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NOTES FOR REMARKS TO THE
CANADA LABOUR AND EMPLOYMENT RELATIONS NETWORK
TORONTO, ONTARIO
OCTOBER 6, 2009

"New Chair, New Direction"

I've been told that the topic of my remarks is "Canada Industrial Relations Board, New Chair, New Direction". I'm not sure if that is a statement of fact, or a question. Perhaps you will let me know after you've heard what I have to say.

I was very pleased to learn of the existence of the Canada Labour and Employment Relations Network, and your connection to the U.S. Labor Advisory Group. In my view, there is much that we can learn from one another, particularly these days. I am not sure the average person really understood the impacts of the "globalization" that academics have been speaking about for a number of years until the recent economic crisis that demonstrated how small and interconnected a world we really live in.

So my intent today is to share with you some thoughts from my short time as Chair of the Canada Industrial Relations Board, and where appropriate, including observations gleaned from visits with my US counterparts.

No discussion of US and Canadian approaches to labour relations can take place without a reference to the issue of jurisdiction. Determining who has jurisdiction over the labour relations of various enterprises preoccupies a considerable amount of a Board's time in Canada.

In the US, labour relations is an aspect of trade and commerce, which is a federal responsibility, and most private sector companies can be relatively certain that their activities are regulated by either the *National Labor Relations Act* or the *Railway Labor Act*. (Although, as an aside, I am hearing that some jurisdictional disputes are emerging between these two statutes in respect of companies that provide support services to railways and airlines). In Canada, the picture is much less clear. Since 1924, when the Judicial Committee of the Privy Council decided that labour relations are an aspect of property and civil rights, and therefore presumptively a provincial responsibility, federal jurisdiction over labour relations has been restricted to only those industries that the *Constitution Act* assigns to us - such as banking, broadcasting, telecommunications, interprovincial transportation (whether by air, rail, marine, or ground) and postal services; industries declared to be for the general advantage of Canada such as grain handling and uranium handling; Crown Corporations such as Atomic Energy of Canada and the national museums; and enterprises that are "integral" to the operation of any of these employers. Federal labour relations law also applies to all private enterprises in our three northern territories.

So the jurisdiction of the Canada Industrial Relations Board is small when compared to that of the National Labor Relations Board - about 6000 employers and less than 1 million employees. But of course we like to say that our jurisdiction is composed of all of the key infrastructure industries - the companies that knit the country together and keep the economy rolling.

My counterparts at the NLRB were surprised to learn, as you may be, that the CIRB is not expected to be completely unbiased when we interpret the *Canada Labour Code*. The Code contains a Preamble that reflects Parliament's commitment to collective bargaining and "deems the development of good industrial relations to be in the best interests of Canada." As a result, the CIRB, and its predecessor the CLRB, have consistently interpreted the *Code* so as to encourage the establishment of collective bargaining relationships. For example, when the Board is dealing with an application for certification, it is sufficient for us to define "an appropriate unit for bargaining" - we don't have to determine the most appropriate unit. As a matter of policy, the Board favours larger units, but if the choice is between certifying a small unit or no unit at all, the Board will accept a smaller unit.

The best example of this was back in the late 1970s, when bank workers began to organize. The banks argued that the appropriate bargaining unit would be a nation-wide one; the unions argued that an individual bank branch was equally appropriate. The Board determined that, in order to encourage the establishment of collective bargaining relationships, it would accept the individual bank branch as an appropriate bargaining unit. In view of this longstanding Board policy, it will not surprise you to hear that the unionization rate in the federal private sector stands at about 40% and is relatively stable. Most of the industries in our jurisdiction are highly unionized, the exceptions being the banking and trucking sectors.

Another significant difference I have noticed between ourselves and the NLRB is in the approach to the administration of our respective statutes. In the US, unfair labour practices under the NLRA are treated in the way a human rights complaint or a criminal complaint would be treated in Canada: the employee, union or employer files "charges" alleging an unfair labour practice, which are investigated by an official of the NLRB General Counsel's office. The General Counsel is independent from the Board. Charges found to have merit, which cannot be resolved through mediation, result in a formal complaint that goes before an Administrative Law Judge for hearing and determination. At the hearing, the prosecution of the complaint is the responsibility of the General Counsel's office, who plays a role much like that of a public prosecutor in a criminal law case. The decision of the administrative law judge is reviewable by the Board. From what I have observed, the Board's proceedings are extremely formal.

To date, the CIRB's proceedings have been only slightly less formal than those of the NLRB, although at the CIRB, unfair labour practice complaints are treated more like private law matters - it is the responsibility of the person bringing the complaint to adduce the evidence at the hearing and "make his case". The complaint is heard in the first instance by a panel of the Board that is normally composed of one or three members. Hearings have historically been conducted following the civil litigation model.

One of the longstanding criticisms of both the CIRB and the former CLRB, is that it is too

“judicial” in its approach - that there has been an over-reliance on rules and legal arguments instead of seasoned labour relations experience. There are many reasons why things evolved this way - in some ways, it is a “chicken and egg” question: did the Board become more judicial because unions and employers starting hiring legal counsel to present their cases, or did unions and employers feel they needed to use legal counsel because the Board was behaving like a court? A little of both, I think.

Related to this were numerous criticisms of the appointment process and the quality of the appointments that were being made to the Board. An effort was made to address the issue of lack of labour relations experience in 1999, when two important amendments were introduced to the *Code*. Since that time, nominees for appointment to the positions of Chairperson and Vice-Chairperson are required to have “experience and expertise in industrial relations” and secondly, the Board became a “representative” Board. There is a formal process for consultation with the labour and management communities over the appointment of their respective representative members. For the most part, labour and management have nominated experienced labour relations practitioners to sit on the Board, and this has brought a practical voice to the table.

Nevertheless, while these changes were intended to ensure that the decision makers had appropriate expertise in labour relations, they did not address the problem of excessive procedural technicality and over-judicialization that had developed and that is reflected in the Board’s regulations and procedures. The single most frequent criticism of the Board that I heard, both before and after my appointment, was the community’s dissatisfaction with the length of time that it takes the Board to dispose of matters brought to it. Clients have suggested that the lengthy delays in decision making detrimentally affect collective bargaining relationships, and I can’t disagree with them.

In my mind, the issues of excessive procedural technicality and the lengthy delays in dealing with files are related. We have taken a number of steps to address these issues and I would be interested in your views on these initiatives.

First, we have made a concerted effort to reduce the backlog of pending cases by disposing of as many of them as possible without an oral hearing. Section 16.1 of the *Code* allows the Board to decide any matter without holding an oral hearing: decisions are made solely on the basis of the written record. To some counsel, this came as a shock, as they had come to expect that, once they had filed their materials, they had a year - if not more - before they would be called upon to argue their case. They are now getting used to the fact that they are expected to put their entire case before the Board in their written submissions. There is no such thing as “reserving the right” to add or supplement submissions at a later date. The one resource that the Board cannot manufacture more of is time - proceeding by way of “paper” hearings allows the Board to decide many more cases in the same amount of time.

I’m happy to say that through this effort, we reduced the active caseload by 25% in less than 18 months and, with the exception of some complex bargaining unit review files and cases that are still being finalized by vice-chairs whose terms have expired, there are no files older than 24 months still in our system. While 24 months is still too long to wait for a Board decision, we are

working on reducing that number as well. Clearing off the old files has freed up the panels and has allowed us to schedule hearings in the cases that require them in a much more timely way.

Second, we implemented a "*prima facie*" process for duty of fair representation complaints. In the past, we would ask the union and employer to respond to such complaints every time one was filed, no matter how non-meritorious it may have been. This often required an unnecessary expenditure of time and resources by clients in responding to complaints that had no hope of succeeding. Now, a panel of the Board reviews every incoming duty of fair representation case to determine whether the complainant has made out a "*prima facie*" case that he or she has been subjected to arbitrary, discriminatory or bad faith treatment by the union. Only if this test is met will the union and the employer be asked to respond. As employers, you may think that a DFR complaint is the union's problem, but if such a complaint is upheld, it can become a problem for you if the Board orders the union to take a grievance to arbitration, despite of any time limits you may have in your collective agreement. As a result, the Board always appreciates the employer's submissions regarding a duty of fair representation complaint, as it assists in putting a context around the union's actions.

Another one of the "new directions" the CIRB is taking is to transform itself from a court-like "quasi-judicial" tribunal into a full service labour dispute resolution agency. I don't believe that Parliament wanted the CIRB to be a mini-court. There is nothing in the *Canada Labour Code* that requires the Board to set its procedures up in a manner that promotes an adversarial approach: the Board is the master of its own procedure. In my view, by putting too much emphasis on the "quasi-judicial" aspect of its mandate, the Board has compromised its obligation to encourage constructive labour management relations.

Had the legislators wanted to establish a labour court, they could easily have done so. They did not. Instead, in 1999, Parliament expressly gave the Board the ability to offer mediation, if the parties wish to use a co-operative approach to resolving their labour relations issues. The Board also has investigative powers, so we are not restricted solely to receiving evidence through the process of direct examination and cross-examination of witnesses that is used in civil and criminal courts.

As an example, our investigative powers were used recently in a case involving maintenance of activities. In that case, the Board was asked by the Minister of Labour to determine whether there were any services necessary to prevent an immediate and serious danger to public health or safety that needed to be continued during a strike by the Ottawa municipal transit workers. The Board provided notice of the Ministerial referral to the public and solicited public input on the question. Based on the public submissions, the Board identified three categories of individuals who could potentially be detrimentally affected by the transit strike:

(a) persons who are deemed essential workers under other legislation, particularly health care workers;

(b) persons confined to home, who rely on personal care or personal support workers for the basic necessities of life; and

(c) persons who require medication (such as insulin) or medical treatments (such as dialysis) on a regular basis.

The parties were asked to provide the Board with their representations regarding the services that might need to be continued to prevent these individuals from suffering harm, and were able to satisfy the Board that adequate alternative services were available to prevent any such harm. It is interesting to note that, although they were engaged in a collective bargaining dispute, the parties were in agreement on all of the evidence presented to the Board - the hearing was not at all litigious and the Board was able to complete the hearing and its deliberations within a day. While the use of a public comment process is unusual, it was an appropriate approach given the factors in play in this particular case. The elapsed time from receipt of the Ministerial referral to final decision was only one month. In my view, anything that the Board can do to reduce the time required to hear and decide matters can only contribute to more effective labour relations.

If your company operates in the federal jurisdiction, you may have noticed the emphasis that the CIRB is now placing on the resolution of complaints through mediation, rather than adjudication. The Board staff and the representative members have embraced this approach. As a result, the Board encourages the parties to engage in settlement discussions, and offers the assistance of its Industrial Relations Officers and the representative members at various opportunities from the time a complaint is filed right through to the time of the hearing.

We are now in the process of reviewing all of our internal procedures and regulations to see what more can be done to reduce the bureaucracy and to take advantage of the powers and flexibilities that have been built in to the *Code*. Any suggestions you might have in this regard would be gratefully received.

On another topic altogether, the Board has been receiving inquiries from various U.S. sources regarding certification by card check, expedited representation votes and first contract arbitration. As you can imagine, this interest in matters north of the 49th parallel has been provoked by the prospect that the proposed *Employee Free Choice Act* may see the light of day after all. It may reassure you to know that the experience here need not raise alarm bells south of the border.

Only Quebec and the federal jurisdiction still certify unions based on membership cards alone - the other Canadian jurisdictions have moved to representation votes in most cases, although there are some exceptions. Various academic studies have been done regarding the relative success rates of unions under each process, but in my view the relatively higher unionization rates in the federal and Quebec jurisdictions are likely more attributable to cultural factors, and the bias in favour of establishing units suitable for collective bargaining that I described earlier, rather than to the choice of method for ascertaining employee wishes. I should note that federally, we do hold representation votes in displacement situations when the challenging union can demonstrate on the basis of cards that it represents more than 50% of the employees in a bargaining unit that is already represented by another union.

The expedited representation vote used in Ontario and Nova Scotia reflects the compromise that was reached to overcome the fear that holding a vote in every case would give employers an opportunity to affect the outcome of the vote. Ontario has been very successful in setting up a system that sees most votes conducted within 5 days of the day on which the certification application is filed. However, I understand that the Ontario board still uses the card check

system in the construction industry.

First contract arbitration is another area in which there has been considerable experimentation in the various Canadian jurisdictions. In some jurisdictions, either party can invoke the process unilaterally. In the federal jurisdiction, there is no provision for an "application" for first contract arbitration, the referral comes to the Board from Minister of Labour, and the Board makes its own inquiries before deciding whether or not to impose a contract. Factors that are likely to lead to a Ministerial referral, and ultimately to imposition of a first agreement, are the presence of numerous, well-founded unfair labour practice complaints which suggest that the parties will be unable to reach agreement through the normal processes of collective bargaining. Even in those cases where the Board has imposed a contract, the terms tend to be "bare bones" agreements, as the Board will not "reward" an intransigent party by giving it provisions that it could not obtain through bargaining. In our experience, the threat of this provision is more effective than its actual use.

I firmly believe the old adage that labour relations are human relations. I don't have to tell you that one of the hallmarks of the most successful companies is that they have found ways to promote employee engagement. I recognize that this can be a challenge when your labour force is unionized, but the existence of a union also provides you with opportunities to obtain that employee engagement. Many times, we see 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. 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. The Board should always be the **last**, not the first, resort for sorting out labour management disputes.

Thank you.