *Code* amendments included section 36.1 which provides just cause protection to employees following certification, but before the conclusion of a first collective agreement:

36.1 (1) During the period that begins on the date of certification and ends on the date on which a first collective agreement is entered into, the employer must not dismiss or discipline an employee in the affected bargaining unit without just cause.

(2) Where a disagreement relating to the dismissal or discipline of an employee during the period referred to in subsection (1) arises between the employer and the bargaining agent,

(*a*) the bargaining agent may submit the disagreement to an arbitrator for final settlement as if it were a difference; and

(*b*) sections 57 to 66 apply, with the modifications that the circumstances require, to the disagreement.

Because no collective agreement has ever been negotiated, the duty of fair representation obligation in section 37 of the *Code* does not yet apply to the certified trade union: *McDonald*, 2005 CIRB 319. This may also reflect the fact that the newly certified trade union will usually not be receiving dues from employees in the bargaining unit.

Just cause protection after the expiry of the collective agreement and statutory freeze

The 1999 amendments to the *Code* also added just cause protection for established bargaining relationships. For the purposes of the *Code*, the parties' collective agreement ends at the expiration of its term, even if the parties negotiated a bridging clause: *City of Yellowknife*, 2012 CIRB 661:

> 53. The Board commented above why section 67(1) alone cannot assist the City since its collective agreement had an explicit three-year Term. Similarly, the Board fails to see how a bridging clause, like the one found in article 36.04, which merely keeps the existing terms and conditions of the expired collective agreement in force until the parties conclude a new one, can simultaneously create a brand new collective agreement to which the provisions of section 67(1) apply.
>
> 54. There is a difference in labour relations between an automatic renewal clause for a collective agreement, and a bridging clause. An automatic renewal clause simply replaces bargaining if neither party provides notice to bargain before the expiration of the Term. The *Code*'s minimum "open periods" are respected, though a new collective agreement comes into force upon the expiration of that Term.
>
> 55. In contrast, the Board recently examined a bridging clause in *Canada Post Corporation*, 2012 CIRB 627 (*CPC 627*). That type of clause maintains employees' existing terms and conditions of employment in force and, depending on its wording, could add to the parties' respective rights following the end of the *Code*'s statutory freeze.
>
> 56. A bridging clause, just like the *Code*'s statutory freeze, maintains employees' terms and conditions of employment. Neither keep the underlying collective agreement in force beyond the expiration of its Term: *Bradburn* v. *Wentworth Arms Hotel*, [1979] 1 SCR 846 (*Bradburn*).

Similarly, a bridging clause does not impact the date when the *Code*'s statutory freeze ends: *Canada Post Corporation*, 2012 CIRB 627:

> 52. The Board is satisfied that the Legislator intended, despite the 1999 amendments, for the end of the section 50(*b*) statutory freeze to signify the start of the Interim Period. The Final Period does not begin, if ever, until a party has respected the requirements of the new sections 89(1)(*e*) (essential services) and 89(1)(*f*) (strike or lockout notices).

53. In this case, the parties agreed that the statutory freeze ended on May 25, 2011. The Interim Period thus began.

54. The Board commented earlier on sections 94(3)(*d.1*) and (*d.2*). These ULP provisions allow a bargaining agent to ensure its members maintain their insurance plan coverage following the expiration of the statutory freeze, as long as premiums are paid. Put another way, once the Interim Period begins, an employer cannot end the collective agreement's insurance plans, without first providing the bargaining agent with an opportunity to pay the premiums required to maintain members' coverage.

55. This demonstrates two things. First of all, the Legislator clearly did not intend for the freeze to remain in place until a lawful strike or lockout occurred. If it did, the text of section 50(*b*), and of the new ULP provisions at sections 94(3)(*d.1*) and (*d.2*), would refer to all of section 89(1), rather than just 89(1)(*a*) to (*d*).

56. In contrast with section 50(*b*) of the *Code*, the Quebec *Labour Code* at section 59 extends the freeze in that province to coincide with the exercise of the right to strike or lockout. The Quebec *Labour Code* also explicitly provides for negotiated bridging clauses which extend the freeze until a new collective agreement is signed:

> 59. From the filing of a petition for certification and until the right to lock out or to strike is exercised or an arbitration award is handed down, no employer may change the conditions of employment of his employees without the written consent of each petitioning association and, where such is the case, certified association.
> The same rule applies on the expiration of the collective agreement until the right to lock out or to strike is exercised or an arbitration award is handed down.
>
> The parties may stipulate in a collective agreement that the conditions of employment contained therein shall continue to apply until a new agreement is signed.
> (emphasis added)

57. Secondly, the existence of the new ULP provisions confirm that, during the Interim Period, an employer could refuse to apply the collective agreement, including employee insurance plans, subject to the bargaining agent's right to pay the premiums.

58. The Legislator foresaw that changes might occur during the Interim Period. These changes would not always constitute, contrary to CUPW's submissions, an unlawful lockout.

In the absence of a bridging clause, the end of the collective agreement and the statutory freeze could create a legal void for employee discipline or dismissal. Section 67(6) of the *Code* now maintains access to third party arbitration:

> 67(6) Where a disagreement concerning the dismissal or discipline of an employee in the bargaining unit arises during the period that begins on the date on which the requirements of paragraphs 89(1)(*a*) to (*d*) are met and ends on the date on which a new or revised collective agreement is entered into, the bargaining agent may submit the disagreement for final settlement in accordance with the provisions for the settlement of differences contained in the previous collective agreement. The relevant provisions in the collective agreement and sections 57 to 66 apply, with such modifications as the circumstances require, to the settlement of the disagreement.

Besides these statutory provisions, the CIRB applies the *Code*'s ULP provisions in a manner similar to that of other Canadian labour tribunals. For recent examples of the Board's application of the *Code*'s ULP provisions see, *inter alia*, *Plante,* 2011 CIRB 582, and *Acadian Coach Lines LP*, 2012 CIRB 654.

B. OLRB

Protection against Termination and Displacement Applications

Unlike the *Code*, the *LRA* provides only a finite period of time during which a bargaining agent, new or established, is protected from an application for termination of bargaining rights or displacement application for certification.

New bargaining agents, whether bargaining rights are obtained through certification or through voluntary recognition, are afforded protection by the following provisions of section 67 of the *LRA*:

> **67.** (1) Subject to subsection (3), where a trade union has not made a collective agreement within one year after its certification and the Minister has appointed a conciliation officer or a mediator under this Act, no application for certification of a bargaining agent of, or for a declaration that a trade union no longer represents, the employees in the bargaining unit determined in the certificate shall be made until,
>
> (a) 30 days have elapsed after the Minister has released to the parties the report of a conciliation board or mediator;
>
> (b) 30 days have elapsed after the Minister has released to the parties a notice that he or she does not consider it advisable to appoint a conciliation board; or
>
> (c) six months have elapsed after the Minister has released to the parties a notice of a report of the conciliation officer that the differences between the parties concerning the terms of a collective agreement have been settled,

> as the case may be.
>
> (3) Where a trade union has given notice under section 16 and the employees in the bargaining unit on whose behalf the trade union was certified as bargaining agent thereafter engage in a lawful strike or the employer lawfully locks out the employees, no application for certification of a bargaining agent of, or for a declaration that the trade union no longer represents, the employees in the bargaining unit determined in the certificate shall be made,
>
> (a) until six months have elapsed after the strike or lock-out commenced; or
>
> (b) until seven months have elapsed after the Minister has released to the parties the report of the conciliation board or mediator or a notice that the Minister does not consider it advisable to appoint a conciliation board,
>
> whichever occurs first.
>
> (4) Subsections (1) and (3) apply with necessary modifications to an application made under subsection 7 (3).

Section 7(3), referenced in section 67(4), is concerned with displacement applications for certification where there is a voluntary recognition agreement between the employer and the incumbent union.

Established bargaining agents are afforded protection by section 67(2) of the *LRA*:

> (2) Where notice has been given under section 59 and the Minister has appointed a conciliation officer or a mediator, no application for certification of a bargaining agent of any of the employees in the bargaining units as defined in the collective agreement and no application for a declaration that the trade union that was a party to the collective agreement no longer represents the employees in the bargaining unit as defined in the agreement shall be made after the date when the agreement ceased to operated or the date when the Minister appointed a conciliation officer or a mediator, whichever is later, unless following the appointment of a conciliation officer or a mediator, if no collective agreement has been made,
>
> (a) at least 12 months have elapsed from the date of the appointment of the conciliation officer or a mediator;

> (b) a conciliation board or a mediator has been appointed and 30 days have elapsed after the report of the conciliation board or the mediator has been released by the Minister to the parties; or
>
> (c) 30 days have elapsed after the Minister has informed the parties that he or she does not consider it desirable to appoint a conciliation board,
>
> whichever is later.

The OLRB has held that the bar in section 67(2) is triggered by the appointment of a conciliation officer by the Minister under section 18 of the *LRA*: the OLRB has no jurisdiction to inquire into whether or not the appointment was properly made and therefore will not inquire into whether notice was given under section 59 of the *LRA*. See *Evans Lumber and Builders Supply Limited*, [2005] OLRB Rep. Nov./Dec. 948.

The OLRB has also held that the bar in section 67(2) runs until the later of the event described in section 67(2)(a) ("at least 12 months have elapsed from the date of the appointment of the conciliation officer or a mediator") and one or other of the events described in sections 67(2)(b) or (c) (i.e. 30 days from the release by the Minister of the report of the conciliation board appointed by the Minister or the release by the Minister of a "no board report"): *Westway Taxi Nepean Ltd.*, [1998] OLRB Rep. May/Jun. 493.

A recent decision of the OLRB, however, has held that the time limits under section 67(1) are directory only and that after some reasonable period of time, likely not exceeding 15 months, an application for termination of bargaining rights or displacement application for certification will not be barred: *Operative Plasterers' and Cement Masons' International Association of the United States and Canada Union Local 598 v. Signature Contractors Windsor Inc*., 2013 CanLII 16801 (ON LRB). An application for judicial review of this decision is pending.

Notably, an application under section 43(1) of the *LRA* seeking a direction to have a first collective agreement determined by arbitration does not bar an application for termination of bargaining rights or a displacement application for certification. Rather, sections 43(23.1) to (23.4) require that the OLRB to deal with the application for termination of bargaining rights or displacement application before dealing with or continuing to deal with the application for first contract arbitration.

Just cause protection following certification or after the expiry of the statutory freeze period

Unlike the *Code*, the *LRA* does not provide express "just cause" protection to employees following certification or during the period between the expiry of one collective agreement and the commencement of a new one.[2]

Section 86 of the *LRA*, however, provides for what is commonly referred to as a "statutory freeze" period as follows:

> 86. (1) Where notice has been given under section 16 or section 59 and no collective agreement is in operation, no employer shall, except with the consent of the trade union, alter the rates of wages or any other term or condition of employment or any right, privilege or duty, of the employer, the trade union or the employees, and no trade union shall, except with the consent of the employer, alter any term or condition of employment or any right, privilege or duty of the employer, the trade union or the employees,
>
> (a) until the Minister has appointed a conciliation officer or a mediator under this Act, and,
>
> (i) seven days have elapsed after the Minister has released to the parties the report of a conciliation board or mediator, or
>
> (ii) 14 days have elapsed after the Minister has released to the parties a notice that he or she does not consider it advisable to appoint a conciliation board,
>
> as the case may be; or
>
> (b) until the right of the trade union to represent the employees has been terminated,
>
> whichever occurs first.

[2] On November 5, 1992, the *Labour Relations and Employment Statute Law Amendment Act*, 1992, S.O. 1992, c. 21 (commonly known as "Bill 40") was passed. Section 21 of Bill 40 amended the *Labour Relations Act* to provide employees on strike with the right to be discharged or disciplined only for just cause, enforceable through arbitration. That protection, however, was repealed by the passage of the present Act (commonly known as "Bill 7") on November 10, 1995.

> (2) Where a trade union has applied for certification and notice thereof from the Board has been received by the employer, the employer shall not, except with the consent of the trade union, alter the rates of wages or any other term or condition of employment or any right, privilege or duty of the employer or the employees until,
>
> (a) the trade union has given notice under section 16, in which case subsection (1) applies; or
>
> (b) the application for certification by the trade union is dismissed or terminated by the Board or withdrawn by the trade union.
>
> (3) Where notice has been given under section 59 and no collective agreement is in operation, any difference between the parties as to whether or not subsection (1) of this section was complied with may be referred to arbitration by either of the parties as if the collective agreement was still in operation and section 48 applies with necessary modifications thereto.

Section 86(3) references notice under section 59, not section 16. That is, it only applies to a notice to bargain given by parties to an existing (expiring) collective agreement, not to new bargaining relationships. The effect of section 86(3) is to afford the right to proceed to arbitration with respect to, inter alia, discipline or discharge during the statutory freeze period established by section 86(1). No similar right to proceed to arbitration exists with respect to new bargaining relationships, even if the union has displaced another union which previously had a collective agreement with the employer. In this latter situation, however, discipline or discharge may constitute a violation of the statutory freeze which may be remedied by an application to the OLRB. See: *Canadian Union of Public Employees and its Local 4960 v. Corporation of the Town of Arnprior*, [2013] O.L.R.D. No. 910.

Termination of employees following the statutory freeze periods may be addressed under the *LRA* in other ways. If it is alleged that the termination is tainted by anti-union animus, it may be the subject of an ULP application under section 96 of the Act. The issue on such an application is not whether the employer had cause for the termination, but rather whether the termination was tainted by anti-union animus. While cause is not the legal issue before the Board, it is generally an important factual issue. Section 96(5) of the LRA places the onus of proof upon the employer to justify the termination. Failure to prove the grounds asserted for the termination, including any allegation of cause, will often given rise to an inference that the termination was for an unstated ground tainted by

anti-union animus. Likewise, the absence of any grounds for termination may also raise an inference that the termination was for an unstated ground tainted by anti-union animus.

If the termination takes place within the context of a campaign to establish bargaining rights, in addition to a ULP application under section 96 of the *LRA*, an application for an interim order for reinstatement may be brought pursuant to section 98(1)(b) of the *LRA*. Sections 98(2) and (3) provide:

> (2) The Board may exercise its power under clause (1) (b) or (c) only if the Board determines that all of the following conditions are met:
>
> 1. The circumstances giving rise to the pending proceeding occurred at a time when a campaign to establish bargaining rights was underway.
>
> 2. There is a serious issue to be decided in the pending proceeding.
>
> 3. The interim relief is necessary to prevent irreparable harm or is necessary to achieve other significant labour relations objectives.
>
> 4. The balance of harm favours the granting of the interim relief pending a decision on the merits in the pending proceeding.
>
> (3) The Board shall not exercise its powers under clause (1) (b) or (c) if it appears to the Board that the alteration of terms and conditions, dismissal, reprisal, penalty or discipline by the employer was unrelated to the exercise of rights under the Act by an employee.
>
> (4) Despite subsection 96 (5), in an application under this section, the burden of proof lies on the applicant.

Interim applications filed under section 98 of the *LRA* are determined by means of an expedited process governed by Rule 19 of the OLRB's Rules of Procedure. The parties are required to file full written submissions and declarations from individuals with first-hand knowledge of the events in question in support of their positions. Rule 19.3 provides:

> Where the responding party has raised a new matter, which the applicant had no opportunity to address or a matter which could not reasonably have been anticipated, the applicant may file reply declarations, as described in Rule 19.1(a), within one (1) day of receipt of the responding party's declarations.

An oral consultation is generally held. The purpose of the consultation is to ensure that the OLRB properly understands the positions of the parties and the material filed. Parties are expected to have their declarants available so that they may be questioned by the OLRB. If the OLRB asks questions of a declarant, the parties will also be permitted to ask questions of the declarant, but only in relation to the area(s) of the OLRB's inquiries. The parties may also be given an opportunity to expand upon their submissions.

In *Patrolman Security Services Inc*., [2005] OLRB Rep. Sept./Oct. 818, the OLRB described the nature of the inquiries which sections 98(2) and (3) direct the OLRB to make as follows:

> 49. Firstly, with respect to section 98(2)1., the Board must determine as a question of fact, whether the circumstances giving rise to the unfair labour practice complaint in the main pending application arose during a campaign to establish bargaining rights.
>
> 50. Secondly, section 98(2)2. requires the Board to review the pleadings of both parties to determine whether there is a serious issue between them to adjudicate in the main application.
>
> 51. Thirdly, sections 98(2)3. and 4. both require the Board to draw conclusions as to the likely prospective consequences to the parties where the relief sought is or is not granted. Both sections require the Board to attempt to anticipate the degree of harm or the labour relations consequences which will occur, as a result of the granting or withholding of relief. Both require the Board to examine the current circumstances of the parties and to then extrapolate to predict likely future outcomes.
>
> 52. Fourthly, section 98(3), crafted with a double negative, requires the Board to determine whether it "appears" that the discipline or discharge was "unrelated" to the exercise of rights under the Act. In the context of an application for interim relief as here, where the main claim is that employees have been discharged ***because*** they were exercising rights under the Act, the term "unrelated" must mean "not causally related" as there could not be other possible degree of "relatedness" that would be relevant or probative.
>
> 53. In the Board's view, section 98(3) assumes that the Board will look beyond the pleadings and declarations filed to make an assessment of the quality of the evidence to be put forward in the main application. Where the pleadings and materials filed in the interim application reveal disputes of fact, section 98(3) contemplates that the Board will engage in some process of inquiry to determine whether there is an appearance of a relationship between the exercise of rights and the impugned discipline or discharge. The Board is required then to conduct some form of inquiry to determine whether there is an ***appearance*** of a ***causal***

> ***relationship*** between the exercise of rights under the Act and the impugned employer conduct. ....
>
> [Emphasis in original.]

In addition, terminations outside of the statutory freeze periods may be the subject of discussions at the bargaining table. The grounds on which an employer may dismiss an employee during a strike are typically a matter of fundamental importance to the union. It is common, therefore, for issues of discharge (and discipline) of employees for picket line infractions during the course of collective bargaining to be raised at the bargaining table.

Absent consensual settlements with respect to employees discharged during a strike, referral to arbitration is a common, if not standard means of resolving such disputes. Nonetheless, there have been circumstances in which the parties have been unable to reach such agreements. The question then arises whether an employer's maintenance of a position of refusing to agree to arbitration of discipline or discharge constitutes a breach of section 17 of the *LRA* which requires the parties to "bargain in good faith and make every reasonable effort to make a collective agreement".

The OLRB has held that it is not illegal *per se* for an employer in collective bargaining to maintain to impasse a position of refusing to agree to arbitration of strike related discipline or discharge: see *Vale Inco Ltd.*, [2010] OLRB Rep. July/Aug. 548. Such a decision must, however, be made in good faith. Further, because of the fundamental importance of the issue to unions, maintenance of such a position will invite the scrutiny of the OLRB to ensure, having regard to the circumstances, it is not patently unreasonable and thus in breach of the obligation to "make every reasonable effort to make a collective agreement". As stated in *Vale Inco Ltd*., [2012] OLRB Rep. Jan./Feb. 251, [2012] O.L.R.D. No. 668, 206 C.L.R.B.R. (2d) 80, [2012] CLLC para. 220-044, 2012 CanLII 8468 ("*Vale Inco # 2*") at para. 95:

> The significance of an issue to the other party is a factor which a party, acting reasonably, will include in assessing its own position on that issue. A contrary position with respect to an issue of fundamental significance may be maintained only if the party maintaining that position has compelling grounds for doing so. The obligation to make every reasonable effort to make a collective agreement means, at least for issues of this sort, that those grounds must be more than mere beliefs: they must be capable of rational discussion; they must be based on an honest assessment of the negotiations and what would be reasonably required to make a collective agreement having regard to the significance of the issue. If not, depending on the overall circumstances of the case, the Board may conclude that the

> party has adopted and is maintaining a patently unreasonable position and is not making every reasonable effort to make a collective agreement.

In that case, following a review of the evidence, the OLRB concluded (at para. 142) that the employer had:

> … adopted an intransigent position on an issue of fundamental significance to trade unions. That decision was ultimately based on little more than belief and maintained without regard to the negotiations and what would reasonably have been required to make a collective agreement (which we emphasize is not the same as an obligation to make a collective agreement on the terms preferred by the other party). [The] decision was not one which was open for rational discussion.

In the result the Board found that there had been a breach of the duty to make every reasonable effort to conclude a collective agreement contained in section 17 of the *LRA*. Given the agreement of the parties as to remedy, the OLRB directed arbitration of the discharges on a just cause standard.

II. Collective bargaining, including first contract situations: when and how will the CIRB or the OLRB intervene?

A. CIRB

The *Code* during the CLRB's time did not contain an explicit remedial provision for violations of the duty to bargain in good faith. The CLRB issued remedies based on its general power in section 99(2) to make equitable orders:

> 99(2) For the purpose of ensuring the fulfilment of the objectives of this Part, the Board may, in respect of any contravention of or failure to comply with any provision to which subsection (1) applies and in addition to or in lieu of any other order that the Board is authorized to make under that subsection, by order, require an employer or a trade union to do or refrain from doing any thing that it is equitable to require the employer or trade union to do or refrain from doing in order to remedy or counteract any consequence of the contravention or failure to comply that is adverse to the fulfilment of those objectives.

The SCC in *Royal Oak*, *supra*, conducted an extensive review of the "framework of the rules" for collective bargaining under the *Code*. The Royal Oak case examined one of Canada's most horrendous collective bargaining experiences, which included the deaths of nine innocent miners from a bomb. The SCC split over whether the CLRB could impose binding arbitration to resolve the parties' longstanding bargaining dispute.

The SCC's majority decision, while emphasizing the importance of free collective bargaining under the *Code*, accepted that the *Code*'s then remedial provisions allowed the CLRB to impose binding arbitration in the special circumstances of the case:

> 61. In my view, the remedy directed by the Board was not patently unreasonable, rather it was eminently sensible and appropriate in the circumstances presented by this case. A judicial review of the order must take into consideration both the complex factual background, and the prior involvement of the Board in this dispute. In this case, the factual background presented to the Board was such that it cried aloud for the imposition of a remedial order.

The SCC's minority decision, on the other hand, would have found that the *Code* did not permit the Board effectively to impose a collective agreement on the parties:

> 232. Binding mediation and arbitration may be effective mechanisms for resolving disputes but they are mechanisms which may be chosen by the parties as an alternative to free collective bargaining. It does not lie within the jurisdiction of the Board to impose binding arbitration on the parties where the parties have opted to resolve their dispute through free collective bargaining. In this regard, the Board's order not only lacked the requisite nexus to the breach of the Code, it was also antithetical to the objects of the Code.

In 1999, Parliament amended numerous provisions in the *Code*. The amendments added section 99(1)(b.1) which described explicitly the Board's remedial powers for collective bargaining complaints:

> 99(1) Where, under section 98, the Board determines that a party to a complaint has contravened or failed to comply with subsection 24(4) or 34(6), section 37, 47.3, 50 or 69, subsection 87.5(1) or (2), section 87.6, subsection 87.7(2) or section 94, 95 or 96, the Board may, by order, require the party to comply with or cease contravening that subsection or section and may
>
> …
>
> (*b.1*) in respect of a contravention of the obligation to bargain collectively in good faith mentioned in paragraph 50(*a*), by order, require that an employer or a trade union include in or withdraw from a bargaining position specific terms or direct a binding method of resolving those terms, if the Board considers that this order is necessary to remedy the contravention or counteract its effects;

Evidently, when considering the "framework of the rules" for collective bargaining in the *Code*, this explicit provision will now also have to be taken into consideration. The protections for first-time bargaining agents mentioned above against revocation applications, as well as the just cause protections for employees in the new bargaining units, similarly form part of that important framework.

But there is more to consider.

The *Code* has consistently included a role for the Minister of Labour (Minister) for first contract situations. Section 80(1) establishes the Minister's discretion to direct the Board to consider whether it should settle the terms and conditions of the parties' first collective agreement:

> 80(1) Where an employer or a bargaining agent is required, by notice given under section 48, to commence collective bargaining for the purpose of entering into the first collective agreement between the parties with respect to the bargaining unit for which the bargaining agent has been certified and the requirements of paragraphs 89(1)(a) to (d) have otherwise been met, the Minister may, if the Minister considers it necessary or advisable, at any time thereafter direct the Board to inquire into the dispute and, if the Board considers it advisable, to settle the terms and conditions of the first collective agreement between the parties.

While the 1999 amendments removed section 97(3) of the Code which had previously required the Minister's consent before a complaint could be filed for a violation of the statutory freeze or bargaining in bad faith, the Minister's discretion over first contract arbitration remained.

This was not an oversight. Indeed, the default term for any collective agreement which the Board might impose after receiving a direction from the Minister under section 80(1) was extended from one year to two: section 80(4).

The foregoing suggests that in first contract situations, parties will need to examine the *Code's* framework, including the Minister's role among other items, as they prepare their cases and their arguments. In bargaining complaints related to the renewal of a collective agreement, the SCC's comments in *Royal Oak, supra*, similarly remain highly relevant.

For a recent decision examining this subject area, see *Intek Communications Inc.*, 2013 CIRB 683.

In a non-bargaining unfair labour practice complaint from a newly-certified bargaining agent, the Board was persuaded to impose a *Royal Oak* type remedy of binding

arbitration: *D.H.L. International Express Limited*, 2001 CIRB 129, upheld on reconsideration *D.H.L. International Express Limited*, 2002 CIRB 159. In this case, the employer had contracted out almost all bargaining unit positions following certification.

In a later case involving two experienced parties, the Board overturned an earlier panel's decision to order binding arbitration as a remedy: *Telus Communications Inc.*, 2005 CIRB 317.

B. OLRB

Section 17 of the *LRA* provides:

> The parties shall meet within 15 days from the giving of the notice or within such further period as the parties agree upon and they shall bargain in good faith and make every reasonable effort to make a collective agreement.

The OLRB's remedial jurisdiction is broad. Upon the finding of a breach of section 17, section 96(4) provides in pertinent part that the OLRB:

> … shall determine what, if anything, the employer, employers' organization, trade union, council of trade unions, person or employee shall do or refrain from doing with respect thereto and such determination, without limiting the generality of the foregoing may include, despite the provisions of any collective agreement, any one or more of,
>
> (a) an order directing the employer, employers' organization, trade union, council of trade unions, employee or other person to cease doing the act or acts complained of;
>
> (b) an order directing the employer, employers' organization, trade union, council of trade unions, employee or other person to rectify the act or acts complained of;

The purpose of a remedy is, of course, to put the aggrieved party to the extent possible in the position it would have been had there been no breach. Consideration of the remedies granted by the OLRB for breach of the duty to bargain must, therefore, begin with an understanding of the scope of that duty.

The Board's approach to the scope of the duty to bargain is well explained in the following statement from *Governing Council of the University of Toronto (Royal Conservatory of Music*), [1985] OLRB Rep. Nov. 1652, 1985 CanLII 1085 (ON LRB):

30. The scope of the duty to bargain imposed under section 15 [now 17] of the Act is squarely raised on the instant facts and has not been dealt with quite so directly by the Board previously. It is useful to refer first to the classic exposition of the duty in *De Vilbiss (Canada) Limited, supra*, [1976] OLRB Rep. March 49, at paragraph 13:

> The section imposes an obligation upon both employers and trade unions to enter into serious discussion with the shared intent to enter into a collective bargaining agreement. Once a trade union is certified as the exclusive bargaining agent of employees within an appropriate bargaining unit the employer of those employees must accept that status of the trade union. It cannot enter into negotiations with a view to ridding itself of the trade union. And thus it can be said that the parties are obligated to have at least one common objective-that of entering into a collective agreement and section 14 [now 17] is intended to convey this obligation. But this is not to say that they will or are obligated to have common objectives with respect to the contents of any collective agreement they might enter into. The legislation is based upon the premise that the parties are best able to fashion the law that is to govern the work place and that the terms of an agreement are most acceptable when the parties who live under them have played the primary roles in their enactment. In short, the legislation is based upon the notion of voluntarism and reflected in the many administrative and judicial pronouncements that neither trade union nor employer is, by virtue of the bargaining duty, obligated to agree to any particular provision or proposal. Therefore, while they must share the common objective to enter a collective agreement, the legislation envisages that they have differences with respect to just what the content of that agreement should be and those differences may force the parties to have recourse to economic sanctions.

31. Given that "voluntarism" is the touchstone, it is implicit that the Board's role pursuant to section 15 [now 17] of the Act is one of monitoring the *process* of bargaining and not the *content* of the proposals tabled. This role stands in sharp contrast with the American approach embodied in the "mandatory-directory" classification of proposals and the different consequences for bargaining of classification as a "mandatory" or "directory" item. The mandatory-directory approach has been rejected in this jurisdiction as not consonant with the legislative scheme:

> see *Consolidated Bathurst, supra,* [[1983] OLRB Rep. September 1411]*; Pulp and Paper Industries, supra; Westinghouse Canada Limited, supra,* [1980] OLRB Rep. April 577.
>
> 32. This does not mean that the Board is totally distanced from the *content* of the parties' proposals or that there are no limits whatsoever on the scope of bargaining. The Board may have regard to the *content* of items tabled in order to determine whether either party does not intend to enter into a collective agreement (e.g., is engaging in surface bargaining) or whether the employer, for example, is seeking to undermine the union as exclusive bargaining agent by tabling an offer "tailor-made for rejection": see *Radio Shack,* [1979] OLRB Rep. Dec. 1220; *Fotomat Canada Ltd., supra,* [[1980] OLRB Rep. October 1397]; *Irwin Toy Ltd.,* [1983] OLRB Rep. July 1064. Further, the Board may review the content of proposals to assess whether any items are "illegal". For example, a strike for recognition or to resolve a jurisdictional dispute is contrary to the legislative scheme: see *United Brotherhood of Carpenters & Joiners of America, supra; Toronto Star Newspapers Ltd.,* [1979] OLRB Rep. May 451, [1979] OLRB Rep. Aug. 811. See also: *Croven Limited,* [1977] OLRB Rep. Mar. 162; *A.N. Shaw Restorations Ltd.,* [1976] OLRB Rep. September 504; *T. Barlisen & Sons,* [1960] OLRB Rep. May 80; *Canada Cement LaFarge Ltd.,* [1980] OLRB Rep. Nov. 1583; *Treco Machine Tool Ltd.,* [1982] OLRB Rep. Dec. 1954. The Board notes that, although two examples of demands which have been found to be "illegal" are mentioned and other examples are contained in the cases referred to, the appropriate scope of the concept of "illegality" is not before the Board in this case.
>
> 33. However, subject to the comments outlined in paragraph 32 above, the Board will not evaluate or censure the content of proposals tabled by the parties. Again, apart from those comments, if the parties are free to *agree* that any matter may become part of their collective agreement, it is implicit that each party must be free to *table* that matter for discussion. While this is perhaps the bluntest enunciation of this principle, the proposition is not novel: see *Westinghouse, supra; Sunnycrest Nursing Homes, supra, [1982] OLRB Rep. February 261; Consolidated Bathurst, supra; Canadian Industries Limited, supra,* [1976] OLRB Rep. May 199.
> ….
>
> [Emphasis in original.]

Consistent with the focus on the process of collective bargaining as opposed to its contents, the OLRB has long said that it will not act as an “interest arbitrator” (see *Canada Trustco Mortgage Company*, [1984] OLRB Rep. Oct. 1356, at paragraph 30).

Accordingly, while the OLRB will make orders designed to ensure the integrity and efficacy of the process of collective bargaining, the OLRB will rarely require one party to either withdraw or make specific proposals. A notable exception is that the OLRB will require a party to withdraw a demand which is "illegal per se" and has been maintained to the point of impasse, such as a demand to amend the bargaining unit description.

The exception to this general approach arises from the specific statutory provisions which relate to first collective agreements. Section 43(1) of the *LRA* provides:

> **43.** (1) Where the parties are unable to effect a first collective agreement and the Minister has released a notice that it is not considered advisable to appoint a conciliation board or the Minister has released the report of a conciliation board, either party may apply to the Board to direct the settlement of a first collective agreement by arbitration.

Unlike under the *Code*, the determination of whether or not to direct first contract arbitration is not subject to the exercise of Ministerial discretion. Rather the OLRB is required to direct first contract arbitration if certain specified criteria are satisfied. Section 43(2) of the *LRA* provides:

> (2) The Board shall consider and make its decision on an application under subsection (1) within 30 days of receiving the application and it shall direct the settlement of a first collective agreement by arbitration where, irrespective of whether section 17 has been contravened, it appears to the Board that the process of collective bargaining has been unsuccessful because of,
>
> a) the refusal of the employer to recognize the bargaining authority of the trade union;
> b) the uncompromising nature of any bargaining position adopted by the respondent without reasonable justification;
> c) the failure of the respondent to make reasonable or expeditious efforts to conclude a collective agreement; or
> d) any other reason the Board considers relevant.

The Board's approach to such applications was discussed in *Rainbow Concrete*, [2010] O.L.R.D. No. 351, 2010 CanLII 4341:

> **13** Counsel for the applicant cited *Consolidated Drilling and Blasting Inc*., [2009] O.L.R.D. No. 4474. Counsel for the responding party cited *Metro Taxi Ltd. (c.o.b. as Capital Taxi)* [1996] O.L.R.D. No. 3226 and *Saxum Canada Inc.*, [1999] OLRB Rep. Mar./Apr. 328. There was no dispute as to the test to be

applied. It was summarily stated in *Consolidated Drilling* at paragraph 28 as follows:

> In effect, the Board must consider, first, the question of whether it appears to the Board that the process of collective bargaining has been unsuccessful. If there is such an appearance, then the Board must then consider whether the responding party has engaged in conduct that falls within subsections 43(2)(a) to (d). If the responding party has engaged in such conduct, then the Board must satisfy itself that there is a causal connection between the responding party's conduct and the failure of the collective bargaining process. Only once these prerequisites have been established is the Board to direct that a first collective agreement be settled by way of arbitration.

14 In *Metro Taxi*, the Board discussed the measure by which to determine whether the "process of collective bargaining has been unsuccessful". The Board noted the primacy of free collective bargaining, in recognition that an agreed to collective agreement is always preferable to an imposed one (paragraph 16). The Board stated that the threshold for "unsuccessful" collective agreement should not be set so low as to have a "narcotic", "corrosive" or "chilling" effect on the process of collective bargaining. It is noteworthy, in this respect, that the particular concerns that the Board expressed were that the parties not be "unwilling to compromise because at the end of the day, they assume that a third party will "split" the difference between the two" or that the parties would "take positions at the table designed primarily to enhance their positions before a Board of Arbitration". The Board concluded its discussion on this issue as follows:

> 77. As the jurisprudence suggests, there are no "mandatory" steps or numbers of negotiating sessions that parties must have before the Board may determine that collective bargaining has been unsuccessful. What must an applicant then show to discharge the onus of demonstrating that collective bargaining has been unsuccessful?
>
> 78. We would expect that at a minimum, an applicant should be able to show that it has attempted to seriously explore with the respondent all of the significant issues that exist between the parties. Of course, if the respondent has in fact rendered such attempts pointless, then that would be sufficient to determine that bargaining has been unsuccessful.
>
> Are further discussions possible and if so would they be helpful or fruitful? These are the types of questions that have been posed in

> the Board's jurisprudence. There is no specific number of bargaining sessions that parties must participate in before these questions can be answered. In some cases, many unproductive sessions may be indicative of a lack of success, but it is not necessarily so.

The statutory requirement that the OLRB determine the matter within 30 days of the date of the application for first contract arbitration means that the Board is effectively forced to hold expedited hearings in such cases: see *Rainbow Concrete*, [2010] O.L.R.D. No. 351, 2010 CanLII 4341; application for judicial review dismissed, [2011] OLRB Rep. Nov./Dec. 934, see in particular paras. 54-62. This is now reflected in the special provisions contained in Rule 12 of the OLRB's Rules of Procedure which apply to such applications, which include the requirement that the parties file declarations from individuals with first-hand knowledge of the facts upon which each relies. As noted in Rule 12.4:

> Unless a party can satisfy the Board that there is good reason for not doing so, the hearing may be conducted based on the declarations filed by the parties, with *viva voce* evidence permitted only to the extent that the Board considers necessary to determine the matter.

Section 43(19) of the *LRA* provides that a first collective agreement settled pursuant to section 43(1) is effective for a period of two years from the date of its settlement.

III. Professionalism Issues

This paper will examine three specific professionalism issues: i) civility; ii) lawyer conflict of interest; and iii) document disclosure.

A. Civility

The Rules of Professional Conduct of the Law Society of Upper Canada ("LSUC") for lawyers provide in part as follows[3]:

> Rule 4 Relationship to the Administration of Justice
>
> 4.01 THE LAWYER AS ADVOCATE
>
> Advocacy

[3] The Rules of Conduct for Paralegals are similar to The Rules of Professional Conduct applicable to lawyers.

4.01 (1) When acting as an advocate, a lawyer shall represent the client resolutely and honourably within the limits of the law while treating the tribunal with candour, fairness, courtesy, and respect.

Commentary [to Rule 4.01 (1)]

….

This rule applies to the lawyer as advocate, and therefore extends not only to court proceedings but also to appearances and proceedings before boards, administrative tribunals, arbitrators, mediators, and others who resolve disputes, regardless of their function or the informality of their procedures.

(2) When acting as an advocate, a lawyer shall not

> (a) abuse the process of the tribunal by instituting or prosecuting proceedings which, although legal in themselves, are clearly motivated by malice on the part of the client and are brought solely for the purpose of injuring the other party,
>
> (b) knowingly assist or permit the client to do anything that the lawyer considers to be dishonest or dishonourable,
>
> (c) appear before a judicial officer when the lawyer, the lawyer's associates or the
>
> client have business or personal relationships with the officer that give rise to or might reasonably appear to give rise to pressure, influence, or inducement affecting the impartiality of the officer,
>
> (d) endeavour or allow anyone else to endeavour, directly or indirectly, to influence the decision or action of a tribunal or any of its officials in any case or matter by any means other than open persuasion as an advocate,
>
> (e) knowingly attempt to deceive a tribunal or influence the course of justice by
>
> offering false evidence, misstating facts or law, presenting or relying upon a false or deceptive affidavit, suppressing what ought to be disclosed, or otherwise assisting in any fraud, crime, or illegal conduct,
>
> (f) knowingly misstate the contents of a document, the testimony of a witness, the substance of an argument, or the provisions of a statute or like authority,

> (g) knowingly assert as true a fact when its truth cannot reasonably be supported by the evidence or as a matter of which notice may be taken by the tribunal,
>
> (h) deliberately refrain from informing the tribunal of any binding authority that the lawyer considers to be directly on point and that has not been mentioned by an opponent,
>
> (i) dissuade a witness from giving evidence or advise a witness to be absent,
>
> (j) knowingly permit a witness or party to be presented in a false or misleading way or to impersonate another,
>
> (k) needlessly abuse, hector, or harass a witness,
>
> (l) when representing a complainant or potential complainant, attempt to gain a
>
> benefit for the complainant by threatening the laying of a criminal charge or by offering to seek or to procure the withdrawal of a criminal charge, and
>
> (m) needlessly inconvenience a witness.
>
> ….
>
> (6) A lawyer shall be courteous, civil, and act in good faith to the tribunal and with all
>
> persons with whom the lawyer has dealings in the course of litigation.
>
> Commentary [to Rule 4.01 (6)]
>
> Legal contempt of court and the professional obligation outlined here are not identical, and a consistent pattern of rude, provocative, or disruptive conduct by the lawyer, even though unpunished as contempt, might well merit discipline.

The OLRB expects counsel to conduct themselves with civility in their dealings with each other and with the OLRB. In *Limen Masonry Ltd.*, 2006 CanLII 42045, [2006] O.L.R.D. No. 4624 the Board stated the following:

> I have reviewed the correspondence among counsel in this matter. I had expected the correspondence to deal with production. A small portion of it does. Much of it consists simply of personal attacks on one another. Counsel are reminded of the

comments of Justice Rosenberg in *R. v. Felderhof*, (2003) 68 O.R. (3d) 481 at pp. 513-518, a portion of which reads at page 513:

> It is important that everyone, including the courts, encourage civility both inside and outside the courtroom. Professionalism is not inconsistent with vigorous and forceful advocacy on behalf of a client and is as important in the criminal and quasi-criminal context as in the civil context. Morden J.A. of this court expressed the matter this way in a 2001 address to the Call to the Bar: "Civility is not just a nice, desirable adornment to accompany the way lawyers conduct themselves, but, is a duty which is integral to the way lawyers do their work." Counsel are required to conduct themselves professionally as part of their duty to the court, to the administration of justice generally and to their clients. As Kara Anne Nagorney said in her article, "A Noble Profession? A Discussion of Civility Among Lawyers" (1999), 12 Georgetown Journal of Legal Ethics 815, at 816-17, "Civility within the legal system not only holds the profession together, but also contributes to the continuation of a just society. ... Conduct that may be characterized as uncivil, abrasive, hostile, or obstructive necessarily impedes the goal of resolving conflicts rationally, peacefully, and efficiently, in turn delaying or even denying justice." Unfair and demeaning comments by counsel in the course of submissions to a court do not simply impact on the other counsel. Such conduct diminishes the public's respect for the court and for the administration of criminal justice and thereby undermines the legitimacy of the results of the adjudication.

> I hope that it will not be necessary to remind counsel of their obligations to the Board and to each other in future.

As noted in the commentary to Rule 4.01 (6) "a consistent pattern of rude, provocative, or disruptive conduct by the lawyer, even though unpunished as contempt, might well merit discipline." On April 25, 2013, the Professional Regulation Committee of the Law Society of Upper Canada made a report to Convocation which included a discussion of a new "Tribunals Complaints Protocol" (the "PRC Report").[4] The PRC Report noted that

[4] The PRC Report may be found at: http://www.lsuc.on.ca/WorkArea/DownloadAsset.aspx?id=2147494499

since 2009 a mechanism has been in place to address complaints by members of the Ontario Court of Justice and Superior Court of Justice to the Law Society with respect to the conduct of lawyers and paralegals. The Tribunals Complaints Protocol was modeled on that mechanism.

The Tribunals Complaints Protocol commences with the following observation:

> 1. Administrative tribunals have the statutory authority to control their own processes and to address the behaviour of lawyers and licensed paralegals that represent parties appearing before them. Some may even have powers to sanction conduct in a manner roughly analogous to the exercise of a judicial contempt power.
>
> 2. Lawyer or paralegal misconduct, such as incivility and unprofessionalism in the context of a tribunal proceeding, may also be the subject of a complaint best addressed by the Law Society as regulator of the legal professions. The Law Society also receives and addresses complaints about unauthorized practice / unauthorized provision of legal services.
>
> 3. The intention of this protocol is to create a coordinated process for bringing complaints to the attention of the Law Society, for tribunals that wish to adopt such a process. It is expected that the protocol will also improve communications between the Law Society and Tribunals.

The Tribunal Complaints Protocol has been endorsed by the Executive Chairs of the Social Justice Tribunals cluster and the Environment and Land Tribunals cluster. Once the Tribunals Complaints Protocol is in place at those clusters, the Law Society's intention is to conduct an outreach program to other adjudicative agencies, including those operating under federal auspices, so that they too can "take advantage of the new TCP".

The OLRB also has the power to address issues of lack of civility by stating a case for contempt. Section 13(1) of the *Statutory Powers Procedure Act,* R.S.O. 1990, c. S. 22 ("the SPPA") provides:

> Where any person without lawful excuse,
>
> ….
>
> (c) does any other thing that would, if the tribunal had been a court of law having power to commit for contempt, have been contempt of that court,

> the tribunal may, of its own motion or on the motion of a party to the proceeding, state a case to the Divisional Court setting out the facts and that court may inquire into the matter and, after hearing any witnesses who may be produced against or on behalf of that person and after hearing any statement that may be offered in defence, punish or take steps for the punishment of that person in like manner as if he or she had been guilty of contempt of the court.

There is only one case involving discourtesy in which the OLRB has felt compelled to consider going that far. In *United Food & Commercial Workers International Union, Local 175 v. Vic Murai Holdings Ltd*., 1996 CanLII 11176 (ON LRB) the Board stated:

> 116. It is a trite observation that certain litigation can bring out the worst in legal counsel. This was one such matter in which the behaviour of counsel was so disruptive to the proper conduct of the hearing that the Board feels compelled to make several comments regarding the behaviour of counsel. During the first week of hearings in these proceedings counsel for the applicants was Mr. Kucey. Appearing for the employer and for the group of objecting employees were, respectively, Mr. Tarasuk and Mr. Abbass. After the first week of hearings, Mr. Stout acted for the applicant in the certification application. It should be stressed here that none of the comments which follow are directed towards Mr. Stout, who represented his client before the Board in an entirely professional manner throughout the course of his participation in this proceeding.
>
> 117. Mr. Tarasuk and Mr. Abbass were, on numerous occasions, rude, interruptive, and disrespectful of other counsel appearing at the hearing, of me, as the Vice-Chair of the Board assigned to hear this matter, and of the Ontario Labour Relations Board, as an institution. Mr. Abbass, in particular, seemed to take pleasure in continually disrupting the course of this proceeding. Both Mr. Abbass and Mr. Tarasuk appear to hold the view that each has the unqualified right to interject personal opinions or snide commentary at will during opposing counsel's argument. On innumerable occasions I directed each of Mr. Abbass and Mr. Tarasuk to refrain from such conduct. Each was advised that he would have an opportunity, at the appropriate time, to respond to opposing counsel's argument. However, my directions were regularly ignored or challenged by counsel and more often than not caused Mr. Abbass and Mr. Tarasuk to more vigorously interject, resulting, on occasion, in the need for me to raise my voice above theirs in order to maintain some semblance of order in the hearing room.
>
> ….

128. The type of conduct exhibited by Mr. Abbass and Mr. Tarasuk during the course of this proceeding is unacceptable before the Board. Their conduct seriously distracted from the legitimate issues before the Board, serving to prolong the hearing grossly beyond what was reasonable in the circumstances, and certainly resulted in needless expense to the taxpayers of this Province and their own clients. Worse yet, their conduct may well have negative long-term consequences to the parties which are now embarking on a new relationship.

129. On occasion, the Board has written decisions in which the conduct of a party has been criticized (see, for example, *Bemar Construction (Ontario) Inc.*,[1992] OLRB Rep. May *565);* however, such cases typically involve unrepresented parties and have not focused on the conduct of senior members of the bar of Ontario, who are presumed to be aware of the proper behaviour before the Board in litigation of this nature. In particular, it is my view that Mr. Abbass' conduct was intended by him to be disrespectful of the Board. On the last day of the hearing, Mr. Abbass made a somewhat lame attempt to justify his conduct as being the result of his "frustration" with certain aspects of Mr. Stout's argument. Such a justification for his conduct is just not available on the facts of this case. It is not necessary to speculate why Mr. Abbass conducted himself in the manner that he did, because there is simply no excuse for his behaviour. It suffices to say that whatever the cause, be it opposing counsel's argument or Mr. Abbass' belief in the significance of his self-described "experience" at the Board, his frustrations or difficulties should be dealt with beyond the hearing rooms of the Board and ought not to manifest themselves in the manner that they did during the course of this proceeding.

130. During the course of this hearing the Law Society of Upper Canada published in the September, 1995 edition of "The Advisor" (delivered to all members of the bar of Ontario) the following note under the heading "Courtesy, respect should guide conduct of lawyers before tribunals":

The Law Society, from time to time, receives complaints about lawyers from judges and members of administrative tribunals and boards.

Members of the profession are reminded of their obligation to treat both courts and tribunals with respect and courtesy. This includes, but is not limited to, behaviour relating to lateness, lack of preparation, non-attendance and double-booking.

The Professional Conduct Committee notes that most administrative tribunals lack the extensive power of the courts, such as the power to make findings of contempt, to deal with these situations when they occur.

> However, flagrant breaches of the duties of courtesy and respect by members appearing before or having dealings with such bodies could, upon investigation, result in disciplinary action.
>
> Neither Mr. Abbass nor Mr. Tarasuk treated this tribunal with the requisite degree of courtesy and respect expected of lawyers in this province. In light of the contentious nature of the proceedings typically before the Board, a certain level of vigour is not unexpected from legal counsel that appear. During these proceedings, the conduct of Mr. Abbass and Mr. Tarasuk went well beyond the duty owed to their clients to raise any arguments available, and to represent their interests with vigour.
>
> ….
>
> 132. In all of the circumstances, it is my view that Mr. Abbass and Mr. Tarasuk ought to attend before the Board to show cause why the Board ought not to state a case of contempt to Divisional Court or report their conduct to the Law Society of Upper Canada. Once the Board has had an opportunity to hear the evidence and submissions on behalf of Mr. Abbass and Mr. Tarasuk, it will be in a position to determine what action ought to be taken. Counsel should be prepared to address the possibility that the Board could state a case to Divisional Court of either civil or criminal contempt. In light of the nature of the inquiry, counsel should consider whether they ought to be represented by counsel at the hearing.

Prior to the scheduling of the dates for the show cause hearing, Mr. Abbass and Mr. Tarasuk provided a written apology to the Vice Chair which he accepted. In the result the show cause hearing was not convened. See *Robert M. Heenan Sales Ltd.*, 1996 CanLII 11182, [1996] O.L.R.D. No. 1570.

B. Conflict of Interest

The Rules of Professional Conduct set out lawyers' obligations in the area of conflict of interest. For example, and subject to exceptions, a lawyer cannot represent or advise more than one side in a dispute (Rule 2.04(2)) or act against a former client (Rule 2.04(4)).

Allegations of a conflict of interest now arise more frequently before labour tribunals given the frequent movement of lawyers between firms.

Can a lawyer act against a former client?

The seminal case on the law with respect to conflict of interest is *MacDonald Estate v. Martin*, 1990 CanLII 32 (SCC), [1990] 3 S.C.R. 1235. In that case, the Supreme Court of Canada noted [at para. 13]:

> In resolving this issue, the Court is concerned with at least three competing values. There is first of all the concern to maintain the high standards of the legal profession and the integrity of our system of justice. Furthermore, there is the countervailing value that a litigant should not be deprived of his or her choice of counsel without good cause. Finally, there is the desirability of permitting reasonable mobility in the legal profession.

The Court then conducted an extensive review of the law in Canada and other jurisdictions before articulating the "appropriate test". The Court stated [at para. 44 and 45]:

> …. In dealing with the question of the use of confidential information we are dealing with a matter that is usually not susceptible of proof. As pointed out by Fletcher Moulton L.J. in *Rakusen*, "that is a thing which you cannot prove" (p. 841). I would add "or disprove". If it were otherwise, then no doubt the public would be satisfied upon proof that no prejudice would be occasioned. Since, however, it is not susceptible of proof, the test must be such that the public represented by the reasonably informed person would be satisfied that no use of confidential information would occur. That, in my opinion, is the overriding policy that applies and must inform the court in answering the question: Is there a disqualifying conflict of interest? In this regard, it must be stressed that this conclusion is predicated on the fact that the client does not consent to but is objecting to the retainer which gives rise to the alleged conflict.
>
> Typically, these cases require two questions to be answered: (1) Did the lawyer receive confidential information attributable to a solicitor and client relationship relevant to the matter at hand? (2) Is there a risk that it will be used to the prejudice of the client?

Historically, the OLRB declined to address allegations of conflict of interest on two bases. First, the OLRB questioned whether it had jurisdiction to address such allegations. Second, assuming it had such jurisdiction, as a matter of discretion the OLRB would decline to exercise it on the basis that the more appropriate forum was the courts or the Law Society. This was the approach taken in *Labourers' International Union of North America, Local 183*, [2004] OLRB Rep. March/April 338, [2004] O.L.R.D. No. 3685. The decision of the OLRB resulted in an application to the Ontario Superior Court for a declaration that the counsel in question was disqualified from acting on the matter before the Board by virtue of conflict of interest: *Universal Workers' Union, Labourers' International Union of North America, Local 183 v. Labourers' International Union of*

North America, et al. (2004) 70 O.R. (3d) 435, 2004 OLRB Rep., March/April 471, 2004 CanLII 66334, (Ontario Superior Court of Justice). In that application, Justice Nordheimer found first that sections 23(1) and 25.0.1 of the SPPA "either individually or collectively" gave the OLRB jurisdiction, concurrent with the courts, to deal with allegations of conflict of interest in proceedings before it. Those provisions state:

> 23(1) A tribunal may make such orders or give such directions in proceedings before it as it considers proper to prevent abuse of its processes.
>
> 25.0.1 A tribunal has the power to determine its own procedures and practices and may for that purpose,
>
> (a) make orders with respect to the procedures and practices that apply in any particular proceeding; and
>
> (b) establish rules under section 25.1.

Second, Justice Nordheimer expressed the view that it was more appropriate for the Board to make the determination in the first instance:

> [24] The Board is in a much better position, with its specialized knowledge and expertise, to know whether the lawyer or law firm is in possession of confidential information, whether the confidential information is relevant to the issues that the Board has to determine and whether that confidential information could be used to the detriment of the objecting party. It makes more sense for the tribunal, who must make the ultimate determination of the issues on the hearing before it, to decide whether any conflict alleged against the lawyer is real or only apparent, based on the usual practices of the lawyers and law firms who appear before it. For example, in this case the Board might conclude that whatever information the lawyer and law firm either did or might have become possessed of as a consequence of acting for the objecting party in the certification hearing could not possibly prejudice the objecting party in respect of the current unfair labour practices hearing. The Board is in a much better position to determine whether that is the reality of the situation than the court would be.

A subsequent decision, arising from further litigation involving the Local 183, held that the OLRB will be held to a standard of correctness with respect to its determinations on issues of conflict of interest: *Universal Workers Union, Labourers' International Union of North America, Local 183 v. Ontario (Labour Relations Board)*, 2007 CanLII 65612, [2007] O.J. No. 1048. Applying this standard, the court reversed a decision of the OLRB (*Universal Workers Union, Labourers' International Union of North America, Local 183*, 2006 CanLII 37384, [2006] O.L.R.D. No. 4041) which had held that there was no conflict of interest in the case before it .

In yet another case involving Local 183, the OLRB declined to remove counsel who had previously acted for the opposing party on the basis of conflict of interest because it had not been shown that the "previous relationship… is sufficiently related to the retainer from which it is sought to remove the solicitor", that the information at issue would have been known to him as a result of that previous professional relationship: *Building Union of Canada v Labourers' International Union of North America, Local 183*, 2013 CanLII 21410 (ON LRB).

In *Oakville United Taxi Ltd.*, [2012] OLRB Rep. May/June 512, [2012] O.L.R.D. No. 1520, 2012, CanLII 22930 (ON LRB) at the commencement of the proceedings a lawyer acted for the applicants and a law firm acted for the responding party. During the course of the proceedings the lawyer joined the law firm. While the lawyer ceased acting for the applicants, the law firm continued to act for the responding party. With respect to the first of the questions posed by the Supreme Court of Canada in *MacDonald Estate*, there was no issue that the lawyer had confidential information relevant to the issue at hand. The issue was with respect to the second of the questions: was there a risk that the information would be used to prejudice the applicants? The OLRB analyzed this issue as follows:

> 8. The Court [in *MacDonald Estate*] began by observing [at para. 47]:
>
> > A lawyer who has relevant confidential information cannot act against his client or former client. In such a case the disqualification is automatic. No assurances or undertakings not to use the information will avail.
>
> So, in this case there is no question that Ms. Sheikh cannot personally act for the responding party, nor is there any suggestion that she has. The question is whether or not the other partners or associates of the firm which she has joined, Levitt LLP, can continue to act for the responding party. On this question, the Court observed, the answer is less clear. Nonetheless, the Court did lay out certain principles which govern the manner in which this determination is to be made. The Court stated:
>
> i. "There is … a strong inference that lawyers who work together share confidences." [para. 49]
>
> ii. "In answering this question, the court should therefore draw the inference, unless satisfied on the basis of clear and convincing evidence, that all reasonable measures have been taken to ensure that no disclosure will occur by the "tainted" lawyer to the member or members of the firm who are engaged against the former client." [para. 49]

iii. "Such reasonable measures would include institutional mechanisms such as Chinese Walls [i.e. Ethical Walls] and cones of silence. …. [I]n the vast majority of cases, the courts are unlikely to accept the effectiveness of these devices until the profession, through its governing body, has studied the matter and determined whether there are institutional guarantees that will satisfy the need to maintain confidence in the integrity of the profession." [para. 49]

iv. "*A fortiori* undertakings and conclusory statements in affidavits without more are not acceptable. These can be expected in every case of this kind that comes before the court. It is no more than the lawyer saying "trust me". This puts the court in the invidious position of deciding which lawyers are to be trusted and which are not. Furthermore, even if the courts found this acceptable, the public is not likely to be satisfied without some additional guarantees that confidential information will under no circumstances be used." [para. 50]

In applying these principles to the case before it, the Court also provided some guidance as to what "more" should be contained in affidavits which were filed. The Court stated [at para 53]:

> Indeed, there is nothing in the affidavits to indicate that any independently verifiable steps were taken by the firm to implement any kind of screening. There is nothing to indicate that when Ms. Dangerfield joined the firm, instructions were issued that there were to be no communications directly or indirectly between Ms. Dangerfield and the four members of the firm working on the case. While these measures would not necessarily have been sufficient, I refer to them in order to illustrate the kinds of independently verifiable steps which, along with other measures, are indispensable if the firm intends to continue to act.

9. These principles have, of course, been developed through their application in other cases. While I do not suggest that this is an exhaustive list, some of the other principles which emerge from the case law are as follows:

i. Absent sufficient explanation, the Ethical Walls must be in place when the conflict first arises, which in a case such as this will be the effective date of the merger creating the "new firm": *Skye Properties Ltd. v. Wu*, [2003] O.J. No. 3481 (Div. Ct.), affirmed on appeal, [2004] O.J. No. 3948.

ii. The effectiveness of the Ethical Walls should be monitored by an independent lawyer outside the immediate client service team. Indeed, in *1964 Bay Inc. (c.o.b. Budget Car Rentals Toronto Ltd.)*, [2008] O.J. NO. 5048, the Divisional Court held that such counsel must be appointed in order to avoid a finding of conflict of interest [at para. 17]:

> Independent counsel should deal with any issues arising with conflict in terms of setting up screening measures, ensuring that the screening measures are respected, and dealing with any litigation arising as a result of the conflict. The continued involvement of counsel with carriage of the file giving rise to the conflict taints what may well be non-substantive discussions. Involvement of an independent counsel is necessary to meet the objective test so that a reasonably informed person would be satisfied that no use of confidential information would occur.

iii. The new firm should give immediate notice to former clients of the lawyer who has joined the firm of any potential for conflicts and of the steps which the new firm is taking to address the issue. Failure to give such notice is not in and of itself sufficient to give rise to a finding of a conflict of interest, but it is a factor which may be considered along with other factors: *Skye Properties Ltd. v. Wu*, op cit.

iv. While the provisions for addressing conflict of interest developed by the Law Society of Upper Canada in response to *MacDonald Estate* are not binding upon the courts, or this Board, failure to meet at least those provisions will likely result in a finding of conflict of interest: *Inron Contracting Limited v. Whitebread*, [2001] O.J. No. 4277; *Skye Properties Ltd. v. Wu, op cit.*.

The "provisions for addressing conflict of interest developed by the Law Society of Upper Canada" refers to "guidelines" contained in the commentary to Rule 2.05 (Conflicts from Transfer between Law Firms) of the Rules of Professional Conduct. As stated in the commentary, the guidelines "are intended as a checklist of relevant factors to be considered. Adoption of only some of the guidelines may be adequate in some cases, while adoption of them all may not be sufficient in others." Those guidelines are as follows:

> 1. The screened lawyer should have no involvement in the new law firm's representation of its client.
>
> 2. The screened lawyer should not discuss the current matter or any information relating to the representation of the former client (the two may be identical) with anyone else in the new law firm.
>
> 3. No member of the new law firm should discuss the current matter or the previous representation with the screened lawyer.
>
> 4. The current matter should be discussed only within the limited group that is working on the matter.

> 5. The files of the current client, including computer files, should be physically segregated from the new law firm's regular filing system, specifically identified, and accessible only to those lawyers and support staff in the new law firm who are working on the matter or who require access for other specifically identified and approved reasons.
>
> 6. No member of the new law firm should show the screened lawyer any documents relating to the current representation.
>
> 7. The measures taken by the new law firm to screen the transferring lawyer should be stated in a written policy explained to all lawyers and support staff within the firm, supported by an admonition that violation of the policy will result in sanctions, up to and including dismissal.
>
> 8. Undertakings should be provided by the appropriate law firm members setting out that they have adhered to and will continue to adhere to all elements of the screen.
>
> 9. The former client, or if the former client is represented in that matter by a lawyer, that lawyer, should be advised (a) that the screened lawyer is now with the new law firm, which represents the current client, and (b) of the measures adopted by the new law firm to ensure that there will be no disclosure of confidential information.
>
> 10. The screened lawyer's office or work station and that of the lawyer's support staff should be located away from the offices or work stations of lawyers and support staff working on the matter.
>
> 11. The screened lawyer should use associates and support staff different from those working on the current matter.
>
> 12. In the case of law firms with multiple offices, consideration should be given to referring conduct of the matter to counsel in another office.

In *Oakville United Taxi Ltd.* the OLRB was not satisfied that the law firm had "discharged its onus of establishing that it has taken all reasonable measures to avoid a conflict of interest and accordingly there is a risk that the confidential information will be used to the prejudice of the applicants." In the result it was removed from the record.

In *Cooney Transport Ltd., Cooney Bulk Sales Ltd. and Transport Cooney Québec Inc.*, 2008 CIRB 411, the CIRB considered a trade union's motion to disqualify the employer's

lawyer. That lawyer had previously represented the trade union when working at a previous law firm.

The Board first confirmed that it had jurisdiction to determine this type of dispute:

> 13. In this regard, the Board adopts the reasoning of the Ontario Superior Court of Justice in *Universal Workers' Union, Labourers' International Union of North America, Local 183* v. *Laborers' International Union of North America, supra*, citing *Wilder* v. *Ontario (Securities Commission)* (2001), 184 D.L.R. (4th) (Ont. Div. Ct.) 165. As suggested in that decision, the Board's objective is not to discipline counsel for any professional misconduct, but rather to control its own processes and to prevent abuse of those processes. On a practical level, the Board accepts that, because of its specialized knowledge and expertise, it is in the best position to determine whether a specific lawyer or law firm is in possession of confidential information, whether that information is relevant to the issues before the Board and whether it could be used to the detriment of the objecting party.
>
> 14. However, the Board cautions parties appearing before it that it will judiciously exercise this jurisdiction, so as not to attract a multiplicity of frivolous allegations of conflict of interest that will only serve to delay and defeat the Board's objective of resolving workplace disputes and differences expeditiously. Only in compelling circumstances, on concrete evidence and not speculative allegations, where it is shown to be necessary to ensure a fair hearing and prevent real harm to the interests of a party, will the Board exercise its jurisdiction to disqualify counsel for conflict of interest.

On the merits of the objection, the Board referred to the applicable analysis it had to apply from the SCC's decision in *MacDonald Estate* v. *Martin*, [1990] 3 S.C.R. 1235:

> 19. According to the test set out by the Supreme Court of Canada in *MacDonald Estate* v. *Martin*, [1990] 3 S.C.R. 1235, the Board must answer two questions in order to determine whether counsel should be disqualified from acting for a client on the basis of conflict of interest:
>
> > 1. Did the lawyer receive confidential information attributable to a solicitor-client relationship relevant to the matter at hand?
> >
> > 2. Is there a risk that the confidential information will be used to the prejudice of the client?

The Board concluded that the lawyer had not received any confidential information about the specific case before it and could therefore remain on the record:

> 23. The Board has concluded that the union has provided no evidence that Mr. Lister has confidential information regarding his former client; if he has such information, there is no evidence that it is attributable to the solicitor-client relationship; and if he has any confidential information attributable to the solicitor-client relationship, there is no evidence that it is relevant to the matter that is presently before the Board. Accordingly, there is no need for the Board to apply the second branch of the *MacDonald Estate* v. *Martin, supra,* test.

Who is a lawyer's client: the grievor or the trade union?

Frequently, a lawyer who pleaded a grievor's case at arbitration may later represent the union's interests in a related duty of fair representation complaint hearing. Is that lawyer in a conflict of interest?

In *French v. Johnson* 1997, O.J. No. 4035, Madame Justice Abella, then of the Ontario Court of Appeal, confirmed orally her endorsement that a lawyer assisting a grievor at arbitration has only the union as a client:

> We see no merit to this appeal. The solicitor-client relationship was between the solicitor and the union, not the grievor. Any remedy, therefore, was pursuant to the duty of fair representative (sic) provisions in the *Labour Relations Act.*

Can the lawyer pleading a case call as a witness another lawyer from his/her firm?

In *Fun Télécom Inc.,* 2010 CIRB 497, the Board disqualified a law firm from acting when it intended to call a member of the firm as a witness. The lawyer/witness had represented the client at collective bargaining and had important evidence to give.

The Board reviewed the criteria used in the courts for these types of issues:

> 53. In short, the criteria considered by the courts to determine whether a lawyer's disqualification extends to all members of the law firm are the credibility of the lawyer with respect to the disputed issue, the fact that justice must be seen to be done, the key nature of the testimony for resolving the dispute and the harm suffered by the party deprived of counsel of its choice.

In applying those principles, the Board concluded that the nature of the firm lawyer's testimony prevented the firm from continuing to plead the case:

> 65. Counsel must maintain credibility before the court and such credibility can be called into question as a result of his or her testimony, which, when it relates to significant and

> key parts of a dispute, has repercussions on the entire law firm. Since Mr. Rochefort's credibility could be called into question given the importance of his testimony for the respondent, the Board is of the view that counsel for the respondent, who is the witness's partner, would not have the necessary detachment to argue the witness's credibility.
>
> 66. Clearly, the fact of declaring counsel arguing the case and all members of his firm disqualified to act causes prejudice to the complainant, but given the importance of the senior partner's testimony and his role in the negotiations, the Board is of the view that it is necessary, under the circumstances, to declare Mr. Morency and his partners in the same firm disqualified from acting, to ensure a fair hearing for all parties in the dispute. The Board wishes to stress the unusual nature of this case, in which the respondent itself chose to call as a witness the lawyer whose services it had retained for negotiations with the union and a partner of Mr. Gérard Morency, its counsel in this matter before the Board.

C. Document Disclosure

The CIRB generally encourages production of relevant documents as part of the initial pleading process. Section 16.1 allows the Board to decide a case based solely on the initial written pleadings it receives:

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

As a result, it is important for legal counsel to produce with their pleadings both the facts and supporting documents. In *Wildman*, 2013 CIRB 675, the CIRB recently reviewed the importance of filing full pleadings in any case:

> [5] The *Canada Labour Code* (*Part I—Industrial Relations*) at section 16.1 does not oblige the Board to hold an oral hearing in every case:
>
> > 16.1 The Board may decide any matter before it without holding an oral hearing.
>
> [6] Section 12 of the Canada *Industrial Relations Board Regulations, 2001* (*Regulations*) set out at the material time the requirements for a Response or Reply:
>
> > 12. Any person who makes a response or reply must include the following information in the response or reply:
> > (a) the name, postal and email addresses and telephone and fax numbers of the respondent and of their
> > legal counsel or representative, if applicable;
> > (b) the Board's file number for the relevant application;
> > **(c) full particulars of the facts, relevant dates and grounds for the response or reply;**
> > **(d) a copy of supporting documents for the response or reply;**
> > **(e) the person's position relating to the order or decision sought by the applicant or respondent, as the case may be;**

> (j an indication as to whether a hearing is being requested and, if so, the reasons for the request; and
> (g) a description of the order or decision sought.[1]
>
> (emphasis added)

[7] Parties have long been required to file their full submissions when responding to a Board matter. Those submissions may include preliminary objections. However, the raising of objections does not relieve a party from responding to the merits as well.

III-Case Law

[8] The Federal Court of Appeal in *Nav Canada* v. *International Brotherhood of Electrical Workers*, 2001 FCA 30 confirmed the importance of parties filing full and complete submissions in Board matters:

> [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.

[9] The Board's case law has similarly emphasized that parties must provide their full submissions within the time limits in the Regulations. An attempt to reserve the right to plead pending the disposition of preliminary objections may simply result in the Board deciding the case based on the submissions on file:

> [13] The parties are well aware of section 16.1 of the Code, which permits the Board to decide any matter before it without holding an oral hearing. Accordingly, the Board expects parties to put forward their entire case at the time that the complainant or applicant files its complaint or application and the respondent files its written response. Parties who purport to "reserve the right" to file further submissions do so at their own peril, as there is no such right once the period for filing a response and reply to the application or complaint has expired. The Board may proceed to determine the matter on the basis of the record before it as soon as the deadline for submissions has passed.
>
> (Canadian National Railway Company, 2009 CTRB 446)

[10] The Board in Canadian National Railway Company, 2009 CIRB 461, commented further on the importance of parties filing complete pleadings:

> [20] The TCRC submitted at paragraphs 34 and 35 of its reconsideration application that the Board's process in this regard violated natural justice:
>
> > 34. An essential element of the concept of natural justice is the right to have the opportunity to be heard and to fully present one's case. The parties ought to have been

> afforded the opportunity to put forward their arguments, and to have those arguments heard and considered.
>
> 35. In the circumstances of the present case, the original panel failed to consider the parties' full submissions, given that the Respondent raised a preliminary matter and requested that the Board summarily dismiss the Application. The Applicant TCRC replied only to the Respondent's preliminary matter.
>
> [21] The Board recognizes that the parties' pleadings in a matter require a significant amount of preparatory work. Since the Board is not required to hold an oral hearing given section 16.1 of the Code, this long-standing detailed application process allows it to deal more expeditiously with the cases that come before it.
>
> [24] The Board was therefore not required to chase CN for its submissions. Rather, if a party purports to reserve for a later time its right to make submissions, and thereby fails to file its response in accordance with the Board's Regulations, then the Board will decide the case based on the materials before it.
>
> [11] In appropriate cases, the Board may decide unfair labour practice complaints based solely on the parties' written submissions: *Levesque*, 2011 CIRB 562.

If the CIRB decides to hold an oral hearing, then the *Code* authorizes the CIRB to hold case management conferences. In the event the parties cannot agree about production issues, the CIRB can resolve the dispute in advance of the hearing.

Similarly, the OLRB's Rules of Procedure require parties to file all documents upon which they intend to rely in a timely manner. Since the OLRB may decide matters on the basis of the materials filed without a hearing, parties must be forthcoming in filing of documents.

In addition, of course, opposing parties may seek production of documents which are arguably relevant to their own case.

Both the OLRB and the CIRB have experienced situations where legal counsel seem quite unaware of the implied undertaking rule. The rule, which the SCC reviewed recently in *Juman* v. *Doucette*, 2008 SCC 8, essentially prevents a party from using in a separate proceeding, information, whether documentary or oral, that was produced under compulsion in another legal proceeding. In *Maxi*, [1998] OLRB Rep. May/June 448, 1998 CanLII 18322, [1998] O.L.R.D. No. 2183, the OLRB expressly held that documents produced in the course of proceedings before it are subject to an implied undertaking that they will not be used for a purpose other than the proceeding except with the consent of the party which produced the documents or with leave of the OLRB.

Once a document has been admitted into evidence, however, it is no longer confidential in the same sense and its contents may be disclosed to all persons present at the hearing, and reported by them to others. The implied undertaking in relation to production of such a document no longer applies. Further, a request for an additional order expressly directing a party not to make use of the documents or the information contained therein is at odds with the "open court" principle, and thus will rarely be granted. The OLRB had occasion to discuss this issue in *Association of Management, Administrative and Professional Crown Employees of Ontario v. Crown in Right of Ontario*, 2011 CanLII 24623 (ON LRB):

> 38. I begin from the proposition that, according to the common law, documents produced in the course of litigation are subject to an implied undertaking that the confidentiality of the documents will be maintained. This undertaking prevents a party to whom documents have been produced from revealing either the document or its contents. This implied undertaking serves to encourage production and protect the confidentiality of information that never makes its way into evidence in a legal proceeding. However, once a document is entered into evidence, it is no longer covered by the implied undertaking and its contents can be disclosed to all persons present at the hearing and reported by them to others. The implied undertaking no longer applies as the document and its contents are now in the public domain and it makes little sense to restrict the use to which a litigant and its counsel can put the document or its contents but not anyone else attending the hearing or reading the Board's decisions (see *Maxi*, *supra*, paragraph 13). Further, open and transparent proceedings are a cornerstone of our justice system. Sealing evidence heard and considered in a legal proceeding is antithetical to openness and transparency.
>
> 39. The Board has the jurisdiction pursuant to section 110(16) of the Act to determine its own practice and procedure. The Board thus has the jurisdiction to issue a confidentiality order that extends to documents entered into evidence.
>
> 40. Imposing a confidentiality order on AMAPCEO in respect of documents entered as exhibits would be a qualification, albeit modest, on the open court principle which has been described by the Supreme Court of Canada in *Vancouver Sun (Re)*, 2004 SCC 43 (CanLII), [2004] 2 S.C.R. 332 at paragraph 23 as a "hallmark of a democratic society". One of the underlying values of the open court principle is the need to ensure that justice is carried out in a non-arbitrary manner (see: *Named Person v. The Vancouver Sun*, 2007 SCC 43 (CanLII), [2007] 3 S.C.R. 253 at paragraphs 31 and 32). A fully open proceeding is considered to result in more independent and impartial adjudication. Publicity of proceedings is one way in which our society can see that justice is in fact carried out and is an effective guard against impropriety. While the order sought by the Employer in this case does not restrict observers of the hearing from publicizing the information contained in the documents, it restricts the very party who may have the greatest interest in ensuring that justice has been administered in a non-arbitrary manner from publicly referring to the

> document. Thus, while the extent to which the requested order impedes the open court principle may be modest, it is an impediment that ought to be avoided unless counterbalancing factors suggest otherwise.

Breach of the implied undertaking or of an express Confidentiality Order is a serious matter. In *Kimberly-Clark Corp.*, [2008] OLRB Rep. May/June 402, 2008 CanLII 23941, [2008] O.L.R.D. No. 1992, documents produced in proceedings before the OLRB were used to commence a civil action in breach of the implied undertaking and/or an express Confidentiality Order governing the documents produced. The party which had produced the documents among other things asked the OLRB to state a case for contempt to the Divisional Court. The OLRB declined, concluding that on the facts of the case there was no labour relations reason for it to do so:

> **91** The Board's ruling on this request for relief is as follows. The Board clearly has the jurisdiction to state a case for contempt to Divisional Court pursuant to section 13 of the SPPA. The Board has exercised its discretion to do so in *Plaza Fiberglas* [[1988] O.L.R.D. No. 220] and *1229026 Ontario Inc.* [[2006] OLRB Rep. May/June 307]]. The question is whether the Board should, on the facts of this case, exercise that discretion.
>
> **92** In determining whether the Board should exercise that discretion, the Board must consider two things. First, whether there is a *prima facie* case that the conduct would amount to contempt. Second, whether there is a labour relations purpose for stating a case.
>
> **93** The primary labour relations purpose for stating a case is to compel a party to comply with a Board order so that the Board can continue to adjudicate the matter. For example, a party may be refusing to comply with a production order. Left unchallenged, this would have the effect of shutting down the hearing, which may be what the non-compliant party wants. The other party would not be able to adjudicate the remedies it is seeking. There is a strong labour relations purpose in stating a case to compel the non-compliant party to comply with the Board's order so that the Board can continue to fulfil its mandate of adjudicating the matter. This is not necessarily the only labour relations purpose. In some cases, penalization and deterrence could also be labour relations purposes for stating a case to enforce and promote compliance with the Board's orders and processes.
>
> **94** The responding parties have given a number of reasons for their request that the Board state a case. The Board finds that the responding parties' primary reason is to have the Divisional Court order KM and the Union to pay to the responding parties their expenses. The Board comes to this conclusion for the following reason.
>
> **95** The responding parties state that the Board does not need to consider their request for a stated case if the Board rules that it has the jurisdiction to grant them their

requested expenses. This makes it quite clear that the primary reason the responding parties are asking the Board to state a case is so that they can request the Divisional Court to order KM and the Union to pay them their requested expenses if the Board cannot do this.

96 The Board finds that this is not a sufficient labour relations purpose for the Board to exercise its discretion to state a case. The breach and the expenses issues have delayed the adjudication of this matter, but they have not shut it down. KM has admitted to and apologized for the breach and its conduct. KM and the Union have consented to some of the requested relief. There are no orders of the Board that KM or the Union are refusing to comply with. Following this decision, the Board will continue, in June 2008, to adjudicate the merits of this matter. Accordingly, there in no need for the Board to state a case so that this matter can continue. This should happen on its own without a stated case.

97 The other reasons the responding parties have given for why the Board should state a case are for the Board to determine the nature and extent of the obligations imposed by the implied undertaking and the Confidentiality Order, to determine the extent of the breach, and to determine the extent of the Board's jurisdiction to exercise control over its proceedings. The Board finds that these reasons are also, in this case, not sufficient labour relations purposes to state a case. The Board has ruled on, and the parties do not dispute, the obligations that are imposed upon KM and the Union by the implied undertaking and the Confidentiality Order. KM and the Union have consented to relief aimed at ensuring the confidentiality of documents. The Board has granted this, and other relief. There is no current dispute regarding future compliance with the implied undertaking and the Confidentiality Order. The Board is able to exercise control over this proceeding. The Board does not need to determine the extent of the breach because the extent of the breach would not affect the fact that this matter is prepared to proceed.

98 To the extent that the responding parties seek a stated case to penalize KM and the Union, although the conduct of KM has been very serious, in view of the admission, apology and consent to remedies, the Board will not state a case for this reason.

99 The responding parties have brought a motion in the civil action regarding the breach. The Board does not have the jurisdiction to amend the Statement of Claim. However, the Board's findings of fact and rulings in this decision may be relevant to that motion. The responding parties do not require a stated case to continue with that motion. The motion is not a labour relations purpose for stating a case.

100 Having found that there is no labour relations purpose for the Board to state a case, the Board does not need to consider whether there is a *prima facie* case that the extent and nature of KM's or the Union's conduct would amount to contempt. The

> Board does not need to determine whether the breach was inadvertent, or the reasons for the delay in admitting to the breach. Again, the Board makes no rulings on those issues. Nor does the Board need to consider any of the other submissions raised by the parties.

Documents which either the OLRB or CIRB may compel to be produced in a proceeding cannot automatically be used in another proceeding. However, in some situations, a tribunal or court may issue relief against the implied undertaking rule.

IV. Conclusion

As stated at the outset, it is important for counsel to understand the framework of the tribunal before which they will be appearing in order to organize their case.

On issues of protection of bargaining rights and employees during periods of time when there is no collective agreement in place, the OLRB and the CIRB operate within markedly different frameworks. The *Code* bars termination or displacement applications following certification of a new bargaining agent or during the course of a strike or lock out unless the CIRB is "satisfied that the bargaining agent has failed to make a reasonable effort to enter into a collective agreement in relation to the bargaining unit." The *LRA* contains no comparable potentially open-ended bar. Rather, section 67 of the *LRA* provides for a time-limited bar, which typically expires twelve months after the appointment of a conciliation officer or the thirty days after the release of a "no board" report, whichever comes first.

The *Code* provides just cause protection to employees following certification but prior to the negotiation of the first collective agreement and following the expiry of the statutory freeze and the conclusion of a replacement collective agreement. The *LRA* provides no similar express protection. The termination of an employee for reasons tainted by anti-union animus is subject to a ULP complaint and if the termination takes place within the context of an organizing drive, it may result in an interim reinstatement order. Termination during the statutory freeze period may be remedied through the arbitration provisions of an expired collective agreement. And the termination of an employee during a strike or lock out will almost certainly be an issue during collective bargaining where it may be resolved by means of settlement or referral to arbitration. In the absence of such a resolution, the duty to bargain applies and, given the fundamental significance of this issue to unions, compelling grounds will be required for an employer to maintain to impasse a position of refusing to agree to arbitration.

On issues of professional practice, the OLRB and the CIRB are similar. Both expect and depend on counsel to fulfill their professional obligations with respect to civility and production of documents. Both expect counsel to avoid conflict of interest.

About the Authors:

Mr. Ian Anderson is an Arbitrator and Mediator. He is also a part-time Vice-Chair of the Ontario Labour Relations Board. Prior to stepping down in April 2013 to pursue his arbitration and mediation practice on a full-time basis, Ian had been a full-time Vice-Chair of the Ontario Labour Relations Board for nine years and a part-time member of the Human Rights Tribunal of Ontario for eight years. From 1987 to 2004, Ian practiced primarily in the fields of labour and employment law.

Mr. Graham J. Clarke was appointed a Vice-Chairperson of the Canada Industrial Relations Board on April 23, 2007 and reappointed for a further four-year term in 2012. Mr. Clarke is the author of *Clarke's Canada Industrial Relations Board*, which was published following the 1999 amendments to the *Canada Labour Code*.

From 1990 to 2007, Mr. Clarke represented private sector clients in both official languages before a wide range of administrative tribunals and courts.