Canadian Association of Counsel to Employers

CACE

Association canadienne des avocats d'employeurs

A Review of the Nova Scotia Labour Board's Policy on Casual Employees

SUBMISSION OF THE

CANADIAN ASSOCIATION OF COUNSEL TO EMPLOYERS ("CACE")

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The Canadian Association of Counsel to Employers (CACE) is an association of management-side labour and employment lawyers across Canada. CACE has over 1,300 members, including leading labour and employment counsel in private practice and corporate counsel.

This submission is solely made on behalf of CACE and its members and does not necessarily represent the position of our clients.

A. Background on CACE

CACE is a national not-for-profit association of management-side labour and employment lawyers with a mandate to ensure that advancements in Canadian law also reflect the experience and interests of employers. CACE was established in 2004 and its members include lawyers employed in practice and as in-house counsel, who live and practice law across the country, and represent clients in every sector of the economy. CACE is overseen by a volunteer board of 18 directors from all Canadian provinces. CACE is the only national organization of management-side labour and employment lawyers.

CACE engages in legislation and law reform activities at both the provincial and federal levels. Its objectives include providing governments, courts, labour boards, and other administrative tribunals with input in respect of policy and legislative reform from the perspective of lawyers who act on behalf of employers in Canada. One of CACE's top priorities is presenting timely and substantive submissions on public policy matters of interest to its membership and constituency. It regularly monitors key developments in the legislative and regulatory arena, at both the provincial and federal levels, and draws upon the shared experience and expertise of its members to address legal issues affecting Canadian employers through the work of its Advocacy Committee, which has a mandate to participate in significant legal and policy development.

CACE is grateful to have the opportunity to present our point of view on the topic of the review of the Nova Scotia Labour Board's Policy on Casual Employees.

B. SUMMARY

In the context of answering the questions posed by the Board in its *Discussion Document: Review of the Labour Board's Policy on Casual Employees* (November 21, 2017) CACE appreciates the role that the *Charter of Rights and Freedoms* ("Charter") plays in labour law. The Supreme Court of Canada ("SCC") has determined that the Charter's protection of freedom of association extends to collective bargaining[1] (including the right to strike[2]). In these same decisions, the SCC emphasized that the inquiry into the freedom of association right necessitates a contextual and fact-specific

[1] *Health Services and Support — Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27 (CanLII) ("*Health Services*").

[2] *Saskatchewan Federation of Labour v. Saskatchewan*, [2015] 1 SCR 245.

approach.[3] Consistent with this contextual and fact-specific approach, CACE respectfully submits casual employees should be excluded from bargaining units **unless** in the specific workplace context it is demonstrated that casual employees have a sufficient:

1. continuing interest in the workplace, so that they have a legitimate interest in the representational question.

2. community of interest with other members of the bargaining unit so that a unit viable for collective bargaining may be established.

C. RESPONSE TO SPECIFIC QUESTIONS RAISED BY LABOUR BOARD

The following is CACE's response to the questions raised by the Labour Board. The questions are in **bold**:

1. **Is the current presumption against the inclusion of casuals appropriate? - Yes.**

The statutory and policy rationale for the Labour Board's **presumption** that casual employees will be excluded from bargaining units remains appropriate for the reasons articulated by the Canada Labour Relations Board in *Bank of Montreal v. USW*[4], which were endorsed by the Nova Scotia Labour Relations Board in *USW and Heather Hotel and Convention Centre*,[5] namely, "genuine casual employees do not share a sufficient community of interest with the other employees to include them in the same bargaining units as regular employees and part-time employees."

There is no reason for the Labour Board to depart from this presumption for the following reasons:

First, the *Trade Union Act* ("TUA") requires that the Board determine the **unit appropriate for collective bargaining** and in doing so, follow the legislative direction contained in s. 25(14) that "in determining the appropriate unit [the Board] shall have regard to the community of interest **among the employees in the proposed unit** in such matters as work location, hours of work, working conditions and methods of remuneration…" If casual employees in a particular workplace context do not share a sufficient community of interest with the full time and regular part time employees, they cannot be included. If, however, in the circumstances of a particular workplace casual employees share a sufficient community of interest, they should be included.

The Board must necessarily be sensitive to the potential issues that the inclusion of casuals presents in collective bargaining. The following are some examples:

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[3] *Health Services*, paras. 31 and 92.

[4] (1987), 19 CLRB 112

[5] LRB No. 4176 (May 6, 1994)

- Section 47(3) of the TUA demands that before a strike may be declared there must be a "secret vote by ballot of employees in the unit affected…and the majority of such employees have voted in favour of a strike…" The determination as to the casual employees who would be affected and have the right to cast a ballot in such a secret vote will inevitably be complicated.

- It is not uncommon for collective agreements to require that overtime opportunities be first offered to full-time employees on the basis of seniority. In a bargaining unit in which casuals are included, such clauses clearly present a conflict.

Second, the SCC's decision in *Mounted Police Assn. of Ontario v. Canada (Attorney General)*,[6] ("RCMP") (which according to the Board's decision in *High-Crest Springhill Home for Special Care and CUPE, Local 4184*, "underscored the need for the Board to review its policy statement on casual employees"[7]) does **not** say that casual employees should be included. Rather, the SCC said that no one model of labour relations is guaranteed by the Charter. The SCC also reinforced the importance of community of interest by saying that it is essential that any model of labour relations chosen must "**ensure that an employer deals with the association most representative of its employees**."[8]

Third, the exclusion of casuals is only a **presumption** and accordingly such a presumption can and will be rebutted in appropriate circumstances. The SCC made clear in *RCMP* that labour schemes should be "responsive to the interests of the parties involved and the particular workplace context."[9] Casual employment relationships come in all shapes and sizes, and the Board should apply its presumption in accordance with a contextual and nuanced consideration of the workplace, with the guiding focus being whether the casual employees, in the context of that workplace, share a sufficient community of interest with the other employees in the proposed bargaining unit.

Fourth, other labour relations boards have confirmed the important emphasis that should be placed on community of interest when determining whether casual employees should be included in the bargaining unit. The Alberta Labour Relations Board suggests that casual employees are "usually difficult to organize [because] [i]n theory, though not always in practice, they tend to be less supportive of unionization than regular employees."[10] The British Columbia Labour Relations Board's

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[6] 2015 SCC 1 ("*RCMP*")

[7] 2015 NSLB 54 (CanLII) at para. 27

[8] *RCMP*, *supra* note 6, at para. 94.

[9] *Ibid.* at para. 96.

[10] *AUPE v. Bosco Homes, Societies for Children & Adolescents*, [2001] Alta LRBR LD-030 at para. 26 ("*Bosco Homes*").

concern, which it initially expressed in 1979,[11] and continues to express,[12] is that casual employees have different bargaining objectives from employees with a more permanent employment relationship:

> Instead, it is necessary to examine the facts of each case to determine whether there is sufficient community of interest between regular, full-time employees and others to warrant the latter's inclusion in the same bargaining unit. **In such examinations, an important factor will be the relative permanence of employment of the category of employees. Employees in casual or temporary positions which carry little or no likelihood of continuing employment will have very different bargaining objectives from full-time employees.** They will also be more likely to favour acceptance of modest gains at the bargaining table where the alternative may be a strike with concomitant loss of wages during what would be a substantial portion of those employees' expected terms of employment.
>
> [Emphasis added]

Accordingly, the BC Board is less concerned with the casual vs. regular part time employee distinction and focuses instead on whether that employee "has a **sufficient continuing interest in the issue of union representation at the time of the application**."[13] The BC Board implicitly recognized that not "all casuals [and workplaces in which casuals work] are the same". In applying this test, the Board considers a number of factors:

- **permanence of employment**; - casual employees "which carry little or no likelihood of continuing employment will have very different bargaining objectives from full-time employees."[14]

- **proportion of casual/temporary employees in the total work force**; - In one case where the bargaining unit consists primarily of employees who work a broad range of hours, the casual employees were included.[15] In another case, the BC Board was concerned that the "proportion of casual employees in the workforce [is large] their numbers may disproportionately alter the balance by potentially outweighing the wishes of the smaller number of regular workers."[16]

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[11] *Edoco Healey Technical Products Ltd. and Miscellaneous Workers, Wholesale and Retail Delivery Drivers and Helpers' Union, Local 351*, 1979 CarswellBC 1821 at para. 20.

[12] *Certain Employees of Brookfield Properties (Vancouver)*, 2012 CarswellBC 73 at para. 63 ("*Brookfield Properties*").

[13] *Whistler (Resort Municipality) and CUPE, Local 210*, 2013 CarswellBC 3119 at para. 20 ("*Whistler*").

[14] *Brookfield Properties*, *supra* note 12, at para. 63.

[15] *Leisure Aquatics (1999) Inc. v. CUPE, Local 402*, BCLRB No. B149/2005, at para. 23.

[16] *P.Sun's Enterprises (Vancouver) Ltd. v. CAW, Local 4234*, 2000 CarswellBC 2924, at para. 159.

- **the nature and organization of the employer's business**; and

- **each individual's particular employment circumstances**.

The BC Board recognizes that the "determination does not lend itself to hard and fast rules. Generally speaking, a casual or seasonal employee in a long term employment relationship demonstrating a pattern of continued employment is an employee [and will be included], unless the circumstances indicate there is no reasonable prospect they will return to work."[17] The Ontario Labour Relations Board adopts a similar approach to the BC Board.[18]

2. **If not, should "all employee" units be the preferred/default bargaining unit? – No.**

Employees who share a sufficient community of interest and who have a sufficient continuing interest in the workplace should be included in the bargaining unit.

3. **If the presumption should be changed to include casuals, how should the Board determine membership support and voting eligibility of casual employees in the event that it finds it appropriate to include casuals?**

The presumption should not be changed to include casuals for the reasons articulated above. If, however, the presumption is modified, the Board should adopt an approach that promotes labour relations democracy by ensuring that the decision to "unionize" a workplace is determined by employees who have a sufficient continuing interest in the workplace and are most representative of the workplace.

The following are examples of various approaches to determining the constituency:

(a) Nova Scotia - Double Date Rule

The Double Date Rule applies to the non-construction industry and provides that, in order for an employee to be included in the bargaining unit, the employee must be employed and working on the date the union chooses to file its application for unionization and on the date of the representation vote, **unless** the employee is not working due to a scheduled day off, vacation, leave (e.g. parental), or LTD for a period of less than 2 years. The Double Date Rule implicitly recognizes that employees are sometimes absent for good reason and that such absences should not deprive them of having a say on

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[17] *Whistler*, *supra* note 13, at para. 20.

[18] Adams, *Canadian Labour Law* (looseleaf) at para 7:1050 at footnote 303:

> *In British Columbia, if a person is laid off on the date of an application for certification, to be considered an employee for the purposes of a non-construction industry application, the person must have a "sufficient **continuing interest**" in that workplace which is assessed by determining whether there is a "continuing, tangible, felt relationship" with the employer…. Ontario **used a 30/30 rule of thumb for non-construction cases (but now follows the British Columbia approach)***

unionization. The rigid application of the Double Date Rule, however, does not exclude employees who do not have a continuing interest in the workplace (e.g. resign shortly after the vote) from having a say in the representation question.

(b) New Brunswick – 30/30 Rule

The New Brunswick Labour and Employment Board ("NB Board") has consistently applied the 30/30 Rule which provides:

> It bears repeating the 30/30 "rule" is an interpretative rule for the purposes of identifying, in the words of the Industrial Relations Act, section 14(1): "the number of employees in the bargaining unit at the date the application was made". It is in this sense that the 30/30 "rule" includes:
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> - **employees at work on the date of application**;
>
> - employees not at work on the application date but who worked in the bargaining unit at any time during the 30-day period prior to the application date, and returned to work... within the 30 days [after the date of application]; and
>
> - employees not at work on the application date but who worked in the bargaining unit at any time during the 30-day period prior to the application date, and are expected to return within the 30 days.

The 30/30 Rule, however, does not appear to recognize (unlike the Double Date Rule) that employees may be absent from work outside of the two 30 day time period for legitimate reasons (e.g. parental leave, disability).

The NB Board applies this rule because, first, similar to section 28(7)[19] of the TUA, which provides that the Board must be satisfied that at the date of the filing of the certification application that the applicant union had as members in good standing at least 40 percent of employees "in the unit," section 14(1) of the New Brunswick *Industrial Relations Act* provides that:

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[19] Section 28(7) provides: *When the Board has determined that a unit of employees is appropriate for collective bargaining, if the Board is satisfied that at the date of the filing of the application for certification the applicant trade union had as members in good standing*

(a) less than forty per cent of the employees in the unit, the Board shall dismiss the application; or

(b) forty per cent or more of the employees in the unit, the Board shall, subject to subsection (11), take and count the vote.

> When, pursuant to an application for certification under this Act by a trade union, the Board has determined that a unit of employees is appropriate for collective bargaining, the Board shall ascertain the number of employees in the bargaining unit at the date the application was made and the number of employees in the unit who were members of the trade union at such time as is determined under paragraph 126(2)(e).

Second, the 30/30 Rule prevents the manipulation of the constituency. In *Best Western*, the NB Board explained its rationale as follows:

> **It is clear that the focus of section 14(1) is on the bargaining unit rather than simply the employees at work on the application date as a single event.** Thus, the 30/30 rule serves to give meaning to "the number of employees in the bargaining unit at the date the application was made" in section 14(1) and to balance the (at times) conflicting interests of a union and an employer. **The 30/30 rule protects employees from a single point in time approach which would disenfranchise employees whose labor relations interests are critically impacted by a certification application. It also serves to reduce manipulation of the relevant constituency for the purposes of establishing the level of union support and promotes labor relations democracy.**[20]
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> [Emphasis added]

(c) Alberta – Date of Application For Casuals

The Alberta Board only permits casual employees who are at work on the date of application to vote in a representation vote. The rationale for this Policy was explained in *Bosco Homes:*

> … The Voting Rules, which reflect many years of this Board's practice, are structured to recognize that casual employees are still employees who will be affected by representational choices, but to give casual employees a lesser role in representational choices than regular employees. The Voting Rules do this by providing that only casual employees at work on the date of the application are counted as in the bargaining unit for purposes of the application, unless the Board otherwise orders. **The theory is that a representative slice of an employer's casual workforce can thus have a say in the representational issue without having a weight in the result that is disproportionate to the degree of interest they have in their workplace.**[21]
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> [Emphasis added]

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[20] *United Brotherhood of Carpenters and Joiners of America, Local 1386 v 663345 NB Ltd. (Best Western Plus Bathurst)*, 2017 CanLII 58240 (NB LEB), ("*Best Western*") at para. 126.

[21] *Bosco Homes*, *supra* note 10, at para. 9.

The Alberta Board also applies a 30/30 rule, but also permits non-casual employees who are absent due to a statutory or contractual child care leave to vote:

> 16(1) Unless the Board otherwise directs, the following persons employed in the bargaining unit shall be deemed to be eligible to vote in a representation vote:
>
> (a) employees at work on the date of application,
>
> (b) full-time or regular part-time employees, who are not at work on the date of application, but who:
>
> (i) worked at any time during the 30 days preceding the application, and
>
> (ii) in the opinion of the officer presiding at the vote, are likely to return to work during the 30 days following the date of application; and
>
> (c) employees absent from work on the date of application because of parental leave.
>
> …
>
> (3) For this Rule, absent from work because of parental leave means absent from work because of maternity, paternity, adoption or similar contractual or statutory leave, unless the person has advised their employer of an intention not to return to work at the conclusion of their leave.

(i) Is it appropriate to consider "employment" and being "on shift" as one and the same for casuals? – No

It is not appropriate to consider "employment" and being "on shift" to be one and the same for casual employees because a casual employee may be on "shift" on a particular day (e.g. date of application or date of the vote), but have no continuing interest or attachment to the workplace. The analysis must necessarily be more contextual and nuanced.

(ii) If so, is the "double date" rule (i.e. working on the date of application and date of the vote) adequate to determine employee wishes?

The Double Date Rule is preferable to the Snapshot Rule, but fails to take into account that employees who satisfy the criteria of the Double Date Rule may have no continuing interest in the workplace beyond the vote date.

The Board has consistently applied the Double Date Rule rigidly. For example, in *United Food and Commercial Workers Union, Local 864 v Cambridge Sydney Limited*,[22] the Board refused to depart from the Double Date rule despite legitimate concerns raised by the employer that some employees who satisfied the Double Date rule no longer had a legitimate interest in the workplace:

> 29. The question of whether the votes should be counted of the employee on LTD for less than two years, and the three employees who resigned at the time of the application or shortly after raises similar issues. **The Employer has argued, essentially, that neither of these groups of employees, because of their status, will have a continuing interest in the bargaining unit, and that their votes should not be counted. While she recognized that the Board has consistently ruled that an employee who was employed on the date of the application and the date of the vote is entitled to vote and to have their vote counted, she argued that the Board should move from that approach to the Ontario model which focuses on continuing interest in the employment.**
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> 30. **To say that the Board has been consistent in its approach to defining "employee" for the purposes of the vote is an understatement**. The policy was explained in 2004 in Re Deniso Lebel (Scotsburn) (supra) as follows:
>
> > The policy of the Board as explained in the Kelly Rock case is that a person is an employee, for purposes of reaching the 40% and of having his or her vote counted, if that person was actually employed both on the date of the filing of the application for certification and on the date of the conduct of the vote. To this general rule, the Board has allowed special exceptions only for (1) persons on long-term disability for a period not exceeding two years; and (2) persons on vacation, on a leave of absence, or on maternity leave.
> >
> > In the Kelly Rock case, the Board had explicitly rejected ... an attempt to expand the list of special exceptions to include persons who, although not at work had either a "reasonable expectation of return to work (the Ontario test) or who had a "continuing interest" in employment, the Canadian Industrial Relations Board test).
> >
> > We add this: when a situation has arisen that an employee has fallen within the above exceptions but had been replaced at work during the "absence", we would only permit one of them to vote, either the absent employee or the replacement employee, but not both of them.

[22] 2011 NSLB 84.

31. These comments were reinforced by Chair Darby in 2009 in Re First Student Canada (supra):

> We note that the Board's policy is a long-standing one of which the decision of the Board, in Communication Energy and Paperworkers' Union of Canada Local 857 and Canadian Gypsum Company Inc. LRB No. 4662 (October 13, 1998) ... is an example. In this case, counsel for the Employer argued that whether employed after the date of filing of the application for certification or after the date of the vote, all employees with a "continuing connection and bona fide interest as an employee" in the terms and conditions of employment ought to be given the opportunity to vote. The Board's response in the Gypsum case is equally applicable to our situation and reflects the policy of the Board:

[Emphasis added]

In CACE's submission, as these cases reveal, rigid adherence to the Double Date Rule fails to apply the overriding principle that the membership in a bargaining unit must reflect a commonality of interests.

(iii) Is the "snap shot" rule (i.e. working on the date of the vote) more appropriate to determine employee wishes? – No.

The Snapshot Rule question posed raises the following questions:

First, it appears that the Discussion Document erroneously defines the Snapshot Rule as those "working on the date of the vote." The Snapshot Rule, as it is applied in the Nova Scotia construction industry (and which has only been applied by the Labour Board to the non-construction industry on one occasion) is that it is the date of application (not the date of the vote) upon which the "snapshot" is taken. The rationale provided by the Labour Board for departing from the Double Date Rule in *Egg Films Inc*.[23] and adopting the Snapshot Rule was:

> 69. As is no doubt clear from the Board's approach to the previous issues, our conclusion in relation to the standard "double date" employment rule under Part I is that it must yield in the film/commercial production industry to a "bright line" date of application rule in the light of a purposive interpretation of the Act. The purpose of the "double date" rule in relation to industrial bargain [sic] units with relatively stable workforces is parallel to the discussion above on whether "casual" employees should be in or out of bargaining units with full and regular part-time employees. If the rule of having to be employed on the date of application and the date of the vote were not the

[23] 2012 NSLB 120.

> subject of an exception for employees in the commercial advertizing production segment of the film industry, large numbers of employees would potentially be denied their capacity to exercise their constitutional freedom to join a union and participate in collective bargaining. Moreover, such an approach would be inconsistent with the purpose of the Act as set out in the Preamble, and consistently reinforced in the Board's jurisprudence over more than 20 years. The purpose of the *Trade Union Act* is to promote properly regulated collective bargaining and thus help to establish good working conditions and sound labour-management relations. This is one of the pillars upon which effective economic development or "common well-being" is the [sic] based, according to the Act's Preamble. Imposing the "double date" of employment rule for eligibility to vote in certification applications in the film industry runs counter to these basic purposes.
>
> 70. In this respect, the Ontario cases cited earlier (*Cocodile*, *City of Brantford* etc.) have it right. In the stage and theatre business, the "construction industry" approach is best: those at work in the industry on the date of application only are entitled to vote in the certification ballot established by the Board. The Ontario stage and theatre cases cannot be meaningfully distinguished in this regard. This Board's decision in Power Promotions recognizes the correct principle. There is no reason not to adopt this approach in the film/commercial advertizing industry in the Province, where parallel labour relations conditions prevail. While the "double date" rule of Part I has a useful function in many standard industry certifications, preventing unfair manipulation of voting constituencies and ensuring that those with a continuing interest in the workplace have a franchise to exercise, its non-purposive application in the film/commercial industry would have the opposite effect. It would disfranchise those with a continuing interest in the workforce of an industry of which both the Applicant Union and the Respondent are a part.

Second, it is unclear whether the Board intends the phrase "more appropriate to determine employee wishes" to apply only to casual employees or to apply to all employees. If the intent is to only apply the Snapshot Rule to casual employees, this would be consistent with the Alberta Board's approach, namely, only those casual employees who are working on the date will be counted. Casual employees not working on the date of application will be excluded. If, however, the intent is to apply the Snapshot Rule to all employees, such is problematic for the following reasons:

1. The rationale for why the Snapshot Rule was restricted to the construction industry was due to the absence of an automatic quick vote and the transitory nature of work in the construction industry. In *Gil Son Construction and IBEW, Local 625*, the Board confirmed that the Snapshot Rule should apply in the construction industry, even though it resulted in the exclusion of a long term employee on vacation on the date of application:

> The Board instituted the precursor of the widely imitated "Nova Scotian mandatory quick vote process" which, after judicial challenge, was introduced into the *Trade Union Act* by legislative amendment in what are now found in the provisions of section 25 of the Act. This legislative compromise, which works well for industrial sites and statically located business under Part I of the Act, reduced if not eliminated employer interference with employee exercise of choice as to whether or not to unionize under Part I. **However, the legislature of the Province wisely chose not to introduce such a mandatory "quick vote" system for the very different conditions of the construction industry, where construction work moves from site to site and where the size of the work force often varies with the scale of the project in question**: see *Carpenters, Local 83 and Capital General Contracting*, LRB 2306 C, June 25, 2003…. **Moreover, even the "quick vote solution" is problematic in the construction industry where the five day grace period for holding such votes could outlast employee presence on a transitory jobsite.**[24]

[Emphasis added]

2. The Snapshot Rule would essentially exclude a number of employees who have a strong connection to the workplace who happen to be absent due to vacation, scheduled days off, parental leaves, or disability leave from the representation question. The Saskatchewan Labour Relations Board's thoughtful and nuanced criticism of the Snapshot Rule in the construction industry applies with even more force to the application of the Snapshot Rule to the non-construction industry:

> …In deciding who should be regarded as an employee for the purpose of having a voice in the question of whether a group of employees should be represented by a trade union, the Board must consider the implications of drawing the boundaries of the franchise too narrowly or too broadly.
>
> **On the one hand, to require that an employee actually be at work on the date the application is filed in order to be included in the Statement of Employment would be clearly unfair to employees who are by any reasonable standard regular employees, and who are for some reason absent on that arbitrarily chosen date. An employee who is away on sick leave or maternity leave has a legitimate and obvious interest in the outcome of the representational question.**

[24] 2009 NSLRB 9, at para. 41.

> At the other end of the spectrum, allowing the inclusion of a large number of persons whose current connection with the employer is tenuous may give a disproportionate voice in the representation question to persons whose stake in the terms and conditions of employment in the workplace may be minimal.[25]

[Emphasis added]

In effect, if the Board, with a view to protecting casual employees, was to apply the Snapshot Rule to all employees, the Board would be excluding a number of employees who by any reasonable standard are regular employees, and who for legitimate reasons, happen to be absent on the date of application.

(i) Are there more appropriate criteria to demonstrate employee status (such as sufficient workplace connection/ongoing monetary interest demonstrated through a history of work) rather than actually being on shift which the Board should consider? – Yes

The "being on shift" on a particular day or particular days (i.e. the application date or date of vote or both dates) is too limited a criteria and will result in the inclusion of casual employees who do not have a sufficient workplace connection/ongoing interest.

4. The Labour Board Policy and case law currently differentiates between a "regular part time" employee and a "casual employee" based on several criteria including having a regular schedule (vs. call in); whether there is a "regularity and continuity" of employment; the option of refusing assignments; and the number of hours in a test period.

The current Policy provides:

> Part-time employees who can demonstrate a regularity to their employment, even if it is only a few hours per week but is consistent week in and week out in a particular test period are considered included in a bargaining unit. Whereas casual employees are those non-scheduled employees who are called in to replace others who are on sick-leave, vacation, maternity-leave, etc.

[25] *International Brotherhood of Electrical Workers, Local 2038 v. Croft Electric Ltd.*, 2007 CanLII 68772 (SK LRB), at para. 43, quoting from *International Union of Operating Engineers, Hoisting, Portable and Stationary, Local 870 v. Little Rock Construction*, [1995] 4th Quarter Sask. Labour Rep. 102, at pp. 104-05.

Regular part-time employees in the Hospital sector are required to work an average of two shifts or more per week in any given test period.

(ii) Are these appropriate criteria?

The weakness of the Policy is that it presumes that all casuals and workplaces are the same. As stated above, casual employees (and the workplaces in which casual employees work) come in all shapes and sizes. The focus of the Board's analysis should be on whether the employee who has "casual" characteristics has a sufficient:

- continuing interest in the workplace beyond the vote date; and
- community of interest with the other employees in the bargaining unit.

(iii) If an employee has a demonstrated work history over a given test period (demonstrating a sufficient workplace connection/ongoing monetary interest), should s/he be considered "regular part time" (or some other new category) even though there may be other "casual" indicia i.e. no regular schedule and no guarantee of hours (which may be hallmarks of precarious employment)?

If an employee has a demonstrated work history over a given test period, which will often reasonably signal a continuing interest, and shares a community of interest with the other employees in the bargaining unit, the employee should be included.

The decision of the Board's predecessor in *Trade Centre Ltd.*[26] is an example of the Board including casual employees in accordance with community of interest and continuing interest principles. The Board concluded that the "off-list" employees who could be called into work in one of the following three ways were properly included in the bargaining unit.

- Major events which are scheduled for months in advance for which a sign-up sheet is posted months in advance by which an 'off-list' person could get scheduled by signing.
- Off-list people may be approached by management when on the premises and asked if they wish to work a specific upcoming event.
- There is a staffing hotline in which employees could call.

The Board considered the following:

- The terms and working conditions of the off-list people are the same as the on-list people.

[26] L.R.B. No. 5069 (Interim Order 1, June 17, 2003) and L.R.B. No. 5069 (Interim Order 2, December 4, 2003)

- Some of the off-list people work numbers of hours and cleared amount of wages which were equivalent to or higher than some of the 'on-list' people.

- If no events are booked, no one in the food and beverage classification works at all.

- Once they commit and are scheduled, they are expected to be there.

- With respect to the community of interest factors, the Board concluded that all food and beverage servers have more in common in terms of work location, hours of work, working conditions, and methods of remuneration.

3. **Are there any industry specific considerations the Board should consider? - Yes**

Consistent with the Board's approach in *Trade Centre,* the BC Board's approach and the workplace contextual approach advocated by the SCC in *RCMP*, the specific industry and workplace should be considered.

4. **Are there other issues/questions the Board should be considering? – No**

5. **Is further consultation necessary? - Yes**

Yes. Stakeholders should have the opportunity to make oral submissions and the Labour Board should have the opportunity to ask questions of the Stakeholders that have made submissions.

Yours truly,

CANADIAN ASSOCIATION OF COUNSEL TO EMPLOYERS

Per:

Adrian Frost

ADRIAN FROST
President