

**Legislative  
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**ONTARIO LABOUR RELATIONS BOARD  
ORDER-IN-COUNCIL APPOINTMENT OF BRIAN SMEENK \***

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Prepared for:

Standing Committee on Government Agencies

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## INTRODUCTION

This paper has been prepared for the Members participating in the Committee's review of the Order-in-Council appointment of Brian Smeenck as a part-time member of the Ontario Labour Relations Board (OLRB or "the Board"). It describes the mandate and operations of the Board, presents information about the appointee, and identifies possible lines of questioning.

## ONTARIO LABOUR RELATIONS BOARD

| Enabling Statute                                                                                                                                                                                                                                                                       | Responsible Ministry                                                                                                                                                                                                                                  |
|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <a href="#"><i>Labour Relations Act, 1995</i></a>                                                                                                                                                                                                                                      | Labour, Training and Skills Development                                                                                                                                                                                                               |
| Agency Type                                                                                                                                                                                                                                                                            | Most Recent Annual Report                                                                                                                                                                                                                             |
| Adjudicative                                                                                                                                                                                                                                                                           | <a href="#">2019-2020</a>                                                                                                                                                                                                                             |
| Activities of the Agency                                                                                                                                                                                                                                                               |                                                                                                                                                                                                                                                       |
| The OLRB is an independent, adjudicative tribunal that mediates and adjudicates labour and employment matters under various statutes including the <i>Labour Relations Act, 1995</i> , the <i>Employment Standards Act, 2000</i> , and the <i>Occupational Health and Safety Act</i> . |                                                                                                                                                                                                                                                       |
| Board Membership                                                                                                                                                                                                                                                                       |                                                                                                                                                                                                                                                       |
| <b>Statutory No. of Members:</b> No specific number in the legislation; however, the Board is composed of a Chair (and an Alternate Chair), one or more Vice-Chairs, and an equal number of Members representing employers and employees, respectively. <sup>1</sup>                   | <b>Position Remuneration<sup>2</sup></b><br><br><b>Chairs:</b> \$174,184—\$199,059<br><br><b>Vice-Chairs (Full-Time):</b> \$136,545—\$156,077<br><br><b>Vice-Chairs (Part Time):</b> \$583 per diem<br><br><b>Members (Part-Time):</b> \$472 per diem |
| <b>Number Appointed by Cabinet:</b> All                                                                                                                                                                                                                                                |                                                                                                                                                                                                                                                       |
| <b>Current Membership:</b><br>Chair/Alternate Chair (2)<br>Vice Chairs (17 Full-Time, 10 Part-Time)<br>Members (10 Part-Time)                                                                                                                                                          |                                                                                                                                                                                                                                                       |
| <b>Term of Office:</b> No limit in the legislation; however, the <i>Agencies and Appointments Directive</i> generally limits the term of appointment to a maximum of ten years for adjudicative tribunals. <sup>3</sup>                                                                |                                                                                                                                                                                                                                                       |

<sup>1</sup> *Labour Relations Act, 1995*, S.O. 1995, c. 1, Sched. A, s. 110.

<sup>2</sup> Treasury Board Secretariat, *Agencies and Appointments Directive*, [Schedule B: remuneration of appointees to adjudicative tribunals and regulatory agencies](#).

<sup>3</sup> *Ibid.*, s. 3.2.2. Re-appointment to a further term beyond the maximum of ten years in total may be made in exceptional circumstances.

### Position Requirements

Members are appointed in accordance with a competitive, merit-based process that assesses a candidate's (1) experience, knowledge, or training on the subject matter and legal issues dealt with by the tribunal; (2) aptitude for impartial adjudication; and (3) aptitude for applying alternative adjudicative practices and procedures.<sup>4</sup>

## MANDATE AND OPERATIONS

The OLRB is an independent, adjudicative tribunal that operates at arm's length from the Ministry of Labour, Training and Skills Development. It mediates and decides cases under a variety of labour and employment laws. The majority of the tribunal's work falls under its founding statute, the *Labour Relations Act, 1995* (LRA). The LRA confers authority on the Board over many aspects of labour relations including

- the certification of unions and the termination of bargaining rights;
- the handling of unfair labour practices;
- issues pertaining to strikes and lockouts; and
- the arbitration of grievances in the construction industry.<sup>5</sup>

In addition, a significant portion of the Board's work falls under the *Employment Standards Act, 2000* (ESA) and the *Occupational Health and Safety Act* (OHSA). The Board's authority under the ESA includes reviewing the decisions made by Employment Standards Officers (who decide claims filed with the Ministry of Labour related to wages, overtime, and severance, among other things). The Board's authority under the OHSA includes hearing appeals from orders or decisions of health and safety inspectors (who are responsible for enforcing the OHSA and may issue certain orders to ensure compliance with it).<sup>6</sup>

The Board also has jurisdiction to decide certain matters under more than 20 other statutes including the *Crown Employees Collective Bargaining Act*, the *Colleges Collective Bargaining Act*, and the *Education Act*.<sup>7</sup>

## Board Processes

As an independent adjudicative tribunal, the Board is entitled to determine its own practices and procedures, and make rules governing the conduct of proceedings. The Board's [Rules of Procedure](#), forms, and [Information Bulletins](#) are available on its website. OLRB adjudicators render decisions based on the evidence presented and submissions received, and on the adjudicator's interpretation of the facts in dispute and the relevant law.<sup>8</sup>

<sup>4</sup> [Adjudicative Tribunals Accountability, Governance and Appointments Act, 2009](#), S.O. 2009, c. 33, Sched. 5, s. 14(1).

<sup>5</sup> Ontario Labour Relations Board (OLRB), *Annual Report 2019-2020*, p. 6.

<sup>6</sup> *Ibid.*; *Employment Standards Act, 2000*, S.O. 2000, c. 41, s. 116; *Occupational Health and Safety Act*, R.S.O. 1990, c. O. 1, s. 61.

<sup>7</sup> OLRB, *Annual Report 2019-2020*, p. 5.

<sup>8</sup> *Ibid.*, p. 4.

Most applications filed with the OLRB are first assigned to a mediator to explore the possibility of settlement without a full hearing. In 2019-20, 90% of all disputes filed with the Board were resolved, including by mediation, prior to a final hearing.<sup>9</sup>

If mediation is not successful, the matter is scheduled for a consultation or a hearing. A consultation is a less formal type of hearing, where the adjudicator takes greater control over the proceedings (for example, by asking questions of the parties or limiting the scope of questioning). A hearing is a formal court-like process, where the parties make opening statements, examine and cross-examine witnesses, present relevant documentary evidence, and submit final arguments.<sup>10</sup> Following a consultation or hearing, the Board issues a written decision, which is sent to the parties and available to the public.

## Caseload

In 2019-20, the Board received 3,571 new applications, compared with 3,930 in the previous fiscal year, the second highest and highest number in the last five years respectively.<sup>11</sup> The majority of applications fell into the following five categories:

- certification (617) and termination (111) of bargaining rights under the *Labour Relations Act, 1995*;
- contraventions of the *Labour Relations Act, 1995* (500), the *Colleges Collective Bargaining Act* (3), and the *Public Service of Ontario Act* (0);
- appeals of decisions of Employment Standards Officers under the *Employment Standards Act, 2000* (1067);
- referrals of construction industry grievances under the *Labour Relations Act, 1995* (679); and
- complaints with respect to reprisals, and appeals of inspectors orders, under the *Occupational Health and Safety Act* (364).<sup>12</sup>

Of the 5,321 cases before the Board in 2019-20 (some were carried over from the previous year), 3,804 were completed either with or without a hearing (e.g., by final decision, settlement, or withdrawal). Of those cases, 52% were completed within approximately 90 days from receipt of the initial application, and 68% were completed within five months.<sup>13</sup>

## FINANCIAL INFORMATION

In 2019-20, the Board's total expenditure was \$13.3 million, with approximately \$3.2 million going to remuneration for OIC appointees. The Board's annual operating budget is part of the Ministry's estimates and allocation process, and the Board is required to report regularly on its expenditures and planned

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<sup>9</sup> Ibid., p. 8.

<sup>10</sup> Ibid.

<sup>11</sup> Ibid., 17.

<sup>12</sup> Ibid., p. 19.

<sup>13</sup> Ibid., p. 17.

commitments. The Ministry has delegated authority for specific financial and administrative transactions to the Chair of the Board, the Director, and managers.<sup>14</sup>

An overview of the Board's financials for 2019/2020 is set out in the table below.

**Figure 1: OLRB Estimates and Actuals 2019/20**

*All figures in \$000.0 thousand*

| Account                          | Expenditure Estimates | In-year Board Approvals | Year-end Budget | Year-end Actuals |
|----------------------------------|-----------------------|-------------------------|-----------------|------------------|
| Salaries and Wages               | 8,159.9               | -                       | 8,159.9         | 8,118.8          |
| Benefits                         | 1,002.1               | -                       | 1,002.1         | 1,066.7          |
| Transportation and Communication | 448.9                 | 285.6                   | 734.5           | 236.2            |
| Services                         | 3,197.6               | 170                     | 3,367.6         | 3,822.4          |
| Supplies and Equipment           | 82.2                  | -                       | 82.2            | 82.8             |
| <b>Total</b>                     | <b>12,890.7</b>       | <b>455.6</b>            | <b>13,346.3</b> | <b>13,326.9</b>  |

Source: OLRB, *Annual Report 2019-2020*, p. 44.

## RECENT DEVELOPMENTS

### Impact of COVID-19

Like other Tribunals, the OLRB has had to expand electronic filing and virtual hearings over the past year due to the COVID-19 pandemic. While the Board struggled initially to set up staff who had never been equipped or required to work remotely, it has continued to operate and function throughout the pandemic.<sup>15</sup>

Currently, all filing must be made electronically. In addition, the Board is currently operating under the presumption that matters will proceed by video hearing unless an in-person hearing is requested by the parties and directed by the Board. Mediation is also being offered by video or teleconference.<sup>16</sup> In August 2020, the Board released a series of policies and protocols for resuming some in-person hearings and mediations at its Toronto offices.<sup>17</sup> However, since Toronto moved into lockdown in November 2020, the Board has stated that it will not hold

<sup>14</sup> Ibid., p. 44.

<sup>15</sup> Ibid., p. 2.

<sup>16</sup> OLRB, "[COVID-19 Operations](#)"; OLRB, [Notice to the Community – In-Person Hearings and Mediations](#), version 1.0, August 24, 2020.

<sup>17</sup> See, for instance, OLRB, [Policy for Resumption of In-Person Hearings](#), August 23, 2020, and OLRB, [Resumption of In-Person Hearings and Mediations: Safe, Limited, Gradual](#), (Presentation), August 25, 2020.

in-person hearings or mediations “absent very exceptional and demonstrated circumstances” until further notice.<sup>18</sup>

## **THE WITNESS**

According to the Office of the Premier, the Witness, of Toronto, is a partner at Fasken Martineau DuMoulin, and serves as a Chair (part-time) for the Public Service Grievance Board. His community involvement includes serving as President and Chair for the Merit Award Bursary Program.

## **POSSIBLE QUESTIONS**

*What has motivated the witness to seek this position?*

*What particular contribution does the witness hope to make as a member of the Board?*

*What challenges, if any, does the witness anticipate the Board will continue to face in its operations during the COVID-19 pandemic?*

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<sup>18</sup> OLRB, [Notice to the Community – In-Person Hearings and Mediations](#), November 23, 2020.