

**THE CIRB - NEW DIRECTIONS OR SAME OLD SAME OLD?
PRESENTATION TO THE INSIGHT CONFERENCE ON
MANAGING FEDERALLY REGULATED WORKPLACES
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Thank you for the opportunity to meet with you to talk about what is new - and not so new - at the Canada Industrial Relations Board.

I have been the Chairperson of the Board for almost 11 months now, and the time has flown by. People keep asking me if I am enjoying the job - and I can tell you that I am. Every day at the CIRB presents interesting new challenges. I love the work and the people. However, the one big difference that I have discovered between my past life and my present one, it is that, as a mediator, you at least have a good chance that the parties will go away happy; I am finding that as an adjudicator, most assuredly at least half, if not all, of those who appear before you will go away unhappy. So as an adjudicator, you have to learn to have a very thick skin.

I would like to start by telling you what I found when I arrived at the Board in January of this year, what we have been doing lately and some of our new initiatives.

The first thing that I realized when I arrived at the Board last January is that **all** of the staff, the vice-chairs and members of the Board are extremely dedicated and hard-working individuals. They believe in industrial relations and the importance of the work that the Board does, and are determined to do a good job. If they have any flaw at all, it is that they are perfectionists - every single one of them wants every order and decision and set of reasons coming from the Board to be absolutely perfect. Of course, this approach necessarily creates delays - sometimes significant delays - in completing matters.

I felt that people had become so focused on the **quality** of the decisions and written reasons that they had lost track of the importance of **timeliness**. In my view, if the Board wants to be relevant to the labour management community, its decisions have to be not only appropriate, but timely. So the first order of business was to examine what the bottlenecks are and what could be done to fix them. In some cases, it is a resource issue - too few people for the volume of cases; in others it was simply excessive internal bureaucracy that had been created to eliminate the possibility of error. My new mantra has become "strive for excellence, not perfection." We are all working hard to resolve complaints and, when decisions are necessary, to get them out to the parties on a more timely basis. Through extraordinary efforts on the part of all of the Board staff and members, we have managed to reduce the backlog by over 150 cases since January.

Another important thing that I have learned this year is that it is relatively easy to reach a decision - but it is significantly harder to exercise the discipline necessary to sit down and write the reasons for that decision. Particularly in a way that will satisfy the parties to the dispute, the labour relations community, the legal community and the courts. And the longer that you wait to sit down to write the reasons, the more difficult it gets. If you are going from one hearing to the next, without the time to write the reasons for the last case you heard, the problem only gets

worse, as the mountain of files waiting for written reasons grows higher. So one obvious mechanism that we have instituted to deal with this is to ensure that writing time is scheduled for the panel chairs. As well, Board members have taken up the challenge and are writing the first draft of reasons for decision, to take the load off the panel chairs. Another technique that you may see us use more frequently in future is the issuing of “Bottom line decisions,” with reasons to follow. This allows the Board to get the decision to the parties quickly in order to enable them to move on.

We are currently reviewing our practice of issuing letter decisions rather than full blown reasons for decision. The concept of letter decisions - or LDs as they are known - was developed to deal with a number of constraints the Board was facing, including a high volume of duty of fair representation complaints, many of which were only of interest to the immediate parties to the dispute and not the community at large. If you work in the federal jurisdiction, you are aware of the *Official Languages Act*, which requires federal departments and agencies to publish any public documents in both official languages at the same time. Because reasons for decision - RDs - are made public, they are subject to the translation obligation and therefore take somewhat longer to produce and publish. Thus, the practice of issuing LDs developed.

LDs were supposed to be used for cases with no jurisprudential value. They were intended to be brief and to allow the Board to deal quickly with relatively routine matters. They could be provided to the parties immediately, with translation to follow at a later date. However, the use of LDs has been growing as the Board strives to deal with its caseload in a timely manner, and the process around writing LDs has become almost as time consuming as that for RDs. Some of this is due to the need to respond to the dicta of the courts regarding sufficiency of reasons, but some of it is also attributable to our obsession with perfection. We are now developing criteria as to when the LD format will be used, and when reasons should be issued in an RD format, and considering other mechanisms that will allow us to get the decisions into the hands of the parties more quickly while still meeting our *Official Languages* obligations.

Having seen for myself how dedicated and hard working all of the Board’s personnel are, I found it hard to reconcile what I knew to be the internal work ethic with the public perception that the Board is so slow. Part of this perception may have arisen because if you look at the publicly available reasons for decision, it will appear as if the Board has only issued 21 decisions so far this year. That doesn’t look like much output for the amount of effort going on. But, there is an explanation: due to the translation and other obligations that I just mentioned regarding the production of RDs, we only publish the decisions that we feel are precedent setting or contain rulings that would be of interest to the larger industrial relations community. So the public only sees the proverbial tip of the iceberg. Over and above the 21 publicly available RDs, the Board has also issued another 262 letter decisions this year, and has dealt with 138 bargaining unit determinations (certifications, reviews or revocations). So there is really a great deal going on at the Board that is not obvious to the larger labour management community.

I also want to take this opportunity to emphasize that not all of the delays in dealing with

applications and complaints are attributable to the Board. I can't tell you the number of times that counsel have asked for extensions of time to respond, or the for rescheduling or adjournment of hearings because they are not available when the Board is ready to proceed. The Board has a very heavy hearing schedule and it isn't always easy to find new dates if the parties aren't available when the Board is. While the parties have the right to counsel of their choice, they also need to accept some of the responsibility for the delays that occur when counsel's schedules prevent the Board from proceeding expeditiously.

As well, since the *Code* was amended in 1999 to remove the requirement for ministerial consent to complain, the Board has seen an increase in the number of bargaining related unfair labour practice complaints that are filed - sometimes not because there is a real desire for a decision, but simply to obtain some kind of strategic advantage in bargaining. I am not impressed by parties who attempt to abuse the Board's resources and processes in this manner.

Another conclusion that I have come to is that the Board should do more to settle matters, so that an adjudicated decision is not required. There are a number of motives for this: firstly, I think that the Board was intended to contribute to constructive labour relations, not to promote adversarial ones. Secondly, and quite selfishly, if the matter can be settled, the Board does not need to make a decision and thus no reasons writing is required.

I recognize that the concept of mediation rather than adjudication by labour Boards is not universally accepted. Some lawyers I have spoken with have suggested that, when they file a complaint with the Board, it is because they want an adjudicated decision and if the matter could have been settled, it would have been. Maybe some cases are like that, but it has been my observation that there are a significant number of cases coming before the Board that cry out for mediation. In my view, resolution of the underlying issue that brought the parties to the Board will do more to serve the interests of the clients and the labour management relationship than a legal determination of a narrow point of law.

In my view, labour Boards are not, nor were they ever intended to be, courts. Had the legislators wanted to establish a labour court, they could easily have done so. However, over the course of the 30 some years since the full-time federal labour Board was created, it has gradually moved away from its intended role. There many reasons for this - some having to do with court decisions that made the Board feel it had to act more judicially.

But I think that this view of labour Boards as quasi-courts is changing. The Ontario and B.C. Boards are both placing more emphasis on mediation and resolving cases in non-traditional ways. In Ontario, a recent decision of the Divisional Court is instructive, and I would like to quote from it, if I may. In a 2007 case called *Guild Electric*, the Divisional Court said:

"Labour relations disputes are not the same as civil litigation, and the Board is an administrative tribunal, not a court. It operates in a complex, dynamic and highly fluid environment where expeditious rulings and informal and accessible procedures are often

essential to maintaining the delicate balance between the parties' various interests. The Board exists distinct from the courts, precisely because "court procedure" was inadequate, as history shows, to respond to the needs and pace of labour relations and labour dispute matters."

(Guild Electric, 2007 CanLII 65617 Ont SCDC, at para 44)

The danger of falling into the trap of thinking of labour Boards as mini-courts was identified by Andy Sims in his 1995 study of the *Canada Labour Code*, "Seeking a Balance". Mr. Sims observed that the then CLRB relied too heavily on rules and legal arguments instead of seasoned labour relations experience. He found that there was a culture of deliberate detachment from the community and a lack of accountability, as evidenced by the lengthy delays in decision making that detrimentally affected collective bargaining relationships.

Parliament listened to Sims' recommendations and enacted a number of amendments to the *Code* in 1999. But when I arrived at the Board, it didn't appear to me that we were taking full advantage of the new powers we had been given in 1999. Anyone who is familiar with the *Code* will be aware that there is nothing in it that requires the Board to set up its procedures to encourage adversarial relations. On the contrary, the 1999 amendments explicitly gave the Board the ability to offer mediation, if the parties wish to use a co-operative approach to resolving their labour relations issues. We also have investigative powers, so we are not restricted solely to receiving evidence through the process of direct examination and cross-examination of witnesses used in civil and criminal courts. I have commissioned a full review of our internal procedures to see what can be done to take advantage of the powers and flexibilities that have been built in to the *code*, and thereby contribute to more constructive labour management relations.

It is trite - but true - to say that "labour relations are human relations". Many times, we see that the disputes and differences that are brought to the Board for an adjudicated resolution are ones that the parties really should resolve through dialogue and sincere efforts to build a positive working relationship. So you are going to see the Board place even more emphasis on what I would call "appropriate dispute resolution". It may well be that the dispute requires an adjudicated solution, and if it does, that is what the parties will get. But they - you - will be offered every opportunity to resolve the underlying labour relations issues first. Our labour relations officers in the regional office will canvass the parties as to the prospects of settlement when an application or complaint is filed. There will be case management meetings or teleconferences to explore the possibility of resolution without adjudication. We hope to be able to institute settlement conferences involving a senior staff person or a vice-chair other than the one assigned to hear the case. Even once the hearing has begun, the parties may be offered mediation by the representative members of the panel, or the panel chair.

If time permits, I would like to share with you a few other initiatives and preoccupations that the Board has been dealing with recently.

A large part of the Board's case load are the section 37 - duty of fair representation cases. Although these tend to have a lower priority (unless a termination of employment is involved), they represent 30 - 40% of the caseload and take up a lot of the Board's resources. During the former chair's tenure, the concept of applying a "*prima facie*" test was developed. Instituted in January 2006, the idea was that instead of automatically asking for the union and employer's submissions, the incoming complaint would be reviewed by a panel to determine whether the complainant had made out a *prima facie* case that the union should be called upon to respond to. If the information provided by the complainant passed this test, then the full Board process of investigation, submissions and hearing would follow. The idea behind this initiative was a good one - to relieve both unions and employers of the burden of responding to non-meritorious complaints. However, it did not weed out as many cases as had been expected. And there were different interpretations of what the threshold was or should be (that is, what does it take to pass the test - was mere suspicion enough, was a little evidence adequate or did we require persuasive evidence or evidence beyond a shadow of a doubt?). Some panels were reluctant to dismiss a complaint without hearing from the other side. Because of these factors, the *prima facie* process had pretty much fallen into disuse.

We held a full Board policy discussion earlier this year to explore the problems that had been encountered with our *prima facie* process. We invited the chair and the registrar of the BCLRB to talk to us about how the test is applied in their jurisdiction, where it is a statutory requirement. We came to a common understanding of what our test is, and we are now looking for a suitable case in which to articulate this test to the community in public reasons for decision. We have instituted a "limited process" for borderline cases: instead of submitting such cases to the full investigation and hearing process when we think the complainant has made out a *prima facie* case, the union and the employer are sent a letter asking them to respond in writing to the allegations contained in the complaint. If their submissions demonstrate that the complaint has no merit, it can be dealt with quickly. But our experience has been that, if there is some merit to the complaint, the recipients of these letters have been quick to address the underlying issue and a number of settlements have been achieved. We offer mediation assistance and if that is unsuccessful, only then do we proceed to a hearing. I should note that with respect to the s.37 cases, the Board is making extensive use of its power to decide matters without an oral hearing. This saves considerable time and resources.

So my advice to you is that, if you receive a letter from us asking for your side of the story in a duty of fair representation complaint, take it seriously; you may be able to avoid the cost and inconvenience of a hearing. And by the way, there is no such thing as "reserving your right" to comment at a later time - a practice that some counsel appear to have adopted when faced with a Board request for a response to a dfr complaint. You may only be asked once, and the Board is entitled to proceed without your input if we don't get it!

Another initiative currently in progress is a review of all of the cases that have been outstanding for 2 years or more. A number of these are on our books because they have been placed in abeyance at the request of the parties. If there is no labour relations purpose for these cases to

continue, the parties are going to be asked to withdraw them, or they will be dismissed as moot. Over time, it is my objective to reach a point where no case takes more than 12 months from start to finish, unless there are very valid reasons why a longer period is required. Of course, our “tier one” cases, such as illegal work stoppages and maintenance of activity applications will proceed much more quickly, as will unfair labour practice complaints affecting bargaining and applications for certification. I suspect, however, that complicated bargaining unit reviews will always take considerable time, and we will be encouraging the parties to try to reach agreement on bargaining unit inclusions and exclusions before approaching the Board.

So, to answer the question posed in the title of this presentation - “new directions or same old same old?” - the answer is: a little bit of both. We are fine tuning some of our procedures to make them more efficient and introducing some new initiatives to ensure that we are responsive to the needs of the labour management community.

However, in conclusion, let me say that, in my view, the Board should be the **last**, not the first, resort for sorting out labour management disputes. While I can assure you that we have a dedicated, caring and hard working group of people at all levels of the Board, ready and willing to do what it takes to ensure that the objectives of the *code* are achieved, the responsibility for effective labour management relations will always rest with the parties to that relationship - you.

Thank you.