Commentary
on
A Review of Labour Relations in British Columbia
March 2002

INTRODUCTION

On March 12, 2002 the provincial government released a "discussion paper" setting out various proposed changes to the *Labour Relations Code* (the "Code"). View a copy of the discussion paper here.

The purpose of this commentary is to assist unions in analyzing the proposed changes to the Code. If you have any questions as to how the proposed changes might apply in a particular situation, please do not hesitate to contact us.

There are 18 areas of proposed changes set out in the discussion paper. The discussion paper describes many of the proposals in very general terms, without providing the actual statutory language proposed to effect the changes. In addition, in some cases even the general intent of proposals is unclear. Consequently it is difficult to fully analyze all of the proposals. However, in our view, it is clear that there are several common themes running through these proposals:

1. The proposals would shift the emphasis of the Code from promoting collective bargaining to promoting employer "competitiveness".[1]

2. The proposals would make it much more difficult for non-union employees to obtain union representation.[2]

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[1] Proposal 3

[2] Proposals 2, 3, 5, and 13

3. The proposals would make it much more difficult for unionized employees to maintain their union representation in various circumstances.[3]

4. The proposals would allow greatly increased state intervention in free collective bargaining and the internal affairs of unions. [4]

In our view, while almost all of the proposals will adversely affect employees and their unions, the proposals with the most far-reaching negative implications are the following:

1. The proposed amendments concerning the purposes of the Code (Proposal #3). This proposal would likely result in a substantial change in the Board's approach to the various substantive provisions of the Code and would also allow increased state intervention in free collective bargaining and the internal affairs of unions.

2. The proposed amendments concerning employer communications with employees (Proposal #5). This proposal would allow employers considerably increased latitude to actively campaign against unions during organizing campaigns, effectively immunizing employer communications from existing unfair labour practice provisions of the Code.

3. The proposed amendments concerning partial decertification of bargaining units (Proposal #18). This proposal would allow groups of employees to decertify without any regard for the impact on employees in the remainder of the bargaining unit.

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[3] Proposals 2, 3, 5, 7, 8, and 18.

[4] Proposals 3 and 15

4. The proposed amendments concerning decertification after two years of employer inactivity (Proposal #7). This proposal would have a very significant negative impact on employees and their unions in some industries, particularly the construction industry.

5. The proposed amendments concerning the exclusion of employees from bargaining units (Proposal #2). This proposal would likely result in many non-managerial employees being denied the right to union representation and collective bargaining.

We will now address each of the 18 proposals in turn.

1. Definition of Picketing

Proposal

The Code presently defines picketing in Section 1 as follows:

> "picket" or "picketing" means attending at or near a person's place of business, operations or employment for the purpose of persuading or attempting to persuade anyone not to
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> a) enter that place of business, operations or employment
> b) deal in or handle that person's products, or
> c) do business with that person,
>
> and a similar act at such a place that has an equivalent purpose;

The discussion paper proposes to amend the existing definition of picketing in the Code so that it excludes "consumer leafleting". There are then two alternative proposals for a new definition of "consumer leafleting".

The first proposed definition is as follows:

> "Consumer leafleting" means the communication of information regarding a dispute for the purpose of persuading or attempting to persuade a consumer to boycott a product or a business, or for an equivalent purpose.

The second proposed definition is as follows:

> "Consumer leafleting" means the distribution of lawful, accurate written information about a labour dispute to persuade potential consumers to boycott a product or a place of business, operations or employment, where:
>
> a. the information does not encourage or entice the commission of unlawful or tortious acts and is not misleading or defamatory;
> b. the information is distributed in a manner which is not coercive or intimidating and which does not impede access to or egress from the leafleted premises; and
> c. the distribution of the information does not have the purpose or effect of preventing employees of the leafleted entity from working or interfering with the contractual relations between the leafleted entity and third parties.

Background

In 1999 the Supreme Court of Canada struck down the present definition of picketing because it violated the Charter's guarantee of freedom of expression by restricting consumer leafleting.[5]

Commentary

The proposed amendments would maintain the existing definition of picketing, excluding only consumer leafleting from the definition. There may still be other forms of expression which would be unconstitutionally caught by this definition of picketing (such as secondary picketing[6] and political protests). Consequently the proposal may still leave British Columbia with unconstitutional picketing provisions.

The difference between the two proposed definitions of consumer leafleting is that the first one excludes all consumer leafleting, while the second one excludes only certain types of consumer leafleting, leaving the Board free to restrict as picketing any consumer leafleting that the Board considers misleading or unlawful at common law.[7]

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[5] *United Food and Commercial Workers, Local 1518 v. K-Mart Canada Ltd.,* [1992] 2 S.C.R. 1083

[6] See the recent Supreme Court of Canada decision, *Retail, Wholesale and Department Store Union, Local 558 v. Pepsi-Cola Beverages (West) Ltd.*, 2002 S.C.J. No. 7

[7] Jurisdiction to determine whether consumer leafleting is unlawful at common law currently rests with the courts. It seems odd that the discussion paper would propose giving the Board jurisdiction in this area – an area outside the Board's area of expertise – at the same time as the discussion paper proposes moving existing Board jurisdiction over other areas to the courts, ostensibly to save money (see proposals 6 and 10).

2. Definition of Manager

Proposal

The Code presently defines "employee' in Section 1 as follows:

> "employee" means a person employed by an employer, and includes a dependent contractor, but does not include a person who, in the board's opinion,
>
> a) performs the functions of a manager or superintendent, or
> b) is employed in a confidential capacity in matters relating to labour relations or personnel;

The discussion paper states:

> Concerns have been raised that in recent years, the LRB has reduced the scope of manager functions to include only supervisors who have the right to hire and to fire employees.

The discussion paper then proposes:

> . . . persons who are integrated into a "management team" and not just those who hire/fire, should be excluded from the bargaining unit.

The discussion paper does not set out the actual statutory language proposed to effect this change.

Background

Only "employees" as defined in the Code have access to collective bargaining. Managers do not have access to collective bargaining under the Code. This exclusion of managers is based on the notion that employers are entitled to the undivided loyalty of their managers, and that consequently managers should be deprived of the right to collective bargaining enjoyed by other employees.

The question is where exactly the line should be drawn between managers and employees. The Board presently looks primarily at whether a person has labour relations

input and authority over discipline and discharge, with authority over hiring and promotions being a secondary factor.[8] As a result, front line supervisors are considered employees rather than managers, unless they have significant authority in the relevant areas.

The "management team" is a concept historically employed by the Board to exclude *employees* from a bargaining unit, even though they are not managers under the Code, when their community of interest lies with management and not the union. Contrary to what is suggested by the discussion paper proposal, the Board still uses the management team concept to exclude employees who are not managers from bargaining units. However, the Board has noted that this concept was sometimes distorted and inappropriately enlarged to the point where the "team" was understood to include "near managers", an understanding that could result in the exclusion of front line supervisors.[9] The Board has rejected this approach and restored the much narrower meaning that was originally ascribed to this concept. For example, employees with a personal or familial relationship with a manager, or those who share in the ownership of the business, might be excluded from the unit on the basis of the management team concept. The Board has stated that exclusion on this basis would be relatively rare.[10]

Commentary

The proposal to exclude individuals who are part of the "management team" from collective bargaining, "and not just those who hire/fire" will likely result in a more expansive notion of the management team that has previously been denounced by the Board. The proposal expressly contemplates that individuals who do not "hire/fire" may

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[8] *Cowichan Home Support*, B28/97

[9] *Vancouver General Hospital*, B81/93

[10] Ibid

be excluded. This suggests that the Board may well exclude "near managers" even where the three key criteria of labour relations input, authority over discipline and discharge, and hiring and promotion are not met. Thus, the proposal would effectively reverse the Board's existing approach that supervisors should not be excluded where only minimal conflict of interest arises through the exercise of their supervisory duties.[11]

This proposal resurrects a largely discredited concept that was once described by (then) Chair Kelleher as having had a "chequered career at the Labour Relations Board"[12]. Persons such as front line supervisors who would otherwise enjoy collective bargaining in either the primary bargaining unit or a supervisory unit will likely be deprived of access to union representation (or have existing union representation taken away). Unions will also lose the strength and bargaining power that results from the inclusion of individuals with supervisory skills in bargaining units and the ability to withdraw their labour in a strike.

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[11] *Highland Valley Copper*, B289/98

[12] *Legal Services Society*, L224/82

3. Purpose of the Code (Section 2)

Proposal

Section 2 of the Code presently provides as follows:

> 2 (1) The following are the purposes of this Code:
>
> (a) to encourage the practice and procedure of collective bargaining between employers and trade unions as the freely chosen representatives of employees;
> (b) to encourage cooperative participation between employers and trade unions in resolving workplace issues, adapting to changes in the economy, developing workforce skills and promoting workplace productivity;
> (c) to minimize the effects of labour disputes on persons who are not involved in the dispute;
> (d) to promote conditions favourable to the orderly, constructive and expeditious settlement of disputes between employers and trade unions;
> (e) to ensure that the public interest is protected during labour disputes;
> (f) to encourage the use of mediation as a dispute resolution mechanism.
>
> (2) The board must exercise the powers and perform the duties conferred or imposed on it under this Code having regard to the purposes set out in subsection (1).

The discussion paper proposes to amend Section 2 to provide as follows (with the new statutory language in bold):

> 2(1) **The board and other persons exercising authority conferred by the Code must exercise the powers and perform the duties conferred or imposed on them under this Code in a manner that:**
>
> a. ***recognizes the rights and obligations of employees, employers and trade unions under the Code;***
> b. ***fosters the employment of workers in a productive and competitive manner;***
> c. ***facilitates*** the practice and procedure of collective bargaining between employers and trade unions as the freely chosen representatives of employees;
> d. encourages cooperative participation between employers and trade unions in resolving workplace issues, adapting to changes in the economy, developing workforce skills and promoting workplace productivity ***and competitiveness;***
> e. minimizes the effects of labour disputes on persons who are not involved in the dispute;
> f. promotes conditions favourable to the orderly, constructive and expeditious settlement of disputes between employers and trade unions;
> g. ensures that the public interest is protected during labour disputes;
> h. encourages the use of mediation as a dispute resolution mechanism.

Background

The existing Section 2 sets out various purposes of the Code. It then requires the Board to exercise its powers and perform its duties having regard to these purposes.

The existing Section 2 does not confer any rights or impose any obligations on unions, employers, or employees. It is only directed toward the Board.

The existing Section 2 is considered an important aid to interpreting the other provisions of the Code.

Commentary

The proposed amendments to Section 2 do two things. First, they significantly change the purposes of the Code. Second, they impose a new requirement that unions act in accordance with those purposes. We will address each aspect in turn.

The changes to the purposes of the Code reduce the emphasis on promoting collective bargaining. Since 1992, the Code has had the purpose of *encouraging* collective bargaining. The proposal deletes this purpose and replaces it with the mere *facilitation* of collective bargaining. In addition, the proposal adds several new purposes. The most significant is the new purpose of "fostering the employment of workers in *a productive and competitive manner*". These changes to the purposes of the Code have the potential to substantially change the Board's approach to the various substantive provisions of the Code, to the benefit of employers and the detriment of employees and their unions.

Equally significant is the new requirement that unions act in accordance with the new purposes when "exercising authority conferred by the Code". Union activities that may fall within this phrase include collective bargaining, striking, picketing, and the

representation of members. Consequently, these proposals open the door to unprecedented state intervention in free collective bargaining and the internal affairs of unions in the name of encouraging productivity and competitiveness.[13] For example, when a union engages in collective bargaining, it could be required to do so in a manner that fostered the employment of workers in a productive and competitive manner,[14] contrary to the Board's traditional hands off approach to the substance of collective bargaining.[15]

While the proposals would open the door to both state intervention in collective bargaining and internal union affairs and a substantial change in the Board's approach to the various substantive provisions of the Code, the amendments do not necessarily compel such results. The Board has considerable discretion in the interpretation and application of the purposes section of the Code.

In a paper published by Brent Mullin prior to his recent appointment as Chair of the Board, Mr. Mullin expressly advocated amending the Code to encourage competitiveness and investment:

> .
> . . . I suggest that we now need to write directly into the *Code* the full 1992 economic mandates of encouraging competitiveness and investment, along with the "adapting to changes in the economy" and productivity which have already been put into the *Code*. **Developing competitiveness and investment should be made an express provision in the Section 2 purposes of the *Code*. It then needs to be clearly understood that via Section 2(2), the need to encourage these economic goals is**

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[13] We note that determining issues of productivity and competitiveness is not a matter the Board can claim to have any expertise in and consequently it is a matter where the Board is likely to defer to an employer's views.

[14] Similarly, when a union exercises its rights to strike and picket, the *union* could be required to do so in a manner that minimized the effect on persons who are not involved in the dispute (Section 2(1)(e)) and ensured that the "public interest" was protected (Section 2(1)(g)).

[15] However, it should be noted that the Board has already in recent years started to move away from this traditional hands off approach to the substance of collective bargaining. See, e.g. *Northwood Pulp and Timber*,B271/94

> **to be considered in every labour relations activity or decision which ultimately falls under the jurisdiction of the Labour Relations *Code***, be it mediation, adjudication at the Board, arbitration, etc.
>
> If this mandate of encouraging competitiveness and investment is properly implemented, we will have to address and foster the success of the enterprises within our labour relations system. We can **then** go on to the traditional, redistributive role. . . .
>
> By fully implementing the 1992 mandate, **the result would be that the *Code* would now have two, fundamental purposes**:
>
> (1) as identified in the 1992 mandate, **to respond to the changes in the economy and encourage productivity, competitiveness and investment. The purpose of these goals is to produce profits and prosperity, in order to lay a proper basis for**
>
> (2) **the traditional, redistributive goal**, though now augmented to address the contemporary needs of job security and retraining.[16]

This suggests that ensuring employer profits should be the foremost goal of the Board, with the labour movement's "traditional redistributive role" only coming into play *after* these employer goals have been satisfied.

In our view it is likely that the Board would use the proposed changes to the purposes of the Code to significantly change the Board's existing approach to the substantive provisions of the Code in a way that benefits employers and their goals – by reducing the emphasis on promoting collective bargaining and creating a new emphasis on promoting the competitiveness and profitability of employers. In our view there is also a very real possibility that the Board would use the proposed changes to Section 2 to intervene in free collective bargaining and the internal affairs of unions to promote purposes such as employer "competitiveness".

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[16] B. Mullin, *Towards a Progressive Labour Relations Board*, Part 3, pages 19 - 20 (emphasis added)

4. Review of the Code (Section 3)

Proposal

Section 3 of the Code presently provides:

> 3 (1) The minister may appoint a committee of special advisors to undertake a continuing review of this Code and labour management relations and, without limitation, to
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> (a) provide the minister with an annual evaluation of the manner in which the legislation is functioning and to identify problems that may have arisen under its provisions,
> (b) make recommendations concerning the need for amendments to the legislation, and
> (c) make recommendations on any specific matter referred to the committee by the minister.
>
> (2) The minister may make regulations considered necessary or advisable respecting the receipt and dissemination of submissions and recommendations under subsection (1).

The discussion paper makes two proposals under the heading of Section 3. The first proposal is to have a tri-partite committee of special advisors set up to review the proposed changes to the Code contained in the discussion paper and make recommendations to the Minister of Labour.

The second proposal is described as follows:

> In the recent past, three major public sector groups have been unable to reach agreement after months of bargaining and work disruption: nurses/paramedical professionals, Lower Mainland transit and teachers. These disputes were settled through legislation. A formal review of public sector bargaining should be undertaken.

Background

Following the release of a preliminary version of the discussion paper in January 2002, the B.C. Federation of Labour took the position that any changes to the Code should be dealt with through a committee of special advisors pursuant to Section 3 of the Code.

Commentary

The proposal to possibly set up a tri-partite committee of special advisors to review the other proposals in the discussion paper is *not* a proposal to follow the Section 3 process. Under the Section 3 process the committee of special advisors is to conduct its own review of the legislation, not merely examine proposals that originate primarily (if not entirely) from employers. Consequently, even if acted upon, this proposal falls far short of the independent review contemplated by Section 3.

An independent review of public sector collective bargaining might have some merit in theory. However, we view this proposal with considerable skepticism given the government's legislative abrogation of collective agreements and free collective bargaining in the public sector in January of this year.

5. Right to Communicate (Section 8)

Proposal

Section 8 of the Code presently provides:

> 8. Nothing in this Code deprives a person of the freedom to communicate to an employee a statement of fact or opinion reasonably held with respect to the employer's business.

The discussion paper proposes amending Section 8 to provide:

> 8. Nothing in this code deprives a person of the freedom to express his or her views on any matter, including matters relating to an employer or a trade union, provided he or she does not use intimidation, coercion or threats.

The discussion paper also proposes amending the Code to provide a process where, prior to a representation vote, either the employer or the union could apply for a meeting to make a presentation to employees (with the other side participating and a "moderator" designated by the Board). The discussion paper states:

> It has also been suggested that amendments be made to the Code and the Regulations respecting certification and de-certification to permit a pre-vote meeting with members of the unit, prior to a representation vote. Upon an application to the Board:
>
> - Permit either party (the employer or the union) to decide that they want to make a presentation to employees affected by the outcome of the vote within 48 hours of when the vote is scheduled.
> - The employer will inform the LRB of a convenient time and location for the meeting.
> - Employee attendance at the meeting is voluntary if the meeting held outside of company time and location.
> - The union (or the employer) is entitled to attend the meeting and respond to comments made by the other party.
> - A person designated by the LRB would also attend the meeting and act as a moderator.
> - The moderator would ensure:
>   - Equal time for employer and union to speak.
>   - Adequate opportunity for questions and answers.
>   - Questions could be asked without revealing employee identity.

- This person would make a report to the LRB respecting the discussions taking place at the meeting.
- Statements made at the meeting are subject to Section 8 of the Code.

> The cost of attendance by a Special Investigation Officer or another person appointed by the Board would be $500. The cost would be shared if the employer's union's [sic] business representatives attend the meeting.
>
> It has further been proposed that this option for either party to request a formal supervised meeting with members of the bargaining unit should also be available in situations involving the use of a Final Offer Vote pursuant to Section 78.

The discussion paper does not set out the actual statutory language proposed to effect these changes.

Background

The unfair labour practice provisions of the Code prohibit anti-union intimidation and coercion (Section 9), threats and promises (Section 6(3)(d)), and interference with the formation, selection or administration of a trade union (Section 6(1)). Employer communications with employees can violate any of these provisions.

The Board has always recognized the unique power that employers have over their employees and has consequently rejected the notion that employers should have a free hand to campaign against unions, particularly during organizing drives.[17]

Commentary

The existing Section 8 only deals with employer statements with respect to the employer's business. Under the proposed amendment to Section 8, employers would be free to express views on *any* matters, including matters relating to unions. In addition, employer communications would no longer have to be statements of fact or reasonably

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[17] See, for example, *Cardinal Transportation*, B344/96

held opinions to be protected by Section 8. Consequently an employer would have much more latitude to engage in an active campaign against a union during an organizing drive – a campaign where the employer could make all sorts of statements about unions, no matter how unfounded and unreasonable those statements might be.

Employers would still be prohibited from using intimidation, coercion, and threats by the Code's unfair labour practice provisions. However, the Board is likely to take a narrower view of what constitutes intimidation, coercion and threats given the express employer right to express views on matters relating to unions.[18] In addition, it appears likely that employer communications that interfered with the formation, selection or administration of a union would be permissible – in effect immunizing employer statements from the unfair labour practice protections of Section 6(1).[19] Employer promises designed to induce employees to refrain from union membership might similarly be immunized from the unfair labour practice protections of Section 6(3)(d).

This proposal ignores the unique power employers have over employees and would result in American style "election campaigns" during organizing drives. [20]

In light of these concerns, the additional suggestion that some sort of pre-vote joint meeting might be scheduled on the employer's premises with a Board moderator in attendance to ensure "equal time" appears to be nothing more than a transparent attempt to appear even-handed while actually giving employers much greater ability to interfere

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[18] The Board has historically been generally quite ready to find that employer statements about unions constituted intimidation, coercion, and threats. The Board's willingness to do so will likely be diminished as a result of the proposed employer right to express views on matters relating to unions.

[19] By virtue of the introductory words of Section 8: "Nothing in this Code deprives".

[20] We note that while this proposal is of greatest concern in regard to organizing drives, it also enlarges an employer's ability to interfere in union matters post-certification, such as in decertification and collective bargaining situations.

with employee choice. First, an employer's unique power over employees gives an employer the unique ability to improperly influence employees. The proposal ignores this fundamental difference between employer communications and union communications. Second, employers have access to employees alone, without a moderator, every working day. A single meeting that ensures "equal time" to both sides does not change this fact. Third, the proposed "pre-vote" joint meeting proposal requires that the union first secure sufficient support for a vote – there is no meeting otherwise. The possibility of a union even obtaining sufficient support for a vote so as to get a meeting is significantly diminished by the proposal concerning Section 8.

6. Duty of Fair Representation Complaints (Sections 12 & 13)

Proposal

Section 12 of the Code contains the duty of fair representation. Section 13 sets out the procedure for complaints under Section 12.

The discussion paper contains two alternative proposals.

The first proposal is that Sections 12 and 13 be dropped from the Code, and that complaints respecting the treatment of a union member by a trade union be resolved by complainants proceeding directly to the courts.[21]

The second proposal is described as follows:

> An alternative suggestion is to streamline the process for the affected parties and the LRB, by giving the LRB more discretion to use procedures other than formal adjudication to process a Section 12 complaint where appropriate. Possible alternative procedures could include referral to and adjudication by:
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> - The Employment Standards Tribunal adjudicators
> - The LRB Mediation Division mediators
> - A settlement conference
> - A read and review process
> - A brief "inquiry" hearing
> - Mediation/arbitration by a special investigating officer.
>
> As another streamlining initiative, the Code could be amended to specify a time limit for filing a Section 12 complaint. While the Code is silent at present, LRB policy is currently 1 year. It has been suggested that such complaints be filed within six months.

There is no statutory language proposed to accomplish this proposal.

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[21] Section 10 of the Code also deals with complaints by employees against unions concerning internal union affairs. However, the discussion paper makes no mention of Section 10.

Background

Since the origin of the Code in 1973, the Board has had jurisdiction over complaints of this nature. This is common to most jurisdictions in Canada.

As set out in the discussion paper, there are a large number of Section 12 complaints each year, with less than 5% being found to have merit.

Commentary

There are sound policy reasons for keeping Section 12 and 13 in the Code. The Board, with its relative expertise and understanding of labour relations issues, is generally better suited to determining complaints of this nature than the courts. Transferring jurisdiction to the courts will also mean that disputes of this kind will be more costly for all parties involved.[22]

It is not possible to properly comment on the alternative proposal to "streamline the process" without further details of the proposal.

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[22] The expense of court proceedings may also dissuade some potential complainants from proceeding with their complaints.

7. Revocation of Bargaining Rights (Section 33)

Proposal

The discussion paper proposes that an employer should be able to make an application for decertification if the business of the employer has not been active for a period of two years.

The discussion paper does not set out the actual statutory language proposed to effect this change.

Background

Section 33 of the Code provides for decertification of unions. At present, an employer can apply under Section 33(1) for an order canceling a certification if it "…has ceased to be the employer of the employees in the unit." To succeed, an employer must affirmatively establish that the business has closed and will not reopen. The Board takes a cautious approach to these requests, even where the business has apparently been dormant for some time and there are no employees at the time of the application. As the Board stated in *Kitimat Builders Supplies* "…a hiatus in the operation of a business does not automatically result in the termination of a Union's bargaining rights."[23]

From 1984 to 1992 the previous *Labour Code* and *Industrial Relations Act* contained provisions requiring the Board to cancel a certification where an employer had not employed bargaining unit employees for two years, except in limited circumstances of unreasonable employer conduct.[24] These provisions were eliminated in 1992.

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[23] B100/97

[24] Section 52(8) under both previous Acts.

Commentary

Since an employer can presently make an application for decertification at any time, we assume the actual intent of this proposal is not the stated intent of enabling employers to make such applications after two years of inactivity. Instead, we assume the intent is to require the Board to grant such applications after two years of inactivity, similar to the legislation in effect from 1984 to 1992.

This would be a departure from the current approach, which treats a hiatus, even a lengthy one, as a factor to be considered but not as determinative. The Board has the discretion to dismiss an application by an employer where the business might reopen after a lengthy hiatus. If the proposal is adopted, the Board would no longer have the discretion to refuse to cancel a certification after a dormant period of two years.

This proposal is of serious concern because it enables employers to defeat a certification through a relatively simple device. Decertification will follow a two year period of inactivity. This is of greatest concern in industries such as the construction industry where employers are mobile and can operate in other jurisdictions. In these industries employers can simply operate outside British Columbia for two years to evade their certifications here.[25]

This proposal is aimed at suppressing the healthy skepticism expressed by the Board in decisions like *Kitimat Builders Supplies*: "…their application begs the question: if they have no intention of reopening (or transferring) the business why do they want the certification cancelled?"[26]

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[25] Similarly, an employer might be able to operate through contractors for two years and thus evade its certification.

[26] B100/97

8. Successorship Rights (Section 35)

Proposal

Section 35 of the Code contains the successorship provisions of the Code. Section 35 provides in part:

> 35 (1) If a business or a part of it is sold, leased, transferred or otherwise disposed of, the purchaser, lessee or transferee is bound by all proceedings under this Code before the date of the disposition and the proceedings must continue as if no change had occurred.
>
> (2) If a collective agreement is in force, it continues to bind the purchaser, lessee or transferee to the same extent as if it had been signed by the purchaser, lessee or transferee, as the case may be.

The discussion paper proposes that the successorship rights and obligations under Section 35 should not apply if the business is sold, leased or transferred by a trustee under the *Bankruptcy and Insolvency Act*, unless the Board is satisfied that the employer is attempting to evade collective bargaining obligations.

The discussion paper does not set out the actual statutory language proposed to accomplish this.

Background

Where a successorship occurs, the new employer is bound by the certification and collective agreement of the previous employer and is required to continue the employment of existing employees.

Under the current Code, a sale, lease or transfer of a business by a trustee in bankruptcy may give rise to a successorship so that the purchaser is bound by the collective

agreement. This was not the case under the previous *Industrial Relations Act* in effect from 1987 to 1992, which expressly provided that the successorship provisions did not apply where the business was sold, leased, transferred or otherwise disposed of by a trustee in bankruptcy unless the Council was satisfied that there was an attempt to evade collective bargaining obligations.[27]

Commentary

The proposed amendment to the Code resurrects the provisions of the previous *Industrial Relations Act.* This proposal serves to diminish protection for workers at a time when they need it the most. Employees do not enjoy any particular priority as against secured creditors, so bankruptcy proceedings afford them little in the way of security. This proposal means that the measure of security provided to them by the successorship provisions of the Code in bankruptcy proceedings are eliminated too. They will lose the benefits of their collective agreement, if they are maintained on the payroll by the new employer at all.

Furthermore, the proposed amendment allows employers to manipulate the process so as to defeat a union's certification. It is a difficult task to show that a claim in bankruptcy was designed to "evade" collective bargaining obligations. After all, bankruptcy is, in a sense, a device to legally avoid or "evade" certain obligations.

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[27] Section 53 (1.3)

9. Essential Service Designation (Section 72)

Proposal

The discussion paper proposes that the Code be amended to permit the LRB to appoint a mediator or Special Investigating Officer with the authority to mediate and adjudicate essential service designations.

The discussion paper does not set out the actual statutory language proposed to effect such a change.

Background

Part 6 of the Code contains the provisions concerning the designation of essential services. Section 72(3) permits the Associate Chair to appoint "one or more mediators to assist the parties to reach an agreement on essential services designations". Section 72(5)(b) permits the Board to adopt the mediators recommendations "in its discretion" when formally designating essential services.

As the Board noted in *Health Employers Association of BC*[28] these changes were included in Bill 84 after the Industrial Relations Council struggled with essential services designations prior to a strike in the health care industry in 1992. The Board also noted that:

> one of the lessons learned from that experience was that the parties are sophisticated, capable and mature enough to settle most of the issues on their own or with the assistance of mediation, and at the end of the day comparatively little adjudication may be required. The result was that mandatory mediation was incorporated as part

[28] B73/96

> of the essential service regime in the Code as a first step before coming before the Board for adjudication.[29]

The Board further noted that a conference was held in 1995 to permit the labour relations community to discuss all aspects of the essential services process and that the "…experience in 1992 and the parties' participation in the ESD conference in 1995, in the Panel's view, were important catalysts to the parties' ability to resolve most of the issues with respect to the Standard Order in this case at the mediation stage."[30]

Commentary

The proposal that mediation might be part of the essential services designation process is not new, or necessary. It is redundant. Indeed, mediation was introduced in 1993 after the health care dispute the previous year, and became an important and effective part of the process and remains so to date.

The proposal that mediators and Special Investigating Officers might adjudicate unresolved issues is, in our view, one that is aimed at facilitating the downsizing of the Board rather than improving the process. As things now stand, the Board may adopt the recommendations made by mediators, thereby potentially reducing the time required for adjudication. Also, the matters referred to adjudication are relatively few, since mediation has proved effective. Therefore, unless the number of vice-chairs stands to be significantly reduced, then there is no need to assign issues to mediators and SIOs for adjudication. The adjudication of essential services disputes is not the drain on the Board's resources that it once was.

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[29] Ibid

[30] Ibid

We also note that the Code does not permit those who are not vice-chairs to serve as adjudicators, unless they are members assigned to a panel along with the chair or a vice-chair.

10. LRB Review of Arbitration Awards (Section 99)

Proposal

Section 99 of the Code gives the Board the power to review arbitrations awards.

The discussion paper proposes that Section 99 be repealed from the Code and that issues related to arbitration decisions be appealed directly to the courts.

Background

Section 99 gives the Board the power to review arbitration awards on two grounds:

> (a) a party to the arbitration has been or is likely to be denied a fair hearing, or
>
> (b) the decision or award of the arbitration board is inconsistent with the principles expressed or implied in this Code or another Act dealing with labour relations.

Since 1975, the Board has had review jurisdiction over arbitration awards.[31] This is unique in Canada. In all other Canadian jurisdictions the courts, rather than labour boards, review arbitration awards.

Commentary

In our view, the Board's review jurisdiction over arbitration awards has generally served the labour relations community well. As with the duty of fair representation in Section 12, there are sound policy reasons for keeping jurisdiction over the review of arbitration awards with the Board. The Board, with its relative expertise and understanding of labour relations issues is generally better suited to determining these issues than the

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[31] This appellate jurisdiction is shared with the B.C. Court of Appeal which has appellate jurisdiction in relatively narrow circumstances under Section 100 of the Code. The discussion paper does not address Section 100.

courts. Transferring jurisdiction to the courts will also mean that reviews of arbitration awards will be more costly for the parties.[32]

[32] However, if the proposed changes to the purposes of the Code are implemented, it is possible that the courts may become a more favourable environment for unions than the Board in regard to the review of arbitration awards.

11. Reconsideration of Board Decisions (Section 141)

Proposal

Section 141 of the Code permits the Board to reconsider its own decisions. The discussion paper proposes to reduce the current reconsideration powers by eliminating reconsideration of Board decisions under Section 12 and Section 99 (if Section 99 is not repealed as proposed in Proposal # 10).

Background

An observation made in the discussion paper in support of this proposal is that "reconsideration within the LRB is costly and time consuming." Apparently, the Board's resources were stretched in attempting to deal with the many reconsideration applications filed by unsuccessful Section 12 complainants.

As for reconsideration applications concerning Section 99 decisions, the Board regards these as "an appeal of an appeal" and will generally defer to the original panel.

Commentary

These proposals are made in anticipation of a reduction in the Board's resources. The proposal anticipates that there will too few vice-chairs to efficiently manage the reconsideration applications filed by unsuccessful Section 12 complainants. Admittedly, there are many of these applications filed, the vast majority of which have no merit.

If the Board no longer reconsiders Section 12 decisions, complainants (or unions or employers, for that matter) must apply to Court for judicial review of the original decision. This too is costly and time consuming, and somewhat more daunting for unrepresented complainants than a reconsideration application. Consequently fewer

unsuccessful complainants may pursue judicial review than reconsideration. The Board's original decision would therefore more likely be the end of the matter, a prospect that is likely of some appeal to the labour relations community. On the other hand, because of the Board's expertise in labour relations and the duty of fair representation, it is perhaps better for unions if the complaint is before the Board for as much of the process as possible. Board adjudicators are aware of the challenges that face unions, and the difficult choices and the trade-offs that they must make.

On balance, we are of the view that the complaint is best left with the Board for as much of the process as possible. The proposal appears aimed at downsizing the Board and managing the funding cuts, not improving the process.

In our view the proposal to eliminate reconsideration of Section 99 decisions is not generally of great significance. True, this means that Section 99 decisions must be judicially reviewed by a Court. However, the Board's view that a reconsideration of a Section 99 decision is "an appeal of an appeal" means that the Board is loathe to reverse the decision of the original panel. A determined applicant will likely be forced to apply for judicial review in any event, given the extremely low odds of successfully challenging the Section 99 panel. We also note that currently, Section 141(3) of the Code provides that a Board decision can only be reconsidered once. Then, the decision must be judicially reviewed. In a sense, the proposal amounts to the same thing for arbitration awards; an award can only be reviewed by the Board once. Then, the losing party must apply for judicial review.

12. Expedited Arbitration (Sections 104, 105)

Proposal

Section 104 of the Code provides for expedited arbitration. Section 105 of the Code provides for consensual mediation-arbitration. The discussion paper proposes eliminating Sections 104 and 105 from the Code.

In the alternative, the discussion paper proposes amending Sections 104 and 105 "in one or more of the following ways":

- Decisions of arbitrators (Section 104) or mediator-arbitrators (Section 105) shall be without precedent for future interpretation or application of the collective agreement, unless the parties agree to make them so;
- Section 104 would apply unless a provision in the collective agreement provides that Section 104 does not apply; or,
- As a variation on the previous proposal, Section 104 would only have application once the parties bargained it into their collective agreement.

Background

Section 104 of the Code is the expedited arbitration provision. If a grievance is referred to the director of the Collective Agreement Arbitration Bureau (the "CAAB"), he must appoint an arbitrator and fix a date for the commencement of the hearing within 28 days. A practice soon developed of commencing the hearing by way of a brief conference call within the 28 day period, with additional dates set weeks or months into the future. The director circulated a bulletin in an effort to discourage this practice, but it still occurs.

In addition, the Board has determined that once the date for the commencement of the hearing is fixed within the 28 day period, the arbitrator can grant an adjournment over the

objection of one of the parties, even if the hearing then commences after the 28 day period has passed.[33]

Section 105 is the consensual mediation-arbitration provision. If both parties agree, a grievance may be referred to mediation-arbitration through the CAAB, and the hearing must commence within 28 days of the referral unless the parties agree on some other date. The mediator-arbitrator must attempt to settle the difference through mediation. Failing that, she or he must serve as arbitrator.

Commentary

Although Section 104 has not delivered a process that is quite as expedited as the labour movement might have hoped, it has been used effectively to "get the employers attention" and at least commence the arbitration process. The proposal to eliminate Section 104 will not benefit unions.

Moreover, the proposal to eliminate Section 104 is in our opinion misleading. It suggests that unless Section 104 is eliminated, the parties cannot negotiate their own expedited arbitration process. Indeed, the discussion paper states that "currently, the parties cannot bargain out of Section 104 to negotiate their own expedited arbitration process." That is not accurate. It is true that Section 104(9) prohibits the parties from contracting out of Section 104, but that does not mean that the parties cannot bargain another expedited arbitration process. It simply means that they cannot bargain a substitute for Section 104.

The proposal to permit the parties to contract out of Section 104 is not particularly objectionable, since this would require the agreement of the union. This might enable the union to secure an expedited arbitration provision that is more to its liking in exchange for contracting out of Section 104. However, the proposal to leave it to the parties to

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[33] *Pacific Newspaper Group Inc.*, B7/2002

bargain Section 104 into the collective agreement is problematic, since this too requires agreement and effectively eliminates Section 104.

The proposal that the awards of arbitrators or mediator-arbitrators should be without precedent means that these awards would be treated differently than other arbitration awards. This can perhaps be justified if the process is truly expedited, that is, where a hearing is convened and completed within 28 days, and where the award is very brief. In those circumstances, the award is unlikely to be of much value in other cases anyway, and a certain amount of "rough justice" will be dispensed. Unions must be careful of the type of issues that are referred to adjudication in such a process.

The proposal to eliminate Section 105 is of no benefit, since it cannot be seen as a burden on either party, given that a joint application must be made. If there are any problems with this section, it is perhaps that it is under utilized.

Generally, the proposals on Sections 104 and 105 are likely aimed at saving money through the elimination of the CAAB rather than improvements to the process.

13. Deadlines for certain LRB processes (Sections 5(2), 99, 141)

Proposal

The discussion paper proposes to amend the Code and Labour Relations Board Rules to refer to “working days” rather than “calendar days” for deadlines under Sections 5(2), 99 and 141 of the Code.

Background

Pursuant to Section 5(2), the Labour Relations Board must schedule a hearing within 3 calendar days for unfair labour practice complaints alleging that an employee has been disciplined in contravention of the Code when no collective agreement is in force.

Pursuant to Section 99 and the Rules, a party must apply for review of an arbitration awards within 15 calendar days.

Pursuant to Section 141, a party must apply for reconsideration of a Board decision within 15 calendar days.

Commentary

The most significant aspect of this proposal is in regard to unfair labour practice complaints pursuant to Section 5(2), where speedy redress of employer unfair labour practices can be essential to any chance of effectively remedying the impact on employees during an organizing campaign. This is particularly so now that there are mandatory votes – a remedy for an unfair labour practice is much more effective if it is

ordered prior to the vote taking place. Two days delay in these circumstances can be very significant.[34]

[34] We also note that one time limitation the discussion paper makes no mention of extending is the 24 hour time period for holding a hearing into employer complaints alleging unlawful strikes or picketing pursuant to Part 5 of the Code.

14. Fees for LRB Services

Proposal

The discussion paper proposes to introduce user fees for filing all or certain applications or complaints with the Board and to introduce user fees for the provision of Board mediation services.

Background

There are currently no user fees.

Commentary

User fees will restrict access to the Board and undermine the Code's purpose of promoting expeditious settlements of disputes. While this proposal is silent as to the size of the proposed user fees, we note that they may be quite large if the $500.00 figure for a Board "moderator" in proposal #5 is any indication.

15. Strike Vote Supervision

Proposal

The discussion paper proposes that “strike votes should be supervised and verified by an independent person”.

The discussion paper does not set out the actual statutory language proposed to accomplish this.

Background

There has been no requirement for state supervision of strike votes since the origin of the Code in 1973.

Commentary

This proposal is another example of state intervention in the internal affairs of unions. It also runs counter to the discussion paper’s purported goals of “streamlining” the Board’s role and reducing costs.

16. Privatize Mediation Services

Proposal

The discussion paper proposes the privatization of the Board's mediation services.

Background

The Board's mediation services are currently provided free of charge.

Commentary

Privatization of mediation services would result in significant additional costs for unions and employers and will consequently restrict access to mediation and undermine the Code's purpose of promoting expeditious settlements of disputes.

17. Reduce use of LRB 'Members'

Proposal

The discussion paper proposes the elimination or reduced use of Board members.

Background

There are a number of Board "members" drawn equally from employers and unions. They regularly sit as "wingers" with vice-chairs in selected cases. Generally they are used in the more important cases or in cases where their assistance in settlement is contemplated. Sometimes they issue dissenting reasons.

Commentary

The present system of using members ensures that labour has a voice in Board decisions. Eliminating or reducing the use of members will eliminate or reduce that voice.

18. Partial Decertification

Proposal

The discussion paper's proposal concerning partial decertification is not detailed in any meaningful manner. Rather, the government has simply made two broadly worded and unclear statements:

> It has been suggested that the Code be amended to resolve any ambiguity respecting the right of employees to apply for a partial decertification.
>
> An application for decertification results in a vote as long as the employees covered by the collective agreement remain an appropriate bargaining unit.

The discussion paper does not set out the actual statutory language proposed to accomplish this.

Background

A partial decertification is an application by which a minority of employees in a bargaining unit apply to have a union removed as their bargaining agent, and thereby become non-union. Such applications do not permit the majority of the employees, who have a vested interest in the application, to have any say in the outcome of the application.

The Code has never expressly provided for partial decertifications (although it does expressly provide for decertification of an entire bargaining unit). However, the Board has held that it has the discretion to vary a group of employees out of an existing bargaining unit as a means to in effect grant partial decertifications.

Last year the Board in the *White Spot*[35] decision fundamentally altered its longstanding policy on partial decertifications by creating a new two-step test with the intention of making partial decertifications more readily available to groups of employees. This change undermined the rights and protections of both employees and unions.

Under the Board's policy prior to *White Spot*, the Board would only grant partial decertifications if a group of employees could demonstrate a change in circumstances since the certification such that it was no longer appropriate for the employees to be included in the bargaining unit. For example, where the interests of a group of employees conflicted with the remaining employees, a partial decertification might be appropriate. Further, the Board said employee wishes was a factor in the Board's decision, although not determinative. The Board thereby permitted partial decertifications in certain circumstances but did not permit applications as of right.

Notwithstanding the sound labour relations policy encapsulated in the old policy, the Board dramatically altered its policy with the introduction of the two-step *White Spot* test.

The first step of the *White Spot* test is a threshold analysis to determine if the group of employees that would remain in the bargaining unit constitute an appropriate bargaining unit. At this stage of the analysis, the Board applies the four *IML* factors used in certification applications: functional integration; similarity in skills, duties, interests and working condition; administrative and organizational structure of the employer; and geography. If the remaining group is found to be appropriate, the Board proceeds to the second step which is to determine if any reasons exist not to grant the application. Although the Board has not set out an exhaustive list of factors it will examine at this second stage, the Board has said that it will examine the following factors: the impact on the employees remaining in the bargaining unit; the impact on the collective bargaining relationship; the timing of the application (such as if it occurs during collective

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[35] *Certain Employees of White Spot Limited*, BCLRB No. B16/2001

bargaining or an industrial dispute); whether the employer has improperly interfered with the wishes of the employees; and the practical impossibility of a full (or actual) decertification application.

Commentary

While the Board's new *White Spot* policy is certainly a very bad policy, and must be changed to create stable labour relations in the province, the proposed further changes could be catastrophic.

To date, a tremendous divide exists between the Board's new policy in theory and how it applies in practice. In theory, the Board considers the rights and interests of the majority of employees, however to date the Board has paid little more than lip service to the interests of the majority of employees. In theory, a partial decertification is an extraordinary remedy, in practice the Board readily grants applications treating them as an application as of right. But, most importantly, in practice the Board grants applications unless the union can demonstrate functional integration between the group of employees seeking the extraordinary remedy of partial decertification and the group of employees that would remain. In most multi-location certifications, functional integration does not exist to the degree that would defeat an application for partial decertification. Consequently, each site in multi-location bargaining unit is capable of applying for partial decertification notwithstanding the manner by which the group of employees became certified.

Since *White Spot*, the Board has granted numerous applications for partial decertification. In only one decision has the Board refused an application for partial decertification on the merits.

The *White Spot* policy, which invites applications for partial decertifications, necessarily creates instability. For example, a group of employees who, for whatever reason decide in the short term that it is advantageous to decertify, can do so as long as they are in a separate location. Unions will no doubt find it increasingly difficult to make necessary tough decisions during collective bargaining and the administration of collective agreements because of the ease with which a minority of employees can obtain partial decertifications.

Notwithstanding these difficulties with the *White Spot* policy, it would be even worse if the government acts on the proposed changes.

First, the proposed changes appear to enshrine the Board's current policy into the statute thereby eliminating any possibility of changing the policy short of legislative changes. The proposed changes would effectively require the Board to grant partial decertifications whenever the remaining group of employees constituted an appropriate bargaining unit. However, in adopting its *White Spot* policy, the Board expressly stated that it would need to monitor the impact of the new policy and considered the possibility that changes would be necessary. Consequently, even the Board recognized that its unprecedented policy could have unintended, and adverse, consequences. Of course, once it is part of the statute, the ability of the Board to alter the policy is likely lost. A bad law is much harder to change than a bad policy.

As well, the proposed changes appear to eliminate any considerations of the impact of the partial decertification has on the remaining employees. Although the Board currently does not attach much weight to the factors of the impact on the remaining employees and the impact on collective bargaining, the proposed changes remove *any* consideration of these important factors.

The proposal will make it much easier for minority groups of employees to decertify, depriving some employees of union representation they desire and without any regard for the impact on the remaining employees.