

Report of the B.C. Labour Relations
Code Review Committee

**Regarding the role of Members of the
Labour Relations Board**

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INTRODUCTION

The BC Labour Relations Code Review Committee, established in December 2002 under Section 3 of the Labour Relations Code, was requested in March 2007 to provide advice and recommendations regarding Members of the BC Labour Relations Board. More specifically:

- 1) The Role that Members could play with respect to:
 - i) Settlement and adjudication of issues and disputes brought before the Board;
 - ii) Contributing, identifying and addressing critical policy issues facing the Board
 - iii) Effective engagement of the labour relations communities; and,
 - iv) Any other matters that the Section 3 Committee considers to be a useful and relevant role for Members.
- 2) An appropriate process for seeking and appointing Members to the Board
- 3) Mechanisms to ensure the effective involvement of Members during their term.

In approaching our task we concluded it would be helpful to solicit input from the labour relations community on these issues. Accordingly, we extended an invitation to the Business Council of British Columbia, the Coalition of BC Businesses and the BC Federation of Labour to provide us with written submissions on the above issues.

We also extended invitations to those organizations to meet with us for the purpose of expanding on their written submissions.

In addition, we met with the Board and a number of former Members to seek their views. It is also to be noted that two members of this Committee are former Members of the Board and we have received the benefit of their experience.

The following constitutes our advice and recommendations.

THE LABOUR RELATIONS BOARD

The Labour Relations Board is one of the most important administrative tribunals in terms of its impact on the economic well-being of the province. The problems the Board must resolve include:

- The setting of essential service levels in health care, education, municipal and public utilities
- The regulation of strikes, lockouts and picketing
- The imposition of first collective agreements
- The structure of collective bargaining
- Whether labour legislation is contrary to the Charter of Rights and Freedoms

All of the foregoing can arise during times of crises and can have significant and wide-ranging consequences for businesses and employees throughout the province. In particular they can affect investment and confidence in industries that are critical to the provincial economy such as mining, forestry, the film industry and construction among others.

There are also significant impacts on the public when disputes affect health care, education, ferries, municipal services and other transportation services. The Board's decisions ultimately define the rights of workers and their access to collective bargaining. In many circumstances, the impacts of decisions the Board must make are similar in magnitude to those of heads of administrative tribunals, senior civil servants and judges.

In our report of April 11, 2003, which was based on significant consultation with the business community and labour, we made the following observations:

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.

These observations continue to be valid. Our advice and recommendations in this report have been guided by these observations and speak directly to matters required to ensure the proper functioning of a well-respected and well-supported Board.

BACKGROUND

The composition of the Board is set out in Part 9 of the *Labour Relations Code* of British Columbia. The Board consists of a chair, vice chairs and as many members, equal in number that are representative of employers and employees, as the Lieutenant Governor in Council considers proper. Each of these positions is to be appointed by the Lieutenant Governor in Council after a merit based process. Part 9 further establishes that the Chair of the Board will be consulted before the appointment of Vice Chairs and Members.

Under the *Code*, the Chair may establish panels of the Board. A panel has the power and authority of the Board in matters referred to it by the chair or the Board. A panel may consist of a combination of the Chair and Vice-Chairs or Chair, Vice-Chairs and Members, where Members are equal in number, representative of employers and employees respectively.

The *Code* also sets out the duties of the Chair, Vice Chairs and Members. These duties are found in Section 2 of the *Code* as follows:

- 2 The board and other persons who exercise powers and perform duties under this Code must exercise the powers and perform the duties in a manner that
 - (a) recognizes the rights and obligations of employees, employers and trade unions under this Code,
 - (b) fosters the employment of workers in economically viable businesses,
 - (c) encourages the practice and procedures of collective bargaining between employers and trade unions as the freely chosen representatives of employees,
 - (d) encourages cooperative participation between employers and trade unions in resolving workplace issues, adapting to changes in the economy, developing workforce skills and developing a workforce and a workplace that promotes productivity,
 - (e) promotes conditions favourable to the orderly, constructive and expeditious settlement of disputes,
 - (f) minimizes the effects of labour disputes on persons who are not involved in those disputes,
 - (g) ensures that the public interest is protected during labour disputes, and
 - (h) encourages the use of mediation as a dispute resolution mechanism.

Members participate at the Board on a part-time basis and have been appointed primarily through an informal consultation process between the Board and the community with nominations coming from various labour and employer organizations.

Over the past 34 years, Members have been used on panels where they have assisted the Chair and Vice-Chairs to adjudicate cases, to provide policy input to the Board and to mediate and seek settlements between the parties.

The number of Members and their role has varied over the years. In 2001, a Member's Committee was established to examine the Board's use of Members and to make recommendations. The Member Committee worked to identify concerns expressed by Members and Vice-Chairs regarding the Board's use of Members.

The Member's Committee identified that from the late 1990's to 2001, the use of Members by the Board had declined. A number of reasons for the decline were identified by Vice Chairs including:

- A concern regarding the Board's financial resources when determining whether or not to add Members to a case
- A concern that Members' availability caused delays in scheduling a hearing or the continuation of a hearing
- A concern that disagreement among panel members may have caused delay in issuing decisions
- A concern that Members on a panel may have caused more work for a Vice-Chair who was already very busy

In this same report, concerns were also identified by Members. They included:

- Members wanted to be active and participate more fully in the Board
- Members were not used enough on panels
- Members were used inconsistently by different Vice-Chairs
- Members found it difficult to participate in policy discussions because of a lack of notice and a lack of awareness of the issues

In April 2006 the terms of appointment of all Members but two expired. None of these appointments were renewed and no new appointments were made. These two Members of the Board have not been used by the Board in any form over the past year and are effectively Members in name only.

As noted, as part of our review, we met with the Board and former Members to seek their perspectives. Both the Board and former Members with perhaps different emphasis agreed the concerns raised in the 2001 Members' Committee report were still valid today.

SUBMISSIONS

In response to our invitation, we received and considered three written submissions from the Business Council of British Columbia, the Coalition of B. C. Businesses and the B. C. Federation of Labour. We will provide a concise summary of those submissions below.

The three submissions support the value of Members.

The Coalition stated:

“The value of having Members on the Board can be measured by the unique perspectives that they bring to the table. Members with business and labour background add depth to the Board and the hearing and adjudication process through their real world experiences and expertise.”

The B. C. Federation of labour stated:

“Members bring their knowledge of the day-to-day reality of labour relations in the workplace to the task of adjudication, increasing community confidence in the resulting decisions. Their rapport with the parties to Board applications can help to mediate settlement of applications and complaints. They provide feedback on the performance of the Board from the perspective of knowledgeable key stakeholders. And members help to shape policies geared to the practical realities of labour relations, within the framework of the statute.”

The Business Council of British Columbia stated:

“Members would be mindful of the necessity to balance “industrial justice” with the realities faced by both employers and trade unions.”

The submissions differ, to some degree, in the role which Members are expected to play at the Board. The B. C. Federation of Labour made the most extensive submission to the effect that Members should be utilized in the adjudication process to the largest extent possible. Their submission acknowledged that, in matters which need to receive expedited treatment, such as certification applications, unfair labour practice complaints and Part 5 applications, it may not be feasible to use Members. Their submission also contained support for the utilization of members in policy development, as advisors to the Board, in achieving settlements of disputes and in the review of decisions.

The Business Council considered that Members should be appointed to Panels hearing both straight forward and complex cases. The Business Council did not consider Members should be involved in an engagement process with the community.

The B. C. Federation of Labour suggested that there should be 22 members and the Business Council recommended the appointment of 12 members as did the Coalition.

The Coalition suggested that Members receive training in how to remain impartial and objective. The submissions were very pointed when they discussed the issue of how members should be selected.

The Coalition stated:

"With regard to the selection and appointment of Members, the Labour Relations Board should continue the practice of consulting with the business community and labour groups. The Coalition of B. C. Businesses values the opportunity to forward nominees to the selection process as our nominees bring forward the point of view of small and medium-sized businesses that would be of value to the Board's adjudication process.

We would recommend that the Board consider expanding the selection process to include nominees from unions outside of the BC Federation of Labour to take advantage of the perspectives advanced by B. C. independent unions.

The B. C. Federation stated:

We believe that an appropriate process for seeking and appointing members is to define standards, criteria and expectations while relying on the interested parties in business and labour to identify candidates worthy of appointment, in consultation with the Chair of the Board. In the past, this process has allowed us to strike a reasonable balance in terms of experience, diversity and sectoral representation – factors that also go to community confidence that the Board will understand their perspectives."

The Business Council stated:

As stated at the outset, Members should be selected to the Board based on their experience and reputations within the labour relations community. For qualified employer Member appointments, we recommend the Board canvass the Business Council of B.C. as well as other employer organizations in the Province. For labour appointments, it should canvass the B.C. Federation of Labour and as well as other labour organizations not affiliated with the Federation.

The Committee appreciates the time taken to prepare these submissions and has fully considered them in the process of formulating our recommendations.

DISCUSSION

Value of Members

There was a general consensus amongst the parties we consulted that Members can add value to the Board. Members benefit the Board by bringing practical perspectives on real-life industrial relations problems and by being able to assist in the informal resolution of disputes. Members also provide an important linkage to the broader labour relations community.

By using Members the Board can also enhance the level of trust which the community has regarding Board decisions. Those decisions can carry more weight and can be viewed as representing a broader perspective. In addition, persons appearing before the Board can take greater comfort in knowing the panel reflects the views of the labour relations community which may assist in the acceptance of decisions.

On the other hand, there is a financial cost to the utilization of Members as well as the additional complexity associated with scheduling their availability and the resulting delay that may occur. Additionally, the active involvement of Members requires extra management time and support from the Board which has been difficult in the current budgetary circumstances.

In preparing our recommendations we have made the assumption that Vice Chairs will be appointed in a timely way and to the level necessary to carry out the work of the Board.

Subject to the recommendations that follow, we are of the opinion that Members have an important role to play in the proper functioning of the Board.

Appointment of Members

In order for Members to bring value to the Board it is critical that the right people be appointed and that the appointment process have a high degree of rigor.

The right people are those who have the support and respect of the community. They also have the following attributes:

- A personal commitment to supporting the role and responsibilities of the Board
- Personal integrity and a respect for confidentiality
- Independence of thought
- A willingness to question conventional assumptions
- Labour relations experience in a real-world context

- Strong interpersonal skills
- A willingness to make themselves available

Given the part-time nature of a Member's role, it is important that the organizations these people work for, fully support and facilitate their participation in the Board's activities. Those organizations must also respect the confidentiality and independence which Members must exercise in carrying out their duties.

We understand the appointment and reappointment process is solely within the Government's prerogative and the government is free to make whatever decisions it determines to be appropriate. That said, it is fundamental to the support and proper functioning of the Board that the process of appointing Members be responsive to attributes we have described above.

To achieve this we believe appointments should be based on recommendations flowing from a nomination process and evaluation process which uses clear selection criteria.

Selection criteria

Selection criteria should be finalized based on the attributes described above and made available to the labour relations community. In addition, the selection criteria should include the appropriate management/labour balance, sectoral representation as well as a consideration of gender and diversity.

Nomination process

Candidates should first be identified through a nomination process. Any organization with a labour-relations purpose would be invited to nominate individuals who meet the selection criteria. The nomination should be accompanied by a description of how the potential candidate meets those criteria.

Evaluation process

A confidential evaluation committee should be created to assess candidates who have been nominated. That committee could be based on the existing Section 3 or another committee created for this purpose consisting of a small number of individuals from the labour relations community.

This committee would conduct a confidential review of the qualifications of candidates against the selection criteria, seek input on a confidential basis from members of the labour relations community as they consider appropriate, seek advice from the Chair of the Board, and make recommendations for the consideration of the Minister.

In terms of determining the views of the labour relations community, we do not believe it would be useful to conduct a broad public consultation with respect to the appointment or reappointment of Members. We believe such a broad consultation would engender controversy and debate which would be difficult to resolve. It would also have the potential to compromise the integrity of the selection criteria.

Role of Members

Adjudication

The changes to Section 2 of the *Code* have led to a fundamental reconsideration of certain policies of the Board. Those changes may affect how, when and for what purpose Members are used. In addition to some of the more traditional roles, Members may be able to assist the Board in determining how to carry out their duties under Section 2. Further, Section 2 is unique in requiring adjudicators to make judgments on a number of competing economic and societal interests. We believe Members can be of great assistance in making those judgments and further, could contribute to the communities understanding of what Section 2 duties require.

The determination of the role of Members must begin with a consideration of the types of cases heard by the Board. Those cases fall into a continuum between primarily fact-driven to cases that involve a consideration of policy issues to cases involving complex legal issues such as the application of the Charter of Rights and Freedoms.

We recommend Members be selectively used on the fact-driven and policy-based part of the continuum. We consider they would have less to contribute in complex legal cases.

In practice this would mean Members would be used in the following examples:

- Unfair labour practices
- Certifications
- Appropriate bargaining unit cases
- Exclusions from bargaining units
- Common employer/successorship

We recommend Members generally be excluded from:

- Section 99 cases
- Expedited cases such as picketing and strikes
- Reconsiderations except those involving broad policy issues
- Section 10 and 12 cases

Settlement

Certain submissions we have received urged us to recommend the use of Members in informal attempts to resolve matters that are before the Board. We agree with those submissions. The circumstances where members should be used depends on the assessment of the presiding panel as to the relationship of the Members to the parties and the willingness of the parties to participate. Additionally we are of the view that Members require training in order to effectively participate in the settlement of cases and discuss the role of training below in our report.

Non-hearing role

Finally, Members can provide an important liaison between the Board and the labour relations community. This can include explaining Board processes and, if necessary, defending decisions and policies. Members can also provide the Board with insight on what is happening in the real world of labour relations in British Columbia. This can keep the Chair and Vice-Chair's current with trends and issues.

Number of Members

There is no means to determine the right number of Members. The determination of the number of Members to be appointed depends upon a variety of factors including the availability of Members, the desirability of providing Members with regular opportunities to participate, the nature and frequency of cases to which Members are appointed and the need for diverse representation.

We recommend that an initial number of 18 members be appointed. Experience will determine if this is the appropriate number and we further recommend the number of Members be periodically examined.

Mechanisms to ensure the effective involvement of Members

In order to obtain value from Members it is necessary to require the Board to have accountability for their use and to allocate specific resources in a number of areas. The parties we consulted were clear that in the absence of such accountability and allocations, the use of Members would be doomed to failure. Further, Members need to believe that they are a part of the Board and have the respect of the Board's adjudicators. Some of the matters which are most important are described below.

Board Accountability

In an internal policy guideline issued by the Board on October 5, 2001 it was stated that:

“Members are a vitally important part of the Board. They contribute knowledge and experience to the decision-making process, and serve as a valuable link to the community.”

In order that these contributions be realized it will be necessary for the Board to ensure that members are used appropriately.

We recommend the Board be accountable in its utilization of Members by involving them in the adjudication of cases on a regular basis and by integrating Members fully into the operations of the Board.

In order to achieve this goal the assignment of Members to cases should not be left solely with the Vice Chairs. A process should be in place which would allow the Registrar or the Associate Chair, Adjudication to participate in those decisions.

Financial Resources

In the past few years the Board has faced significant administrative challenges regarding its budget and the maintenance of a full complement of Vice Chairs. In order that these challenges are not aggravated we recommend a segregated budget be established and maintained. The expenditures from this budget would be restricted to the costs associated with Members. Those costs would involve:

- Initial orientation
- Specific training involving matters such as decision-writing; alternative dispute resolution and mediation;
- Attendance at policy meetings, full Board meetings and hearings
- Administrative support including access to staff lawyers and a designated Members room

Additionally, the time spent by Members should be adequately compensated and therefore their daily rate should be reviewed from time to time.

Review Process

If our recommendations are accepted, and Members are appointed to the Board, a review process should be put in place to periodically consider the effective involvement of Members. It is logical that a review take place in the year prior to the expiry of a significant number of Members appointments.

SUMMARY

It is evident to us that a consensus exists that the appointment of Members would be beneficial to labour relations in the province. It is equally obvious to us that the mere appointment of Members without adequate resources and clarity as to their role would not succeed.

Also, we believe it is essential that care be taken in the selection process in order that individuals with the necessary background, commitment and availability are appointed.

The active participation of Members at the Labour Relations Board is an important way of providing input from the labour relations community regarding the Board's processes, policies and procedures. The Board cannot do an effective job of performing the duties required under the Labour Relations Code if it is isolated from employers and labour organizations. We are confident that a properly resourced Board that includes qualified Members will make a positive contribution to labour relations in our province.