NEWFOUNDLAND & LABRADOR employers' COUNCIL

THE NEWFOUNDLAND AND LABRADOR EMPLOYERS' COUNCIL'S POSITION ON THE FINAL REPORT OF THE INDUSTRIAL INQUIRY COMMISSION

Approved by the NLEC Board of Directors
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INTRODUCTION

The Newfoundland and Labrador Employers' Council is the lead business advocacy association in the province on matters that impact the employment relationship. Our membership employs greater than 50% of all non-government employees in the province. Our Board of Directors are composed of employment relations professionals who are well versed in collective bargaining and the Labour Relations Act.

Our members have expressed deep concern with recommendations #1 and #5 made by the Industrial Inquiry Commission in their final report. A decision by government to accept these recommendations of the Industrial Inquiry Commission will have an impact on almost every unionized workplace in this province -- workplaces that are not party to, nor impacted by the same circumstances that led to the labour dispute at the Voisey's Bay site. This fact should be the premise of any and all recommendations that government chooses to accept from this Industrial Inquiry.

Government must also consider the intended purpose of the Industrial Inquiry. This Industrial Inquiry provision in our legislation exists to assist and place additional pressure on the parties to a local dispute to reach a collective agreement on their own. It is to be used only in extreme cases. We submit that the objective of the Inquiry has been successfully achieved. Both parties arrived at an agreement on their own. One labour dispute should never be used as a blueprint for all disputes.

Legislative change is best achieved through processes other than an Industrial Inquiry such as the current review of our Labour Relations Act through a tri-partite process involving employers, organized labour and government. Government, Business and Labour committed to government's process of legislative review and have invested heavily in that process. To have government enact legislative change outside of this process, based on a report examining one unique labour dispute, jeopardizes the commitment of stakeholders to future tri-partite processes. Legislative change must not be done in isolation. Any process of legislative change must examine the entire legislative framework and the history of all disputes in this province.

It is in the long-term best interests of our province to ensure that our labour relations legislation remains focused on assisting workplace parties to resolve their own disputes. A third party dictating terms of an agreement to private businesses and private citizens (as is proposed by the Commission in recommendation # 5) is well outside the principles of our free market economy and free collective bargaining.

As well, signaling out multi-national corporations for treatment under our collective bargaining framework (as is proposed by the Commission in recommendation #1) would ignore the multitude of collective agreements successfully achieved by multinationals in this province and send the wrong message about our province's interest in multinational investment in our economy.

NLEC POSITIONS ON SPECIFIC INDUSTRIAL INQUIRY RECOMMENDATIONS

Industrial Inquiry Recommendation 1:

The Commission recommends that Government now re-examine the mechanisms by which it facilitates collective bargaining to take account of a) the organizational structure of multi-national corporations, b) the need to ensure that such corporations respond to Canadian labour relations values, and c) the relative economic weight of the parties in the collective bargaining relationship. Such reexamination must involve government in all its mandates vis-à-vis such enterprises and not simply the traditional labour relations regulating mandate. Such reexamination must recognize that, where the current adversarial model creates advantages to any of the participants, such advantages will not easily be forgone.

NLEC Analysis:

Government needs to be careful that one dispute (the Voisey's Bay Project site dispute) is not used as the norm for all multinational company and union experiences with collective bargaining. Again, one labour dispute should not be used as justification to change the collective bargaining framework for every multinational organization in the province.

Despite the claims of the Newfoundland and Labrador Federation of Labour and the United Steel Workers during their dispute with Vale, trade unions in this province have a long history of successfully reaching collective agreements with multinational corporations. Multinational corporations are a significant part of our province's history and have contributed to the wealth and prosperity of our province for decades. Trade unions have reached hundreds of collective agreements with multinationals in this province, both those headquartered inside and outside the province. To single out multinationals simply because one dispute (Voisey's Bay Project Site) took longer to resolve than is typical, does not mean that the rules that govern collective bargaining need to be changed for all unionized workplaces. Suggesting that unions have somehow lost their bargaining power with multinationals ignores the long-standing and on-going success they have had with multinationals in this province. Employers could make the same claims about how multinational unions, with significant financial resources, deal with local employers with limited financial means.

If some unions feel they have lost their effectiveness with multinationals then they should examine their own strategies and adaptability to global competition. Unions have historically been slow to change their business model of collective bargaining based on changes in the economy. This inability of unions to keep pace was highlighted in the discussion paper commissioned by the Industrial Inquiry entitled, "Thinking Outside the Box": Globalization, Labour Relations and Public Policy in Provincial Jurisdictions. In the paper, author Dr. Gregor Murray talks about the need for unions to enter into new forms of international union coordination and develop what are now called "Global Union Federations", which bring together national union movements in particular industries into a single overarching coordination structure for related industries. In his paper, Murray concludes on page 16 of his report, "There are, however, few examples of actual coordination of bargaining and fewer again of joint cross-border bargaining." Unions need to

learn to adapt and evolve. Refusing to adapt and evolve and instead turning to third parties to impose agreements the union is unable to achieve is a short sighted strategy. Unions must not be allowed to abdicate their responsibilities.

NLEC position 1: The NLEC is opposed to any re-examination of the mechanisms by which government facilitates collective bargaining for multinational corporations that would impact multinationals differently from other employers. Multinationals must not receive different treatment under our collective bargaining framework especially labour legislation.

INDUSTRIAL INQUIRY RECOMMENDATION 2:

The Commission recommends that Government seek to amend the *Labour Relations Act* to provide that all collective agreements contain a provision that a mandatory Labour-Management Committee be established.

NLEC Analysis:

Mandatory Labour Management Committees (LMC's) are not appropriate for every workplace. Treating every workplace with the same blanket requirement would ignore the inherent differences across industries and workplaces. It is in the long-term best interest of workplace parties to develop their own methods of communication. Government must be careful not to force rigid structures of union management communication in a process that is inherently fluid. If workplaces choose to communicate in ways besides labour management committee then that is their prerogative and their right.

In addition, mandatory labour management committees would ignore the resource challenges (both financial and human) such committees would place on small to medium sized employers. This concern was raised by the Industrial Inquiry Commission themselves in their commentary surrounding this recommendation. In their report they state, *"There is division among the Commissioners on whether such a provision should be mandatory in every unionized workplace in the Province. There is one view that another mandatory committee should not be imposed on smaller employers or in workplaces where there is already sufficient dialogue between management and the bargaining unit."*

NLEC Position 2: Workplace parties should be encouraged to take responsibility for their own union / management relationships and left to develop their own methods of communication -- methods that reflect the resource constraints of their own workplaces. Government must not legislate mandatory Labour Management Committees.

INDUSTRIAL INQUIRY RECOMMENDATION 3:

The Commission recommends that Government re-evaluate the use of conciliation boards and appoint such boards to report in circumstances where it appears that the traditional pressures of the strike/lockout model are unlikely to be effective in bringing about a collective agreement.

NLEC Analysis:

Conciliation boards remain an option under our current legislation and government has used them in the past, albeit infrequently. There are two reasons for the infrequent use of Conciliation Boards -- they lengthen labour disputes and cost money. Conciliation Boards take away some of the responsibility for workplace parties to be the architects of their own solutions.

As was evidenced in the Voisey's Bay Project Site dispute, and according to the Commissioners themselves, the establishment of the Industrial Inquiry actually lengthened the dispute. Workplace parties went into a "waiting mode" while the report of the Inquiry was being developed. The perspective of the NLEC's senior labour relations professionals is that Conciliation Boards have much the same effect.

In addition, the cost of Conciliation Boards can be significant for some and, together with the tendency of such third party intervention to lengthen disputes, employers see little cost benefit in Conciliation Boards. Labour relations in Canada has naturally evolved away from the use of Conciliation Boards.

NLEC Position 3: Currently, government has the ability to utilize Conciliation Boards. If government chooses to evaluate the use of Conciliation Boards, it should be done in the context of our collective labour relations experience and give serious consideration to the cost benefit of such third party assistance.

INDUSTRIAL INQUIRY RECOMMENDATION 4 (PART I):

The Commission recommends that:

(a) the Labour Relations Board establish dates for the hearing of unfair labour practices immediately upon the receipt of them by the Board;

(b) the Labour Relations Board exercise its authority to abridge the time for filing of 'Replies to Applications' and 'Replies to Replies' to one-half of the current time periods in unfair labour practice complaints and in any other matter where urgency is indicated; and

(c) Government allocate funding to the Labour Relations Board so that the Board can establish and publish, in advance, an annual calendar of at least five hearing dates per month to be used as matters necessitate, with priority being given to matters of urgency.

NLEC Analysis:

The NLEC is concerned with the "tone" of the Commission's commentary surrounding this recommendation. It could be perceived as not valuing the existing expertise of the Labour Relations Board in assisting workplace parties to resolve disputes on their own. Our members report that the Labour Relations Board does provide appropriate support when requested to do so by the workplace parties. The Board, as an arm's length entity of government, must be given leeway to assist parties based on their expertise and experience.

However, the inability of the Labour Relations Board to review a complaint of an unfair labour practice in a timely manner is a concern. The process of collective bargaining can only work if both parties are playing by the rules. The goal of the Labour Relations Board and Agency must be to ensure that parties are adhering to those rules. One party not complying with those rules results in protracted labour disputes and negative labour relations climates. The Labour Relations Board must treat such complaints with high priority and expedite such matters.

The Commission also recommends establishing a fixed number of dates for hearings (five per month) for the Labour Relations Board. This is impractical and the NLEC is doubtful if this would be a procedure that could actually be followed given the many competing interests of those involved in such hearings. However, if the Labour Relations Agency believes this recommendation is achievable and financially feasible then the NLEC would welcome such an initiative.

The NLEC is supportive of the Labour RelationsBoard undertaking a review of its operations to ensure that issues are processed as efficiently as possible and if not, then adequate resources be provided to the Agency to accomplish their aims in a timely manner.

NLEC Position 4.1: (a) NLEC fully supports the hearing of unfair labour practices in a timely manner. (b) The NLEC fully supports the Labour Relations Board exercise its authority to abridge the time for filing of 'Replies to Applications' and 'Replies to Replies' to one-half of the current time periods in unfair labour practice complaints and in any other matter where urgency is indicated. (c) Although the NLEC is doubtful that such a recommendation is achievable, we are supportive of any reasonable cost initiatives that can enhance timely access to the services of the Labour Relations Board.

INDUSTRIAL INQUIRY RECOMMENDATION 4 (PART II):

The Commission recommends that Government seek to amend section 18 of the *Labour Relations Act* dealing with powers of the Board in order to specifically authorize the Board to limit the scope of any hearing which it might order.

INDUSTRIAL INQUIRY RECOMMENDATION 4 (PART III):

The Commission recommends that Government seek to amend the remedial provisions of the *Labour Relations Act* so as to provide the Labour Relations Board with the authority to fashion those remedies it deems necessary to redress the consequences of a party's failure to bargain in good faith.

NLEC Position 4.2 and 4.3: The NLEC believes that before any additional responsibility is put to the Labour Relations Board, the agency should examine potential process improvements and then determine the additional cost benefit of increasing funding to the agency.

INDUSTRIAL INQUIRY RECOMMENDATION 5:

The Commission recommends that Government seek to amend the *Labour Relations Act* to provide a process for the imposition of a collective agreement in the following circumstances when:

a) one of the employer or the bargaining agent makes application; and

b) the applicant shall have been found by the Labour Relations Board to have bargained in good faith; and

c) all of the conditions precedent to a strike or lockout have been met;

d) it is apparent that strike and/or lockout mechanisms have been ineffective in bringing about resolution of the dispute;

e) the Labour Relations Board is satisfied that the collective bargaining process has failed; and

f) the public interest requires the imposition of a collective agreement.

The Commission further recommends that Government seek to amend the *Labour Relations Act* to provide that, once an application is successful in establishing that the public interest requires the imposition of a collective agreement, the following steps should be taken:

a) the employer and the bargaining agent shall have a further 30 days in which to reach a collective agreement;

b) failing agreement, the Labour Relations Board shall refer the dispute to a three-person arbitration panel appointed by the Board to settle the terms of a collective agreement between the employer and the bargaining agent;

c) the arbitration panel shall have the powers of a conciliation board under the Act; and

d) the panel's decision on the collective agreement shall be binding on the parties for a period of not less than one year.

NLEC Analysis:

This recommendation is well outside the accepted principles of collective bargaining legislation in North America and free market economics. A third party dictating terms of employment to private citizens and private businesses is exceedingly rare in our country and for good reason. The rights of private citizens and businesses to freely negotiate and determine the wages and benefit they are willing to work for and, from the employer's perspective, willing to pay must be held to a higher standard than the items outlined under recommendation # 5. The items in recommendation # 5 that would trigger third party imposition of a collective agreement, such as where the strike and/or lockout mechanisms have been ineffective in bringing about resolution of the dispute, are subjective and not sufficient to warrant such an intervention. The NLEC argues that it should be the role of government to do the exact opposite of what is proposed in recommendation # 5. Government is entrusted to uphold the rights of private citizens and private corporations to determine their own economic priorities. It is when negotiations become challenging and labour disputes protracted, that those rights become more relevant and deserving of protection. It is in these situations that it becomes more important for the workplace parties to come to an agreement on their own. Governments in North America resist the temptation to erode such fundamental principles and rights as they are core to our economic system and our economic success. Newfoundland and Labrador's

acceptance of such a recommendation would place the province well outside established private sector labour relations legislative provisions in North America.

Implementing such a provision would have an immediate negative impact on business attraction and retention. Business is not willing to have strategic management decisions made by outside third parties. Such decisions are too important to the long-term interests and success of the organization. Third parties do not have the same understanding or appreciation of the challenges and needs of organizations to bargain hard at the table to achieve specific objectives. We believe strongly that changing our legislation in such a manner would negatively impact the province's efforts to attract and retain business.

Imposing a collective agreement through recommendation #5 would not resolve the dispute -- it would, in fact, prolong it. Certainly, the strike would be over but the actual "dispute" would continue -- it would just take a different form. And the form that it would take could be even more disruptive and damaging to the labour relations relationship than had the strike been allowed to continue. Forcing an end to the strike has the potential to bottle up the resentment between the two parties until it "bursts out" in even greater measures. Some of these measures could include: high turnover, lateness in reporting for work, absenteeism, low productivity, wildcat strikes, work-to-rule campaigns, extreme safety to limit production, workers refusing overtime, sit-ins, and sabotage. The ability of the employer to operate under any, or a combination of these conditions could severely limit production and even bring the operation to a standstill. At least in a strike or lockout the employer is able to meet their legal and financial obligations and protect the long-term viability of the operation through the use of replacement workers.

The failure of imposing collective agreements on parties is well documented. In a study conducted by the C.D. Howe Institute (June 2010), Benjamin Dachis and Robert Hebdon examined how contracts were resolved in contract negotiations, depended on how it was settled in the previous contract. The study concluded the likelihood to use a back-to-work order was 3.41 times higher if the previous contract was settled by a back-to-work order. The results implied that back-to-work legislation negatively affected the capacity for labour and management to be accountable for assembling their own solutions to problems. Back-to-work legislation also increased the probability of both parties relying on third party involvement and increased the chances of postponements to negotiations during the next round.

The lack of success in binding arbitration (recommendation # 5) is also evident in the fishing industry. Binding arbitration in that industry is premised on the economic value of the industry to rural regions in the province, and the very short fishing season. The opportunity for losing an entire season led stakeholders to initially support binding arbitration. The suitability of it to even that industry is questionable, given repeated shutdowns and strikes after arbitration rulings are issued. Third party decisions are often worst-case scenarios: deals across the table between parties have the benefit of representing agreed concessions that decisions through binding arbitration do not. In short, to expect an employer and a union to agree to a collective agreement outside of what they were previously willing to accept simply because it is developed by a third party is optimistic at best and at worst contributes to labour strife.

To the NLEC's knowledge, Manitoba has the only example of such a legislative provision in North America. Without any other examples of such legislative provisions we must rely on this model to ascertain the probability of such a provision assisting in protracted labour disputes.

This provision has been utilized twice since the NDP Government of Manitoba introduced the provision ten years ago. In the first of those two cases, the employer ceased operations in that province *(United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, Local 3-1375 and Tembec Industries Inc.,* Order No. 1474, Case No. 339/09/LRA) and in the second, the union members decertified the union *(CAW-Canada, Local 144 and Winnipeg South Orsborne Legion Branch #252, Order No. 1405, Case No. 85/07/LRA)*.

We submit that this provision has not been positive for labour relations in the Province of Manitoba and as such, should not be considered as a model for this province.

The C.D. Howe research cited earlier raises concern that such an amendment to the Labour Relations Act would have a chilling effect on bargaining in this province if one party determines that it may be more advantageous to seek the imposition of a collective agreement. This is to be avoided.

In addition, such language in our legislation may lead to lengthy and costly hearings and many employers may feel compelled to hire legal representation to represent their interest before the arbitration board. This would be fiscally challenging for smaller employers or employers with low profit margins.

Finally, the Industrial Inquiry Commission states that the criteria necessary to trigger this recommended provision for binding arbitration should be set at a high level and only used when the failure of the collective bargaining process is in the public interest. Within the commentary surrounding this controversial recommendation, the Commissioners state that, "this case (the Voisey's Bay Project Site strike) might not set the appropriate standard." The NLEC finds it perplexing that the Commission is making a recommendation to impact all unionized workplaces that, by their own admission, may have not have even assisted in the resolution of the Voisey's Bay Strike. We therefore question the conclusion that this recommendation is helpful to our labour relations framework.

NLEC Position 5: The NLEC rejects the recommendation in its entirety.

INDUSTRIAL INQUIRY RECOMMENDATION 6:

The Commission recommends to Vale and the USW that they now jointly engage the Innu Nation and the Nunatsiavut Government in an effort to ensure that the aboriginal peoples of Labrador as stakeholders in the Voisey's Bay enterprise are fully able to participate in the benefits associated with the spirit and intent of the Impacts and Benefits Agreements.

NLEC Analysis:

This recommendation is outside the parameters of Labour Relations. The NLEC therefore does not feel it is our place to make comment.

NLEC Position 6: As this recommendation is not a Labour Relations issue, the NLEC has no comment.

CONCLUSION

It is difficult for the employer community to comprehend how the Industrial Inquiry Commission could recommend such a legislative anomaly (recommendation # 5) when there are other legislative provisions that have a history of successfully assisting parties reach agreement and ones that exist in almost every other jurisdiction in Canada. An example is Final Offer Vote legislative provisions. This provision exists in all jurisdictions in Canada with the exception of PEI and Newfoundland and Labrador. Although the Commission discusses this option in their report they chose to not recommend the norm but the anomaly, an anomaly that has no proven record of success.

We note that government in their negotiations with the public sector resists binding arbitration (the Commission's recommendation #5) presumably for the reasons we have presented in this paper. The implementation of recommendation # 5 would subject government to more pressure from the public service for similar legislative provisions in the Public Service Collective Bargaining Act.

The implementation of recommendation # 5 would also subject government to increased public pressure to resolve private sector labour disputes. Government could expect more pressure, not less, from union leaders and the general public to dictate terms of collective agreements to private businesses and private citizens. Labour disputes would become even more political than at present. This is not in the best interest of business, labour or government.

Government must also not ignore the long history of multinational corporations achieving collective agreements in this province and signal them out for different treatment as is proposed in recommendation #1. Such a move by government would send the wrong message about our province's interest in attracting investment. Our labour relations climate and legislative framework are major considerations in long-term strategic business planning. Recommendation #1, if adopted, would make our jurisdiction an anomaly in labour relations and negatively impact not only our competitiveness but also our ability to attract and retain business.

Finally, we once again implore government not use one labour dispute (that was resolved by the workplace parties themselves) as a reason to implement legislative provisions that would apply to all unionized employers in this province. The vast majority of the employer community of this province is not party to, or dealing with the same conditions as was experienced at the Voisey's Bay site. We object to being subjected to change as a result of one labour dispute that is not typical of the collective.