Commentary
on the
Labour Relations Code Amendment Act, 2002
("Bill 42")

INTRODUCTION

In March 2002 the provincial government released a "discussion paper" setting out various proposed changes to the *Labour Relations Code* (the "Code"). Various union and employer representatives subsequently made submissions to the government in response to the discussion paper.

View a copy of the discussion paper and our previous commentary regarding the discussion paper.

In May 2002 the provincial government passed the *Labour Relations Code Amendment Act, 2002* ("Bill 42"). A copy of Bill 42 is attached as an appendix to this commentary. Bill 42 includes significantly modified versions of two of the most significant proposals from the government's March 2002 discussion paper. The modifications to the discussion paper proposals incorporate changes requested by the Business Council of British Columbia in its submissions to the government.

The two key elements of Bill 42 are:

1. Amendments concerning employer communications with employees (**these amendments came into effect July 30, 2002**).

2. Amendments to the purposes of the Code (**these amendments will come into effect September 1, 2002**).

In addition, Bill 28 contains several less significant amendments to the Code.

It remains to be seen how the Board will interpret and apply the Bill 42 amendments. However, in our view, the amendments concerning the purposes of the Code may well result in a substantial change in the Board's approach to the various substantive provisions of the Code in favour of employers. These amendments may also affect decisions by arbitrators and may result in increased Board intervention in free collective bargaining and the internal affairs of unions.

In addition, the amendments concerning employer communications with employees may result in the Board allowing 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.

We will now address in turn the various amendments contained in Bill 42.

1. THE PURPOSES OF THE CODE

The statutory background

Section 2 of the Code, which will be amended by Bill 42 on September 1, 2002, presently provides as follows:

Purposes of the Code

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 existing section 2 sets out the 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.

The discussion paper proposal

The government's March 2002 discussion paper proposed amending 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.

The Business Council's request

In its submission to the government regarding the March 2002 discussion paper, the Business Council of British Columbia requested that the notion of business viability in the global context be incorporated in section 2:

> The purpose clause of the *Labour Relations Code* should act as the governing principles for all decisions that emanate from the LRB. Panels of the LRB should look to the purpose clause when arriving at their decisions. We do not believe this to have been the case in all decisions. As stated earlier in this submission, the way in which businesses operate and are managed in this province has changed. Our competitors span the globe. Employers must have the tools to constantly innovate and change to stay in business. Panels of the Board must be aware of the effects of

> their decisions on the viability and competitiveness of the employer. The purpose clause must be changed to reflect this need…
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> . . . the notion of viability should be incorporated into subsection (d). While a business may have similar cost structures and methods of operation to make them competitive with a business in the same jurisdiction, they may not be viable in the global context. Therefore, while competitiveness is a necessity, so is viability. Hence, we recommend that the word "viable" be included at the end of the proposed subsection (d).

The Bill 42 amendments

The government in Bill 42 has accepted the Business Council's request that the notion of business "viability" be incorporated in the purposes of the Code. Section 1 of Bill 42 amends section 2 of the Code effective September 1, 2002 to provide as follows (with the new statutory language in bold):

Duties under this Code

2 **The board and other persons who exercise powers and perform duties under this Code must exercise the powers and perform the duties in a manner that**

- **(a) recognizes the rights and obligations of employees, employers and trade unions under this Code,**
- **(b) fosters the employment of workers in economically viable businesses,**
- **(c)** encourages the practice and procedures 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 **developing a workforce and workplace that promotes productivity**,
- (e) promotes conditions favourable to the orderly, constructive and expeditious settlement of disputes,
- (f) minimizes the effects of labour disputes on persons who are not involved in those disputes,
- (g) ensures that the public interest is protected during labour disputes, and
- (h) encourages the use of mediation as a dispute resolution mechanism.

Commentary

The Bill 42 amendments to Section 2 do two things. First, they significantly change the purposes of the Code. Second, they impose a new requirement that *all* persons who "exercise powers and performs duties" under the Code – not just the Board – act in accordance with those purposes.

The Bill 42 amendments add several new purposes. The most significant is the new purpose of "fostering the employment of workers in *economically viable businesses*". 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. [1]

Equally significant is the new requirement that other persons who "exercise powers and perform duties" under the Code also act in accordance with the new purposes. This would include arbitrators and other decision makers under the Code.[2] In addition, unions are considered "persons" under the Code. Union activities that may be considered the exercise of powers and duties under the Code include collective bargaining, striking, picketing, and the representation of members. Consequently, the Bill 42 amendments open the door to unprecedented state intervention in free collective bargaining and the internal affairs of unions in the name of encouraging the economic viability of businesses. For example, when a union engages in collective bargaining, it could be required to do so in a manner that fosters the employment of workers in economically

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[1] We note that determining issues of economic viability is not a matter the Board can claim to have any expertise in and consequently it is a matter where the Board may well tend to defer to an employer's views. It is also a matter which could lead to protracted litigation, with expert evidence being presented by persons such as accountants and economists.

[2] Including mediation officers, settlement officers, special officers, and industrial inquiry commissions.

viable businesses,[3] contrary to the Board's traditional hands off approach to the substance of collective bargaining.[4]

While the proposals would open the door to both state intervention in collective bargaining and internal union affairs and a very substantial change in the Board's approach to the various substantive provisions of the Code, the amendments do not necessarily compel such results. However, as noted in our previous commentary on the March 2002 discussion paper, statements by Brent Mullin prior to his appointment by the Liberal government as Chair of the Board strongly suggest that the amendments to the purposes will have a very significant impact. In a paper published by Mr. Mullin prior to his appointment he expressly advocated amending the purposes of 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 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**:

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[3] 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)(f)) and ensured that the "public interest" was protected (section 2(1)(g)).

[4] 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.

(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.[5]

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. It also indicates a view that the Board should encourage employer economic goals in all types of Board decisions.

In our view the Board may very well 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 creating a new emphasis on promoting the economic viability of employers. In addition, arbitrators may be required to similarly promote the economic viability of employers.[6] Finally, in our view there is also a very real possibility that the Board will use the changes to section 2 to attempt to intervene in free collective bargaining and the internal affairs of unions.

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

[6] The Board may require arbitrators to do so through the Board's power to review arbitration awards pursuant to section 99 of the Code.

2. EMPLOYER COMMUNICATIONS

The statutory background

The unfair labour practice provisions of the Code prohibit interference with the formation, selection or administration of a trade union (section 6(1)), anti-union threats and promises (section 6(3)(d)), and anti-union intimidation and coercion (section 9).

Section 6(1) of the Code prior to the Bill 42 amendments provided:

> An employer or a person acting on behalf of an employer shall not participate in or interfere with the formation, selection or administration of a trade union or contribute financial or other support to it.

Section 6(3)(d) of the Code, which remains unchanged by Bill 42, provides as follows:

> An employer or a person acting on behalf of an employer shall not . . .
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> (d) seek by intimidation, by dismissal, by threat of dismissal or by any other kind of threat, or by the imposition of a penalty, or by a promise, or by a wage increase, or by altering any other terms or conditions of employment, to compel or to induce an employee to refrain from becoming or continuing to be a member or officer or representative of a trade union.

Section 9 of the Code, which remains unchanged by Bill 42, provides as follows:

> A person shall not use coercion or intimidation of any kind that could reasonably have the effect of compelling or inducing a person to become or to refrain from becoming or to continue or cease to be a member of a trade union.

The “employer free speech” provisions of the Code are contained in section 8. Prior to the Bill 42 amendments section 8 provided:

> 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 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.[7]

The discussion paper proposal

The March 2002 discussion paper proposed amending section 8 to provide as follows.

> 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 proposed 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 did not set out the actual statutory language proposed to accomplish this. However, the discussion paper stated:

> 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:
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> - 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.

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

- 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.
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> 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 Business Council request

In its submission to the government regarding the March 2002 discussion paper, the Business Council of British Columbia stated as follows regarding the section 8 proposal:

> . . . the Business Council supports the changes as proposed in the Discussion Paper with one exception. The word "threats" should be deleted to bring us into line with other jurisdictions and with Section 9 of the Code.

The Bill 42 amendments

The government in Bill 42 has accepted the Business Council's request that there be no restriction against threats in the amended section 8. Section 3 of Bill 42 amends section 8 of the Code to provide as follows:

> Subject to the regulations, a person has the freedom to express his or her views on any matter, including matters relating to an employer, a trade union or the representation of employees by a trade union, provided that the person does not use intimidation or coercion.

Section 2 of Bill 42 has also amended section 6(1) of the Code to provide as follows (with the new language in bold):

> 6(1)**Except as otherwise provided in Section 8**, an employer or a person acting on behalf of an employer shall not participate in or interfere with the formation, selection or administration of a trade union or contribute financial or other support to it.

The regulations contemplated by the new section 8 of the Code have not yet been promulgated. However, section 8 of Bill 42 allows the government to make regulations "respecting presentations by employers and trade unions related to votes under this Code". Based on comments by the Minister of Labour, it appears that the government is planning to issue regulations providing for pre-vote meetings similar to those described in the discussion paper.

Commentary

The previous section 8 only protected employer statements *with respect to the employer's business*. Under the Bill 42 amendment to Section 8, employers are free to express views on *any* matters, including matters relating to unions, provided only that they do not use intimidation or coercion. In addition, employer communications no longer have to be statements of fact or reasonably held opinions to be protected by section 8. Consequently an employer may now have much more latitude to engage in an active campaign against a union during an organizing drive – a campaign where the employer may be able to make all sorts of statements about unions, no matter how unfounded and unreasonable those statements might be.

While employers are still prohibited from using intimidation and coercion by section 9, the Board may take a narrower view of what constitutes intimidation and coercion given

the express employer right to express views on matters relating to unions.[8] In addition, it appears that employer communications that interfere with the formation, selection or administration of a union may be permissible – in effect immunizing employer statements from the unfair labour practice protections of section 6(1) unless they constitute intimidation or coercion. Employer threats and 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). Such an approach would ignore the unique power employers have over employees and would result in American style “election campaigns” during organizing drives.[9]

In our view, regulations providing for some sort of pre-vote joint meeting scheduled on the employer’s premises are unlikely to benefit unions or employee freedom of choice. First, 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. Second, an employer’s unique power over employees gives an employer a unique ability to improperly influence employees. The proposed meetings ignore this fundamental difference between employer communications and union communications. Third, union supporters will feel pressure to keep silent at such meetings out of fear of retaliation by the employer. Anti-union employees will have no such fear and will likely dominate the meeting. Consequently the true views of employees are unlikely to be expressed. Finally, the “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

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

[9] 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.

even obtaining sufficient support for a vote so as to get a meeting is significantly diminished by the Bill 42 amendments.

3. OTHER AMENDMENTS

Chair gains authority over CAAB Director

The Collective Agreement Arbitration Bureau ("CAAB") is constituted under section 83 of the Code. The Director of CAAB appoints expedited arbitrators under section 104, appoints mediator-arbitrators under section 105, and appoints regular arbitrators when the parties are unable to agree on the selection of an arbitrator under section 86.

Prior to the Bill 42 amendments, section 83(1) of the Code provided for the Director and employees of CAAB to be appointed under the *Public Service Act*. Under section 4 of Bill 42, the Chair of the Board now appoints the Director and the Director appoints the CAAB employees.

In addition, under section 7 of Bill 42, the Chair may now delegate a power, duty, or function of the Director to members of the Board.

Chair gains authority to combine associate chairs

Prior to the Bill 42 amendments, section 116 of the Code required that the Board have both an associate chair of the Adjudication Division and an associate chair of the Mediation Division. Under section 6 of Bill 42, the Chair now has the option of appointing one person to both positions.

Mandatory joint requests for appointment of mediator-arbitrator

Prior to the Bill 42 amendments, section 105(3) of the Code permitted the parties to make a joint request to the CAAB Director to appoint a mediator-arbitrator if they were unable to agree on one. Under section 5 of Bill 42, the parties *must* make such a joint request.

User fees

Under section 8 of Bill 42, the government may establish user fees for Board services by regulation.