

**THE CHANGING ROLE OF LABOUR RELATIONS BOARDS IN CANADA:  
KEY RESEARCH QUESTIONS FOR THE 21<sup>st</sup> CENTURY**

**RESEARCH REPORT**

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## **1 Introduction**

This report reviews the preliminary phase of a research project conducted in 2013 under the auspices of the Centre for Law in the Contemporary Workplace. The formal title of the project is “The Changing Role of Labour Relations Boards in Canada: Key Research Questions for the 21<sup>st</sup> Century”. It is known more familiarly as the Labour Board Project, or LBP. The academic research team for the project consists of Centre Director Dr Kevin Banks and Senior Fellow Dr Elizabeth Shilton. In this preliminary phase, generously funded by a grant from Queen’s University’s Senate Advisory Research Committee, Drs Banks and Shilton were assisted by two JD students at Queen’s Law, Angela Wiggins and Jenna-Dawn Shervill. The academic research team is being advised throughout by an expert panel consisting of Elizabeth Macpherson, Chair of the Canada Industrial Relations Board, Professor Emeritus Donald Carter, former Chair of the Ontario Labour Relations Board, and Robert Blair, lawyer and former Chair of the Alberta Labour Relations Board. All three members of the panel were members of the Centre’s Advisory Committee in 2013.

The LBP is a pilot or preliminary module of a larger CLCW research project, the Unified Workplace Rights Tribunal Project (UWRTP), which will focus on the question of whether the adjudication of workplace rights claims for unionized and non-unionized employees could and/or should be dealt with by a single unified workplace rights tribunal (sometimes called a “labour court” (Lippe, Arthurs & Brookbank; MacDowell 2000)), instead of by a wide variety of tribunals, as is currently the case. Versions of this question have been on the policy table since at least the middle of the 20<sup>th</sup> Century, and it continues to be a live issue (British Columbia Law Institute Workplace Dispute Resolution Project; Ontario. Ministry of Labour, 2001). The consolidation of workplace adjudication holds out the promise of increased efficiency, simplified access to justice and more uniform development of workplace jurisprudence. To date, however, the attractions of a unified tribunal have not outweighed its perceived disadvantages, and proposals for large-scale consolidation have not come to fruition.

Nevertheless, smaller-scale merger and “clustering” experiments are widespread. Labour boards,<sup>1</sup> among the oldest and most significant institutions currently adjudicating workplace rights issues in Canada, are one of the primary sites of this experimentation. Understanding how labour boards worked in the past, how they have changed and how they are currently working is a critical cornerstone of any broader project exploring the adjudication of workplace rights claims. Accordingly, we have embarked on this LBP both as self-contained module of the larger (UWRTP), and as a testing ground for developing the complex and inter-connected set of research questions that must be identified before undertaking a broader study of whether the current mix of labour and employment law institutions provide fair and effective dispute resolution for Canadian employers, employees, and unions, and whether a unified adjudication model would produce improved outcomes.

## **2 Project Methodology**

The objective of the preliminary phase of the LBP on which this report focuses was twofold: (1) to identify a set of research questions which would enable Banks and Shilton to examine changes

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<sup>1</sup> We use the generic term “labour board” for those tribunals variously called labour relations boards, labour and employment boards or industrial relations boards in Canada.

in the role of labour boards across Canada, how labour boards have adapted to these changes, and whether these changes have undermined or strengthened the initial policy justification for taking labour issues out of the courts; and (2) to assist in the design of a research study or set of studies which would contribute to answering these questions. This preliminary phase has consisted of the following components:

1. A detailed literature review (see attached bibliography, Appendix A);
2. An email survey of all labour boards in Canada, asking for responses to the following questions:
  1. What statutes does your board administer, in whole or in part?
  2. Does your board adjudicate rights grievances or interest disputes, as well as statutory rights issues?
  3. Has your board been consolidated or “clustered” with other boards or adjudicatory bodies within the past ten years? Are there plans in place to consolidate in the near future?
3. A survey of statutes dealing with the current functions of labour boards on a jurisdiction-by-jurisdiction basis: see Part 4, below;
4. An in-person meeting conducted by Dr. Banks with the chairs of Canadian labour relations boards in June of 2013 to discuss general issues concerning the LBP.
5. Consultations conducted in British Columbia by Dr Banks and in Ontario by Dr Shilton to gather preliminary information and opinions from experienced practitioners and participants in labour board administration and adjudication both on the LBP research questions, and on what research questions would be appropriate for tackling both the LBP and the larger UWRTP.

### **3 Historical Background of Labour Boards in Canada<sup>2</sup>**

To place the current role of labour boards in context, we have completed preliminary research on the historical background to the establishment of labour boards in Canada. Labour boards were originally conceived in the 1940s and early 1950s in Canada as one of the “legislative hallmarks” of Canada’s collective bargaining model (*Ontario (Attorney General) v. Fraser*, [2011] 2 SCR 3). They played a key role in reducing industrial conflict by providing a mechanism for resolving disputes over union representation and collective bargaining impasses (Bromke 1961; Fudge & Tucker). Their primary functions were to certify unions, monitor strikes and lock-outs and enforce the unfair labour practice provisions of the statutes which governed fairness in union organizing campaigns and during collective bargaining. They brought expertise in union-management relations to their task of providing rapid and cost-effective dispute resolution within the unionized sector of the Canadian labour market. Most labour relations boards were initially structured as tripartite tribunals consisting of neutral members and members representing unions and employers (Arthurs; Burkett). Union and employer representatives were chosen for their

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<sup>2</sup> Information in this section is based primarily on our literature review, supplemented by consultations: see Bibliography, Appendix A

practical experience in the field, and were typically not legally trained. Neutral members brought both legal and practical expertise (Bromke 1961). An important part of the board's function was to facilitate and support the essentially voluntaristic mechanisms of collective bargaining, a role very different from that of the courts which traditionally focus on policy-neutral adjudication of rights disputes.

While the structural model for labour boards has remained largely unchanged since the 1940s, their role has changed greatly in many Canadian jurisdictions in a number of different ways (MacDowell 1978). First, at a very practical level changes in union density and the role of unions in society have changed the 'mix' of work currently performed by labour relations boards. Fewer union organizing campaigns mean that labour boards devote less time to the adjudication of issues arising out of certification proceedings. Lower union density means that they spend less time dealing with collective bargaining disputes. Time formerly devoted to these core functions is now allocated to additional functions associated with unionized employment sectors, such as the processing and adjudication of 'duty of fair representation' complaints filed by individual employees, and processing construction industry grievances. Second, in many Canadian jurisdictions, labour boards are no longer seen exclusively as specialists in collective employment relations. They have been assigned a variety of disparate adjudicative functions that cross boundaries between unionized and non-unionized workplaces, including, in some cases, the adjudication of individual grievances and human rights complaints (MacDowell & Stelmaszyznski; Ontario Labour Relations Board: History). The factors which have contributed to the broadening scope of labour board functions are complex and diverse, and vary from jurisdiction to jurisdiction across the country.

The degree of variation across the country is clearly illustrated in the jurisdictional summaries provided in Part 4 below. The reasons for that variation will require further study. Based on our preliminary research, it appears that in some cases change has been driven largely by policy factors, while in other cases, it appears to have been driven more by expediency and a desire for cost-savings.

#### **4 The Current Functions of Labour Boards in Canada: Jurisdiction-by-Jurisdiction Summaries:**

The following summaries of the current functions of labour boards across Canada are based on our statutory review, supplemented by responses to our email survey to labour board chairs. The information is current to December 31, 2013. The gist of these summaries is also presented in chart form in Appendix B. The summaries are presented in alphabetical order:

##### **Provincial Jurisdictions:**

###### ***Alberta***

Alberta is remarkable primarily for its continued adherence to the old model. The duties of the Alberta Board are almost exclusively assigned by the *Labour Relations Code*, RSA 2000, c L-1. It also carries out traditional labour relations functions under two additional statutes: the *Public Service Employee Relations Act*, RSA 2000, c P-43 (the Board was given this jurisdiction in 1994) and the *Police Officers Collective Bargaining Act*, RSA 2000, c P-18 (the Board was given this jurisdiction in 1983).

## ***British Columbia***

British Columbia has also adhered to the old model. The BC Board's core duties are those assigned by the *Labour Relations Code*, RSBC 1996, c 244, as well as similar duties assigned under the *Public Service Labour Relations Act*, RSBC 1996, c 388, the *Public Education Labour Relations Act*, RSBC 1996, c 382, the *Community Services Labour Relations Act*, SBC 2003, c 27 the *Fire and Police Services Collective Bargaining Act*, RSBC 1996, c 142, and the *Fishing Collective Bargaining Act*, RSBC 1996, c 150

The Chair of the BC Board advises that the Board is clustered with the Employment Standards Tribunal. This appears to be an informal arrangement that is not reflected in statute and does not involve any consolidated adjudication.

## ***Manitoba***

The Manitoba Board has jurisdiction under a number of statutes in addition to its core jurisdiction under *The Labour Relations Act*, CCSM L10. It hears complaints from individual employees under *The Employment Standards Code*, CCSM E110. It also has responsibilities for administration and/or adjudication under a diverse range of statutes: *The Apprenticeship and Certification Act*, CCSM A110; *The Construction Industry Wages Act*, CCSM C190; *The Elections Act*, CCSM E30; *The Essential Services Act*, CCSM E145; *The Pay Equity Act*, CCSM P13; *The Public Interest Disclosure (Whistleblower Protection) Act*, CCSM P217; *The Public Schools Act*, CCSM P250; *The Remembrance Day Act*, CCSM R80; *The Victims' Bill of Rights*, CCSM V55; *The Worker Recruitment and Protection Act*, CCSM W197; and *The Workplace Safety & Health Act*, CCSM W210.

The Manitoba Board also appoints arbitrators and/or nominees to arbitration panels for purposes of hearing disputes under collective agreements, where the parties are unable to agree. This is a role played in several other jurisdictions by the Ministry of Labour. In addition, the Manitoba Board plays the role of interest arbitrator not only for first collective agreements (a function which has now become commonplace), but also for subsequent collective agreements where the parties are not able to reach agreement and the statutory conditions are met.

## ***New Brunswick***

The New Brunswick Board has very complex and comprehensive jurisdiction. In addition to its core responsibilities under the *Industrial Relations Act*, RSNB 1973, c I-4, it administers the *Public Service Labour Relations Act*, RSNB 1973, c P-25 and the *Fisheries Bargaining Act*, SNB 1982, c F-15.01. It also hears complaints from individual employees under the *Employment Standards Act*, SNB 1982, c E-7.2 where parties are unsatisfied with decisions of the Director of Employment Standards. The chair of the Board appoints arbitrators to deal with pay equity disputes in the public service under the *Pay Equity Act, 2009*, SNB 2009, c P-5.05 (replacing the *Pay Equity Act*, SNB 1989). It also administers dispute resolution in nursing homes under the *Essential Services in Nursing Homes Act*, SNB 2009, c E-10.5, and hears reprisal complaints under the *Public Interest Disclosure Act*, SNB 2012, c 112.

In addition, the New Brunswick Board hears human rights complaints, a function not performed by any other board in Canada. Under the prior statute, the *Human Rights Act*, RSNB 1973, c H-

11, the Human Rights Commission had the option to appoint a board of inquiry or to make a referral to the NB Board. Under the more recent *Human Rights Act*, RSNB 2011, c 171, the NB Board now hears all complaints referred by the New Brunswick Human Rights Commission. Up to July 1, 2013, it also heard matters under the *Pension Benefits Act*, SNB 1987, c P-5.1 upon referral from the Superintendent of Pensions; that jurisdiction has now been transferred to a newly-created Financial and Consumer Services Tribunal.

The New Brunswick Board has had much of its complex jurisdiction since 1994, when it was created through the merger of four tribunals, the Employment Standards Tribunal, the Industrial Relations Board, the Pensions Tribunal, and the Public Service Labour Relations Board, under the *Labour and Employment Board Act*, Chapter L-0.01, RSNB. The Fishing Industry Relations Board was merged into the Labour and Employment Board in 2001.

### ***Newfoundland and Labrador***

The Newfoundland and Labrador Board also administers a wide range of statutes in whole or in part, in addition to its core jurisdiction under the *Labour Relations Act*, RSNL 1990, c L-1. It administers specialized labour regimes under the *Public Service Collective Bargaining Act*, RSNL 1990, c P-42, the *Fishing Industry Collective Bargaining Act*, RSNL 1990, c F-18, the *Teachers' Collective Bargaining Act*, RSNL 1990, c T-3 and the *Interns and Residents Collective Bargaining Act*, RSNL 1990, c I-18. In addition, it hears individual employment standards complaints under its *Labour Standards Act*, RSNL 1990, c L-2 as well as reprisal complaints under the *Occupational Health and Safety Act*, RSNL 1990, c O-3, the *Smoke-Free Environment Act*, SNL 2005, c S-16.2 and the *House of Assembly Accountability, Integrity and Administration Act*, SNL 2007, c H-10.1.

### ***Nova Scotia***

The current Nova Scotia Board was constituted in February 2011 under the *Labour Board Act*, SNS 2010, c 37 as a consolidation of six separate tribunals: the Labour Relations Board / Construction Industry Panel, the Civil Service Employee Relations Board, the Highway Workers' Employee Relations Board, the Correctional Facilities Employee Relations Board, the Labour Standards Tribunal and the Occupational Health and Safety Appeal Panel. In addition to its core jurisdiction under the *Trade Union Act*, RSNS 1989, c 475, the Nova Scotia Board currently deals with collective labour relations matters under three additional specialized statutes: the *Civil Service Collective Bargaining Act*, RSNS 1989, c 71, the *Highway Workers Collective Bargaining Act*, SNS 1997, c 1 and the *Teachers' Collective Bargaining Act*, RSNS 1989, c 460. It also hears complaints from individual employees under the *Labour Standards Code*, RSNS 1989, c 246, the *Occupational Health and Safety Act*, SNS 1996, c 7 and the *Public Interest Disclosure of Wrongdoing Act*, SNS 2010, c 42.

### ***Ontario***

While the Ontario Board's core functions are those assigned under the *Labour Relations Act*, 1995, SO 1995, c. 1, the Ontario Board administers and enforces all or part of the following very diverse list of statutes:<sup>3</sup> *Ambulance Services Collective Bargaining Act, 2001*, SO 2001, c.10;

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<sup>3</sup> <http://www.olrb.gov.on.ca/english/juris.htm>

*Colleges Collective Bargaining Act, 2008, SO 1990, c.5; Community Small Business Investment Funds Act, SO 1992, c.18; Crown Employees Collective Bargaining Act, 1993, SO 1993, c.38; Education Act, RSO 1990, c.E.2; Employment Protection for Foreign Nationals Act (Live-In Caregivers and Others), 2009, SO 2009, c.32; Employment Standards Act, 2000, SO 2000, c.41; Environmental Bill of Rights, 1993, SO 1993, c.28; Environmental Protection Act, RSO 1990, c.E.19 (giving the Board jurisdiction under the following legislation: *Environmental Assessment Act, RSO 1990, c.E.18, Environmental Protection Act, RSO 1990, c.E.19, Ontario Water Resources Act, RSO 1990, c.O.40, Pesticides Act, RSO 1990, c.P.11, Fisheries Act, RSC 1985, c.F-14, Nutrient Management Act, 2002, SO 2002, c. 4); Fire Protection and Prevention Act, 1997, SO 1997, c. 4; Hospital Labour Disputes Arbitration Act, RSO 1990, c.H.14; Labour Relations Act, 1995, SO 1995, c.1; Local Health System Integration Act, 2006, SO 2006, c.4; Occupational Health and Safety Act, RSO 1990, c.O.1; Ontario Provincial Police Collective Bargaining Act, 2006, SO 2006 c. 35, Schedule B; Public Service of Ontario Act, 2006, SO 2006, c.35, Schedule A; Public Sector Dispute Resolution Act, 1997, SO 1997, c.21, Schedule A; Public Sector Labour Relations Transition Act, 1997, SO 1997, c.21, Schedule B; and Smoke-Free Ontario Act, SO 1994, c.10**

In some cases, the Board plays an extensive role in administering the statute, similar to the role it plays under the *Labour Relations Act, 1995* (eg. *Crown Employees Collective Bargaining Act, 1993*; the *Employment Standards Act, 2000*). In others, its role is limited to dealing with workplace-related reprisal complaints, where a right to file such a complaint is part of a broader statutory scheme which is not itself within the purview of the Board (eg the *Environmental Protection Act*).

In addition, Board personnel play a role in supporting other tribunals which adjudicate workplace rights disputes. Cooperative arrangements are worked out through a variety of mechanisms including formal memoranda of agreement and cross-appointments. The different types of arrangements are described on the Board's website, as follows:<sup>4</sup>

#### Support to other Agencies and Commissions

##### *Pay Equity Hearings Tribunal*

In 2008, by the signing of their respective Memoranda of Understanding with the Ministry of Labour, the Board assumed administrative oversight over the Pay Equity Hearings Tribunal. The PEHT has its own OIC appointees (many of whom are cross-appointed from the Board), but relies on the Board for all its administrative, mediative and legal support.

##### *Public Service Compensation Restraint Board*

Between March 2010 and September 2012 the Board, through a Memorandum of Understanding with the Ministry of Finance, assumed administrative oversight over the Public Service Compensation Restraint Board. The OICs appointed to adjudicate whether the *Public Sector Compensation Restraint to Protect Public Services Act, 2010* applied to

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<sup>4</sup> <http://www.olrb.gov.on.ca/english/AboutUs.htm>. See also Ontario Labour Relations Board. "Ontario Labour Relations Board: History", online:<http://www.olrb.gov.on.ca/english/aboutus.htm>

an employer, employee or office holder, were all cross-appointments from the Board.

#### *Education Relations Commission and College Relations Commission*

The Chair of the Board is currently the Chair of both the Education Relations Commission and the College Relations Commission and the Board provides whatever administration support is necessary to these Commissions.

#### *College of Trades and Human Rights Tribunal of Ontario*

Some Vice-Chairs from the Board are on the roster of adjudicators for the Ontario College of Trades, and act as Vice-Chairs for Review Panels required under the *Ontario College of Trades and Apprenticeship Act, 2009*. Some Vice-Chairs are also cross-appointed to sit as Vice-chairs and members of the HRTTO.

#### ***Prince Edward Island***

The Prince Edward Island Board has jurisdiction under a single statute, the *Labour Act*, RSPEI 1988, c L-1. This statute is a traditional labour relations statute under which the PEI Board is assigned adjudicative duties in relation to union certification and unfair labour practices, including supervision of conduct during collective bargaining. The Board does not have jurisdiction to deal with public service collective bargaining, which is governed by the *Civil Service Act*, RSPEI 1988, c C-8.

#### ***Quebec***

Quebec's current *Commission de relations du travail* (CRT) was formed in November 2002 by amalgamating the jurisdictions of the former *Bureau du commissaire du travail* and *Tribunal du travail*. Since 2002, three other tribunals have been consolidated with the CRT: *Commissaire de l'industrie de la construction* (April 2008); *Commission de reconnaissance des associations d'artistes et des associations de producteurs* (July 2009); *Conseil des services essentiels* (October 2011).

The CRT's core jurisdiction is to administer the *Labour Code*, CQLR c C-27 ("*Code du travail*"). Like Ontario, however, it also has a variety of different adjudicative functions under specific sections of thirty-six statutes included in Schedule 1 to the *Code du travail*, which range from broad responsibility for enforcement to a narrow role in enforcing reprisal provisions. The scheduled statutes are the *Building Act* (CQLR c B-1.1); the *Charter of the French language* (CQLR c C-11); the *Cities and Towns Act* (CQLR c C-19); the *Municipal Code of Québec* (CQLR c C-27.1); the *Act respecting the Commission municipale* (CQLR c C-35); the *Act respecting collective agreement decrees* (CQLR c D-2); the *Act respecting elections and referendums in municipalities* (CQLR c E-2.2); the *Act respecting school elections* (CQLR c E-2.3); the *Election Act* (CQLR c E-3.3); the *Pay Equity Act* (CQLR c E-12.001); the *National Holiday Act* (CQLR c F-1.1); the *Act respecting municipal taxation* (CQLR c F-2.1); the *Public Service Act* (CQLR c F-3.1.1); the *Act respecting workforce vocational training and qualification* (CQLR c F-5); the *Jurors Act* (CQLR c J-2); the *Stationary Engineers Act* (CQLR c M-6); the *Act respecting labour standards* (CQLR c N-1.1); the *Act respecting municipal territorial organization* (CQLR c O-9); the *Act respecting the protection of persons and property in the*



*event of disaster* (CQLR c P-38.1); the *Act respecting labour relations, vocational training and workforce management in the construction industry* (CQLR c R-20); the *Act respecting the professional status of artists in the visual arts, arts and crafts and literature, and their contracts with promoters* (CQLR c S-32.01); the *Act respecting the professional status and conditions of engagement of performing, recording and film artists* (CQLR c S-32.1); the *Courts of Justice Act* (CQLR c T-16); the *Act respecting bargaining units in the social affairs sector* (CQLR c U-0.1); the *Fire Safety Act* (CQLR c S-3.4); the *Act respecting the Communauté métropolitaine de Montréal* (CQLR c C-37.01); the *Act respecting the Communauté métropolitaine de Québec* (CQLR c C-37.02); the *Act respecting public transit authorities* (CQLR c S-30.01); the *Act to amend various legislative provisions concerning regional country municipalities* (SQ 2002, c 68); the *Act respecting pre-hospital emergency services* (CQLR c S-6.2); the *Act respecting the process for determining the remuneration of criminal and penal prosecuting attorneys and respecting their collective bargaining* (CQLR c R-8.1.2); the *Act respecting the representation of family-type resources and certain intermediate resources and the negotiation of process for their group agreements* (CQLR c R-24.0.2); the *Act respecting the representation of certain home childcare providers and the negotiation process for their group agreements* (CQLR c R-24.0.1); the *Act respecting the Agence du revenu du Québec* (CQLR c A-7.003); the *Anti-Corruption Act* (CQLR c L-6.1); and the *Sustainable Forest Development Act* (SQ 2013, c 2).

In addition, the CRT advises that it has jurisdiction under two additional statutes not listed in the Schedule to the Code: the *Act concerning municipal courts* (CQLR c C-72.01), and the *Act concerning the consultation of citizens on the territorial reorganization of certain municipalities* (SQ 2003, c 14).

### ***Saskatchewan***

The Saskatchewan Board adjudicates under *The Trade Union Act* RSS 1978, c. T-17, *The Construction Industry Labour Relations Act, 1992* SS 1992 c. C-29.11, and *The Public Service Essential Services Act* SS 2008 c. P-42.2. In addition, pursuant to the newly enacted *Saskatchewan Employment Act*, SS 2013, c S-15.1, the Saskatchewan Board will have jurisdiction to hear appeals against decisions made by adjudicators under *The Occupational Health and Safety Act, 1993*, SS 1993, c O-1.1 and *The Labour Standards Act*, RSS 1978, c L-1. This appellate jurisdiction was formerly held by the Saskatchewan Court of Queen's Bench. The *Saskatchewan Employment Act* has not yet been proclaimed (as of December 31, 2013), but will consolidate the first two of the above statutes with a number of other employment-related statutes as well as enacting a number of new provisions.

### **Federal Jurisdiction (incl. Territorial):**

Within the federal sector there are two separate labour boards, the Canada Industrial Relations Board, which deals generally with labour relations in the federal private sector and broader public sector, and the Public Service Labour Relations Board, which deals with similar issues concerning the federal public service.

The ***Canada Industrial Relations Board*** (CIRB) administers Part I (Industrial Relations) of the *Canada Labour Code*, RSC 1985, c L-2.. In addition, it hears reprisal complaints under Part II (Occupational Health and Safety) of the *Canada Labour Code*. In April, 2013, it was consolidated with the Canadian Artists and Producers Professional Relations Tribunal (CAPPRT),

and now administers Part II (Professional Relations) of the *Status of the Artist Act*, SC 1992, c 23. For many years prior to the consolidation, the CIRB shared certain facilities such as library facilities with the CAPPRT under an informal arrangement promoted by the tribunal Chairs. Similar facilities-sharing arrangements continue with the PSLRB.

The ***Public Service Labour Relations Board*** (PSLRB) administers the collective bargaining and grievance administration systems of the federal public service under the *Public Service Labour Relations Act*, SC 2003, c 22, s.2. It performs the same role for parliamentary employees under the *Parliamentary Employment and Staff Relations Act*, RSC 1985, c 33 (2<sup>nd</sup> Supp). It hears reprisal complaints under Part II of the *Canada Labour Code* (Occupational Health and Safety) for employees within its jurisdiction. It is also involved in pay equity complaints concerning employees under the *Budget Implementation Act, 2009*, SC 2009, c. 2, which enacted the *Public Service Equitable Compensation Act*, SC 2009, c. 2, s. 394 (not yet in force) and gave it a role in transitional arrangements for the administration of pay equity complaints for the public service filed with the Canadian Human Rights Commission. When the new *Public Service Equitable Compensation Act* comes into force, the current federal pay equity regime will be replaced with a new regime which the PSLRB will be mandated to administer. Under this new regime, the PSLRB may hear pay equity complaints, including those from non-unionized employees.

In addition to its role within federal jurisdiction *per se*, the PSLRB also administers the collective bargaining and grievance adjudication systems under two territorial statutes, the *Yukon Education Labour Relations Act*, RSY 2002, c 62 and the *Yukon Public Service Labour Relations Act*, RSY 2002, c 185.

The PSLRB has direct jurisdiction to hear grievances referred by individual employees (with the consent of their bargaining agent) and unions whose collective agreements fall under its jurisdiction). Parties may select their own arbitrator, but if they choose not to do so, the PSLRB chair refers the grievance to a PSLRB member.

Prior to the consolidation of the CAPPRT with the CIRB, the PSLRB provided administrative services to that tribunal Public Service Staffing Tribunal and another smaller tribunal.

## **5 Summary of Expert Consultations**

Limitations on both time and financial resources made it unrealistic for us to conduct comprehensive consultations with experts at this stage of our project. We concluded on the basis of our literature and statutory review that two jurisdictions offered a useful contrast: Ontario, where the board has a very comprehensive jurisdiction, and the British Columbia, where the board still has a traditional labour relations/collective rights focus. We chose to focus our consultations on those two jurisdictions, although some of the experts we consulted had knowledge and experience beyond the boundaries of those jurisdictions. The experts with whom we met were selected from a longer list assembled in consultation with our advisory committee. They were not a representative sample; our selection was largely dictated by efficiency considerations such as their availability to meet during our limited interview period, and their ability to speak to a broad range of concerns and issues. We sought to explore perceptions of how labour boards had changed over time, how well those changes have worked, and whether or not they have affected the quality of adjudicative outcomes both within the core jurisdiction of labour

boards, and in their expanded jurisdiction where there has been significant change in the scope of their work. We got useful input from the consultees, who were well-versed in the practices and the culture of the jurisdictions we focused on, and sufficiently experienced and connected that they could also speak from a comparative perspective. We note, however, that we asked somewhat different questions of our Ontario and our BC consultees (see Appendices C and D), and would benefit from hearing further from them on issues on which they have not yet had an opportunity to comment. We also remain very conscious, of the need to expand our reference group as the project continues in order to ensure that our research takes into account the perspectives of a much broader range of experts and users, and in particular that it takes into account the perspective of “outsiders” as well as “insiders” in the workplace rights adjudication process.

The consultations were conducted as semi-structured interviews, with individuals and with small groups. Although they were conducted in open-ended fashion, the experts were provided before the meeting with a lengthy list of questions on which they were invited to reflect in preparing for the consultations. We have attached the full lists of questions in Appendices C, D and E of this report. The questions were designed to explore certain fundamental issues about the potential impact of unified adjudication identified by our literature review, including its impact on the “expert” nature of adjudication, on the efficiency of dispute resolution, and on the accessibility of dispute resolution to users of adjudication services. The general themes of these questions can be summarized as follows:

- a. Does the addition of new functions to a labour board’s core jurisdiction have implications for subject specialization, traditionally regarded as important for administrative tribunals? How have governments handled the specialization issue in the appointments procedure? Has the dispersion of subject specialization affected the willingness of the courts to defer to labour boards on judicial review?
- b. What role does tripartism play in labour board adjudication? Is it still important? How does tripartism function where boards adjudicate individual rights claims as well as collective rights claims?
- c. Are there conceptual or operational obstacles to assigning the adjudication of *collective rights* issues (such as union certification and unfair labour practice) and the adjudication of *individual rights* (such as human rights issues) to the same tribunal?
- d. Who benefits and who loses by unification of workplace adjudicative functions? By lack of unification? Does unification affect different constituencies and interest groups differently, and if so, how?
- e. Why have formal proposals for broad unification failed, while more targeted unification experiments have continued?

### *Ontario Consultation*

On August 28, 2013, Dr Shilton met with Voy Stelmaszynski, Senior Solicitor at the OLRB for many years. Mr Stelmaszynski moved over to the OLRB from the Office of Adjudication in the late 1990s when employment standards adjudication was placed under the aegis of the OLRB. This has given him a particularly valuable perspective on the issue of how labour boards deal with individual employment standards complaints. For part of the meeting they were joined by Catherine Gilbert, OLRB Assistant Registrar. Ms Gilbert was formerly a mediator and had a number of insights into the use of mediation for various types of complaints.

The consultees described a Board that deals with cases of the traditional labour relations type, but also hears the claims of individual employees (both unionized and non-unionized) under a wide variety of workplace-related statutes. Its workload cuts across several specialty areas, including labour relations, occupational health and safety, employment standards and construction industry grievances. It has been operating with this expanded jurisdiction for many years now (e.g. it has enforced employment standards legislation since 1998). In addition to its direct enforcement authority for a variety of statutes, it is also linked with three other Tribunals (the Pay Equity Hearings Tribunal, the Education Relations Commission and the College Relations Commission) through a series of cross-appointments and shared administrative services. This is not a formal “cluster” (the “clustering” process is governed by *Adjudicative Tribunals Accountability, Governance and Appointments Act*, 2009, SO 2009, c 33, Sch 5), but has many practical similarities. Governments of all political stripes in Ontario have experimented with strategies for grouping tribunals over the years, with and without explicit statutory authority (e.g. through shared services agreements, formal and informal cross-appointments and tribunal mergers). For example, the Harris government moved many workplace tribunals into the same building in the late 1990s with a view to sharing administrative services (and presumably moving towards closer links). This was only a partial success, in part because tribunals had different cultures even at the level of administrative services (one example was reception services – OLRB receptionists are trained to respond to certain types of telephone inquiries, whereas Workers’ Compensation Appeals Tribunal (WCAT) receptionists operated simply as a switchboard). In addition, initiatives to merge tribunals like WCAT with the OLRB have also foundered on funding obstacles – OLRB is funded from consolidated revenues while WCAT is funded through employer assessments. (WCAT is now the Workplace Safety and Insurance Appeals Tribunal (WSIAT).)

On the issue of specialization/expertise, consultees noted that in the past 15 years, all OLRB appointments have come out of the labour bar (ie the collective labour bar). Likewise the OLRB Advisory Committee comes from the labour bar. There is no organized bar for employment standards or the other types of work the Board now does, and therefore no clearly identifiable pre-appointment specialized expertise in those areas among current appointees. Appointees are aware of the Board’s broad jurisdiction and must be willing to take on cases within the full range of the board’s legislative responsibility. Some appointments are made specifically to address the construction industry context, but all appointees are expected to handle all types of adjudication. Since the Board has administrative oversight of the Pay Equity Hearings Tribunal, Vice-Chairs and members from the OLRB have been cross-appointed to hear PEHT matters. OLRB Vice-Chairs have also been cross-appointed to the Human Rights Tribunal of Ontario. A number of the Board’s construction Vice-Chairs have also been cross-appointed to the recently established College of Trades. Most recently, there have been special (one-year) appointments of seasoned arbitrators (who are former Vice-Chairs) to assist in the adjudication of construction industry “open period” certifications and terminations. The Courts continue to recognize the Board’s expertise in labour and workplace adjudication.

On the issue of tripartism, consultees told us that the culture of tripartism that formerly prevailed has been significantly diluted. Under current scheduling practices, cases are much more likely to be heard by vice-chairs sitting alone than by tri-partite panels. The Board does this in part for ease of scheduling and in part to conserve resources. However, it has experienced little pressure

to maintain tripartism. Mr Stelmaszynski described this “a shift in the community’s expectation ... with respect to the tri-partite philosophy”.<sup>5</sup> “Sidespersons” play a lesser role at the Board, and a lesser role in their respective communities.

Consultees indicated that the OLRB uses alternatives to the traditional hearing-type adjudication format for many different types of complaints. It offers mediation in all areas of its work and settles a very high percentage of cases. The Board’s success is quite dependent on its high-quality mediators. The older generation of mediators hired from a body of experienced in-house people (union representatives or human resource professionals) is being replaced by a complement of legally-trained professionals with labour and employment backgrounds. Over half of the Board’s current mediators are either lawyers or persons with graduate degrees in industrial relations. In addition to mediation, the Board uses alternative adjudication strategies much like the HRTO to deal with issues simply on paper and to dismiss cases without a hearing on the basis that there is no prima facie case; in fact, the HRTO probably borrowed their much-publicized approach from the OLRB. The use of consultations rather than formal hearings has been accepted by the courts: *International Brotherhood of Electrical Workers Local 1739 v. International Brotherhood of Electrical Workers*, 2007 CanLII 65617 (ON SCDC), <<http://canlii.ca/t/1whd5>.

Many types of cases have become more complex and “legalistic”. Particularly in labour relations matters, there is an expectation that parties will be represented by counsel, and parties who are not represented may experience difficulty navigating the hearing. There is an experienced labour bar which has evolved over the past few decades, with specialized boutique firms and lawyers who specialize in employment and labour law (for one side or the other in large cities, or both sides in smaller communities). Because of its expanding jurisdiction, the OLRB has created more forms, rules of procedure and time limits. While the Board aspires to be a user-friendly environment in which parties do not require lawyers, in reality the procedural requirements may be complex and onerous for unrepresented parties. Individual employees without union representation are disadvantaged within the current systems, including individuals filing claims under employment standards and occupational health and safety legislation, or those filing duty of fair representation complaints under the *Labour Relations Act*. There are now a very significant number of unrepresented litigants in all the areas of Board jurisdiction (although the Board does not keep statistics on this). There is no dedicated legal support for unrepresented litigants appearing before the Board, in contrast to the situation at some other workplace rights tribunals such as the HRTO.

Consultees believe that processes like consultation work much better for unrepresented litigants than formal hearings, and that users are much more satisfied because they feel “heard”; the “day in court” issue is very important to user satisfaction. Board adjudicators have been forced to rethink their roles and adapt their adjudicative styles to deal with unrepresented litigants. In the late 1990’s when employment standards and OHS/A appeals were initially transferred to the Board’s jurisdiction, there was some philosophical resistance to the new role required of decision-makers, who now needed to take a much more hands-on role with individual claimants, without the “buffer of institutional representation”. The presence of self-represented parties changes the dynamic in the hearing room, requiring a cultural shift where adjudicators must deal more directly with affected parties.

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<sup>5</sup> Mr Stelmaszynski responded to many of the questions listed in Appendix C in writing, and some of this text is adapted from those written responses.

With respect to employment standards complaints, parties are frequently unrepresented on both sides (i.e. both the employee and the employer). Under the old system, the Ministry of Labour formally “carried” employment standards complaints that reached the hearing stage, but this is no longer routine; the Ministry now appears on fewer than 10 percent of cases. For good or ill, Ministry disengagement has boosted the settlement rate, since under the old system it frequently resisted settlements which fell below minimum standards. Under current procedures, Board mediators take a more pragmatic approach and promote settlement.

Unique among Canadian labour boards, the OLRB plays a role in adjudicating grievances under collective agreements in the construction industry. There is a cost to the parties for this service, but it is low compared to typical costs for this service from private arbitrators: currently \$200 per party in filing fees, mediation offered free, and \$500 per party in adjudication fees if the case doesn’t settle in mediation. Consultees believe the OLRB does a good job with grievance arbitration, that the parties are satisfied, and that there should be no obstacles in principle to the OLRB doing other types of grievance arbitration.

In general, consultees believe that the OLRB is well-adapted to functioning as a full service labour and employment tribunal. It could take on more adjudicative tasks provided there is adequate communication between the government and the Board, so that the Board is aware of impending changes that will have impact on operations. The Board also needs to be adequately resourced to deal with expanded jurisdiction. This does not always happen; the Board has on occasion been given significant additional jurisdiction without any new resources (e.g. in 1998 when the teachers were brought under the aegis of the *Labour Relations Act* and therefore under the OLRB). They pointed out that the integrated model allows the Board to resolve in a single proceeding the multiple issues that may arise in a particular file, some of which are in Board jurisdiction and some of which may not be: for example, a grievance arbitration or a reprisal complaint may have a human rights component, and complaints may have been filed both with the OLRB and at the HRTO. Board mediators work to fashion global settlements.

### *British Columbia Consultations*

British Columbia, by contrast with Ontario, has preserved the old model in which labour boards deals exclusively with issues arising in connection with unionization and unionized employees, and where the parties are largely institutional parties – unions and employers. While there have certainly been significant changes in the BC Board’s jurisdiction over the years – the 1973 addition of jurisdiction to hear appeals from the decisions of grievance arbitrators is a good example – these changes have affected the unionized sector. Unlike boards in many other jurisdictions, the BC Board has not been assigned workplace claims related to other statutory rights, such as employment standards. However, the BC board no longer operates on the old tripartite model, in which adjudicative panels are structured with sides-persons representative of the interests of management and labour, with a neutral chair. It has in recent years conducted its hearings without sidespeople.

Dr. Banks met with two former Chairs of the Board, Don Munroe and Stan Lanyon, with a former counsel to the Board and Vice-Chair of the Canada Labour Relations Board, Jim Dorsey, with the current Chair, Brent Mullin, and with Professor Mark Thompson, author of an important government-commissioned review of labour standards published during the mid-1990s. He met with Mr. Dorsey and Mr. Mullin individually on August 26, 2013, and with Mr. Lanyon, Mr. Monroe and Mr. Thompson together on August 27.

Mr. Mullin saw the Board as operating in a context in which economic conditions placed growing importance on enabling employers and unions to find solutions to their differences expeditiously, a context reflected in fundamental reforms to the *Labour Relations Code* in British Columbia first by the New Democratic Party (NDP) government in 1993), and then confirmed and strengthened by the Liberal government in 2002. He saw reducing the legalization of labour relations as a key challenge facing the Board. He saw a real need to get back to a “party-oriented, problem-solving process” in which mediation by the Board would play a significant role. One of the Board’s major initiatives in response to this challenge has been to set a six-month timeline for the resolution of cases. In his view, the key challenges in meeting this deadline were changing the culture so that Board management of proceedings to meet timelines was expected, overcoming risk aversion about such changes, and ensuring the processes at the Board, including such matters as the production of documents, are proportional to the complexity and stakes of the case. Mr. Mullin did not approach these challenges by setting out rules, but instead allowed Vice-Chairs to work flexibly with their strengths to meet targets. Most adjudicators were now using an early case conference. He counted some recent large construction industry successor rights cases as successes in which a resolution was achieved by active search for solutions. He said that succinct decisions helped to meet the needs of employers and unions. In his view they appreciate timeliness and do not mind if not every argument that they present is addressed in depth. He also emphasized that the Board’s move to use single adjudicators addressed the needs of the parties for expeditious dispute resolution. Finally, he said that the Board had worked with the parties to have them accept that the adjudicator attempt to mediate a resolution where appropriate. He said that the culture of labour relations dispute resolution had evolved to the point where the parties and their counsel have accepted that process.

The Board has reformed its procedures to handle duty of fair representation (DFR) cases more efficiently. The Board decides about 90 per cent of such cases on the basis of a document review rather than an oral hearing. Mr. Mullin did not favour routine consultations in DFR cases because the Board’s experience has been that such claims are very often unfounded under the legislation, in which case there is little point in further discussion. In British Columbia jurisdictional disputes in the building trades portion of the construction industry are generally referred to a private dispute resolution process, and therefore the Board has not had reason to consider adopting consultation procedures to handle such matters.

The Board has measures in place to assist unrepresented litigants, the vast majority of whom are applicants presenting claims that unions have violated the DFR. The Board provides them with a copy of its leading case on the meaning of the duty, and a “plain language” guide to the duty. Staff in the Board’s registry cannot advise applicants on their case, but can and do tell them if an application is deficient, or if they should examine a particular precedent.

The Board has not faced much demand for teleconference hearings, probably because counsel and party headquarters tend to be in Vancouver.

Mr. Mullin did not think that economies of scale mattered much in arguments over whether to consolidate workplace tribunals. He thought that the basic issue was that the mandates and roles of different tribunals were quite different. He did say however that for a tribunal smaller than the BCLRB case management systems can become very expensive, so that consolidation of functions might matter more to smaller tribunals.

The other consultees tended to agree, or at least to have no particular reason to doubt, that the Board was operating efficiently within its current understanding of its mandate. Most also thought that the Board operated without direct political interference, though it was occasionally subject to patronage appointments. Most agreed that longer terms, perhaps 5 or 10 years, and stipulated grounds for re-appointment would help reduce the potential for indirect government influence on the development of the law through adjudication. However, all expressed concern over whether the Board's current mandate or understanding of its mandate was appropriate from a policy perspective. In this regard their views tended to converge on a number of points.

First, they shared a concern that the capacity of the Board to lead in the development of labour relations law has declined over the past two decades. Possible inter-related explanations for this included the weakening of the political and economic position of the labour movement leading to marginalization of labour relations law, the political preferences of the current government, the lack of capacity or will in the current Board to engage in outreach within the labour relations community, repeated failures by governments to consult deeply with the labour relations community in making appointments or about restructuring the Board, the erosion of the tacit acceptance of a leading role for the Board among employer and union communities, and a growth in politicization and distrust within the labour relations community itself.

Second, all of the other consultees saw the loss of this leadership capacity as problematic. They thought that the Labour Relations Board should play an important and pro-active role in addressing emerging labour relations issues with legal dimensions.

Third, they thought that in British Columbia tri-partism, at least at the stage of consulting with respect to policy issues and legislative reform, remains fundamental to trust-building and thus to the credibility of the Board. Some also felt that the loss of sidespeople in Board adjudication had weakened its position within the labour relations community.

Fourth, they perceived the 2010 Ministry of Labour proposal to consolidate workplace tribunal decisions as hastily conceived and lacking in political support. In their view the proposal failed for many reasons, key among them a lack of trust among stakeholders. As one consultee put it: "the employer community is not going to allow trade unionists to make decisions about employment standards, and human rights activists don't want unions and employers making decisions about human rights". Such distrust would have, in their view, required extensive and meaningful consultations to overcome.

On the question of whether a consolidation of any kind would in fact be desirable, the other consultees differed. Those who supported consolidation said that

- there would be a real advantage in having issues such as human rights adjudicated by people who really understood the employment relationship, and in particular the need for concise, understandable awards, and for sensitivity with respect to the use of reinstatement;
- a lot of the pioneering legal development in workplace law, especially in the area of human rights, remains to be done and should be done by a high profile tribunal with a strong mandate from government and the trust of the workplace parties;
- in human rights cases in a unionized setting the union should be there to explain the collective agreement;
- divided jurisdiction still poses problems in dealing with the human rights dimensions of employment standards – it is often necessary to go to the Human Rights Tribunal to deal



- with systemic aspects of employment standards issues, because employment standards adjudicators do not have jurisdiction to deal with them<sup>6</sup>;
- employment standards are a field of growing importance that should be integrated into the mandate of a consolidated tribunal; and
  - the Human Rights Tribunal does not sufficiently enjoy the confidence of the courts, which has opened up its determinations to judicial review.

Supporters of consolidation were quick to add however that it would require extensive consultation to build trust among the relevant constituencies, notably employers, unions and human rights advocates. One suggested that a gradual approach might be appropriate, with cross-appointments between tribunals serving as an interim step. Others noted that such a tribunal would need to design low-cost expeditious procedures to deal with employment standards cases efficiently and effectively, and to design early interventions in employment standards cases, including proactive inspection to counter access issues.

One consultee spoke against consolidation. In his view an integrated employment tribunal required the legislature to articulate a vision of the law of the workplace and the competing policy factors that have to be balanced to fashion it. He argued that the current environment does not provide a propitious context for doing so. He also worried that two aspects of human rights litigation would reduce the effectiveness of a workplace tribunal in meeting its mandate. First, the transactional nature of human rights litigation would not bring with it a culture that understands appropriately the need for give and take within employment relationships. Secondly, the lack of deference by courts in human rights adjudication would carry over into other matters handled by a consolidated tribunal. As a result, integration might simply reduce the approach to workplace adjudication to a “least common denominator”. This would in turn mean that the tribunal would not attract a strong mandate or complement of adjudicators to lead the development of a consolidated body of workplace law.

The consultees were each provided with an opportunity to review a draft of this report before it was finalized, and each took the opportunity to offer additional comments. Most of these are reflected in the summary presented above. Mr. Mullin offered in addition a response to the perception of other consultees that there had been a loss of leadership capacity at the Board over the past two decades. He did not agree that this was the case. He said that the Board had shown leadership in taking very significant and forward-looking initiatives during that time. He saw the 1993 and 2002 amendments to the Code as very important, and emphasized that it was incumbent upon the Board to implement them. After his appointment as Chair in 2002, it had taken considerable perseverance and time for the Board to fulfill its obligation to substantively interpret and apply those amendments. It had done so notwithstanding what had been a status quo culture within much of the legal and labour relations communities. He said that the Board had shown leadership in successfully addressing (by means described above) problems with the speed of its dispute settlement process. It had done this because it was in the public interest, despite receiving little active support from the legal community. The Board had also taken the initiative by

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<sup>6</sup> In British Columbia, the jurisdiction of cognate tribunals to deal with human rights and *Charter* issues is frequently limited by their constituting statutes (see, for example, *Employment Standards Act*, RSBC 1996, c 113, ss. 86.1-86.2) and by ss.45-46.3 of the *Administrative Tribunals Act*, SBC 2004, c 45.

suggesting reform to the labour arbitration system to improve its timeliness, possibly along a timelines report approach such as that implemented by the Board, in its 2012 and 2013 Chair's Messages. In his view the perception that the leadership capacity of the Board had diminished might simply reflect fundamental disagreement with the policy directions that it had pursued.

## **6 Conclusions from the Preliminary Research and New Research Questions**

Our study to date suggests some preliminary conclusions about the current role of Canadian labour boards in adjudicating workplace rights claims in Canada, and the current state of research on that role:

- There is significant variation across the country in the range of adjudicative functions currently assigned to labour boards. Changes and accretions to the traditional role of labour boards have occurred at different rates, for different reasons and under different operating conditions across the country. The reasons for this variation are not self-evident, and have not yet been systematically explored by researchers.
- Many modern Canadian labour boards already deal both with matters concerning union certification and collective bargaining arising out of labour relations statutes, and with a variety of individual statutory employment-related rights claims. In some cases, they also enforce rights claims arising out of collective agreements. There has been very little research on the impact of assigning collective and individual rights adjudication to a single agency on procedures and outcomes, and on the implications of assigning grievance arbitration to tribunals whose primary function is the adjudication of statutory claims.
- The traditional tripartite structure of labour boards is under some strain across the country; in some jurisdictions it has fallen largely into disuse, whereas in others it remains a cornerstone of labour board credibility. There is some correlation between continued adherence to tripartism and continued adherence to traditional labour board jurisdiction.
- “Subject expertise” may be less central than it was in the mid-20<sup>th</sup> Century to labour board appointments (although this is far from clear), and takes on a different meaning for boards with broader workplace jurisdiction. The implications of this for processes and outcomes has not been studied.
- Both traditional and expanded-mandate labour boards have implemented expeditious dispute resolution procedures intended to enhance both efficiency and accessibility. These include paper-based decision processes, consultation proceedings, and early case management meetings. Alternative procedures are in use for all types of claims, although they are not always used in the same way. There has been little research done on how well such alternative procedures are adapted to deal with different types of claims, and whether their benefits are evenly distributed among different “players” in the system (i.e. employees, employers and unions) and among different types of rights claimants (i.e. those making individual right claims as compared to those making collective rights claims).
- Both traditional and expanded-mandate labour boards have experienced significantly increased numbers of users without institutional support or professional representation.

- This is also true for many other administrative tribunals, and there has been some research done on the implications of this phenomenon and how it might be addressed in other contexts, but not in the context of labour boards.

Following on these preliminary conclusions, we have developed a set of research questions that warrant further study:

*The trajectory of policy rationales for board mandates*

- What were the reasons behind the original establishment of labour boards as specialized tribunals with a unique mandate in relation to unionized workplaces?
- Why has that mandate been changed in specific ways in some jurisdictions, but remained relatively unchanged in others? What factors account for these differences?
- What implications do those factors have for broader public policy?

*Efficiency, accessibility and fairness under expanded mandates*

- Where labour boards have been given expanded mandates, how and how well have they handled their additional functions, measured against the core administrative law values of efficiency, accessibility and fairness?
- Has the expansion of the mandates of labour boards beyond their traditional functions affected their ability to deliver efficient, high quality adjudicative services to a range of users both within their traditional jurisdictions and within their expanded jurisdictions?

*The nature of subject matter expertise under expanded mandates*

- What impact have expanded board mandates had on the subject matter expertise of board appointees?
- How has expansion affected appointment procedures?
- Has expansion “diluted” subject expertise?

*Quality of decision making under expanded mandates*

- If subject matter expertise has been diluted, has it affected the quality of adjudicative outcomes? The willingness of courts to defer to board decisions on judicial review?
- Are there particular types of cases that pose particular challenges for a unified workplace rights tribunal (perhaps because they address values that clash with collective labour values (e.g. human rights), or because they address highly technical subject matters (e.g. pensions), or because they benefit from the flexibility of “party” control, or because of how they have been traditionally funded (eg workers’ compensation)?

*The role of tripartism today*

- Is tripartism still important for labour boards in carrying out their mandates and maintaining their credibility among their users?
- Is it consistent with modern principles of administrative law regarding the objectivity and independence of adjudicators? How does it function within boards with expanded mandates?

### *Modernization of dispute settlement procedures*

- How do modern labour boards use alternate dispute resolution procedures? Are they used within the areas of traditional board jurisdiction? Expanded jurisdiction?
- Do they work equally well for all types of cases? For all types of users?

### *Access to justice for the unrepresented litigant*

- Are there special challenges for labour boards in dealing with unrepresented (often labelled the “self-represented”) litigants? Are there particular asymmetries in litigation before labour boards that need to be addressed (e.g. the fact that employers and unions are less frequently unrepresented than individual employees?) Are there particular types of claims in which this is likely to be a bigger issue than others?
- How and how well are labour boards dealing with this issue?

Answers to these questions should provide a knowledge base from which to identify the factors that may enhance or detract from the ability of more unified tribunals to provide efficient, accessible and effective adjudicative services. They therefore have implications for public policy in identifying best practices in the adjudication of workplace rights issues, and more generally in the structuring of administrative tribunals.

Our preliminary study has identified a clear need for more systematic study of the issues raised here. It has confirmed that labour boards provide an important site for research on the efficacy of consolidating the adjudication of workplace rights adjudication. Because of the variation across the country, labour boards provide “test sites” for examining the implications of combining the adjudication of individual statutory rights claims with the adjudication of the collective rights claims more traditionally addressed by labour boards. More concrete information about how well labour boards currently manage expanded mandates would shed considerable light on the question of whether a unified tribunal dealing with a comprehensive range of employment-based rights issues for both unionized and non-unionized employees would be an efficient and workable mechanism for delivering fair adjudication.

Further research on labour boards should yield insights into the pros, cons and practical challenges for the unified adjudication of workplace issues in Canada. We look forward to being involved in this research, and to developing follow-up research studies, both qualitative and quantitative, that will build on the knowledge gained through this preliminary study and contribute to policy development on how best to provide efficient, accessible and effective dispute resolution for Canada’s workplace rights claims.

## APPENDIX A

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## APPENDIX B

### LABOUR BOARD FUNCTIONS ACROSS CANADA AS OF SUMMER 2013

	Public Sector	Empl Stand.	OccHS	Pay Equity	Pension	Human Rights	Griev. Arb.	Interest Arb. (2)	Dismiss. (Non-union)	Reprisal Oth.Stat	App. Role (3)
<b>BC</b>	Yes	No	No	No	No	No	No	Yes	No	No	Grievances
<b>AB</b>	Yes	No	No	No	No	No	No	No	No	No	No
<b>SK (1)</b>	Yes	Appeal	Appeals	No	No	No	No	Yes	No	No	Yes
<b>MN</b>	No?	Yes	Yes	No	No	No	No	Yes	No	Yes	No
<b>ON</b>	Yes	Yes	Yes	No	No	No	Yes (Cnst.)	Yes	No	Yes	OHS & Emp. Std.
<b>QC</b>	Yes	Yes	Yes	Yes (4)	No	No	No	Yes	Yes	No	No
<b>NB</b>	Yes	Yes	No	Yes (4)	No	Yes	No	No	No	Yes	No
<b>PEI</b>	No	No	No	No	No	No	No	No	No	No	No
<b>NS</b>	Yes	Yes	Yes	No	No	No	No	Yes	No	Yes	No
<b>NL</b>	Yes	Yes	Yes	No	No	No	No	Yes	No	Yes	No
<b>Can</b>	No	No	Yes	No	No	No	No	Yes	No	No	No

**NOTES: (1) Bill 85 is fully reflected here (2) Most deal only with first contract arbitration (3) The nature of the appellate role varies (4) These boards appoint arbitrator for pay equity disputes.**

## APPENDIX C

### QUESTIONS TO BE CONSIDERED BY ONTARIO CONSULTEES

1. How has the role of labour relations boards changed since the 1940s?
2. Why has it changed? In response to economic pressures? Political pressures?
3. Do the new roles taken on by labour boards mesh with the expertise traditionally required by labour boards?
4. Have some Canadian jurisdictions embraced change more comprehensively than others, and if so, what factors may account for differences in the pace of change?
5. In those jurisdictions in which proposals for further consolidation of workplace adjudication have been put forward (eg Ontario in 2001; BC in 2010), why have those proposals not been implemented by governments? Are the obstacles primarily political, operational or philosophical?
6. Are there constituencies who are particularly ill-served by existing access mechanisms? Particularly well-served? Do current adjudicative processes and mechanisms within labour relations boards pose particular challenges for parties who are not part of the institutional mechanisms of collective bargaining, such as individual employees wishing to challenge their trade unions, employers seeking to opt out of employer associations, or individual employees seeking to enforce non-collective rights?
7. Have boards been able to adapt to their new roles through internal organizational changes? to what extent has legislative change been required? and to what extent do existing legislative structural requirements or appointment protocols impede adaptation?
8. How have governments (and the boards themselves) responded to the expertise issue? Cross- or special appointments? Special panels?
9. Has the need to adjudicate a wide range of issues affected the quality of dispute resolution? The ability to resolve disputes expeditiously? Does the answer to this question vary from issue to issue?
10. Have any of the following issues posed particular “integration of expertise” challenges?
  - a. Statutory rights complaints from non-unionized employees?
  - b. Health and safety complaints?
  - c. Grievance arbitration?
  - d. Rights arbitration?
  - e. Essential services complaints?
  - f. Human rights complaints?
  - g. Pay equity complaints?
  - h. Pension disputes?
  - i. Public sector amalgamation issues?
  - j. Public sector accountability issues?
11. Where the roles of labour boards have been expanded, are their new duties all classic adjudicative functions (ie the enforcement of statutory rights) or do some of them contain substantial regulatory (policy) elements?
12. How do boards adapt their processes to deal with areas in which they are required to function in an appellate capacity?
13. Are there reasons to maintain separation of services to public sector and private sector employers and employees? Where consolidation of these services has occurred, has it been successful?



14. Have there been changes in the behaviour of institutional parties who have traditionally appeared before the board as a result of changes to the board's adjudicative mandate? For example, are unions more or less likely to get involved in the adjudication of "individual rights" issues such as human rights complaints when those complaints are heard by the board? Are employers any more or less likely to agree to mediate complaints? Are lawyers more or less likely to be involved in all types of cases?

In addition, the following questions (specifically identified as "data-based") were raised:

15. Have additional responsibilities increased the board's caseload or its case handling times?
16. Have sufficient additional resources been provided to deal with increased caseloads?
17. Are parties before the board represented by lawyers? Para-legals or other professionals? Self-represented?
18. Does the board have different processing streams for dealing with different types of complaints under different statutes?
19. What resources are available to provide advice to parties seeking to access the board's processes?
20. Has the board adopted any innovative adjudicative techniques (e.g. med/arb, "active adjudication") in response to its changing clientele and/or changing caseload?
21. Does the board offer mediation services? Are they compulsory in some cases? all cases?
22. Are all hearings oral hearings? If you use paper hearings, for what kinds of cases do you use them? Are they voluntary or compulsory?

## APPENDIX D

### QUESTIONS TO BE CONSIDERED BY BRITISH COLUMBIA CONSULTEES

#### Questions for discussion – British Columbia

August, 2013

We are interested in your insights as neutrals or former neutrals into (1) why the BC Labour Relations Board has the jurisdictional mandate that it has, (2) how well it meets that mandate, (3) why it works well or does not, (4) whether it might provide a platform upon which a well-functioning unified labour and employment tribunal could be established, and (5) whether consolidation of labour and employment adjudication on a different institutional platform would pose risks to the quality of resolution of disputes regarding rights under the Labour Relations Code.

We have formulated a number of specific questions (below) that we think will help to answer those larger questions. We are interested not only in your responses to those questions, but also in whether you think they are the right questions, and how you think the right questions could be answered through further research.

#### Questions

1. The jurisdictional mandate of the BCLRB has remained entirely within the field of collective labour relations. Other jurisdictions such as Ontario have significantly expanded LRB jurisdiction. What policy or political considerations do you believe underlie BC's decision to confine the jurisdiction of the LRB to collective labour relations?
2. Why do arbitration decisions which raise human rights issues not go to the Board on appeal, but rather go directly to court? Is this good policy?
3. To what extent, if at all, has the Board been vulnerable over the years to political influence or patronage appointment?
4. How efficient and fair are Board procedures and how transferable are those procedures to cases outside of collective bargaining relationships? You may wish to consider some of the more detailed evaluative questions on Board operations in the Annex, which contains a set of questions that we will address to the Board itself.
5. Has the government or the Board developed user-approved criteria/benchmarks/service standards by which to measure Board performance in meeting the needs of the public? Are they publicly available? Are they valid measures of success or failure in the delivery of board services?
6. Why did the Ministry of Labour's proposal for a unified tribunal (that was the subject of a study by the British Columbia Law Institute in 2010) not move forward?
7. Would expanding the jurisdiction of the Board to cover matters involving statutory rights of employees/workers unrelated to unionization and collective bargaining risk diluting the expertise required to successfully handle labour relations dispute resolution? Are such risks manageable or more deeply problematic? Could a single tribunal deal expertly with the full range of statutory labour and employment law rights issues?

8. Would adding such statutory rights issues to the jurisdiction of the Board create a risk of delay in handling labour relations matters? Does the answer to this question depend upon anything other than resource allocations?
9. Can values of labour relations law emphasizing expeditious resolution and compromise in the interests of the majority be reconciled with those of human rights law, within a single tribunal?
10. An amalgamation of tribunals into a unified tribunal necessarily might place the allocation of resources between different types of case (eg human rights, employment standards, and labour relations) in the hands of the tribunal. Are such resource allocation issues manageable or would they subject the tribunal to problematic political pressures?

## **Annex**

### Questions about the operation of the Board:

- Has the government or the Board developed user-approved criteria/benchmarks/or service standards by which to measure Board performance in meeting the needs of the public? Are they publicly available?

### Intake

- How does the Board respond to applications and inquiries from persons (whether employees or not) whose problems do not fall within the jurisdiction of the Board? Does the Board have a high volume of such inquiries?

### Case management system

- Are there economies of scale in operating the Board's system?
- Are there data that demonstrate its effects on efficient

### Communication and information technology

- What technologies does the board use to facilitate the filing and circulation of documents?
- Does the board use videoconferencing technology to conduct meetings or hearings? Why or why not?
- Are there economies of scale involved in implementing the use of such technology?
- In general, how does the Board service remote locations?

### Handling labour relations rights disputes

#### *Empirical data*

- Rate of resolution through mediation for different types of issue
- When does the Board use hearings based on written submissions and when does it use oral hearings?
- Case handling times for different types of issue, and different types of procedure?
- Does the board make any use of consultation procedures as opposed to full hearings? In what types of cases? What is the rate of their use?

### *Evaluative insights*

- To what extent do successful processes depend upon sophisticated and knowledgeable parties?
- What are the main impediments to achieving greater expedition?
- What considerations underlie any decisions to adopt or not adopt consultation as opposed to adjudication procedures?

### Duty of fair representation complaints:

#### *Data*

- Rates of settlement
- Incidence of oral hearings versus decisions on the basis of written record
- Case handling times
- Do Board mediators take any steps to ensure that unrepresented individual complainants are not subject to undue influence to settle potentially meritorious claims on disadvantageous terms?
- How does the board balance procedural fairness with the need for efficiency?

#### *Evaluative insights*

- What procedures work best for promoting early resolution, and w

### Arbitration appeals

#### *Data*

- Rates of settlement
- Incidence of oral hearings versus decisions on the basis of written record
- Case handling times

#### *Evaluative insights*

- What is the rationale for this system?
- Is this system more efficient than a system without appeals and subject only to judicial review?
- Does it result in a lower rate of judicial review in BC?
- Does the possibility that a matter might be resolved by an independent public body influence the negotiating and dispute settlement behavior of the parties?
- Why do arbitration decisions which raise human rights issues not go to the Board on appeal, but rather go directly to court?

### Unrepresented Litigants

- How has the Board responded to the needs of unrepresented litigants for information and assistance?

#### *Data*

- Incidence and extent of assistance to unrepresented litigants
- Criteria applied to determine eligibility for assistance

#### *Evaluative insights*

- How effective is this assistance?
- Does this pose a significant strain on Board resources?
- Do labour relations board processes disadvantage unrepresented applicants? Do outcomes vary depending on whether represented or unrepresented?

General accessibility

- Is the population of individual applicants representative of the overall workforce?
- Is the population of workers whose cases proceed to a hearing representative of the workforce?

## APPENDIX E

### Questions for the Chair of the British Columbia Labour Relations Board Regarding its Operations

#### Case management system

- Are there economies of scale in operating the Board's system?
- Are there data that demonstrate its effects on efficiency?
- Communication and information technology
- What technologies does the board use to facilitate the filing and circulation of documents?
- Does the board use videoconferencing technology to conduct meetings or hearings? Why or why not?
- Are there economies of scale involved in implementing the use of such technology?

#### Handling labour relations rights disputes

##### *Empirical data*

- Rate of resolution through mediation for different types of issue
- When does the Board use hearings based on written submissions and when does it use oral hearings?
- Case handling times for different types of issue, and different types of procedure?
- Does the board make any use of consultation procedures as opposed to full hearings? In what types of cases? What is the rate of their use?

##### *Evaluative insights*

- To what extent do successful processes depend upon sophisticated and knowledgeable parties?
- What are the main impediments to achieving greater expedition?
- What considerations underlie any decisions to adopt or opt consultation as opposed to adjudication procedures?

#### Duty of fair representation complaints:

##### *Data*

- Rates of settlement
- Incidence of oral hearings versus decisions on the basis of written record
- Case handling times
- Do Board mediators take any steps to ensure that unrepresented individual complainants are not subject to undue influence to settle potentially meritorious claims on disadvantageous terms?
- How does the board balance procedural fairness with the need for efficiency?

##### *Evaluative insights*

- What procedures work best for promoting early resolution, and why?
- Is the whole dfr system (right of file a complaint with possible remedy of an order to arbitrate) worth the trouble, or should we reconsider whether grievors should have direct access to arbitration at their own expense?

## Arbitration appeals

### *Data*

- Rates of settlement
- Incidence of oral hearings versus decisions on the basis of written record
- Case handling times

### *Evaluative insights*

- What is the rationale for this system?
- Is this system more efficient than a system without appeals and subject only to judicial review?
- Does it result in a lower rate of judicial review in BC?
- Does the possibility that a matter might be resolved by an independent public body influence the negotiating and dispute settlement behavior of the parties?

How has the Board responded to the needs of unrepresented litigants for information and assistance?

### *Data*

- Incidence and extent of assistance to unrepresented litigants
- Criteria applied to determine eligibility for assistance

### *Evaluative insights*

- How effective is this assistance?
- Does this pose a significant strain on Board resources?

Has the Board made comparative inquiries to see what procedures work well in other jurisdictions?