March 27, 2018

Submission by Chris Budgell to the B.C.

Labour Relations Code Review

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Attn: Michael Fleming (Chair)

Sandra Banister (Member)

Barry Dong (Member)

I am a former member of CUPE Local 15. The interests of the union leadership and employer communities are being well represented by other written submissions and presentations in the meetings scheduled in March and April 2018. I see my role as speaking for the public interest as well as the interests of rank-and-file union members.

Having learned about the submission process the day after acceptance of submissions was closed, I've not had the time I would have liked to prepare an optimal submission. This may however benefit from being shorter than it might have otherwise been.

The two issues with the Labour Code that I want to address in this submission are:

1) The Duty of Fair Representation - and Section 13

The first (and perhaps more interesting) one is regarding section 13, that was a unique statutory provision when enacted in 1992. If I were the current minister of labour I would have already moved to have section 13 repealed, so that is something I am recommending, however the problems of which section 13 is part require a more comprehensive solution. Key to that comprehensive solution is removing responsibility for oversight of the "duty of fair representation (DFR)" from the Labour Relations Board. I think we have too many administrative justice agencies already, but I cannot see a way to avoid creating another agency specifically to handle this responsibility.

2) The Grievance Arbitration Regime

I have had the experience of being the subject of a grievance arbitration that was conducted over two successive days in rooms rented from two different hotels in downtown Vancouver. (I mention the fact that we reconvened at a different hotel for the second day because I view it as part of the evidence that the arbitration wasn't well planned.) The arrangements for these proceedings are entirely in the hands of the employers and unions. The Labour Board routinely cites that fact. There's an array of problems with the regime and all of them impact the grievors, not the two "parties". One of them is that the grievors have no representation either in the preparation for or in the conduct of the hearings. The Law Society of B.C. dismissed a complaint I filed about the conduct of one of its members relying solely on the observation that the union's lawyer with whom I'd been forced to deal (but who then refused to even attend the hearing) was not obliged to represent my interests, but rather those of the union. The grievor and the union are not the same entity, and it cannot be denied that there is potential that their interests will conflict.

I suggest that the manner in which these proceedings are run, including routinely using hotel rooms and never recording the proceedings, is archaic. This is the 21st Century. We must, and we can, do much better.

There is abundant evidence that the labour relations / labour law communities remain committed to preserving the existing system. Former Ontario Chief Justice Warren Winkler has provided some of that evidence in speeches dating from 2010 and 2011 found at these two links:

http://irc.queensu.ca/sites/default/files/articles/dwls-2010-warren-k-winkler-labour-arbitration-and-conflict-resolution-back-to-our-roots.pdf

http://www.ontariocourts.ca/coa/en/ps/speeches/2011-arbitration-cornerstone-industrial-justice.htm

If his perspective has any merit, then it's reasonable to ask what has been accomplished to address his concerns in the six or seven years since he gave those speeches.

The solution must include giving grievors a real voice in the arbitration process.

The Duty of Fair Representation - and Section 13

It isn't necessary for me to recount here the history of the Duty of Fair Representation. However, I'll note that legal recognition of the duty in Canada preceded assigning, by statute, oversight of the duty to any labour boards. It existed as a "common law" duty and there is a notable case on record that was decided by the BCSC: Fisher v. Pemberton. I believe that consideration should be given to altering the Code so that recourse to the courts is again available if someone prefers to take that route. That might encourage whatever agency has oversight of the statutory duty to ensure that it offers an option that is at least as attractive.

Section 13 was and remains a unique statutory provision. The record seems to indicate that it was conceived and drafted by three consultants retained by the new NDP government following the election in 1991. Two of them were labour lawyers and one was a well-known figure in the labour relations community. The debate in the House on November 26, 1992 is very revealing. The Hansard record is found at https://www.leg.bc.ca/documents-data/debate-transcripts/35th-parliament/1st-session/19921126pm-Hansard-v6n24, and at this link - http://www.uncharted.ca/images/users/ssigurdur/hansard_on_sect_13_2.pdf - is found the copy of the debate that I extracted with the "*prima facie*" terms highlighted.

Those hybrid Latin / English terms are ones the vast majority of people have never had cause to use and whose meanings they would not know. I encountered "*prima facie* case" for the first time when I initially approached the Labour Relations Board. I don't recall that I initially questioned what it was supposed to mean and I was not informed that it had been used expressly in the section 13 debated in 1992. It was no longer in that section in the year (2000) I approached the Board. Eventually I discovered that it had been used expressly in the provision (twice in two successive lines). The provision as debated isn't recited in the Hansard record, but it was subsequently accurately recited in Labour Board decision B156/1994 found at this link - http://www.lrb.bc.ca/decisions/B156$1994.pdf.

That the provision had been vigorously debated with notable reliance on that term by the MLA's and that subsequently the term had been removed from the provision motivated me to make inquiries about the meaning of the term and the means by which it had been removed. I had no prior knowledge of legislative processes, but I learned that the Legislature has exclusive power to enact, amend, and repeal statutes and individual statute provisions. I also ascertained that the B.C. Legislature had never revisited section 13 after 1992. Further inquiry revealed that the change became effective following the "statute revision" exercise that resulted in the designation "RSBC 1996", and that there is essentially no publicly accessible record of the revision process, which was conducted by a branch of the Ministry of Attorney General called the Legislative Counsel Office.

On the related inquiry about the meaning of "*prima facie* case" I was eventually fortuitously directed by a comment in a legal blog (still found here - http://www.thecourt.ca/omalley-the-prima-facie-test/) to an important source: the first edition of The Law of Evidence in Canada, that was published in 1992, the same year section 13 was debated. In that edition the relevant section begins on page 65 and ends on page 73. The final paragraph begins, "*The terms "prima facie evidence", "prima facie proof", and "prima facie case" are meaningless unless the writer explains the sense in which the terms are used.*" And it concludes with "*. . . these phrases are superfluous and, as the decisions of the Supreme Court clearly demonstrate, their use is dangerous.*".

In 1998, a year or less after the formal completion of the statute revision exercise, the labour law community made use of another opportunity to amend section 13. This time four consultants delivered to the Minister of Labour a report that included a draft of a considerably longer section 13 (most notably adding mediation steps to the process). The recommendation was that this amendment would be presented to the Legislature. I've found no record of any government response to this recommendation. It wasn't presented to the Legislature.

In 2002 I challenged the Labour Board's application of section 13 in a judicial review heard by the B.C. Supreme Court. In the result - https://www.canlii.org/en/bc/bcsc/doc/2003/2003bcsc119/2003bcsc119.html - delivered in January 2003 I prevailed. Despite the fact that the term "*prima facie* case" was not then in section 13 it was cited - though just once - in the judgment (at paragraph 38).

Within a month of the release of that judgment the Labour Board issued as decision B63/2003 - http://www.lrb.bc.ca/decisions/B063$2003.pdf - what appeared to be a response to that result. B63/2003 makes no mention of my case and it decides nothing at all about the case it does name. It does though accurately recite - at paragraph 8 - section 13 as amended. This version can be compared to the one recited in the 1994 decision. The Chair, who signed the 2003 decision, had also signed (then as a Vice Chair) the 1994 decision. While this confirms the removal of the two instances of "*prima facie* case" from section 13, B63/2003 does refer expressly to the term in paragraph 99. There the Board claims that the absence of the term from section 13 reflects the express intent of the Legislature to create a standard distinct from the purported "*prima facie*" standard.

The CanLII database currently reports that the B63/2003 policy statement has now been cited by the Board in 700 subsequent decisions.

It should be apparent from that short discussion that a great deal more could be said about this matter. I will conclude what I have to say about it at this point by referring the committee and other readers to a previous section 3 committee report - https://www2.gov.bc.ca/assets/gov/employment-business-and-economic-development/employers/additional-labour-resources/03_april_lrc_review.pdf - to read what it had to say about the duty of fair representation and B63/2003, also referred to simply as *Judd*.