

**Report of the
B.C. Labour Relations Code Review Committee
to the
Minister of Skills Development and Labour**

April 11, 2003

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LETTER OF TRANSMITTAL

April 11, 2003

The Honourable Graham Bruce
Minister of Skills Development and Labour
PO Box 9052
STN PROV GOVT
Victoria B.C. V8W 9E2

Dear Minister Bruce,

On behalf of my colleagues John Bowman, Eric Harris, Bruce Laughton and Marcia Smith, I am pleased to submit to you our analysis of the 14 issues referred to us at our appointment on December 18, 2002. This report also includes a list of additional issues raised by the labour relations community during the course of our review.

We would like to thank you for the opportunity to undertake this analysis and hope the discussion provided in this report will assist you in making decisions about how to proceed.

Yours truly,

A handwritten signature in black ink, appearing to read 'Daniel Johnston', with a stylized flourish at the end.

Daniel Johnston
Chair

Encl.

ACKNOWLEDGEMENTS

The committee would like to thank the various organizations and individuals from the entire spectrum of the B.C. economy who took the time to make submissions that helped inform our deliberations.

Our work was greatly assisted by two individuals whose contribution we would like to acknowledge. Jennifer O'Rourke provided valuable assistance in researching the legal issues and Trevor Figueiredo provided writing, communications and organizational support.

INTRODUCTION

The Appointment

In March 2002 the Minister of Skills Development and Labour, Graham Bruce, released a discussion paper that set out ideas for potential changes to the *B.C. Labour Relations Code* ("the Code") and initiated a consultation process with the business community, unions and employees.

The consultation process identified a number of issues. On December 18, 2002, the Minister appointed a committee of special advisors, under Section 3 of the Code, to provide him with advice on 14 specific issues arising out of the consultation process. This committee was called the B.C. Labour Relations Code Review Committee.

Committee Make-up

Our committee was chosen apparently on the basis of suggestions received from a wide range of employer and labour interests, including the B.C. Federation of Labour, the Business Council of British Columbia, the Coalition of B.C. Businesses, trade unions and large and small businesses from across the province.

Chaired by Daniel Johnston, our committee's members include, John Bowman, Eric Harris, Bruce Laughton and Marcia Smith. A description of the background of the members was included in the news release announcing the committee. It is attached at Appendix A.

It was recognized the committee includes individuals who are actively involved in labour relations issues, including involvement with some of the issues that were referred to the committee for consideration. The members of the committee disclosed such involvement to each other at the outset.

The Issues

The 14 issues our committee was asked to analyze ranged from the definition of an employee to how the Code should deal with union mergers. During the consultation process, stakeholders brought forward additional issues. These issues are set out in this report under the section titled Additional Issues. Further to our Terms of Reference we did not undertake any research or analysis of these issues.

The Process

As a committee, we were asked to do our work in two separate phases.

During the first phase of this review our role was to provide a well-researched objective analysis of the issues. We were asked not to provide recommendations in this first phase.

We decided from the outset that the key to understanding B.C.'s labour relations challenges would be to receive opinions from the full range of labour relations stakeholders. To receive this input, letters were sent to the labour relations community requesting public submissions based on any or all of the 14 issues our committee was reviewing. Stakeholders were also asked to provide commentary on other issues they felt were relevant to the review process. A website (www.labour.gov.bc.ca/lrcreview/) was set up to receive submissions as well as to keep stakeholders updated on the process.

Additionally, advertisements were posted in all of B.C.'s daily newspapers requesting submissions either through the website or by mail.

A total of 40 submissions and nine responses to submissions were received, which are available publicly on our committee's website (see Appendix B for the list of submissions and responses). We also met with representatives of the labour relations community to gather further input on the issues under consideration.

We conducted extensive research into current legislation, best practices and new and emerging approaches in a number of jurisdictions. This research, along with public submissions, assisted us in better understanding B.C.'s labour relations challenges.

This report reflects a consensus of our committee with respect to the research and analysis of each issue. Our goal was to reach an objective understanding of the issues we were directed to evaluate. The results of that process are contained in this report.

We are fully conscious that the Minister of Skills Development and Labour has the prerogative to determine which issues will require formal recommendations. If, after reviewing this report, the Minister asks our committee to make recommendations on any of these issues, we will develop these recommendations during the second phase of this review.

The Report

This report separately examines each of the 14 issues set out in our Terms of Reference. For simplicity's sake, the format for each issue is organized in the following manner:

- Understanding the issue;
- Community concerns;
- Research; and
- Discussion.

While researching and writing this report, we also kept in mind the purposes set out in our Terms of Reference, which were:

- Labour relations in the context of the modern economy;
- Fostering labour stability within the province;
- Promoting economic growth; and
- An appropriate balance of rights and obligations among employers, employees and unions.

B.C.'S LABOUR LEGISLATION: A SHORT HISTORY

In order to understand better today's labour relations challenges, it helps to consider our labour relations past. The modern era of labour relations in British Columbia begins with the 1973 *Labour Code of British Columbia Act*.

The 1973 Code

Controversial from the beginning, the 1973 Code was to some in the union community a much-needed attempt to balance the interests of labour with those of management, while safeguarding the rights of employees. Others, particularly in the business community, believed the Code gave too much power to trade unions.

The 1973 Code was distinctive because, for the first time, the regulation of labour legislation was centralized through the use of an administrative board. The creation of the board was an attempt to shift labour disputes away from the courts and towards mediation and adjudication by a specialized tribunal. Issues such as picketing, once adjudicated by the civil courts, became the jurisdiction of the newly created Labour Relations Board.

A Decade of Little Change

The subsequent decade saw few significant changes to the 1973 Code, although there was some attempt to increase the rights of employers.

The 1984 Amendment Act

In 1983 labour groups rose in opposition to the government's economic restraint program, particularly when legislation (Bill 2 and Bill 3) was introduced limiting the rights of public sector unions. Termed 'Operation Solidarity' and lasting 130 days, the labour dispute was one of the largest in the modern history of B.C.

In 1984, the *Labour Code Amendment Act* was introduced. The amended Code changed the process by which trade unions became certified. Prior to that amendment, a union was certified on the basis of the number of signed membership cards. The 1984 amendment stipulated signed membership cards were not sufficient to obtain certification and employees had to confirm their wish to form a union through a secret ballot vote.

Employer rights were increased as a result of the 1984 amendment and employers could now apply for decertification of a trade union after two years of having no employees in the union. The ability of unions to picket at other operations of the same employer—something that had occurred regularly in previous years—was also curtailed.

The 1987 Industrial Relations Act

In 1987, the government made further changes and passed Bill 19, the *Industrial Relations Act*.

The Act sparked criticism and many, particularly in the labour movement, felt there had been no public consultation and that the legislation did little to improve dialogue between management and labour interests.

Many trade unions responded to this Act by initiating a boycott of the Industrial Relations Council that lasted until 1991.

The 1992 Sub-committee of Special Advisors

A new government came to power in 1991 promising labour relations reform yet again. That government appointed a committee to broadly review the state of labour relations in the province and a Sub-committee of Special Advisors who were tasked with specifically reviewing the *Industrial Relations Act*.

The Sub-committee made a series of recommendations to the Minister of Labour. These recommendations spanned a broad range of issues from the rights of employers and employees to the operation of the Labour Relations Board itself.

One of the Sub-committee's key recommendations was to develop an ongoing means of reviewing the Code under a new Section 3 provision. The recommendations made by the Sub-committee formed the basis of a revised and renamed 1992 *Labour Relations Code* that included the Section 3 provision.

Our committee is the second such Section 3 committee appointed by the Minister. The first was appointed in 1997.

The 1997 Section 3 Committee and 1998 Amendment Act

In 1997, the first committee appointed under Section 3 of the Code was struck. The committee was appointed after then Minister John Cashore withdrew Bill 44, which proposed significant and controversial changes to the Code. The Bill was withdrawn after objections from interested parties, including those in the business community, expressing concern over a lack of consultation and specifics of the legislation.

The committee made 21 recommendations with regards to labour relations, but recommended only minor amendments to the Code. Another panel also reported simultaneously on labour issues within the construction industry.

In 1998, the government implemented the *Labour Relations Code Amendment Act*, which primarily established a new collective bargaining structure for craft bargaining units within the unionized sector of the B.C. construction industry.

Amendments in 2001

A new government came to power in June 2001 and almost immediately introduced labour relations reforms. Bill 18 specifically made education an essential service under the Code, repealed sectoral bargaining in the construction industry and re-introduced a mandatory secret ballot vote on all union certification applications for the first time since 1992. Prior to implementation of Bill 18, the secret ballot vote was required in only a minority of certification applications.

Current Circumstances

In May 2002, after consultation with interested parties, the Minister of Skills Development and Labour, introduced Bill 42, the B.C. Labour Relations Code Amendment Act, 2002. Two of the most significant changes were the addition of the consideration of fostering the employment of workers in economically viable businesses (to the Duties section of the Code) and the increase in freedom to speak about labour relations matters.

The Minister continued to consult with interested parties on labour relations matters and, on December 18, 2002, appointed this committee of special advisors under Section 3 of the Code.

THE CURRENT LABOUR CLIMATE

In considering the issues that have been referred to us, we have been mindful of the structural changes that have been occurring in the B.C. economy and in the work life of British Columbians. In approaching many of the questions referred to us, it has become clear that solutions adopted in prior decades may not be responsive to changing circumstances. Some of those circumstances are described below.

Service Sector Growth

B.C.'s labour market has undergone enormous change in the past 25 years. While resource-based industries are still an important part of the province's economy—particularly in small communities where they are often the biggest employers—there is now a greater emphasis on services, knowledge-based and value-added manufacturing.

B.C.'s service sector continues to grow rapidly, and for every person employed in the goods sector (resource and non-resource-based), three are employed in service-oriented positions. Many of these positions are either part-time or temporary. One in four service sector jobs involves part-time work, a much higher ratio than elsewhere in the economy.

Women's Participation

Women now make up 45 percent of the B.C. workforce and are much more likely to work in service industries than in other sectors. There is also an increased presence of women in the development of small businesses and in the leadership of unions.

Self-employment

Historically, self-employment has been most common in the goods sector, primarily because there are many self-employed farmers, fishers and loggers. However, in the last 15 years, self-employment in the service sector has grown significantly – from 14 per cent in 1994 to 21 percent by the end of the 1990s. And in the economy as a whole, the percentage of self-employed workers has risen from 16 percent to 21 percent during the same period of time.

Small Business Growth

Of the 1.5 million British Columbians who have a job but are not self-employed, 41 percent work at a business with fewer than 20 employees. These small businesses constitute the largest number of employers in B.C., in both the goods and services sectors, and many are non-unionized.

Unionization

According to the latest figures from Statistics Canada (2001), just over half of all B.C. union members (270, 000) are employed in the public sector. In B.C.'s public sector, 77.7 percent of employees are unionized, compared to 21.1 percent of employees in the private sector.

The highest rates of unionization in B.C. are in education (70.6 percent), public administration (70.4 percent), health care and social assistance (64.5 percent), and utilities (66.1 percent).

There are 535,000 union members in B.C., a union density of 33.8 percent – a five-point decrease since 1991 and a significant 11.8-point decrease since 1983 (Statistics Canada 2001 and 2002, B.C. Labour Directory, 1991). Although from 2001 to 2002, union density in B.C. actually rose from 33.1 per cent to 33.8 percent.

Adapting to Change

Demographic shifts, such as more women in the workplace and an aging workforce, combined with the growth of the service sector and increasing part-time work have all contributed to dramatic changes in B.C.'s labour market.

The 1992 Sub-committee of Special Advisors wrote, “those sectors of the economy growing most rapidly are those which have had little experience with collective bargaining – small businesses and the service industry where the workforce is generally better educated, younger and predominantly female.” This comment is still very relevant today.

Along with increased global competition and technological advances, the union and employer communities have had to adjust to these changes. Both communities will continue to face increasing pressures to adapt.

Responsive Approach

B.C.'s labour legislation must be responsive to the evolving labour climate. Our committee approached its research and analysis with this climate very much in mind.

ISSUE 1: DEFINITION OF EMPLOYEE

Understanding the issue

The current Code and previous legislation contemplate that certain employees should be excluded from collective bargaining because of the position they hold with the employer.

We have been asked to examine the issue of whether members of a "management team" should be excluded from the Code's definition of employee. We have also been asked how the Board currently deals with issues respecting management exclusions.

Community concerns

The employer community supports the expansion of "manager" to include those persons who are part of the management team arguing such persons have an interest that is more closely aligned to the employer than to the trade union. They argue there is a potential for conflicts of interest in the way the term "employee" is currently defined.

The Business Council of British Columbia makes two recommendations. First, they recommend that, in addition to the tests articulated prior to *Highland Valley Copper*, BCLRB No.B289/98, the Board should accept the ability of an employee to substantially impact the employer's operations as an indication of management. In the alternative, they argue, the concept of management teams should be broadened to exclude those that have a "potential conflict of interest".

Similarly the Coalition of B.C. Businesses argues the Board's current approach used to define managers is too narrow, with the result that people are included in the bargaining unit who have a serious conflict of interest with other members of the bargaining unit. However, the Coalition also notes that to expand the definition of a manager to include all members of the management team would not deprive a significant number of employees access to collective bargaining as unions rarely seek to include these employees in the bargaining unit because they often do not support the union's organizing efforts.

Gateway Casinos submits the concept of placing supervisors in a separate supervisory unit is unworkable in practice. Gateway argues that having the supervisors in their own unit has created divided loyalties and although the supervisors were supposed to be managing and disciplining, they have instead tended to bond with other employees.

For the most part, the union community submits the current policy is appropriate and does not warrant change. Several unions explain that the title of manager is given to an employee as a means of obtaining overtime work without having to pay overtime rates, and does not mean the employee is a manager.

The B.C. Federation of Labour notes the changes to the definition of manager in the *Employment Standards Act* and states that managers are potentially going to be excluded from protections and benefits under that statute and would also be deprived of their rights to collective bargaining if the exclusion provision is broadened in the Code. They argue that the term "management team" has no significance and that employees are being given meaningless "management" job titles. They note that under the current policy of the Board, exclusions of employees considered to be part of the management team are permitted, including professionals who provide confidential advice to management and employees with familial relationships with management. They also argue that the impact of the change of the exclusion test from "potential conflict of interest" to "sufficient potential conflict of interest" in *Highland Valley Copper* has been exaggerated. They state virtually every employee faces some "potential conflict of interest" and it is essential for the Board to assess whether the potential for conflict of interest is sufficient to warrant exclusion.

The B.C. Teachers' Federation argues that while the government indicates it will not amend the replacement workers provision in the Code, depending on the number of managers excluded, an amendment to include members of a management team could have the same impact by permitting employers to continue operations during a strike by using its "management team". This could affect the strength and bargaining power unions gain from the inclusion of these individuals in the bargaining unit.

The Christian Labour Association of Canada suggests an employee should remain part of the bargaining unit except in cases where there is a demonstrable conflict of interest in favour of the employer, and that a demonstrable lack of community of interest exists with the bargaining unit.

The International Union of Bricklayers and Allied Craftworkers, Local Unions 01 and 03 B.C. suggest that while this issue has little impact on the construction industry, the committee should contemplate the unique structure of the construction workplace. In particular they argue that forepersons are 'front line managers' and they must remain in the bargaining unit in order that the current balance and certainty in the construction industry is not upset. They argue the status quo is appropriate.

Research

There have been five changes to the definition of employee since 1973.

In 1973, the definition read:

“employee” means a person employed by an employer, and includes a person engaged in police duties, and a dependent contractor included in an appropriate bargaining unit under section 48, but does not include a person who, in the opinion of the board,

- (i) is employed for the primary purpose of exercising management functions over other employees; or
- (ii) is employed in a confidential capacity in matters relating to labour relations; or
- (iii) is qualified in a profession, trade, or calling and is licensed under the *Architectural Profession Act*, *Chartered Accountants Act*, *Chiropractic Act*, *Dentistry Act*, *Engineering Profession Act*, *Insurance Act*, *Land Surveyors Act*, *Legal Profession Act*, *Medical Act*, *Naturopathic Physicians Act*, *Optometry Act*, *Podiatry Act*, *Real Estate Act*, *Securities Act, 1967*, or *Veterinary Medical Act*, or is an enrolled student under any such Act, and is engaged and working in the practice of such profession, trade, or calling; or
- (iv) is employed in domestic service, agriculture, hunting or trapping; or
- (v) is a teacher as defined in the *Public Schools Act*;

In 1975, subparagraphs (iii) and (iv) were repealed and subparagraph (v) was re-lettered as paragraph (iii).

In 1977, the managerial and confidential exclusions were reworded. The revised definition read:

“employee” means a person employed by an employer, and includes a person engaged in police duties, and a dependent contractor included in an appropriate bargaining unit under section 48, but does not include a person who, in the opinion of the board,

- (i) is employed to exercise the functions, and does exercise the functions, of a manager or superintendent in the direction or control of employees, or
- (ii) is employed in a confidential planning or advisory position in the development of management policy for the employer, or

- (iii) is employed in a confidential capacity in matters relating to labour relations or personnel, or
- (iv) is a teacher as defined in the *Public Schools Act*;

In 1987, the definition was amended to repeal the subsection excluding teachers from the definition of employee.

The definition was amended again in 1992 to read:

“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 definition has not been amended since 1992.

Currently, a two-step process is followed by the Board to determine if individuals will be included in the bargaining unit.

First, the Board determines if the individuals are employees or managers. If they are managers, not employees, the person in question will not be included in the bargaining unit.

The authority to make or effectively determine discipline, hiring, and firing decisions is the key to deciding whether individuals are managers. Effective determination means "at least in the majority of cases the sanction imposed by the individual whose status is in question must be the ultimate discipline imposed" (*Cowichan Home Support Society*, BCLRB No. B28/97, paragraph 112). Merely having input into decision-making means that the discipline was not "effectively determined" by the individual in question.

In the second step, and if the Board has determined the persons in question are employees, then the Board must determine if these employees should be excluded from the bargaining unit because of a sufficient potential conflict of interest.

Highland Valley Copper sets out an approach to applying this test at paragraph 19:

Potential conflict of interest is measured through the application of the *VGH* and *Cowichan* factors. A determination is made as to whether there is sufficient conflict of interest to justify the granting of undivided loyalty to the employer by the exclusion from employee status under the Code. If a person is excluded from the Code due to managerial status, that ends any consideration of that person under the Code. At that point the issue of undivided loyalty

has been addressed. If, however, it is determined that there is not sufficient potential conflict of interest to justify undivided loyalty, the person is an employee under the Code. The potential conflict of interest, as already measured, is then considered for the purposes of determining the appropriateness of including the person in a unit that includes the employees supervised by that person. If it is determined that concern about the potential conflict of interest requires exclusion from that bargaining unit, and if there is an application for a separate supervisory unit, the appropriateness of that separate supervisory unit will then be considered pursuant to the Board's policy in *Island Medical Laboratories Ltd. and H.S.A.B.C.* (1993), 19 CLRBR (2d) 161 (BCLRB No. B308/93) (Leave for reconsideration of IRC No. C217/92 and BCLRB No. B49/93) ("IML").

Other jurisdictions tend to use generalized phrases to exclude managers from the definition of employee. Examples of this are an employee "who performs management functions" and a person who "performs management functions primarily".

There is no jurisdiction in Canada that includes the term "management team" in its definition of excluded employees.

Discussion

We have set out the statutory history of this issue in detail in order to demonstrate the similarity of treatment various governments have given to the definition of employee over the past 30 years. The record demonstrates there has been a lot of tinkering with the definition of employee in the Code. That tinkering may or may not have resulted in significant changes to the outcome of Board decisions. In most cases it has been almost impossible to adopt a simple test of whether a person should be excluded from the bargaining unit. That is not surprising in light of the many ways in which private and public sector enterprises are organized and managed. It has also become obvious that individual employers are constantly changing how they are managed and the authority given to their managers.

As noted above, we received a great deal of conflicting advice with respect to this issue, which was usually grounded in the individual experience of particular parties. Therefore, most of the submissions were not helpful to us in attempting to adopt a common approach to this issue. The question of who is and who is not an employee is often a tactical matter of determining who should be able to participate in a certification vote. In our view, changing the definition would simply give rise to different tactics with a similar level of uncertainty.

We acknowledge the concerns of the employer community about the *Highland Valley Copper* decision and agree that it is a narrow, restrictive definition. The interpretation of this decision has resulted in serious concerns about this issue within the employer community.

During our review of the current labour climate, we note the changing nature of workplaces often accompanies changes in how businesses and organizations are structured and managed. For example, in small businesses and in the service sector, there are often practices where there is no strict definition of what work can be performed by an excluded manager. In our view, these types of flexible approaches should be encouraged in order to improve cooperation and teamwork in the workplace.

We do not have confidence that an alteration to the definition of employee to specifically include the management team concept would necessarily improve the process of labour relations. Ultimately the Labour Relations Board must adopt a definition that is understandable and consistent with the amended duties in Section 2 of the Code. We suggest that Board policy be monitored for a longer period prior to any decision being made regarding whether legislative change is desirable.

ISSUE 2: DEFINITION OF PICKETING

Understanding the issue

In 1999, the Supreme Court of Canada ruled in *United Food & Commercial Workers, Local 1518 v. KMart Canada Ltd.*, [1999] 2 SCR 1083, that permissible forms of expression, including consumer leafleting were protected under the Charter of Rights and Freedoms. The Court found that the Code's definition of picketing, which included consumer leafleting was overly broad and therefore unconstitutional.

Given that the Supreme Court has struck down the Code's definition of picketing, the key issue for consideration by our committee was whether there should be a new definition of picketing in the Code and if so, what should it be? In other words, where should the line be drawn between permissible forms of expression—including consumer leafleting—and picketing?

Community concerns

Employers are concerned that if the exception for leafleting is read too broadly, unions will be able to carry out activities traditionally thought of as "picketing" (such as the use of placards) at secondary sites. Accordingly, they seek a "bright line" distinction between picketing and leafleting that would preclude any activity other than small numbers of individuals handing out leaflets at secondary sites.

Unions, on the other hand, view the statements of the Supreme Court of Canada in the subsequent decision of *Pepsi-Cola Canada Beverages (West) Ltd. v. R.W.D.S.U., Local 558* (2002), 208 DLR (4th) 385 as calling into question the "electric fence" concept of a picket line that has traditionally been used to justify the regulation of peaceful picketing. Noting the Supreme Court of Canada's repudiation of the primary/secondary site distinction in common law, unions predict that there will be a day when peaceful picketing will be recognized as legitimate, non-coercive union speech. In the interim, they favour minimal restrictions through a broad definition of the exception for consumer leafleting.

Research

In the *KMart* decision, the Court distinguished traditional picketing from consumer leafleting on the basis that leafleting lacks the coercive element of picketing: Conventional picketing, characterized by picket lines can have a "signal effect" – an automatic reflex response that tells people not to cross the line. Leafleting, on the other hand, seeks to persuade members of the public to take a certain course of action through informed discourse and does not trigger the "signal" effect inherent in picket lines.

The Court also noted that any harmful effects flowing from leafleting would not differ from those arising from a permissible consumer boycott campaign.

The Court stated that the relevant comparison between conventional picketing and consumer leafleting must focus on the respective effects and not on the motivations in pursuing the activity. The Court held that when deciding whether consumer leafleting is acceptable, it is important to determine whether consumers are able to choose what course of action to take without being unduly disrupted by the message of the leaflets or the manner in which it was distributed. However, the Court also recognized that some forms of leafleting could be considered to be picketing or the equivalent of picketing.

While the term "picketing" is not specifically defined in any other provincial labour code or the federal code, Alberta, New Brunswick and Newfoundland regulate picketing activity in their labour codes using language similar to British Columbia's definition of "picketing" that was struck down by the Supreme Court in the *KMart* decision. Most other jurisdictions in Canada rely primarily on the courts to regulate picketing activity and do not have specific provisions dealing with the issue of picketing.

It is also noteworthy that in the companion case to the *KMart* decision, *Allsco Building Products Ltd. v. United Food and Commercial Workers International Union, Local 1288P (U.F.C.W.)* [1999] 2 S.C.R. 1136, the Supreme Court of Canada considered the New Brunswick legislation dealing with the regulation of picketing. However, in *Allsco*, the Court found that it was unnecessary to find that the legislation prohibited peaceful leafleting by a union, and thus it was unnecessary to find that the legislation infringed the Charter.

The Court stated that while the relevant section appeared to prohibit even peaceful leafleting, the New Brunswick legislation had another provision of the Act that authorized a union and its members to express their views freely, provided that the manner in which they were expressed was not "coercive, intimidating, threatening, or intended to have an undue influence upon any person".

In terms of defining permissible consumer leafleting, the Supreme Court of Canada has provided a framework. The Supreme Court found behaviour meeting the following six conditions constituted acceptable consumer leafleting protected under the Charter:

1. The message conveyed by the leaflet was accurate, not defamatory or otherwise unlawful, and did not entice people to commit unlawful or tortuous acts;
2. Although the leafleting activity was carried out at neutral sites, the leaflet clearly stated that the dispute was with the primary employer only;

3. The manner in which the leafleting was conducted was not coercive, intimidating, or otherwise unlawful or tortuous;
4. The activity did not involve a large number of people such as to create an atmosphere of intimidation;
5. The activity did not unduly impede access to or egress from the leafleted premises;
6. The activity did not prevent employees of neutral sites from working and did not interfere with other contractual relations of suppliers to the neutral sites.

If restrictions on freedom of expression were to be legislated through a definition of picketing, these restrictions would need to comply with the conditions established by the Supreme Court of Canada.

Discussion

Introducing a broader definition of picketing into the Code might have the benefit of providing greater certainty in the labour relations community. Employers and unions want to know the type of activity that is and is not permissible. However, it may be difficult to devise a definition that would provide complete certainty.

There are many questions that do not easily accommodate a legislated definition: When do peaceful, permissible forms of expression, including consumer leafleting become picketing? If someone wears a placard – is that picketing? Does it matter what the placard says? And what if people are also handing out leaflets – is that picketing? Moreover, a whole number of activities beyond picketing and consumer leafleting may need to be examined. For example, in our modern world, is a leaflet limited to a paper sheet? Or should it not also include electronic media such as e-mail and the Internet?

Leaving the Code as it stands—with no legally binding definition of picketing—would allow the Board to continue to determine the definition of picketing on a case-by-case basis. This is what is currently taking place, however, it does not provide the certainty the labour relations community is looking for.

The argument for finding certainty on this issue can also be extended to the public as a whole. Any person not involved in a labour dispute has an interest in being able to determine whether a labour dispute can in any way affect them.

Approaches to this issue may include, but are not limited to:

- (a) Retaining the existing definition, and adding that it is to be read with the new section 8 of the Code, which broadly defines the right to communicate;
- (b) Defining picketing by using the current definition and adding language stating the definition does not include peaceful consumer leafleting;
- (c) Excluding from the definition of picketing a specific list of activities that may go beyond consumer leafleting; and
- (d) Making no change and allowing the definition of picketing to be determined by the Board and the courts.

In our view, a broad range of issues must be considered in order to make recommendations that will resolve the uncertainty surrounding this issue.

ISSUE 3: UNFAIR LABOUR PRACTICES

Understanding the issue

In an application to certify a trade union or to decertify a trade union, rights and restrictions on employees, employers and the trade union itself are addressed within various provisions of the Code.

These provisions include:

- Section 6 which prohibits interference with the formation of a trade union;
- Section 7(1) which limits a trade union's organizing activities;
- Section 8 which guarantees the right to communicate information to employees;
- Section 9 which prohibits coercion or intimidation;
- Section 14(4)(f) which allows for remedial certification;
- Section 33(6) which allows for the cancellation or refusal to cancel a certification because of an unfair labour practice; and
- Section 133(1)(c) which allows for the denial of an application because of improper conduct.

Our committee approached this issue with three key questions in mind:

- Is there a difference in the rights that apply to a certification compared to the rights that apply in a decertification?
- If there is a difference, is this difference created by a structural weakness in the Code, by the perceptions of stakeholders, or by Board practice?
- If there is a difference, is this difference appropriate?

Community concerns

The employer community strongly believes there is a difference—one created by a structural weakness in the Code—that creates an imbalance in the protections given to employees in a certification, compared to employees in a decertification. Employers argue these protections should be the same, but are not.

In particular, they point to Section 33(6) of the Code and argue this provision gives the Board discretion to refuse to cancel the certification of a bargaining unit in certain circumstances, but the Code does not specifically empower the Board to refuse to certify the union in similar circumstances. They further argue that in adjudicating unfair labour practice cases the Board has treated wrongs (i.e. coercion or intimidation) committed by unions during decertification and certification campaigns less seriously than wrongs committed by employers or employees opposed to a certification or in favour of a decertification.

The employer community is also unhappy with the remedial certification power of the Board under Section 14(4)(f), as they see no equivalent power of remedial decertification.

Most unions assert certification and decertification are not equivalent processes—that there is, in fact, a difference—but argue that because the right to be a member of a trade union is fundamental, this difference is appropriate. Unions argue that employers have greater power to limit an employee's freedom to choose union representation (i.e. favours for those who oppose unionization and adverse action for those who support unionization). Unions argue they do not have this power and therefore need greater protection in certification than in decertification.

The B.C. Nurses' Union argues that "the lack of symmetry of powers is an illusion" and that the rights that apply in certification and decertification are in fact the same. In the context of a certification the Board has the power to issue remedial certification where there has been an unfair labour practice under Section 14(4)(f). They argue that the Board has exercised similar remedial powers with respect to decertification.

Research

Our research indicates the structure of the Code itself may foster employers' perception of a difference between how unfair labour practices are treated in a certification compared to a decertification matter.

In a decertification matter, the Code (Section 33(6)) clearly provides similar penalties for both employers and trade unions.

In a certification matter, this equality of treatment is not clear because various sections of the Code—rather than one section in particular—address the issue. This somewhat haphazard layout may create the perception of difference that causes employers' concerns and may even create confusion for the Board.

Nonetheless, a close examination of the Code identifies sections clearly available to ensuring similar treatment of unions and employers with regard to certifications. Those provisions include Section 8, which broadly guarantees the right to free speech; Section 9, which prohibits coercion and intimidation by any person; and Section 133(1)(c) which allows the Board to refuse a certification due to improper conduct.

Further, Board statistics indicate there was no significant difference between the time required to process certifications and decertifications.

Discussion

The way the Code is structured can lead to a belief that there is inequitable treatment in different circumstances. However, we have found it impossible to compare the examples we have been given to determine whether they have resulted in different outcomes in cases of similar behaviour. This is because the behaviour can only be fairly examined in the context of the party's relationship and those relationships will differ from case to case.

We are sympathetic to the challenge that the Board faces in cases of unfair labour practices, which is to discern the impact of such practices on employees, their rights and their ability to make rational or voluntary choices free from coercion or undue influence from either their employer or a union.

It is evident in the submissions we have received that the perception of parties on this issue very much depends on the outcome of particular applications that affected them. This is natural, but it is not a reason by itself to make legislative change other than to possibly consider the location in the Code of the various relevant provisions. It is unlikely the reorganization of these sections would require further recommendations.

ISSUE 4: DUTY OF FAIR REPRESENTATIONS COMPLAINTS

Understanding the issue

Sections 12 and 13 of the Code deal with duty of fair representation complaints and address the obligation of trade unions, trade union councils and employer associations not to treat their members in a discriminatory, arbitrary or bad faith manner.

Members of those organizations who believe they have been unfairly treated by their organization can take their complaint to the Board. The most common complaint is that a union has not pursued a grievance on behalf of the employee.

The primary question our committee considered was what is the most expeditious and cost-effective manner of addressing such complaints?

Community concerns

Both employer and union communities have expressed concern about the length of time and the amount of Board resources, as well as their own time and resources, required in adjudicating these types of complaints. The labour relations community wants to ensure a fair process that is also more expeditious than what currently exists.

As the Coalition of B.C. Businesses writes in their submission, "the goal of a streamlined process must not be to simply process these issues more quickly, but to ensure that Section 12 complainants are given an efficient and effective forum in which to have their complaints heard and resolved." The Coalition suggests the creation of a labour ombudsman with the power to investigate complaints and issue recommendations to resolve such disputes at an early stage.

The B.C. Federation of Labour similarly suggests a focus on the intake stage with Board officers intervening in an "informal fact finding role" to determine whether there is a prima facie case. The Federation also expresses dissatisfaction with the mediation/arbitration experiences at the Board arguing that unions feel pressure to pay off complainants simply to make them go away.

Research

The committee's research on this issue supports concerns raised by unions and employers regarding the significant amount of Board resources devoted to resolving duty of fair representation complaints.

The Board receives approximately 200 such complaints a year of which less than five percent are successful. In 2002, it took an average of 245 days from the date of application for the complaint to be resolved.

Duty of Fair Representation

Year	Filed	Disposed of	Not Proceeded With	Withdrawn	Settled	Granted	Dismissed	Other	Hearings Held
2002	177	186	62	0	35	1	88	0	15
2001	227	224	95	0	47	7	75	0	19
2000	199	196	85	0	30	3	78	0	27
1999	230	228	96	0	21	5	106	0	21
1998	245	263	140	0	16	4	103	0	17
1997	242	206	120	0	8	8	70	0	19

In the most recent case dealing with this issue, *James W.D. Judd*, BCLRB No. B63/2003 ("*Judd*"), the Board references the "excessive demands" placed on it as a result of Section 12 complaints. The Board states:

While this may be due to an increased level of sophistication amongst employees in the workforce in general, in our view it may also flow from a fundamental misconception regarding the nature of the rights and obligations arising under Section 12 . . . this has resulted in a consistently large number of unmeritorious complaints, which is contrary to the goals of the labour relations system identified earlier, and diverts critical resources both from unions and from the system as a whole.

In order to deal with these concerns, the Board, in the *Judd* decision set out a clear explanation of the scope of Section 12 in the hopes of largely eliminating the need for lengthy decisions in response to each complaint. At paragraph 110, the Board held:

In order to assist these processes, we provide the following specific, concrete guidelines regarding the general requirements under Section 12 of the Code. In general, Section 12 requires a union to:

1. Talk to the grievor and learn what the grievor is complaining of;
2. Investigate, for example:
 - a. Obtain information from those involved;
 - b. Construct a sequence of events from the information obtained; and
 - c. Offer the grievor a chance to respond;

3. Make a reasoned decision, for example:
 - a. Consider the collective agreement language (and potentially the practice in the industry or the workplace);
 - b. Take into account how similar grievances have been handled in the past; and
 - c. Provide to the grievor the reasons for the union's decision; and
4. Proceed with the grievance (if a decision is made to do so) in a manner which is not in blatant or reckless disregard of the grievor's interests (all the while remembering that the union must represent the bargaining unit as a whole, not simply the interests of the grievor).

The committee also reviewed information materials and legislation from the other jurisdictions in Canada.

In Ontario, after an application is filed, a Labour Relations Officer is generally assigned to meet with the parties to help them reach agreement. Before or after the parties meet with the officer, the board can dismiss an application if it does not make out an arguable case. The officer does not have the authority to decide the case and they do not speak to the panel that will be deciding the case.

If there is no settlement, a consultation (or, in some cases, a hearing) will be held with a Vice-Chair. A consultation process is less formal than a hearing and the Vice-Chairs play a more active role including questioning the parties and their representatives, expressing views, defining or re-defining issues, and making determinations as to what matters are agreed to or are in dispute. The giving of evidence under oath and cross-examination of witnesses are normally not part of a consultation.

Consultation processes normally last no longer than one day and a decision with brief reasons are given with one of four results: the Board may exercise its discretion not to inquire further into the application, it may dismiss the application on its merits, it may grant the application or it may schedule the application for a full hearing before the Board.

In Alberta, after a complaint is filed, it is reviewed by the Director of Settlement to determine if it contains adequate particulars and might amount to a breach of the Code. If the complaint is accepted, a Board officer contacts the parties involved and asks for responses. The Director then recommends a dispute resolution procedure. This may involve a settlement meeting with a Board officer or a resolution conference held by a Chair or Vice-Chair. A Board officer may also investigate the complaint. That officer may write a report outlining the facts and/or ask the parties for additional information.

If resolution is not possible, the matter is sent to a documentary review panel. That panel assesses the case based on the documents received to decide if the complaint has merit. If not, the complaint is dismissed. If the panel decides the complaint appears to have merit, a Board hearing is scheduled.

Without a clear understanding of how these policies and procedures work in practice it is difficult to provide a reasoned analysis on whether the adoption of any of these processes would or would not alleviate any of the problems faced by our Board in dealing with duty of fair representation complaints.

The legislation of the other jurisdictions in Canada does not assist us with this matter.

Discussion

The committee views this issue as one where concerns arise not because of poorly worded or ineffective legislation, but rather because of the way in which complaints are processed. Streamlining of such complaints is clearly required and the Board's recent ruling on this in the *Judd* case may assist in producing a more efficient, but still fair, process.

Given the realities of limited government resources, it may be difficult to institute a new office of labour ombudsperson to handle such complaints. While such an office may assist in increasing the efficiency of the process, the benefits of such an office would have to be carefully weighed against its costs.

All parties agree union members must have the ability to take complaints against their union to the Board. We agree with this view. The challenge remains to ensure this process is both expedited and fair. This will require a monitoring of the Board's processes following its decision in *Judd* to determine whether the Board's new approach will achieve those objectives. If the Board's procedures following its decision in *Judd* are considered to be inadequate, then consideration could be given to the procedures used in other jurisdictions.

Complainants must be provided with a means to raise their concerns and have them dealt with. However, the principles of natural justice do not require a full evidentiary hearing in every case and the Board may need to consider alternative adjudicative models. Some of those other models may require legislative change (e.g. a model that would provide administrative officers with decision-making power).

Accordingly, if monitoring the implementation of the *Judd* decision results in the assessment that complainants are not receiving fair and timely handling of their complaints, we would suggest that it would be appropriate to look at differing approaches to this issue.

ISSUE 5: CHANGE IN UNION REPRESENTATION

Understanding the issue

The Board will usually order a representation vote if more than 50 percent of employees support a change in union representation. If a vote favours such a change, a new union replaces the previously certified union, although the original collective agreement remains in place until its expiry. This change in union representation is commonly called a "raid." The Code restricts raid applications to the seventh and eighth month of each year of a collective agreement.

Our committee was asked to consider whether the current raid period should be altered. In examining that question we were asked to review the number of raid applications, the potential disruption caused by those applications, and whether employees should only be allowed one opportunity to change union representation during the term of a collective agreement.

Community concerns

Members of the labour relations community recognize raid applications are inherently disruptive for employees, employers, unions and sometimes for third parties. Nonetheless, members of the community are divided on the issue of how frequently raids should be allowed during the course of a collective agreement.

The employer community is split on the issue of amendments to the raid provisions. Some employer groups favour maintaining the current raid provisions in the Code. They argue that if employees are dissatisfied with their union representation, they should not have to wait until the final year of the collective agreement to change representation.

The Business Council of British Columbia also argues that if the Code is amended to only permit raids in the seventh and eighth month of the last year of the collective agreement, employees may be unwilling to ratify long-term contracts. Long-term agreements are favourable to the business community as they promote stability and certainty.

The Coalition of B.C. Businesses suggests our committee consider lengthening the period between raid applications on a sectoral or industry-specific basis, as raid applications are more frequent and disruptive in some industries.

The Independent Contractors and Businesses Association of B.C. recommends allowing raids to occur in the second year of a collective agreement and if the agreement goes beyond three years, then in the fourth and sixth years.

The ICBA argues the destabilizing effects of raids are very pronounced in the construction industry where large projects can extend over at least two raid periods.

The Canadian Council of Grocery Distributors and the Canadian Manufacturers and Exporters Association submit the provision should be changed to allow raids only in the seventh and eighth month of the final year of a collective agreement.

Unions, for the most part, recommend the status quo be maintained with respect to raiding periods. They see no justification in changing the period, arguing there have not been significant problems for unions or employers.

The B.C. Federation of Labour submits that the current provision regarding raids is appropriate as it strikes a reasonable balance of interests. They argue that limiting raids to the last year would motivate bargaining agents to demand lengthy agreements to minimize the opportunity for bargaining unit members to leave, resulting in long-term agreements that would be unresponsive to changing circumstances.

They also note that by permitting raids only in the seventh and eighth month of the last year of the agreement, the attempt to change bargaining units would come just prior to the expiry of the contract. With pressure to begin negotiations, the new bargaining agent would be left with little time to develop a relationship with the employer and understand the business.

They also argue employers interfere in this area by selectively permitting representatives of a union of the employer's choosing to have access to the workplace and employees, while other unions are denied the same opportunity.

The notable exception to the union view is from the Christian Labour Association of Canada. They argue current raid periods are too frequent and recommend raid applications be limited to the seventh and eighth months of the last year of any contract up to three years duration, and the seventh and eighth month of each contract year beyond three years. Where the parties terminate a long-term contract early, CLAC recommends the first two months of the succeeding collective agreement be treated as an open period for raid purposes. They argue that due to frequent raid opportunities, B.C.'s legislation provides the potential for the greatest amount of labour instability in the country.

Research

Raids can be very disruptive when they occur. However, it is important, to note that raids in B.C. do not account for a significant number of the cases before the Board.

In 2002, only 15 applications under Section 19 were filed with the Board. Given the volume of certification and decertification cases handled by the Board each year, this is not a large number.

The statistics for the last five years are:

Raid Applications

Year	Filed	Disposed of	Not Proceeded With	Withdrawn	Granted	Dismissed
2002	15	15	1	3	7	4
2001	27	30	0	11	12	7
2000	12	6	0	0	4	2
1999	17	24	0	7	9	8
1998	22	26	1	8	9	8

B.C., compared to other Canadian jurisdictions, does allow for more frequent periods during which raids can occur. Nonetheless, this is balanced against an equally frequent period during which decertifications are allowed.

By way of background we attach Appendix C and D, which are tables listing the periods during which raids and decertifications can occur across Canada.

Discussion

Raids are not a regular occurrence in B.C., therefore, it is unlikely that the potential for disruption is significant. Furthermore, there are Code provisions in place to minimize these disruptions when they do occur. Section 21(1)(c), for example, stipulates the raiding union must inherit the existing collective agreement. Section 19(2) states that any union is barred from reapplying for a minimum of twenty-two months following a raid application that leads to a decision of the Board.

It is important to provide the opportunity for employees to determine whether they wish to be represented by a particular union. That opportunity must be given on a periodic basis. While the presence of a raid may create disruption in a workplace, it is not a reason to unduly restrict that right.

Increasing the time between raid applications could result in a number of unintended consequences. These might include:

- Depriving employees of the democratic right to the union of their choice for lengthy periods of time;
- Causing unions to negotiate long term agreements, not for the sake of employees, but for the sake of preserving the union certification; and
- Creating workplace disharmony due to the inability of employees to obtain a union of their choosing.

The current provisions of the Code assist in avoiding these problems by striking a balance between instability in the workplace and employees' rights to be represented by the union of their choice.

ISSUE 6: PARTIAL DECERTIFICATION

Understanding the issue

When an application is made to decertify an entire bargaining unit, the Board will order a representation vote if 45 percent or more of the employees in the bargaining unit request one. If the vote succeeds, the bargaining unit is decertified.

In the case of an application to decertify only part of a bargaining unit (called 'partial decertification'), the Board currently applies a two-stage threshold test. This test is a matter of Board policy, not legislation. It was established in the case of Certain Employees of White Spot Limited, BCLRB No. B16/2001. This test includes assessing:

- Whether a "rational and defensible" line of separation can be drawn around the group seeking to leave the bargaining unit; and
- Whether the remaining employees would continue to make up a viable bargaining unit

As well as this test, the Board considers a range of other factors in deciding whether to grant a partial decertification, including the timing of the application and how a decertification would impact labour relations stability.

In considering this issue, the key question for our committee was whether current Board policy is adequate, requires improvement, or demands a legislative response.

Community concerns

The employer community raises several issues with respect to the issue of partial decertification. In particular, they advocate amending the Code to explicitly provide for partial decertification and to further spell out the requirements for such applications. With respect to the requirements for such applications, they argue that there should be no requirement for the group leaving the bargaining unit to show that they are an appropriate unit. They submit that applicant employees should only have to prove the unit that remains is appropriate for collective bargaining.

In *7-Eleven Canada Inc.*, BCLRB No. B354/2002, the Board held that no applications for partial decertification would be allowed between the time a notice to bargain had been delivered and a collective agreement was concluded. The Business Council of British Columbia notes that employees can apply for full decertification during bargaining (except immediately after certification), during a strike, or during a lockout and should be able to make partial decertification applications during these same time frames.

Similarly, the Business Council notes, new employees can be brought into a bargaining unit through a variance during bargaining, strike or lockout. They argue there is no reason to restrict the timing of applications for partial decertification.

The Business Council also submits that the Board has only been willing to apply the *White Spot* decision to multi-location bargaining units. They submit the proposed test for partial decertifications (which should be codified) should apply equally to single and multi-location bargaining units if the "appropriateness" threshold is met.

The Coalition of B.C. Businesses also points out that collective bargaining can take months, which is a lengthy period to deny employees their right to decertify. They also argue that the *White Spot* decision states the impact on collective bargaining is just one of a number of factors to be considered, rather than being determinative.

The Coalition also submits the Board's practice in dealing with partial decertifications (i.e. the fact that the Board engages in a lengthy submission process before holding a vote) has hindered access to employees and it is virtually impossible to attempt partial decertification without legal counsel.

By comparison, the union community argues the Code should not explicitly provide for the partial decertification of a bargaining unit. The general consensus is that the current approach works and should not be changed.

The B.C. Federation of Labour, the B.C. Nurses' Union and the Industrial, Wood and Allied Workers of Canada argue the policies set out in *White Spot* and *Island Medical Laboratories*, BCLRB No. B308/93 ("IML") are relatively new. They argue that if these policies are left to the Board, they will continue to evolve as the Board gains experience with them.

The Federation also argues legislative change ignores the complexity of the issues involved and the need for the Board to have the discretion to address different factual situations. They also submit the decision in *White Spot* was the result of lengthy deliberations by a 7-person panel where every major player in the labour relations community was involved. This policy should therefore not be lightly abrogated.

The B.C. Teachers' Federation expresses concerns that codification would "unnecessarily tie the hands of the Board." The BCTF argues the Board should be able to assess all relevant considerations.

The CAW argues that few applications for partial decertification have been denied on the basis of a policy reason and the main challenge to the applications has been based on allegations of employer unfair labour practice activity.

The CAW also points out that if appropriateness is not to be a factor in partial decertification applications, then it should not be a factor in initial applications for certification. The B.C. Nurses' Union also strongly advocates an appropriateness test.

Research

In 2002, of 32 partial decertification applications, more than half (17) succeeded. Another six did not proceed, five were withdrawn and four dismissed. In 2001, five out of 15 applications succeeded, five did not proceed and five were dismissed.

With regard to other Canadian jurisdictions, no labour code specifically provides for partial decertification. The provisions of some codes allow for the amendment of certifications; however, other boards have generally not interpreted these provisions as allowing for partial decertification. For example, the Canada Labour Relations Board found that the *Canada Labour Code* does not allow for partial decertification in *Uli Henssler et al.* (1997), 38 CLRBR (2d) 96. In *Alberta Treasury Branches (Re)*, [1997] Alta. L.R.B.R. 596 the Board came to the same conclusion under Alberta legislation.

Discussion

In the course of our research we reviewed the report of the 1992 Subcommittee of Special Advisors and we note their recommendation under the section titled "Revocation of Bargaining Rights" was:

Our recommended changes in this area are designed to provide a parallel between the procedures for the acquisition of bargaining rights and the revocation of bargaining rights.

We have therefore assumed that the intention of the current provisions of the Code in this area was that procedurally there should be some parallel between the process of acquiring certification rights and the process for the revocation of such rights. However, it is not apparent that the Subcommittee was considering the issue of partial decertification at the time they made their recommendations.

Stakeholders raised a number of key points regarding the Board's current approach to dealing with partial decertification applications, including concern about:

- An application for partial decertification not being permitted once notice to bargain has been given;
- The fact that both the group leaving and the group remaining in the collective bargaining unit must be appropriate as determined through the threshold test;

- The partial decertification process not being expedited; and
- The application process for employees seeking to leave being too onerous.

If it was determined that legislative change was appropriate in this area, consideration would need to be given to the foregoing concerns and decisions would need to be made about the policies that should be adopted on those matters.

However, while such matters could be clarified through statute, some aspects of partial decertification applications, such as whether it is appropriate to partially decertify a unit, cannot be legislated. These matters will continue to require decision-making on a case-by-case basis by the Board. There is nothing unusual about this since the appropriateness of partial decertification requires a decision-making process that, similar to the decision-making process for applications for certification, considers individual circumstances and specific, case-related facts. The unavoidable requirement for a case-by-case consideration of "appropriateness" will always constrain the desire for predictability.

While this issue creates a lot of interest in the employer community for obvious reasons, the ultimate issue is whether employees have the right to determine, in appropriate circumstances, whether to continue to be represented by a trade union.

ISSUE 7: REVOCATION OF BARGAINING RIGHTS

Understanding the issue

Section 33 of the Code allows for the cancellation of a union certification if the employer no longer employs anyone in that bargaining unit. An employer must satisfy the Board that it has ceased to operate and there is no reasonable likelihood that it will re-open in the foreseeable future.

The Code does not specify the length of time a business must be closed before it can request decertification. During the Ministry's consultation process, it was suggested that an employer should be automatically granted a decertification after a specified period of time if, during that period, no one was employed at the certified operation. This would mean the employer would no longer have to satisfy the Board that there was any reasonable likelihood the operation would re-open in the foreseeable future.

Community concerns

The employer community argues that where a business has not been in operation for a period of two years, the employer should be able to apply to the Board to cancel the certification. The Coalition of B.C. Businesses argues that the only exception should be where the union and the employer have bargained recall rights for laid off employees that extend beyond two years. In that case the relationship would continue to be alive until the expiry of the recall rights.

The Business Council of British Columbia argues that this change is important to investment and commerce as it helps to facilitate the sale of properties or businesses. New owners would not be encumbered by a historic union certification. The Coalition similarly argues that the purpose of the Code is not to confer perpetual collective bargaining rights on unions.

The Construction Labour Relations Association argues that the "question of the duration or period of time that should elapse before representational rights are lost, should not be left to the Board to determine. Investors need to know, with certainty, whether the business they are involved in, or intend to become involved in, has a union certification or not."

The union community opposes this amendment arguing that there is no legitimate labour relations purpose to this issue. The B.C. Federation of Labour notes that the 1992 Sub-committee of Special Advisors was convinced that there was a pattern of abuse of the former provisions. They further note that there is no need for this change – employers are not prevented from going to the Board and applying for the cancellation of the certification. The only benefit is to make it easier for employers to get rid of unions.

The Federation also notes “multi-national, multi-location union employers may also find it attractive to shut down one branch location for the determined period in an effort to break a union, while relying on income from other locations.”

The CAW argues that if the closure period were equal to the right of recall under the collective agreement, the effect “would be to make increasing the right of recall a matter of great importance in the collective agreement. Unions would be in a position of trying to negotiate as long a period of recall as possible as a method of combating automatic decertification following closure, even though such lengthy recall rights would normally not be required in the day-to-day operations at the workplace.” They argue that this issue is primarily of concern in the construction industry and that the issue should be dealt with as a separate issue in a separate section of the Code for the construction industry.

The Industrial, Wood and Allied Workers of Canada argues that the effect of this kind of amendment would be to “allow forest companies to shut down logging operations and sawmills for lengthy periods of time while retaining harvesting rights to public timber.” They argue that this would disrupt and destabilize the labour force in forest dependent communities.

Research

In Canada, only Alberta and New Brunswick permit an employer to be decertified as a result of not employing persons for a certain period of time.

The idea that a certification should be cancelled after a fixed period of time first arose in B.C. in the 1984 amendments to the Labour Code. The *Labour Code Amendment Act, 1984*, S.B.C. 1984, c. 24, added the following subsection dealing with the cancellation of a certification:

52(8) Where the board is satisfied, on application by an employer for cancellation of the certification of a trade union as bargaining agent for his employees in a bargaining unit, that the employer has not, during the 2 years immediately preceding the application, employed any person as an employee in the unit, the board shall cancel the certification, but the board may refuse to cancel the certification where in the board's opinion the conduct of the employer applying for the order is unfair or unreasonable.

This subsection was amended in 1987 by the *Industrial Relations Reform Act, 1987*, S.B.C. 1987, c. 24:

52(8) Where an employer applies to the council for cancellation of the certification of a trade union as bargaining agent for his employees in a bargaining unit on the ground that the employer has not, during the 2 years immediately preceding the application,

employed any person as an employee in the bargaining unit, the council shall forthwith inquire into the matter and shall complete its inquiry within 30 days after the date of the application.

(8.1) Where, on completion of the inquiry required by subsection (8), the council is satisfied that the employer has not, during the 2 years immediately preceding the application, employed any person as an employee in the bargaining unit and that the conduct of the employer is in the circumstances of the matter fair and reasonable, the council shall cancel the certification.

This meant that if a business closed for 2 years, the employer could apply to cancel the union certification.

In 1992 the Sub-committee of Special Advisors considered the consequences of these amendments. They stated:

We also recommend the deletion of those provisions in the existing legislation which permit an employer to apply for cancellation of a union's certification and/or collective agreement where no employee has been employed in the bargaining unit for a period of two years. During our tour we heard of cases of employers who discontinued operations in the Province for a two-year period, decertified the union, and then returned to the Province to resume business. These provisions had a particularly devastating effect on building trades unions in the construction industry.

In our opinion, there was no justifiable public policy reason for those provisions. The Labour Relations Board has always had the authority, and will continue to have the authority under the sections which we propose to cancel a certification if bargaining rights have been abandoned.

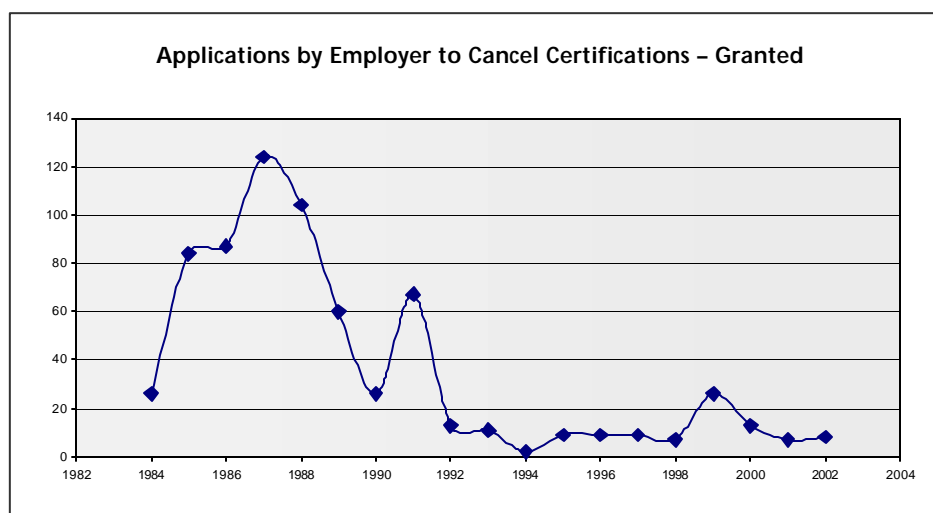
Following the report of the 1992 Sub-committee of Special Advisors, the provision relating to automatic decertification was not carried forward into the new Code. Therefore, it is only possible to determine the effect of these provisions during the period 1984 to 1992. The Sub-committee was persuaded that these provisions were being abused and had a "devastating effect" on building trades unions in the construction industry.

Discussion

The research we have conducted does not permit us to distinguish between applications for decertifications for the above noted reasons and applications for decertifications due to bankruptcy. Those statistics were combined by the Board, as both were applications made by employers for the cancellation of certifications.

While we are unable to separate the data in a fully satisfactory way, there does appear to have been a fairly clear relationship between the passage of the 1984 amendments and the number of applications for decertification brought by employers within two years following the amendments. Thereafter, the number of applications rapidly declined. The statistics therefore provide us with some support for the conclusions reached by the 1992 Sub-committee of Special Advisors.

To illustrate this point we refer to the following graph:



Employer representatives were emphatic that no businessperson would consider closing their business for two years solely for the purpose of shedding a collective bargaining relationship. However, based on the submissions and other data available to us, this appears to be an issue particular to the construction industry. We are informed that this is only one aspect of the difficulties that exists in the construction industry in B.C.

A review of the additional issues is summarized starting at Page 63 of our report will illustrate that participants in the construction industry believe that there are a series of outstanding issues affecting the viability of certain segments of the industry. A solution to this issue could only be achieved in the context of a review of the changing dynamics in the construction industry.

ISSUE 8: TIME BAR AFTER DECERTIFICATION

Understanding the issue

If employees in a bargaining unit vote to decertify their union, the Code allows that now decertified union to re-apply for certification at any time. By comparison, any other union seeking certification of that unit must wait ten months after that decertification unless the Board exercises its discretion to permit an application to be brought in a shorter period.

The primary question considered by our committee was whether this asymmetrical treatment between the old decertified union and any new union seeking certification is justifiable. Our committee also considered whether the time bar itself is appropriate.

Community concerns

The employer community, as reflected in the submission of the Canadian Council of Grocery Distributors, believes the ten-month time bar should remain and should apply to all unions.

Specifically, the Business Council of British Columbia submits the law, as it currently stands, allows the decertified union to immediately engage in a certification campaign. If the union is re-certified, the Business Council argues, it would be in a position to demand the employer bargain collectively for a new agreement. They argue this favourable treatment toward the decertified union is absurd and ignores the objectives of the Code.

The Coalition of B.C. Businesses submits "the reason for the 10 month bar is to have a period of calm within the workplace, in which employees can assess whether they are satisfied with their choice to decertify, and for the workplace to recover from the disruption of the decertification process."

The union community argues that the bar to employees being able to join the union of their choice during the ten-months following decertification should be removed as it is a violation of the employees' freedom of association.

The B.C. Federation of Labour argues the probability of unions exploiting the decertification process to obtain a change in union representation outside of the established raiding period is "so negligible as to be virtually non-existent." They argue a way to prevent raids from occurring outside the period permitted by the Code, is to give the Board the discretion to refuse a new certification by another union within a ten-month period where there is evidence of such activity.

The B.C. Nurses' Union argues such an approach does not require an amendment to the Code, as the Board regularly monitors applications to ensure unions do not attempt to finesse the raiding period provisions.

The BCNU suggests that concerns about workplace stability can be met by including a provision similar to Section 30 of the Code, providing the Board with the power to designate a length of time, not less than ninety days, that must elapse before a new decertification application may be considered.

Responding to employers' suggestion that employees be barred from joining any union for ten months to give them time to assess their satisfaction with the decertification, the Federation states that if employees are satisfied with their new status, this would mitigate against them seeking certification. Consequently, no time bar is required. Employees who realize they have made a mistake should not be forced to wait ten months before recourse.

The CAW agrees that employees should not lose their right to union representation for ten months just because they decertify. CAW points out the Code does not have a time bar for repeat applications for certification and decertification (although the Board can impose one if there is evidence of significant workplace disruption).

The exception to this view in the union community comes from the Pulp, Paper and Woodworkers of Canada who state a ten-month time bar seems reasonable. The Christian Labour Association of Canada submits that if change is inevitable, the waiting period should be shortened from ten months to two.

Research

Our research indicates that across Canada there are few time restrictions for a union to reapply for a certification after the union has been decertified. However, most Canadian jurisdictions reference specific periods of time when a decertification application can be made. By comparison, in B.C., an application for decertification can be made at any time, except during the ten months following a certification. See Appendix D for a chart that provides a comparison of decertification periods across Canada.

Discussion

Whether a time bar is kept in the Code or eliminated, one thing is clear: the rule should apply equally to both the union just decertified and any new union seeking certification.

While the asymmetrical approach may have originated as an attempted means of preventing disguised raids (it may also have been an error or oversight – our research is inconclusive on this point), we could not identify any evidence or public policy rationale to support the asymmetrical treatment between the old union and any potential union.

ISSUE 9: SUCCESSOR RIGHTS AND OBLIGATIONS – BANKRUPTCY

Understanding the issue

Currently, under Section 35 of the Code, when a unionized company declares bankruptcy, and the operations of the company are sold or transferred, the certification and collective agreement may be transferred to the purchaser of those operations. It has been proposed that successor rights under the Code should have limited application or no application to an operation that is disposed of after being declared bankrupt under the *Bankruptcy and Insolvency Act*.

In undertaking our analysis, we considered the following:

- Does the existing approach of transferring a collective agreement and certification to a new owner after a bankruptcy make sense?
- Whether the proposed changes are likely to encourage more cooperative participation between employers and unions in resolving difficult workplace issues;
- The ramifications of bankruptcy terminating only the collective agreement and not the established certification; and
- How this issue has been addressed in other jurisdictions.

Community concerns

The employer community argues successorship rights and obligations under Section 35 should not apply under a bankruptcy.

The Business Council of British Columbia states “a finding that upon bankruptcy, that a Trustee in bankruptcy or a purchaser from the Trustee . . . is a successor is contrary to the purpose of the Bankruptcy and Insolvency Act.” The Business Council submits the current Code approach acts as a deterrent to Trustees or purchasers assuming control of the bankrupt company and “only results in the value of those assets being diminished.”

The Coalition of B.C. Businesses argues similarly, noting that “it is in the public interest to promote the re-entry into the marketplace of business principals who are willing to take entrepreneurial risks” and successorship acts as a deterrent to this re-entry.

The union community argues successorship rights and obligations are an important part of the Code and should be left intact.

The B.C. Federation of Labour argues that it is not within the Province’s jurisdiction to make changes to the rights and obligations of employees after a bankruptcy, as bankruptcy is under federal jurisdiction. They submit removing successorship rights and obligations after a bankruptcy would act as a “union busting” strategy allowing the new employer to “purge union supporters very easily, so worker choice after the sale would be tainted.”

The Industrial Wood and Allied Workers of Canada notes at least one large company and many small companies in the forest sector are currently facing financial difficulties flowing in part from the realities of the current trade dispute with the U.S., the prevailing market conditions and also possibly from cost issues. They argue that changes to the bankruptcy provision will increase uncertainty and negatively impact efforts to restructure struggling operations, as many workers stand to lose bargaining rights.

The United Steelworkers of America argue related corporations controlled in whole or in part by a single directing entity have the capacity to transfer capital and resources from one to the other. They submit, in these circumstances, it is possible to "create" the bankruptcy of one corporation by transferring its capital or other resources to another corporation, regardless of productivity and profitability, for the improper purpose of achieving the termination of bargaining rights. Thus, automatic termination of bargaining rights upon bankruptcy would be a vehicle for abuse of process and for the defeat of bargaining rights.

Research

We have determined that no provincial or federal labour legislation in Canada specifically provides for the cancellation of a trade union's certification or collective agreement after bankruptcy.

Our research into U.S. federal bankruptcy law has identified a different means of dealing with the collective agreement after a bankruptcy. Under U.S. law, a union certification remains in place, however, in some circumstances the collective agreement may be subject to review. In *Re: American Provision Co.* (1984), 44 BR 907, the U.S. bankruptcy court for the District of Minnesota outlined nine requirements for court approval of the rejection of collective bargaining agreements:

1. The debtor in possession must make a proposal to the union to modify the collective bargaining agreement.
2. The proposal must be based on the most complete and reliable information available at the time of the proposal.
3. The proposed modifications must be necessary to permit the reorganization of the debtor.
4. The proposed modifications must assure that all creditors, the debtor and all the affected parties are treated fairly and equitably.
5. The debtor must provide to the union such relevant information as is necessary to evaluate the proposal.
6. Between the time of the making of the proposal and the time of the hearing on approval of the rejection of the existing collective bargaining agreement, the debtor must meet at reasonable times with the Union.
7. At the meetings the debtor must confer in good faith in attempting to reach mutually satisfactory modifications of the collective bargaining agreement.

8. The union must have refused to accept the proposal without good cause.
9. The balance of the equities must clearly favor rejection of the collective bargaining agreement.

Discussion

A range of issues come into play in analyzing this issue. These include whether the business has come to a complete end, whether it is restructured and continues to operate, whether the collective agreement has contributed to the bankruptcy, and whether the union is prepared to negotiate changes.

Additionally, there is the constitutional issue raised by some parties. Given that bankruptcy is within federal jurisdiction, caution must be exercised in ensuring any amendments to the Code remain within the confines of provincial labour law.

The U.S. approach is a compromise position between what currently exists in the Code and the complete removal of successorship rights and obligations that employers are arguing for.

Some elements of this approach may be helpful in answering questions raised in our committee's Terms of Reference, including the need to "encourage more cooperative participation between employers and unions in resolving difficult workplace issues."

The U.S. approach may also provide a greater degree of certainty for trustees or potential buyers of a bankrupt business, thus removing the deterrent to re-entry identified by the employer community.

It is clearly in the interest of British Columbia that every opportunity be created to find a way to allow businesses in difficulty to continue, rather than be broken up with the assets being sold, possibly outside British Columbia. It seems to us that a balanced approach could be adopted to enhance the maintenance of meaningful jobs in the province where a company has become insolvent or has sought bankruptcy protection.

ISSUE 10: SUCCESSORSHIP – CONTRACTING OUT

Understanding the issue

An employer who contracts out work is generally permitted to do so, provided it is not contrary to the terms of the collective agreement and does not constitute an unfair labour practice.

Successorship provisions are designed to preserve the rights of employees and unions where there are changes in the identity of the employer. Under Section 35 a purchaser or transferee of a business, or part of a business “steps into the shoes” of the buyer or seller with respect to any obligations under the Code, including a certification and obligations under a collective agreement.

Contracting out of one area of an employer’s activities will not constitute a successorship if there is merely a transfer of work to a new contractor, with the employer maintaining ultimate control. Similarly, the Board has held that the loss of a services contract from one employer to another (e.g. for janitorial work) does not amount to a successorship.

The committee has been asked to look at the different approaches to successorship that can be taken when contracting out and the practical ramifications of these different approaches.

Community concerns

The employer community opposes the introduction of any provisions that would provide for a successorship in cases of contracting out. They argue that contracting out provisions are a matter for collective bargaining.

The Business Council of British Columbia goes further and argues that the Code should be amended so that all arms-length contracting out agreements are exempted from the successorship provisions.

The Coalition of B.C. Businesses also opposes the introduction of any provisions that would provide for a successorship in cases of contracting out. They submit that the decision to contract certain functions to an outside firm with expertise in performing that function is a legitimate business decision. They argue that this type of provision would create a form of sectoral certification and sectoral bargaining. They also argue that this type of provision would impose collective agreement obligations on companies whose employees have not chosen union representation or have chosen representation by a different trade union. Finally, they argue that this type of provision would punish the employees of a business entity that successfully bids on a contract to provide services to a unionized employer, through termination of employment or displacement.

The Canadian Manufacturers and Exporters submit that the Code should create a strong presumption in favour of contracting out such that the union would have a very high threshold to meet to obtain a successorship declaration. They argue that the ability of business to contract out aspects of their work is integral to their profitability, and is crucial to retaining existing business, and attracting new business to B.C.

The Canadian Newspaper Association argues that the potential for a successorship would be a disincentive for contractors to bid on contracts at unionized operations, thus reducing the potential for a competitive marketplace.

B.C. Transit similarly argues that to oblige successful contractors to assume the collective agreements of their unsuccessful predecessors would seriously undermine the competitive bidding process.

The union community considers this is a very important issue for the committee to examine. They argue that successorships should occur in contracting out situations. They argue that certification should be tied to the work performed for the benefit of the employer. They argue that employers contract out in order to avoid their obligations under the collective agreements and therefore the Code should protect employees from this type of activity.

The B.C. Federation of Labour argues that contracting out rights should not be a matter left to the bargaining power of the employers and unions because it would cause instability in people's lives. They argue the affected workers are often women, visible minorities and seniors trying to supplement inadequate pension incomes who are trapped in a downward spiral of wages, benefits and working conditions.

The Vancouver and District Labour Council viewpoint is that Section 35 of the Code is outdated because it does not result in the retention of collective bargaining rights in a broad enough range of circumstances. They say this is especially prevalent in the private service and technology sectors.

The CAW notes that they have direct experience with the janitorial, food services, security, and school bus transportation industries. They add that the workers in these sectors are mainly employed by contractors. Since employees work in different locations they are difficult to organize, but when they are organized the union is unable to negotiate appropriate wages and benefits because employers would lose contracts to those employers who pay less.

The Industrial, Wood and Allied Workers of Canada notes that this issue is particularly relevant to the logging sector in B.C. where the expansion of the use of contractors in logging operations has resulted in difficulties. For example, contract fallers who have been working in the same camp for years suddenly

face displacement when operations restructure or downsize, when contracts are replaced or as other contractors and crews expand. The IWA supports providing contractors and their employees access to union representation through sectoral bargaining or contract extension to provide for standardization of agreements (wages and working conditions) in the sector.

The Christian Labour Association of Canada argues that, as a minimum, the company should get the certification, if not the collective agreement when contracting out.

Research

The federal statute addresses subcontracting of pre-board security services in the airline industry and other designated services by stipulating that an employer who succeeds a previous contractor may not reduce levels of remuneration.

In Saskatchewan a sale of business is deemed to have occurred in cases involving successive contractors engaged in building cleaning, food services and security services that are provided to the owner or manager of a building owned by the provincial or municipal government or a hospital, university or other public institution.

In Nova Scotia, where the Board is satisfied that an employer contracted out or agreed to contract out work regularly done by its employees in order to defeat bargaining rights or to avoid its collective bargaining obligations, the board may find that a transfer of the business or part of the business has taken place. This is an unfair labour practice that is remedied by a successorship declaration.

The Quebec Labour Court has interpreted their successorship provision broadly to include "subcontracting" situations. This interpretation has recently been upheld by the Supreme Court of Canada in *Ivanhoe Inc. v. United Food and Commercial Workers, Local 500*, 2001 SCC 47 and *Sept-Îles v. Quebec (Labour Court)*, 2001 SCC 48.

In B.C., Section 5 of Bill 44 (1997) contained provisions on this issue. The Bill would have resulted in successorship rights applying to building cleaning services, food services and security services. Bill 44 was subsequently withdrawn in the face of employer opposition and the government of the day appointed a Section 3 committee to consult on the issues contained in the Bill. That Section 3 committee recommended further study.

Discussion

A clear distinction must be drawn between contracting out bargaining unit work in the first instance and a subsequent decision to cancel or not renew the initial contract and to re-tender the work to a new contractor.

The contracting out of bargaining unit work in the first instance is an issue that can be addressed in collective bargaining and no legislative change is needed to achieve that result. On the other hand, a loss of work due to the re-tendering of a contract is not a matter that the parties to a collective agreement can control. Such control rests in the hands of the customer.

Legislation to address this second issue would be a significant change in the law regarding successorship rights in British Columbia. As stated above, in B.C. such legislative change has never proceeded past the first reading stage.

We were specifically asked to consider differing approaches to this issue. Approaches could include:

- The preservation of rights for employees working in certain sectors (e.g. building and janitorial services);
- The potential preservation of a union certification, but not necessarily the collective agreement on the transfer of such work;
- The authority of the Board to order the continuation of certification and bargaining rights if the change in work arrangements has been motivated by anti-union sentiment; and
- A broadening of the Board's authority to determine who is the "true employer".

This is a difficult and sensitive issue. As the trend toward more and more employees being employed by contractors continues, this issue will likely become more pressing.

It is clear to us that an adoption of any new approach in this area would be extremely controversial.

ISSUE 11: MERGERS OF UNION LOCALS

Understanding the issue

National and international unions have constitutions and by-laws under which a union local is chartered. These constitutions and by-laws usually stipulate the national or international union has general rights over the union local, including:

- The right to place a union local under trusteeship and have it governed by designated officials; and
- The right to decide whether the union local can merge with another local of the same union or another union.

Under the Code, national and international unions are not recognized as trade unions in B.C. The Board therefore has limited jurisdiction over internal union matters such as those referred to above.

Our committee was asked whether the Code should be amended so as to govern the relationship between a union local and the national or international union under which it is chartered. In particular, we were asked to examine whether Sections 37 and 150 should be amended.

Community concerns

The employer community argues the Code should not govern the relationship between a local union and the national or international union that it is chartered under. They argue this is a matter for the union community to address and as long as the union adheres to its obligations under the Code, the internal affairs of the union should not be regulated by the legislature. At the same time, we learned through meetings with representatives of the employer community that they would not wish to have internal union restrictions interfere with the structure of collective bargaining.

The union community argues there is no need for the Code to govern internal union organizational issues. They point out that there already is some supervision of the internal arrangements of unions, including Sections 10 and 150 and the fact that the Code can grant a union successorship application that does not comply with the provisions of a national or international union constitution. As well, if members of a bargaining unit are dissatisfied with their union, they can decertify.

This issue is particularly of concern to the Carpenters (British Columbia Provincial Council of Carpenters) and its parent body the United Brotherhood of Carpenters and Joiners of America. The BCPCC argues that Section 37(1) should be amended to allow the Board to deal with the transfer of certification or voluntary recognition rights with or without the approval of international unions that are not bona fide trade unions in B.C.

The BCPCC argues that neither Section 10 nor Section 150 of the Code give the Board the power to restrict trusteeships where just and reasonable cause does not exist. They argue that Section 150 should be amended to add a provision that states, "A provincial, national or international trade union must not assume supervision or control over a subordinate trade union except for just and reasonable cause." They submit that these proposed amendments would bring B.C.'s legislation in line with Ontario's legislation.

The United Brotherhood argues for an amendment to Section 37 of the Code to allow for a distinction between inter-union mergers and intra-union mergers. The reason for this distinction is that in a merger of two subordinate bodies within the same parent organization, the impact on the membership is minimal – they would remain as members of the same national or international union under the same constitutional framework. On the other hand, in an inter-union merger, the membership would be introduced to an entirely new organization with a different constitution and way of operating. The United Brotherhood argues that no amendments should be made to Section 150.

Research

The result of a number of Board decisions on this issue has been that where a parent body's constitution requires the approval of the General President to a merger and such approval is not forthcoming, the Board cannot approve the merger even if a majority of the affected employees support such an outcome. This is in spite of the fact that the Board has generally recognized the right of employees, in certain circumstances, to make choices with regard to union local mergers.

In *British Columbia Transit*, BCLRB No. B499/98, the Board stated in connection with a Section 37 application: "The choice of trade union representation is the property of the employees affected. While this purpose is not absolute, the free choice of employees is to be accorded weight in the interpretation of other sections of the Code."

Discussion

It would be consistent with the general framework of the Code that mergers of union locals be decided through a democratic process by the employees affected. Where an international or national union has the ability to prohibit a merger that entity is effectively taking away the employees right to choose.

In our view, the Board's primary concern in examining union local mergers should be whether the decision to merge was arrived at by a democratic process. The Board should not concern itself with whether an international or national union has approved that decision.

We also considered the circumstances in which a trusteeship might be imposed on a local union within B.C. by the national or international union. It is noteworthy that Paul Weiler, former Chair of the B.C. Labour Relations Board commenting on his experience as Chair stated:

From that experience I would single out two areas as requiring legislative attention: one is the imposition (even more, the maintenance) of trusteeships on local unions, often through decisions made outside the province.

(From a paper titled 'The Process of Reforming Labour Law in British Columbia', *The British Columbia Labour Code in the 1980's*, Carswell: Vancouver, 1984)

Since Weiler's comments, amendments have been made to the Code (Sections 10 and 150) dealing peripherally with trusteeships, however, the Code has not addressed any standard for the imposition of a trusteeship on a local union. This differs from the approach used in Ontario, which prevents a parent trade union from assuming supervision or control of a local without just cause.

We support the idea that there should be some standard that would apply to the imposition of trusteeships.

ISSUE 12: FIRST COLLECTIVE AGREEMENTS

Understanding the issue

Under the Code, where employees form a union, the union and the employer must begin collective bargaining. If the bargaining of a first collective agreement breaks down and the union holds a successful vote to strike, both the union and the employer are entitled under Section 55 of the Code to seek expedited assistance from the Board to reach an agreement.

Once the Board becomes involved, it will attempt to mediate a settlement. If mediation fails, the Board has a number of options, including referring the matter to binding arbitration or referring negotiations back to the union and employer. The parties are then free to strike or lockout if an agreement is not reached.

Our committee was asked to study the issue of either retaining or eliminating the strike/lockout vote prior to accessing the Section 55 process for first collective agreements. We also were asked to examine whether strikes or lockouts should be able to take place once the Section 55 process has commenced.

Community concerns

The employer community supports the retention of the strike/lockout vote requirements. They argue the requirement that a union succeed in a strike vote serves several useful purposes. These include demonstrating employees' support the union's position and ensuring both the union and the employer make genuine attempts to bargain.

The Business Council of British Columbia also expresses concern about the decision in *P.T. Savage Enterprises Ltd. (Re)*, BCLRB No. B445/99 stating the majority found, in effect, the union may represent that the strike vote is not for the purpose of a strike, but rather an administrative vote for the purpose of accessing Section 55.

The union community wants to eliminate the requirement for a strike vote in order to make it easier to gain access to the first agreement mediation and/or arbitration process. They also want to retain the right to strike. Unions argue this will foster stability and cooperative participation.

The B.C. Federation of Labour states the requirement of a strike vote gives an unfair tactical advantage to employers—if union members are concerned about the prospect of a strike, they have no access to an alternative settlement process. By comparison, the employer can lock them out at any point after meaningful, good faith bargaining has taken place. If union members support a strike, the employer can opt for the Section 55 process and delay or prevent any job action.

Research

Our research indicates most first collective agreements (approximately 80-85 percent) are settled, most through mediation, with only approximately 15-20 percent proceeding to strike/lockout. Very few first collective agreements are referred to arbitration if a settlement is not reached. In 2002, only one such case was referred to arbitration out of a total of 16 cases disposed of. The following data describes the handling of applications in this area:

Applications for First Collective Agreements

Year	Filed	Disposed of	Not Proceeded With	With-drawn	Settled	Granted	Dismissed	Other	Hearings Held	Referred to Binding Arbitration
2002	14	16	0	0	15	0	0	1	1	1
2001	27	25	0	0	12	0	0	13	0	4
2000	31	33	0	0	18	0	0	15	0	4
1999	25	24	0	0	9	0	0	15	0	7
1998	33	33	0	0	18	0	0	15	0	2
1997	44	40	0	0	27	0	0	13	1	4

Our research into other jurisdictions indicates only New Brunswick, Nova Scotia and P.E.I. do not have specific provisions dealing with the negotiation of a first collective agreement. All other Canadian jurisdictions have specific sections dealing with first agreements. Generally either party can apply to the relevant board for assistance in reaching a first agreement.

In Ontario, the Minister can direct the Board to inquire into a dispute and settle the terms and conditions of the first collective agreement, where the Minister considers it necessary or advisable.

Only Saskatchewan has a requirement for a strike vote prior to being able to access the Board's assistance. A strike vote is not required, however, if the employer has commenced a lockout or the Board has made a determination pursuant to an unfair labour practice and the Board determines it is appropriate to assist the parties.

In the absence of legislated criteria the Board has established principles to be applied by an arbitrator in imposing a first collective agreement. These principles, are described in *Yarrow Lodge*, BCLRB No. B444/93 as follows:

1. A first collective agreement should not contain breakthrough or innovative clauses; nor as a general rule shall such agreements be either status quo or an industry standard agreement.
2. Arbitrators should employ objective criteria, such as the comparable terms and conditions paid to similar employees performing similar work.

3. There must be internal consistency and equity amongst employees.
4. The financial state of the employer, if sufficient evidence is placed before the arbitrator, is a critical factor.
5. The economic and market conditions of the sector or industry in which the employer competes must be considered.

Discussion

The broad question of policy is whether it is important that the Code provide a process to support the collective bargaining of a first agreement. If it is important to have this support, which does not appear to us to be controversial, then the question is how can that support be most effectively provided in a way that is consistent with the underlying policy.

In examining this issue a number of questions arise, including the following:

- Are the provisions that require a strike or lockout vote prior to accessing the Section 55 process having unintended consequences?
- Does conducting a strike or lockout vote assist in ultimately achieving a voluntary collective agreement by causing the parties to take the issues more seriously?
- Do these provisions poison the developing bargaining relationship or lead to more labour disputes?

While we agree that the precondition of a successful strike or lockout vote before parties can access Section 55 has a real impact on the bargaining process, we are unable to agree on what that impact is. On the one hand, such a vote may increase the tension around this issue and make it more difficult for parties to resolve their differences during negotiations. On the other hand, retaining the obligation to take a strike or lockout vote would preserve one form of pressure in pushing parties toward a voluntary solution.

This issue should not be left to become a tactical weapon rather than a vehicle to support the bargaining of first collective agreements. If we were asked to make recommendations on this issue, we would be inclined to look more broadly at the matter. This would include the question of whether Section 55 should be eliminated, particularly if it is not possible to find a balance that could be supported by both the employer and union communities.

ISSUE 13: LAST OFFER VOTES

Understanding the issue

The Code allows an employer, before a strike or lockout, to apply to the Board for a secret ballot vote on its last offer.

Similarly, if there is an employer's organization representing more than one employer, a union can request a vote by the employers be taken of the last offer given to the employer's organization.

Also, once a strike or lockout has commenced, the Minister can direct that a vote be held with respect to an offer last received if the Minister considers that it is in the public interest.

This procedure is called a "last offer vote." A request to the Board for a "last offer vote" can only be made once. If the offer is voted down, the employer and the union must return to the bargaining table. If the vote indicates the last offer is accepted, the terms constitute a collective agreement. In limited circumstances, the Board can decline the employer's request to hold a vote.

Our committee was asked to consider the effect of the current "last offer vote" process on the dynamics associated with negotiating a collective agreement and to determine if there are any alternatives to this process.

Community concerns

Generally the employer community wants the ability to request a "last offer vote" and seeks to have this process preserved in the Code without change. They argue these provisions allow employers a necessary avenue to put their positions to employees directly, particularly when unions are perceived not to be acting in the employees' best interests.

Unions, by contrast, argue the provision for last offer votes should be eliminated from the Code. They argue this provision interferes with and undermines the union's role as a bargaining agent. Furthermore, unions argue this section generally does not assist with the bargaining process, as employees most often reject the final offer. Some unions also argue this provision is unbalanced because unions are not able to take their final offers to shareholders, boards of directors, municipal councils, or other employer entities.

Research

Both sides in the debate recognize this section is rarely invoked and the statistics show employees more often than not reject the final offer.

Last Offer Votes

Year	Filed	Disposed of	Not Proceeded With	Withdrawn	Settled	Granted	Dismissed	Other	Hearings Held
2002	20	20	2	0	0	18	0	0	0
2001	19	20	0	1	0	19	0	0	1
2000	38	38	0	2	0	36	0	0	0
1999	29	29	0	0	0	29	0	0	1
1998	30	31	0	1	0	30	0	0	1
1997	33	32	0	0	0	32	0	0	1

Of the votes granted, the results were as follows:

Year	Votes Granted	Offer Accepted	Offer Rejected	Employer withdrew offer before vote	Settlement before vote	Other *
2002	18	7	8	2		1
2001	19	7	10	1		1
2000	36	13	22	1		
1999	29	6	21	1	1	
1998	30	6	21	2	1	
1997	32	5	26	1		

* *E.g. premature application, ballot box sealed pending result of an unfair labour practice*

With regard to other jurisdictions, Alberta, Manitoba, New Brunswick, Nova Scotia, Ontario, Saskatchewan and federal labour legislation all have provisions that allow for the last offer of the employer to be put to a vote. New Brunswick's legislation is similar to B.C.'s, while other jurisdictions present slightly different alternatives to the B.C. approach.

Federal legislation and Manitoba's legislation, for example, provide the Minister may direct a vote when there has been notice to bargain and the Minister feels it is in the public interest.

Ontario's legislation provides the Minister may direct a vote after commencement of a strike or lockout if the Minister believes it is in the public interest. However, if the employer requests a vote before the commencement of a strike or lockout, the Minister shall (and in the construction industry may) direct that a vote be held. The employer can only make this request once.

Alberta's legislation allows either party to apply to the Board to conduct a vote any time after notice to commence bargaining has been given and proposals have been exchanged. Each party is only allowed to apply once during each dispute. According to the Alberta legislation, on application for a last vote, the Board shall, if it is satisfied that the offer could form a collective agreement, conduct a vote.

In Saskatchewan, after a strike has continued for 30 days, the union, the employer or 25% of the employees (or 100 employees, whichever is less), can apply to the Minister for an appointment of a special mediator. This mediator can recommend the Board conduct a vote to determine whether the employees are in favour of accepting the employer's final offer. If recommended by the mediator, the Board must conduct the vote. No more than one vote in respect of the same strike can be held.

In Nova Scotia, before the commencement of a strike, but after a report of the conciliation officer is made to the Minister, a vote must be taken as to the last offer of the employer or union.

Discussion

In considering this issue, there are three approaches available:

- Maintain the current provision allowing last offer votes;
- Eliminate the current provision allowing last offer votes; and
- Establish a new provision that allows last offer votes to be held at the discretion of the Minister or Board.

Since this section is rarely invoked and since, in many cases, employees reject the final offer, our committee does not see this issue as one that has significant effects on the dynamics associated with collective bargaining.

ISSUE 14: EXPEDITED ARBITRATION

Understanding the issue

Currently, expedited arbitration is administered by the Collective Agreement Arbitration Bureau under Section 104 of the Code.

The 1992 Sub-committee of Special Advisors found, “throughout the province we heard persistent complaints from employers and unions concerning the delays and costs inherent in the present arbitration system.” As originally conceived by the Sub-committee, the purpose of the expedited arbitration process was two-fold:

1. Provide quick, cost-effective access to dispute resolution for mid-contract disputes.
2. Act as a training ground for new arbitrators thereby increasing the pool of trained arbitrators while assisting to expedite the process

The expedited arbitration process under Section 104 was to be the fix.

A key question for our committee was whether the current process under Section 104 met the goals of providing quick, cost-effective access to dispute resolution while training skilled new arbitrators? Has it been a fix?

Community concerns

The Business Council of British Columbia submits that Section 104 has not met the objectives of the 1992 Sub-committee of Special Advisors in recommending an expedited arbitration process. The Business Council writes, “in our view the concerns regarding delay and costs have not been adequately addressed, if at all, by the current provisions for expedited arbitration found in Section 104.”

They go on to argue that unions currently use the expedited arbitration process “to gain a tactical advantage rather than to resolve a pressing workplace issue.” The Business Council recommends scrapping Section 104 entirely.

Generally, believing the process has not worked, the employer community wants to eliminate the expedited arbitration provisions in the Code or be able to contract out of the provisions by adopting their own privately negotiated expedited arbitration processes.

The Canadian Council of Grocery Distributors and the Canadian Newspaper Association suggest it is not appropriate to hear all types of disputes under expedited processes. In particular, they argue, cases involving interpretation of a key provision in the collective agreement may not be appropriate for an expedited process.

The B.C. Federation of Labour is more satisfied with the existing process. The Federation states Section 104 “plays an important role in ensuring that an expedited process is available to all employees” and advocates the section remain. But the Federation also acknowledges “the frustration many affiliates have expressed about the delays in the current Section 104 process.”

Generally, the union community does not want any amendments to the expedited process under the Code that would allow the parties to contract out of Section 104. They argue that if the parties want to use their own privately negotiated processes, they can also negotiate superior provisions to those under the Code. However, these organizations suggest the provisions of the Code should continue to be available if the parties are not able to negotiate their own provisions.

The B.C. Nurses’ Union supports revisions to the manner in which arbitrators are selected under Section 104 to allow employer and union input, both in the expedited arbitration list and the selection of specific arbitrations.

Research

Since 1998, overall rates for the settlement of cases under the expedited process have varied between 59.5 percent (2002) and 73.3 percent (2001) but have never dropped below 59 percent. This indicates some degree of efficiency in the existing process as cases are either “weeded out” prior to the appointment of an arbitrator or settled once an appointment is made.

Nonetheless, both union and employer communities have expressed frustration at costs and delays experienced in the existing process while arriving at different conclusions about what needs to be done about it.

Complaints regarding delays are borne out by our research. In 2002, on average, it took 173.2 days to proceed from grievance to award (almost double this time in the health and social services sector) and 2.1 hearing days (four days in the health and social services sector). These are significant periods of time, given the supposedly “expedited” nature of the process.

Another concern addressed by the community was the use of the expedited process for cases dealing with significant issues of contract interpretation. In reality, the data shows that approximately one third of the cases going to the expedited process involve discipline as compared to interpretation of collective agreements or entitlements under the collective agreement.

Number of requests for appointment under Section 104,
by type of grievance by industry sector 2002/Jan/01 to 2002/Dec/31

Type of Grievance	All Sectors		Private Sector		Public Sector	
	Number	Percent	Number	Percent	Number	Percent
Benefits Entitlement	40	9%	31	9%	9	8%
Classification/Pay Rate	16	3%	10	3%	6	6%
Contract Interpretation	14	3%	9	3%	5	5%
Discipline/Suspension	63	14%	49	14%	14	13%
Dismissal	82	18%	53	15%	29	27%
Duty to Accommodate	4	1%	3	1%	1	1%
Harassment/Discrimination	14	3%	11	3%	3	3%
Hours of Work/Scheduling	23	5%	21	6%	2	2%
Job Posting/Selection	31	7%	16	5%	15	14%
Management Rights	51	11%	39	11%	12	11%
Non-Payment of Dues/Benefits	26	6%	23	6%	3	3%
Seniority/Lay-Off/Recall	33	7%	30	8%	3	3%
Wages (Payment Of)	38	8%	33	9%	5	5%
Work Jurisdiction	28	6%	26	7%	2	2%
Total:	463	100%	354	100%	109	100%

With regard to the goal of training skilled new arbitrators, our committee's experience suggests the expedited arbitration process has not succeeded in becoming a training ground for new, skilled arbitrators.

Discussion

Our committee believes the current expedited arbitration process is inflexible, fails to respond adequately to employers of different sizes or parties with particular issues, and has not provided quick, cost-effective dispute resolution.

While the policy objective of expedited arbitration remains valid, the delivery mechanism has not been as effective as originally conceived.

The effectiveness and efficiency of the process may be enhanced by developing statutory provisions that:

- Eliminate procedural objections to the appointment of arbitrators;
- Allow parties to engage in consultation regarding the choice of arbitrator;
- Determine which issues should or should not proceed to expedited arbitration;
- Permit parties to design their own expedited process; and
- Allow for non precedent-setting decisions.

ADDITIONAL ISSUES

We are providing the Minister with a summary of additional issues (see list below) that were raised by the labour relations community during our consultation process and that are consistent with Section 9 in our Terms of Reference. As further directed by our Terms of Reference, we have not researched, analyzed or discussed these issues.

A short summary of these additional issues can be found in Appendix E in this report. A full description and the arguments for change can be found in the submissions, which are available at www.labour.gov.bc.ca/lrcreview/.

- Essential services legislation and designation process
- Dispute resolution mechanisms
- Replacement workers
- Special provisions for construction sector
- Non-affiliation, union-only subcontracting and secondary boycotting
- Discretion for expedited hearings under Section 5(2) of the Code
- Remedial certification
- Regulation of picketing of provincial enterprises by employees of federally-regulated enterprises
- Secondary picketing
- "Hot" declarations
- Termination of employment due to revocation of union membership
- Job targeting
- Imbalance of power re: craft construction industry
- Collective agreement issues
- Deterring employer retribution against individual workers
- Legislative changes dealing with the period between the initial certification and negotiation of a first collective agreement
- Strengthening of deterrence of illegal strikes
- Scope of section 12 to deal with internal matters
- Individual employee rights

CONCLUSION

Nature of our Mandate

Our committee was asked to provide an analysis of 14 specific and technical issues. We hope our analysis will aid in bringing clarity to these matters and will assist the Minister in making decisions about how to proceed.

Because the scope of our mandate was limited, we were unable to address the wider context of B.C.'s labour relations environment. This wider context, which we believe to be critical, must be the subject of further discussion, analysis and creative thinking.

In particular, this wider context includes the need to:

- Support the Labour Relations Board; and
- Foster an understanding of how meaningful jobs are created and maintained as a result of cooperation between unions, employees, employers and government.

Strengthening and Supporting the Labour Relations Board

While conducting our review, the importance of the Labour Relations Board was brought to our attention time and again through our research and from stakeholders.

We believe the proper functioning of the Board is vital to a healthy labour relations climate. As we hope is clear from our analysis, a significant number of issues cannot be addressed solely through legislative action. For the Code to be effective, it is essential that the Board have the ability to provide clear, understandable and timely policy decisions regarding these issues. Such decisions can only be made when a body is strong and has sufficient resources.

Our committee believes a well-supported and well-respected Board is a strategic investment in the health of this province's labour relations future. A well-performing labour relations system will encourage economic activity and a cooperative environment.

Fostering Cooperation

The work of our committee has afforded us the opportunity to hear from both the employer and union communities. Their input has been invaluable to this process, but it has also illustrated the polarization present between the two communities on many issues.

Participants in the labour relations community are generally, and understandably, preoccupied with their own circumstances. We are concerned, however, that there is a lack of forums where representatives of management, labour, and government can discuss what is required to improve and maintain meaningful employment in British Columbia. Without such forums, it is difficult to reach agreement on the principles necessary to develop a modern labour relations system.

Consideration needs to be given to a broad cooperative strategy involving unions, employees, employers and government on a wide range of issues. The development of common objectives in training workers, meaningful job creation strategies, and the maintenance of productive and secure work environments are some examples of the issues that should be examined. It would be more productive, in our view, to work together on those issues, than to be preoccupied with tactical issues in an adversarial environment. Ultimately, this will be successful only if all parties, namely the employer community, union community and government are willing to take individual and collective responsibility for successfully addressing these issues.

APPENDICES

Appendix A – News release announcing appointment of committee

Appendix B – List of submissions and responses to submissions

Appendix C – Periods during which raids can occur across Canada

Appendix D – Comparison of decertification periods across Canada

Appendix E – Additional issues

APPENDIX A – NEWS RELEASE ANNOUNCING COMMITTEE



NEWS RELEASE

For Immediate Release
2002SDL0039-001104
Dec. 18, 2002

Ministry of Skills Development and Labour

INDEPENDENT COMMITTEE TO REVIEW LABOUR RELATIONS ISSUES

VICTORIA – A committee of special advisors has been set up to provide advice to government on matters pertaining to the labour code, Minister of Skills Development and Labour Graham Bruce announced today.

“The committee, appointed under Section 3 of the Labour Relations Code, will be asked to review 14 issues to provide government with a better understanding of today’s labour relations challenges,” Bruce said. “The committee has been instructed to conduct the review with an eye to ensuring the labour code is fair and balanced.

“The calibre of the members chosen to sit on this committee reflects our desire to build a climate of respect, open-mindedness and teamwork among people in the workplace,” Bruce said. “I want to see B.C. continuing to move towards an era of labour-management cooperation. I’m confident this committee can help achieve that goal.”

The committee was chosen from nominations by labour and employer associations, such as the B.C. Federation of Labour and the Business Council of B.C., along with trade unions and large and small businesses. The chair of the committee is Daniel Johnston, a lawyer with extensive mediation and facilitation experience locally, nationally and internationally. The members are:

- John Bowman, who has handled a majority of labour board hearings for the Canadian Auto Workers in B.C. and Alberta.
- Eric Harris, QC, whose practice focuses in the areas of labour, employment and administrative law.
- Marcia Smith, a managing partner with the Vancouver office of National Public Relations who was appointed as a member to the B.C. Labour Relations Board in 1995.
- Bruce Laughton, who has been consistently recognized as a leader in the areas of labour and employment law.

Earlier this year, Bruce released a discussion paper that set out changes to the labour code that had been suggested by interested groups and the public. Bruce decided these and other issues needed to be reviewed in greater detail.

The committee will provide the minister with advice on these issues in March 2003. After considering the advice, the minister may ask the committee to come back with formal recommendations. More information, including the terms of reference for the committee, is available at <http://www.labour.gov.bc.ca/lrcreview> on the Internet.

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Visit the province's Web site at <http://www.gov.bc.ca/> for online information and services.

Media contact: Betty Nicholson
Communications Director
250 387-2699

Labour Relations Code Review Committee Information

Section 3 of British Columbia's Labour Relations Code permits the Minister to appoint a committee of special advisers to undertake a review of the Code and labour management relations. Such committees can also be asked to:

- Make recommendations concerning the need for amendments to the legislation; and
- Make recommendations on any specific matter referred to the committee by the Minister.

The Minister of Skills Development and labour has appointed a Labour Relations Code Review Committee comprised of five special advisors who have been nominated by labour and employer associations, trade unions, and large and small businesses. The committee members are:

Daniel Johnson, Chair

Daniel Johnston is a lawyer who is familiar with labour issues and has extensive mediation, facilitation, and arbitration experience dealing with a wide range of complex commercial, environmental, First Nations, labour, and public policy issues. In addition to his direct labour experience, many of the multi-party negotiations or public policy processes mediated or facilitated by him have included a wide range of business and labour interests in the forest, mineral, and tourism sectors of the economy. In addition to his work in Canada, he has provided negotiation training and conflict resolution training for CIDA funded projects in South Africa and Thailand.

John Bowman

John Bowman handles a majority of labour board hearings for the Canadian Auto Workers (CAW) in B.C. and Alberta and represented CAW before the Canada Industrial Relations Board. Bowman has been involved in organizing over 10,000 members in the CAW and before that, the Canadian Association of Industrial, Mechanical & Allied Workers (CAIMAW). He has presided over 200 formal BC Labour Board hearings and has resolved many cases through the LRB's informal processes. Bowman is a member of the Organizing Advisory Committee within the BC Federation of Labour and an instructor for the Federation's Organizing Institute.

Eric Harris, QC

Eric Harris is a lawyer, practicing in the areas of labour, employment and administrative law. He appears regularly before arbitration boards, administrative tribunals and courts and has negotiated several major collective agreements. He has acted as both legal counsel and as a negotiator on behalf of employers; written and delivered papers at a number of legal conferences and industry association meetings; has had written works published in legal journals; was recently recognized by Euromoney in England as one of the best labour lawyers in the world.

Marcia Smith

Marcia Smith is a managing partner in the Vancouver office of National Public Relations, Canada's largest public relations and public affairs consulting firm. She was appointed a member of the B.C. Labour Relations Board in 1995. Smith has 18 years of experience in corporate reputation management, crisis communications and public affairs counsel. Her experience covers a wide range of industry sectors and issues including labour and employee relations.

Bruce Laughton

Bruce Laughton has his own law practice, Laughton and Company, with extensive experience in labour, administrative and employee benefit practice. He has represented a large number of trade unions, such as the carpenters, Council of Film Unions, and fire fighters before the B.C. Labour Relations Board, the Canada Industrial Relations Board, as well as cases in the courts. Laughton has been a lecturer at Continuing Legal Education courses and is a member of the Editorial Board of the Employment and Labour Law Reporter magazine. He has been consistently recognized by L'Expert as a leader in the areas of labour and employment law and also acts as general counsel to the B.C. College of Teachers.

APPENDIX B – LIST OF SUBMISSIONS & RESPONSES TO SUBMISSIONS

Submissions

Business Organizations

1. Business Council of British Columbia
2. Coalition of B.C. Businesses
3. B.C. Chamber of Commerce
4. Canadian Council of Grocery Distributors
5. Canadian Manufacturers and Exporters, BC Division
6. Canadian Newspaper Association
7. Independent Contractors and Businesses Association of B.C.

Employers

8. B.C. Transit
9. PCL Constructors Canada Inc.
10. Gateway Casinos Inc.
11. Convergys Customer Management Canada, Excel Agent Services Canada Co and RMH Teleservices (Joint submission)
12. Westwood Media Productions Inc.

Labour Organizations

13. B.C. Federation of Labour
14. Building and Construction Trades Department, AFL-CIO
15. British Columbia and Yukon Territory Building and Construction Trades Council
16. Vancouver and District Labour Council
17. Port Alberni and District Labour Council

Unions

18. National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada)
19. Industrial, Wood and Allied Workers of Canada, CLC (IWA)
20. United Steelworkers of America
21. Pulp, Paper and Woodworkers of Canada
22. B.C. Nurses' Union
23. B.C. Teachers' Federation
24. B.C. Government Employees Union
25. B.C. Provincial Council of Carpenters
26. Teamsters Local No. 155
27. Christian Labour Association of Canada
28. United Brotherhood of Carpenters and Joiners of America
29. Canadian Union of Public Employees, B.C. Division

30. College Institute Educators' Association of B.C.
31. International Union of Bricklayers and Allied Craftworkers Local Unions 01 and 03 B.C.
32. International Union of Bricklayers and Allied Craftworkers

Bargaining Associations

33. Health Employers Association of B.C.
34. Construction Labour Relations Association of B.C.

Individuals

35. W. Baird Blackstone
36. Hugh Finnamore
37. Terry Thompson
38. Hirschel Wasserman
39. B. K. Anderson
40. Scott Goodman

Responses to Submissions

Labour Organizations

1. B.C. and Yukon Territory Building and Construction Trades Council *response to submission of the Independent Contractors and Businesses Association of B.C.*

Unions

2. International Brotherhood of Electrical Workers Provincial Council Locals 213, 230, 258, 993 and 1003 *response to the submission of the Independent Contractors and Businesses Association of B.C.*
3. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada *response to the submission of the Independent Contractors and Businesses Association of B.C.*
4. United Brotherhood of Carpenters and Joiners of America *response to the submission of the B.C. Provincial Council of Carpenters*
5. United Food and Commercial Workers Union of B.C. *response to the submission of the Canadian Council of Grocery Distributors*
6. Telecommunications Workers Union *response to the submission of Convergys Customer Management Canada, Excel Agent Services Canada Co., & RMH Teleservices (Joint Submission)*
7. Union of B.C. Performers *response to the submission of Westwood Media Productions Inc.*
8. B.C. Nurses' Union *response to the submission of the Business Council of B.C. and the submission of the Health Employers' Association of B.C.*
9. Local 213 of the International Brotherhood of Electrical Workers *response to the submission of the Independent Contractors and Businesses Association of B.C.*

APPENDIX C – PERIODS DURING WHICH RAIDS CAN OCCUR ACROSS CANADA

Province	Raid Periods
British Columbia	Sec 19 <ul style="list-style-type: none"> • 7th and 8th months of each year of the collective agreement • Not within 22 months of a previous application if the previous application resulted in a decision by the board on the merits of the application
Canada	Sec 24 <ul style="list-style-type: none"> • Certification, no CA – after expiration of 12 months from time of cert or earlier with consent of board • CA term of <3 years - last 3 months of operation of agreement • CA term of >3 years - after the start of the 34th month and before the start of the 37th month of its operation (last 3 months of 3rd year) + last 3 months each year after 3rd year of CA + after the commencement of the last 3 months of its operation
Alberta	Sec 37 <ul style="list-style-type: none"> • Certification, no CA – after expiration of 10 months from date of cert • If cert questioned/reviewed – anytime after expiration of 10 months from final disposition of question/review (unless decision to certify quashed) • CA term of <2 years - last 2 months of agreement • CA term of >2 years - last 2 months of 2nd year + last 2 months of every anniversary + 2 months preceding the end of term
Saskatchewan	Sec 33 <ul style="list-style-type: none"> • CA - 30 to 60 days before the anniversary of the agreement
Manitoba	Sec 35 <ul style="list-style-type: none"> • Certification, no CA – after expiry of 12 months from date of cert or 12 months from date on which court proceedings are concluded (whichever is later) • <u>No application</u> by another union during the first 6 months of the CA • <u>No application</u> by another union during the last 3 months of the term of the CA • CA term <18 months - 3 months prior to last 3 months of agreement • CA term >18 months - 3 months prior to anniversary of the date the CA became effective or 3 months preceding last three months of the term of the CA
Ontario	Sec 7 <ul style="list-style-type: none"> • Cert, no CA – after expiration of one year from the date of cert • Recognition agreement, no CA – after expiration of one year from date recognition agreement entered into • CA term <3 years - last 3 months of agreement • CA term >3 years – after the start of the 34th month and before the commencement of the 37th month (last 3 months of 3rd year) + last 3 months of every anniversary + after commencement of last 3 months of its operation

Province	Raid Periods
Quebec	Sec 22 <ul style="list-style-type: none"> • Certification, no CA – 12 months after the date of the cert • 9 months after date of expiration of CA or arbitration award in lieu of a CA • CA term <3 years - between 90 and 60 days before expiration • CA term >3 years - between 180 and 150 days before expiration or between 180 and 150 days prior to 6th anniversary + between 180 and 150 days prior to every anniversary after the 6th (except where the period would end within 12 months or less of the 180th day prior to the date of expiration of the CA)
New Brunswick	Sec 10 <ul style="list-style-type: none"> • Certification, no CA – after expiry of 12 months from date of the cert • Recognition agreement, no CA – after expiry of 12 months from date recognition agreement entered into • CA term <3 years - last 2 months of agreement • CA term >3 years – after start of 35th month and before the 37th month of CA (last 2 months of 3rd year) + last 2 months of each year the agreement continues after 3rd year + after last 2 months of its operation
Nova Scotia	Sec 23 <ul style="list-style-type: none"> • Certification, no CA – after expiry of 12 months from the date of cert or before with consent of Board • CA term <3 years - last 3 months of agreement • CA term >3 years –after the start of the 34th month and before the start of the 37th month of its operation (last 3 months of 3rd year) + last 3 months of every anniversary after the 3rd year + in 3 months before the end of the term
Newfoundland	Sec 36 <ul style="list-style-type: none"> • Certification, no CA – after expiry of 12 months from the date of cert or earlier with consent of board • CA term <2 years - last 2 months of agreement • CA term >2 years – 11th or 12th month of 2nd or subsequent year of the term (last 2 months of 2nd year + last 2 months of every anniversary) + in 2 months before the end of the term
PEI	Sec 12 <ul style="list-style-type: none"> • Certification, no CA – after 10 months from date of cert, or earlier with consent of board • CA term <2 years - last 2 months of agreement • CA term >2 years – after start of 23rd month and before the start of the 25th month of the term (last 2 months of 2nd year) + last 2 months of every anniversary after the 2 years + after commencement of the last 2 months of the term • Expired CA, notice to bargain given – expiration of 10 months after agreement or earlier with consent of board

APPENDIX D – COMPARISON OF DECERTIFICATION PERIODS ACROSS CANADA

Province	Decertification
British Columbia	<p>Sec 33</p> <ul style="list-style-type: none"> Anytime, except 10 months following certification
Canada	<p>Sec 38</p> <ul style="list-style-type: none"> Application can only be made during the period in which an application for certification can be made: No CA – anytime after 1 year from date of certification CA term of <3 years - last 3 months of operation of agreement CA term of >3 years - after the start of the 34th month and before the start of the 37th month of its operation (last 3 months of 3rd year) + last 3 months each year after 3rd year of CA/last 3 months of operation of CA + after the commencement of the last 3 months of its operation
Alberta	<p>Sec 54(2)(c)</p> <ul style="list-style-type: none"> When the bargaining rights of a trade union are revoked, the trade union shall not negotiate or enter into a collective agreement or apply for certification for the same or substantially the same unit with the employer to whom the bargaining rights relate for a period of 6 months from the date of the revocation of the bargaining rights. <p>Section 52</p> <ul style="list-style-type: none"> An application for revocation of bargaining rights <ul style="list-style-type: none"> may be made by the trade union at any time when there is no collective agreement in effect may be made by the employees in the unit <ul style="list-style-type: none"> if no CA - after 10 months from the date of the certification if the certification is questioned or reviewed by the Court – after 10 months from the date of the final disposition of the question or review, unless the Court quashes the decision of the Board to certify the bargaining agent, CA term < 2 years – last 2 months before the end of the term CA term > 2 years - in the 11th or 12th month of the 2nd or any subsequent year of the term (but application must be made at least 10 months prior to the end of the term of the collective agreement) or in the 2 months immediately preceding the end of the term. may be made by an employer or former employer only if the employer or former employer and the bargaining agent have not bargained collectively for a period of 3 years after the date of certification, if no collective agreement has been entered into affecting the employer or former employer and the bargaining agent, or after the first date fixed for the termination of the collective agreement, if a collective agreement has been entered into affecting the employer or former employer and the trade union.

Province	Decertification
Saskatchewan	Sec 5(k) <ul style="list-style-type: none"> • Board may make orders rescinding a certification if application is made to the board during 30 to 60 days prior to anniversary date of CA or order
Manitoba	Sec 49 <ul style="list-style-type: none"> • Application for decertification may be made by an employee during the following times: • Cert, no CA – after expiry of 12 months from date of cert or 12 months from date on which court proceedings are concluded (whichever is later) • CA term <18 months - 3 months prior to last 3 months of agreement • CA term >18 months - 3 months prior to anniversary of the date the CA became effective or 3 months preceding last three months of the term of the CA • CA has terminated and the parties have bargained collectively either after the termination of the agreement or within 3 months before the termination of the CA – no application for certification of a bargaining agent for employees in a unit shall be made until after 90 days after the termination of the agreement except by the bargaining agent which was a party to the CA or with the consent of the bargaining agent. • At any time if board is satisfied that employees or employer would suffer substantial and irremediable damage or loss if it did not entertain an application and that it is not reasonable that the employees or their employer should suffer that damage or loss • Application for certification can be made at any time if board is satisfied that employees or employer would suffer substantial and irremediable damage or loss if it did not entertain an application and that it is not reasonable that the employees or their employer should suffer that damage or loss
Ontario	Sec 63 <ul style="list-style-type: none"> • Application can only be made during the following periods <ul style="list-style-type: none"> ○ No CA – 1 year after certification ○ CA term <3 years - last 3 months of agreement ○ CA term >3 years - after the start of the 34th month and before the start of the 37th month (last 3 months of 3rd year) + last 3 months of every anniversary + after commencement of the last 3 months of its operation
Quebec	Sec 41 Labour commissioner may, during the following times, cancel the certification: <ul style="list-style-type: none"> • Cert, no CA – 12 months after the date of the cert • 9 months after date of expiration of CA or arbitration award in lieu of a CA • CA term <3 years - between 90 and 60 days before expiration • CA term >3 years - between 180 and 150 days before expiration or between 180 and 150 days prior to 6th anniversary + between 180 and 150 days prior to every anniversary after the 6th (except where the period would end within 12 months or less of the 180th day prior to the date of expiration of the CA)

Province	Decertification
New Brunswick	<p>Sec 23</p> <ul style="list-style-type: none"> • No time bar for same union to apply for certification after having been decertified • At any time if board is satisfied that employees or employer would suffer substantial and irremediable damage or loss if it did not entertain an application and that it is not reasonable that the employees or their employer should suffer that damage or loss • Cert, no CA – after expiry of 12 months from date of the cert or term of CA • Recognition agreement, no CA – after expiry of 12 months from date recognition agreement entered into • CA term <3 years - last 2 months of agreement • CA term >3 years – after start of 35th month and before the 37th month of CA (last 2 months of 3rd year) + last 2 months of each year the agreement continues after 3rd year + after last 2 months of its operation
Nova Scotia	<p>Sec 29</p> <ul style="list-style-type: none"> • Cert, no CA – after expiry of 12 months from the date of cert or before with consent of Board • CA term <3 years - last 3 months of agreement • CA term >3 years –after the start of the 34th month and before the start of the 37th month of its operation (last 3 months of 3rd year) + last 3 months of every anniversary after the 3rd year + after last 3 months of its operation
Newfoundland	<p>Sec 52</p> <p>Application to revoke certification can be made anytime <u>except</u>:</p> <ul style="list-style-type: none"> • 12 months following certification • 12 months following notice to bargain • 6 months following the date when a previous application to revoke certification was refused
PEI	<p>Sec 20</p> <ul style="list-style-type: none"> • An employer or trade union named in a certification order or any employee in the union may apply to the board for the revocation of the certification. If the board is satisfied that the majority of employees no longer wish the union to act as bargaining agent on their behalf, the board shall revoke the certification of the trade union. • Certification, no CA – after 10 months from date of cert, or earlier with consent of board • CA term <2 years - last 2 months of agreement • CA term >2 years – after start of 23rd month and before the start of the 25th month of the term (last 2 months of 2nd year) + last 2 months of every anniversary after the 2 years + after commencement of the last 2 months of the term • Expired CA, notice to bargain given – expiration of 10 months after agreement or earlier with consent of board

APPENDIX E – ADDITIONAL ISSUES

Essential services legislation and designation process

The following groups identified this issue:

- Health Employers Association of BC
- B.C. Nurses' Union (reply submission)

The HEABC argues that the current system of essential services designations and implementation should be changed.

Dispute resolution mechanisms

The following individual identified this issue:

- W. Baird Blackstone

Mr. Blackstone submits that certain principles regarding dispute resolution should be reflected in the Code, such as increased use of mediation and mediation-arbitration processes, more expedited and streamlined arbitration proceedings.

Replacement workers

The following groups identified this issue:

- B.C. Chamber of Commerce
- Business Council of British Columbia
- Canadian Council of Grocery Distributors
- Canadian Newspaper Association
- Coalition of B.C. Businesses
- United Food and Commercial Workers Union, Local 1518 (reply submission)
- Telecommunications Workers Union (reply submission)
- B.C. Nurses' Union (reply submission)

The employer community would like the restrictions on the use of replacement workers in the Code to be repealed.

Special provisions for construction sector

The following groups identified this issue:

- B.C. Federation of Labour
- British Columbia and Yukon Territory Building and Construction Trades Council
- Construction Labour Relations Association of B.C.
- International Union of Bricklayers & Allied Craftworkers
- PCL Constructors Canada Inc.
- Vancouver and District Labour Council

The issue is whether the Code should contain a specific Part dealing solely with the construction industry.

Non-affiliation, union-only subcontracting and secondary boycotting

The following group identified this issue:

- Business Council of British Columbia

The Business Council seeks to have the Code prohibit collective agreements from containing non-affiliation clauses, restrictions on the subcontracting of work to unionized firms, and the ability to honour “hot” declarations.

Discretion for expedited hearings under Section 5(2) of the Code

The following group identified this issue:

- Coalition of B.C. Businesses

The Coalition wishes to have the time for the hearing of unfair labour practices under Section 5(2) of the Code left to the discretion of the Board.

Remedial certification

The following group identified this issue:

- Coalition of B.C. Businesses

The Coalition wishes to amend the Code to clearly provide that the Board must order a vote before a certification in all circumstances.

Regulation of picketing of provincial enterprises by employees of federally-regulated enterprises

The following group identified this issue:

- Canadian Council of Grocery Distributors
- Coalition of B.C. Businesses

These organizations seek to give the Board the power to regulate picketing of provincially regulated businesses by employees of federally-regulated enterprises.

Secondary picketing

The following group identified this issue:

- Canadian Council of Grocery Distributors

The CCGD seeks an amendment to restrict picketing to an employer’s primary place of work.

“Hot” declarations

The following group identified this issue:

- Canadian Newspaper Association

This organization seeks to prohibit collective agreements from containing provisions permitting union members to honour “hot” declarations.

Termination of employment due to revocation of union membership

The following group identified this issue:

- Canadian Newspaper Association

The CNA seeks to prohibit a union from obtaining the termination of an employee as the result of expulsion from a union except where the employee has failed to pay dues, assessments or initiation fees required to be paid by all members of the union, or had engaged in activity against the union contrary to the statute.

Job targeting

The following groups identified this issue:

- Independent Contractors and Businesses Association of B.C.
- International Brotherhood of Electrical Workers, Local 213 (reply submission)

The ICBA seeks a prohibition on union funds being used to assist employers in obtaining work, a practice known as “job targeting”.

Imbalance of power re: craft construction industry

The following group identified this issue:

- Independent Contractors and Businesses Association of B.C.

The ICBA suggests that steps be taken to equalize the balance of power between trade unions and contractors in the construction industry.

Collective agreement issues

The following groups identified this issue:

- Westwood Media Productions
- Union of B.C. Performers (reply submission)

Westwood has raised concerns about its collective agreement with the UBCP.

Deterring employer retribution against individual workers

The following groups identified this issue:

- B.C. Federation of Labour
- College Institute Educators' Association of B.C.
- United Steelworkers of America
- Telecommunications Workers Union (reply submission)

These groups suggest that the Code should include provisions to financially penalize employers for committing unfair labour practices.

Legislative changes dealing with the period between the initial certification and negotiation of a first collective agreement

The following groups identified this issue:

- CAW
- Telecommunications Workers Union (reply submission)

They propose that the Code should be amended to extend the freeze period following certification and should allow employees upon certification access to a standard of just and reasonable cause where discipline has been imposed.

Strengthening of deterrence of illegal strikes

The following group identified this issue:

- Health Employers Association of BC

The HEABC propose that there should be legislation imposing significant monetary sanctions against unions and/or their members who engage in illegal strike activity.

Scope of section 12 to deal with internal matters

The following individual identified this issue:

- Terry Thompson

Mr. Thompson would like Section 12 of the Code to deal with internal union disputes not necessarily arising from the employment relationship.

Individual employee rights

The following individuals identified this issue:

- Hirschel Wasserman
- B.K. Anderson

These individuals submit that the Code should permit a person to choose not to become a member of a trade union.