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UNTAMED TRIBUNAL? OF DYNAMIC INTERPRETATION AND PURPOSE CLAUSES

SARA SLINN[†]

I. INTRODUCTION

This is a story about legislative frustration and administrative resistance. It is the story of a legislature that created a labour relations tribunal, instilled it with broad powers—even drawing away some jurisdiction from the courts—and charged it with using its own expertise to manage all aspects of labour relations. It is the story of a legislature that then changed its mind, and of successive governments seeking to rein in the tribunal’s decision making. The means chosen by these governments to exercise control was a series of increasingly restrictive changes to the purpose clause in the tribunal’s governing legislation. However, the legislature’s own creation, once set free, has resisted being called to heel. Although this is the tale of the experience of the British Columbia Labour Relations Board (“Board”) and the purpose clause in B.C. labour legislation, it is really a story that plays out between many administrative tribunals and the state as they negotiate the boundaries of administrative independence and control.¹

Part II of this article examines Board case law to assess whether the amendments to the purpose clause have influenced the Board’s decision making.² This study concludes that the new purpose clause did not appear to influence the Board’s decisions in a new direction and did not reorient labour relations, as had been widely anticipated at the time of the amendments. Instead, the Board has interpreted the

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¹ *Labour Relations Code*, R.S.B.C. 1996, c. 244 [Code].

² Case law is reviewed from the passage of the Purpose Clause in 2002 to the end of 2008.

amended purpose clause in a manner that supports and reinforces the traditional structure and balance of labour relations.

Given the government's strong statements about its intentions in amending the purpose clause and converting it to a duties provision, and the history of expressed governmental and legislative dissatisfaction with the Board's application of the purpose clause in the past, this leads to the question of how the Board's response is to be characterized.

Is this a tribunal resisting yet again the legislature's expressed will and direction? Or is it something else? Although the Board may not be (and if we accept governments' past criticisms, has not been) interpreting and applying the purpose clause as the legislature intended, it does not follow that the Board is a 'rogue,' acting inappropriately or improperly resisting the direction of the legislature and its legislation. Is it instead, as some legislative and administrative scholars might argue, an example of an administrative tribunal exercising its appropriate role and discretion in discharging its responsibilities, given labour boards' independence and the distinctive nature of tribunal decision making and administrative legislation? Is it, indeed, a rogue board and an example of ineffective political control over an agency? Alternatively, is it an example of dynamic statutory interpretation by a tribunal fulfilling its role, and reflecting its own narrative, history, and understanding of the statute?

Part III of this article addresses these questions. In doing so, it looks to the role and decision making of tribunals such as the Board, and interpretive and legislative theory. It then examines the role of purpose clauses, both generally and within administrative decision making.

II. THE PURPOSE CLAUSE AND THE BOARD

A purpose clause was introduced into B.C. labour legislation in 1973, with the passage of the province's first comprehensive, modern labour statute.³ British Columbians had elected the social democratic New Democratic Party ("NDP") in 1972, after two decades of conservative Social Credit ("Socred") governments. The NDP's key election promise was to build more peaceful and

³ *Labour Code of British Columbia Act*, S.B.C. 1973 (2d sess.), c. 122 [1973 Code].

constructive labour relations, ending years of labour-management turmoil in the province. The Socred opposition supported this promise both in principle and in the legislature.⁴

Against this backdrop of a cooperative political effort to improve labour relations in the province and, particularly, to calm labour unrest, labour relations legislation was substantially reformed and the Board was restructured. The new *1973 Code* contained many innovative elements and its primary goal was to make the collective bargaining process work successfully and to achieve effective industrial relations by allowing the Board to become involved in the “total process” of labour relations.⁵

British Columbia embraced the spirit and recommendations of the 1969 *Woods Task Force Report* with its *1973 Code*.⁶ One recommendation taken up was to broaden the labour board’s jurisdiction to include all facets of labour disputes.⁷ The Board’s authority was expanded to cover the full spectrum of labour relations issues, and it was conceived of as an independent, expert body expected to use the experience and judgment of its members to manage labour relations, with the mission of establishing more constructive labour relations in the province. In order for the Board to discharge its newly broadened responsibilities, the Legislature granted it a great deal of autonomy and power, much of which had previously been within the jurisdiction of the courts. A separate part of the *1973 Code* set out the Board’s structure, functions, and jurisdiction, and included a purpose clause.⁸

The purpose clause was not intended to restrict the discretion or flexibility of the Board in its decision making.⁹ On the contrary, in

⁴ Paul C. Weiler, *Reconcilable Differences: New Directions in Canadian Labour Law* (Toronto: Carswell, 1980) at 3.

⁵ *1973 Code*, *supra* note 3; British Columbia, Legislative Assembly, *Official Report of Debates (Hansard)* (1 June 1987) at 1489 (Hon. Mr. Hanson) [*Hansard* (1 June 1987)].

⁶ *Canadian Industrial Relations—The Report of the Task Force on Labour Relations* (Ottawa: Privy Council Office, 1968).

⁷ *Ibid.* at 207–208.

⁸ *1973 Code*, *supra* note 3; *Hansard* (1 June 1987), *supra* note 5 at 1489.

⁹ *1973 Code*, *supra* note 3. S. 27(1) provided: “The board may exercise the powers and shall perform the duties conferred or imposed upon it under this Act with the object of securing and maintaining industrial peace and promoting conditions favourable to settlement of disputes”

the interests of allowing the Board flexibility, it provided that the Board was not bound by the general policies it formulated and permitted it to seek submissions from other persons when formulating general policies.¹⁰ The purpose clause provided that the Board “may exercise the powers and shall perform the duties” given to it under the *1973 Code*, and identified two objectives to be met by the Board in exercising its powers and performing its duties: securing and maintaining industrial peace, and promoting conditions favourable to settlement of disputes. Nevertheless, few Board decisions paid explicit attention to the purpose clause.

A. DEVELOPMENT OF THE PURPOSE CLAUSE

1. EARLY EVOLUTION

Over the course of numerous amendments (in 1977, 1987, 1992, and most recently in 2002) the legislature’s use of this provision evolved.¹¹ Evident throughout is the government and opposition’s apparent recognition of the potential importance of the purpose clause in influencing the Board’s policy and decision making and, therefore, labour relations in the province.¹²

¹⁰ British Columbia, Legislative Assembly, *Official Report of Debates (Hansard)* (24 October 1973) at 917 (Hon. Mr. King); see *1973 Code*, *supra* note 3, ss. 27(1)–(2).

¹¹ *Labour Code of British Columbia Amendment Act*, S.B.C. 1977, c. 72, s. 5 [*1977 Code*]; *Industrial Relations Reform Act*, S.B.C. 1987, c. 24, s. 18 [*1987 IRA*]; *Labour Relations Code*, S.B.C. 1992, c. 82, s. 2 [*1992 Code*]; *Labour Relations Code Amendment Act, 2002*, S.B.C. 2002, c. 47, s. 1 [*2002 Amendment Act*].

¹² In 1977 the Socred government amended the purpose clause (*1977 Code, ibid.*). The government stated that, with these amendments, it intended that the *Labour Code* would serve the public interest, that labour legislation was not the “private preserve” of unions and employers, and that the amended purpose clause would make it clear that the public interest would have primacy over the private interests of the parties in labour relations (British Columbia, Legislative Assembly, *Official Report of Debates (Hansard)*, (9 September 1977) at 5357–5358 (Hon. Mr. Williams)).

In 1987, the Socred government contended that its widespread changes to labour legislation, including the purpose clause, would create industrial relations stability (*1987 IRA, ibid.*). In particular, introducing the purpose of minimizing harmful effects of labour disputes on third parties was necessary because “[F]or too long organized labour has held the innocent third party to ransom in many a

In 1992 the NDP government substantially amended the purpose clause. Following the recommendations of a subcommittee of special advisors on labour law reform, the purpose clause was relocated to the beginning of the statute (from section 27 to section 2) to emphasize its role as providing the legislation's "governing principles",¹³ and reworded to reflect, and provide the foundation for, substantive changes to other parts of the statute.¹⁴

Brent Mullin described these amendments as a profound change from the process-orientation of earlier labour relations, recognizing that the challenges of the new economy demanded that the Board and government become more involved in ensuring that parties reach

community across this province" (*Hansard* (1 June 1987), *supra* note 5 at 1485-1486 (Mr. Hewitt)).

The NDP opposition was concerned that emphasizing the public interest would mean that the interests of others would be preferred over those members of the public in labour (British Columbia, *Official Report of Debates of the Legislative Assembly (Hansard)* (2 June 1987) at 1502 (Mr. Lovick)). It also charged that the change in purpose from fostering harmonious relations between "employers and unions", to "employers and employees" signaled the government's fundamental rejection of labour relations and demonstrated its intention to deunionize the province (*Hansard* (1 June 1987), *supra* note 5 at 1481-1482 (Mr. Gabelmann)). It argued that the amended purpose clause meant that rights of individuals would be treated as paramount to good industrial relations (*ibid.* at 1496 (Mr. Gabelmann)), and signaled the government's intention to use the statute to rid the province of organized labour (*ibid.* at 1487 (Mr. Lovick)). Generally, the opposition charged that the Government was trying to legislate a competitive economy and consensus in industrial relations, and to increase state intervention in labour relations (*ibid.* at 1484 (Mr. Clark)).

¹³ British Columbia Labour Relations Review Committee, *Report of the Subcommittee of Special Advisors* (Vancouver: The Committee, 1992) at 18.

¹⁴ *Ibid.* 1992 Code, *supra* note 11, s. 2 provided:

(1) The following are the purposes of this Code:

- (a) to encourage the practice and procedures of collective bargaining between employers and trade-unions as the freely chosen representatives of employees;
- (b) to encourage cooperative participation between employers and trade unions in resolving workplace issues, adapting to changes in the economy, developing workforce skills and promoting workplace productivity;
- (c) to minimize the effects of labour disputes on persons who are not involved in the dispute;
- (d) to promote conditions favourable to the orderly, constructive and expeditious settlement of disputes between employers and trade unions;
- (e) to ensure that the public interest is protected during labour disputes;
- (f) to encourage the use of mediation as a dispute resolution mechanism.

(2) The board shall exercise the powers and perform the duties conferred or imposed on it under this Code having regard to the purposes set out in subsection (1).

desirable labour relations outcomes,¹⁵ and as a change from a one-dimensional focus on redistribution and counter-balancing employer power towards recognition of the need to promote productivity.¹⁶ Mullin described this as “a fundamental shift in the most basic, underlying purposes of the *Code*.”¹⁷ However, Mullin later concluded that the Board ignored these changes in all but a few isolated cases.¹⁸

2. PURPOSES TO DUTIES

In the 2001 election, the neo-conservative B.C. Liberal party gained power with a tremendous majority, capturing 77 of 79 seats in the legislature.¹⁹ Labour relations reform was high on this powerful new government’s agenda, and among the extensive amendments to the *Code* passed the following year were substantial changes to the purpose clause.²⁰

Among the most controversial—and anticipated to be the most significant—of these changes were amendments to the introductory portion of Section 2, re-titling it a “duties” clause, binding both the Board, and “other persons who exercise powers and perform duties under this Code.” The Minister of Labour emphasised that, with this change, the government intended to oblige the Board to consider the principles set out in Section 2 in all cases, and sought to ensure this

¹⁵ Brent Mullin, *Towards a Progressive Labour Relations Board* (1998) [unpublished, archived in author’s files] at 13 [Mullin, “Towards”]. Brent Mullin served as a Vice-Chair of the Board from 1992 to 1998, returning to private practice until January 2002 when he was appointed as Board Chair. In August 2002 Mullin was also appointed Chair of the B.C. Employment Standards Tribunal.

¹⁶ *Ibid.*; Brent Mullin, *Towards a Progressive Labour Relations Board—Part III* [unpublished, archived in author’s files] at 7 [Mullin, “Part III”].

¹⁷ Mullin, “Part III”, *ibid.* at 7.

¹⁸ *Ibid.* at 8.

¹⁹ The remaining two seats went to the NDP: Elections BC, “Summary of Results By Political Party: 37th General Election—May 16, 2001” (2001), online: Elections BC <<http://www.elections.bc.ca/elections/sov01/polpart.htm>>.

²⁰ *2002 Amendment Act*, *supra* note 11, s. 1. In the remainder of this article “Section 2” and “Purpose Clause” refers to the s. 2 purpose clause as amended by the *2002 Amendment Act*.

by recasting the purpose clause as a duty.²¹ The Minister explained that this was necessary to counter what the government viewed as the Board's failure to apply the existing purpose clause with sufficient rigour. In the government's view, the Board had simply used the Section 2 purpose clause as a guideline and a policy tool, rather than as a substantive part of the *Code* which the Board was required to consider.²²

Six of the eight purposes enumerated following the introduction appeared in much the same form in the 1992 purpose clause: encouraging the practice and procedure of collective bargaining between employers and trade unions as the freely chosen representatives of employees; minimizing the effects of labour disputes on persons who are not involved in those disputes; ensuring protection of the public interest during labour disputes; and, encouraging the use of mediation as a dispute resolution mechanism.²³ The new subsection 2(d) is a slight modification of the earlier "cooperative participation" provision, substituting the phrase "developing a workplace that promotes productivity" rather than "promoting workplace productivity". Similarly, subsection 2(e) is broader than its predecessor, by encouraging "settlement of disputes", rather than specifying "disputes between employers and trade unions".

Two new purposes (or principles) were added: a duty to recognize the rights and obligations of employees (as well as employers and trade unions), and to foster the employment of workers in economically viable businesses.²⁴ The Minister of Labour explained this reference to employees was introduced because employees are affected by board decisions, and recognizing employee rights would ensure the balance that is necessary in labour relations.²⁵ He also stated that the second new purpose "will provide greater protection for [employees] by ensuring that job security and

²¹ British Columbia, Legislative Assembly, *Official Report of Debates (Hansard)*, Vol. 8, No. 1 (15 May 2002) at 3508 (Hon. Mr. Bruce) [*Hansard* (15 May 2002)].

²² *Ibid.*

²³ *Code*, *supra* note 1, as am. by *2002 Amendment Act*, *supra* note 11, s.1.

²⁴ *Ibid.*, ss. 2(a)–(b).

²⁵ *Hansard* (15 May 2002), *supra* note 21.

viability of the business are considered in [Board] decisions”,²⁶ and emphasised that economically viable businesses are necessary for jobs to exist, pointing out that “[l]abour relations is sometimes said to be about sharing the pie, but of course first you need a pie to share.”²⁷

In short, the purpose clause has long been the focus of legislative interest and change in B.C.’s labour legislation, with successive governments complaining that the Board has ignored, or not implemented, the purpose clause in the manner intended by the legislature.

Following the 2002 amendments, the Purpose Clause reads as follows:

Duties under this Code

2. The board and other persons who exercise powers and perform duties under this Code must exercise the powers and perform the duties in a manner that

- (a) recognizes the rights and obligations of employees, employers and trade unions under this Code,
- (b) fosters the employment of workers in economically viable businesses,
- (c) encourages the practice and procedures of collective bargaining between employers and trade unions as the freely chosen representatives of employees,
- (d) encourages cooperative participation between employers and trade unions in resolving workplace issues, adapting to changes in the economy, developing workforce skills and developing a workforce that promotes productivity,
- (e) promotes conditions favourable to the orderly, constructive and expeditious settlement of disputes,
- (f) minimizes the effects of labour disputes on persons who are not involved in those disputes,
- (g) ensures that the public interest is protected during labour disputes, and

²⁶ British Columbia Ministry of Skills, Development and Labour, News Release 2002SDL0003-000049 “Labour Code Improved to Help Revitalize Economy” (13 May 2002), online: Government of British Columbia <www2.news.gov.bc.ca/archive/2001-2005/2002SDL0003-000049.htm>.

²⁷ *Hansard* (15 May 2002), *supra* note 21 at 3508 (Hon. Mr. Bruce).

(h) encourages the use of mediation as a dispute resolution mechanism.²⁸

3. THE PURPOSE IN OUR BEGINNINGS

Canadian labour legislation draws heavily on the United States' 1935 *National Labor Relations Act*, or *Wagner Act*, which enhanced the power of trade unions by providing legal protection to unions chosen by workers as their bargaining representatives.²⁹ The *NLRA* was a product of organized labour's political power and President Roosevelt's determination to harness economic forces to combat the Great Depression.³⁰ The first section of the *NLRA*, entitled "Findings and Policies", is effectively a purpose clause, which explained that the act was a response to the harm caused to commerce by industrial unrest, including employers' refusals to recognise unions. This clause also declared the following to be the policy of the United States:

[T]o eliminate the causes of certain substantial obstruction to the free flow of commerce and to mitigate and eliminate those obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.³¹

Canadian labour statutes have adopted several of the objectives identified in this provision. Foremost among these are redistributing power towards unions and workers, fostering collective rights, and a process-orientation focusing on establishing a functioning union-employer relationship.³²

²⁸ *Code*, *supra* note 1, s. 2.

²⁹ 29 U.S.C. § 151 (1935) [*NLRA*]; George W. Adams, *Canadian Labour Law*, 2d ed., looseleaf (Aurora, ON.: Canada Law Book, 1993) at para. 1:220 [Adams, *Labour Law*].

³⁰ Charles O. Gregory, *Labor and the Law*, 2d ed. (New York: Norton, 1961) at 229–230.

³¹ *NLRA*, *supra* note 29, § 151.

³² Karl Klare considered the "Findings and Policy" along with case law and literature to identify the following as the main objects of the *Wagner Act*: promoting industrial peace, collective bargaining, bargaining power, free choice,

(a) *Rebalancing Power & Collective Rights*

One goal of the *NLRA*, and laws modelled on it, is redistributing power to increase labour's strength as a counterbalance to employers' power. As the "Findings and Policies" provision describes, the act was posed primarily as an economic tool to generate purchasing power and inflation to counteract the deflationary effect of depression by enabling trade unions to improve terms and conditions of work through their collective bargaining power.³³ A necessary companion objective is promoting collective rights and representation.

Reflecting on two decades of labour decisions in Ontario, George Adams contended that clear legislative change would be needed to shift the allocation of bargaining power reflected in existing labour law, and speculated that modifying the purpose clause of labour statutes could be a means for doing so.³⁴

(b) *Process-Oriented*

A key feature of the labour relations system is its process-orientation, meaning that it is primarily concerned with establishing lasting collective bargaining relationships between labour and management, rather than with directing a particular labour relations outcome.³⁵ Although state intervention exists through procedures such as compulsory conciliation and binding arbitration, even these procedures are still fundamentally process-orientated and meant to encourage parties to resolve disputes—not determine the terms of

consumption, and industrial democracy (Karl E. Klare, "Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941" (1978) 62 *Minn. L. Rev.* 265 at 281-84).

³³ Gregory, *supra* note 30 at 225, 343.

This may have been a pragmatic choice to make passage of the highly contested *Wagner Act* possible, rather than reflecting the true intention of the *Act's* framers (see James Gross, *The Making of the National Labor Relations Board: A Study in Economics, Politics, and the Law, 1933-1937* (Albany, NY: State University of New York Press, 1974) at 144-147).

³⁴ George W. Adams, "Towards a New Vitality: Reflections on 20 Years of Collective Bargaining Regulation" (1991) 23 *Ottawa L. Rev.* 139 at 170, n. 102 [Adams, "New Vitality"].

³⁵ American Bar Association, Committee on International Labor Law, *Labor Relations Law of Canada*, ed. by Richard Lyon Martin (Washington: The Bureau of National Affairs, 1977) at 57-58.

resolution. This orientation regards free collective bargaining as preferable to a system of government-directed labour relations outcomes because it can reflect the particular needs and characteristics of individual workplaces and workforces, and respond to concerns for freedom of contract, competitive markets, and private property.³⁶ Consequently, proponents argue, it is the best instrument of labour regulation for distributive issues.³⁷ As Adams points out, this system is not only concerned with distributive issues, but also with the market. However, Adams notes that a weakness of process-oriented systems is that they do not offset power imbalances between parties, even when it might be desirable to do so.³⁸ Another commentator, Mullin, contends that the process-oriented approach no longer functions with the challenges of the new economy. He argues that a more hands-on approach to labour relations is needed, and that a labour board should not simply be a “spectator to the final outcome” but should rather be a “catalyst” helping parties to achieve desirable outcomes.³⁹

B. ANTICIPATED EFFECTS

Labour was greatly concerned that recasting Section 2 as a duties clause and expanding its application would substantially affect the balance of power between unions and management, as well as affecting existing understandings of collective rights and the Board’s non-interventionist and process-oriented approach to dealing with matters before it. Similarly, the newly-added purposes (subsections 2(a) and (b)) had the potential to alter the rights available under the *Code* as well as the Board’s traditionally non-interventionist and process-oriented approach to disputes and issues.

1. DUTIES & OTHER PERSONS

First, converting the *Code*’s purposes into “duties” which the Board must consider in all cases had the potential to alter the Board’s role, possibly shifting its focus from a process-orientation towards an outcome-orientation, reducing the degree of self-governance in

³⁶ Adams, “New Vitality”, *supra* note 34 at 145.

³⁷ *Ibid.* at 145–146.

³⁸ *Ibid.* at 149–150.

³⁹ Mullin, “Towards”, *supra* note 15 at 13 [footnotes omitted].

labour-management relationships, leading to greater Board participation and direction in matters that unions and employers had previously worked out themselves, such as negotiations and labour disputes. Some commentators warned that it could also lead to unprecedented government intervention in Board and arbitral decision making and in the internal affairs of unions, with the object of enhancing businesses' economic viability.⁴⁰

Mullin, arguing in favour of a duties clause, contended that it would produce a "new dynamic" in labour relations in which employers and unions would be required to demonstrate to the Board how their own positions would further those Section 2 duties reflecting the concerns and interests of the other party:

For the employer, that would be how what it was advocating would further the objectives of the Code reflected in job security, retraining, and ultimately better terms and conditions of employment for the employees. For the union, it would be how its position would assist the enterprise in adapting to the changes in the economy through greater productivity, competitiveness, and ultimately reinvestment as a result of the profitability and success of the business.⁴¹

Requiring the union to adapt its positions in accordance with employer concerns and interests could seriously compromise unions' ability to represent members and alter the balance of power between labour and management.

Further, the new requirement that not only the Board, but "all other persons" exercising powers and performing duties under the *Code*, must adhere to the purpose clause was expected to apply to all decision-makers under the *Code*, such as arbitrators, settlement officers, and industrial inquiry commissioners. Of even greater concern, was whether it would extend to unions and employers.⁴² Given the broad definition and interpretation of the definition of

⁴⁰ *Code*, *supra* note 1, ss. 2(b), (f), (g); "Commentary on the *Labour Relations Code Amendment Act*, 2002 ("Bill 42")" (2002), online: Hastings Labour Law Office <<http://www.labourlawoffice.com/misc/Bill%2042%20Commentary.htm>> ["Commentary"].

⁴¹ Note that Mullin was making this argument about a predecessor purpose clause and the effect of s. 2(2), which is now the introductory part of s. 2 (Mullin, "Part III", *supra* note 16 at 20-21).

⁴² "Commentary", *supra* note 40.

“person” in the *Code*, it would be surprising if Section 2 did not include unions and employers.⁴³

Commentators suggested that requiring unions to exercise their statutory powers in harmony with the Section 2 duties could oblige unions to collectively bargain in a manner that “fosters the employment of workers in economically viable businesses,” as subsection 2(b) requires. Meanwhile, unions engaged in striking and picketing would be required to do so in a manner that “minimizes the effects” on third parties and “ensures that the public interest is protected”, as subsections 2(f) and (g) demand.⁴⁴ Not only could this seriously affect unions’ ability to represent their members, but it could lead to “state intervention in collective bargaining and internal union affairs and a very substantial change in the Board’s approach” to other *Code* provisions.⁴⁵

Finally, these changes also had the potential to give new emphasis to existing purposes such as: encouraging the practice and procedure of collective bargaining; minimizing the effects of labour disputes on third parties; protection of the public interest; and, encouraging mediation. It could also emphasize the modified purposes: developing workplaces that promote productivity; and, encouraging settlement of disputes.⁴⁶ Several of these purposes, primarily the protection of third parties and the public interest, had the potential to affect the Board’s treatment of labour disputes, particularly strikes, picketing, and leafleting, as well as bargaining, in a manner favouring employer interests. This could have tremendous implications for the location of the balance of power between employers and unions, and for collective rights under the *Code*.

2. INDIVIDUAL EMPLOYEE RIGHTS: SUBSECTION 2(A)

One newly introduced principle was the requirement that the rights and obligations of employees, as well as those of employers and

⁴³ S. 1 of the *Code*, *supra* note 1, defines “person” such that it includes an employee, an employer, an employers’ organization, a trade union and council of trade unions, but does not include a person in respect of whom collective bargaining is regulated by the *Canada Labour Code*.[.]

⁴⁴ *Ibid.*, ss. 2(b), (f), (g).

⁴⁵ “Commentary”, *supra* note 40.

⁴⁶ *Code*, *supra* note 1, ss. 2(c)–(h).

unions, be considered.⁴⁷ Collective and individual rights and interests conflict at many junctures in labour relations, particularly with respect to unionization, collective bargaining, and the duty of fair representation. Explicitly including employee rights had the potential to shift the balance of power towards individuals and the employer at the expense of collective rights and unions. Such effects would not be without precedent. Notably, an amendment to the *NLRA*'s purpose clause expressly recognizing individual rights provided a foundation for an anti-union shift in labour jurisprudence in the U.S.⁴⁸

3. FOSTERING EMPLOYMENT IN ECONOMICALLY VIABLE BUSINESSES: SUBSECTION 2(B)

The addition of fostering employment of workers in economically viable businesses to the enumerated *Code* purposes was highly contentious.⁴⁹ Focusing on the term "economically viable businesses", critics warned that this could be the most significant of the changes to Section 2 because of the effect it could have on the Board's approach to many other substantive *Code* provisions.⁵⁰ It could shift the balance of power in favour of employers⁵¹ and encourage Board intervention in unionization, collective bargaining, and labour disputes. It could also affect treatment of collective bargaining, strikes, and picketing. Critics also suggested that use of

⁴⁷ *Ibid.*, s. 2(a).

⁴⁸ This aspect of the *Wagner Act* was weakened when the 1947 Taft-Hartley amendments redrafted the "Findings and Policy" provision to emphasise individual employee rights and identify some union practices as hindering commerce (*Labor-Management Relations Act, 1947*, 29 U.S.C. § 141 (1947) at § 141 (1)(b)). James Gross contends that these changes allowed Republican-dominated panels of the National Labour Relations Board to interpret the declaration of policy to give individual rights equal or greater priority over collective rights and, thereby, justify anti-collective bargaining and anti-union policies (James A. Gross, "Conflicting Statutory Purposes: Another Look at Fifty Years of NLRB Law Making" (1985) 39 *Indus. & Lab. Rel. Rev.* 7 at 13; James A. Gross, "The Demise of the National Labor Policy: A Question of Social Justice" in Sheldon Friedman *et al.*, eds., *Restoring the Promise of American Labor Law* (Ithaca, NY: ILR Press, 1994) 45 at 46-47).

⁴⁹ *Code*, *supra* note 1, s. 2(b).

⁵⁰ "Commentary", *supra* note 40.

⁵¹ *Ibid.*

the term “viable” would require the Board to make inappropriate international comparisons as opposed to intra-provincial comparisons of business competitiveness.⁵² Commentators also raised concerns that the Board’s lack of expertise in determining the viability of businesses could lead to faulty decisions as well as lengthy hearings necessitating expert evidence to determine the question of economic viability.⁵³ Finally, this could also encourage the Board towards outcome-oriented decisions focusing on the effects on business viability.

C. ASSESSING EFFECTS

The government clearly suggested that these changes were a response to longstanding frustration with the Board’s disregard for the purpose clause. So, the question becomes: did the legislature succeed in its apparent effort to rein in this rogue Board? To address this question, this Part examines Board decisions from the passage of the Purpose Clause in 2002 to the end of 2008. It begins by outlining the new analytic framework introduced in the new Purpose Clause, addresses the interpretation the Board has given to “duties” and “other persons”, and then reviews the interpretation of the two newly introduced purposes. Then, reflecting the necessary interplay among particular duties, the law relating to key stages of labour-management relationships are considered. This Part concludes by assessing whether the Purpose Clause has modified the three key dimensions of the labour relations system addressed earlier: the balance of power, collective rights, and the traditionally process- rather than outcome-orientation of labour regulation.

1. NEW ANALYTIC FRAMEWORK

An early Board decision declared that the Purpose Clause had created a new analytical framework for Board decisions and for fostering labour relations: that the Board would approach the Purpose Clause by reading it as a whole, and together with other substantive provisions of the *Code*, treating it as a “comprehensive

⁵² British Columbia, Legislative Assembly, *Official Report of Debates (Hansard)*, Vol. 8, No. 6 (28 May 2002) at 3642 (Ms. MacPhail).

⁵³ They further cautioned that this lack of expertise may lead to lengthy hearings involving expert evidence to determine the question of economic viability (“Commentary”, *supra* note 40, n. 1).

roadmap ... proceeding from the rights and obligations of the parties, to an identification of the goals to be obtained” to the application and interpretation of the *Code*.⁵⁴ The following passage has come to be known as setting out this new analytic framework:

Section 2 sets out a vision of labour relations which: describes the goals of the system to the immediate parties; places those goals within a larger, societal context; and emphasizes the mechanisms by which to proceed towards those goals (i.e., the "cooperative participation" of (d) and the mediative approach emphasized in (h)).

Subsection 2(a) recognizes the rights and obligations of the three immediate parties to labour relations: the employees, employers, and trade unions. Subsection 2(b) then identifies the goal of ensuring that the labour relations system fosters or encourages the employment of workers in economically viable businesses.

Building on that base, subsection 2(c) confirms the critical franchise under which employees in the Code can freely choose to be represented by a union.

Once unionization has been chosen by the employees, subsection 2(d) addresses the Code's preference as to how the employer and the union are to meet the challenges they face. [cooperative participation, adapting to economic changes, developing workforce skills and promoting productivity] ...

The subsections then proceed to: emphasize the need for “orderly, constructive and expeditious settlement of disputes” (subsection 2(e)); place all of these matters within the larger public interest (subsections 2(f) and 2(g)); and, lastly, encourage mediation as a dispute resolution mechanism in labour relations (subsection 2(h)).⁵⁵

The Board has also held that the judgment of the legislature, as reflected in its changes to Section 2, is that modern labour relations require more than “simply promoting structures which are based on an adversarial relationship”, declaring that the “essence” of the

⁵⁴ *Judd and C.E.P., Local 2000*, BCLRB Decision No. B63/2003 at paras. 18–23, 91 C.L.R.B.R. (2d) 33 [*Judd*]. This framework was applied in *Judd*, BCLRB Decision No. B130/2003, [2003] B.C.L.R.B.D. No. 130 (QL), and upheld in BCLRB Decision No. B357/2003, [2003] B.C.L.R.B.D. No. 357 (QL).

⁵⁵ *Judd, ibid.* at para. 23.

Purpose Clause reflects two concepts: the need to be competitive and to work together.⁵⁶

2. DUTIES & OTHER PERSONS

Though Section 2 states that its duties apply to “other persons who exercise powers and perform duties under the Code”, subsequent Board decisions suggest that the scope and effect of these changes are not as significant as some had anticipated. It does not appear that Mullin’s prediction of a “new dynamic” has come to pass, where parties are compelled to address the other side’s interests and demonstrate that their own positions would advance the purposes in Section 2.⁵⁷ The Board has shown little enthusiasm for applying duties directly to employers, unions, or individual employees. Instead, the Board seems to prefer to locate central responsibility for the Purpose Clause on itself, while stating that the parties bear indirect responsibility for realizing the goals of Section 2.⁵⁸

The Board has identified two possible conceptions of “other persons” falling within Section 2, preferring the narrower of the two possible interpretations, limiting application of the Purpose Clause to the Board, its Chair, Vice-Chairs, Members, Mediators, Board employees, and other decision-makers such as arbitrators whose authority arises from the *Code*.⁵⁹ The Board noted that the legislative record supports this narrower characterization of the duty,⁶⁰ and that this amendment was aimed at decision-makers:

⁵⁶ *Orca Bay Hockey Ltd. Partnership and BC-NHLPA*, BCLRB Decision No. B172/2007 at paras. 54–56, 144 C.L.R.B.R. (2d) 219 [*Orca Bay*] (leave for reconsideration of BCLRB Decision No. B138/2006, 124 C.L.R.B.R. (2d) 173).

⁵⁷ See Mullin, “Part III”, *supra* note 16 at 20–21.

⁵⁸ *Health Employers’ Ass’n of British Columbia and H.E.U.*, BCLRB Decision No. B415/2003 at paras. 77–80, 102 C.L.R.B.R. (2d) 101 [*HEABC Original Decision*] (original decision set aside on reconsideration: BCLRB Decision No. B393/2004, 109 C.L.R.B.R. (2d) 28 [*HEABC Reconsideration*]).

⁵⁹ *HEABC Original Decision*, *ibid.* at paras. 53–54, 70, 72. Although employers or unions have argued in several subsequent cases that the Purpose Clause properly extends to parties, the Board has not explicitly addressed or decided the question (See e.g. *Lender Services Ltd. and B.C.G.E.U.*, BCLRB Decision No. B165/2006, 126 C.L.R.B.R. (2d) 114; *Western Rubber Products Ltd.*, BCLRB Decision No. B212/2006, [2006] B.C.L.R.B.D. No. 212 (QL); *Canadian Forest Products Ltd.*, BCLRB Decision No. B235/2006, [2006] B.C.L.R.B.D. No. 238 (QL)).

⁶⁰ *HEABC Original Decision*, *supra* note 58 at paras. 70, 72.

The mischief that the Legislature was addressing was what in its view was the Board's apparent reluctance to apply the purposes of the Code with the vigour the Legislature thought they deserved. The amendments were thus aimed at the decision makers under the Code to direct them to apply those principles that were previously expressed as purposes of the Code with a greater imperative. The other persons must then be those who also engage in decision-making under the auspices of the Code ... and anyone else who in the narrow definition of duty exercises an office or discharges a statutory function under the Code. It would not however, include the parties under the Code⁶¹

Nevertheless, the Section 2 duties may indirectly apply to parties, by way of the decision makers' obligation to encourage cooperation by parties and to consider the Code purposes:

[W]hether directly or indirectly, it is the parties who ultimately must bear the burden of putting life into the Section 2 principles It is at the very least the Board's duty to ensure that everyone governed by the Code pays due regard to the principles enunciated in Section 2 by interpreting and applying the Code with that goal in mind.⁶²

The Board has said that the parties "must also take an active role" in fostering the Section 2 objectives before seeking intervention by the Board.⁶³ The Board has concluded that, pursuant to Section 2, its role is to assist parties in a variety of ways to work out issues between them, and to encourage the parties to address the principles

⁶¹ *Ibid.* at para. 72.

⁶² *HEABC Original Decision*, *supra* note 58 at paras. 77, 80. On reconsideration, the Board affirmed the general approach required by s. 2 outlined by the original panel, stating: "[W]e agree with the original panel that the amended Section 2 puts greater emphasis on the Board to foster unions and employers considering each others' perspectives and interests in the course of their decision-making" (*HEABC Reconsideration*, *supra* note 58 at para. 60).

⁶³ *Forest Industrial Relations Ltd. and Council of I.W.A. Locals*, BCLRB Decision No. B312/2003 at para 45, 100 C.L.R.B.R. (2d) 65 [*FIR*]; *Farmer Construction Ltd. and B.C. Provincial Council of Carpenters*, BCLRB Decision No. B238/2004 at para 18, 108 C.L.R.B.R. (2d) 185 (leave for reconsideration of BCLRB Decision B217/2004, 108 C.L.R.B.R. (2d) 161) [*Farmer Construction Reconsideration*].

in Section 2,⁶⁴ but that it must not intrude unnecessarily into parties' self-governance.⁶⁵

Therefore, it appears that process-orientation and traditional interest in parties' self-government has not been compromised by this aspect of the new Purpose Clause.

3. INTRODUCTION OF INDIVIDUAL EMPLOYEE RIGHTS: SUBSECTION 2(A)

Contrary to some expectations, the Board's application and interpretation of the new duty to recognize employee rights (subsection 2(a)) has been measured, and the duty has been interpreted in what could even be described as a collectivist rather than an individualist manner. What has emerged as a key element of recognizing employee rights is the right to free choice about union representation. The Board has stated that employee choice is the fundamental premise of the *Code*, and that subsection 2(a) reinforces this.⁶⁶ Consequently, this right is largely being used to reinforce the protection of employees and their freedom to associate collectively and choose union representation.⁶⁷

4. FOSTERING EMPLOYMENT IN ECONOMICALLY VIABLE BUSINESSES: SUBSECTION 2(B)

The effect of the newly introduced duty to foster the employment of workers in an economically viable business (subsection 2(b)) has also not been as negative as commentators feared. First, the Board has clarified its interpretation of "economically viable", ruling that it means more than "mere survival", "capable of living or existing", yet that it does not mean "economically prosperous" either. Rather, it

⁶⁴ *FIR, ibid.* at para. 47.

⁶⁵ *HEABC Original Decision, supra* note 58 at paras. 77, 80 (this view was affirmed on reconsideration: *HEABC Reconsideration, supra* note 58 at para. 60).

⁶⁶ *Ledcor CMI Ltd.*, BCLRB Decision No. B229/2004 at para. 7, [2004] B.C.L.R.B.D. No. 230 (QL) (leave denied for reconsideration of BCLRB Decision No. 218/2004, [2004] B.C.L.R.B.D. No. 219 (QL)).

⁶⁷ *Convergys Customer Management Canada Inc. and B.C.G.E.U. (February)*, BCLRB Decision No. B62/2003, 90 C.L.R.B.R. (2d) 238 (leave for reconsideration denied: BCLRB Decision No. B111/2003, 90 C.L.R.B.R. (2d) 287) [*Convergys*]; *British Columbia Corps. of Commissionnaires*, BCLRB Decision No. B396/2003, [2003] B.C.L.R.B.D. No. 396 (QL).

means “at least potentially, bettering the circumstances of the employees, the union, and the employer.”⁶⁸

The Board has also consistently, and in different contexts, held that this duty must be read in harmony with, and be balanced against, other Section 2 duties, particularly the subsection 2(c) duty to encourage the practice and procedure of collective bargaining between employers and trade unions as the freely chosen representatives of employees, and the subsection 2(a) duty to recognize the rights of employees, employers, and trade unions under the *Code*.⁶⁹ As is evident in the discussion that follows, subsection 2(b) has not taken precedence over other duties in Board decisions. Concerns about economic viability are treated as relevant, but have not been the Board’s primary concern and have not dictated the outcomes of its decisions.

(a) Access to Representation

With the introduction of employee rights and the duty to foster employment in economically viable businesses into the Purpose Clause (subsections 2(a) and (b)) the effect on access to representation, including bargaining unit definition and other representation questions, could have been a substantial shift away from access and collective rights and toward individual rights and employers’ interests in defining bargaining units and determining representation questions. Although these duties, along with minimizing the effects of labour disputes on third parties (subsection 2(e)) have frequently come into play as competing considerations in representation matters, the Board has consistently emphasized the facet of individual employee rights relating to the free choice of representation (subsection 2(c)), and has consistently refused to allow the subsection 2(b) concern for economically viable workplaces to govern its decisions in representation matters.

⁶⁸ *West Shore Transport Ltd.*, BCLRB Decision No. B254/2006 at paras. 7, 17, 21, [2006] B.C.L.R.B.D. No. 254 (QL) (leave for Reconsideration denied: BCLRB Decision No. B280/2006, [2006] B.C.L.R.B.D. No. 280 (QL)) [*West Shore*].

⁶⁹ See e.g. *Interwrap Inc.*, BCLRB Decision No. B305/2003, [2003] B.C.L.R.B.D. No. 305 (QL); *Sodexo MS Canada Ltd. and H.E.U.*, BCLRB Decision No. B349/2004, 109 C.L.R.B.R. (2d) 54 [*Sodexo*]; *Nanaimo Seniors Village Partnership*, BCLRB Decision No. B221/2005, [2005] B.C.L.R.B.D. No. 221 (QL), leave for reconsideration denied: BCLRB Decision No. B221/2005, [2005] B.C.L.R.B.D. No. 308 (QL).

The Board clearly rejected the notion that subsection 2(b) alters the balance between access to collective bargaining and industrial stability that is a key criterion for determining bargaining unit appropriateness, declaring that it is incorrect to equate industrial stability with economic viability.⁷⁰ It has also confirmed that the existing policy for determining appropriate bargaining units strives to balance access to collective bargaining and industrial stability, and that subsection 2(b) is simply one part of the equation for determining appropriateness and cannot be considered in isolation: The Purpose Clause must be read as a whole and in conjunction with the other provisions in the *Code*.⁷¹

Employers have also repeatedly challenged the “building-block” approach to defining bargaining units,⁷² arguing that it is contrary to subsection 2(a) because it interferes with employers’ rights of free association, violates the rights of non-union employees in the workplace, and is also contrary to subsection 2(b) because it is more difficult for an employer to negotiate an agreement for a smaller rather than larger group of its workers, and because it allows a small proportion of the workforce to unionize and possibly disrupt the operation and work of non-union workers with a labour dispute.⁷³ The Board rejected these arguments, concluding that these concerns are fully answered by existing *Code* provisions and the power to amend units,⁷⁴ and finding no threat to business viability.⁷⁵

⁷⁰ *Aramark Canada Facility Services Ltd.*, BCLRB Decision No. B243/2004 at paras. 86–88, [2004] B.C.L.R.B.D. No. 244 (QL) (leave for reconsideration denied: BCLRB Decision No. B75/2005, [2005] B.C.L.R.B.D. No. 73 (QL)) [*Aramark*].

⁷¹ *Vancouver Film School Ltd.*, BCLRB Decision No. B387/2002 at para. 86, 99 C.L.R.B.R. (2d) 34 [*Film School Original Decision*] (leave for reconsideration and reconsideration, BCLRB Decision No. B291/2003, 99 C.L.R.B.R. (2d) 61 [*Film School Reconsideration*]). Note that the original decision was set aside on reconsideration without addressing s. 2.

⁷² See e.g. *Film School Original Decision*, *ibid.*; *Aramark*, *supra* note 70.

⁷³ *Film School Original Decision*, *supra* note 71 at para. 54. This argument was upheld on reconsideration although the original decision was overturned as the original panel misapplied the “geographic separateness” aspect of the test for unit appropriateness. *Film School Reconsideration*, *supra* note 71 at para. 3.

⁷⁴ *Film School Original Decision*, *supra* note 71. at para. 86.

⁷⁵ *Ibid.* at paras. 22, 86.

The Board has also held that, though employers have their own interests to advance through representation votes (reflected in subsections 2(a) and (b)), its main concern is conducting votes so that employees have a fair opportunity to express their true wishes, pursuant to the duty to encourage collective bargaining with unions as the freely chosen representatives of employees (subsection 2(c)).⁷⁶ Further, declaring that Section 2 does not require it to “screen” unions to ensure their views and positions benefit or are in harmony with employers’ political views or economic interests,⁷⁷ the Board rejected the argument that the subsection 2(b) duty to foster employment in economically viable businesses rendered a union an “inappropriate” bargaining agent where the union’s political activities and lobbying could harm the employers’ business.⁷⁸

(b) Unfair Labour Practices

Unfair labour practices (“ULPs”), particularly in the context of union organizing, can pit the rights and interests of anti-union employers and employees against those of unions and their supporters. Consequently, the subsection 2(a) emphasis on employee rights had the potential to affect the application of ULP prohibitions in a manner allowing greater interference with unionization. The Board has stated that the subsection 2(a) duty to recognize employee rights, along with the subsection 2(c) duty and the subsection 4(1) recognition of employee freedom to choose to join a union “define employees’ freedom of association and access to collective bargaining as a fundamental premise of the Code” and, “given this fundamental premise, the role of the unfair labour practice provisions of the *Code* is to preserve employees’ freedom of

⁷⁶ *Ledcor CMI Ltd.*, BCLRB Decision No. B306/2004 at para 35, [2004] B.C.L.R.B.D. No. 307 (QL), leave for reconsideration: BCLRB Decision No. B354/2004, [2004] B.C.L.R.B.D. No. 355 (QL); remitted to the original panel and upheld on reconsideration in *Taseko Mining Ltd.*, BCLRB Decision No. B48/2005, [2005] B.C.L.R.B.D. No. 46 (QL).

⁷⁷ *Sodexo*, *supra* note 69 at para. 29.

⁷⁸ *Ibid.*

association.”⁷⁹ Consequently, the Board must consider allegations of employer ULPs during organizing in light of these provisions.⁸⁰

However, a series of earlier decisions dealing specifically with employer communications during union organizing accorded less weight to employee rights, concluding that amendments to the employer free speech (section 8) and ULP provisions (section 6), introduced at the same time as the new Purpose Clause, altered the weight to be given to employees’ and employers’ rights in employers’ favour when it came to employer speech during organizing.⁸¹ As a result, the expanded the scope of permissible communications provided by the amendments to sections 6 and 8 were not to be limited by the duty to recognize employee rights. It concluded that the legislature had made important judgments about employees’ abilities to make free choices and to assess employers’ attempts to influence their decisions, based on employees’ knowledge that employers will usually oppose unionization.⁸²

However, more recent decisions have taken a different approach to employer communications, giving employees’ rights and interests a central role. In comments meant to provide additional guidance to the amended speech and ULP provisions, the Board has recently emphasized that employers must not be “disrespectful of the employees and their right to a non-coercive work environment in which to exercise their right of free choice.”⁸³

⁷⁹ *Convergys*, *supra* note 67 at paras. 96–97. S. 4(1) of the *Code*, *supra* note 1, provides: “Every employee is free to be a member of a trade union and to participate in its lawful activities.”

⁸⁰ *Convergys*, *ibid.*

⁸¹ *2002 Amendment Act*, *supra* note 11, ss. 2–3; *Convergys*, *ibid.* at para. 98. S. 8 of the *Code*, *supra* note 1, provides: “Subject to the regulations, a person has the freedom to express his or her views on any matter, including matters relating to an employer, a trade union or the representation of employees by a trade union, provided that the person does not use intimidation or coercion”.

⁸² *Convergys*, *ibid.* at para. 118. This approach was followed in subsequent cases. See e.g. *British Columbia Lottery Corp. and B.C.G.E.U.*, BCLRB Decision No. B289/2003, 99 C.L.R.B.R. (2d) 93 (leave for reconsideration, and decision upheld in part, of BCLRB Decision No. B82/2003, 99 C.L.R.B.R. (2d) 72).

⁸³ *Simpe “Q” Care Inc. and H.E.U.*, BCLRB Decision No. B161/2007 at paras. 87–88, 139 C.L.R.B.R. (2d) 281 (leave for reconsideration of BCLRB Decision No. B171/2006, 126 C.L.R.B.R. (2d) 133).

(c) *Collective Bargaining*

The Board has interpreted the Purpose Clause in a manner strongly supportive of parties' own arrangements, be they voluntary recognition, settlement, or collective bargaining agreements, locating the underlying rationale for this approach in the subsection 2(c) duty to encourage collective bargaining. As well, the Board has found such agreements consistent with and encouraged by the principles of fostering co-operative participation between employers and unions, and encouraging the expeditious resolution of disputes (subsections 2(d) and (e)), noting that these agreements also avoid the costs and delay of litigation,⁸⁴ and declaring that "upholding settlements is a foundational principle of good labour relations policy."⁸⁵ All of this, the Board says, dovetails with its policy to promote parties' self-governance.⁸⁶

The overall approach of the Board in such circumstances appears to be one of supervision rather than intervention, consistent with its stated policy of encouraging self-governance. For instance, it has held that it will not scrutinize voluntary recognition agreements and unit definitions, in particular, on the same standard as a certification application, for to do so would curtail parties' flexibility, and the Board prefers to defer to the parties' agreement.⁸⁷

Similarly, the Board will not intervene to insulate parties from market pressures and, instead, expects parties to "assume the responsibility to respond to these challenges."⁸⁸ For instance, the Board refused to relieve a union from memoranda of agreement signed under pressure of employer threats to contract out work, concluding that such pressure is part of the ordinary course of bargaining and the subsection 2(d) duty to encourage cooperative participation between employers and trade unions in resolving

⁸⁴ *Kutzne and Sodexo MS Canada Ltd.*, BCLRB Decision No. B174/2007 at para. 69, 144 C.L.R.B.R. (2d) 257.

⁸⁵ *McDonald & Ross Construction Ltd. and U.A., Local 170*, BCLRB Decision No. B228/2007 at para. 26, 149 C.L.R.B.R. (2d) 228.

⁸⁶ *Ibid.* at para. 27. See also *Overwaitea Food Group v. United Food and Commercial Workers International Union, Local 247*, BCLRB Decision No. B117/2008 at para. 120, 2008 CanLII 38943, [2008] B.C.L.R.B.D. No. 117 (QL).

⁸⁷ *Ibid.* at paras. 27–29.

⁸⁸ *Mainroad Holdings Ltd. and B.C.G.E.U.*, BCLRB Decision No. B37/2007 at paras. 43–44, 132 C.L.R.B.R. (2d) 175 [*Mainroad*]. See also *FIR*, *supra* note 63.

workplace issues.⁸⁹ The Board has also said it will not interfere in a dispute where a party is simply dissatisfied with the terms of its agreement, and is seeking outside interference to achieve what it had not in bargaining.⁹⁰ It found this to be the case even where altering the negotiated bargaining structure might further Section 2 goals (such as subsections 2(b), (c), and (d)).⁹¹

(d) Strikes and Picketing

The Board has expressly held that the legislature did not intend the new Purpose Clause—in particular protection of third parties and the public interest, protection of employer rights, or obligations on employers and employees—to alter the Board’s existing treatment of strikes.⁹² Furthermore, it emphasized that the *Code* contains many purposes, and the subsection 2(f) duty to minimize the effects of disputes on third parties is only one of these purposes. To give it precedence would deprive employees and unions of rights, and would not further other purposes such as recognizing rights or encouraging the practice and procedure of collective bargaining.⁹³

The Board has also used the new Purpose Clause to justify denying an employer’s attempt to restrict picketing, recognizing that picketing has a legitimate and constructive function in the labour relations system, and is thus consistent with the purpose of promoting the process of collective bargaining (subsection 2(c)). Further, the subsection 2(b) goal of promoting employment in economically viable workplaces did not favour restricting picketing, given the reasonable prospect that the employees would continue to

⁸⁹ *Mainroad, ibid.* at para. 42.

⁹⁰ *Farmer Construction Ltd.*, BCLRB Decision No. B217/2004 at para. 69, 108 C.L.R.B.R. (2d) 161 (leave for reconsideration denied: *Farmer Construction Reconsideration, supra* note 63).

⁹¹ *Ibid.* at paras. 65–69.

⁹² *Victoria Times Colonist Group Inc. and C.E.P., Local 25-G*, BCLRB Decision No. B265/2005 at para. 25, 116 C.L.R.B.R. (2d) 249 (leave granted but reconsideration denied: BCLRB Decision No. B168/2006, 126 C.L.R.B.R. (2d) 121).

⁹³ *Ibid.* at para. 26. See also *Pacific Newspaper Group Inc. and C.E.P., Local 2000.*, BCLRB Decision No. B129/2006, 124 C.L.R.B.R. (2d) 85 (leave for reconsideration: BCLRB Decision No. B264/2006, 127 C.L.R.B.R. (2d) 313; remitted to the original panel and upheld on reconsideration: BCLRB Decision No. B24/2007, 132 C.L.R.B.R. (2d) 109).

work in the business in question. Consequently, the Board held that the “collective bargaining process should be allowed to play itself out.”⁹⁴

(e) Duty of Fair Representation

The union’s duty of fair representation to employees it represents is an area where some of the most acute conflicts between the interests of individual employees and those of the union lie. It is not uncommon that promoting collective interests exacts a costly toll on some individual employees. In these cases we might expect to find a labour board to significantly restrict the wide discretion unions are presently allowed over negotiating and administering collective agreements, in favour of increasing protection for individual employee rights. This could well have been one effect of the new Purpose Clause.

Instead, the Board has held that an overbroad interpretation of unions’ duty towards individual employees would be detrimental to the rights of employees because it would “undermine the union’s ability to control its resources and actions”.⁹⁵ Here, the Board used the Section 2 concern for individual employee rights and obligations to reinforce the legitimate scope of union discretion in administering a collective agreement, and interpreted individual employee rights in what is a rather collectivist manner. Moreover, the Board looked not only at rights, but also obligations under subsection 2(a), to conclude that the duty of fair representation imposes obligations not only on unions but also on employees: “Employees should be aware that once [the Union’s] obligations have been met, they too have an obligation to carry on and act consistently with the principles contained in Section 2 of the Code.”⁹⁶

⁹⁴ *Trivern Enterprises Ltd. (Re)*, BCLRB Decision No. B397/2004 at para. 79, [2004] B.C.L.R.B.D. No. 398 (QL) (leave for reconsideration denied: BCLRB Decision No. B76/2005, [2005] B.C.L.R.B.D. No. 74).

⁹⁵ *Judd*, *supra* note 54 at para. 90. See also *Subotin*, BCLRB Decision No. B62/2007, [2007] B.C.L.R.B.D. No. 62 (QL).

⁹⁶ *Judd*, *ibid.* at para. 27.

(f) Conclusion

Unlike with previous purpose clauses, parties and the Board appear to have embraced the new Section 2 duties clause. Since its enactment, it has been argued and explicitly applied in numerous Board decisions. However, the actual effect of the Purpose Clause has not been as predicted. While the Purpose Clause had the potential to significantly rebalance labour relations in favour of the interests of individual employees, management and business outcomes, diminishing the collective rights and process-orientations of labour relations, this does not appear to have been the result. Indeed, we've seen the Board using Section 2 to enhance and bolster the traditional orientation of the labour relations regime. It is also clear that the Board does not consider individual subsections of the Purpose Clause in isolation, instead balancing individual duties or objects against others.⁹⁷

Is this a rogue Board resisting the will of the legislature, and an example of ineffective political control over an agency? Or, as some legislative theorists might contend, is it an example of dynamic statutory interpretation by a tribunal fulfilling its role, reflecting its own narrative, history, and understanding of the statute and Purpose Clause? The next Part examines these questions.

III. LEGISLATIVE THEORY, ADMINISTRATIVE TRIBUNALS, AND THE PURPOSE CLAUSE

Given the Government's strong statements about its intentions in introducing the Purpose Clause, the history of its dissatisfaction with the Board's application of purpose clauses, and the contrary finding that key dimensions of the labour relations system remained unchanged by the Purpose Clause, this leads to the question of how to characterize this phenomenon.

This Part of the article addresses these questions, looking to the role and decision making of tribunals such as the Board, and interpretive and legislative theory. It then examines the role of purpose clauses, both generally and within administrative decision making.

⁹⁷ See e.g. *Aramark*, *supra* note 70 at para. 87; *West Shore*, *supra* note 68 at paras. 24–25.

A. PURPOSE CLAUSES

A purpose clause is a substantive provision located in the body of legislation, commonly following the enacting clause. As such, and even though purpose clauses are not a necessary element of legislation, they are as binding as any other substantive provision in the statute.⁹⁸ Sullivan characterizes the function of the purpose clause as identifying “legislative values” by setting out the principles, policies or objective that the legislature wants to implement or achieve with the statute.⁹⁹ Consequently, it can influence and guide interpretation and understanding of the legislation as a whole, and can define the limits of discretion the act allows decision-makers or interpreters.¹⁰⁰ In essence, the purpose clause is the lens through which all other provisions are viewed.

Nevertheless, purpose statements seldom appear in Canadian legislation, and are not even addressed in federal or provincial interpretation acts.¹⁰¹ They are similarly scarce in labour legislation, with only British Columbia and Ontario including purpose statements in their collective bargaining statutes.¹⁰²

B. THE NATURE OF TRIBUNAL DECISION MAKING

The character and role of tribunals has consequences for the nature of their decision making, which is also distinct. Statutory interpretation and decision making by administrative tribunals differ distinctly from that of courts, arising from their different capacities for rule and policy-making and exercising discretion, the ongoing rather than episodic nature of tribunal decision making, different degrees of independence from political control and, as addressed in a subsequent section, the potential—or perhaps inevitability—of dynamic statutory interpretation.

⁹⁸ Ruth Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4th ed. (Markham, ON: Butterworths, 2002) at 300–301.

⁹⁹ *Ibid.* at 300.

¹⁰⁰ *Ibid.* at 300–302; *CAIMAW v. Paccar of Canada Ltd.*, [1989] 2 S.C.R. 983 at 1028–1030, 62 D.L.R. (4th) 437 [*Paccar*].

¹⁰¹ Sullivan, *supra* note 98 at 300.

¹⁰² *Code, supra* note 1 at s. 2; *Labour Relations Act, 1995*, S.O. 1995, c. 1, s. 2.

1. DISCRETION IN DECISION MAKING

Courts and tribunals engage in different types of decision making, reflecting the different functions and capacities of the two institutions. Legislatures typically grant tribunals broad authority to exercise discretion in interpreting and applying legislation. In contrast, courts are not intended to engage in rule or policy-making, chiefly because they are not meant to apply the degree of discretion necessary for such decision making.¹⁰³ Instead, courts are responsible for applying common law and interpreting statutes on a textual, intentional, or purposive approach.¹⁰⁴

2. ONGOING DECISION MAKING

A further defining feature of tribunal decision making is that it is an experience of ongoing and integrated interpretation of relatively indeterminate, or intransitive, statutes.¹⁰⁵ In contrast, judicial

¹⁰³Edward L. Rubin "Law and Legislation in the Administrative State" (1989) 89 Colum. L. Rev. 369 at 374, 385 [Rubin, "Law and Legislation"]. As discussed in the next section, this institutional competency (as Rubin terms it) has implications for the nature of legislation intended for primary interpretation by a tribunal rather than courts. Sossin and Smith note that labour boards, in particular, develop public policy (Lorne Sossin & Charles Smith. *The Independent Board & The Legislative Process* (June 2006), online: Alberta Federation of Labour <<http://www.afl.org/upload/sossinreport.pdf>> at 13 [Sossin]. See also France Houle & Lorne Sossin, "Tribunals and guidelines: Exploring the between fairness and legitimacy in administrative decision-making" (2006) 49:3 Canadian Public Administration 282.

¹⁰⁴Edward Rubin, "Dynamic Statutory Interpretation in the Administrative State" (Article 2 of the Symposium on Dynamic Statutory Interpretation, November 2002), (2002) Issues in Legal Scholarship, online: The Berkeley Electronic Press <<http://www.bepress.com/ils/iss3/art2>> at 6 [Rubin, "Dynamic Interpretation"]. Rubin notes, in the U.S., the purposive approach is "somewhat exotic" and remains controversial and, though applied, it was not really recognized prior to Eskridge's article (at 6-7); See William N. Eskridge Jr., "Dynamic Statutory Interpretation" (1986-1987) 135 U. Pa. L. Rev. 1479. In contrast, the Supreme Court of Canada has set forth the modern approach to statutory interpretation as, essentially, a purposive approach: "Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament." (*Rizzo & Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27 at para. 21, 36 O.R. (3d) 418).

¹⁰⁵Peter L. Strauss, "When the Judge is Not the Primary Official With Responsibility to Read: Agency Interpretation and the Problem of Legislative History" (1990) 66 Chicago-Kent L. Rev. 321 at 321-322 [Strauss, "Judge"].

decision making is characterized as episodic interpretation of legislation of relatively determinate, or transitive, statutory text.¹⁰⁶

This continuing and integrated experience of decision making is, itself, a significant influence on tribunal decision making and one which Strauss identifies as possibly the greatest difference between the judicial and tribunal forums.¹⁰⁷ Strauss likens the effect of this to the different treatment given to relational and discrete contracts, where the effects of a particular contract may not capture the entire, intertwined and ongoing relationship between the parties, and interpretation of a particular contract must take this relational context into account.¹⁰⁸ Similarly, in many administrative law settings, and certainly for labour relations matters, the particular matter before the tribunal is only a single episode in the parties' ongoing relationship. Effective resolution of that matter may depend on taking the longer term view into consideration.¹⁰⁹

C. INDEPENDENCE AND GOVERNMENT CONTROL

In assessing the Board's treatment of the Purpose Clause, it is helpful to first consider the Board's overall function and role as an administrative tribunal and part of the machinery of the modern regulatory state, which is characterized by its reliance on statutory regulation and administrative agencies charged with interpreting and applying this legislation.

1. INDEPENDENCE

Tribunals are not constitutionally distinct from the executive branch of government, and it is not entirely clear what degree of formal

¹⁰⁶*Ibid.*

¹⁰⁷*Ibid.* at 327.

¹⁰⁸*Ibid.* at 328.

¹⁰⁹Labour boards have long emphasized their concern with the effect of the resolution of an immediate dispute on the parties' long-term collective bargaining relationship, and such considerations can strongly influence the board's treatment of a particular matter. This is a central aspect of labour boards' "voluntaristic" approach to regulating labour relations (H.D. Woods, *Labour Policy in Canada*, 2d ed. (Toronto: Macmillan of Canada, 1973) at 152.

independence labour boards are entitled to in Canadian law.¹¹⁰ Administrative tribunals fall under the mandate of the legislature, have a policy function, are funded by the executive, and may be subject to policies, procedures, and practices established by the executive.¹¹¹ Consequently, they are not entitled to the type of absolute independence that is the hallmark of the judiciary. Nevertheless, tribunals, and particularly those with substantial adjudicative functions such as labour boards, may be entitled to some degree of independence.¹¹² The nature of this independence, though, is important to recognize: “[It] is not a protection of the Board, it is, rather, a protection of those who come before the Board.”¹¹³

Furthermore, this is a common law rather than constitutional protection, and the degree of independence applicable to a given tribunal is determined by the legislature,¹¹⁴ and involves a contextual, and not categorical, analysis.¹¹⁵ Being common law independence, it can be restricted or modified by legislation.¹¹⁶ Nevertheless, as Lorne Sossin notes, this common law protection is “modeled on the constitutional norm of judicial independence”,¹¹⁷ and the Supreme Court has indicated that courts will not “lightly assume” that legislation interferes with independence.¹¹⁸

¹¹⁰ *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)*, 2001 SCC 52 at para. 24, [2001] 2 S.C.R. 781, 204 D.L.R. (4th) 33 [*Ocean Port*]; Sossin, *supra* note 103.

¹¹¹ *Ocean Port*, *ibid.* at paras. 32, 23; Sossin, *ibid.* at 14. As the Supreme Court of Canada explains, it is because implementation of government policy may require a tribunal to make quasi-judicial decisions that tribunals “may be seen as spanning the constitutional divide between the executive and judicial branches of government.” (*Ocean Port*, *ibid.* at para. 24). McLachlin C.J.C. states: “They [tribunals] are, in fact, created precisely for the purpose of implementing government policy” (at para. 24).

¹¹² *Ocean Port*, *ibid.*; *Bell Canada v. Canadian Telephone Employers Assn.*, 2003 SCC 36 at para. 22, [2003] 1 S.C.R. 884, 277 D.L.R. (4th) 193 [*Bell*].

¹¹³ Sossin, *supra* note 103 at 14.

¹¹⁴ *Ocean Port*, *supra* note 110 at paras. 22–23.

¹¹⁵ *Bell*, *supra* note 112 at para. 22.

¹¹⁶ Sossin, *supra* note 103 at 14–15.

¹¹⁷ *Ibid.* at 3.

¹¹⁸ *Ocean Port*, *supra* note 110 at para. 21.

2. INFORMAL INDEPENDENCE

Nonetheless, there is a strong, informal tradition of labour board independence in Canada, demonstrated particularly by what has been described as the “fiercely independent” B.C. Board.¹¹⁹ Though Canadian labour boards have not always succeeded in avoiding—or appearing to avoid—political influence in their decision making, it is clear that this is a valued feature of our labour relations system.¹²⁰ Such traditions and expectations of board independence can be a significant force in labour relations.¹²¹ Sossin notes that tripartite and relatively independent labour boards have become a fixture and a counter-trend to government intervention in labour relations.¹²²

3. CONTROL

The counterweight to tribunal independence is control. Political control or oversight of agencies by the legislature and executive is a well-studied phenomenon, and can operate overtly or implicitly, with traditional forms of agency control by the legislature including both statutory and non-statutory control techniques.¹²³ Statutory techniques include drafting the tribunal’s governing legislation such that it specifies how the tribunal is meant to operate and decide matters before it, or setting out precise prohibitions in the tribunals’ budget allocation. Non-statutory techniques include the use of review committees, reports to the legislature, and public hearings.¹²⁴

¹¹⁹See Sossin, *supra* note 103 at 8–12. For a discussion and historical review of the tradition of informal independence by Canadian labour boards, see Sossin, *ibid.*, at 10–12, and Andrew C.L. Sims, “Reflections on Administering Labour Law” (2005) 12 C.L.E.L.J. 121 at 123, 127.

¹²⁰See Sossin, *ibid.*; Kevin M. Burkett, “The Politicization of the Ontario Labour Relations Framework in the 1990s” (1998) 6 C.L.E.L.J. 161; Judith McCormack, “Comment on ‘The Politicization of the Ontario Labour Relations Framework in the 1990s’” (1999) 7 C.L.E.L.J. 325.

¹²¹See Sossin, *ibid.* at 10–11 for a discussion of the determination of chairs of the Ontario and British Columbia Labour Relations Boards, in particular, to protect and insulate their boards from government influence and intrusion.

¹²²*Ibid.* at 12.

¹²³Strauss, “*Judge*”, *supra* note 105; R. Douglas Arnold, “Political Control of Administrative Officials” (1987) 3 J.L. Econ. & Org. 279 at 280.

¹²⁴Arnold, *ibid.*

An alternative approach, using administrative rules and procedures as tools of control, has also been recognized.¹²⁵ Arnold identifies two types of such administrative rules and procedures: broad procedural rules and policy-specific procedural innovations.¹²⁶ Broad procedural rules, such as statutes dealing with the operation of administrative tribunals, can have the effect of allowing external forces to influence administrative processes.¹²⁷ In this way, it can make administrative rulemaking more akin to legislative lawmaking.¹²⁸ Meanwhile, policy-specific procedural innovations, such as requiring environmental impact statements or government funding of consumer advocates, are also not intended to be policy-neutral.¹²⁹ Rather, they are intended to advance particular interests, ensuring that they are not ignored, thereby altering the “balance of political forces” influencing administrative officials. “designed to advance interests that otherwise might be ignored.”¹³⁰ Overall, such control techniques operate by changing agencies’ decision-making environment so as to “limit an agency’s range of feasible policy actions”,¹³¹ “forc[ing] agencies to hear and consider the full range of policy preferences that Congress itself would hear if it had retained jurisdiction over these decisions.”¹³²

McCubbins *et al.* note that an interesting feature of procedural controls is that they allow legislators to impose their preferences on tribunals without needing to know or to dictate the precise outcome that is most desirable to them:

The most subtle and, in our view, most interesting aspect of procedural controls is that they enable political leaders to assure compliance without specifying, or even necessarily knowing, what substantive outcome is most in their interest. By controlling

¹²⁵ Mathew D. McCubbins, Roger G. Noll & Barry R. Weingast “Administrative Procedures as Instruments of Political Control” (1987) 3 J.L. Econ. & Org. 243.

¹²⁶ Arnold proposes these sub-categories of administrative rules used as instruments of political control of agencies (Arnold, *supra* note 123 at 283–285).

¹²⁷ *Ibid.* at 284.

¹²⁸ *Ibid.*

¹²⁹ *Ibid.* at 285.

¹³⁰ *Ibid.*

¹³¹ McCubbins, *supra* note 125 at 244.

¹³² Arnold, *supra* note 123 at 281.

processes, political leaders assign relative degrees of importance to the constituents whose interests are at stake in an administrative proceeding and thereby channel an agency's decisions toward the substantive outcomes that are most favored by those who are intended to be benefited by the policy. Thus, political leaders can be responsive to their constituencies without knowing, or needing to know, the details of the policy outcomes that these constituents want.¹³³

Executive control, meanwhile, also includes the power to appoint, renew (or not), or sometimes even terminate administrative officials. With such actions, the executive can clearly communicate its satisfaction or dissatisfaction with tribunal members' decision making. It is easy to imagine that this can then influence tribunal members' conduct.¹³⁴ Although such actions are often overt, this power can also give rise to implicit pressure and control, such as through political appointments made, as Strauss describes it "with an eye to the appointee's program or likely approach, or of a successful bureaucrat's intuitive knowledge what course of action will avoid political reprisal or earn political credit."¹³⁵

4. TENSION

As a result, one influence defining and distinguishing tribunal and judicial decision making is the government and its policy agenda, and the degree of political control the executive is entitled to exercise over the tribunal. The consequence is that tribunals such as labour boards operate subject to an imperfectly calibrated tension between acting as an independent adjudicator, and a policy arm of government. This is well-reflected in Sossin's description of the labour board's role:

¹³³McCubbins, *supra* note 125 at 244.

¹³⁴In Ontario and British Columbia there have been a number of government decisions and actions regarding labour board chairs and vice-chair that have appeared to be responses to government dissatisfaction with decisions of particular vice-chairs. The labour relations community (sometimes both management and labour) branded this government action as improper interference with the labour board (for Ontario see e.g. Burkett, *supra* note 120; McCormack, *supra* note 120).

¹³⁵Strauss, "Judge", *supra* note 105 at 332.

Labour Boards perform adjudicative functions but do so in the service of policy goals (the primary policy goal, however, remains impartial and informal dispute-resolution based on expertise in labour relations rooted in mutual acceptability of employer and union groups).¹³⁶

D. THE NATURE OF TRIBUNAL LEGISLATION

The modern regulatory state is characterized by an abundance of statutory regulation and administrative agencies charged with interpreting and applying this legislation. As such it is a departure from the earlier, common-law and court dominated legal world.¹³⁷ This departure, commentators contend, has necessary implications for the shape of such statutes. This new environment demands a different concept of law and of legislation to account for the distinctions between administrative tribunals and courts in their roles, and in their relationship to government.¹³⁸ This section considers the nature of tribunal legislation and notions of transitivity and goal or implementation-oriented legislation characterizing tribunal legislation.

Courts and tribunals, as discussed above, engage in different forms of decision making. As a result the character of legislation directed at these two types of interpretive mechanisms, as Rubin labels them, is also distinct. It is the two primary differences between courts and administrative tribunals examined in the previous section, their differing capacities for policymaking and exercising discretion and their differing degrees of independence, that ground necessary distinctions in legislation intended for each.¹³⁹

¹³⁶Sossin, *supra* note 103 at 13. For an examination of the question of whether to recognize quasi-judicial tribunals as part of the judicial branch of government, and introducing structural independence, see S. Ronald Ellis, "The Justicizing of Quasi-Judicial Tribunals, Part I" (2006) 19 Can. J. Admin. L. & Prac. 303 and S. Ronald Ellis, "The Justicizing of Quasi-Judicial Tribunals, Part II" (2007) 20 Can. J. Admin. L. & Prac. 69.

¹³⁷Rubin, "Law and Legislation", *supra* note 103; Strauss, "Judge", *supra* note 105; Peter L. Strauss, "Legislative Theory and the Rule of Law: Some Comments on Rubin" (1989) 89 Colum. L. Rev. 427 [Strauss, "Legislative Theory"].

¹³⁸Rubin, "Law and Legislation", *ibid.*

¹³⁹*Ibid.*

Rubin identifies several dimensions on which statutes may differ. Most centrally, for this study, is the degree of intransitivity of the legislation, and whether the legislation is goal- or implementation-oriented. Intransitivity is addressed first, then the orientation of statutes.

1. INTRANSITIVE DIRECTION TO TRIBUNAL

The “degree of transitivity” of a statute refers to how specifically the legislature identifies in the statute the rule it expects the decision-maker to apply.¹⁴⁰ Highly transitive legislation sets out specific rules and, as described by Rubin, is characterized by containing rules that are “typically ... stated with sufficient precision so that they can be used as rules of conduct by private persons, and so that society is justified in visiting unpleasant consequences on those who fail to comply.”¹⁴¹

At the other end of the spectrum is highly intransitive legislation, which just directs the decision-maker to develop rules. As Rubin points out, such legislation primarily speaks to the decision-maker rather than the public because “until the mechanism acts, the ultimate target of the statute cannot know what behaviour the statute will require.”¹⁴²

Transitivity of legislation can also be regarded as “the extent to which the statutory directive ... is intended to pass through the primary implementation mechanism and apply to its ultimate target.”¹⁴³ As such, transitive statutes are directed primarily at the parties that are the object of the legislation, while relatively intransitive statutes speak primarily to the interpretive mechanism or decision-maker. Therefore, the degree of transitivity in a statute reflects the decision-maker’s capacity for adjudication or discretion. Most simply, transitive statutes are described as demanding adjudication, while intransitive ones require rulemaking.¹⁴⁴

¹⁴⁰ *Ibid.* at 381.

¹⁴¹ *Ibid.* at 381, 385.

¹⁴² *Ibid.* at 381, 410.

¹⁴³ *Ibid.* at 381.

¹⁴⁴ *Ibid.* at 383.

It is important to note that “[s]tatutes can be intransitive with respect to either their application or their elaboration.”¹⁴⁵ Regarding transitivity of application, a statute is intransitive if it states no rule, simply directing the decision-maker to develop rules to apply; but is transitive if it specifies “at least some rules” that the decision-maker is to apply directly to the target of the legislation.¹⁴⁶

Statutes that are transitive in application do, however, vary in their degree of transitivity of elaboration. Therefore, in order to assess the overall transitivity of statutes that are transitive in application it is also necessary to consider how the statutory rules are to be elaborated.¹⁴⁷ If, for instance, the express rule is set out in broad terms, then the overall character of the legislation will be intransitive, even though it contains an explicit rule to be applied directly to the target.¹⁴⁸

Statutes containing express rules the decision-maker is to apply directly to the target and, therefore, being transitive in application, may be rendered overall intransitive in nature because of the way these rules must be elaborated.¹⁴⁹ For instance, a statute may include express rules but may not be specific about the content of the rules. Similarly, a statute may set out a number of precise rules, but also give the decision-maker authority to make additional rules, or leaves gaps in the rules for the decision-maker to use its discretion to fill.¹⁵⁰ In this way, what may first appear to be transitive statutes can be converted to intransitive ones.

The notion of intransitivity is also relevant to the application or elaboration of the statute.¹⁵¹ Transitivity in application refers to whether or not the statute states the rule the agency is to apply directly to the legislation’s target. A statute that is highly intransitive in its application does not state the rule that the tribunal is to apply. Rather, it simply directs the tribunal to develop rules to apply.¹⁵² At

¹⁴⁵ *Ibid.* at 381.

¹⁴⁶ *Ibid.*

¹⁴⁷ *Ibid.*

¹⁴⁸ *Ibid.*

¹⁴⁹ *Ibid.* at 381–82.

¹⁵⁰ *Ibid.*

¹⁵¹ *Ibid.* at 381.

¹⁵² *Ibid.*

the other end of the scale, highly transitive statutes state rules in very specific, precise terms and, as Rubin describes it, they are “intended to pass through the primary implementation mechanism and apply to its ultimate target.”¹⁵³ Such rules require little interpretation, discretion, or policy-making.¹⁵⁴

Transitivity in elaboration refers to how broadly or narrowly the rule is stated, and so requiring more or less elaboration by the tribunal. This is crucial, as Rubin points out that this can define the overall, effective character of the legislation and can even transform a transitive statute into one that is, in effect, intransitive.¹⁵⁵

In Rubin’s view (though he acknowledges that there is disagreement about the appropriate or actual degree of judicial discretion)¹⁵⁶ the lack of discretion courts are legitimately able to apply has implications for the type of legislation that they are best suited to interpreting and applying.¹⁵⁷ Rubin suggests that courts are suited to highly transitive statutes. In contrast, and as discussed earlier, administrative tribunals are created for the very purpose of policy-making and exercising discretion¹⁵⁸ and, as a result, are suited to intransitive legislation.¹⁵⁹

The overall degree of intransitivity determines the basic stance of the implementation mechanism, and the degree of discretion, rule, and policy making it will likely engage in. Thus, where a statute has both transitive and intransitive features, then the overall character of the legislation will be a matter of degree. For instance, where the statute sets out specific rules directed at the target, but the rules are relatively broadly stated (that is, it is transitive in applicability but intransitive in elaboration), then some degree of rule-making will occur.¹⁶⁰

¹⁵³ *Ibid.*

¹⁵⁴ Rubin allows that “There is probably no such thing as a totally transitive rule, however, since all rules, no matter how precise, raise some interpretive problems in their application” (*ibid.* at 382 [footnotes omitted]).

¹⁵⁵ *Ibid.* at 381.

¹⁵⁶ *Ibid.* at 385.

¹⁵⁷ *Ibid.*

¹⁵⁸ *Ocean Port*, *supra* note 110 at para. 24; *Bell*, *supra* note 112.

¹⁵⁹ Rubin, “Law and Legislation”, *supra* note 103 at 372.

¹⁶⁰ *Ibid.* at 383.

2. ORIENTATION: GOALS AND IMPLEMENTATION

Consistent with regarding statutes as “directives issued to implementation mechanisms”, Rubin contends that a legislature’s objective of reaching a particular outcome can be realized by two different, intransitive, statutory approaches: what he terms ‘goal-oriented’ and ‘implementation-oriented’ legislation.¹⁶¹

Goal-oriented legislation “simply enact[s] its goal as law,” instructing the decision-maker to produce the desired outcomes, perhaps supplemented with non-binding suggestions or subsidiary provisions setting out possible means for the implementation mechanism to achieve the goal.¹⁶² Such legislation is intransitive because it relies on the decision-maker to devise the rule that will be applied.¹⁶³

Rubin identifies several potential advantages to goal-oriented legislation. First, including what Rubin labels a “goal statement” in a statute may be “the most effective way [for the legislature] to exercise purposive control over an implementation mechanism.”¹⁶⁴ In particular, such specified goals can be used as readily available performance criteria that the legislature can use to control a tribunal.¹⁶⁵ Second, using goal-oriented legislation may be more effective at realizing the legislator’s goals than clear rules. It relieves the legislature from the responsibility and difficulty of defining rules and implementation strategies which, as Rubin notes, may involve complicated issues requiring empirical data.¹⁶⁶ Moreover, because such legislation necessarily draws on the expertise, experience, and discretion of the interpreter, it has the advantage of being able to adapt to changing circumstances and experience, which inflexible transitive rules do not.¹⁶⁷

Alternatively, a legislature could take a more process-oriented approach using implementation-oriented legislation. In this type of legislation, the statute specifies implementation processes, such as

¹⁶¹ *Ibid.* at 409–410.

¹⁶² *Ibid.* at 410, 411.

¹⁶³ *Ibid.* at 410.

¹⁶⁴ *Ibid.* at 412.

¹⁶⁵ *Ibid.* at 413.

¹⁶⁶ *Ibid.* at 411, 413.

¹⁶⁷ *Ibid.* at 414 [footnotes omitted].

techniques or strategies, for the tribunal to follow when applying the legislative rule.¹⁶⁸ This type of statute is intransitive because it provides the decision-maker with directions that are supplementary to the actual rule.¹⁶⁹

Rubin notes that this type of legislation is directed at the tribunal itself, in order to achieve control over the tribunal's behaviour, and is not directed at citizens or the broader community.¹⁷⁰ Such legislation embodies a particular perspective of the tribunal's role, treating it as "a crucial component of the implementation process" rather than "a transparent medium through which a statute is transmitted to the populace."¹⁷¹ Implementation-oriented legislation may also be effective at achieving the legislature's desired outcomes and political control of the decision-maker.¹⁷² However, it has the weakness, compared to goal-oriented legislation, of requiring that the legislature correctly predict the effect of the rule and mandated implementation mechanism. Otherwise, such legislation can produce undesirable outcomes.

E. DYNAMIC STATUTORY INTERPRETATION

Administrative tribunals are recognized to (and, in Rubin's view, must) engage in what William Eskridge terms "dynamic statutory interpretation".¹⁷³ Eskridge's thesis is that interpretation of a statute may change over time such that it departs farther and farther from the enacting legislature's interpretation of the statute.¹⁷⁴ Social,

¹⁶⁸ *Ibid.* at 418, 410. Rubin notes that this is "specification of a different sort [compared to transitive rules]" at 418.

¹⁶⁹ *Ibid.* at 410.

¹⁷⁰ *Ibid.* at 418.

¹⁷¹ *Ibid.* at 419.

¹⁷² *Ibid.* at 418.

¹⁷³ William Eskridge elaborated on his classic article (*supra* note 104) in his book *Dynamic Statutory Interpretation* (William N. Eskridge, *Dynamic Statutory Interpretation*, (Cambridge: Harvard University Press, 2004)) [Eskridge, *Dynamic Statutory Interpretation*]; Rubin, "Dynamic Interpretation", *supra* note 104.

¹⁷⁴ Eskridge, "Dynamic Statutory Interpretation", *ibid.* at 5–6. Eskridge explicitly drew on several intellectual traditions to develop this theory and to explain dynamic statutory interpretation, including pragmatism, hermeneutics, and positive political theory (at 80).

economic, political, and legal contexts are all potential influences driving this dynamism.¹⁷⁵ A statute may also be applied dynamically from the outset, perhaps because the statute contains unresolved, suppressed, overlooked, or unanticipated issues, or perhaps because the tribunal's ideology differs from that of those who enacted the statute.¹⁷⁶ Furthermore, statutes can even be "doubly dynamic": not only may the decision-maker be interpreting it dynamically, but the legislature can "rewrite statutes when it disagrees with the way they are interpreted."¹⁷⁷ As Eskridge describes it:

[S]tatutory policy is often doubly dynamic: agencies and courts attend to current as well as historical congressional preferences when they interpret statutes, and when they fail to attend perceptively enough, Congress often rewrites the text to reflect current values.¹⁷⁸

Though Eskridge mainly had courts in mind when developing the notion of dynamic statutory interpretation, Rubin contends that dynamic statutory interpretation not only better describes administrative tribunal decision making, but that "the institutional realities of agency interpretation virtually command dynamic statutory interpretation."¹⁷⁹ Furthermore, (as addressed earlier) the intransitive character of legislation governing administrative tribunals allows more scope for dynamic interpretation because of its relatively indeterminate nature.

1. DRIVERS OF DYNAMIC DECISION MAKING

Labour board decision making is influenced by complicated relationships among the political branches of government (the executive and the legislature), courts and the board, and between the board and its constituency, the labour relations community. These

¹⁷⁵Rubin, "Dynamic Interpretation", *supra* note 104 at 1.

¹⁷⁶Eskridge, *Dynamic Statutory Interpretation*, *supra* note 173 at 51, 77. Eskridge notes "Dynamic statutory interpretation can occur immediately after a law's enactment . . . because the ideology of the implementing agency may be different from that of the enacting coalition" (at 77 [footnotes omitted]).

¹⁷⁷*Ibid.* at 7.

¹⁷⁸*Ibid.*

¹⁷⁹Rubin, "Dynamic Interpretation", *supra* note 104 at 4.

external and internal factors are potential drivers for dynamic statutory interpretation.¹⁸⁰

(a) *External Sources of Dynamism: the Context of Decision Making*

Two important sets of external influences are recognized as pressures that administrative tribunals, such as labour boards, experience from both “above” and “below”.¹⁸¹ Judicial, legislative, and political oversight of the labour board, as well as the indirect influence of public pressure on government, are external forces acting on tribunals from above.¹⁸² These pressures encourage the tribunal to respond to what Eskridge describes as “current rather than historical political preferences” in its decision making.¹⁸³

i. *Pressure from Above*

The influence and supervision of the courts over tribunals such as the Board is limited and relatively clear. Tribunals are overseen by the courts, through the mechanism of judicial review.¹⁸⁴ However, reviewing courts generally allow tribunals a high degree of deference,¹⁸⁵ and labour statutes in Canadian jurisdictions (and B.C. in particular) contain strong privative clauses limiting the scope for

¹⁸⁰Eskridge, *Dynamic Statutory Interpretation*, *supra* note 173.

¹⁸¹*Ibid.* at 49.

¹⁸²As Strauss notes, this can be viewed as a series of principal-agent problems (Strauss, “Legislative Theory”, *supra* note 137). Eskridge describes this as pressure on the tribunal from above and below (Eskridge, *Dynamic Statutory Interpretation*, *supra* note 173 at 49).

¹⁸³Eskridge, *Dynamic Statutory Interpretation*, *ibid.*

¹⁸⁴Strauss, “Judge”, *supra* note 105 at 333 notes that agencies are subject to both political and court oversight.

¹⁸⁵Note that judicial review of labour relations boards is relatively uncommon. In B.C., particularly, this may be due to the relatively expansive reconsideration jurisdiction of the Board (*Code*, *supra* note 1, s.141). Also note that the Supreme Court of Canada has recently redefined the standard of judicial review for administrative tribunals, eliminating the concept of “patently unreasonable” with two standards of review remaining: correctness or unreasonableness. It indicated that adjudication in labour law would generally be subject to the reasonableness standard, depending on the nature of the question at issue (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] S.C.R. 190, 291 D.L.R. (4th) 577).

judicial review.¹⁸⁶ Consequently, judicial oversight of labour tribunals likely has little influence on these tribunals' decision making and interpretive approach on a day-to-day basis.

Legislative oversight and control is potentially much more meaningful since tribunals are subject to the direction of the legislature to the extent that they are subject to applicable legislation, and appointments and re-appointments to the tribunal are controlled by the legislature. Procedural or substantive changes to the home statute or ancillary legislation governing the tribunal can significantly affect tribunals' operation and decision making, altering their jurisdiction and, therefore, the scope of judicial review.¹⁸⁷ Exercise of legislative control is often concerned with the tribunal's responsiveness to current political preferences and, simply put, a legislature can change a statute if it objects to the tribunal's interpretation, or if it finds that the legislation doesn't satisfy current political values.¹⁸⁸ This is what Eskridge terms "legislative feedback".¹⁸⁹ Because of the high degree of control that the executive exercises over the legislature in Canadian governments, the goals of legislative control are often indistinguishable from those of political control.¹⁹⁰

Less well defined is the legitimate role of politics and the degree of direct influence or control the executive has over tribunals. As discussed earlier, tribunals are created to implement government policy and, so, function as a policy arm of the government. As such they are legitimately subject to the oversight and control of the executive branch. Though the necessary degree of independence for

¹⁸⁶See e.g. *Code*, *supra* note 1, s. 138.

¹⁸⁷See e.g. the *Administrative Tribunals Act*, S.B.C. 2004, c. 45, or the *Administrative Tribunals Appointment and Administration Act*, S.B.C. 2003, c. 47.

¹⁸⁸Eskridge, *Dynamic Statutory Interpretation*, *supra* note 173 at 47, 49.

¹⁸⁹*Ibid.* at 47.

¹⁹⁰This influence of the Legislature is qualified by the potential for executive "capture" of the legislature in majority governments, and Donald Savoie argues that both the legislature and cabinet are institutions that are being bypassed by the executive, and that effective government power is exercised by the Leader of the Executive and his "courtiers". Savoie's observations were made about the federal Canadian government, but similar arguments could be made about provincial governments (Donald S. Savoie, "The Rise of Court Government in Canada" (1999) 32:4 *Canadian Journal of Political Science* 635).

labour boards is not yet certain, a high degree of governmental and political control and oversight is possible, and may be legitimate.¹⁹¹ An ongoing dilemma for government is that once it delegates decision-making authority to an administrative tribunal, it then has the challenge of finding some way to regulate that decision-making.¹⁹² The government will likely be sensitive to pressure from the public arising from tribunal decision-making which, in turn, will likely influence government efforts to control or influence the tribunal.

ii. *Pressure from Below: Constituency Pressures*

Both government and tribunals are also subject to pressure from “below” from their constituents. Governments are sensitive to voters’ demands and frequently labour issues (and by extension labour board performance) are hot-button political and election issues, with the result that these demands can influence the executive’s dealings with labour boards.

At the same time, the labour board’s own constituents—the labour relations community—pressure the board to make decisions that respond to the community’s new and developing circumstances and needs,¹⁹³ and the community’s reliance on the tribunal’s interpretations,¹⁹⁴ in what Eskridge terms a “hydraulic process of feedback and anticipation”.¹⁹⁵ The pressure of this community can compel the tribunal in a different direction from—and possibly counter to—the political influence applied by the government. Pressure from the agency’s constituency may be a more immediate and effective influence compared to the relatively remote pressures from government and courts. This is the community the tribunal members are immersed in daily, and is often (particularly with expert tribunals) the community that they come from and will likely return to.

¹⁹¹ See Sossin, *supra* note 103.

¹⁹² Eskridge, *Dynamic Statutory Interpretation*, *supra* note 173 at 49.

¹⁹³ *Ibid.*

¹⁹⁴ *Ibid.*

¹⁹⁵ *Ibid.*

(b) *Internal Sources of Dynamism*

Eskridge also recognizes sources of dynamism that are internal to the interpreting body, such as its own perspective, culture, history, and tradition. In particular, pressures can arise where the perspective of the interpreter differs from that of drafter, arising from different “assumptions and beliefs about society, values, and the statute itself”.¹⁹⁶ Such disjunction encourages dynamism,¹⁹⁷ and this effect can be magnified where the statute contains unresolved or suppressed issues that the legislature has, effectively, left the tribunal to sort out.¹⁹⁸

Labour boards are likely to have their own traditions and understanding not only of the statute, but of the role of labour boards as independent (in fact if not in law), relatively apolitical institutions, whose true mandate is to foster constructive labour relations without political or government interference.

As a result administrative tribunals, and certainly labour boards, operate “in the world of politics as well as that of law ...”¹⁹⁹ Therefore, it may well be that a tribunal, acting properly, will interpret and apply legislation in a manner not in accordance with the legislature’s intention. Consequently, in assessing a tribunal’s treatment of legislation, we must do so in light of the nature of administrative tribunal decision-making, and not apply inapt judicial standards.

F. ASSESSING AND EXPLAINING THIS PHENOMENON

The government likely had several objectives in mind in introducing this new Purpose Clause. First, the enacting government came to power with a new agenda under which it planned substantial reforms, including reforming labour relations in the province. A purpose clause is a substantive, binding part of the *Code*, and the amendment to the introductory portion of the provision, stating that the “the board and other persons who exercise powers and perform duties under this Code must exercise the powers and perform the duties in a manner that” meets specified purposes, reinforces this

¹⁹⁶ *Ibid.* at 58.

¹⁹⁷ *Ibid.* at 11, 49.

¹⁹⁸ *Ibid.* at 49.

¹⁹⁹ Strauss, “Judge”, *supra* note 105 at 329.

with its mandatory language. Further, as Adams noted, a preamble is potentially a powerful tool for reorienting labour legislation.²⁰⁰ Therefore, the government clearly viewed the purpose clause as a potentially effective means to reorient labour relations and redirect Board decisions in line with the government's view of labour relations.

As noted earlier, the Board has long been criticized as not giving sufficient regard to the direction provided by the statute's purpose clause. This criticism has come from government as well as the labour relations community. Therefore, amending the purpose clause provided the government with an opportunity to show the public and its constituents that it was addressing the perceived Board misconduct. The purpose clause speaks directly, in greatest part, to the Board, directing its process and interpretation of the balance of interests inherent in the *Code*. Perhaps more importantly, it allowed the government to explicitly recognize individual and business interests, and to demonstrate a commitment to these interests and constituents perceived to have been under-served by past Board decisions. At the same time, it explicitly located responsibility for protecting these interests onto the Board and, therefore, away from government.

There are clear indications that the new Purpose Clause was not directed at the populace or the labour relations community but, rather, to the Board itself. Even the Board has explicitly recognized that it was the target that the purpose clause amendments were aimed at, acknowledging:

The mischief that the Legislature was addressing was what in its view was the Board's apparent reluctance to apply the purposes of the Code with the vigour the Legislature thought they deserved. The amendments were thus aimed at the decision makers under the Code to direct them to apply those principles that were previously expressed as purposes of the Code with a greater imperative.²⁰¹

Clearly the legislature was trying to "generate particular behaviour" by the Board, as Rubin would describe it: making it more self-conscious about its decision-making, and "bring[ing] the agency into view as a crucial component of the implementation process."²⁰²

²⁰⁰ Adams, "New Vitality", *supra* note 34 at 157, 170.

²⁰¹ *HEABC Original Decision*, *supra* note 58 at para. 72.

²⁰² Rubin, "Law and Legislation", *supra* note 103 at 418–419.

Applying Rubin and others' analyses of tribunal decision-making and statutory taxonomy to the new Purpose Clause can help illuminate the intended—or even accidental—function and role of this provision.

By its very nature as an expert tribunal charged with adjudicating the full spectrum of labour relations matters, the Board must apply expertise and discretion in its decision-making. Moreover, the Board's experience of decision-making is very much one of ongoing interpretation of the *Code*. This arises not only from the types of matters falling under the Board's responsibility, but the long-standing conception of labour boards' regulation of labour relations as an ongoing relationship between the parties governed by voluntary principles, with discrete matters coming before the Board regarded as a single episode in a continuing relationship.

The Purpose Clause is a highly intransitive legislative provision. Although it specifies a number of goals and mechanism that it directs the Board to “recognize”, “foster”, “encourage”, “promote”, “minimize”, and “ensure”, it does not set out specific rules for the Board to apply. The Purpose Clause does not make it clear to the targets of the legislation—employer, unions, and individual employees—what behaviour the statute requires. Therefore, it meets Rubin's description of a highly intransitive provision.²⁰³ This is not surprising as a purpose clause, by its very nature, is likely to have a high degree of intransitivity because a purpose clause has no independent application. Its role is as a supplementary guide to interpreting and applying the rest of the statute. As such it would be difficult to envision a highly transitive purpose clause.

Applying Rubin's categorization of intransitive statutory approaches, examining the Purpose Clause reveals that it embodies both a goal-oriented and, to a lesser degree, implementation-oriented approach. Though we might expect a provision titled a “purpose” or “duties” clause to be goal-oriented—and a few specific duties appear to be goals—a more careful look suggests that it is also process- and implementation-oriented. Indeed, the following passage from an early decision has come to be known as setting out the new “analytic

²⁰³This discussion relates to the Purpose Clause, specifically. However, the *Code*, as a whole, is relatively intransitive, containing many clearly intransitive provisions such as ULP and duty to bargain in good faith provisions which simply state goals or broadly expressed rules. The *Code* also contains transitive elements, such as the highly procedural union certification provisions (*Code, supra* note 1).

framework” introduced by the new purpose clause indicates that the Board itself regards the purpose clause as both goal- and implementation-oriented:

Section 2 sets out a vision of labour relations which: describes the goals of the system to the immediate parties; places those goals within a larger, societal context; and emphasizes the mechanisms by which to proceed towards those goals²⁰⁴

In addition to expressly reaffirming recognition of certain rights and obligation contained in the *Code*—those of employers, unions, and employees (subsection 2(a)), and the employees’ right to freely chose union representation (subsection 2(c))—the Purpose Clause identifies several express goals and implementation mechanisms.

The Purpose Clause clearly sets out the following as outcome goals: fostering employment in economically viable businesses (subsection 2(b)); promoting conditions favourable to the orderly, constructive and expeditious settlement of disputes (subsection 2(e)); minimizing effects of disputes on third parties (subsection 2(f)); and, protecting the public interest during disputes (subsection 2(g)). It also identifies the following processes to be followed by the Board in applying the *Code*: use of collective bargaining (subsection 2(c)); cooperative participation, which the Board has described as identifying “the Code’s preference as to how the employer and the union are to meet the challenges they face” (subsection 2(d));²⁰⁵ and mediation (subsection 2(h)).

It is evident that the Board faces myriad external and internal pressures encouraging dynamic interpretation of the *Code*, including the Purpose Clause. As discussed earlier, the Board has a traditionally keen sense of independence, a broad reconsideration jurisdiction, and a strong privative clause. These features all serve to moderate the effects of external pressures on Board decision-making such as judicial, legislative, and political supervision. However, the province’s history of frequent and significant changes to labour legislation and occasional non-renewals of Board appointments—all viewed as politically-motivated—do provide some external pressure “from above” on Board decision-making.

²⁰⁴ *Judd*, *supra* note 54 at para. 18.

²⁰⁵ *Ibid.* at paras. 18, 21.

Likely more influential, however, are external pressures from “below”—the labour relations community, which is the Board’s constituency—and internal dynamic factors. Labour relations in the province are noted for being particularly vital—if not contentious—and the community is relatively small and has a great deal of interaction within itself and with the Board. By the very nature of the matters the Board deals with, parties who come within the *Code*’s regulation have repeated interaction with the Board and with each other. In a larger sense the Board has a role in managing parties’ labour relations over time. Furthermore, the Board is made up of lawyers, labour relations practitioners, unionists, and businesspeople from the labour relations community. By the nature of Board appointments, the expectation and experience is that Board members eventually return to the community to resume their previous roles or take on new ones such as arbitrator. As a result, the Board is highly immersed in its community and likely feels far more acute and immediate pressure from it than from any external source.

Internal dynamic pressures include the Board and its members’ own understandings of not only the *Code*, but the broader labour relations scheme and culture and the lessons drawn from their own labour relations experience. It may well be the case that their understandings differ markedly from those of the legislators.

Both external pressures from the community and internal pressures faced by this Board are likely intensified by its traditional independence and strong sense of identity, stemming in large part from its original, bold, conception and mandate to be the sole institution dealing with all labour relations matters in a holistic manner, even assuming exclusive responsibility for matters that had previously been (and in other provinces remain) within the authority of the courts.

These drivers of dynamism, combined with the high degree of discretion the Board exercises, the Board’s independence, the ongoing nature of its decisions and the matters coming before it, and the overall highly intransitive and goal-oriented nature of the Purpose Clause, provide ideal circumstances for dynamic interpretation of the new purpose clause.

IV. CONCLUSION

In conclusion, this article applies analyses of administrative tribunals and legislative theory to explore the experience with the Purpose

Clause in B.C. labour relations legislation. This new Purpose Clause arose out of government criticism that the Board had failed in the past to give adequate regard to the *Code's* purpose clause and out of the government's determination that the Board would now do so. The purpose clause was converted to a "duties" clause containing a mandatory direction to the Board to act consonant with the articulated purposes, and two new purposes were added. Contrary to expectations that this purpose clause would significantly change the direction of Board decisions and, therefore, labour relations in the province, review of the first five years of Board decisions under the Purpose Clause concludes, in Part I of this article, that it had little discernable effect on the labour relations system. The key features of the established balance of power, collective rights orientation, and process- rather than outcome-orientation remain unaltered.

This raises the question of how to properly assess this result experience. Is it, on the one hand, a rogue Board which is once again resisting the legislature's direction, and an example of ineffective political control over an administrative tribunal, as the government and some commentators might suggest? Or, is it more properly characterized as an example of a tribunal engaging in legitimate dynamic statutory interpretation of the purpose clause, as Rubin and Eskridge might argue?

The preceding review suggests that the latter is a more accurate explanation. A highly expert tribunal such as the Board, granted broad jurisdiction, with a tradition of independence, and that is deeply embedded in the labour community, combined with a highly intransitive and largely goal-oriented piece of legislation such as the new purpose clause, is a recipe for dynamic statutory interpretation. Consequently, rather than tribunal misconduct, a fairer interpretation of the Board's treatment of the Purpose Clause is that of an administrative tribunal fulfilling its role by exercising its discretion to reflect its own narrative, understanding, and history of the statute and labour relations system as a whole, in its decisions to dynamically interpret the new Purpose Clause.