

Labour Relations Code Review

Sandra I. Banister, QC - Banister & Company

Barry Dong - Harris & Company

1

LABOUR RELATIONS CODE REVIEW PANEL REPORT TO THE MINISTER OF LABOUR

RECOMMENDED AMENDMENTS

Labour Relations Code Amendment Act, 2018

2

The Panel

- ▶ On February 6, 2018, the Minister of Labour appointed Sandra Banister Q.C. (union appointee), Barry Dong (employer appointee), and Michael Fleming (Chair), as a Labour Relations Code Review Panel (the “Review Panel”) with a broad mandate to review the B.C. *Labour Relations Code*, RSBC 1996, c.244 (the “Code”) and to provide recommendations for any amendments or updates to the Code.



3

Background and Mandate

- ▶ The conceptual and structural framework for the Code was established 45 years ago and there have been significant changes in the B.C. workforce, workplaces and economy in the intervening decades.
- ▶ The terms of reference directed the Review Panel to consult with the community, consider labour law developments in other Canadian jurisdictions.
- ▶ Alberta and Ontario recently reviewed and amended their legislation.
- ▶ The Review Panel was asked to determine its own procedures, including the format for reporting to the Minister and communications but was expected to consult with and receive submissions from interested stakeholders, including the BCLRB, from all regions of the province.
- ▶ The Review Panel was also tasked with assessing each issue canvassed from the perspective of how to “ensure workplaces support a growing, sustainable economy with fair laws for workers and business” and promote certainty as well as harmonious and stable labour/management relations.

4

Process

- ▶ The Review Panel undertook a public consultation process during which we received 108 written submissions and replies, 94 emails and 83 oral presentations from stakeholders and individuals at 10 public meetings in communities across B.C. Following this extensive public consultation we met with several groups, including the BC Federation of Labour, the BC Business Council, the Arbitrators Association of B.C., the Labour Relations Board (the “Board”) and the Labour Subsection of the Canadian Bar Association. Input received from the labour relations community was invaluable to this review.
- ▶ The Review Panel provided a written report to the Minister on or about August 31, 2018 outlining its processes, observations, and recommendations for amendment or updates to the *Code*.

5

Ongoing Review

Recommendation No. 2

Section 3 should be amended to provide that the Minister of Labour must appoint a committee of special advisors to conduct a transparent and public consultation process to review the *Code* periodically and, in any event, not less than every five years.

6

Certification

Recommendation No. 5

The secret ballot vote be retained providing there are sufficient measures to ensure the exercise of employee choice is fully protected and fully remediated in the event of unlawful interference.

Dissent, by Sandra Banister, Q.C.

Employees should not be required to reconfirm their decision to join a trade union by voting. While I fully support this Report's recommendations to deter and remedy employer interference during organizing campaigns, card check certification remains the single most effective mechanism to avoid unlawful employer interference and to ensure employee choice. Card check certification should be restored.

7

Employer Communication

Recommendation No. 3

A. Amend Section 8 as follows:

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

B. Amend Section 6 (1) by deleting “Except as otherwise provided in Section 8”.

C. Rule 24 of the Board Rules be amended so that when the Board provides notice of an application for certification, it attaches its contact information and particulars regarding rights and obligations under the *Code*, with a direction it be posted.

8

Remedial Certification

Recommendation No. 4

Amend Section 14 (4)(f) to read as follows:

(f) despite section 25(3), if the employees affected by the order are seeking trade union representation the board may certify the trade union if it determines an act prohibited by section 5, 6, 7 or 9 has occurred and that remedial certification is appropriate and equitable to ensure the likely consequences of the unlawful interference on employee choice are fully remedied.

9

Certification Votes and Procedures

Recommendation No. 6

A certification vote under Section 24 (2) and a revocation vote under Section 33(2) of the *Code* must occur within five days, excluding week-ends and statutory holidays following an application for certification.

10

Recommendation No. 7

- A. Amend Section 24 so that mail ballots only occur with the agreement of both parties or where the Board is satisfied there are exceptional circumstances and there are no other viable alternatives. In those circumstances, the Board must ensure mail ballot voting is completed expeditiously.
- B. Amend Section 140 and Regulations 7 and 8(2)(a) to make it clear the Board determines the date, time, place, and manner of voting under Part 3 and to require the returning officer be an employee of the Board.

11

Recommendation No. 8

Regulation 3 be amended to provide that membership evidence be valid for a period of six months.

12

Recommendation No. 9

Amend section 140 of the *Code* to enable the Board, upon receipt of an application for certification, to require the employer to provide a list of employees in the proposed bargaining unit within such time as the Board determines.

13

Raids**Recommendation No. 10**

A. Repeal Section 19 and substitute the following:

19(1) Except in construction

(a) if a collective agreement is in force for a term of 3 years or less, a trade union claiming to have as members in good standing a majority of employees in a unit appropriate for collective bargaining may apply to the board to be certified for the unit during the seventh and eighth months of the last year of the collective agreement,

(b) if a collective agreement is in force for a term of 3 years or more, a trade union claiming to have as members in good standing a majority of employees in a unit appropriate for collective bargaining may apply to the board to be certified for the unit during the seventh and eighth months of the third year of the agreement and thereafter in the seventh and eighth months in each year of the collective agreement or any continuation.

14

(2) In construction

(a) if a collective agreement is in force for a term of 3 years or less, a trade union claiming to have as members in good standing a majority of employees in a unit appropriate for collective bargaining may apply to the board to be certified for the unit in July and August of the last year of the collective agreement,

(b) if a collective agreement is in force for a term of 3 years or more, a trade union claiming to have as members in good standing a majority of employees in a unit appropriate for collective bargaining may apply to the board to be certified for the unit in July and August of the third year of the collective agreement and thereafter in July and August of each year of the collective agreement or any continuation.

15

(3) Despite subsections (1) and (2), an application for certification may not be made within 22 months of a previous application under those subsections if the previous application resulted in a decision by the board on the merits of the application.

(4) Unless the board consents, a trade union is not permitted to make an application under this section during a strike or lockout.

16

B. Amend Section 1 by adding the following:

“construction” means construction, alteration, decoration, restoration or demolition of buildings, structures, roads, sewers, water or gas mains, pipelines, dams, tunnels, bridges, railways, canals or other works, but does not include

(a) supplying, shipping or otherwise transporting supplies and materials or other products to or delivery at a construction project, or

(b) services directly or indirectly related to servicing and maintenance of the premises;

17

Recommendation No. 11

Amend section 27(1) by adding the following:

(d) despite subsection (1) (c), if there is a change in representation pursuant to section 19 and there are two or more years remaining in the term of the collective agreement, the trade union may serve the employer with three months' notice of its desire to terminate the collective agreement and apply to the board to terminate the collective agreement. The board may declare the collective agreement terminated or make other orders and determinations as the board considers appropriate. If the board grants the request to terminate the collective agreement all provisions of this Code apply to the negotiation of the collective agreement.

18

Successorship in Contract re-tendering

Recommendation No. 12

A. Section 35 of the *Code* be amended by adding the following subsections:

(1.1) This section applies if a contract for services for

(a) building cleaning, security or bus transportation, or

(b) the health sector, including food, housekeeping, security, care aides, long-term or seniors' care

is re-tendered and substantially similar services continue to be performed, in whole or in part, under the direction of another employer.

19

(1.2) Subsection (1.1) is effective August 31, 2018.

(1.3) Subsection (1.1) may be amended by order of the Lieutenant Governor in Council to provide for the addition of other sectors.

B. It follows that we recommend that those provisions in the *Health and Social Services Delivery Improvement Act* Section 6(5) and the *Health Sector Partnerships Agreement Act* Sections 4(4) and 5(5) which are inconsistent with this recommendation be repealed.

20

Recommendation No. 13

An industrial inquiry commission should be appointed pursuant to Section 79 of the *Code* to review the forest industry.

Partial Dissent of Sandra Banister, Q.C.

While I agree an industry inquiry commission is required, for the foregoing reasons, I would extend successorship protection to the re-tendering of contracts in the logging sector.

21

Statutory Freeze following Certification**Recommendation No. 14**

A. Amend Section 45 (1)(b)(i) as follows:

“12 months after the board certifies the trade union as the bargaining agent for the unit, or until an application under Section 55, made within the 12 months, has concluded, whichever occurs last, or”

B. For consistency, amend Section 33 (3)(a) and (b) by striking out “10 months” and substituting “12 months”.

22

Collective Agreements must be filed

Recommendation No. 15

Amend Section 51 to add the following:

(2) This requirement includes any substantive ancillary agreements amending rates of pay, hours of work or benefits and any continuation to the collective agreement or to the substantive ancillary agreements.

(3) If a copy of the collective agreement, including any substantive ancillary agreements, and any continuation, has not been filed with the board, the board may decline to consider it in any proceedings under this Code.

23

Co-operative Relationship Facilitation

Recommendation No. 16

Amend Section 53 (5) to allow the appointment of a Board facilitator at the request of either party.

24

Adjustment Plans

Recommendation No. 17

Amend Section 54 by adding:

(2.1) If, after meeting in accordance with subsection (1), the parties have not agreed to an adjustment plan, either party may refer any outstanding issues to the associate chair of the Mediation Division for the appointment of a mediator to assist the parties to conclude an adjustment plan.

25

(2.2) If, after mediation, the parties have not agreed to an adjustment plan, the mediator may make recommendations for the terms of an adjustment plan.

(2.3) The parties must provide the information the mediator requests concerning the change, its impacts and the parties' efforts to develop an adjustment plan.

26

First Collective Agreements

Recommendation No. 18

A. Delete Section 55 (1)(b) which requires the majority of employees to have voted in favour of a strike in order to access the Board's mediation assistance.

B. Delete Sections 55 (7) and (8) and substitute the following:

(7) If a remedial certification was granted, the mediator may consider the parties' conduct, prior to and following certification, when determining the recommended process under subsection 6(b).

27

(8) If the parties do not accept the mediator's recommended terms of settlement or if a first collective agreement is not concluded within 20 days of the report under subsection (6), the associate chair may direct a method set out in subsection (6) (b) for resolving the dispute and, if a remedial certification was granted, when making that direction may consider the parties' conduct, prior to and following certification.

(9) If the associate chair directs a method set out in subsection (6) (b) (i) or (ii), the parties must refrain from or cease any strike or lockout activity, and the terms of the collective agreement recommended or concluded under that subsection are binding on the parties.

28

Sectoral Bargaining

Recommendation No. 19

Sectoral multi-employer collective bargaining should be examined by industry councils under Section 80 and, in appropriate circumstances, by an industrial inquiry commission.

29

Definition of Picketing

Recommendation No. 20

Amend Section 1 of the Code to add the following definition of picketing:

“picket” or “picketing” means attending at or near a person’s place of business, operations or employment for the purpose of persuading or attempting to persuade anyone not to

(a) enter that place of business, operations or employment,

30

(b) deal in or handle that person's products, or

(c) do business with that person,

and a similar act at such a place that has an equivalent purpose, but does not include lawful consumer leafleting that does not unduly impede access or egress or prevent employees working at or from the site.

31

Health Sector

Recommendation No. 21

Delete Sections 72 (1)(a)(ii), 72 (2.1) and all references to 72 (2.1) in Subsections (3), (5)(a), (6) and (7).

32

Industry Councils

Recommendation No. 22

Repeal Section 80 and substitute the following:

The Minister may, on application by an employer or trade union, on motion of the board, or on his or her own motion, direct the board to assist the parties to establish industry councils which may

33

- (a) recommend measures to achieve more efficient collective bargaining and procedures for settling disputes,
- (b) identify industry or sector issues, skills and training needs, health and safety related issues, competitive and productivity challenges,
- (c) develop labour market information and marketing initiatives, and
- (d) make any recommendations necessary to advance the industry or sector.

34

Arbitration

Recommendation No. 23

A. Amend Section 87 to delete the requirement the request for a settlement officer be made “within 45 days of the completion of the steps of the grievance procedure preceding a reference to arbitration”.

B. Amend Section 89 by adding the following:

(2) The arbitration board must within 30 days of appointment conduct a case management conference to schedule the timely exchange of particulars and reliance documents, schedule hearings date(s) and encourage early mediation.

35

Expedited Arbitration

Recommendation No. 24

A. Amend Section 104 to provide that applications must be made within 15 days of completion of the grievance procedure. Within 7 days of the appointment of the arbitrator, the arbitrator shall conduct a case management conference to schedule the timely exchange of particulars and reliance documents, schedule hearing dates and explore the viability of early mediation. The hearing must be completed within 90 days of the date of a referral to arbitration. The arbitrator must render a brief decision, not to exceed 7 pages, within 30 days of the date of the completion of the hearing.

36

B. To enable the arbitrator to expedite the hearing and conclude it within the 90 day time limit, provide the arbitrator additional powers to order:

- i) the hearing date;
- ii) a brief written summary of each party's position be exchanged in advance;
- iii) an agreed statement of facts be prepared and/or limited *viva voce* evidence;
- iv) a fixed time period for the presentation of any evidence and argument;
- v) limited reference to legal or other authorities; and,
- vi) any other step or procedure designed to facilitate an expedited decision in the proceeding.

37

C. Section 104 should also be amended to provide either party may apply to the Director of CAAB for the appointment of a settlement officer to assist the parties to settle the dispute.

38

Appeals of Arbitrations to Court of Appeal

Recommendation No. 25

Amend Section 100 as follows:

On application by a party affected by a decision or award of an arbitration board, the Court of Appeal may review the decision or award if the basis of the decision or award is a matter or issue of the general law unrelated to the collective agreement, the labour relations context, or related factual determinations and not included in Section 99 (1).

39

Recommendation No. 26

To be consistent with all other Canadian jurisdictions, consideration should be given to amending the ATA to delete the patently unreasonable standard of judicial review.

40

Recommendation No. 27

Amend the *Code* by adding the following:

Section 123(1) The Board prepare a poster, available on-line, containing the following information relating to

- a) the rights of employees
 - (i) to join a union and participate in its lawful activities including discussing and engaging in organizing during non-working time,
 - (ii) to apply for certification, to sign applications for membership in a union, to vote freely in a certification vote, to participate in collective bargaining, and
 - (iii) to engage in lawful actions under the *Code*,

41

- (vi) not to threaten to close a business or otherwise retaliate against employees for engaging in organizing activities, and

- (vii) to bargain in good faith with the Union following certification.

- c) the obligations of a union or persons acting on behalf of a union not to threaten, intimidate or coerce employees or compel or induce employees to become or refrain from becoming a union member.

- d) contact information for the Board including its website and telephone number.

(2) The Board may require an employer to post the poster in a conspicuous location or locations in the workplace.

42

Recommendation No. 28

Amend Section 158 to authorize the Board to impose a fine of up to \$5,000.00 for individuals and \$50,000.00 for companies and unions for failure to comply with a Board order.

43

The Board

Recommendation No. 29

The Board's funding must be increased to enable it to meet its duties under the *Code*.

44