

Exclusions

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Outline

- The importance of union membership
- The reason for exclusions
- How exclusions are determined
- Procedure for exclusions at the PEA
- Exclusions for Government Lawyers

Union Rights and Membership

- The decision of whether or not an employee is excluded from a union is an important one, as it determines if the employee has access to the benefits of being a union member, such as:
 - Just cause protections and access to a grievance process under the collective agreement as a means of resolving disputes;
 - The ability to organize and fight together for favourable terms and conditions of employment; and
 - The right to strike

The Role of the Union

- The right to take collective action through a union is protected under s. 2(d) of the *Charter of Rights and Freedoms* in a number of ways, including with respect to the right to bargain collectively and strike.

...s. 2(d) functions to prevent individuals, who alone may be powerless, from being overwhelmed by more powerful entities, while also enhancing their strength through the exercise of collective power. Nowhere are these dual functions of s. 2(d) more pertinent than in labour relations. Individual employees typically lack the power to bargain and pursue workplace goals with their more powerful employers. Only by banding together in collective bargaining associations, thus strengthening their bargaining power with their employer, can they meaningfully pursue their workplace goals (Mounted Police Association of Ontario v. Canada (Attorney General), [2015] 1 SCR 3)

Reasons for Exclusions

- The underlying policy rationale for exclusions is to maintain an arm's length relationship between management and a union to avoid a potential conflict of interest which could be created by placing a person within a bargaining unit when they should be excluded from employee status (*Gateway Casinos & Entertainment Inc. (c.o.b. Lake City Casinos)(Re)*, [2010] B.C.L.R.B.D. No.81)
- At the same time, arbitrators have recognized that union membership is an important right, and are reluctant to find that an individual is excluded absent evidence that their work is inconsistent with that membership

Sources of Rules Regarding Exclusions

- *Public Service Labour Relations Act*, RSBC 1996, c 388
- Collective agreement
- Decisions of the Labour Relations Board and other decision makers

Who is in the Bargaining Unit

- Section 4(b) of the *Public Sector Labour Relations Act* (“*PSLRA*”) includes a list of exclusions under s. 1; lawyers are currently listed here at s. 1(b) but will be removed
- Absent an exclusion under s. 1, s. 4(b) of the *PSLRA* states:

4 For the purpose of collective bargaining, every employee must be included in

...

(b) a licensed professional bargaining unit, including all employees in a professional classification in the public service classification structure who are members of an association that had, before July 1, 1998, statutory authority to license a person to practise that profession

...

- Members of the PEA’s GLP unit typically fall within certain professional designations and maintain connections with their professional organizations and licensing bodies.

Who is in the Bargaining Unit?

- The scope of the bargaining unit is found in the certification language, but the scope of the unit can change over time
- The scope of the bargaining unit may be determined by the Parties to a collective agreement, and is typically found in the agreement's terms
- In the PEA's Government Licensed Professionals ("GLP") collective agreement the bargaining unit is defined as (at 2.01):
 - ...all employees for whom the Union has been certified to bargain collectively pursuant to the Public Service Labour Relations Act, except those employees or classes of employees who may be excluded pursuant to Clause 2.03 of this Agreement.

Collective Agreement

2.03 Exclusions

(a) The parties agree that the Employer shall retain the current exclusions as listed in Appendix B to this Agreement together with such exclusions as may be decided pursuant to Clause 2.03(b) of this Agreement.

- Positions previously excluded by agreement found at Appendix B
- Appendix B lists positions excluded by department, position title and year agreement to exclude was made
- Total Number of Exclusions from 1974 through April 2022 = 240

Collective Agreement

2.03 Exclusions

(b) During the life of this Agreement the Employer will restrict applications for any further exclusions to either new positions or to positions which undergo significant changes in job content or responsibility. Additional exclusions shall be based on the criteria outlined in Section 11 of the Public Service Labour Relations Act or on such other criteria as may be agreed to by the parties and shall be added to the list in Appendix B.

(c) Where no response to any new application by the Employer pursuant to (b) above is received within 40 days the Union shall be deemed to have agreed with such application.

(d) Where the parties are unable to agree pursuant to (b) above, and where (c) above does not apply, the matter may be referred by either party for resolution as provided under Section 11(2) of the Public Service Labour Relations Act

Who is not in the Bargaining Unit

- The bargaining unit does not include:
 - Individuals working for the government who are represented by other unions;
 - Individuals performing work not captured in the scope of the collective agreement; and
 - Managers and others who are excluded from the bargaining unit due to the nature of their work and by statute.

PSLRA

Exclusions from collective agreement

11(1) A collective agreement concluded under section 8 or 9 may exclude from its application certain employees or classes of employees.

(2) Employees or classes of employees to be excluded from the collective agreement may be determined by negotiation between the parties, but if the parties are unable to agree, either party may refer the matter to the board for a final and binding decision.

PSLRA

11(3) In making its decision under subsection (2), the board must exclude those employees or classes of employees who are employed

(a) to exercise the functions, and do exercise the functions, of a manager or superintendent in the direction or control of employees,

(b) in a confidential planning or advisory position in the development of management policy for the government, or

(c) in a confidential capacity in matters relating to labour relations or personnel.

Interpretation of Rules Regarding Exclusions

- Absent agreement the Parties refer the dispute to the Labour Relations Board
- The goal of exclusions in the collective agreement and in legislation is to avoid conflicts between individuals who are properly employees and those who act on behalf of and are aligned with and/or share a community of interest with management
- The assessment of a potential conflict is based on an "objective examination of the actual responsibilities and authority of the individual at issue" (*Cowichan Home Support Society*, [1997] B.C.L.R.B.D. No.28)

Interpretation of Rules Regarding Exclusions

Burnaby (District) (Re), [1974] B.C.L.R.B.D. No. 1

- Statutory limitations are placed on employees aligned with management being members of the bargaining unit because “true bargaining requires an arm’s length relationship between the two sides, each of which is organized in a manner which will best achieve its interests”
- Through legislation “management must be assigned to the side of the employer”

Interpretation of Rules Regarding Exclusions

Cowichan Home Support Society(Re), [1997] B.C.L.R.B.D.No.28

- Discipline and discharge, together with labour relations input, are the two most significant factors in determining managerial status
- In the exercise of their specialized expertise professionals participate (as do managers) in decision making concerning the direction of the workforce, but that knowledge and authority may arise from the particular expertise gained from long years of study and practice, and not from the specific delegation of managerial power
- Delegation of power must be bona fide (no “sprinkling”)

Direction and Control of Employees

- Involves the power to hire, discipline and manage other employees, which are traditional management activities, with discipline being the most important
- Issue of “effective determination,” ie: who is actually making the final decision
- Where there are levels of authority above the individual in question, the individual exercising these powers may not be a manager
- Where the supervisory responsibilities of managers are hard to distinguish from a number of other bargaining unit positions that include supervisory responsibilities those factors may not be as significant

Direction and Control of Employees

*The Board's jurisprudence is clear that supervisors can access collective bargaining provided they do not exercise effective determination with respect to the relevant factors. It is also established that effective determination means more than mere input into the decision-making process (**Howe Sound Pulp & Paper Corp. (Re)**, [2019] B.C.L.R.B.D. No. 173).*

Confidential Planning or Advisory Position

- Can relate to aspects of management such as corporate planning, financial planning, marketing, or other normal functions of management
- Concerned with whether or not a position goes to the “very root of the operation” such that the community of interest of the position lays more with management than the bargaining unit
- Where a position exerts significant influence over matters like determining staffing complement or strategic direction it is more likely to be excluded
- Where the individual acting in the position exercises independent judgement, implements policies and takes actions which could impact employees in the bargaining unit it is more likely that they would be found to be excluded

Working in a Confidential Capacity

- Relates to having access to confidential information which is inconsistent with remaining in the bargaining unit as part of one's job duties
- An exclusion will result where the employee has access to the type of confidential labour relations information that could disadvantage the employer either in bargaining or in administering the collective agreement
- Generally the employee will be regularly and materially involved in personnel matters such that they are entrusted with confidential information about other employees and must be discreet with respect to that information
- The information is of a nature that its disclosure could impact the relationships between the employee and other employees or the employer
- The employee receiving the information must make judgements about it rather than simply recording or processing it

Employer Perspective on Exclusions

- Greater flexibility regarding ability to hire and terminate workers
- Reduced employee rights and fewer limitations regarding the worker's terms of employment
- Reduced risk of conflict of interest and greater alignment with and loyalty to the interests of management
- Decreased bureaucracy, risk and expense of resources if exclusions are automatic

Union and Worker Perspective on Exclusions

- Union membership provides more rights for workers, including greater job security and just cause protections
- Members and unions can achieve seniority rights and favourable terms of work through bargaining
- Greater number of members in the bargaining unit results in greater strength for the Union, including through the right to strike
- Greater independence from management for the member in their work

Considerations in Contested Positions

- In the disputed positions:
 - Does the employee advise and make recommendations, or decide?
 - Is the employee aligned with or do they have a community of interest with management?
 - Would the employee's duties place them in a conflict if they were to be included in the union?
 - Is the member required to act in direct opposition to the PEA as counsel for the Employer?
 - Are there ways to structure work that allow for union membership (ie: avoiding "sprinkling")

Thank You

Questions?