Ministry of Labour

Labour Relations Code Review 2018

Written Submissions (Phase 1)

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KELOWNA, BC
17/22 ATU

AMALGAMATED TRANSIT UNION
LOCAL 1722
Mailing Address: P.O. BOX 2224 KRC, KELOWNA B.C. V1X 4K6
President Scott Lovell (250) 870-2796 Vice President AJ Peressini (250) 878-3468
UNION HALL LOCATION: #3 – 1925 Kirschner Road, Kelowna, BC

Labour Relations Code Review

Section 19 (1) change to read in the first year of a new contract only

- **Allowing an open raid period in every year creates an upheaval for individual Unions and with the recent happenings at the Canadian Labour Congress this will allow for more raids on Locals**

Section 35 (1 & 2) See attached document

- **As these two sections apply to transferring of a business or operation how do they apply when a Request for Proposals for Operations are put out?**

Section 38 - This Section needs to have a better definition for what constitutes a Common Employer

Question to the Board: Does a Provincial Crown Corporation have the right to Exempt themselves from any part of The Code?

Section 49 – There needs to be some sort of recourse or penalties if either party does not follow the Terms of a Collective Agreement. The reason for this is that many of the Employers today are Multi-National Corporations that do not familiarize themselves with current Labour laws and are use to different terms in the areas or countries they operate in.

Gordon Irish

ATU 1722

KELOWNA, BC
17/22 ATU

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March 13,2018

BC Transit - Succession Rights

The fight for equality and fairness:

BC Transit contracts out the entire public transit systems in the province except for a few locations.

Most of the locations which are contracted out are run by for-profit companies. The companies usually are massive for profit overseas operating companies. There are a few transit properties that are run by the municipalities which makes better sense. Decisions are made locally for local needs.

BC Transit owns all of the equipment (Buses etc.) and typically pays these for-profit companies a management fee to operate the systems.

Bidding to run the individual transit systems are done by way of RFP. (Request for proposal) The RFP is an ever-evolving document in most cases hundreds of pages long. These RFPs detail exactly what is going to happen in the transit system. The routes, the timing, transit staffing policies and expectations, training programs, maintenance programs.... Anything that can possibly detail how exactly to operate a transit system. That is all prepared and controlled by BC Transit.

BC Transit staff do everything except physically run the systems. They offload the staffing to these private for-profit companies. There is no duty to the workers in the system by BC Transit, there is no responsibility of the workers conduct in the systems by BC Transit, and there is no obligation to the workforce by BC Transit.

In recent years BC Transit has informed the companies that they should not make money off of the labour force. Meaning the companies cannot make profit off of the backs of labour. Apparently, the companies can't bill BC Transit for labour and not transfer the labour funding to the employee group - to the actual employees for the work done.

Many years ago, built into these RFPs was a caveat referred to as succession rights. What that means is workers that are in the system now that have committed to this career would have a guaranteed job, a guarantee of wage, a guarantee of yearly holiday entitlements, should in fact the operation of transit systems change to a different employer. When the Campbell government came in this was removed from all RFPs.

KELOWNA, BC
17/22 ATU

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BC Transit has been reluctant to put the caveat of successorship rights into the RFPs. The questions have been asked if a change in employer status occurs how does this employee group have any job? The response has been that BC Transit "can't see it happening." It recently has happened in northern BC. The Kitimat contract went from a very long time employer (First Transit) to a new one (PWT) and the new company severely underbid the incumbent employer and subsequently did not rehire the old workforce in whole. The workers that were re-hired were hired at a substantially lower rate of pay.

Successorship rights placed back into RFPs and designated as a policy within BC Transit by the BC Transit Board will prevent the "Race to the bottom" as is the example above. If BC Transit wants a well operated system, then the professional overseas operating organizations would strictly win the RFP bids based on their expertise and operational efficiencies, not off the backs of the workers. This would also allow the incumbent to have a fair playing field when the system they operate goes up for tender. The incumbent has to bid its present labour / workforce wages and entitlements whereas an outside bidder does not as there is no duty to the workforce to maintain any of those costs, hence the underbidding by PWT over First Transit in the north and the loss of jobs to those former employees.

We respectfully request the Minister of Labour and the Minister of Transportation and Infrastructure help us address this inequality and ensure the security of jobs and livelihood of the public transit operations workers in the province of British Columbia, by reinstating the successorship rights of workers in BC Transits RFPs.

The much-preferred option is to have public transit in the Province of British Columbia, which is funded fully by British Columbian taxpayers, whose assets are owned fully by British Columbian Taxpayers thereby fully operated by the Province of British Columbia through BC Transit.

I am available any time to try to help expand this discussion.

Sincerely Yours,

Scott Lovell

President / Business Agent
Amalgamated Transit Union Local 1722

BC FERRY & MARINE WORKERS' UNION

1511 Stewart Avenue
Nanaimo, BC V9S 4E3
250.716.3454 or 1.800.663.7009
250.716.3455 Facsimile

Via Email

March 20, 2018

Labour Relations Code Review Committee,

Re: Submission of the BC FERRY & MARINE WORKERS' UNION to the British Columbia Labour Relations Code Review Panel

(1) The BCFMWU

The BCFMWU represents more than 3,600 marine worker members across the province, on over 35 vessels, 47 ports of call, and numerous other job sites.

(2) Constitutional and International Principles

Canadian workers have a Charter right to access meaningful collective bargaining, as affirmed by the Supreme Court of Canada over a decade ago in Health Services and Support — Facilities Subsector Bargaining Assn. v. British Columbia.[1] In our submission, amendments to the Labour Relations Code are required to bring the legislation in line with the core constitutional principles set out in this case and subsequent decisions, including Mounted Police Association of Ontario v. Canada (Attorney General)[2] and Saskatchewan Federation of Labour v. Saskatchewan.[3]

These core constitutional principles include the following:

(a) Fundamental values of human dignity, liberty, respect for the autonomy of the person and the enhancement of democracy are promoted by ensuring access to collective bargaining for Canadians; and

(b) The freedom of association necessarily includes the right to strike.

[1] [2007] 2 S.C.R. 391.
[2] 2015 SCC 1, at para 68
[3] 2015 SCC 4, at para 69.

(3) Summary of BCFMWU Recommendations

Based on the foregoing principles and our experience representing members across the province under the current Labour Relations Code, we recommend the following amendments:

1. Repeal Section 8 and ensure the fundamental right of employees to associate together in unions is protected, free from employer interference.
2. Restore card-check certification based on simple majority membership support to bring the Code into line with the majority of labour legislation in Canada and the Charter values established by the Supreme Court of Canada.
3. Amend the Code to provide for early disclosure of employee lists and contact information based on demonstrated 20 percent threshold support.
4. Establish firm timelines for decisions.

Amend Section 2 of the Code to focus on meaningful collective bargaining, consistent with *Charter* protected right to freedom of association.

(4) Repeal Section 8

Section 8 of the Labour Relations Code is often referred to as the "employer free speech provision". In our submission, it has been in practice as a tool by employers to suppress the exercise of constitutionally protected associational activity by interfering with the organizing and certification of unions.

The Supreme Court of Canada has clearly established that collective bargaining enhances the Charter value of equality, and specifically one of the fundamental achievements of collective bargaining is to palliate the historical inequality between employers and employees. In our submission, section 8 unfairly shifts the balance firmly in the favour of the employer by permitting a party with recognized power to exercise that power over its employees in a matter that unduly influences or restricts their choices with respect to collectively organizing in the workplace.

(5) Certification

Card-Check System

In our submission, the biggest barrier to certification is the secret ballot vote system, as this Panel will no doubt hear from many unions. Research has demonstrated that unionization and certification is severely suppressed by mandatory votes as compared to card-check certification.[4]

The majority of Canadian jurisdictions employ card-check systems. Card-check certifications exist in Newfoundland and Labrador, New Brunswick, PEI, Quebec, Alberta, Federally all three territories, and in certain industries in Ontario and Nova Scotia.

Mandatory vote systems expose employees to a much greater risk of improper employer influence which can effectively undermine the fundamental right to participate in associational activity by employees.

Prior panels tasked with a review of the Code who turned their minds to the issue all recommended a card check system over a mandatory vote. Some of the observations and recommendations of those panels, arrived at after extensive public consultation and research, include the following:

(a) "While the statute still retained prohibitions against employer interference in the certification process, after the introduction of the vote the rate of unfair labour practices by employers during organization campaigns increased dramatically. The rate of new certification dropped by approximately 50%."[5]

(b) "The surface attraction of a secret ballot vote does not stand up to examination. Since the introduction of secret ballot votes in 1984 the rate of employer unfair labour practices in representation campaigns in British Columbia has increased by more than 100%. When certification hinges on a campaign in which the employer participates the lesson of experience is that unfair labour practices designed to thwart the organizing drive will inevitably follow... It is not acceptable that an employee's basic right to join a trade union be visited with such consequences and illegal interference. Nor is there any reasonable likelihood of introducing effective deterrents to illegal employer

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[4] *Recommendations for labour law reform: a report to the Honourable Moe Sihota, Minister of Labour / submitted by the Sub-Committee of Special Advisers, John Baigent, Vince Ready, Tom Roper.* Victoria, [B.C.]: The Sub-Committee, 1992, at 6 (*1992 Panel Report*); Chris Riddell, "Union Certification Success Under Voting Versus Card-Check Procedures: Evidence from British Columbia, 1978-1998" (2004) 57:4 *Industrial and Labor Relations Review* 493 **at 509**.

[5] *1992 Panel Report, supra*, at 5-6.

conduct during a representational campaign."[6]

(c) "Employers responded negatively to our Discussion Paper proposal to not recommend a mandatory certification vote. They continued to advocate for a vote before certification because they believe that is the only way they can be assured that their employees truly want to organize. We did not hear from employees that they wished a certification vote. Because the employer directly controls the ability of any employee to maintain his or her livelihood and therefore holds the balance of power, we feel that the concerns of employees and their unions must take precedence in this case. We affirm our proposal in the Discussion Paper to not recommend a mandatory certification vote. We affirm the individual right, recognized provincially, nationally, and internationally, to join or form trade unions. Experience demonstrates that employers do seek to affect employees' right to choose. In our view, extending the certification process by introducing a mandatory certification vote would only further invite such illegal activity."[7]

The BCFMWU strongly believes that a mandatory vote system is a process that interferes in the power of employees to collectively pursue workplace goals. We recommend an amendment to the Code so that a union will be certified if it meets the threshold of 55% of membership cards. Where a union has between 45 and 54% of cards, a secret ballot vote should be scheduled.

Early Disclosure of Employee Contacts

In many workplaces today employees at a potential bargaining unit may not know each other because the workforce is spread across a large geographic area, there is a multitude of worksites or because the workforce is composed of a large number of part-time or casual employees, or because employees work from home.

In light of this changing employment landscape, and consistent with the core constitutional values established by the SCC we recommend amendment to the Labour Relations Code to require early disclosure by an employer to a union of the contact information for all employees at a workplace once the Union can establish at least 20 percent membership support.

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[6] *Ibid*, at 26.

[7] *Managing Change in Labour Relations – The Final Report – Prepared for the Minister of Labour Government of British Columbia by the Labour Relations Code Review Committee (Section 3 Committee) Vince Ready, Stan Lanyon, Miriam Gropper and Jim Matkin*, Victoria, [B.C.]: The Review Committee, 1998, at 51-52 ("*The 1998 Panel Report*").

(6) Time Lines

In circumstances where a vote is required on a certification application, the BCFMWU recommends that a certification vote be required to be conducted within five days of any certification application, which may only be extended to a maximum of an additional two days where it is practically impossible to arrange a vote within 5 days.

In our view, the existing 180-day window for decisions is too lengthy, particularly with respect to unfair labour practice complaints during an organizing drive, collective bargaining or job action. Once six months have elapsed since the date of a complaint, the relationship between the union and the employer can have incurred irreparable damage and/or employees can lose faith in the union as their advocate.

The BCFMWU recommends that the Code or the Regulations be amended to require "bottom line" decisions on Part 5 applications and disputes during certification to be rendered within 14 days of the conclusion of submissions or hearing on the matter and no later than 30 days after the complaint or application is filed by the union or employer.

In solidarity,

BC FERRY & MARINE WORKERS' UNION

Graeme Johnston, Provincial President BCFMWU

Submission to the *Labour Relations Code Review Committee* regarding:

Proposed changes to the *BC Labour Relations Code*

Submitted by:
BC Building Trades

March 2018

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SUMMARY

The BC Building Trades welcomes the opportunity to make this submission to the BC Labour Relations Code Review Panel.

The BC Building Trades is the umbrella organization for the 28 local unions that work in British Columbia's building, construction and maintenance industry sectors. There are over 35,000 highly skilled and unionized construction workers in BC. The BC Building Trades has access to over 400 employer partners.

We advocate for building and maintaining a highly skilled and qualified workforce to meet BC's labour force demands.

We work with our employers to develop and build our communities while striking a balance between economic, social and environmental objectives, thus ensuring both prosperity and sustainability for future generations.

We welcome this opportunity to make the following recommendations to the BC Labour Relations Code Review Panel.

Our Position

A first priority, the BC Building Trades requests that this Review Panel recommend to the Minister that he establish a separate panel to review construction labour relations. The construction industry is unique, which means that the application of standard labour relations law results in a skewed and inappropriate interpretation of the existing law. The construction industry requires a Code that addresses definitions, certification procedures, bargaining processes/structures, and dispute resolution mechanisms.

The relationship of workers to the workplace and to their employers is vastly different in construction than in typical industrial, commercial and institutional settings. The construction industry requires access to a highly skilled and mobile workforce that can adapt to the unique challenges presented at each project. Workers need to be trained and skilled in the full scope of each construction trade in order to ensure timely, quality and safe production.

The special nature of the construction industry and the unique labour relations setting that it produces must be recognized if we are to develop a legislative framework that allows balanced economic relations between consumers, management and labour in this industry. That section should have a purpose clause that recognizes the distinctive features of the construction industry. In particular, it must recognize the transient nature of employment in the industry, the traditional use of union hiring halls to provide contractors with access to a pool of skilled union workers and the resulting need to promote fair, stable, and orderly industry-wide multi-trade bargaining.

Only through a separate review of the construction industry can the need for these fair and balanced changes to the Code be identified.

In addition to a separate review of the construction industry, the BC Building Trades calls for changes that protect workers' rights. These include:

- proper funding for the Board;
- clarity on the definition of common employer;
- changes to raiding provisions;
- strengthening provisions around undemocratic and employer dominated unions;
- enabling remedial certifications and strengthen provisions to prevent intimidation;
- restoring a system of union certification on the basis of membership cards alone; and
- review Section 2 of the Code.

Recommendation #1

Conduct a separate review of the construction industry

The Construction Industry is unique in many ways and every Province in Canada has specific legislation dealing with construction labour relations. In every Province except British Columbia, that legislation is designed to facilitate worker's access to meaningful collective bargaining. In British Columbia, the construction specific provisions of the *Labour Relations Code* (Section 41.1 & Regulation 3.1) are designed to inhibit worker's access to meaningful collective bargaining.

The Construction Industry has several unique characteristics that militate in favour of construction specific labour relations legislation[1]. Construction is characterised by the mobility of both workers and employers. It is a cyclical, seasonal, and project driven industry. Construction employers are often small companies that have little capital invested and few if any fixed assets. Construction workers are generally hired on a project by project basis and have no expectation of long term employment. In contrast, the *Labour Relations Code* is designed for fixed industries where workers have stable long term employment and where employers have capital invested in fixed assets.

The unique features of the construction industry make it very difficult for workers in the industry to access their rights under labour legislation. Even if a group of workers is able to become organised during the life of a project, they will likely be laid off before a first collective agreement can be reached. Under our current laws, laid off workers have no right to be recalled when their former employer starts a new project.

As a result of the unique nature of the construction industry and the barriers that exist for workers in the industry to access their fundamental collective bargaining rights, **every other province in Canada** has legislation dealing with construction labour relations which is designed to make it easier for construction workers to have meaningful access to collective bargaining

In British Columbia, the last comprehensive review of construction labour relations was conducted in 1997. The Construction Industry Review Panel (Lanyon & Kelleher) was asked to look at whether construction specific labour relations legislation was necessary and, if so, to recommend appropriate legislation. At page 1 of the Panel's report *Looking to the Future, Taking Construction Labour Relations into the 21st Century*, the Panel concluded: "We agree that construction is unique and merits separate consideration in the Labour Relations Code." The Panel recommended a comprehensive scheme for Industrial, Commercial and Institutional (ICI) construction labour relations. The government accepted the recommendations and enacted Bill 26 in 1998.

The new Legislation established a limited form of sectorial certification in the ICI construction industry. It provided for a rational and balanced system of collective bargaining in the construction industry and provided employees with meaningful access to collective bargaining.

Unfortunately, these construction specific provisions of the *Labour Relations Code* were removed by the Liberal Government soon after being elected in 1991. In their place, the Liberals enacted Section 41.1 & Regulation 3.1 which were intentionally unbalanced and designed to inhibit access to meaningful collective bargaining. Section 41.1 in particular has resulted in building trade unions being subjected to a wildly dysfunctional and unfair system of

[1] The Commission de la Construction du Quebec describes the unique features of the Industry on its website: http://www.ccq.org/en/A_QuiSommesNous/A05_IndustrieConstruction/A05_1_CaracteristiquesIndustrie

collective bargaining[2].

This system needs to change. Unlike every other Province in Canada, BC has legislation designed to inhibit access to bargaining by construction workers. The current BC Labour Relations Code Review Panel will not likely be able to deal adequately with the issues confronting the construction industry. The 1991 Committee of Special Advisors (John Baigent, Vince Ready and Tom Roper) were tasked with reviewing the construction industry but had to defer that mandate because they did not have the time or resources needed to deal adequately with construction.

We believe that the current BC Labour Relations Code Review Panel will face a similar problem and that in any case, the unique nature of the construction industry requires a dedicated and focused review panel.

Recommendation #2
Establish proper funding for the Board

Sixteen years of underfunding have resulted in the dysfunction of the Board. Lack of staffing resources for the Labour Relations Board have meant that Industrial Relations Officers do not have the time to investigate employer payroll records to establish eligible voters for mandatory certification votes. Instead the IROs rely on employers to determine the provisional list of voters. We have also seen unacceptable delays in the administration of hearings and arbitrators' decisions.

The construction industry is unique. Each work site may involve quite different types of construction and will employ a changing group of workers from a variety of trades or skill groups. Workers are called to work individually and may be required for only one or two days at a time and may be laid off and recalled several times during the course of a particular project according to the specific skill requirements of each stage of construction. The employer is not required to call a particular employee back for subsequent stages of the work or even to retain that employee from one project to the next. There may be dozens of companies working on the same site, each performing only a small part of the work.

Proper funding must be established for the Board so it can administer the Code fairly and appropriately. This should include a return to having members of the Board with expertise in construction to ensure that workers and employers in the industry are being treated appropriately.

Recommendation #3
Clarify the definition of common employer

The Code must be amended to clarify the definition of common employer to prohibit double breasting. Employers are currently able to manipulate existing certifications by re-organizing

[2] Some of the problems with the way bargaining has evolved under this system were described in "Interim Report regarding a Section 41 Inquiry into Labour Relations in the British Columbia Building Trades Sector of the Construction Industry": http://www.lrb.bc.ca/decisions/REPORT%20-%20S%20%2041%20(FINAL).pdf
See also the decision of Labour Relations Board in *BC Insulators* BCLRB No. B121/2014
http://www.lrb.bc.ca/decisions/B121$2014.pdf

their corporate structure. Companies cannot be allowed to avoid their union certification by simply transferring their equipment to a new corporate entity and abandoning the old corporation. These corporate shuffles deny workers their right to free association in a democratic society.

The Code must be amended to clarify the definition of common employer to prohibit double breasting.

Recommendation #4
Change raiding provisions and ability to negotiate a new contract

The Code should be revised to require employers to re-open collective agreements after successful raids. These re-openers are especially required if the original collective agreement was not ratified by employees once the project was up to its full complement of workers.

Previously, the two-month “raid” vote window for construction unions was legally set for the busy summer months, July and August. Changes to the Labour Code currently allow a raid to take place during the low employment periods (e.g. November, December). This enables those employers with employer-friendly organizations dressed up as unions to permanently insulate themselves from the accountability resulting from a raid action by crewing down to its loyal workers.

The raiding period for construction unions should be during the busy construction season, in July and August. Moreover, this is traditionally when more workers are on site, which serendipitously increases democracy through sheer numbers alone.

Recommendation #5
Strengthen provisions around undemocratic and employer dominated unions

The Labour Relations Board should be empowered to receive complaints, conduct investigations and audit internal election processes of unions that are alleged to be undemocratic and/or employer dominated. If after investigations, the LRB finds substance to the complaints, the “union” would be ordered to repeal its undemocratic processes. Failure to do so should disqualify that organization from certification in the province.

Recommendation #6
Enable remedial certifications and strengthen provisions to prevent employer intimidation

The workplace is not a public space. The employer controls access to the workplace both legally and practically. Union organizers are not allowed access to job sites and employers can censure the distribution of information favourable to the union.

In contrast, employers can require that all employees attend meetings to propagate the company viewpoint against unionization.

In the absence of remedial certifications, employers have had a free hand to commit unfair labour practices and unions are forced into costly litigation processes. Gathering evidence and arguing the merits of these complaints is a huge annual expense incurred by building trades unions.

We ask the BC Labour Relations Code Review Panel to remove the so-called “employer free-speech” provisions in Sections 6 and 8 which allow employers to conduct aggressive anti-union campaigns and increase the use of remedial certification in cases of unfair labour practices.

Recommendation #7

Restore a system of union certification on the basis of membership cards alone

The board should restore a system of union certification on the basis of membership cards alone. It is critical that workers be allowed to exercise their right to organize without having to run the gauntlet of employer evasion tactics.

Mandatory votes are inevitably stalled to take place on the last possible occasion (the 10th day) after the certification application. During the 10 days before the vote, employers will hold “captive audience” meetings to pressure workers to vote no to the union application. Employers may orchestrate a competing application from another employer-friendly “union” to confound the workers’ bid for real representation. Employers will single out weaker workers and try to pry information or pressure these “weak links” to reject the union certification bid.

We share the BC Federation of Labour position that the choice of a union is the result of a dialogue between workers and a trade union, and ought not be unduly fettered by the requirement that workers confirm their initial decision to sign a membership card by also participating in a certification vote.

Recommendation #8

Review Section 2 of the Code

We ask the BC Labour Relations Code Review Panel to review Section 2 of the Code to increase the focus on access to collective bargaining, including the removal of Section 2(b). Duty to ensure that Code “fosters the employment of workers in economically viable businesses.” This section of the Code has been used successfully by employers to justify interference with workers’ rights (to strike, to organize, to decertify) and deny worker rights.

Conclusion

The construction industry is unique. A thorough and separate review of the industry is required to modernize the Code as it pertains to construction and ensure the needs of workers and employers are fairly balanced with regulations that make sense to our distinct industry.

The cyclical, seasonal, and project-driven nature of the industry puts workers at risk and the Code must be revised in several areas if we are to bring fairness back to British Columbia’s labour relations system. We have made a number of recommendations in this submission and welcome the opportunity to continue our dialogue as the Code is being reviewed.

/jl
MoveUP

BC FEDERATION OF LABOUR SUBMISSION TO

THE *LABOUR RELATIONS CODE* REVIEW COMMITTEE

REGARDING PROPOSED CHANGES TO THE *BC LABOUR RELATIONS CODE*

BCFED

March 2018

March 20, 2018

Email: LRCReview@gov.bc.ca

Labour Relations Code Review Committee (Section 3 Committee)
Ministry of Labour

Dear Committee Members,

We write to express the position of the BC Federation of Labour (the "Federation") on the *Labour Relations Code*.

The *Labour Relations Code* provides the legal framework for many aspects of the relationship between employers, employees and their unions, including collective bargaining, dispute resolution, and access to union representation.

Over the course of the last 16 years under the BC Liberals, our labour laws and their application have become unfair and unbalanced. They have become radically tilted in favour of employers who are allowed to intervene with near impunity to try to prevent workers from exercising their constitutional right to join a union to improve wages and conditions. "Captive audience" communication, forced listening, employees being paid by the boss to vote against the union, and other anti-union tactics are now regular tools for employers.

Administratively, the board has been starved of resources to carry out its work. This too adds to the employer advantage.

Meanwhile the lack of balance and fairness have given employers carte blanche to prevent workers from being able to fully exercise their constitutional right to bargain collectively. The notorious "contract flip" allows employers to target tens of thousands of workers in predominantly female jobs to keep wages low and prevent them from maintaining stable union representation.

The last comprehensive review of the Code was done in 2003. There have been significant changes in the workplaces, the economy and the workforce in British Columbia since then. Other jurisdictions, notably Ontario and Alberta, have undertaken significant review of their labour relations legislation in the past two years.

We are pleased to submit our recommendations to you as part of your consultation under Section 3 of the Code. We support the minister of labour's mandate "to ensure British Columbians have the same rights and protections enjoyed by other Canadians by reviewing the *Labour Relations Code* to ensure workplaces support a growing, sustainable economy with fair laws for workers and business."

It is important that our Code be fair and balanced, and that it be reviewed and amended to

reflect developments in our legal framework and in society. BC's workforce is changing. More and more jobs are precarious, insecure, and exploitative. Unions help to make work and workplaces more fair. Our Code must reflect the role that unions play in supporting good jobs and healthy workplaces by removing barriers to joining a union and keeping a union.

Our position is respectfully submitted on behalf of the Executive Officers of the BC Federation of Labour and represents the views of more than 500,000 affiliated union members across the province of British Columbia.

Irene Lanzinger
President

ab/km/ moveup

Executive Summary

The BC Federation of Labour members calls on the BC government to level the playing field between workers and employers by making the following changes to the British Columbia *Labour Relations Code*:

General

1. Continue the ongoing review of the *Code* by allowing the Section 3 committee to be seized of the question of labour relations improvement on an ongoing basis – rather than every 16 years. s.3.
2. Support the work of the Labour Relations Board by encouraging government to properly fund the board so that critical services like certification votes are not delayed, or conducted by mail, simply because of a lack of resources.
3. Ensure effective and timely decisions by extending the timelines for decisions provided by vice-chairs to those given by arbitrators. s. 91, s. 128, s. 159.1.

Unfair Labour Practices

4. Avoid infringement of workers' Charter right of association by increasing the use of remedial certification in cases of unfair labour practices. s. 14.

Acquisition of Bargaining Rights

5. Repeal of the current Employer Speech provisions during organizing drives, because they infringe workers' Charter rights to choose to join a union. s. 8.
6. Clarify when open (raiding) periods fall by setting them in a regular period in the calendar year, rather than the anniversary of the collective agreement - which is often unknown to interested parties. s. 19.
7. Restore a system of union certification on the basis of membership cards alone. s. 24.
8. Establish faster timelines to ensure labour peace by causing more expeditious voting. If certification votes are necessary, the application threshold shall be in line with those in other Canadian provinces. The timeline for a vote on any issue shall be not more than two working days. s. 24.

Successorship Rights

9. Broaden Section 35 to strengthen successorship rights to prevent subverting collective agreement obligations through contract flipping; and Repeal s. 6 of Bill 29-*Health and Social Services Delivery Improvement Act, 2002* and s. 4 and 5 of Bill 94- *Health Sector Partnerships Agreement Act, 2003.*

Replacement Workers

10. Protecting workers' Charter-protected collective bargaining rights, including the right to withdraw their labour by re-committing to British Columbia's laudable ban on replacement workers. s. 68.

Essential Services

11. Restore Charter-protected collective bargaining rights to teachers by removing education as an essential service. s. 72.

Variations of Certifications

12. Correct issues with partial decertification applications by extending the rules and timelines for full certifications to this type of application s. 142.

Background

In 2015, the Supreme Court of Canada released a landmark trilogy of cases which clarified the character and scope of a number of important union rights (*Saskatchewan Federation of Labour v. Saskatchewan, Mounted Police Association of Ontario v. Canada, and Meredith v. Canada*) (known as "The New Labour Trinity"). These cases together extend *Canadian Charter of Rights and Freedoms* protection to common labour activities such as the right to choose a union, the right to bargain collectively, and the right to strike.

In British Columbia, these rights are regulated by the *BC Labour Relations Code* ("the Code"), which is administered largely by the Labour Relations Board. One of the chief purposes of the Code in our view, and of the board's role in overseeing union-employer relations in British Columbia, is to ensure labour peace in the province. This peace is the result of an historic compromise whereby union workers and employers in the province agreed to be ruled by the board in exchange for union recognition, stability for viable businesses, and the timely resolution of disputes.

For the last 16 years however, the BC Liberal government has employed a number of tactics to disrupt the fine balance upon which the compromise, and labour peace in the province, are predicated. A series of legislative changes shifted the playing field in favour of employers and business interests, resulting in hardship and instability for workers in a number of sectors. The Code was not reviewed to recognize workers' distinct Charter rights during that time, even while aspects of Bills 27, 28 and 29 restricting union rights were struck down by the Supreme Court of Canada.

Any changes to the Code must be made in a fashion that is mindful both of the nature of the

historic compromise embodied by the Code and the labour relations regime it creates; and of the newly-recognized Charter rights of working people to choose a union, to bargain collectively, and if bargaining fails, to strike.

Our position

The BC Federation of Labour is calling for a number of changes to the *Labour Relations Code* which will put workers back on a more even footing with their employers. These include:

- meaningful remedies for unfair labour practice;
- improvements to the regulation of workers' right to choose to join a union (including the repeal of employer speech provisions and automatic certification);
- faster timelines when a vote must be conducted by the board;
- stronger successorship language to prevent contract flipping being used to reduce union representation and to drive down wages in some of British Columbia's key sectors;
- a continued ban on replacement workers during labour disputes;
- meaningful bargaining rights for teachers; and
- fairness during partial decertifications.

The success of these changes will of course rely on sufficient funding for the labour relations regime which is regulated by the Code, so that workers can be confident that their Charter rights will not be infringed through deliberate underfunding. The Federation will also look for more consistent and transparent enforcement of existing worker rights, and will support the ongoing work of the Section 3 Review committee.

Recommendations

General - Ongoing review (s. 3)

The BC Federation of Labour is please to participate in this review of the *Labour Relations Code*, the first review since 2003. For the last 15 years, the BC government has not had the benefit of our direct expert experience in labour relations matters. This approach ignored the spirit of labour relations in British Columbia, which is one of ongoing dialogue and compromise in good faith. BC Liberal changes to the Code tilted the playing field away from one where working people could choose to join a union, to bargain and to exert their combined economic power, without undue employer interference. Given the recently clarified Charter character of these rights, these kinds of

changes cannot be made based on political whim. We would feel most comfortable that an expert panel continue to evaluate the Code and the regime it creates and we recommend the Section 3 Review Committee continue to be seized of the question of labour relations improvement on an ongoing basis.

General - Proper funding

Sixteen years of underfunding have reduced the capacity of the board to deliver the certainty upon which the parties are entitled to rely, and upon which British Columbia's labour peace rests. This raises a significant access to justice issue. In our experience, the Charter rights of BC workers to choose a union has been impaired by chronic underfunding of the Labour Relations Board, and for Industrial Relations Officers charged with conducting certification votes. Our affiliates report mail-in ballots being used instead of in-person votes, purely for budgetary reasons, or due to understaffing. As then-Chair Mullin wisely stated in *Norbord*, "An expeditious vote in a certification application helps to ensure employees are able to express their wishes freely. It is generally accepted that delay between the date of application and the date of a vote can impede the ability of employees to exercise their fundamental right to choose. Similarly, worksite disruption, tension, and the potential for unlawful interference can be prolonged by several weeks or more where a ballot is conducted by mail" (at para 27). Adequate funding is essential to protecting workers' Charter right to organize.

General - Timely decisions (ss. 91, 128, 159.1)

Our affiliates also report unacceptable delays when awaiting arbitrators' decisions on often critical workplace matters. An arbitrator's decision can have significant impact on a worker's situation, and the absence of timelines for arbitrators leads to an access-to-justice concern. We recommend applying the timelines set out in the Code for decisions from vice-chairs to apply equally to decisions given by arbitrators.

Unfair Labour Practices and Remedial Certification (s. 14)

We recommend that the board be able to offer a meaningful remedy to workers seeking to join a union when employers unduly interfere with their choice. When employees are affected by an unfair labour practice, a vote would be unlikely to disclose their true wishes. Unfair labour practices, and the conditions leading to them, have a chilling effect on workers in the context of their choice to join a union. Given that the right to choose a union is a Charter-protected right to

associate, we submit that remedial certification is the most meaningful way to make these workers whole in the face of unfair labour practice whereby the employer seeks to interfere.

Acquisition of Bargaining Rights- Employer speech (s. 8).

One of the more egregious BC Liberal changes to BC's labour regime was to grant employers the unfettered ability to dissuade workers from improving their wages and working conditions by joining a union. This advantage was extended to employers, but not to unions. The changes in Section 8 gave government sanction to the employer's right to infringe a worker's Charter right to associate through captive audience meetings, and constant anti-union messaging in the workplace. The same sanction to these tactics was not extended to unions. The concept of employer speech is incompatible with the principles articulated in the recent Supreme Court decisions. The only way to safeguard the rights of union workers to choose to organize, and to choose between unions is to repeal the current Section 8 of the Code. We recommend restoring the language that existed from 1992-2002.

Acquisition of Bargaining Rights- Open (raiding) period (s. 19).

As we have said, the right to choose to join a union, or to choose between unions, is a Charter right belonging to workers. However, the last several years have seen a significant amount of raiding activity in BC. We lament the increase of this kind of unproductive and divisive activity, and we share the board's recognition that raids are divisive to employers, unions and employees. There have been, and will be, instances when members of certain organizations may not agree that their bargaining agent is sufficiently free from the influence of an employer. They may feel that they are represented by bargaining agents which lack sufficient democratic traditions, or which are of an unduly sectarian character. Workers in this situation may not be able to ascertain when the anniversary of the collective agreement falls in the calendar year, because of a lack of transparency from their bargaining agent. This impairs their ability to choose another union under Section 19 of the Code which states that this period of choice (the "open period"') shall fall in the 7th and 8th months of the collective agreement. We recommend that the open period set out in Section 19 be reset to a regular place in the calendar year to give working people some certainty of when the open period will fall.

Acquisition of Bargaining Rights – Membership cards (s. 24)

The BC Liberal government altered the Code to require working people to choose a union twice: first, by signing a membership card with a certified bargaining agent; and secondly, with mandatory certification votes held some time later. This change represented a departure from the Canadian tradition and imported a process more familiar to American labour relations. As a result, the rate of unfair labour practices increased dramatically, and the rate of certification fell by approximately 50%1. In our experience, the requirement for a certification to confirm a worker's choice to join a union--essentially a second vote--granted employers a de facto campaign period during which to oppose unionization. A 1992 report of special advisers to BC's then labour minister noted with disapproval that "secret ballot votes and their concomitant representation campaigns invite an unacceptable level of unlawful employer interference in the certification system"2. This, coupled with the employer speech provisions discussed earlier, led to an astronomical increase in unfair labour practices associated with union organizing drives. Workers seeking to join a union were unclear about what signing a union card actually meant. The rate of unionization in British Columbia plummeted. We submit that the right to associate belongs to the worker; and employers ought not be given a special opportunity to infringe upon this Charter right. Further, the choice of a union is the result of a dialogue between workers and a trade union, and ought not be unduly fettered by the requirement that workers confirm their initial decision to sign a membership card by also participating in a certification vote. We recommend to the committee that we restore a system of union certification on the basis of membership cards alone.

Acquisition of Bargaining Rights- Threshold for certification and faster vote (s. 24)

The BC Federation of Labour concedes that some issues will require a vote of workers in order to confirm a certification. This will arise when the number of memberships fails to surpass an application threshold. The general average in common law jurisdictions is 50%+1, even in those jurisdictions that have automatic certification. We recommend 50%+1 as an appropriate threshold for automatic certification. In the case when this threshold is not met, we recommend a reduction in the prescribed time to conduct a vote from within ten days currently set out in the Code to not more than two working days. Following *Norbord*, we insist that this vote should be conducted in

[1] 1992 Code review report, p 6 "Since the introduction of secret ballot votes in 1984, the rate of employer unfair labour practices has increased by more than 100%" (1992 report p 26).
[2] 1992 report, p 26.

person unless mutually agreed to by all parties. We note the rise in mail-in ballots that took place under the BC Liberal government. This method of voting adds additional delay and increases the margin of error and fraud, and was clearly being used as a cost-containment measure due to lack of appropriate human resources to fairly administer the Code. We would welcome changes that allow this vote to take place at a location convenient to the workers away from the employer's premise, including any government office.

Successorship Rights (s. 35, Bill 29, and Bill 94)

Successorship can be understood as the principle that workers' rights and benefits that come from their union membership and their collective bargaining agreement are not lost as a result of business operation changes. Successorship laws are meant to provide job security and make sure that employers cannot undermine the efforts of workers to organize and bargain collectively simply by selling off all or parts of their business.

Successorship provisions of the *BC Labour Relations Code* stipulate that if a business or part of it is sold, leased, or transferred, the new owner is bound by any collective agreement in force at that business on the date of sale. Wages, benefits, and rights contained within the collective agreement apply to the new employer and bind them to the same extent as if they had signed the original agreement with the employees and their union. They are considered the "successor" employer.

However, the BC Liberals took further steps to limit successorship in health care by passing Bills 29 and 94, which limit the application of Section 35 of the Code. These laws have allowed employers to evade collective bargaining responsibilities and terminate employees in a manner which undermines the intent of successorship protection in the first place. Current successorship legislation does not apply to contracting out or to contract flipping, and is silent with respect to changes in private service providers. As a result, legally obtained certifications and freely negotiated collective agreement rights simply disappear as a result of a business decision to contract out. This has become a feature of work in British Columbia for many health care, utility, food service and construction workers.

The application of Section 35 of the Code is limited in the health sector by the *Health and Social Services Delivery Improvement Act* (Bill 29) and the *Health Sector Partnership Agreement Act* (Bill 94). Bill 29 prevents Section 35 of the Code from applying to an entity that contracts with a health sector employer. This means that a person who contracts with a health sector employer cannot be

determined to be the successor of that employer.

Bill 94 extends that protection against a finding of successorship to designated private sector partners. This means that an entity that contracts with a private employer who is in a P3 (Public Private Partnership) arrangement with a health sector employer cannot be determined to be the successor of that private employer.

As a result of these changes, we have seen a reduction in wages and working conditions for workers in these sectors, and a loss of industrial stability across the sectors because of the high turnover this produces. The advantages of this system go entirely to employers, while workers see their Charter rights to organize to improve their working conditions eroded by the architecture of the Code. The absence of successorship provisions in the Code encourages employers to exploit these conditions, resulting in greater insecurity for workers and the services they deliver to BC's public.

In order to level the playing field, the BC Federation of Labour recommends that the application of Section 35 be broadened to prevent subverting collective agreements through contract flipping. A functional regime will also require the repeal of the statutory successorship exemptions in health care; specifically, a repeal of Sections 6 of Bill 29-*Health and Social Services Delivery Improvement Act* and of Sections 4 and 5 of Bill 94- *Health Sector Partnerships Agreement Act.*

Replacement Workers (aka Scabs) (s. 68)

A mature system of collaborative labour relations involves concerted collective bargaining in good faith. Should the parties reach an impasse, they then seek to increase their bargaining power by exerting economic pressure either by withdrawing their labour, or by locking out their workers, as regulated by the Code and the board. In other jurisdictions, the power of one party is unfairly undermined by allowing employers to hire replacement workers to do bargaining unit work. British Columbia should be proud of its continued ban on replacement workers. The BC Federation of Labour recommends no change to this section of the Code, and respectfully submits that any amendment would run counter to the good faith spirit of labour relations and would threaten British Columbia's economic stability and labour peace.

Essential Services (s. 72)

The BC Federation of Labour does not take issue with a system which determines that some services are so essential to the preservation of life that workers in these areas are not able to

withdraw their services when collective bargaining between evenly matched parties reaches an impasse. Our affiliates participate willingly in making essential services decisions, often erring on the side of undue designations in the name of expedience. We do, however, take issue with the historical abuse of the essential services designation in British Columbia, which at times designated teaching assistants, and K-12 teachers to be essential.

In light of this, and recent jurisprudence from the Supreme Court of Canada condemning the BC Liberal infringement of the Charter-protected collective bargaining rights of classroom teachers, we recommend that education be removed as an essential service, and that the committee recommend a tightly restricted use of essential services designations outside of the health care sector.

Variations of Certification- Partial decertification applications (s. 142)

The BC Federation of Labour's affiliates are for the most part satisfied with the rules and timelines in place for dealing with certain employees' applications to decertify bargaining units. While we feel this type of application is more often than not brought forward or funded by employers, each case should be decided on its merits before a vice-chair of the board. Our affiliates have raised concerns for many years about the process for partial decertification applications conducted under Section 142, when certain employees seek to have an existing certification altered to exclude some, but not all union members.

Matters conducted in this way are not expedited in the same manner as full decertifications, and the rules for such applications are opaque. We recommend that the Code be amended to prevent applications for partial decertifications from being entertained by the board. In the alternative, we ask that such matters be resolved using the same rules provided for in Division 2 of the Code.

Conclusion

Our *Labour Relations Code* sets the framework for a complex and discrete administrative regime. This system is predicated on an historical compromise between workers and employers made in good faith. For the last 16 years, the ability of the working people to participate fully and to productively resolve disputes has been impaired because the employers have been given an unfair advantage. The BC Federation of Labour is hopeful the committee will recommend to the BC NDP government a series of *Labour Relations Code* changes that will level the playing field, and which

will properly protect the Charter rights of working people to choose to join a union, to bargain collectively, and--when necessary for the expeditious resolution of disputes--to strike.

Due to page limits we have not appended draft wording for our recommendations, but if we can be of assistance to the committee in this regard, we would be happy to oblige.

All of which is respectfully submitted.

LEGISLATION

Canadian Charter of Rights and Freedoms, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c. 11.

Bill 29, *Health and Social Services Delivery Improvement Act,* SBC 2002 c. 2.

Bill 94, *Health Sector Partnerships Agreement Act,* SBC 2003 c. 93.

Labour Relations Code RSBC 1996 c. 244.

JURISPRUDENCE

Meredith v. Canada (Attorney General), 2015 SCC 2.

Mounted Police Association of Ontario v. Canada (A.G.), 2015 SCC 1.

Norbord Inc. v United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, Local Union Number 1-425, 2016 CanLII 23791 (BC LRB), Retrieved from: <http://canlii.ca/t/gpqtl>.

Saskatchewan Federation of Labour v. Saskatchewan, 2015 SCC 4.

REPORTS

Restoring Fairness and Balance in Labour Relations: The BC Liberals' Attacks on Unions and Workers 2001-2016*. MacTavish J, and Buchanan C.* Retrieved from: http://bcfed.ca/sites/default/files/attachments/lrb%20paper.pdf

Recommendations for Labour Law Reform: A Report to the Honourable Moe Sihota Minister of Labour. John Baigent, Vince Ready, Tom Roper (Sub-committee of Special Advisers). September 1992.

Managing Change in Labour Relations - The Final Report prepared for the Minister of Labour, Government of British Columbia. Labour Relations Code Review Committee (Section 3 Committee). February 25, 1998.

March 20, 2018

VIA EMAIL: ***LRCReview@gov.bc.ca***

Labour Relations Code Review Panel

Panel Members:
Barry Dong
Michael Fleming
Sandra Banister, Q.C.

Dear Panel Members

Re B.C. *Labour Relations Code* Review

On February 6, 2018, the Minister of Labour appointed a three-member panel as a Labour Relations Code Review Panel (the "Panel") under Section 3 of the *Labour Relations Code* (the "*Code*"), with a broad mandate to review the *Code*.

In response to the Panel's invitation for input from stakeholders, the BCGEU makes the following submission.

I. INTRODUCTION

The BCGEU is uniquely situated to provide input on this issue. Our union is incredibly diverse, encompassing a broad spectrum of interests and perspectives. The BCGEU represents approximately 75,000 workers in various sectors and occupations in more than 550 bargaining units throughout British Columbia.

Our membership includes direct government employees who protect children and families, provide income assistance to vulnerable individuals, fight forest fires, protect the environment, manage our natural resources, deliver care to people with mental health issues and addictions, administer B.C.'s public system of liquor control, licensing and distribution, staff correctional facilities and the courts, and provide technical, administrative and clerical services.

Our membership also comprises workers throughout the broader public and private sectors where members provide clinical care and home support services for seniors, a diverse range of community social services, highway and bridge maintenance, post-secondary instruction and administration, as well as other non-governmental industries, including financial services, hospitality, retail and gaming.

Many of the sectors in which the BCGEU is a bargaining agent are the subject of essential services designation under the *Code*.

The BCGEU is also the most active union is B.C. in terms of organizing non-union employees. We have a separate organizing department and frequently appear at the Labour Relations Board (the "Board") on organizing matters. As a result, we have special insight into the certification, unfair labour practice, collective bargaining and strike and lockout provisions of the *Co*de.

Based on this significant knowledge and experience, and after careful consideration, we have identified several potential changes to the *Code* to properly reflect the needs and interests of workers in the modern economy.

To that end, the BCGEU's submission revolves around three general themes:

1. Workers are entitled to make internal decisions without outside pressure

Employers would never accept interference by workers in internal day-to-day business decisions. Virtually every collective agreement includes a management rights clause to protect the employer's ability to make its own managerial decisions unfettered by the union and workers. In the same vein, the BCGEU submits that workers should be left to make their own internal decision to unionize without employer pressure.

2. *Workers and employers are entitled to fairness, timeliness and finality*

Workplace justice is not served by pendulum swings in law and policy, the increasing centralization of authority in the Chair of the Board, or by delay and procedural wrangling.

3. The Code must be responsive to erosion of workers' rights in the modern economy

The modern economy has seen a significant change in employer-employee relationships. Part-time and precarious work has increased appreciably. The rising use of contract-flipping, subcontracting, outsourcing and other forms of business reorganization, has resulted in workers losing hard-won labour rights. The *Code* should be revised to stem the tide of workers being left behind by the modern economy.

II. SUMMARY OF THE BCGEU'S RECOMMENDATIONS

The BCGEU proposes the following changes to the *Cod*e:

1. In cases where 60 per cent of workers have already voted to unionize, by signing their names to membership cards, the bargaining unit should be certified. Workers should only be required to vote once.

2. Representation votes should occur not later than three days following the certification application. Mail-in votes should be limited to cases where all parties consent.

3. Representation votes should be respected as internal worker votes. Employers should not be entitled to attend unless invited.

4. Employer communications during certification and decertification campaigns and labour

disputes should be limited to those that serve a legitimate business purpose. Workers should be able to have their own internal discussions free of employer pressure.

5. Employers should be prohibited from changing the terms and conditions of employment after certification until a first collective agreement is reached.

6. The destabilizing effect of partial decertification should be ended and brought in line with the rest of Canada.

7. The introduction of truly expedited arbitration. Arbitrators appointed under s. 104 should be required to issue a decision within six months of appointment.

8. More flexibility in the *Code* to protect workers' rights in the modern economy, including the introduction of multi-employer sectoral certification; provisions to encourage organizing in traditionally difficult-to-organize sectors; and stronger and more expansive successorship, common employer and true employer provisions—particularly to address the loss of unionization as a result of contracting, subcontracting, outsourcing and contract flipping.

9. All references in the *Code* to "proper cause" should be replaced with "just and reasonable cause." Vulnerable workers, including those who have recently unionized but not yet reached a first collective agreement, should not receive less job security than other unionized workers, and less legal protection than even non-union workers.

10. The picketing restrictions at s. 65 of the *Code* should be repealed in order to align the *Code* with ss. 2(b) and 2(d) of the *Charter*.

11. The s. 141 reconsideration power should be limited to narrow circumstances, such as breaches of natural justice.

12. The reintroduction of member appointees (i.e., "wingers") representing union and employer communities to hearing panels.

13. The Chair of the Board should be limited to a single five-year term.

14. A commitment to a well-funded Board with sufficient resources.

15. The BCGEU has also been afforded the opportunity to review the submissions of the BC Federation of Labour, the BC Teachers' Federation and the Canadian Union of Public Employees. We fully endorse the proposals set out in these submissions, without reservation.

III. ORGANIZING AND CERTIFICATION

Membership card-based certification: Workers should only be required to vote once (s.24)

Make no mistake—when workers complete a union membership card, they are engaging in an internal vote to unionize their workplace. These are not simply "membership" cards, but an express demand to have the union act as exclusive bargaining agent. Every union card is required in law to include the following passage:

> In applying for a membership, I understand that the union intends to apply to be certified as my exclusive bargaining agent and to represent me in collective bargaining.

Membership cards are rigorously reviewed by officers of the Employment Standards Branch and Labour Relations Board for veracity and clarity.

Unions applying to certify workplaces are required to have workers vote once, by submitting recently signed cards representing a substantial portion of the workforce and, after 10 days, the workforce is required to undergo a "second vote" in a ballot attended by the employer.

A common refrain from the employer is that the second vote by secret ballot protects workers who have been intimidated into signing membership cards. This is an entirely evidence-bereft assertion. A simple review of Board decisions makes it clear that this is a myth. Workers who bring unfair labour practice complaints against their employer risk antagonizing an entity that has tremendous power over them. In contrast, workers who bring unfair labour practice complaints against unions do so with little or no risk. Yet the number of such complaints are few and far between, with virtually none being found by the Board to have merit.

There is only one reason right-wing governments introduce the second vote: to allow employers to pressure workers to vote against unionization. In some cases, this pressure is overt and heavy-handed—enough to establish an unfair labour practice. However, in other cases, such pressure is simply a manifestation of the imbalance in power between employers and workers. The very presence of employers at the second vote is a form of pressure.

The BCGEU proposes that, in cases where 60 per cent of workers have already voted to unionize by signing their names to membership cards, the bargaining unit should be certified. These workers should not be required to vote again under employer pressure.

Employee lists determined by payroll audit

Payroll audits of employer-provided employee lists should be conducted by Industrial Relations Officers (IROs) as a matter of course. This will help ensure the accuracy of the tentative voters list in representation votes. It will also assist in reducing disputes, and thus submissions/hearings, regarding the composition of the voters list.

Timely in-person representation votes and restrictions on mail-in votes (s. 24)

Representation votes have been structured to allow employers to exert maximum pressure on workers. Despite the *Code* requiring votes "within 10 days" of the certification application, the actual votes have almost all been held on the 10th day, not earlier. The Board's policy has essentially been to allow employers the maximum number of days available to pressure workers. The Board has also increased the number of mail-in ballots in recent years, essentially providing employers with a month or more to exert pressure on workers.

The BCGEU proposes that representation votes, where required, should be mandated by the *Code* to occur within three days of the certification or variance application. The BCGEU further proposes the elimination of the use of mail-in ballots except where all parties consent.

Representation votes should be respected as internal worker votes (s. 24)

Typically, representation votes are held in the worksite with the union and employer attending. It makes perfect sense for the vote to be held at that location: higher turnout is likely when workers do not have to travel a far distance to cast their ballot. A robust turnout is in all parties' interest.

The long-accepted presence of employers at representation votes is an entirely different issue. There is simply no reason for an employer to be able to attend such internal votes. All that is accomplished is workers—often underpaid, vulnerable persons—are subjected to the inherently intimidating gaze of the boss.

The expected reason given for this practice is to allow the employer and union to challenge ballots cast by persons whose eligibility is in dispute. However, such challenges are easily cast in advance by direction to the IRO conducting the vote to segregate ballots cast by persons not on the voters list. The employer could easily advise the IRO in advance of any voters on the list to whom they object.

The BCGEU proposes that s. 24 be amended to ensure only workers, the union and the IRO conducting the vote may attend representation votes (unless the union consents to the employer's presence).

An end to employer pressure under the cloak of "free speech" (s. 8)

For the first three decades of the *Code*, internal worker discussions about matters such as unionization, bargaining, grievances, job action were just that—internal worker discussions. During much of this period, employers were expected to have no role at all in these internal worker discussions. The earlier 1990s version of the *Code* still permitted employers to communicate to workers "a statement of fact or opinion reasonably held **with respect to the employer's business**" (emphasis added). Employers were not deprived of free speech. They were simply restricted to their own affairs.

In 2002, the BC Liberals significantly revised s. 8 under the guise of encouraging "free expression." This provision simply allowed the party with the loudest megaphone to use it in a manner that no employer would ever accept from a group of workers. Employers are no longer restricted to actual facts or opining about their own affairs. During certification campaigns this has allowed employers to subject employees to all manner of American-style anti-union propaganda and "alternative facts."

The BCGEU proposes that Section 8 of the *Code* be deleted in order to allow workers to have their own internal discussions free of employer pressure. The BCGEU further proposes that during certification and decertification campaigns as well as during labour disputes, that employers be restricted to communications that serve a legitimate purpose.

Extend the statutory freeze post-certification until a collective agreement is concluded (s. 45)

Section 45 of the *Code* prohibits an employer from changing the terms and conditions of employment after certification for four months. This prohibition is an essential component of labour relations. It prevents employers from taking advantage of the power imbalance between employers and workers during the vulnerable period of bargaining for a first collective agreement.

However, the laudable purpose of the statutory freeze is often entirely undone by the arbitrary four-month limit on s. 45. There is no evidence to support this time limit. A removal of the time limit would encourage employers to make efforts to quickly reach a collective agreement.

The BCGEU proposes s. 45 of the *Code* be amended to have the statutory freeze apply until a first collective agreement is reached.

Eliminate partial decertification (s. 142)

Once a bargaining unit is certified, it operates as a single coherent entity. Decisions around bargaining, job action and grievances are made on a bargaining unit basis.

The exception is decertification. Under s. 142 of the *Code*, a disaffected part of the bargaining unit may apply to leave, notwithstanding the impact on the bargaining unit as a whole. The decision to allow a partial decertification is up to the Board's discretion, applying a vague ill-defined legal test. What often ensues are lengthy and expensive legal proceedings attributable to the existence of a disaffected sliver of the bargaining unit. In many cases, the group of employees seeking to destabilize the bargaining unit are mysteriously able to retain expensive law firms.

The common response to the problem of partial decertification is that unions are entitled to building bargaining units on a piece by piece basis (the "building block" approach), so it is only fair that bargaining units may be decertified on the same piecemeal basis. This position misses two key points: first, the building block approach is essentially forced on the union by the Board's preference for larger bargaining units; and second, to the best of the BCGEU's knowledge, British Columbia is one of the few (if not the only) jurisdictions to permit partial decertification.

The BCGEU proposes that the *Code* be amended to remove the jurisdiction of the Board to order partial decertification.

IV. TIMELY AND FAIR WORKPLACE JUSTICE ATTUNED TO THE MODERN ECONOMY

True expedited arbitration

One of the underlying bases of Canadian labour relations is speedy workplace justice.

Workers give up the only leverage available to them—mid-contract withdrawal of labour—in exchange for a speedy grievance arbitration system.

Workers are not the only beneficiaries of this this trade-off. Employers are saved the time and expense of the courts in resolving disputes.

This is also the premise of the Board's policy of deferring disputes, wherever possible, to grievance arbitration.

The past decade has seen the arbitration system degenerate into a slow crawl, beset by procedural and scheduling delays. Arbitration hearings are routinely scheduled months, if not years, in advance. Arbitrators' awards are often delivered after a comparable period has passed. Such delays are not limited to weighty legal disputes, but relatively straightforward terminations, which routinely see workers jobless for extended periods of time before their rights are determined.

In contrast, all Board matters, including weighty policy disputes, are required by regulation to be decided within six months.

The *Code*'s deeply flawed s. 104 expedited arbitration process does nothing to repair this broken arbitration system. This provision requires that the arbitration hearing commence within 28 days of the grievance being filed under s. 104, and that an arbitration award be issued within 21 days after the conclusion of the hearing.

Unfortunately, s. 104 is routinely "gamed" by lawyers and arbitrators. The "hearing" commences by conference call with the arbitrator to schedule the actual hearing. A decision rendered within 21 days of the conclusion of the hearing is cold comfort when the grievance is a year old.

The BCGEU proposes s. 104 be amended by requiring a final decision be issued within six months of the appointment of the arbitrator. Any extensions would be granted by the Chair of the Board and only in exceptional circumstances.

Protecting workers in the modern economy

Since the last *Code* review, the modern economy has changed appreciably. Work is more precarious, including part-time, contract and contingent employment, and workers are left more vulnerable. Migrant workers, particularly in caregiver occupations, are left isolated, vulnerable and with little hope of unionization. The employer-employee relationship has changed appreciably as the private and public sectors see more and more contracting, subcontracting, outsourcing, contract flipping and other forms of corporate reorganization. The Supreme Court of Canada recently recognized these changes in *British Columbia Human Rights Tribunal v. Schrenk*, 2017 SCC 62.

The familiar refrain when issues around the modern economy arise is "flexibility." Too often this term acts as a justification for eroding workers' rights. The BCGEU submits that the *Code* should be amended to allow the Board more flexibility to *protect* workers' rights, including:

- the introduction of multi-employer sectoral certification;
- the renewal of the long-dormant principles promoting organizing in traditionally difficult-to-organize sectors; and
- stronger and more expansive successorship, common employer and true employer provisions, particularly to address the loss of unionization as a result of contracting, subcontracting, outsourcing and contract flipping.

Replacing "proper cause" with "just and reasonable cause"

In general, non-union workers may have their employment terminated with just cause or reasonable notice. Over time, the standard for just cause has heightened such that it is rarely relied upon. It is generally easier for employers to negotiate an amount representing reasonable notice.

Unionized workers covered by a collective agreement may not be terminated or disciplined without just and reasonable cause. This is one of the most important rights secured by the union movement. It is a principle enshrined in the *Code*—all collective agreements are deemed to include this provision (s. 84).

It is only those highly vulnerable workers who have unionized, but not yet reached a first collective agreement, who are subjected to a lower standard for discipline and discharge. Such workers may be

terminated for "proper cause," a lesser threshold that essentially requires the employer to show it acted reasonably. The same workers are also left without the right to reasonable notice as provided to non-union workers. It is profoundly unfair for workers who have taken the risk of unionizing but have not secured a collective agreement to be more vulnerable than non-union workers.

The BCGEU proposes that the *Code* be amended to replace all references to "proper cause" with "just and reasonable cause."

V. PICKETING

In *R.W.D.S.U., Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd.* [2002] 1 S.C.R. 156 [*Pepsi*], at para. 32, the Supreme Court of Canada held that "Picketing, however defined, always involves expressive action. As such, it engages one of the highest constitutional values: freedom of expression, enshrined in s. 2(*b*) of the *Charter of Rights and Freedoms*. The Supreme Court of Canada went on to note that "free expression is particularly critical in the labour context" (para. 33). The Court specifically found that picketing is not only an expressive activity, but high value speech.

In *Pepsi*, the Supreme Court of Canada specifically found a blanket ban on "secondary picketing" (i.e., picketing at sites other than the struck or locked out worksite) to be contrary to the *Charter* value of freedom of expression. Put another way, a prohibition on expression based solely on location of that expression is unconstitutional.

Section 65 of the *Code* bans virtually all secondary picketing, contrary to the ss. 2(b) and 2(d) *Charter* rights to freedom of expression and freedom of association. The *Code* treats picketing like no other form of speech, banning it on the basis of location. For example, ss. 65(3) and (8) of the *Code* prohibit unionized workers from engaging in expressive activity, specifically picketing speech, at separate operations of *the struck or locking out employer*. The purpose of this ban is to artificially hamper workers' ability to fully attack the entire economic strength of a typically deeper-pocketed employer.

These restrictions on picketing are particularly onerous in the modern economy. As employers have further reorganized their operations (through contracting, subcontracting, contract flipping, outsourcing and other forms of corporate reorganization), the path available to workers to engage in job action has narrowed greatly.

The BCGEU proposes the repeal of s. 65 of the *Code* in order to align the *Code* with ss. 2(b) and 2(d) of the *Charter*.

VI. AN END TO THE OVERWHELMING CENTRALIZATION OF POWER IN THE CHAIR

Limiting the reconsideration power

To the best of the BCGEU's knowledge, British Columbia is the only province where Board decisions are internally appealed to a "reconsideration panel" with seemingly unlimited authority to overturn decisions.

In the first several decades of the Board, the reconsideration panel was not necessarily the Chair. However, in recent years the previous Chair is always on the reconsideration panel. The method of selecting the two other members of the reconsideration panel is something of a "black box," presumably left to the discretion of the Chair.

In some recent years, close to one-third of reconsideration applications have been successful. There is no clear standard of review—at times it appears to boil down to the whim of the Chair and who they pre-select to serve on the reconsideration panel.

The result is a profound centralization of power in the hands of the Chair to single-handedly control the law and policy of the Board. This centralization is further exacerbated by the fact that the Chair has significant (if not determinative) input in recommending reappointment of Vice-Chairs. These are not circumstances conducive to independent decision-making by Vice-Chairs.

The extraordinary scope of the reconsideration power has expanded to the point of being entirely contrary to the concept of independent decision-making. It is also inconsistent with the actual language of the *Code*. Both the s. 99 power of the Board to review arbitration awards and the s. 141 reconsideration power only permit the panel to disturb the decision under appeal where it "is inconsistent with the principles expressed or implied in this *Code* or another *Act* dealing with labour relations." Under s. 99 this has quite sensibly resulted tremendous deference to arbitrator's award. In sharp contrast, the same language in s. 141 has produced a seemingly limitless power to overturn original decisions of the Board.

Limiting reconsideration to narrow circumstances, or eliminating it altogether would provide certainty, finality and independent decision-making.

The BCGEU disputes any notion that such a move would limit the Board's ability to ensure consistent, predictable labour policy. First, the current regime has hardly provided coherence and predictability given the prevalence of reconsideration decisions overturning or significantly altering original decisions. In most cases, the law and policy are no clearer than they were before countless reconsiderations (e.g., partial decertification).

Second, the easy fix is bringing back "members" or "wingers" for policy-related decisions, or allowing parties to apply to the Registrar to have policy-related applications or other matters heard by a three-member panel.

The BCGEU proposes limiting the s. 141 reconsideration power to narrow circumstances, such as breaches of natural justice.

The Chair of the Board should be term-limited

Until 2002, the Chair was a positon that was often renewed and refreshed. To the best of our knowledge, no Chair served more than a single term.

The most recent Chair of the Board was appointed for approximately 15 years. This is not healthy for labour relations in British Columbia, or the Board.

The BCGEU proposes limiting the position of Chair to no more than a single five-year term.

VII. FUNDING

The BCGEU is mindful that the Panel's mandate is to review the *Code*. However, we would be remiss if we did not address the most pressing requirement to give effect to the purposes and objects of the *Code*—a well-funded Board with sufficient resources.

The financial starvation of the Board has deprived workers (and employers) of labour justice in numerous ways. Industrial Relations Officers are rarely, if ever, available to conduct investigations of voter lists or unfair labour practices, meaning that the parties are left to fight these issues in hearings, at great expense.

The growing practice of ordering mail-in ballots because of a lack of Board resources not only provides employers with more time to pressure workers, but also results in tremendous delay and uncertainty for workers, unions *and* employers.

As alluded to above, prior to 2002, it was common to have hearings heard by not only Vice-Chairs, but also members representing the union and employer communities. Such three-member panels promoted consistency of Board policy, ensured a broad range of perspectives in important decisions, and likely avoided unnecessary reconsideration applications.

The benefits of a well-funded Board are not only visited upon unions and employers. Until the extreme budget cuts by the previous government, the Board was equipped with a well-stocked library for members of the public to access and learn about their labour rights. This has disappeared and been replaced with a bare-bones website.

VIII. CONCLUSION

The BCGEU welcomes the provincial government's decision to review the provincial labour code and we thank the Panel for hearing our submission.

This review is a good first step in the process of restoring fairness to both the B.C. *Labour Relations Code* and the BC Labour Relations Board. We hope to see the B.C. *Labour Relations Code* amended to ensure balance and fairness for workers in B.C.

The BCGEU would be happy to provide elaboration or clarification on our submission at the Panel's convenience.

Yours sincerely

Stephanie Smith

Stephanie Smith
President

SS/SK/sg
MoveUP

Improving Seniors Health Care in Residential Care

Through Improvements to the Labour Code

- Presented by Rick Turner, Co-chair BC Health Coalition and Kamloops Health Coalition.

The BC Health Coalition is a network of individuals and organizations with a shared passion for public health care. Our coalition community is comprised of over 800,000 people in B.C. - and growing.

We are young people, seniors, health care workers, faith communities, health policy experts, and people with disabilities.

In sum, we work to continually improve the system we all rely on, and to uphold the values of caring and fairness that our system represents. We believe care should be there for everyone when we need it, regardless of our age, gender, income level, or the town we live in.

We're a non-profit and non-partisan organization.

The BCHC has a small, hard-working staff team, a network of dedicated health care policy experts, and many committees of community representatives who support our work.

The Kamloops Health Coalition is similar to the BC Health Coalition but much smaller in numbers and it is made up of organizations - the Council of Canadians, an HEU local, retired teachers and other citizens in the Kamloops area.

This afternoon I would like to put forward the case that:

The quality of health care for seniors in residential care is directly affected by the right to join a union and successorship rights in the Labour Code.

We would like to see:

- Improved successorship rights for workers: a change in contractors shouldn't mean the worker loses their job or union designation
- Fewer obstacles to joining unions: a simple majority should be enough and the vote should be close to the workplace, in person and in a few days.

Will this result in better health care for seniors? Yes, especially for seniors in residential care.

In an article this January in the Vancouver Sun and on the BC Seniors Advocate website - the Ministry of Health Seniors Advocate, Isobel Mackenzie, drew our attention to the chronic understaffing of seniors in residential care facilities.

She says:

The number of senior-care facilities in B.C. that don't meet Ministry of Health staffing guidelines has increased by 10 per cent over the last year, despite a government-ordered review.

The newly updated Residential Care Facilities Quick Facts Directory, a report that compiles information for all publicly funded seniors facilities in B.C. for 2015-16, has found that a whopping 91 per cent of care homes — 254 out of 280 facilities — failed to meet the Ministry of Health's staffing guideline of 3.36 hours of care per senior every day.

That's up from 82 per cent in last year's report. It confirms that our the staffing crisis is only getting worse.

We cannot solve the staffing crisis in residential care if we don't deal with the ongoing problem of contracting out and contract flipping, which is disrupting care across the province.

Right now, private operators can contract out and flip contracts at will, laying off entire staff teams in the process. *It's a practice that destabilizes the continuity and quality of care seniors receive.*

Stronger successorship rights for workers would help prevent this.

Often times owners layoff unionized workers to increase profits, pay minimum wage and little in the way of benefits. High turnover is the result . HIgh turnover means less experience, less training, and less knowledge of individual client's needs.

5

The BC Ombudsperson, Kim Carter, in her report and recommendations: The Best of Care: Getting It Right for Seniors in British Columbia (Part 2), vol. 2 said:

"Mass replacement of staff can occur when facility operators switch from contracting with one private service provider to another. ***Such turnovers can disrupt the lives of seniors in residential care, especially those residents whose care needs are complex.***

It is my understanding that over the last decade and a half the Hospital Employees Union alone has had to organize and reorganize over 10, 000 workers in BC between contracting out in hospital services and contract flipping in residential care facilities.

Consider this: The operator of your frail, elderly loved one's publicly-funded residential care facility intends to lay off all of the unionized care staff, and contract out their work to a private company. Many of the current staff have cared for your loved one for several years, and have acquired specialized knowledge of her complex needs. The operator of the facility has prepared a Request for Proposals document, to be issued to potential bidders, likely within the next few months. The operator's sole objective is to cut costs.

Research has shown that contracting out is associated with inadequate training for staff and high turnover, which undermine quality of care. Turnover of staff, in particular, has a significant impact on residents. **Research shows that residents have better health outcomes when they are able to form strong, stable connections with staff.**

[Story of frail elder being moved from Ponderosa and her daughter.]

Over time, long-term staff acquire specialized knowledge of these needs, so the simultaneous replacement of many employees can make it difficult for the seniors because continuity of care is disrupted. This is particularly the case for residents with dementia. It can also be stressful to families since they often need to provide extra support to their relatives during such transitions.

Deep in the second volume of the BC Ombudsperson's second report on seniors' care, is an interesting and important discussion about large-scale staff replacements and other substantial changes at residential care facilities.

Large-scale staff replacements have become "a regular recurrence in recent years," "In my opinion," says Jonathan Chapnick, a lawyer and Senior Advisor at UBC in Workplace Mental Health and whose primary area of interest is workplace law and policy related to mental health and substance use issues, "the best way to eliminate the negative effects of mass staff replacements, is to eliminate mass staff replacements. **This could be accomplished in a number of ways, including through legislative or other restrictions on cost-driven contracting out and contract flipping, or by ensuring, preferably through legislation, that existing staff are not impacted by these changes."**

As an individual, quoted in the report, put it:

Staff do not want to work in a facility that has this kind of job uncertainty. … This impacts seniors in terms of the lack of continuity of their care. … There are many examples of significant problems for residents created in circumstances where new staff have no personal connection to the residents, or where new staff are unfamiliar with the needs of residents. … The point is that these problems do not exist in facilities that do not engage in contract flipping.

Committee members, in summary, better language to retain workers and their union status in the Labour Code around the issue of successorship rights will improve the health of seniors in residential care and that of their families.

Making it easier to join a union will also help retain care aides and other workers in seniors' residential care facilities. Unions have long been able to bargain salaries, benefits and other provisions in collective agreements that make the job of any worker more attractive and give the worker more reason to stay in their employment, in this case, as employees in a residential care facility. The longer they stay the more training, experience, and awareness of individual client needs and how to meet them the worker acquires and that results in better care of our seniors who live in these facilities.

Thank you for your time and attention.

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CANADIAN CONSTRUCTION ASSOCIATION / L'ASSOCIATION CANADIENNE DE LA CONSTRUCTION

Business Council of British Columbia

BC CHAMBER OF COMMERCE

BCCSA BC Construction Safety Alliance

March 19, 2018.

WRITTEN SUBMISSIONS OF THE B.C. ROAD BUILDERS & HEAVY CONSTRUCTION ASSOCIATION

The Review Committee's Mandate

On July 18, 2017, Premier Horgan presented a mandate letter to the Minister of Labour, Harry Bains, which, among other things directed that he ensure British Columbians have the same rights and protections enjoyed by other Canadians by reviewing the Labour Relations Code to ensure workplaces support a growing, sustainable economy with fair laws for workers and businesses.

In order to address this mandate, Minister Bains appointed a three member Labour Relations Code review panel, as you are obviously aware. It is important to remember that the appointment of the Review Panel supports commitments made by Government in the 2017 Confidence and Supply Agreement with the B.C. Green caucus. While the Review Panel is intended to be politically unbiased and independent of Government, any legislative changes will ultimately require the support of the B.C. Green caucus. Consequently, no recommendations should be made that will have little opportunity of becoming law.

In establishing the mandate for the Review Committee, the Minister directed that the Panel **must** assess each issue canvassed from the perspective of how "to ensure that workplaces support a growing sustainable economy with fair laws for workers and business" (echoing the Premier's Mandate Letter to the Minister of Labour). However, of note, the Minister has also directed that the Review Committee's recommendations "promote certainty as well as stable and harmonious labour/management relations". Any recommendations regarding amendments to the Labour Relations Code must both better support a growing, sustainable economy and promote stable and harmonious labour relations in the province.

What is apparent from the various documents leading to the establishment of this Review Committee is that the Code must remain a statute that has as its bedrock balance between the interests of unions, employers and employees; and, it must support a sustainable economy. Ideological and partisan swings from right to left (or in this case from the centre to the right or left) are to be rejected.

The B.C. Road Builders & Heavy Construction Association

The B.C. Road Builders & Heavy Construction Association is a non-profit membership organization representing approximately 260 businesses that are involved in asphalt and concrete manufacturing, grading, paving, utility construction, road and bridge building and maintenance, blasting, and the supply of related goods and services to these industries. The Construction Sector of our membership build the infrastructure needed to make the province's economy competitive. The Maintenance Sector members maintain the critical transportation links in the province. Many provide road and bridge maintenance services on a contractual basis with the Ministry of Transportation. The Service and Supply members provide goods and services to the road building and heavy

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construction industry. Members of the B.C. Road Builders & Heavy Construction Association are also members in the Canadian Construction Association.

We represent the employers of thousands of employees who are living and working in every corner of the Province of British Columbia. These employees and employers are responsible for building and maintaining the critical infrastructure and the transportation system that sustains and promotes provincial economic growth. Our members have collective agreements with a variety of trade unions, including the BCGEU, IUOE, CLAC and the Teamsters. Many of our members' employees are not represented by any trade union. Consequently, our voice represents a diversity of interest within the employer community, which places us in a unique position to address the prospect of change to the *Labour Relations Code* (the Code).

The B.C. Road Builders and Heavy Construction Association is deeply committed to ensuring that any legislative changes in the Province that affect our members and their employees are fair, balanced and will ensure that the prosperity of the Province is maintained. Consequently, we are pleased to provide our input to the Review Committee regarding potential changes to the Code.

The Current Labour Relations Code

The starting point for the Review Committee is to recognize and accept that the current Code is a balanced, centrist policy based statute that places in the hands of labour relations experts (the Chair, Associate Chairs and Vice-Chairs) the ability to shape the general principles articulated in the Code, in a manner that meets the changing needs of the world of work and the Provincial economy. Our courts have recognized the policy making role of the Labour Relations Board:

> Under the Code, not only does the Board perform a managing and supervisory function in the context of the highly regulated, complex field of labour relations, but as part of its broad oversight mandate the Board is expressly charged in s. 2 with policy responsibility and development in a polycentric context, a context that demands a delicate balancing between different constituencies with different and competing interests. Through ss. 136-138, and s. 139(1)(q) in particular, the Legislature has recognized that, in discharging its oversight function, the Board is best equipped to resolve ambiguities and fill voids in the legislative language governing replacement workers in a way that makes sense in the factual context, in the context of the Code as a whole, and in the field of labour relations overall in the province.[1]

Since the last major revision to the Code in 1992[2], labour relations in British Columbia has become more stable and predictable than in the years prior to that revision, which were punctuated by labour unrest and disruption of the economy

[1] *Office & Professional Employees' International Union, Local 378 v. The Labour Relations Board of B.C. et al* 2001 BCCA 433

[2] This re-writing of the Code was a necessary response to wide-spread rejection of an ideological legislative swing to the right by the government of Premier Vander Zalm. Following a rebalancing of the Code to a more centrist approach in 1992, modest amendments were made in 2001, 2002 and 2003.

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through protracted labour disputes in the private and the public sector. Legislative stability and predictability regarding the "rules of engagement" are critical to the attraction of capital and investment in an economy. Consequently, in order to "better support a growing, sustainable economy" and to "promote stable and harmonious labour relations" in the Province, the Code, which has been a model for many jurisdictions, should not be drastically altered. While the approach to engagement with business, labour and employees by the Board as an institution over the past number of years was one that was less inclined to be proactive, that was not a function of Code deficiencies that now require adjustment. The appointment of a new Chair, who may bring a different vision to the role of the Labour Relations Board as a more outward looking institution may well result in more engagement with those affected most by the Code than in the past. As a policy board, comprised of labour relations experts, the Labour Relations Board is well situated to consider the Code's objectives in furtherance of the duties set out in Section 2 of the Code, which in many ways parallel the Minister's mandate to the Review Committee. Few would say that the Code suffers from deficiencies that inhibit the Labour Relations Board from carrying out its important functions.

Indeed, if the Review Committee does feel that significant changes to the Code are necessary, before it reports out with recommendations to the Minister, it should provide the participants who have made submissions to this review process an opportunity to comment on the potential recommendations. Meaningful consultation necessitates that those in the community who will be most affected by recommendations for legislative change have an opportunity to comment on proposed changes in advance.

Potential Changes to the Code

As is apparent from the background discussion above, it is our view that the Code is functioning well. Collective bargaining disputes are being resolved without significant disruption to the economy and the principle of democratic employee choice regarding trade union representation is respected and reflected well in the current provisions. Consequently, we submit that, in large measure the Code should be left unchanged. There are several provisions or changes that likely fall on a "wish-list" for some. We will address our views regarding why the Review Panel should not be tempted to feel the need to make change for the sake of change with respect to those issues. We have also proposed other modest revisions to the Code.

Section 8: Free Expression Regarding Unions and Union Representation

Section 8 of the Code 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."

A key feature of Section 8 is that while it expressly reflects the *Charter* value of free expression, it recognizes that, in a democracy, there can be reasonable limits on expression. Expression regarding a trade union or representation of employees by a trade union must not involve the use of "intimidation and coercion". This effectively codifies the application of Section 1 of the *Charter of*

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Rights and Freedoms, which requires that any limits on constitutionally protected rights be demonstrably justifiable in a free and democratic society.

If the Review Committee proposed changes to Section 8, given the current balance (which is consistent with the *Charter*), such changes would likely be found to be unconstitutional. At a minimum, the changes would upset the current well-articulated tests that establish what is and what is not permissible speech in the context of labour relations matters governed by the Code. The Labour Relations Board and the already resource taxed courts will almost certainly be faced with litigation as unions, employers and employees attempt to understand the limits of and impact of any changes to Section 8. This is bound to cause uncertainty and draw resources out of the economy and lead to destabilizing labour relations. The labour relations practitioners have a good understanding of what is and what is not acceptable. There is no need revise this section of the Code, simply because some may want to limit what they perceive to be undesirable commentary regarding trade unions and trade union representation. Provided that the person expressing their views are doing so in a non-coercive and non-intimidating fashion, the overriding Charter right to free expression should be respected.

Section 24: Requirement for a secret vote

As is the case in any process that produces "winners" and "losers", it is imperative that the process not only be fair but that it is seen to be fair. If that is not the case, the "loser" will have reason to reject the validity of the outcome as a real reflection of reality and may look for ways to resist the outcome. This is true in spades when it comes to the certification of a group of employees. Many employers find it difficult to believe or accept that their employees have chosen to exercise their right under the Code to be represented by a trade union. The current process, which requires a vote of the affected employees, has the positive effect of eliminating any doubt from a skeptical employer's mind that the employees' true wish is to have trade union representation. There is nothing more sobering to a doubtful employer than a ringing endorsement of a trade union through a free and secret ballot vote. Employers faced with such an outcome have little option that to move forward and engage in collective bargaining.

By contrast, the granting of a certification through, a secretive, non-inclusive process of gathering union membership cards only leads to skepticism about whether employees have freely signed the membership cards, if they were pressured to do so or if they simply relented to the insistence of a co-worker or union organizer without truly understanding the decision that they were making. Particularly given that many organizing drives exclude employees who are perceived to be unsympathetic to trade union representation, many employers conclude that the certification is simply a reflection of a vocal minority, rather than a reflection of the true wishes of their employees.

A fair process, i.e. one that results in majority support through a free and secret ballot, results in greater acceptance by the employer and non-supportive employees and grants greater efficacy to the union's assertions that it speaks for the employees.

Not only must the vote be free and secret, there must be sufficient time for it to be held, in order to allow all employees to inform themselves of the merits or

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detractions of trade union representation. Currently, a vote must be held within ten (10) days of a union applying for certification. For those employees who do not work on weekends, that can really mean that they have as little as six (6) days to understand the issues surrounding union membership and representation if an application for certification is filed late in the day on a Friday, as often happens. Reducing the window when a vote must be held not only would make it practically impossible for those employees to gather information (effectively resulting in their disenfranchisement), it would also effectively eliminate the employer's constitutionally protected right to express their views in a real and meaningful manner.

One change to the Code or its Regulations that would improve the efficacy of the vote, would be to expressly require, wherever possible, electronic balloting. This would most likely result in higher employee turn out for a vote and give employees who happen to be on vacation or on a leave of absence a greater opportunity to participate in a decision that will have a profound impact on their working lives.

Aside from the foregoing policy reasons why there should be no changes to the secret ballot vote requirement, as noted earlier in this submission, the leader of the Green Party has publically expressed in very strong terms that his party is opposed to the elimination of it. Andrew Weaver is on publically on record adamantly stating:

> "I will never support legislation that will eliminate the secret ballot... It simply is not going to happen. And no amount of convincing will ever convince me to do that." [3]

In view of the foregoing statements, it would not be appropriate for this Review Panel to make recommendations that could never become law.

Section 63(3): Picketing

The current Code provisions permit employees to picket their employer at locations where the employees work.[4] This is part of the balance that exists in the Code and is consistent with several principles set out in Section 2 of the Code, which have long been the foundation upon which the entire regulatory scheme has been based, in particular the following:

> (b) fosters the employment of workers in economically viable businesses,
>
> (e) promotes conditions favourable to the orderly, constructive and expeditious settlement of disputes,

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[3] *"B.C. Greens kill NDP's proposed change on unionized secret ballots"* http://vancouversun.com/news/politics/b-c-greens-kill-ndps-proposed-change-to-unionized-secret-ballots

[4] Section 63(3) provides: A trade union, a member or members of which are lawfully on strike or locked out, or a person authorized by the trade union, may picket at or near a site or place where a member of the trade union performs work under the control or direction of the employer if the work is an integral and substantial part of the employer's operation and the site or place is a site or place of the lawful strike or lockout.

VISION

The BC Road Builders and Heavy Construction Association is the recognized advocate for the development and maintenance of core infrastructure and a balanced, safe transportation system that promotes economic growth and a sustainable environment.

MISSION

We communicate strong, clear industry positions and expectations to governments and stakeholders.

We promote awareness, innovative solutions and value for investment in core infrastructure.

We provide training, safety awareness, support, fellowship, ethical leadership and a strong voice for our members.

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(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

Some may suggest that the Code should be amended to allow for secondary picketing, i.e. picketing of other parts of a company's operation, where the striking employees do not work. Where employees are represented by a different union, typically will have already reached an agreement with their employer on terms that are satisfactory to them. If secondary picketing is permitted, these employees would be thrown out of work, despite having come to an agreement with their employer on terms and conditions of employment that make sense and are acceptable to both parties in the context of that bargaining unit. Secondary picketing is inconsistent with the above foundational principles. Allowing such activity would widen the scope of strike activity and impact the real lives of employees (and their families) who have no say in ending the labour dispute.

When investor are considering where to devote their capital, there should be no illusion that a labour scheme that permits a trade union to negatively impact uninvolved employee groups and other parts of the operation through secondary picketing will have a chilling effect. Businesses will question why further investment should be made in other locations, if they could be at risk of being shut down or disrupted by picketing of employees at a different location.

Sectoral Bargaining In Construction

Some jurisdictions have put in place various models of sectoral collective bargaining, with a view to establishing a single set of terms and conditions of employment for all unionized employers in the given sector. Indeed, British Columbia has passed legislation that provides a variation on this theme in publicly funded health care facilities and in the public school sector. But generally speaking, private sector employers are not mandated to bargain in a multi-employer structure. Although there are provisions in the Code that allow for the accreditation of employers' associations for the purposes of collective bargaining, they are not mandatory. For example, in the Hospitality Sector, some hoteliers and other hospitality sector employers voluntarily bargain through Hospitality Industrial Relations (HIR). In the forest sector, certain employers voluntary bargain through the Council of Northern Interior Forest Employment Relations (CONIFER) while others bargain through Interior Forest Labour Relations Association (IFLRA). In the Construction Sector, some employers have chosen to be members of the Construction Labour Relations Association (CLRA) and many have not.

The point is that where it makes labour relations sense, voluntary multi-employer bargaining relationships exist. Typically, these take into account the unique geographic and economic circumstances related to the members of the employer associations. Employers should be permitted the freedom to negotiate common terms and conditions of employment with their competitors, if that makes sense; or, they have the ability to negotiate separately to take into account their unique circumstances. Newly certified employers should not be forced into an economic model that fails to take into account the business needs. While that may be considered appropriate in the greater public sector, there is no place for it in the private sector. To impose such a model would not "better support a growing,

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sustainable economy". The current model, which affords employers the ability to decide if they want to be part of a master agreement or negotiate separately, is a much more balanced approach.

Section 91 - Delay by an Arbitrator

Under the regulations passed under the Code, subject to being granted an extension, the Labour Relations Board must render a decision with certain time limits. However, the Code and the regulations do not establish time frames for arbitrators to issue decisions. While delinquency on the part of arbitrators may become self-policing (as parties may simply decide not to use their services) that is no solution to a party who is waiting for an arbitration award. Moreover, some arbitrators are written into collective agreements and the parties are required to utilize their services on a rotational basis. The solution in the Code where there has been unacceptable delay is for the parties to ask the Minister to issue an order "to ensure a decision will be rendered without further undue delay."

Arbitration is intended to be an expeditious form of dispute resolution. We submit that the remedy in Section 91 should be available if an arbitrator has not first complied with his or her statutory duty within a specified time after the completion of the hearing. Sixty (60) days should be sufficient in most cases.

Section 104: Expedited Arbitration

The expedited arbitration provisions set out in the Code does not achieve the intended objective of expeditious resolution of disputes. Although hearings must commence within 28 days, this often occurs by way of a telephone conference call. In some circumstances, that is necessary and appropriate. However, employers and unions often do not utilize this provision of the Code because there is a concern that a policy grievance or a contract interpretation grievance will be decided without having a full airing of the issues and without the parties being given sufficient time to prepare. In order to encourage better use of Section 104, we submit that it should be amended to expressly indicate that it is not applicable to contract interpretation cases. Moreover, any decisions issued under Section 104 should be non-precedential, to encourage parties to utilize the process more frequently. Finally, Section 104 should expressly state that if there are multiple grievances dealing with the same subject matter and one of those grievances is referred under Section 104, all similar grievances should be heard together by the same arbitrator. Under the present scheme, a party could file multiple applications under Section 104 resulting in a multiplicity of appointments of arbitrators and the potential for conflicting decisions.

Respectfully submitted

Kelly Scott

President

B.C. Road Builders & Heavy Construction Association.

Arn Berry **LAWYER**

20 March 2018

Labour Relations Code Review Panel
LRCReview@gov.bc.ca

Re: Submission of British Columbia Regional Council of Carpenters (BCRCC)

This is the BCRCC's submission in response to the Panel's letter to the community inviting submissions from stakeholders and interested residents.

The BCRCC supports the proposals contained in the BC Federation of Labour submission. From its perspective as a stakeholder in the construction industry, the BCRCC provides the following specific comments primarily concerning acquisition and termination of bargaining rights issues.

Right to communicate (Section 8)

The BCRCC wholeheartedly endorses the view of other stakeholders that Section 8 of the Code ought to be repealed. The free-speech provision runs counter to the underlying principle of modern labour legislation intended to protect free collective bargaining and the concomitant right of employees to belong to a trade union of their choice. The employer speech provision is particularly troublesome in the age of social media. An employer's anti-union message can now be spread far and wide in an instant. Employee free choice can be indelibly tainted with a single Tweet or social media posting. Section 8 provides employers with a far too powerful tool in all sectors, but its impact is particularly severe in traditionally difficult to organize industries.

Even where the Board finds that an employer has gone beyond the scope of free-speech, once the damage has been done the Board has failed to appreciate the far-reaching implications of the employer's violation of Section 8. For example, in *Wescor Contracting Ltd.,* BCLRB No. B2/2012, an employer circulated a letter to employees, *inter alia* assuring them that if they opted for decertification their wages would remain the same, but if they remained unionized there would be a wage reduction. The Board found a violation of Section 8 as the free-speech right does not permit an employer to "… insert itself into and initiate or assist employees in a certification campaign." (para 75). To remedy the violation, the Board ordered that the ballots cast in the earlier decertification vote not be counted but went on to order a new vote with conditions (para 103). That remedy failed to recognize that irreparable damage had already been done by the employer. Not surprisingly a majority of ballots cast in the second representation vote favoured decertification.

Repeal of Section 8 should prevent, or at least minimize the future use of *Wescor* like remedies.

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Card check certification system

Apart from being time consuming and administratively cumbersome, conducting a representation vote in connection with every certification application poses a barrier to the exercise of employee free choice. Even if Section 8 is repealed, the time that passes from the filing of an application for certification until a vote is held undermines the exercise of employee choice regarding union representation. It is simply too easy for employers and others to capitalize on the passage of time preceding a vote to mount an anti-union backlash. Provided that *Labour Relations Regulation* 3 and 3.1 are met and there are no other irregularities justifying a vote, certification should be granted where a majority of employees sign cards.

Timelines where certification votes necessary

In certain circumstances, including where unions achieve at least 45% support, but less than a majority, representation votes will be necessary. In order to minimize interference with the true wishes of employees, such votes should in person in all but the rarest of circumstances and the vote ought to be conducted as soon as reasonably possible after the date of application.

Fixed raiding periods

The BCRCC stands with other stakeholders proposing that the Code contain a standardized time frame for raiding rather than tying the open period to a specific time associated with the terms of individual collective agreements.

The 1998 Kelleher Lanyon Construction Industry Review Panel Report included a recommendation that the raiding period for employees in the construction industry be July and August of each year. That recommendation was based on the Panel's recognition that, to avoid raids, certain collective agreements have been structured so that the time frame and duration of the agreement cannot easily be discerned. The government did not act on the Panel's recommendation regarding the open period.

The BCRCC has encountered problems identifying the anniversary date of certain collective agreements. Further, standard agreements in the construction industry are for terms from May 1 to April 30, resulting in the raid period falling in November and December. There are shutdowns throughout the industry in December and, in certain areas of the province weather conditions limit the amount of construction work that can be performed in those months. Therefore, the BCRCC urges the Panel to recommend that the raiding period, at least in the construction industry, be established as July and August of each year.

Use of mail ballots

Mail ballots have been used with increasing frequency in recent years because of the limited numbers of IRO's available to conduct in person votes. There are a number of problems associated with mail ballots, not the least of which is the extended "campaign time" which provides employers a greater opportunity to interfere with the true wishes of

their employees. Further, in the construction industry the mechanics of conducting a mail ballot can be daunting because of the nature of the industry. From one day to the next, eligible voters may be at a remote construction camp, at home or at a different job site. Further, some construction workers do not have fixed mailing addresses. In the result eligible voters are disenfranchised, either as a result of not receiving a ballot in time or at all.

The BCRCC's experience with mail ballots has been dismal. Despite having adequate support at the date of application, the BCRCC has never maintained majority support when a mail ballot has been ordered.
Section 24 of the Code contemplates mail ballots and provides the Board with the discretion to order that the vote be conducted within a longer period than the 10 days specified for in-person votes. Apart from the timing of the vote, the Code contains no criteria governing the use of mail ballots. Section 19 of the *Labour Relations Regulation* provides the returning officer with the authority to decide whether a mail vote should be conducted. The regulation fails to provide any guidelines for the exercise of the returning officer's discretion.

The Code ought to be amended to stipulate when mail ballots are permitted. Their use should be restricted to situations where the parties mutually agree to a mail ballot or where there is no viable way of conducting an in-person vote. Administrative convenience should not be a factor.

Summary

In summary, the BCRCC submits that the above changes are required to modernize the Code so that it meets the needs of modern times and reflects the fundamental intent of labour legislation to foster and protect employee freedom of association and the collective bargaining process.

All of which is respectfully submitted

Yours truly,

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March 16, 2018

Labour Relations Code Review Panel

Panel Members:
Barry Dong
Michael Fleming
Sandra Banister, Q.C.,

Dear Panel Members:

Subject: B.C. *Labour Relations Code* Review

We are writing in response to your call for submissions from stakeholders regarding your review of the *Labour Relations Code* (the *Code*).

The British Columbia Teachers' Federation (BCTF) represents over 43,000 public school teachers and associated professionals in the province. Our submissions focus on the issue of education being designated as an essential service, but we also make limited submissions on other areas of the *Code*, and one related area of the *Administrative Tribunals Act*, that we submit the panel should consider in its review.

As a starting point, we submit that any review of labour law must consider recent *Supreme Court of Canada* jurisprudence that gives constitutional protection to the right to join a union, engage in meaningful collective bargaining, and the right to strike.

In addition to the submissions set out below, we also note that s. 3 of the *Code* contemplates continuing review of the *Code*. This review of the *Code* is long overdue. Although the stakeholders need a degree of certainty with respect to applicable legislation, the *Code* must also be responsive to changing societal and workforce realities. We hope the continuing review of the *Code* will occur on a more regular basis going forward. Similarly, the BCTF submits that the Labour Relations Board has not been adequately funded and it imperative that the Board receive adequate resources in order to conduct its work.

We also note that we support the submissions made by the BC Federation of Labour to the panel.

Education is not an Essential Service

In 2001, the BC Liberal government extended essential services legislation to education, contrary to international law. Under international law, essential services are restricted to those services that protect the life, health, and safety of citizens. All other unionized workers have a right to strike.

As you are aware, the "controlled strike," accomplished through essential services designations, seeks to balance the workers' right to strike (or the employer's right to lockout) with the public's right to the provision of essential public services. The union is free to engage in its strike (or the employer its lockout) provided that essential services are maintained. The levels of essential services can significantly undermine the bargaining power of the union and should only be used in "life and limb" situations, as reflected in international law. The provision of education, while important, is not a "life and limb" service.

By way of background, the first comprehensive labour legislation in British Columbia, the *Labour Code of British Columbia*, S.B.C. 1973, c. 122, contained a provision regarding essential services. It focused on health care workers, firefighters, and police (i.e. services designated to protect the life, health, and safety of citizens). The term "welfare" was added in 1977 when the *Essential Service Disputes Act*, S.B.C. 1977, c. 83 was enacted. The *Act* replaced the essential service provisions in the 1973 *Labour Code*. Section 8 of that *Act* added the phrase "immediate and substantial threat to the economy and welfare of the province and its citizens." Otherwise the legislation was similar to the 1973 legislation.

In 1987 teachers were given collective bargaining rights. At the same time, the *Essential Service Disputes Act* was repealed and incorporated into the *Industrial Relations Act*, R.S.B.C. 1979, c. 212, as amended. This legislation included the "provision of educational services" in the essential services section. During this time there was only one application for essential services designations, which was dismissed (Abbotsford 1991).

In 1992, the newly elected NDP government appointed a tripartite panel of experts (John Baigent as union-side representative, Tom Roper as employer-side representative and Vince Ready as neutral chair) to examine BC labour legislation. After a lengthy consultation process, the panel *unanimously* recommended that education be removed from the essential services legislation. The panel's recommendation was consistent with the "strict sense" of essential services set out in international labour standards:

> We recommend that essential services be more narrowly defined as those necessary or essential to prevent immediate and serious danger to the health, safety or welfare of the residents of British Columbia: *Recommendations for Labour Law Reform* (September 1992).

That change was enacted in the revised *Labour Relations Code of British Columbia*, S.B.C. 1992, c. 82; the essential services legislation no longer made any reference to the education sector. Despite this, a Labour Relations Board hearing panel held that under some circumstances (in that case Grade 12 exams) education could be considered essential under the heading of "welfare". The dispute was settled before designations occurred: *Bulkley Valley School District No. 54 (Re)*, BCLRB Decision No. B147/93, [1993] B.C.L.R.B.D. No. 168.

In 2001, when the newly elected Liberal government added the "provisions of educational programs" to the essential services section of the *Labour Relations Code*, the Liberal government publicly stated that student entitlement to continuous instruction was their goal. As stated in the Legislature when the bill was introduced:

> Mr. Speaker, this bill puts children first. It will restore education as an essential service under the Labour Code *to ensure that no child's right to an education is denied during school strikes and lockouts*….: Hon. G. Bruce, August 14, 2001.
>
> This amendment to the Labour Relations Code ensures that *educational programs are protected in the event of a school strike or a lockout*. This legislation is a statement of our principles. Education must come first, *learning must continue*, and students must be able to complete their school year, regardless of their age or grade level…. It is about recognizing that our children's right to an education must take precedence over labour disputes. Teachers and support staff will have the right to strike. That's not being taken away. Employees will continue to bargain, and they will still be able to put pressure on their employers. *They just won't be able to shut down schools.*..: Hon. S. Bond, August 15, 2001.
>
> …. I look at the essential service… education. To debate whether ten minutes or one hour or two hours is acceptable for our children to lose in education is not the point. *Not one minute is acceptable,* in my heart….” Hon. B. Lekstrom, August 16, 2001 (Hansards, emphasis added).

Despite the above comments, rather than stating that instruction must continue, the legislation states that if the Minister:

> considers that a dispute poses a threat to the *provision of educational programs* to students and eligible children under the *School Act*, the Minister may direct the board to designate as essential services those facilities, productions and services that the board considers necessary or essential to prevent *immediate and serious disruption* to the provision of educational programs: *Labour Relations Code*, R.S.B.C. 1996, c.244, as amended (emphasis added).

The legislation enables the employer, the union, or the Chair of the Labour Relations Board to trigger an investigation regarding whether a dispute *poses a threat* to “the provision of educational programs to students and eligible children under the *School Act*”: s. 72(1). The Minister of Labour may also direct the Board to designate essential services (and usually does) after receiving the investigation report from the Chair of the Board: s. 73 (1).

In any event, it was left to the Labour Relations Board to determine the meaning of “educational programs” and “immediate and serious disruption.” The government also allowed the Labour Relations Board to determine at what point during job action essential services would be triggered, and how many services should be designated as essential.

Canada is a party to International Labour Organization (“ILO”) Convention (No. 87) – *Freedom of Association and Protection of the Right to Organize*, ratified in 1972. Although the Convention does not explicitly refer to the right to strike, there is a body of international jurisprudence finding that meaningful collective bargaining requires a concomitant right to strike. The Freedom of Association Committee of the ILO has consistently held that governments cannot undermine the right to strike by characterizing education an “essential service.” While education is obviously a very important service in all countries, the Committee has repeatedly held that it is not an “essential

service in the strict sense"— that is, not in the sense that justifies interference with the fundamental right of workers to collectively withdraw services.

In 2002, the BCTF made a complaint to the ILO regarding the new essential services provision in the *Labour Relations Code*. In its 330th Report regarding complaint number 2173, the committee noted that the complaint concerned the education sector which is not considered an essential service in the strict sense of the term. The committee held that the legislation arbitrarily deprived teachers of their right to strike to freely negotiate their terms and conditions of employment. It concluded that the BC legislative provisions "which make education an essential service are in violation of freedom of association principles…" The committee stated that the Canadian government should repeal the legislation so that teachers can exercise their right to strike in accordance with the freedom of association principles.

Since 2015 Canadian jurisprudence came into compliance with ILO jurisprudence. In *Saskatchewan Federation of Labour v. Saskatchewan,* 2015 SCC 4, the Supreme Court of Canada held that the right to strike, like the right to the process of collective bargaining, is protected by s. 2(d) of the *Charter*. At issue in *SFL* was new essential services legislation enacted in Saskatchewan. According to the Court, given that it limited the right to strike (as all essential services legislation does), Saskatchewan's legislation could only be saved if it could be justified as a "reasonable limit" under s. 1 of the *Charter*. In order to be saved by s.1, the Court stated that the legislation must be based on a proper interpretation of the term "essential services." That is, it must only pertain to services "whose interruption would endanger the life, personal safety or health of the whole or part of the population." In that case, the legislation was struck down.

Legislators must be cognizant of this constitutionally protected right to strike. Education, while important, does not fit within this description of essential services. Yet, the BC Liberal government made no move to amend the *Code* to accord with the *Charter*.

In addition to its dubious legal status, the essential service designation process that teachers went through in 2001, 2005, 2011 and 2014 was time-consuming and expensive and resulted in extensive litigation before the Labour Relations Board for both parties.

In all the strikes that have been governed by the essential service legislation, the teachers had a phased in approach (i.e., they started with a partial strike). The Labour Relations Board's orders set out the tasks that were not essential and did not have to be performed in the context of a job action. Phase 1(a) was the withdrawal of many administrative, non-instructional duties; Phase 1(b) was the withdrawal of extra-curricular activities. Phase 2 was the full withdrawal of services (which did not occur until 2014). The essential service process that resulted in the orders deflected attention from the substantive contract issues since there had to be two separate teams and two sets of negotiations. Implementing the ultimate orders, and the ongoing monitoring of them, took time and energy away from negotiations at the bargaining table.

Despite complying with essential services designations, and spending weeks at the Labour Relations Board in meetings and mediations prior to the orders, when teachers attempted to escalate their partial strike to a full-scale withdrawal in 2001, 2005 and 2012 the government simply legislatively intervened to end the strike. The essential service legislation was not allowed to run its course.

In stark contrast, in 2014 BCPSEA did not apply for essential services designations when teachers served strike notice. Instead it was content to allow a lengthy full-scale strike. It did later apply to the Labour Relations Board asking that Grade 10–12 exams continue, and that final grades be issued. The Labour Relations Board complied with the request, determining that these (and a few other) duties were essential. By allowing Grade 12 final grades to be issued, there was little pressure on the employer (or government) to resolve the dispute in a timely manner.

In all disputes since essential services legislation was enacted in 2001 the designations simply resulted in a protracted job action. Most importantly, they were not used by the employer, or government, to prevent a single day of instruction being lost in 2014, the original stated purpose for the legislation. It was obvious that the government did not consider education to actually be an essential service.

Given the degree to which essential services legislation limits workers' constitutionally protected right to strike, given the protracted and complex legal disputes that have arisen under the current provisions related to "the provision of educational programs" as an essential service, and given that "health, safety and welfare" provisions will protect educational services where there is a real and substantial risk of significant harm, we recommend that s.72(1)(a)(ii) and 72(2.1) be repealed and "provision of education services" no longer be included as an express ground for essential service designation under the *Code*.

Employer Communications

Section 8 of the *Code*, titled "right to communicate," has been interpreted in a manner that is very unfavourable to unions and workers. Although the provision is expressed as a general right to communicate provision, it has been viewed as an employer free speech provision. It has been applied in a way that gives employers broad latitude with respect to their communications to employees, who may be a captive audience and in a vulnerable position.

Conversely, the provision has generally not been interpreted as applying to employee speech in the same broad manner. In addition, the employer free speech provision is not a fair balance to the provisions that prohibit union supporters and organizers from attempting to persuade workers to join a union during working hours.

Limiting employer speech, particularly during organizing drives, to "fact or opinion reasonably held with respect to an employer's business" would be a more balanced approach and would allow workers to decide whether they wish to join a union without undue influence from their employer

Certification

The card based certification model should be restored to grant union certification to unions demonstrating more than 50% support from workers in a proposed bargaining unit. Votes could be held when applications for certification demonstrate between 40% and 50% support for the union.

Remedial certification should be stipulated in the *Code* as a likely outcome in response to unfair labour practice violations ruing an organizing campaign.

The statutory freeze on terms and conditions of employment after certification should be extended until a new agreement is reached, or a strike or lockout occurs. This would be consistent with the provisions that apply to bargaining successive agreements.

Conduct of Votes

The voting period should be reduced from 10 days to a shorter time frame that gives the Labour Relations Board adequate time to conduct the vote, but reduces delays which harm the campaign.

Mail in ballots should be eliminated, except where all parties consent.

Picketing

The secondary picketing provisions should be repealed, in accordance with the constitutional protection secondary picketing is afforded.

Common site picketing relief should be amended to be consistent with the right to strike under s. 2(d) of the *Charter*.

Vulnerable and Precariously Employed Workers

Trends towards precarious work (including, among other things, part-time, contract, contingent employment in which workers are denied job security and decent wages) make unionization more difficult. But these trends also make unionization even more necessary.

We implore the panel to consider improvement to the *Code* that not only reverse the anti-union provisions in the *Code*, but that also improve the prospects of organizing for vulnerable, precariously employed workers. This should include the introduction of multi-employer sectorial certifications for traditionally difficult to organize sectors and stronger successorship provisions that reflect the modern reality of contracting, subcontracting, contract flipping and corporate transfer.

Raiding

The periods when raiding may occur should be clarified and set at a regular period in the calendar year rather than the anniversary of the collective agreement, which is not readily notable to the interested parties.

Administrative Tribunals Act

Although not part of the *Labour Relations Code*, we submit that the panel should also consider recommending an amendment to the *Administrative Tribunals Act*, which is closely related to the labour relations regime. Sections 58 and 59 of the *Administrative Tribunals Act* codifies the standards of review to be applied to administrative tribunals in the province, including the Labour Relations Board. The *Act* sets out that certain tribunal decisions must not be set aside unless they are “patently unreasonable”.

In *Dunsmuir*, the *Supreme Court of Canada* eliminated the patently unreasonable standard from the common law and simplified the judicial review standards to consideration of two standards: correctness and reasonableness. However, since the *Dunsmuir* ruling in 2008, the patently unreasonableness standard has persisted in British Columbia through the *Administrative Tribunals Act*. The standard was removed from the common law for good reason and it is time that BC catch up with the principles of administrative law applied elsewhere in the country.

Yours sincerely,

Glen Hansman
President

GH/pm:tfeu

SUBMISSION TO THE LABOUR RELATIONS CODE REVIEW PANEL

March 2018

The Business Council of British Columbia is responding to a request for submissions to be considered by the Labour Relations Code Review Panel (hereafter the Panel) in making "any recommendations for amendments and updates to the Code." The Panel's Terms of Reference provide that "each issue" must be considered from the perspective of how to "ensure workplaces support a growing, sustainable economy with fair laws for workers and business" and "promote certainty as well as harmonious and stable labour/management relations." Moreover, in its review of "each issue," the Panel is to consider relevant developments in other Canadian jurisdictions. However, no specific "issues" for consideration are identified in the Panel's mandate.

The time frame for submissions is short, particularly given the importance of the matters before the Panel. This consultation format may be satisfactory if the Panel intends to propose only minor modifications to the Code. However, we expect that some parties will see the review as an opportunity to bring forward recommendations for significant and substantive change, and to do so in a way that leaves the impression that many voices support such change. Indeed, the fact that a Review Panel has been established implies that the government believes there are problems with the existing Code, even though none have been identified in government communication materials or policy papers. The Business Council is concerned that the consultation format provided to the Panel will not enable the kind of input required to understand whether there are serious problems with the Code, if so what those problems are, and how they should be addressed.

If the Review Panel decides to recommend substantive changes to the Code, the Business Council submits that a process must be put in place to allow for meaningful consultation on the proposals made. Responsible reform of labour relations policy demands no less. Labour legislation is of vital importance to the businesses and associations that the Council represents, as well as to other private sector firms that may be looking to invest in British Columbia.

Sound labour policy cannot be developed by taking a quick survey to determine who might want changes to legislation and the specific changes they wish to see. It demands thoughtful and thorough consideration of the legislation based on what it can be expected to achieve, whether the objectives are being met and, if not, why not. It also requires an examination of the institution charged with regulating labour relations, the Labour Relations Board, to determine whether that institution is fulfilling its mandate.

The last major re-draft of the Code occurred in 1992,[1] following a period of significant labour unrest as a result of 1987 legislation[2] that the labour movement saw as an attack on the legitimacy of unions. The unrest culminated in a general strike and a boycott of the then Industrial Relations Council. The current Code is the product of a major redrafting undertaken in 1992, which was preceded by extensive consultations. Most of the 1992 changes had the support of both labour and the business community. Since then, the main elements of the 1992 Code have remained largely intact. As UBC Professor Mark Thompson commented last year, "new governments often tinker with the…Labour Code when they come in power, but they keep the basic structure of the 1992…[C]ode."[3]

Not only did the 1992 Code set the stage for a long period of labour relations stability stretching over much of the following quarter of a century, it also set the standard that other Canadian jurisdictions have looked to when amending their own labour legislation. The Review Panel is directed by its mandate to take note of recent developments in other provinces, particularly Ontario and Alberta. We would observe that the amendments those jurisdictions have recently enacted are in large measure designed to bring their legislation into line with the current BC Code.[4]

No one can dispute that there has been relative labour stability in British Columbia over the past 25 years, especially in the private sector. The limited number of strikes and lockouts attests to this. The labour relations community understands the rights and obligations as set out in the Code, and the parties generally govern themselves accordingly. Most of the provisions in the Code have been the subject of extensive adjudication, and the parties know where they stand.

[1] Incremental revisions were made in 2001, 2002 and 2003.
[2] Bill 19, the Industrial Relations Reform Act, 1987.
[3] "He botched it": how Vander Zalm's labour laws led to one of B.C.'s largest general strikes", CBC May 27, 2017. http://www.cbc.ca/news/canada/british-columbia/he-botched-it-how-vander-zalm-s-labour-laws-led-to-one-of-b-c-s-largest-general-strikes-1.4132289.
[4] See "Governments Focus on Employment and Labour Law Changes", Business Council of BC, Human Capital Law and Policy, September 2017 http://www.bcbc.com/content/3061/HCLPv7n3.pdf.

One of the tasks assigned to the Review Panel is to make recommendations that "promote certainty and harmonious and stable labour/management relations." We submit that the existing Code does just that, and has done so with considerable success for 25 years. Without in any way diminishing the work of this Panel, the business community is worried that this review exercise may be a case of a solution looking for a problem.

Businesses and investors with capital to deploy look for a competitive and stable jurisdiction in which to locate and operate, and often compare the business and public policy environments in multiple provinces/states when deciding where to invest. In doing this analysis, they typically focus on the availability of skilled labour, the cost of inputs, market access considerations, and government policies and regulations touching on taxation, environmental standards, and labour and employee relations. In our experience, big swings in labour legislation may not last long, but they can be disruptive to the economy and to business confidence.

The BC Labour Relations Code has stood the test of time, as one of the hallmarks of balanced labour legislation in Canada. Its provisions contemplate and provide for a changing economy; they also promote workplace cooperation and equip the LRB with tools to further the objectives of the legislation. One might look to the participants – employers, unions and employees – to see whether the objective of workplace cooperation has been achieved, or whether the Board was sufficiently engaged with the parties to see that the Code's objectives were met. But, in our view, one cannot point to deficiencies in the Code itself as hindering the objectives set forth in the Code and that this Review Panel is charged with achieving.

There is no question that employers and unions can do more to engage with each other and to adapt to changes in the economy and the shifting world of work. The point we want to emphasize here is that the Code itself, as it stands, provides a solid and well-established framework for the labour relations community, including the Board, to fulfill the objectives that the Minister of Labour has instructed the Review Panel to consider. Ultimately, it is up to the parties and the Board to fulfill the Code's aspirations.

There may be a temptation to surmise that if a Review Panel has been established, then major change is inevitable. We ask the Panel to resist that temptation, and to question whether there are any provisions of the Code that are not working before accepting "wish lists" for change drawn up by certain parties that, if adopted, are likely to swing the pendulum beyond the norm – thereby undermining the stability BC needs to attract investment, support business growth, and encourage the creation and maintenance of good jobs.

We are aware of anecdotal information suggesting that unions and/or individuals or organizations supporting unions may propose major changes in the areas of certification, picketing, successor rights, and sectoral representation. Below we briefly comment on each of these subjects.

Certification

The method by which statutorily imposed union representation occurs is a significant issue for both employees and employers. We have had over two decades of *Charter* decisions since the 1992 Code was enacted, most notably decisions enshrining the right to unionize into the freedom of association. The freedom to associate also includes the freedom not to associate, recognizing that each employee has the right to make his/her choice without coercion or intimidation by anyone. The only mechanism that ensures that freedom is respected is the secret ballot vote. The vote provides the only forum whereby employees can freely express their wishes anonymously, without fear of retribution. Wars have been fought over the principle of democratic representation and the fight to express one's preferences at the ballot box. We see absolutely no justification for denying employees who are asked to consider unionization this fundamental right.

The card check system was implemented at a time when it was assumed that an employer could have nothing to say about the union issue, and that employees' true wishes could best be determined by a signature on a card. There was an implied assumption that how the signature came to be on the card was beyond question and was free of persuasion, coercion or misinformation. That time has long passed. Today, it is recognized that employers also have the right of free expression, which includes the right to express opinions and provide facts about unionization in the workplace, so long as this is done without coercion or intimidation and in a manner consistent with the law. Union organizers are subject to the same rights and obligations.

The right to choose union representation, which is guaranteed by the Code, is the right to make an informed choice. The employer's right to comment on union representation cannot be emasculated by reducing the time between the application for certification and the vote itself. Nor can it be diminished by any modification to section 8 of the Code. The reality is that if employers are not permitted to express their views or provide information to their employees – i.e., if they are to be effectively cut out of the process – they will have more difficulty accepting the legitimacy of the union in the workplace, should it be certified. Labour relations are not enhanced as a result.

A card check system allows the union selection process to occur while organizers and others are present, opening the door to potential improper pressure on individual employees. Such concerns are minimized with a secret ballot vote which, we submit, remains the best way to ascertain an individual's true choice.

One change that would benefit all concerned in the certification process would be to permit electronic voting. In-person ballots do not permit all workers to participate (vacations, medical leaves etc.) and are expensive to conduct. With proper safeguards in place, employees should be able to cast their ballot through their electronic device. Electronic membership cards are now accepted by the Board,[5] and internet voting is now in place in Ontario.

Picketing

Picketing laws are designed to balance the economic power exerted by both parties during a strike or lockout. Significant problems arose in the 1980s when employees on strike at certain resource-based businesses with integrated operations picketed other parts of those companies' operations where employees represented by a different union were working under a binding collective agreement. The Review Panel should be under no illusions on this point: investment will steer clear of a jurisdiction that permits picketing of an operation that has already settled with its union – and is working under a binding collective agreement. There is no justification for expanding a labour dispute beyond the location of the strike or lockout.

British Columbia is the only common law jurisdiction in Canada which has a blanket replacement worker restriction.[6] This provision itself can act as a disincentive to invest in BC, as we know from discussions with some of our member companies and other businesses that have considered establishing an operation in the province but ultimately chosen to go elsewhere. In our view, this provision should be removed from the Code, given the Review Panel's terms of reference. We appreciate that the current government may not be inclined to do so. If this provision remains in the Code, it will continue to tip the balance of power in a strike/lockout situation in favour of the union.[7] There is no basis to further tip the balance, by permitting a union to shut down operations through picketing where employees who have not chosen union representation are working, or where unionized workers are

[5] *Working Enterprises Consulting & Benefits Services Ltd. (Re)*, [2016] B.C.L.R.B.D. No. 67.
[6] The Canada Labour Relations Code has a provision regarding replacement workers but it is not a blanket restriction.
[7] Striking workers can find other jobs, but the struck employer cannot use other workers.

working under a collective agreement. Other workers ought not to be used as pawns in a union's collective bargaining dispute.

Successorship in Certain Industries

The Review Panel may receive proposals to apply successorship between contractors in certain industries such as food-services, building maintenance or security. The argument sometimes made in support of such a change is that employees who negotiate a collective agreement should not lose their employment and the benefit of that collective agreement to a competing contractor.

Businesses can only succeed when they are competitive. The Code recognizes this in section 2. Unionization does not insulate employees (or employers) from competitive market forces, or from the consequences of changes in technology or in consumer tastes and preferences. Both parties to a collective agreement need to negotiate a competitive arrangement that will allow the business to be sustained over time and to grow. A provision that would automatically apply a collective agreement to a competing contractor – one who may have its own collective agreement – defeats competition. The contracting business must have the ability to choose another contractor if costs become too high or service declines. A contractor that is uncompetitive should not be propped up artificially through labour legislation. Applying a too-costly collective agreement to the replacement contractor saddles both the contracting business and the new service provider with an uncompetitive arrangement.

The argument for contractor successorship is not in aid of representing the difficult-to-organize. In fact, the sectors typically mentioned are not underrepresented by unions. The concern that without successorship, a new contractor can undercut others via a "race to the bottom" is addressed in the existing Code, through the requirement that any new voluntary recognition agreement have the support of employees working under the proposed agreement, and also through the first contract provisions of s. 55 that support the negotiation of a fair collective agreement.[8] In our view, these provisions are sufficient to address the issue.

Sectoral Representation

There are many variations to the notion of a "sectoral" model of union representation. The idea comes down to a single collective agreement within a defined sector (e.g. fast food outlets or franchises), to which employees are

[8] Amendments to the Ontario legislation are comparable to section 55 of the Code.

automatically added as employers are organized. The justification advanced for these models is that they would provide access to union representation in industries that are difficult to organize. However, such a justification, whether plausible or not, does not outweigh the negative implications of government-imposed sectoral representation for employers and for labour relations more generally.

A sectoral model of certification or collective agreement application eliminates any control or say that a newly-certified employer has over the terms and conditions of employment in his or her own business. The employer simply becomes bound by a collective agreement that others have negotiated. As the literature shows, collective bargaining in English-speaking jurisdictions is generally heading in the opposite direction, away from multi-employer models to enterprise-based bargaining.[9] The Business Council submits that the imposition of sectoral bargaining would conflict with the principle in the Code recognizing that employees and their employer should have a direct voice in determining the terms and conditions governing employment in the affected workplace.

The sectoral model does not in any case really address difficult-to-organize sectors, as even under this model a union would have to show majority support in the new place of employment in order to add that workplace to the sectoral agreement. Rather, the model would guarantee employees particular terms and conditions of employment, regardless of whether their employer could afford them. The issue of difficult-to-organize sectors is addressed differently, and in our view more fairly, in section 55 of the Code. This section provides for robust mediation in first contract situations, with the possibility for binding arbitration. The principles established in *Yarrow Lodge,*[10] decided by a five-member panel of the Board, show the balanced approach that should be applied in determining the appropriate collective agreement in a newly certified business. In 2016, this provision was invoked four times by employers and 11 times by unions.[11] The blunt instrument of the imposition of a sectoral collective agreement is not warranted in British Columbia and is strongly opposed by the Business Council.

In Ontario, the notion of sectoral representation was not put into legislation. Rather, the amendment that was made gives power to the Board to consolidate, into a single bargaining unit, different locations owned by the same employer (e.g. franchisees). Again, this power already exists in the

[9] Sims Report "Seeking a Balance", The Context of Multi-Employer Bargaining, 1995.
[10] BCLRB No. B444/93.
[11] LRB Annual report 2016.

current BC Code. Here is another example of other Canadian jurisdictions catching up to British Columbia.

Unintended Consequences

There are three provisions of the Code that the Panel should review to rectify problems that have arisen through their application in a manner that we believe is inconsistent with their original purpose.

The first is section 54, which requires 60 days' notice of a change that affects the terms or conditions of employment of a significant number of employees. In *Wolverine Coal Partnership,*[12] the Board applied this section to the temporary curtailment of a coal mine that had been shut down due to market reasons. While the Board did express the view that it would take a case-by-case approach, we believe there should be an express exemption written into section 54 for market curtailments that are indefinite or temporary in nature. BC's natural resource industries – still the backbone of the province's export economy – need to be able to respond to commodity price fluctuations quickly. In many cases, they are not in a position to foresee the necessity of a curtailment 60 days out.

The second is section 104, which allows either party to a dispute to invoke expedited arbitration within 28 days. In this process, the parties are assigned an arbitrator (who they would otherwise not appoint consensually) by the Board. Section 104 should only be used for those cases which are not precedential, not for disputes that involve significant policy issues or the interpretation of the collective agreement. If it is made clear that section 104 determinations are non-precedential, there would be a greater use of expedited arbitration, and more arbitrators would be introduced into the system – outcomes that would be positive for labour relations in the province.

Finally, the arbitral review process in sections 99 and 100 of the Code has repeatedly led to confusion among parties and adjudicators. The BC Court of Appeal has commented on the odd bifurcation of "general law" issues versus "labour relations" issues. Our suggestion is that there be a single forum for review. If that forum is the Board, then the ability to attend court or the judicial review is preserved.

The Business Council appreciates the opportunity to share our views on the Labour Relations Code and the LRB with the Review Panel.

[12] BCLRB No. B106/2015.

Established in 1966, the Business Council of British Columbia is a cross-sectoral association representing companies and affiliated industry organizations that span the entire provincial economy, including manufacturing, forestry, energy, mining, retail and wholesale trade, transportation, construction, utilities, advanced technology, communications, financial services, life sciences, engineering, environmental services, professional services, and post-secondary education and training. Taken together, the companies, affiliated industry organizations, and educational institutions that comprise the Council's membership account for approximately one-quarter of all payroll jobs in the province. The Business Council has a longstanding interest in labour and employment policy matters.

April 5, 2018

Labour Relations Code Review Committee
Ministry of Labour

Email: LRCReview@gov.bc.ca

Dear Committee Members;

My name is Andrea Craddock and on behalf of the Campbell River, Courtenay & District Labour Council, I am here to extend our recommendations to changes in the Labour Relations Code for your consideration.

It is our belief that in recent years, there has been a critical erosion of the Labour Relations Code. This has given significantly more rights to employers over the rights of workers, except where limited by applicable laws, regulations and collective agreements.

The Labour Relations Code should serve as a legal framework for the relationship between workers and their unions by bringing fairness and balance. Unfortunately, over the past sixteen years, British Columbia's labour laws and their application have served to increase and intensify an imbalance which largely serves employers.

Workers who attempt to exercise their constitutional right to form a union are regularly faced with captive audience communications and meetings, threats, bribes and any number of tactics aimed at stopping unionization efforts. A blatant example of this was the short-lived employer; Target, in Campbell River where employees were routinely showed anti-union propaganda videos and outwardly asked to resist any efforts to unionize their worksite.

It has become painfully clear that the Labour Relations Board has been starved of resources in recent years, making it difficult to help workers and unions in any meaningful way. This too, has given more power to employers without concern of enforcement for actions and has deterred workers from taking their concerns to the LRB.

Many of our union affiliates have also experienced contract flipping. Long term care facilities in Campbell River and Courtenay have undergone this tactic by employers to maximize profit while keeping wages low and preventing workers from fully exercising their constitutional rights to union representation and collective bargaining.

Our economy is changing, largely to the detriment of workers. The expedited addition of automation, significantly more precarious or part-time/casual jobs, contracting out, lElower wages, and an attack on employment standards in recent years means unions are needed more than ever in the fight for fairness. Unions strive to create decent wages and working conditions not just for their members but to help raise the bar for all workers. We need a Labour Relations Code that upholds the rights of workers to obtain and maintain union representation and engage in collective bargaining.

It is an honour to submit our recommendations to you as part of your consultative process under Section 3 of the Labour Code. Our submission is respectfully made on behalf of our affiliated unions to our Labour Council.

Sincerely,

Andrea Craddock
President
CRDC Labour Council

Campbell River, Courtenay & District Labour Council
Labour Relations Code Review
Submission

The Campbell River, Courtenay & District Labour Council calls for a number of changes to the Labour Relations Code in order to strive for fairness and balance. They include the following:

- ✓ Enforceable consequences and remedies for unfair labour practices
- ✓ Improvements to the regulation of a worker's right to choose to join a union (including the repeal of employer speech provisions and automatic certification)
- ✓ Quicker timelines when a vote must be undertaken by the Labour Relations Board
- ✓ Stronger successorship language to deter contract flipping
- ✓ A continuation of the ban on replacement workers during labour disputes
- ✓ Allowing fair bargaining for education professionals and paraprofessionals by repealing "the provision of education as an essential service."
- ✓ Fairness during partial decertification

It is imperative that the Labour Relations Board be adequately funded in order for these changes to be successful. The Board needs to be consistent and transparent in enforcing these changes as well as already existing worker rights.

<u>Recommendations</u>

1. Ongoing Review

The Campbell River, Courtenay & District Labour Council is pleased to be participating in this Labour Relations Code review. The last review was conducted in 2003 when the governing BC Liberals tipped the balance of labour relations to largely favour employers. This allowed for unfair practices to rule while our economy significantly changed over the next 15 years.

Therefore, an ongoing, regular review of the Labour Code needs to occur to ensure relation improvements in a rapidly changing economy.

2. Adequate Funding

While good labour laws are important, enforcement is critical if those laws are going to be meaningful. Years of underfunding has created a serious access to justice. The use of mail-in ballots, delays in certification votes gives employers weeks or more to engage in anti-union activities, including unlawful interference to persuade the outcome. Adequate funding is required to ensure workers have timely access to justice and process for certification without the threat of unlawful interference.

3. The Chair of the Board should be Term-Limited

Prior to 2002, it would appear that no chair lasted longer than one term. For the past 15 years, the position has been held by an appointee. This is not healthy for the Board or Labour Relations in BC.

We recommend limiting the term of the Chair to no more than 5 years.

4. Timely Decisions (ss. 91, 1278, 159.1)

There are often significant delays in arbitrator's decisions and this can create access to justice concerns. It can increase the impact on workers and unnecessarily extend workplace tensions. We would like to see timelines set in the Labour Relations Code to cover decisions from vice-chairs to arbitrators.

5. Unfair Labour Practices and Remedial Certification (s.14)

When an employer unduly interferes in the Charter rights of workers to form a union, a vote will not fairly reflect the wishes of the workers. The fairest way to make workers whole under unfair labour practices is through remedial certification. This would serve to undo the unfair labour practice(s) and also werve as a deterrent.

6. Acquisition of Bargaining Rights – Employer Speech (s. 8)

The BC Liberal addition of Section 8 to the Labour Relations Code must be repealed. This gives employers ample time to talk workers out of forming a union. The same access to workers is not given to unions. Section 8 is an infringement of worker's Charter right to choose and should be struck from the Code.

7. Acquisition of Bargaining Rights – Membership Cards (s. 24)

The BC Liberals changed the rules for certification by requiring a certification vote. Unfair labour practices ensued and certifications dropped by about 50%. Workers became subject to an employer campaigning period leading up to the vote including tactics outlined in 4 and 5 above to change the vote outcome.

We recommend membership cards alone for union certification be restored.

8. Acquisition of Bargaining rights – Threshold for Certification and Faster Vote (s. 24)

We recommend 50% +1 as the threshold for automatic certification based on membership cards alone. In situations where this threshold is not met, we recommend that a vote be held within 2 working days, rather than the current 10 day requirement. We further recommend that the vote be held in person rather than by mail-in ballot unless mutually agreed to by all parties. These changes will mean a more timely decision on certification applications and avoid the employer campaigning period as outlined in 5 above.

9. Successorship Rights (s. 35, Bill 29, and Bill 94)

The successorship provisions of the BC Labour Relations Code state that if an employer sells, leases, or transfers, all or part of their business, then the new owner is bound by any existing collective agreement at the date of sale.

The existing successorship protections were undermined by the BC Liberals with Bills 29 and 94, which limited the application of successorship in the health sector. Current successorship legislation does not apply to contracting out or contract flipping and does not address changes in private service providers.

Consequently, certifications and collective agreements cease to exist through contracting out. This has caused precarity and instability for workers, as well as decreased wages and working conditions.

We recommend the application of Section 35 be widened to prevent subverting collective agreements through contract flipping. We also recommend the repeal of Section 6 of Bill 29, and Sections 4 and 5 of Bill 94.

10. Replacement Workers (Scabs) (s. 67)

The Campbell River Courtenay & District Labour Council supports BC's continuation of the ban on the use of replacement workers. In places where no such ban exists, a union's power is greatly diminished in trying to exert economic pressure. Conversely, no such tactic exsists for unions in the case of a lockout. We recommend no change to this section of the Labour Relations Code.

11. Essential Services (s. 72)

On rare occasions, there may be a need for essential services designations as some services (typically in the medical field) are essential for the preservation of life. However, in recent years, essential services have been mis-used to weaken the rights of working people and their unions. A prime example is in education for teachers and teaching-assistants.

We recommend education be removed as an essential service and that the designation of essential services be limited to those services which are absolutely necessary for the preservation of life.

12. Variations of Certification – Partial Decertification Applications (s. 142)

The Campbell River, Courtenay & District Labour Council is concerned about the existing process for partial decertification applications that fall under Section 142. These applications are not expedited in the same way that full decertification applications are and the rules are not clear. We recommend these applications be resolved using the same rules outlined by Division 2 of the Code.

In conclusion, we thank the Committee for a much needed review of BC's Labour Code. We are hopeful that through gathering information from around the province it will become clear that ongoing changes are necessary to reflect the shifting landscape for workers if we are to continue to strive for balance and fairness.

Respectfully submitted.

CMPA

Canadian Media Producers Association
BC Producers' Branch

AMPTP®
Canadian Affiliates

March 19, 2018

By Email: LRCreview@gov.bc.ca

Labour Relations Code Review Panel

RE: Labour Relations Code Review
Joint Submission - Canadian Affiliates of the Alliance of Motion Picture and Television Producers ("AMPTP") and the Canadian Media Producers Association, BC Producers Branch ("CMPA-BC")

Dear Sirs/Mesdames:

Please accept this joint submission from the Canadian Affiliates of the Alliance of Motion Picture and Television Producers ("AMPTP")and the Canadian Media Producers Association – BC Producers Branch ("CMPA-BC") with respect to the British Columbia Labour Relations Code Review. The AMPTP and the CMPA-BC, as employer representatives, have an interest in maintaining certain, harmonious and stable labour relations within British Columbia ("BC").

Background

The AMPTP and the CMPA-BC represent American and Canadian film and television producers, respectively, in relation to the negotiation of industry collective agreements and the employment of workers on film and television productions in British Columbia and elsewhere. Together, the AMPTP and the CMPA-BC are commonly referred to as the "Negotiating Producers", as they negotiate industry-wide master collective agreements with trade unions in BC, including the British Columbia and Yukon Council of Film Unions (the "Council"), the Union of BC Performers ("UBCP") and the Directors Guild of Canada – BC District Council ("DGC BC").

The bargaining structure involving the Negotiating Producers and the Council was mandated by the Labour Relations Board in 1995, in proceedings under section 41 of the *Labour Relations*

Code: BCLRB No. B448/95.[1] In doing so, the Board recognized the unique culture in the film and television industry, including its mobility and project-based nature.

A second inquiry pursuant to section 41 of the *Code* was commenced on February 4, 2008, when the Labour Relations Board was directed by the Minister of Labour and Citizens' Services to conduct a review of the BC film and television industry, as the industry was facing various challenges that threatened industrial stability (the "Section 41 Inquiry"). Mr. Michael Fleming, then Associate Chair, Adjudication, was constituted as a panel of the Board to conduct the Section 41 Inquiry. Mr. Fleming engaged in extensive consultation with the parties, and issued a number of interim directives and decisions throughout the Section 41 Inquiry, culminating in the "*Report regarding a Section 41 Inquiry into Labour Relations in the British Columbia Film Industry*" issued on March 4, 2012. The Report again acknowledged the unique nature of the industry from a labour relations perspective, including the need for stability and certainty.

The film and television industry is highly active in BC. For the period April 1, 2016 to March 31, 2017, it is estimated that $2.65 billion was budgeted for productions produced in BC, based on the number of applications for tax credits during that period.[2] This includes both AMPTP and CMPA-BC productions, including feature films, TV series, programs and pilots, direct to DVD, mini-series, movies of the week, and web-based productions.

The industry is also a highly mobile industry, as productions can easily be mounted in different jurisdictions, or moved to different locations. A variety of considerations are taken into account in determining where to locate a particular production, one of the most important of which is labour costs and the industrial relations climate.

Submission

The film and television industry in BC has enjoyed a relatively stable labour relations climate since the initial section 41 decision in 1995. The parties have been able to successfully negotiate a series of master collective agreements, usually with three year terms, since that time. Industrial stability is paramount to the decision to locate productions in the province, and any threat to industrial stability may result in productions being located elsewhere, in other jurisdictions.

For this reason, the AMPTP and the CMPA-BC submit to the Panel that the *Labour Relations Code* should not undergo any significant changes as a result of the Review. The existing processes and procedures set out in the *Code* have resulted in a fairly stable and certain labour relations climate for the industry, which has resulted in significant growth in the industry in BC. This

[1] This process was reviewed in the previous Labour Relations Code Review report, dated February 25, 1998, in which it was recognized as an innovative solution to "accommodate and encourage what has become the exponential growth of television and movie production in the province", and as an example of a successful and mature labour-management relationship.

[2] Creative BC, Fiscal Year Reporting. For the period April 1, 2015 to March 31, 2016, the amount was $1.922 billion. https://www.creativebc.com/database/files/library/Tax_Credit_Certifications_2014_2017___Final.pdf

growth has resulted in the creation of a significant number of jobs and high levels of employment for BC workers within the industry.

The importance of the industry in BC, as highlighted above, underscores the need to maintain the certainty and stability of labour relations in the province to ensure the long-term vitality and competitiveness of industry employers.

The AMPTP and the CMPA-BC further respectfully submit that the following duties of the Board and purposes of the *Code*, set out in section 2, must be kept in mind during the course of the Review:

a. Fostering the employment of workers in economically viable businesses;

b. Encouraging the practice and procedures of collective bargaining between employers and trade unions as the freely-chosen representatives of employees;

c. Encouraging the cooperative participation between employers and trade unions in resolving workplace issues, adapting to changes in the economy, developing workforce skills and developing a workforce and a workplace that promotes productivity; and

d. Promoting conditions favourable to the orderly, constructive and expeditious settlement of disputes.

Card-Based Certification

The AMPTP and the CMPA-BC understand that there may be a push from the trade union movement within the province for a change to the *Code* to incorporate card-based certification in BC, rather than the current requirement for a secret ballot vote.

The AMPTP and the CMPA-BC oppose any change to the *Code* that would result in card-based certification. Although the majority of employees in the film and television industry in BC work under union contracts , a large number of non-union productions remain, which are found primarily in the smaller, domestic area of production within the jurisdiction of the CMPA-BC.

Card-based certification may inflate the true level of support for unionization among employees, and result in the true desires of employees not being accurately represented. Employees may sign cards without being fully informed of the implications in doing so.

It is submitted that employees on non-union productions may be especially vulnerable when a large part of the industry is already unionized and, therefore, many employees on a non-union production may already be members of one of the film industry unions. Further, being permitted to vote by secret ballot is a fundamental right of workers in a democratic society, in which all individuals should be afforded the protection of anonymity.

Conclusion

Based on all of the foregoing, the AMPTP and the CMPA-BC respectfully submit that conditions do not warrant the Labour Relations Review Panel making any significant or substantive changes to the *Labour Relations Code* that could affect the competitiveness of British Columbia as a centre of film and television production, or that could affect the long-term certainty and stability of industrial relations in the province.

Under the existing *Labour Relations Code*, employers and trade unions in the industry have successfully collaborated to produce in BC a highly-skilled, well-paid and sought-after workforce capable of performing the magic once confined only to Hollywood, while at the same time offering employers a competitive and stable labour environment that continues to attract motion picture and television production , despite mounting competition from other jurisdictions. Making substantive changes to the *Labour Relations* Code, such as reverting to a card-based system of certification, could serve to make the industry less competitive and drive production to other jurisdictions.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Yours truly,

Tracey Wood
Vice President
Canadian Affiliates of the AMPTP

Jason Lee
Vice President, BC Industrial Relations
CMPA, BC Producers Branch

March 20, 2018

Submission regarding the British Columbia Labour Relations Code

The Canadian Association of Counsel to Employers ("**CACE**") makes this submission to the Labour Relations Code Review Panel pursuant to its February 16, 2018 letter to the Labour Relations Community. This submission is solely the submission of CACE made on behalf of its members and does not necessarily represent the position of our clients.

Background on CACE

The Canadian Association of Counsel to Employers, CACE, is a national not-for-profit association of management-side labour and employment lawyers with a mandate to ensure that advancements in Canadian law reflect the experience and interests of employers. CACE was established in 2004 and comprises over 1300 members from across Canada working in every sector of the economy. It is overseen by a volunteer board of directors from all Canadian jurisdictions consisting of 18 members. CACE's membership includes lawyers employed in the private sector, employed by governments, and in private practice. CACE is the only national organization of management-side labour and employment lawyers.

CACE engages in legislation and law reform activities at the provincial and federal levels. Its objectives include providing governments, courts, labour boards, and other administrative tribunals with input in respect of policy and legislative reform from the perspective of lawyers acting on behalf of employers in Canada. CACE members include internal and external counsel to many British Columbia employers which will be impacted by the proposed legislative changes. CACE is also uniquely positioned to provide a national perspective on the issues in question.

One of CACE's top priorities is presenting timely and substantive submissions on public policy matters of interest to its membership and constituency. It regularly monitors key developments in the legislative and regulatory arena at both the provincial and federal levels with a view to identifying opportunities to make submissions on behalf of its members.

CACE draws upon the shared experience and expertise of its members to address legal issues affecting Canadian employers through the work of its Advocacy Committee, which has a mandate to participate in significant legal and policy development.

CACE has recently made several important contributions to the legal and policy development dialogue:

- Making submissions to the British Columbia government in response to its consultation regarding re-establishing the Human Rights Commission.

- Making submissions to the Nova Scotia Labour Board in connection with its review of its policy in respect of casual employees.

- Making submissions to the Alberta government in response to its request for input in regard to changes to the Employment Standards Code, the Labour Relations Code and the Occupational Health and Safety System;

- Making submissions in response to the Ontario Changing Workforce Review Special Advisors' Interim Report and Bill 148 (proposing amendments to the *Employment Standards Act* and the *Labour Relations Act*);

- Making submissions on federal legislative and policy reviews relating to human rights tribunal procedure, genetic discrimination, privacy and surveillance, work stoppages, replacement workers, Part III of the *Canada Labour Code*, and the *Pension Benefits Standards Act*, 1985;

- Making submissions to the Alberta government relating to employment standards and essential services, and the Standing Committee on Alberta's Economic Future with respect to its review of the *Personal Information Protection Act*;

- Intervening before the Supreme Court of Canada on significant labour and employment law cases (e.g. *BC Teachers Federation v. The Queen; Wilson v. Atomic Energy Canada Limited; R. v. Cole*; *Bernard v. Canada (Attorney General)*; *UFCW, Local 503 v. Wal Mart Canada Corp*).

This submission is based on input from our British Columbia membership and our Advocacy Committee.

General Comments

The present review has asked the following questions (from the website):

1. Which specific sections of the *Labour Relations Code* (the "*Code*") do you wish to see amended, and why?

2. What are your top issues or concerns with the existing *Code*?

3. How do your proposals promote certainty and harmonious and stable labour/management relations?

4. What are your experiences or thoughts about BC's *Code*?

5. Is there anything else you would like the panel to consider when developing recommendations about amendments to the *Code*?

In response, CACE notes that these questions appear to assume that changes to the *Code* are necessary. In that regard CACE's fundamental position is that this premise is flawed and changes to the *Code* are unnecessary and will upset the labour peace that British Columbia has enjoyed for the last several decades:

1. Like all Canadian labour legislation, the *Code* is modelled on the 1935 *Wagner Act* from the United States. In that context, the passage of time alone does not necessitate revising the *Code.* Care must be taken in seeking to fix something that in our submission is not broken.

2. The *Code* is not out of date. In fact, concepts contained in the *Code* have been subsequently followed by other jurisdictions.

3. The *Code* has served British Columbians well. British Columbia labour relations have been increasingly stable over the years, and particularly in recent years. At the same time, employment in British Columbia has led Canada in growth, in income, in competition, and in opportunities created by new investment.

4. There have been no significant or broad-based private sector work stoppages in decades and the province has experienced the longest period of labour relations peace in modern history.

5. In our submission, the *Code* is in line with mainstream Canadian labour legislation. Nevertheless, we caution against over-emphasizing the goal of being "mainstream."

6. From our perspective on behalf of employers, the *Code* is currently fair, balanced, and effective. That does not mean there are not aspects of the *Code* we would advocate changing. However, making changes also comes at a cost of destabilizing labour relations and tipping the playing field. Ultimately, the measure of fairness, balance, and effectiveness should consider all perspectives and give priority to the public interest, not the interests of unions or employers. CACE agrees with the International Labour Organization (ILO) which recognizes that only in consensus can successful legislative change be achieved (see below).

7. Any changes to labour legislation must consider the impact upon the province's competitiveness in attracting investment and economic opportunities for employers.

Capital is mobile, and it is in the public interest that British Columbia's laws and regulations encourage employers to establish and build operations in British Columbia.

8. While participants in the labour relations system will no doubt have preferred areas of change, this is not the same as saying there is a need for change, and any decision to make changes should not be premised on preferences, when there are no real needs.

The Need for Meaningful Consultation and Tripartite Support

While periodic review of how labour and employment relations has changed and how legislation may need to evolve to reflect the needs of employers and workers within the British Columbia economy is important, dramatic recalibration, particularly without broad stakeholder support and consensus will only upset the stable labour relations environment that British Columbia has enjoyed for the past two decades.

Tripartite consultation in labour and employment matters should be the bedrock of stable labour relations dialogue and change. Meaningful tripartite participation and the introduction of amendments based upon overall consensus will avoid the "politicization of laws", which we expect the Panel wishes to avoid, and is also more likely to garner broad acceptance, support, implementation and compliance. Evolution based upon consensus among stakeholders will facilitate the broader goals of the Review, as effective protection for vulnerable workers in precarious jobs depends on the education of employees and employers concerning their respective legal rights and obligations; a respect for the law; compliance strategies (for employers) and consistent enforcement within a stable human resources environment. Each of these goals has a greater likelihood of success in an environment in which all stakeholders have understood and accepted the need to implement the changes ultimately recommended.

Balanced and stable workplaces in British Columbia will not and cannot be served by a swinging pendulum of workplace law that reacts to political ideology or influence. Tripartism must be the foundation for the evolution of labour and employment law in British Columbia. The Tripartite Consultation (International Labour Standards) Convention, 1976, of which Canada is signatory, at Article 1, paragraph 1, provides that:

> Each Member of the International Labour Organisation which ratifies this Convention undertakes to operate procedures which ensure effective consultations, with respect to the matters concerning the activities of the International Labour Organisation set out in Article 5, paragraph 1, below between representatives of government, of employers and of workers.

Fundamental legislative changes, should they be contemplated by the Review, must be reflective of the wishes and concerns of all stakeholders and shaped through consensus. The International Labour Organisation ("ILO") described the optimum decision making process in its National Tripartite Social Dialogue, An ILO guide for improved governance, as follows:

> To lead to agreements, tripartite negotiations involve choices and compromises between all parties. The golden rule is consensus-building. There must be a conducive atmosphere of willingness to give and take, and strike a win-win bargain. Both parties need to concede.
>
> A decision reached by consensus is the expression of the collective will of all the parties involved. Consultations and negotiations take place until a decision that is acceptable to all is reached.
>
> (National Tripartite Social Dialogue, page 34)

Only in consensus can successful legislative change be achieved in line with the principles set out in the Review. In this respect the ILO described the optimum result based process as follows:

> ILO experience shows that labour law reforms that have been crafted through an effective process of tripartite consultation involving the organizations of workers and employers, as real actors of the labour market, alongside relevant government agencies prove more sustainable, since they take into consideration the complex set of interests at play in the labour market. Also, they can ensure a balance between the requirements of economic development and the social needs.
>
> Conversely, labour law reforms imposed without effective consultations not only often meet with resistance on the part of the labour market actors, but also, more importantly, will lack legitimacy and support and thus will face problems at the implementation stage. The development of a sound legal framework requires broad-based dialogue that guarantees support and ownership as well as effective enforcement of the legislative provisions. In this respect, it is important that the consultation of social partners starts early in the process and takes place at every step of labour law development.
>
> (National Tripartite Social Dialogue, page 261)

CACE respectfully wishes to specifically address two aspects of the process relating to the current *Code* review:

1. We are concerned about the accelerated timetable of these changes. The *Code* is important legislation and deserves the appropriate time for study, input, consultation, and legislative drafting (if applicable). The current timetable should be extended. This concern is amplified when considering the next point.

2. We are concerned about the lack of transparency in this process. The areas identified in the communications to the labour community are vague and uncertain, leaving stakeholders unsure of exactly what the Panel or the government is contemplating. This will result in insufficient consultation and commentary from stakeholders on the issues that may result in new legislation. Many of the client groups represented by CACE are unaware of what the Panel or the government may be considering. Many are choosing not to make submissions because they are unclear about the issues. It would have been far more preferable to have specific issues and background information set out in advance which provided guidance to British Columbians, rather than forcing parties to construct "straw persons" at this stage for fear of losing the opportunity to address more concrete concepts at a later stage. At the very least, we ask that the government provide an opportunity for input once potential changes have been identified.

Specific Submissions

We have attempted to anticipate which proposals and policy issues the Panel will be considering in an effort to provide some substantive input at this stage. It is our hope that upon conclusion of the current canvas of proposals and ideas the Panel and/or the government will allow for further input once the community has articulated the proposals that it is considering.

Card-based Certification

CACE expects that a primary issue being considered by the Panel will be card-based certification. In our submission, removing the right to a secret ballot vote and allowing for card-based certification would be a significant mistake and step backward for British Columbia.

The secret ballot vote is a fundamental democratic right. The importance of this right is self-evident. We do not as a society entrust important decisions of mandatory representation, such as government, to procedures that do not ensure this most basic protection. History demonstrates the value of this right. The government of British Columbia should not be moving in a direction that is contrary to democracy.

Union representation under the *Wagner Act* model includes rights and obligations upon different parties. Employees are obliged to be represented by unions they may not want if

a majority of employees have voted for that representation. Part of the balance in our current system is that before we require union representation, support for a union must be demonstrated through the safeguards of a secret ballot vote.

This important safeguard is also recognized by the ILO Committee of Experts:

> "[W]hen national legislation provides for a compulsory procedure for recognizing unions as exclusive bargaining agents [representing all the workers, and not just their members], certain safeguards should be attached, such as: (a) the certification to be made by an independent body; **(b) the representative organization to be chosen by a majority vote of the employees in the union concerned**; (c) the right of an organization, which in a previous trade union election failed to secure a sufficiently large number of votes, to request a new election after a stipulated period; (d) the right of any new organization other than the certified organization to demand a new election after a reasonable period has elapsed." [Emphasis added]
>
> (Freedom of Association and Collective Bargaining, Report III (Part 4B), International Labour Conference, 81st Session, 1994, Geneva, para. 240)

Any movement towards card-based certification is contrary to the process endorsed by the ILO and, we submit, contrary to the freedom of association under the *Canadian Charter of Rights and Freedoms (the "Charter")*.

Experience shows us that card-based certification is not a fair or accurate demonstration of employee wishes for certification:

1. Certification applications frequently fail despite initial support exceeding 50% in union cards or petition signatures. While unions argue this is because of employer unfair labour practices, there is no evidence that unfair labour practices are responsible for any significant impact upon failed certification votes. In any event, such practices are already prohibited by the *Code* and unions have remedies available to them when they have evidentiary support for their claim. It is rare for the Labour Board to order re-votes, which is within its current powers when it is persuaded that the initial vote did not reflect the true wishes of the employees. We note that unions also commit unfair labour practices in the context of certification drives, and the impact of those practices upon certification applications is similarly a concern to employers. The safest measure of employees' true wishes is still the secret ballot vote.

2. Employees are frequently members of more than one union. Membership in one union does not necessarily mean an employee wants that union to represent him or her at a particular employer.

3. Employees frequently sign union cards or petitions for reasons that do not show support for union representation. Employees are often unaware of the implications of signing a union card in a card-based certification system, and in many cases sign cards based on incomplete or inaccurate information provided to them by union organizers. They also may sign a card due to peer pressure, at a moment of pique, or otherwise for reasons other than truly wishing to have a union represent them.

CACE submits that depriving employees of a secret ballot vote is not fair to employees or employers, is not balanced, and is not an effective way of determining employee support. It is also unfair and not conducive to positive labour relations to impose a collective agreement upon employers and employees without a secret ballot vote. The implications in such situations are significant. Similarly, it is not fair to deprive employees of the opportunity to hear from both unions and employers when deciding whether to select a union or not. The *Code* and other Canadian legislation (including the *Charter*) allows for employer free speech with employees, provided certain safeguards are followed (e.g., no intimidation or threats). Like most contentious issues, better decisions result from a free flow of information.

In addition, card-based certification is not mainstream. At present, a mandatory secret ballot vote is required in most Canadian jurisdictions.

There is no evidence to support a compelling need for a card-based model in British Columbia. In CACE's submission, the consideration of such a model appears to be entirely based upon the unsubstantiated assumption that vote-based certification results in decreased levels of unionization. Such reasoning is not only illogical in our submission, it also lacks empirical support.

In fact, there is no statistical correlation provided that connects declining union rates with a vote-based model for certification. Statistics Canada, in its most recent review of unionization trends confirms that the unionization rate has been in steady decline since 1980. This trend is not unique to Canada.

Simply stated, the unionization rate is and continues to be more reflective of a shifting economy rather than the manner in which certifications are conducted. The evidence does not support revolutionary change of the *Code* and the current vote-based union certification model, under which there has been labour and business stability. Transformation is appropriate when a system has proven incapable of functioning and serving the purposes sought – this is not the case in British Columbia, where labour relations have been effectively regulated for decades, and stable for many years.

CACE is not aware of any empirically supported reasons that support amending the fundamental democratic principles in British Columbia workplaces to take away from employees the meaningful right to participate in determining whether they wish, by simple majority, to assign their personal contractual rights to an agent.

CACE also disagrees with the suggestion by labour organizations that the needs of workers can only be addressed through reversing the declining rates of unionization. If workers feel they need the support of a union, the existing provisions of the *Code* allow them to seek representation. It is submitted that the long term trend towards lower unionization rates reflects worker preferences for direct employment relationships with their employers having regard to transformational changes that have occurred in the modern workforce.

"Best Practices Elsewhere in Canada"

It is not possible to respond to this area without understanding what practices from other jurisdictions the Panel is contemplating. We have addressed comments above with regard to the fact that British Columbia is generally in line with the mainstream. From the perspective of employers, there are differences in the *Code* from other provinces that do promote the public benefit in British Columbia. Those aspects of the *Code* should not be changed. We are not proposing changes.

Period Before Certification Vote

The Panel may hear calls to shorten the 10-day statutory timeline from application to certification votes. In reality, the 10-day timeline has effectively been much shorter. A common practice is for unions to file certifications on a Friday, with employers receiving notice of the application the following Monday or Tuesday. This means that the vote is often scheduled for the following Friday or Monday, leaving an actual period of 3-4 business days for an employer to engage in its right to communicate with its employees, and for employees to consider the choice that is before them.

Shortening this period to 5 days (as has been suggested) would effectively eliminate the right of employers to respectfully and lawfully communicate with its employees upon the filing of an application. CACE submits that such a change is also unnecessary given that there has been no ongoing pattern of unfair labour practices or broad-based employer abuse of communication rights under the *Code* since communication rights were helpfully clarified by the Board in decisions such as *Cardinal* and *Convergys* more than fifteen years ago.

The period between application and secret ballot vote is also important for employees to properly investigate and consider the important and relatively permanent choice to give up their right to represent themselves in employment matters and instead have a union represent them as part of a collective. Truncating this period further would significantly impact employees' abilities to make an informed decision, having had the opportunity to hear from both the union and their employer, as well as to make investigations on their own, and to take appropriate time for reflection.

In addition, experience has shown that the logistics of scheduling a vote and generating the voter lists takes much of this 10-day period. A reduction to five days would put enormous and unnecessary pressure on Board resources.

Such a change would be a significant strike at the appropriate balance that has existed for decades.

Communication Rights

We expect that the Panel will be urged by some parties to attack the free speech rights of employers, even where such speech is neither coercive nor intimidating. This is a key area in which repeated legislative changes and Board policy balance has finally found an equilibrium. We respectfully submit that, were the Panel to succumb to these demands, any resulting legislative changes would have a significant impact on the balance that has led to peaceful labour relations in this province, and would increase the uncertainty and litigation that has been a thing of the past for some time.

The current legislation and jurisprudence is consistent with the free speech rights set out in the *Charter* and we strongly urge the Panel not to upset the current balance and unduly restrict non-coercive and non-intimidating employer speech.

Project Labour Agreements

The use of Project Labour Agreements (PLA's) by government and crown corporations, in which the government directs that a certain employer or employers, along with their bargaining relationships, be the employer of employees on a project, is of significant concern. CACE submits that PLA's directly impinge on the right of employees to choose for whom they wish to work, and by whom they wish to be represented. This practice, should it be adopted and expanded by this government, will likely lead to serious questions, and indeed litigation, over whether employees' *Charter* rights are being violated, particularly the freedom of association.

We urge the Panel to carefully consider these important and very complicated issues and the impact that they would have on labour stability in the province. Should the further use of PLA's become a potential recommendation by this Panel, then it would be very important to hear further from the labour relations community as detailed input would be necessary that cannot be accommodated in this format.

Conclusion

The issues in this review of the *Code* could have a significant impact upon employers, employees, unions, and the public should the government make changes to the current state. On behalf of employers, CACE recommends the following:

1. The time allotted to the current review should be extended, and the issues that the Panel is considering for amendment should be identified to the public in a more specific and transparent way so that comprehensive feedback and consultation may be obtained.

2. Do not change the *Code*. It is not necessary to do so. The *Code* continues to serve British Columbians well. BC's labour relations have been stable, and our employment opportunities and benefits have been tremendous. Significant changes to the *Code* will create instability, which in turn will discourage investment and employment growth, which will not benefit anyone.

3. If, despite our submissions the government proceeds to make changes, we recommend it take a cautious and incremental approach, rather than to make substantive changes that serve the interests of only unions. Some of the changes that appear to be under consideration by the Panel are radical in nature, would fundamentally change British Columbia's labour relations, would unfairly tilt the delicate balance currently in place, and are not mainstream.

We appreciate your consideration of these submissions and welcome the opportunity to provide further comments at one of the upcoming public hearings.

Yours truly,

CANADIAN ASSOCIATION OF COUNSEL TO EMPLOYERS

Per: *Adrian Frost*

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March 20, 2018

LABOUR RELATIONS CODE REVIEW PANEL
Attention: Michael Fleming (Chair), Sandra Banister and Barry Dong (Members)

Re: Submission to the Labour Relations Code Review Panel from the Canadian Association of Labour Lawyers/ Association canadienne des avocats du mouvement syndical

This submission is made on behalf of the Canadian Association of Labour Lawyers/ Association canadienne des avocats du mouvement syndical ("CALL-ACAMS") in response to the invitation for submissions by the panel of special advisors (the "Panel") appointed by the Honourable Minister of Labour, Harry Bains, to review the British Columbia *Labour Relations Code* ("Code"). We provide the within recommendations for amendments to the Code for the Panel's consideration.

I. CALL-ACAMS

CALL consists of approximately 600 lawyers from across Canada who represent trade unions and employees, with over 100 members practicing in B.C. Our members appear regularly before the BC Labour Relations Board, the BC Human Rights Tribunal, grievance arbitration boards and various other workplace-related tribunals, as well as all levels of court. CALL also acts as intervenor at the Supreme Court of Canada on matters of significance to our constituency and to the organizations and people we represent. This experience makes our membership both particularly engaged in the question of labour reform (both procedural and substantive), and well-positioned to provide insight and advise on Code amendments needed to address existing challenges under the current legislative regime.

II. INTRODUCTION

In *Health Services and Support - Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27 ("*Health Services*") and other subsequent decisions, the Supreme Court of Canada recognized that collective bargaining is an associational activity protected by the fundamental *Charter* right freedom of association. Some of the significant rulings of the Court are set out as follows:

(a) "Human dignity, liberty, respect for the autonomy of the person and the enhancement of democracy are among the values that underlie the *Charter*" (at para. 81) and these values are complemented and indeed promoted by the inclusion of collective bargaining by section 2(d) of the *Charter*.

(b) "The right to bargain collectively with an employer enhances the human dignity, liberty and autonomy of workers by giving them the opportunity to influence the establishment of workplace rules and thereby gain some control over a major aspect of their lives, namely their work" (para. 82).

(c) Collective bargaining enhances the *Charter* value of equality as "one of the fundamental achievements of collective agreement bargaining is to palliate the historical inequality between employers and employees" (para. 84).

(d) "Finally, a constitutional right to collective bargaining is supported by the *Charter* value of enhancing democracy. Collective bargaining permits workers to achieve a form of workplace democracy and to ensure the rule of law in the workplace. Workers gain a voice to influence the establishment of rules that control a major aspect of their lives" (para. 85).

In summary, the Court stated "Recognizing that workers have the right to bargain collectively as part of their freedom to associate reaffirms the values of dignity, personal autonomy, equality and democracy that are inherent in the Charter" (para. 86).

Importantly, the Court held that recognition of collective bargaining as a section 2(d) right is consistent with Canada's obligations under international law.

In the *Saskatchewan Federation of Labour*[1] decision, the Supreme Court of Canada held that the right to strike is also an associational activity protected by section 2(d).

It is these principles as articulated by the Supreme Court of Canada which will inform and guide this submission.

[1] 2015 SCC 4

III. SUMMARY OF RECOMMENDATIONS

Based on our collective and vast experience working in the labour relations field, CALL recommends the following amendments to the *Code*:

1. Restore card-check certification based on simple majority membership support to bring the Code into line with the majority of labour legislation in Canada and with pronouncements of the Supreme Court of Canada respecting right to access collective bargaining and to engage fully in freedom of association.

2. Repeal Section 8 and restore the wording found in the former section 6(1) of the Code to address employer interference and ensure the fundamental right of employees to associate together in unions is protected.

3. Amend the Code to provide for early disclosure of employee lists and contact information based on demonstrated 20 percent threshold support.

4. Extend the post-certification statutory freeze until a first contract is concluded.

5. Amend successor rights to address contract flipping.

6. Amend Section 2 of the Code to focus on meaningful collective bargaining, consistent with the *Charter* protected right to freedom of association.

IV. SUBMISSIONS ON RECOMMENDATIONS

1. Restore Card-Check Certification based on a simple majority support

CALL recommends that card-check certification be restored, bringing British Columbia in line with the majority of jurisdictions in Canada, with certifications granted where a simple majority of employees have signed union membership cards.

British Columbia has switched back and forth between two fundamentally different certification systems over recent years: the traditional card-check system and the mandatory vote system currently in place. From 1948 until 1984, certifications were granted under a card-check system in British Columbia (in common with almost all other Canadian jurisdictions). If the required majority of employees in an appropriate bargaining unit had signed union membership cards, the union would be certified.[2]

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2 In 1973, the government introduced representation votes as an additional method of obtaining certification (with card check remaining the primary system) where a union could demonstrate membership support of more than 35%, but less than the majority required for card-based certification. In 1977 the level of support required for a card based certification was increased from a simple majority to 55%, and the threshold for obtaining a representation vote was increased from 35% to 45%. In 1984 the government amended the legislation to eliminate the card-check system and replace it for the first time with a mandatory vote system for all applications. Unions had to first sign up over 45% of employees and

It is clear that the general effect of mandatory votes is to reduce the success of certification applications[3]. This is because mandatory votes result in an increase in unlawful employer interference. This has been repeatedly recognized by a broad range of leading labour relations experts, including experts representing the employer community. For example, in 1992 the province's Committee of Special Advisors charged with examining overall industrial relations strategy for British Columbia unanimously recommended a return to the card-check system, describing the effect of the mandatory vote system as follows:

> The surface attraction of a secret ballot vote does not stand up to examination. Since the introduction of secret ballot votes in 1984 the rate of employer unfair labour practices in representation campaigns in British Columbia has increased by more than 100%. When certification hinges on a campaign in which the employer participates the lesson of experience is that unfair labour practices designed to thwart the organizing drive will inevitably follow. The statistical profile in British Columbia since the introduction of the vote was confirmed by the repeated anecdotes our Committee heard in its tours across the Province. It is also borne out in decisions of the Board and Council. Unions would sign up a clear majority of employees as members and a vote would be ordered. Then key union supporters would be fired or laid-off while threats of closure dominated the campaign and the vote itself was viewed as a vote on whether or not to continue with employment rather than as a vote on redefining the employment relationship. It is not acceptable that an employee's basic right to join a trade union be visited with such consequences and illegal interference. Nor is there any reasonable likelihood of introducing effective deterrents to illegal employer conduct during a representational campaign. A shorter time framework will not deter an employer intent on "getting the message" to his employees. Neither is the imposition of fines and/or the expeditious reinstatement of terminated employees likely to introduce attitudinal or behavioural changes in employers intent on ensuring that their employees do not join unions. The simple reality is that secret ballot votes and their concomitant representation campaigns invite an unacceptable level of unlawful employer interference in the certification process.[4]

The majority of Canadian jurisdictions employ card-check systems, to varying degrees. Card-check certifications are available generally in the federal jurisdiction and all three territories, Newfoundland and Labrador, New Brunswick, PEI, Quebec, and Alberta. In addition, card-check certifications are available for certain industries in Ontario and Nova Scotia.

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then subsequently go on to win a representation vote as well. This first mandatory vote regime lasted from 1984 to 1993.

In 1993 the government returned to a card-check system (Although with 55% of employees signing membership cards now being required to obtain a certification rather than the simple majority required prior to 1977. Support between 45% and 55% continued to result in a representation vote). However, in 2001 the government amended the *Labour Relations Code* to again eliminate the card-check system, replacing it with a mandatory vote system for all applications. This second mandatory vote regime has continued until the present day.

[3] See e.g. C. Riddell, "Union Certification Success under Voting Versus Card-Check Procedures: Evidence from British Columbia, 1978-1998" (2004) 57 Indus. & Lab. Rel. Rev. 493; S. Slinn, "An Empirical Analysis of the Effects of the Change from Card-Check to Mandatory Vote Certification" (2004) 11 C.L.E.L.J. 259; BC Labour Relations Board Annual Reports, Tables 1 and 2

[4] V. Ready, J. Baigent, and T. Roper, *Recommendations for Labour Law Reform* (Victoria: Queen's Printer for British Columbia, September 1992), page 26. See also the Report of the 1998 Labour Relations Code Review Committee: V. Ready, S. Lanyon, M. Gropper, and J. Matkin, *Managing Change in Labour Relations*, February, 25, 1998, page 52, as well as the classic discussion of the problems created by mandatory votes in P. Weiler, *Reconcilable Differences: New Directions in Canadian Labour Law* (Toronto: Carswell, 1980), pages 37 to 49.

Saskatchewan and Manitoba are the only other jurisdictions that require a representation vote in all industries. Our legislation should be made more consistent with labour legislation elsewhere in Canada.

Mandatory vote systems are a demonstrated invitation to improper and unlawful employer conduct that prevents the exercise of constitutionally guaranteed freedom of association by employees. The Code should be brought into line with pronouncements by the Supreme Court of Canada respecting the right to access collective bargaining and to engage fully in freedom of association, and with the majority of labour laws in Canada which provides for card-check certification. Accordingly, CALL strongly recommends that the *Code* be amended to reintroduce card-check certification, with certifications being granted when a simple majority of employees sign union membership cards.

2. Repeal Section 8 and restore the wording found in the former section 6(1) of the Code to address employer interference and ensure the fundamental right of employees to associate together in unions is protected

CALL recommends that Section 8 be repealed and the wording found in the former section 6(1) of the Code be restored. This will help to address employer interference during certification campaigns and assist in leveling the inherent employer-employee power imbalance in the employment relationship and thereby ensure the *Charter* right to freedom of association is realized by workers.

Should this recommendation not be adopted, CALL alternatively recommends regulatory changes to promote and restore fairness and balance in employer-employee-union communications.

Section 8 of the Code states as follows:

> **Right to communicate**
>
> 8 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.

This provision is regularly referred to in the labour relations community as the "employer free speech provision". As addressed below, that description cannot be based on the provision's wording, but it has certainly been the case for its application by the Board.

Previously, the Code contained the following prohibition[5]:

> An employer or a person acting on behalf of an employer must not participate in or interfere with the formation, selection or administration of a trade union or contribute financial or other support to it.

[5] This former language was changed on July 30, 2002 pursuant to *Labour Relations Code Amendment Act*, 2002, BC Reg 182/02, more commonly known as "Bill 42".

This wording is consistent with section 94(1)(a) and (b) of the *Canada Labour Code*[6]. It is CALL's recommendation that such wording be re-introduced to the Code in British Columbia.

Prior rulings of the Labour Relations Board had held that this wording put significant restrictions on an employer attempting to influence a decision by employees whether or not they would join a union.

Those restrictions are consistent with the conclusions of the Supreme Court of Canada that the right to engage in collective bargaining is an exercise of the fundamental *Charter* freedom of association. It was specifically recognized by the Court that collective bargaining enhances the *Charter* value of equality, and specifically one of the fundamental achievements of collective bargaining is to palliate the historical inequality between employers and employees. Another comment adopted by the Court was that labour organizations are necessary to enable workers to deal on equal terms with their employer.

The Supreme Court of Canada also held that collective bargaining was supported by the *Charter* value of enhancing democracy, concluding "Collective bargaining permits workers to achieve a form of workplace democracy and to ensure the rule of law in the workplace."[7]

However, there is no doubt that the Code as written has been vigorously interpreted and applied to reflect the principle that unionization is a burden on employers and therefore they are entitled to resist an organization drive to a degree not present in previous iterations of the BC *Code* since 1974. It is not surprising that those who enjoy the power over the workplace oppose a democratic movement to provide workers with collective bargaining rights. However, that perspective cannot be supported given the recognition of the significance of collective bargaining by the Supreme Court of Canada.

3. Amend the Code to provide for early disclosure of employee lists and contact information based on demonstrated 20 percent threshold support

Where a union is able to demonstrate a threshold of 20 percent support of employees in the proposed unit, the employee list and contact information should be disclosed within a reasonable period of time.

One of the most fundamental changes to the economy over the past 25 years has been changes to the workplace and the workforce. As technology advances, the notion that there is a single work location where all the employees attend and know each other is antiquated. It is no longer realistic to premise access to the constitutional right of collective bargaining and freedom

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[6] CALL acknowledges that sub-section 94(2)(c) of the *Canada Labour Code* contains an exception that an employer is entitled to "express a personal point of view, so long as the employer does not use coercion, intimidations, threats, promises or undue influence." CALL does not recommend that provision be adopted. However, if it was recommended by the Panel, such rights to express personal points of view in the workplace, consistent with the decision in *Health Services*, *supra* (at page 1) should not be limited to employers but extended to all employees. That is, the same equivalent rights must be extended to employees, reducing the power imbalance.

[7] *Health Services, supra* (at page 1), para. 85

of association on the theory that co-workers know each other, they know where each of them works, and even how to contact each other. Sometimes this occurs because the workforce is spread across a large geographic area and number of worksites. Sometimes this occurs because the workforce is composed of a large number of part-time, casual, temporary or auxiliary employees. Sometimes this occurs because employees do not even regularly attend their worksite; instead, they receive their direction from their employer through email, texting, smartphones and other devices.

Therefore, the Code should be amended to include an administrative process similar, but not identical, to that recently enacted in Ontario[8]. In short, once a trade union can establish it has achieved 20 percent membership support, the Board ought to disclose to the union a list of employees with contact information. Unlike Ontario, there ought not to be any attempt to adjudicate bargaining unit appropriateness or fix the proposed bargaining unit description as this creates unnecessary legal disputes, costs, and delay. This administrative process is not to pre-determine appropriateness, but to ensure that modern workers have meaningful access to their rights under the Code.

Further, unlike Ontario, there should be a time by which the Board must determine and provide the employee list. It should take a reasonable period of time, no longer than a week, from the date of the union's application for the Board to determine whether the union has at least 20 percent support. The legislation ought to require appropriate safeguards about protecting the information and limiting the use of the information to address privacy concerns with this process. The public policy interests must be balanced against privacy interests.

4. Extend the four month post-certification statutory freeze until a first collective agreement is concluded

CALL recommends that the statutory post-certification freeze provisions be extended until a first collective agreement is concluded.

Like most labour statutes in Canada, the Code contains a prohibition on altering the terms and conditions of employment while a union and employer are engaged in collective bargaining. Section 45(1) sets out a freeze period of four months that applies commencing the date the board certifies the trade union as bargaining agent for the unit, or until a collective agreement is executed, whichever occurs first.

In respect to the establishment of a new bargaining relationship, the Board has identified that the purpose of the freeze provisions is "… to provide a period of calm during which changes cannot be made which might be construed by the employees as penalizing them for electing to engage in collective bargaining. The freeze provisions thus serve a complimentary function to the unfair labour practice provisions …": *KFCC/Pepsico Holdings Ltd.(Re)*, [1997] B.C.L.R.B.D. No. 342, para. 61. In this regard the post-certification freeze, in particular, complements the obligation to bargain in good faith by promoting meaningful and effective collective bargaining:

[8] Section 6.1, *Labour Relations Act*, 1995, S.O. 1995, c. 1, Sched. A

Viva Pharmaceutical Inc., BCLRB No. B167/2002, para. 40; and see *KFCC/Pepsico Holdings Ltd*., para. 60.

Such policy aims are consistent with the pronouncements of the Supreme Court of Canada which has repeatedly recognized that the right to engage in meaningful collective bargaining is a fundamental component of freedom of association under 2(d) of the *Charter*.[9] Extending the post-certification freeze period until a first collective agreement is achieved assists in this goal by providing a process where meaningful collective bargaining may be achieved.

The rationales noted in *KFCC/Pepsico Holdings*, *Viva Pharmaceutical*, *supra*, and other cases, apply equally to the entire period following certification that precedes the parties' concluding a first collective agreement. If the period following certification without a collective agreement is prolonged, the protection afforded by the freeze becomes even more important. The longer bargaining continues, arguably the more fragile the new relationship between newly organized employees and their bargaining agent becomes. The statutory freeze is intended to prevent employers from subverting the bargaining agent when the union is most vulnerable to a loss of confidence among its members. Altering terms and conditions of employment at any point during first-time bargaining is problematic. It can have a profound chilling effect on negotiations, causing employee confidence in the union to be eroded and collective bargaining to be undermined.

Additionally, extending the post-certification freeze period as proposed accords with what already exists in respect of collective agreements up for renewal under section 45(2)(b). The same policy rationales supporting a freeze where a renewal agreement is being bargained likewise support the recommended amendment to section 45(1). Indeed, the time following certification until a first agreement is settled has been recognized as a "particularly sensitive period": *Viva Pharmaceutical*, *supra*, para. 40. It makes little sense to provide less protection to newly certified employees than to those with some labour relations experience and foundation in place. There is no reasonable justification in CALL's submission for the inconsistency between section 42(2) and section 42(1).

Furthermore, four months is an arbitrary number given the reality that first collective agreements typically take much longer to negotiate. As well, employers resistant to unionization can easily delay or drag out bargaining beyond the four month freeze to undermine the limited period of protection currently provided. Moreover, removing the four month timeframe would remove what may be currently an incentive to employers resistant to unionization to avoid reaching an agreement until they can make destabilizing changes. As experience has shown, employers can use the expiry of the freeze period to alter employees' employment conditions and destabilize employee support for the bargaining agent. Unilaterally cutting wages or benefits during bargaining can suggest to employees that their union is ineffective. Equally so, the provision of a raise can lead employees to believe that a trade union is unnecessary to achieve better employment terms. Extending the freeze period provides some protection against this

[9] *Health Services*, *supra* (at page 1), paras. 81-85; *Mounted Police Association of Ontario v. Canada (Attorney General)*, 2015 SCC 1; see also *Saskatchewan Federation of Labour, supra*, and other cases.

tactic when unfair labour practices can have a significant impact on the constitutionally guaranteed right to engage in meaningful collective bargaining.

Favourable examples in line with CALL's submissions are found in Ontario[10] and Federally[11].

Accordingly, CALL recommends that section 42(1) be amended to extend the post-certification freeze period until either a strike or lockout has commenced, or a first collective agreement has been negotiated, similar to what is legislated in Ontario and Canada.

5. Amend successor rights to address contract flipping

CALL recommends the following legislative amendments, which are aimed at addressing two issues, both of which concern the application of the successorship provisions in the Code upon a contracting out:

a) Amend the Code by adding Section 35.1 to provide for successorship upon contracting out in the building maintenance, food, security and health (including long term residential care) sectors in keeping with the Ontario model.

b) Repeal Section 6(5) of the *Health and Social Services Delivery Improvement Act*, SBC 2002, c. 2[12]

c) Repeal Sections 4(4) and 5(5) of the *Health Sector Partnerships Agreement Act*, SBC 2003, c. 93[13]

The first issue arises where the language (or lack thereof) in a collective agreement does not apply to prevent an employer from contracting out in the first instance. The second issue arises where the employer decides to end its relationship with the initial contractor and to award the contract to a new contractor but *after* the trade union has managed to organize the employees of the initial contractor and conclude a collective agreement.[14]

The problems that CALL's proposed legislative amendments aim to remedy were identified by the Board in *The Governing Council of the Salvation Army*[15], and include not only an initial

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[10] Section 86(1), *Labour Relations Act*, *supra* at footnote 8

[11] Section 48, *Canada Labour Code,* R.S.C. 1985, c.L-2; and see related sections 49, 50 and 89

[12] The *Health and Social Services Delivery Improvement Act* is legislation which permitted health sector employers to contract out on a massive scale in the sector and layoff some 8,000 HEU members and which expressly precludes declarations of successorship in Section 6(5).

[13] Sections 4(4) and 5(5) of the *Health Sector Partnerships Agreement Act* are to the same effect as section 6(5) of the *Health and Social Services Delivery Improvement Act*.

[14] Generally, the Labour Relations Board has held that Section 35 of the *Code* does not apply to ensure the integrity and continuity of bargaining rights in either one of these instances. The Board has typically held that these instances involve a transfer of work, not a sale or transfer of a business.

[15] BCLRB No. B56/86, 12 CLRBR (NS) 185, pages 191, 192:

> The second category of decisions has involved not only an initial contracting out of work (see *Finlay Forest Industries*; *Electrohome Ltd*., BCLRB No. L279/82; *Charming Hostess Inc. et al*., [1982] 2 Can LRBR 409 (OLRB); and *Ontario 474619 Ltd*., [1982] 1 Can LRBR 71 (CLRB)) but also the "recapture" of work previously contracted out (see *VS Services Ltd.*, BCLRB No. 152/83; *Three Links Care Society*, BCLRB No. 373/83; and *Rozell Enterprises Inc*., BCLRB No. 137/85), and the transfer of work from one contractor to another (see *Metropolitan Parking Inc*., [1980] 1 Can LRBR 197 (Ontario LRB); *Empire Maintenance Industries Inc., supra*;

contracting out of work but also the "recapture" of work previously contracted out, and the transfer of work from one contractor to another.

Nearly 40 years ago, in *Metropolitan Parking*[16], the Ontario Labour Relations Board recognized that the successorship provision as it existed in Ontario (and as it now exists in British Columbia) was deficient:

> In reaching our conclusion we are not unmindful of the rights of the employees and their union, nor have we rejected the applicant's contention that the "mischief" present here is virtually identical to that which Section 55 is designed to remedy. There is no doubt that the periodic retendering of the management contract can frustrate the employees' established collective bargaining rights, threaten their job security, and significantly undermine the possibility of establishing a stable collective bargaining relationship at the parking location. The need to continually reorganize the individuals employed at the site not only poses a problem for the trade union, but also for the Federal Government and any previously unorganized subcontractor who becomes the successful bidder. There may well be a new application for certification, a new round of bargaining and threat of industrial conflict and disruption of service each time a new employer takes over. This is obviously not the intention of the parties…but it will be the result of the transaction where the circumstances are similar to those existing in the present case. And, for the reasons which we have already set out, we do not think section 55, as presently drafted, can cover the situation. To so hold, in the present case, would be to root bargaining rights in the location, the employees or the work, rather than the "business". Whatever may be the case in other subcontracting situations, we do not think the change of subcontractors in the circumstances of this case constitutes a transfer of a business from one to the other (page 218)

Very recently, the Province of Ontario moved to address these deficiencies in the legislation[17]. Schedule 2 of the *Fair Workplaces, Better Jobs Act*[18] amends the *Labour Relations Act*, *1995*[19] by adding Section 69.1 to provide for successorship where there is a loss or transfer of work but not a transfer of a "business" in the building services sector. Section 69.1 provides that these transactions are deemed to be a "sale".[20] Importantly, Schedule 2 also provides for successorship in cases prescribed by regulation where the service providers receive public funds by adding Section 69.2.

These additions to the *Labour Relations Act, 1995* are intended to cover contracting out *and* re-tendering of contracts in building services. On an initial contracting out, the "employer" in Section 69.1(3)(b) is the primary employer and the contractor is the "employer" in Section 69.1(3)(c). In a retendering situation, the "employer" in Section 69.1(3)(b) is the "old" contractor

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Cafas Inc. (1984), 7 CLRBR (NS) 1 (CLRB); and *Terminus Maritime Inc. et al*, 83 CLLC para. 16, 029 (CLRB). For our immediate purposes, it is not necessary to make distinctions between these various permutations. The general theme of the decisions in this second category is that there has merely been a loss or transfer of work, and not a transfer of all or part of a business to which successorship applies

[16] [1980] 1 Can LRBR 197

[17] See further C. Michael Mitchell and John C. Murray, Special Advisors, *Changing Workplaces Review: An Agenda for Workplace Rights – Final Report*, May 2017

[18] S.O. 2017 c. 22

[19] *Supra*, at footnote 8

[20] A very similar provision was in place in Ontario from 1992 to 1995

and the "employer" in Section 69.1(3)(c) is the "new" contractor.[21] In other words, Section 69.1 covers the "permutations" identified by the Board in *Salvation Army*, *supra*.

In the federal jurisdiction, the *Canada Labour Code* provides that when work is re-tendered to a new contractor to provide pre-board security services, wages must not be reduced.[22]

In British Columbia, Bill 44 (1997) contained provisions to address these deficiencies in the building maintenance, food and security industries but the Bill was withdrawn. Instead, the Provincial Government appointed a Section 3 Committee to hear submissions and make recommendations regarding the issues addressed in the Bill. The 1998 Section 3 Committee chaired by Vince Ready recommended further study "…to provide successorship for contracted services for government operations".[23] This initiative appears to be similar to the concept underlying Section 69.2 of the *Labour Relations Act, 1995* in the sense that both cover service providers who receive public funds.[24]

CALL submits that this issue is indeed pressing given that thousands of workers are employed by contractors, many precariously, and require stable collective bargaining rights. This is now also the case in the health and long-term care sectors. This important issue has already been tackled in other jurisdictions including Federally and in Ontario, and has been previously flagged in British Columbia by multiple Section 3 Committees as a pressing issue. CALL therefore recommends that legislative amendments be tabled to revise the successorship provisions of the Code to address and remedy issues associated with contract flipping.

6. Amend Section 2 of the Code to focus on meaningful collective bargaining, consistent with *Charter* protected right to freedom of association

CALL recommends that Section 2 of the Code be amended to focus on the promotion (not simply facilitation) of meaningful collective bargaining, in accordance with *Charter* protected values.

It is not the appropriate function of the preamble to labour relations legislation to concern itself with corporate interests, such as flexibility, productivity and economic growth. Nor should matters such as "flexibility" and so forth be articulated in a way that suggests an equal footing with *Charter* protected values. Corporate concerns such as flexibility and economic growth, to the extent that they warrant promotion, will be reflected in corporate and tax related legislation and policy.

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[21] See C. Michael Mitchell and John C. Murray, Special Advisors, *Changing Workplaces Review: An Agenda for Workplace Rights – Summary Report*, May 2017, page 27

[22] Other jurisdictions, e.g. Saskatchewan, have had legislation similar to that in Ontario in specific sectors.

[23] *Managing Changes in Labour Relations, supra* (at Footnote 4): see page 3, Part Four "B".

[24] A Section 3 Committee Chaired by Daniel Johnston appointed in late 2002 with an apparently limited mandate noted that as "…the trend toward more and more employees being employed by contractors continues, this issue will likely become more pressing"; see the *Report of the BC Labour Relations Code Review Committee*, April 11, 2003.

We note the following purpose articulated by the Canada Labour Board in its jurisprudence, as an example of how far from the original purposes of the *Wagner Act* model the current expression of the purpose in the B.C. Code has come:

> [Part I] of the Code is designed essentially to promote collective bargaining as a means of remedying the economic imbalance between capital and labour, and thus of ensuring social peace.
>
> ....
>
> The objectives of the Labour Code involve redressing an economic imbalance between two parties which are intimately and necessarily associated with one another in the production of goods and services and "in ensuring a just share of the fruits of progress to all".[25]

CALL recommends that the Preamble to the Code be clear and much simpler, and reflect the rights and values that the Code is uniquely designed to promote (and not simply “facilitate”), for example:

> This Act is created to promote freedom of association and the right of employees to engage in meaningful collective bargaining with their employer, and within that framework, the expeditious and fair resolution of workplace disputes.

V. CONCLUSIONS

A fulsome review of the *Code* is long overdue. The legal framework for labour relations in B.C. is currently unbalanced, favouring employers over workers, and that outcome is compounded by unprecedented changes in patterns of work and forms of employment. Restoring fairness and balance is imperative. It is important that amendments to the Code ensure workers can access their fundamental freedom to associate, recognized by the Supreme Court of Canada as a critically important constitutional right – the right to organize, to join a union, to engage in meaningful collective bargaining and to strike. A number of reforms to the Code are required to realize these rights, to enhance union density and to establish, advance and preserve fair wages and working conditions.

B.C. has fallen behind other jurisdictions and should be brought into line with the majority of jurisdictions in Canada. Restoring card-based certification, strengthening the Board’s remedial powers and eliminating incentives and opportunities for unfair employer interference and wrong-doing in certification drives, and extending successor rights to address the practice of contract flipping by employers affecting workers in precarious and lower wage service sector employment, among other reforms, are essential issues for the Panel to consider and address.

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[25] *Penske Logistics* [2001] CIRB No. 146 at para. 23, citing *Canadian Broadcasting Corporation* (1982), CLRB No. 383.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

CANADIAN ASSOCIATION OF LABOUR LAWYERS | ASSOCIATION CANADIENNE DES AVOCATS DU MOUVEMENT SYNDICAL

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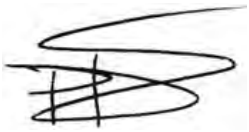

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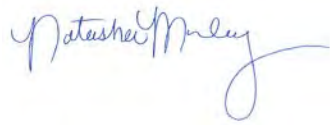

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Examining labour relations through the small business lens

Richard Truscott, Vice-President BC and Alberta

On behalf the Canadian Federation of Independent Business (CFIB) 10,000 small and medium-sized member businesses in British Columbia, we welcome the opportunity to share insights on employment rule changes. While it is prudent to review the labour and employment framework from time to time, we have a number of concerns about this review and the unintended consequences changes will have on the province's entrepreneurs as well as the economy as a whole.

In addition to the joint submission filed with 13 other associations on changes to the labour code, we wanted to submit some additional information. The following submission draws from two CFIB data sources. The first source is a public opinion poll conducted for CFIB by Ipsos between August 23 to August 28, 2018 with a sample size of 2,001 employed Canadians, including self-employed and working students. Secondly, data is also drawn from a national CFIB survey conducted August 22 to October 10, 2017, with data specific to British Columbia analyzed and presented.

The submission is structured as follows:

- Employer and Employee Relationships;
- Benefits of Flexible Workplace Practices;
- Promoting Flexible Workplace Practices;
- Protecting the Private Sector; and
- Recommendations.

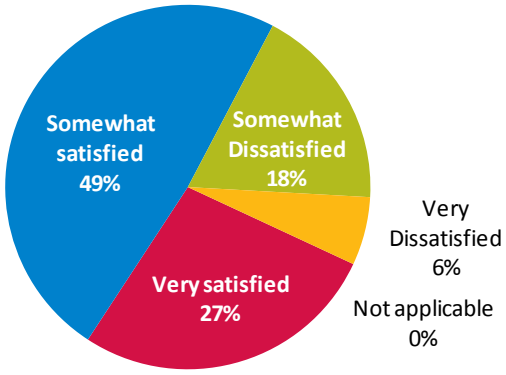
Employer and Employee Relationships

A successful Labour Relations Code is one which promotes a labour force where both employers and employees can thrive. The Labour Relations Code does currently achieve some elements which help to promote positive working relationships. This section of the submission looks to examine the satisfaction of employees in their current working arrangements, and what drives that satisfaction.

Our survey results suggest that the current Labour Relations Code helps effectively frame an environment for employees to succeed. When surveyed, 76 per cent of employees indicated that they were either very satisfied or somewhat satisfied with their overall work arrangement (see Figure 1). In addition, the Code provides employers and employees with the opportunity to negotiate flexible working arrangements. It is essential that the Code continues to promote the possibility for employees and employers to have flexible working arrangements, as it benefits both parties. The benefits for employees can be seen in Figure 2, where 73 per cent of employees indicated that they were either very satisfied or somewhat satisfied with the flexibility to improve work-life/family balance in their working arrangement.

Figure 1

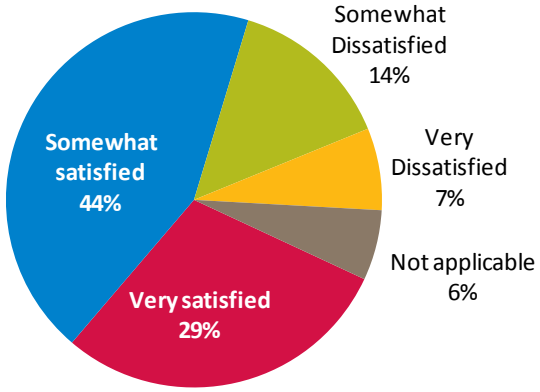
How satisfied are you with the overall satisfaction your work arrangement?



Note: Totals may not add up to 100% due to rounding.
Source: IPSOS Public Opinion Poll conducted on behalf of the CFIB, August 23rd to August 28th, 2017. n=2001 employed Canadians, including self-employed and working student

Figure 2

How satisfied are you with the flexibility to improve work-life/family balance in your work arrangement?

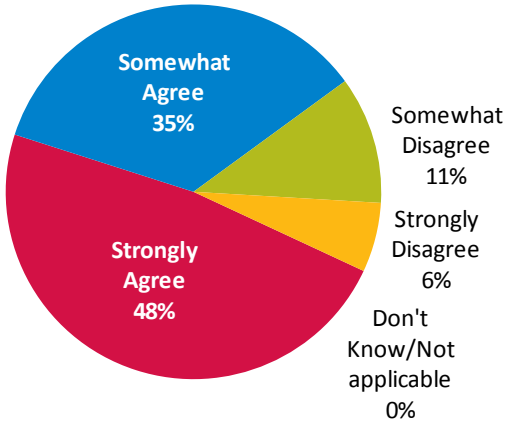


Note: Totals may not add up to 100% due to rounding.
Source: IPSOS Public Opinion Poll conducted on behalf of the CFIB, August 23rd to August 28th, 2017. n=2001 employed Canadians, including self-employed and working student

Not only are employees satisfied with their current work arrangements, the large majority have chosen their current working arrangements. Survey data shows that 83 per cent of employees in all working arrangements agree that their current arrangement is their personal choice (see Figure 3). This is important to highlight, and gives evidence to the fact that the majority of employees are satisfied with their work arrangements and the flexibility that can be negotiated with their employers. The province must continue to support an environment that works for employees and employers; one which does not strip away the possibility for these relationships to exist in the first place.

Figure 3

My current work arrangement is my personal choice.



Note: Totals may not add up to 100% due to rounding.
Source: IPSOS Public Opinion Poll conducted on behalf of the CFIB, August 23rd to August 28th, 2017. n=2001 employed Canadians, including self-employed and working student

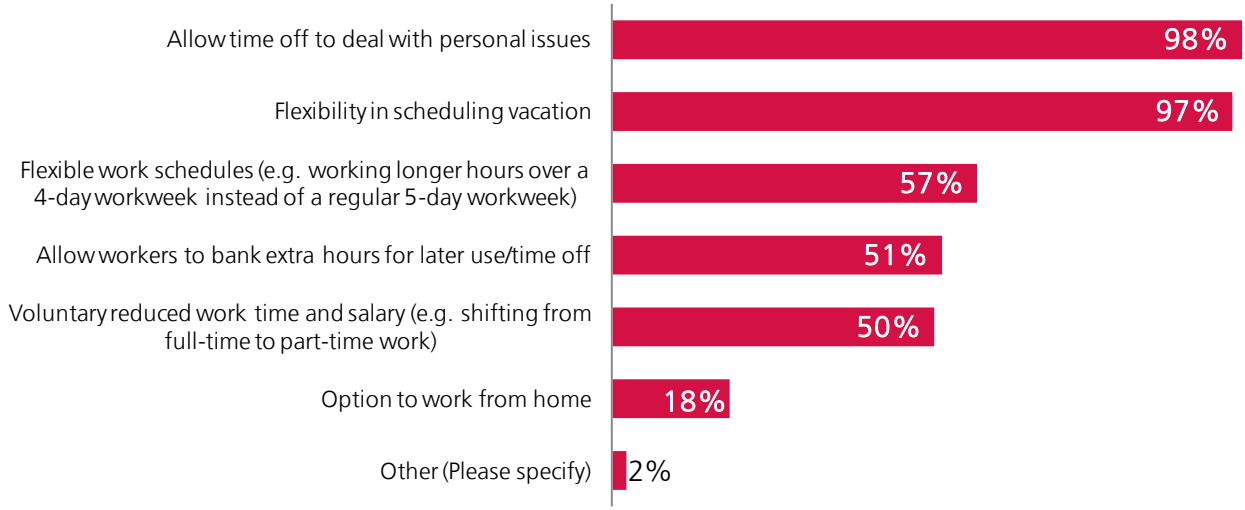
Benefits of Flexible Workplace Practices

Moving forward, it is essential that any review of Labour Relations Code takes into account the value of healthy employer and employee relationships. Not only is it evident that employees benefit and are satisfied with their current work arrangements, access to flexible working schedules seem to be a driving part of that satisfaction. Employers feel the same way. Flexible working environment not only benefit employees, but they contribute positively to employers too. Currently, small businesses in BC offer their employees a variety of flexibility; for example, 98 per cent allow time off to deal with personal issue, 97 per cent offer flexibility in scheduling vacation, and 57 per cent offer flexible work schedules (see Figure 4).

Flexible working environments benefit businesses, and subsequently employers. They help build meaningful relationships between employees and employers and help overall satisfaction of both parties. 90 per cent of employers report better relationships with their employees, 79 per cent have higher employee job satisfaction, and 75 per cent have higher employee retention from flexible workplace practices.

Figure 4

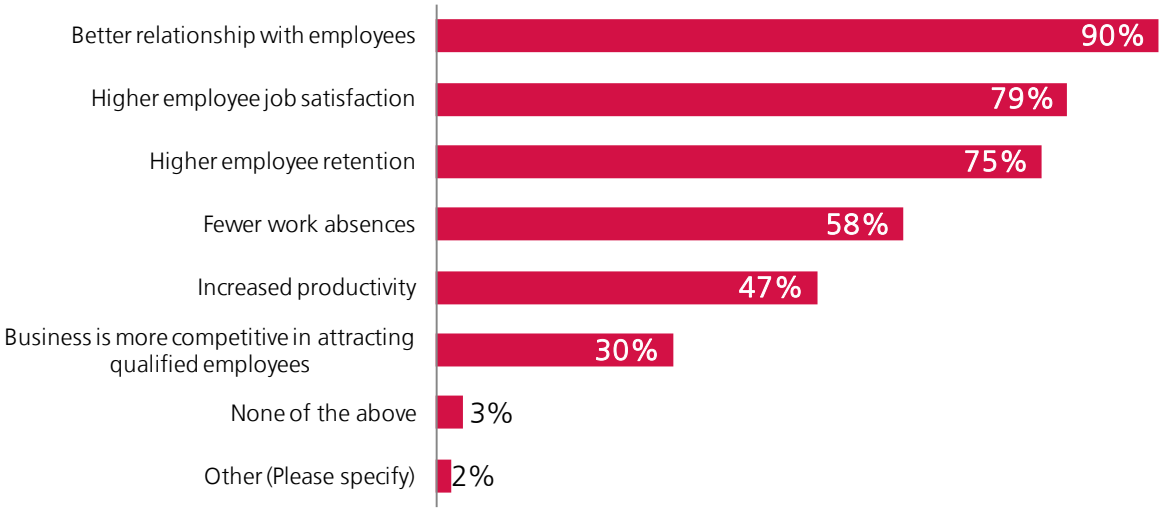
Which of the following flexible workplace practices does your business offer employees? (Select as many as apply)



Source: CFIB Changing World of Work Survey, Aug 22 to Oct 10, 2017. n=391 for BC breakdown

Figure 5

How has your business benefited from these flexible workplace practices? (Select as many as apply)



Source: CFIB Changing World of Work Survey, Aug 22 to Oct 10, 2017. n=390 for BC breakdown

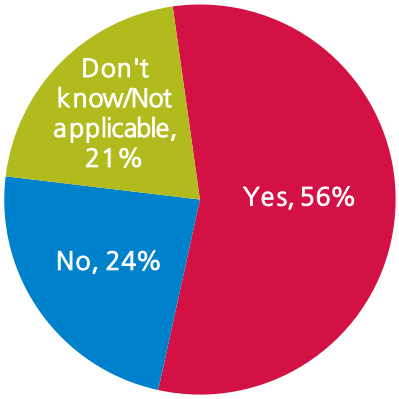
British Columbia must continue to provide employers and employees the flexibility they need to develop positive working relationships. While the Labour Relations Code does help promote this environment to an extent, there is room for improvement. With the best interests of employers and employees in mind, there are several action items that can be taken to help strengthen workplace relationships

Promoting Flexible Workplace Practices

To promote a healthy working environment that allows employers to give the most support they can to their employees, it is important to provide them with the right tools to do so. Government regulation and law can sometimes hinder small businesses from implementing flexible workplace practices. Excessive regulation can choke the variety of flexibility employers can offer, resulting in limited working options for employees. Regulation can limit work flexibility incentives and hinder small business competitiveness. While this is bad for employers, it is equally bad for employees. The burden of government regulation and payroll taxes causes 56 per cent of small businesses to hire fewer employees (see Figure 6). This translates to fewer jobs in BC's economy. Clearly, the current level of government regulation and payroll taxes is not the optimal solution. In fact, this suggests that BC should move towards a Labour Relations Code which favours workplace flexibility.

Figure 6

My business is hiring fewer employees due to the burden of government regulation and payroll taxes

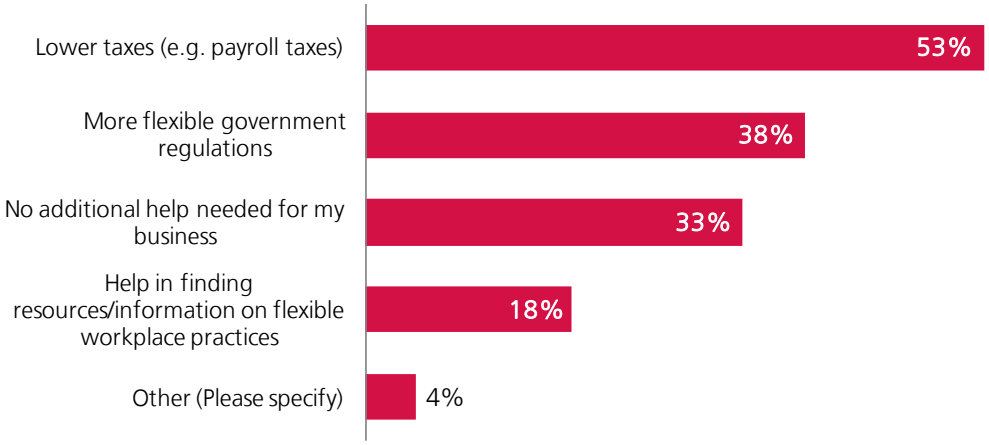


Source: CFIB Changing World of Work Survey, Aug 22 to Oct 10, 2017. n=749 for BC breakdown

There are several ways for the province to continue promoting healthy employer and employee workplace relationships. The best way the province can help support small businesses and employees is through lower taxes (e.g. payroll taxes), which 53 per cent of businesses support. Secondly, 38 per cent of small businesses indicate that more flexible government regulations would help them offer better workplace practices. While it is great news that 33 per cent of businesses indicated they require no additional help, it is important that steps are not taken to jeopardize the confidence of those businesses. We must continue to promote and grow opportunities for our business community to promote flexible working environments for employees.

Figure 7

What would help your business offer flexible workplace practices? (Select as many as apply)



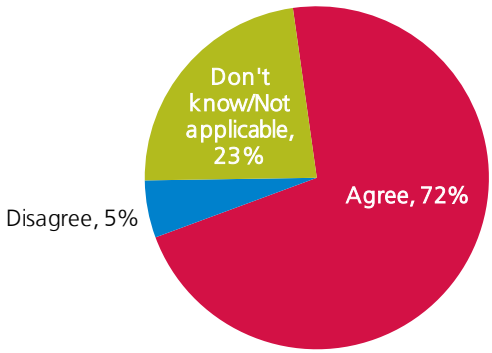
Source: CFIB Changing World of Work Survey, Aug 22 to Oct 10, 2017. n=699 for BC breakdown

Protecting the Private Sector

Throughout this submission, we continue to emphasize the importance and value of flexible workplace practices between employers and employees. Most important is the success of flexible practices. better working relationships, greater employee job satisfaction, and higher employee retention. With this in mind, it is essential that the province does not jeopardize or inhibit the success of flexible working arrangements by altering the current Code.

Figure 8

A written agreement should serve as adequate proof of a business' relationship with a worker for government compliance purposes

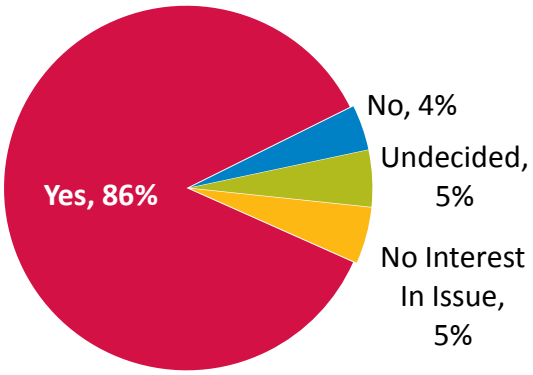


Source: CFIB Changing World of Work Survey, Aug 22 to Oct 10, 2017. n=738 for BC breakdown

72 per cent of small businesses agree that a written agreement should serve as adequate proof of a business' relationship with a worker for government compliance purposes (see Figure 8). With this in mind, there is growing concern around the process of union certification. The governing party originally campaigned on changing the secret ballot vote system to a card-based system, which eliminates the basic democratic right to vote using a secret ballot. In a CFIB survey of BC business owners conducted in 2005, 86 per cent of small business owners indicated that secret ballot votes should be mandatory prior to any union certification (see Figure 9).

Figure 9

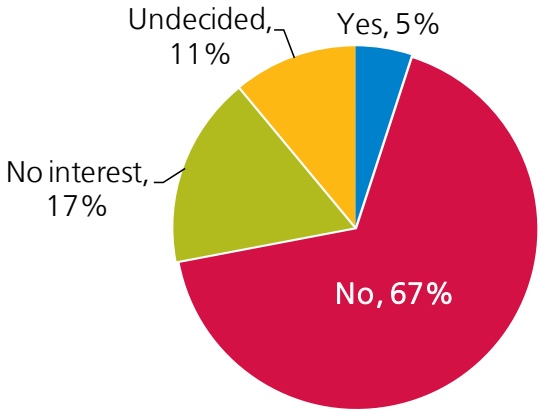
Should secret ballot votes be mandatory prior to any union certification?



Source: CFIB BC Mandate, March 2005. n=1310

Figure 10

Should the Ontario government replace the secret ballot vote system with a based system for union certification in all sectors?



Source: CFIB Ontario Mandate, December 2016. n=1914

With a strong majority in support of keeping secret ballot voting mandatory, there is clearly no demand for alteration of the current union certification processes. While we recognize this data is dated, we are currently surveying our members on whether the secret ballot vote system should be replaced with a card-based system for union certification. For this consultation, we are able to supply data from a recent Ontario survey. In a 2016 CFIB survey, 67 per cent of small business owners in Ontario opposed replacing the secret ballot vote system with a card-based system for union certification in all sectors (see Figure 10).

In context of the Labour Relations Code, let it be noted there is no consensus supporting change from secret ballot voting to a card-based system. We strongly urge the commission to listen to the voice of small business owners in BC. Removal of the secret ballot vote and introduction of a card based system has the potential to encourage intimidation tactics, resulting in outcomes which may not reflect how employees truly feel. This has the potential to harm employer and employee work relations, jeopardizing the benefits that exist from the current system.

Recommendations

Workplaces continue to change rapidly as technology and new generations of employees demand flexibility, choice, and innovative workplaces. Any changes to the Labour Relations Code need to reflect this change and ensure that opportunities for BC's economy to attract investment, talent, and jobs are not compromised in the process. It is important that the province support BC's small businesses with an environment that allows them to provide valued, flexible work opportunities for employees. In addition, it is vital the Labour Relations Code does not stifle such opportunities through government regulation and payroll taxes, as this functions as a disincentive for businesses to hire people.

CFIB stands behind the recommendations made with the 13 other business associations:

- Ensure appointments to the Labour Relations Board reflect balance between union and employer representatives
- Protect the court-tested definition of "essential services"
- Protect the personal and private information of employees
- Prevent legislated sectoral bargaining
- End governments dictating employee choice on large construction projects through project labour agreements

In addition, we also request you please consider CFIB's following recommendations that will benefit small businesses and employees across the province. Please do not hesitate to reach out; we would be pleased to further explain our recommendations or answer any of your questions you have.

1. Do not increase the regulatory burden that small businesses face with respect to employment standards and labour relations requirements.

2. Ensure that any changes to labour legislation allow employers to have flexibility so that they can respond and negotiate directly with their employees.

3. Do not change the union certification process; do not discard the secret ballot voting method, and do not introduce a card-based system to replace the secret ballot vote.

4. Use simple, clear and transparent language in all external communications addressing the requirements under the Labour Relations Code.

Submission to the Section 3 Panel Regarding British Columbia *Labour Relations Code* Reform

Submission By:

The Canadian Union of Public Employees
British Columbia Division

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March 20, 2018

The Canadian Union of Public Employees, BC Division, represents over 87,600 members in municipalities, schools, colleges, universities, libraries, health, emergency medical services, social services, and transportation. We welcome the opportunity to participate in the review of British Columbia's workplace laws, including the *Labour Relations Code*.

A review of the BC *Labour Relations Code* (the "*Code"*) is long overdue. For far too long the people of our province have worked under a legal framework that privileges employers over workers. The balance originally struck in our model of labour relations, which was premised on labour stability by regulating strikes on the one hand, while facilitating unionization through the certification process on the other hand, has been progressively tipped against workers over the past 17 years. Change is needed to restore balance and meet the needs of modern workplaces.

Unions give workers an opportunity to negotiate for improvements to wages and conditions of employment. Unionized workers have greater job security, and better access to vacation, extended health benefits, pensions, and a host of other employment-based benefits. Higher union density jurisdictions see improvements for all workers, in part because all employers have to offer better terms and conditions to attract employees, and in part because a strong labour movement helps to raise legislated minimum standards. Barriers to unionization that exist in the *Code* ultimately drag down the standards for all workers in the province.

The deleterious effects of BC's regressive labour code are exacerbated by trends in the labour market that increase worker vulnerability. Trends towards precarious work (including, among other things, part-time, contract, contingent employment in which workers are denied job security and decent wages) make unionization more difficult. But these trends also make unionization even more necessary. Unions have demonstrated strength in raising wages for members and non-members alike, in setting workplace standards that can be applied to all workers and in acting as a counterbalance to the power of employers. Balancing aspects of the *Labour Relations Code* that are unfair toward workers and unions must be coupled with measures that improve prospects for organizing vulnerable, precariously employed workers.

Any review of labour law must also be done in light of recent Supreme Court of Canada decisions that give constitutional protection to the right to join a union and to engage in meaningful collective bargaining and the right to strike. These decisions emphasize that governments must create legislation that gives real and meaningful access to unionization and collective bargaining to all workers. Changes to the *Code* are required to fulfill this obligation.

On February 6, 2018, Minister Harry Bains appointed a three-member panel under s.3 of the *Code* (the "Panel") with a broad mandate to review the *Code*. The Panel has been directed to "…assess each issue canvased from the perspective of how to 'ensure workplaces support a growing, sustainable economy with fair laws for workers and businesses' and promote certainty as well as harmonious and stable labour management relations".

These are CUPE BC's recommendations for reforms to the *Code*. We firmly believe that these recommendations are a step in the right direction to better align with the realities of the 21st century workplace. These changes, if adopted, will make a positive difference in the lives of working people by restoring balance in labour relations in our province.

We would like to highlight several areas that we are particularly concerned about, which we believe should be the first areas on which the government acts:

- Introduction of card check certification.
    - Certification should be granted when a union can demonstrate membership support of 50% of employees at a worksite. Secret ballot votes should be held only in cases in which a union has submitted membership evidence for more than 40% of employees, but less than 50%.
- Where votes occur, eliminate delay in holding of certification votes by instituting a maximum time of three working days between the certification application filing and the vote being held.
- Extend the post-certification "statutory freeze" period until a first collective agreement is reached.
- Increase penalties for unfair labour practices, including the use of remedial certification.
- Introduce successor rights so that unionized workers maintain their collective agreements and collective bargaining rights when work is contracted out and contracts are flipped between successive contractors.
- Amend provisions of the *Code* related to picketing so that they comply with the *Charter*.

Recommendation 1: Restore Card-Based Certification, granting automatic certification to unions demonstrating more than 50% support from workers in a proposed bargaining unit. Certification votes will be held when applications for certification demonstrate between 40% and 50% support.

Union organizing and certification are cornerstones of our model for labour relations. Workers have a constitutionally-protected right to join unions, and our labour laws should facilitate rather than hinder this process. Both the 1992 Baigent Section 3 Panel and 1998 Ready Section 3 Panel Reports, which can be provided if needed, recognized the fundamental role card-based certification plays in creating balanced labour relations.

Two-stage certification processes such as the one presently in place in BC, whereby a union must first obtain threshold for a vote to be ordered and then succeed with 50%+1 in a secret ballot up to (and usually at) ten days after the certification application is filed, are rife with employer interference.

The 1992 Baigent Section 3 Panel Report rejected arguments in favour of maintaining a secret ballot certification vote as follows in their Report (at p.26):

> "The surface attraction of a secret ballot vote does not stand up to examination. Since the introduction of secret ballot votes in 1984 the rate of employer unfair labour practices in representation campaigns in British Columbia has increased by more than 100%. When certification hinges on a campaign in which the employer participates the lesson of experience is that unfair labour practices designed to thwart the organizing drive will

> inevitably follow. The statistical profile in British Columbia since introduction of the vote was confirmed by the repeated anecdotes our Committee heard in its tours across the Province. It is also borne out in decisions of the Board and Council. Unions would sign up a clear majority of employees as members and a vote would be ordered. Then key union supporters would be fired or laid-off while threats of closure dominated the campaign and the vote itself was viewed as a vote on whether or not to continue with employment rather than as a vote on redefining the employment relationship. It is not acceptable that an employee's basic right to join a trade union be visited with such consequences and illegal interference. Nor is there any reasonable likelihood of introducing effective deterrents to illegal employer conduct during a representational campaign. A shorter time framework for voting will not deter an employer intent on "getting the message" to his employees. Neither is the imposition of fines and/or the expeditious reinstatement of terminated employees likely to introduce attitudinal or behavioural changes in employers intent on ensuring that their employees do not join unions. The simple reality is that secret ballot votes and their concomitant representational campaigns invite an unacceptable level of unlawful employer interference in the certification process."

The 1998 Ready Section 3 Panel Report also expressed the Panel's support for maintaining card-based certification as follows:

> "We affirm our proposal in the Discussion Paper to not recommend a mandatory certification vote. We affirm the individual right, recognized provincially, nationally and internationally, to join or form trade unions. Experience demonstrates that employers do seek to affect employees' right to choose. In our view, extending the certification process by introducing a mandatory certification vote would only further invite such illegal activity."

These observations are still highly relevant today. There is no evidence that membership cards do not adequately reflect employee wishes. Furthermore, employer and union campaigns that take place between the filing of the certification application and the ultimate vote on whether to join the union are frequently hotly contested and may poison workplaces.

Employers regularly use intimidation tactics to dissuade employees from joining a union, including threatening workers with discipline or discharge, or threatening job loss if employees unionize. The ease and frequency at which employers engage in these kinds of tactics is amplified in mandatory certification vote systems, such as the system presently in place in BC.

Parties expend significant resources responding to unfair labour practice complaints. Adversarial interactions between workers and their employers cause mistrust and damaged relationships, which negatively impacts the ability to reach a first collective agreement once a union is certified.

Card based certification is one of the most significant amendments that could be made to the *Code* to balance labour relations and achieve the purposes enshrined in s.2 of the *Code*. Card based certification provides the greatest opportunity for workers to exercise their constitutional right to join a union and limits undue influence by employers in exercising this right. Card based certification protects vulnerable workers from hostile employers, and effectively levels the playing field in matters of union certification.

Jurisdictions that utilize card-based certification have higher rates of success in unionization campaigns. As Sara Slinn notes in her comprehensive survey of the literature on union certification regimes, when mandatory vote systems are introduced the number of certification applications and votes declines.[1] Clearly the system by which union certification is granted has a significant and material effect on certification outcomes. It is not the case that the use of a mandatory vote system diminishes the desire of workers to join a union. Instead we can see that mandatory vote systems act as a barrier to unionization.

There are those who might argue that mandatory votes are more democratic. That line of argument, however, fails to recognize that when workers sign a union card in a certification drive, they are in fact voting for the union. When more than 50% of employees sign cards, the majority should rule, and the union should be certified automatically. A mandatory vote, on the other hand, is regularly tainted by employer intimidation tactics. It might seem counter-intuitive, but the mandatory vote system is actually less democratic because the vote takes place under regular threats of potential reprisals, and in the context of significant power imbalance between workers and their employers. Without access to a free and fair election, the process is slanted in favour of the only group that has the power to discipline and intimidate the workers, and as such mandatory vote systems are tilted towards employers and against workers.

Recommendation 2: Reduce voting period from ten days to three days where a vote is required. Expedite adjudication of bona fide objections raised in the certification process.

As outlined above, long delays between certification applications and votes cause hostile work environments and mistrust among employees and employers, and undermine the purposes of the *Code* as enshrined in section 2. Such long delays are more akin to the labour relations regime in the United States, which has demonstrated a profound weakness in guaranteeing workers' associational rights through union certification. Delays in certification votes, where votes are required, are correlated with significantly lower success rates in union certification applications. Employer use of unfair labour practices during these long delays are undoubtedly the primary cause of the decline in success in these cases.

Clearly, the best way to avoid long delays between application and certification is to introduce automatic certification where the union can demonstrate majority support (i.e., card-based certification as discussed above). However, in cases in which the union chooses to apply for a vote with 40% to 50% membership support, there should be a maximum time between the application and the vote to mitigate the harms associated with drawn out voting campaigns. We say this period should be three days.

Additionally, any objections to the unit applied for or arising out of the certification vote must be dealt with expeditiously and decisions rendered quickly so that workers are not stuck in "limbo" unsure of whether they will be joining the union or not, when they are particularly vulnerable.

We have had a number of cases wherein we applied for certification and it took four months for the Board to render a decision on an employer's objection to the proposed bargaining unit. This meant

[1] Sara Slinn, "Collective Bargaining", *Changing Workplaces Review Research Projects*, 2015, https://cirhr.library.utoronto.ca/sites/cirhr.library.utoronto.ca/files/research-projects/Slinn-9-Access%20to%20Collective%20Bargaining.pdf

that, for four months after the vote took place, prospective members waited patiently (and anxiously) to learn whether they would be certified or not. During that period, the employer typically refused to meet with workers or worker representatives to discuss workplace issues or working conditions, as employers are often not prepared to engage in any discussions with employees until they know whether there will be a union or not. This places serious hardship on workers and cannot be permitted to continue.

Recommendation 3: Eliminate the use of mail-in ballots except where all parties consent.

The normal requirement that a vote be conducted within ten days of the filing of an application for certification does not apply for a vote conducted by mail, per s.24(2) of the *Code*. In fact, where a vote is ordered to occur by mail the voting period is significantly protracted, often in the range of three weeks or so in our experience.

The use of mail-in ballots has been fraught with difficulty in BC. The extended campaign period exacerbates pressure on workers and the impact of unfair labour practices by employers and increases workplace hostility. Until very recently, the Board was routinely ordering mail in ballots even where the parties opposed this process, due to administrative costs of holding in-person votes. While this troubling trend was recently limited after outcry by the labour community, the *Code* itself does not restrict such use of mail ballots. As such, there is a very real possibility that budget cuts in the future may result in an increase in the use of mail ballots contrary to the wishes of the labour community.

As such, we propose amending s.24(2) to read as follows:

> 24 (2) A representation vote under subsection (1) must be conducted within 10 days from the date the board receives the application for certification or, if the vote is to be conducted by mail per s.24(2.1), within a longer period the board orders.
>
> (2.1) A representation vote under this section may be conducted by mail only on agreement by the parties.

Recommendation 4: Extend the statutory "freeze" post-certification until the parties reach a first collective agreement.

A statutory freeze on terms and conditions of employment after union certification is a standard principle in Canadian labour relations. As the 1998 Ready Section 3 Panel observed in their Report, "The statutory freeze… is designed to level the playing field during first contract negotiations." It prevents employers from engaging in reprisals against employees who choose to unionize and fosters conditions for a smooth collective bargaining process. There is no guarantee that any particular condition will remain in place; but there is a guarantee that during the freeze period there will not be constant disruptions to collective bargaining that would happen with unilateral changes to working conditions. In fact, one goal of unionization is to prevent the unilateral imposition of employment terms by employers.

As the 1998 Ready Section 3 Panel Report noted, "the [current] four-month period was reflective of the average time it took to conclude a collective agreement." The Ready Panel further noted that, in

1998, it took on average of six to nine months to conclude a first agreement, and recommended extending the “freeze” period to eight months to better align with that timeframe.

However, there is no rational basis for time-limiting the freeze period at all. Employers can readily delay bargaining by engaging in tactics that extend negotiations beyond whatever time period is established. There is an incentive to do so, as employers then have free reign to change terms and conditions of employment with little consequence or remedy for the affected workers, who are particularly vulnerable.

On the other hand, where parties are bargaining successive collective agreements, the “expired” agreement is extended until a new agreement is reached, or until strike or lockout occurs (pursuant to s.45(2)). This promotes stable labour relations and maintains appropriate balance between employers and workers as they negotiate their working conditions in a collaborative, minimally disruptive manner, in line with the purposes of the *Code*.

Given this, it makes abundant sense to remove the reference to a time-duration for a statutory freeze post-certification. This would simply require deleting s.45(1)(b)(i) and adding language similar to that in s.45(2)(a). We propose that an amended s.45(1)(b) read:

> 45 (1) When the board certifies a trade union as the bargaining agent for employees in a unit and a collective agreement is not in force,
>
> (b) the employer must not increase or decrease the rate of pay of an employee in the unit or alter another term or condition of employment until
>
> (i) a strike or lockout has commenced, or
>
> (ii) a collective agreement is executed.

Note that this change would not prevent an employer from making bona fide changes to working conditions or wages, but would require application to the Board under s.45(3). This would balance an employer’s legitimate business needs while protecting workers when they are most vulnerable, restoring balance in labour relations in a manner that is consistent with the purposes of the *Code*.

Recommendation 5: Institute multi-employer, sectoral certifications (“Broad Based Bargaining”) for traditionally difficult to organize sectors with 50 or less employees per worksite.

Certain sectors of the economy are significantly more difficult to organize under the Wagner model. Additionally, there are sectors, or types of workplaces, in which the Wagner model does not provide sufficient bargaining strength to unions to give meaningful access to good collective agreements. While we are unable to outline a comprehensive proposal within the confines of this submission, we strongly urge the Panel to consider alternatives to the Wagner model to give access to collective bargaining to workers in those sectors/workplaces that are currently difficult to unionize, where union density is currently relatively low.

Recommendation 6: Restore provisions concerning communications such that employer communications are only permissible where they serve a legitimate business purpose.

Section 8 used to read as follows:

> "Nothing in this Code deprives a person the freedom to communicate to an employee a statement of fact or opinion reasonably held with respect to an employer's business."

The Board's approach to s.8 under this previous language struck the appropriate balance between workers and employers, and was outlined as follows in *Cardinal Transportation*, BCLRB No. B344/96 (wherein the Board also upheld s.8 as a reasonable limit on freedom of expression under the *Charter*) at para. 212:

> "In summary, the Board's policy respecting Section 8 (employer free speech) will be as follows:
>
> (a) Employers have a general right to express their views. However, to fall within Section 8, communications must be either statements of fact or opinions reasonably held regarding the business. An employer's statement can influence the choice of an employee provided it is protected by Section 8 (or does not in any way contravene the Code).
>
> (b) Coercion is defined as any effort by an employer to invoke some form of force, threat, undue pressure, or compulsion for the purpose of controlling or influencing an employee's freedom of association.
>
> (c) There is no "statutory immunity" for statements about the employer's business which are coercive, as set out in (b) above.
>
> (d) The definition of "business" in Section 8 includes statements concerning all aspects of managing the business including collective bargaining matters; however, it does not include statements concerned with union membership. Such latter statements can be permissible under the Code so long as they fall outside the prohibition contained in Sections 6 and 9. "Business" does not include negative comments about unions in general.
>
> (e) Captive audience meetings will continue to be given a strict level of scrutiny. Statements that would otherwise be permissible may, in the context of a captive audience meeting, be impermissible. This is especially true in the areas of the economic dependence of employees and union membership requirements.
>
> (f) The longstanding policy of this Board and other labour boards in Canada is that an employer is not entitled to engage in an anti-union political-style campaign in an effort to prevent the union from certifying. The greatest point of resistance by employers to trade unions is at the initial point of employees attempting to exercise their statutory choice in favour of collective bargaining. A statutory choice has been made to restrict employer speech at this point in favour of ensuring employees' freedom of association. An employer's vigorous presentation of its anti-union views may be reasonably perceived by most

> employees as one that is not "safe to thwart". The American experience seems to verify this."

Despite the fact that this language struck the appropriate balance in labour relations and was upheld as a demonstrably justified limit on *Charter*-protected freedom of expression, in 2002 the BC Liberal government amended s.8 to its current language, which significantly expands permissible communication by employers:

> "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."

The Board has interpreted this change in a way that is significantly unfavourable to unions and workers. For instance, the Board has held that, while outright lies are prohibited, statements that are incorrect or unreasonable were not. So, for instance, the Board has permitted statements that the Union is disrespectful and should not be trusted, even when that view is mistaken and unreasonable: *Convergys Customer Management Canada Inc*, BCLRB No. B62/2003, upheld on reconsideration BCLRB No. B111/2003, at para.122. The Board has upheld statements that the Employer does not have to bargain if the Union is certified: *Convergys*, at para. 123. The Board has also upheld a statement that signing a union card has the same legal effect as signing a contract: *Convergys*, at para. 124.

There are a number of other Board decisions with similar outcomes. The overall effect of these decisions is that employers have virtual free reign to do and say what they wish, in a context where employees are very vulnerable and there is a significant power imbalance.

One must bear in mind that virtually unfettered employer free speech, on the one hand, is in no way counterbalanced under the *Code*: union supporters and organizers are prohibited from attempting to persuade workers at the worksite during working hours to join a union pursuant to s.7(1) of the *Code*. This further entrenches the gross imbalance at worksites in relation to union campaigns, and favours employers' ability to pressure workers over workers' ability to communicate with each other regarding unionization while at work.

Limiting employer speech, particularly during organizing drives, to "fact or opinion reasonably held with respect to an employer's business" would restore the balance in workplaces and allow workers to decide whether they wish to join a union, which is their constitutionally protected right, without undue influence from their employer.

In our view, the previous wording of s.8 appropriately balanced competing interests of workers and employers. It is consistent with the *Charter* right to freedom of expression, as it has been held to be a demonstrably justified limit under s.1. As such, it ought to be restored.

Recommendation 7: Institute tougher penalties in relation to unfair labour practice violations, including the use of remedial certification.

Employer interference in organizing campaigns often happens very early in the process, before the union has been able to sign enough cards to apply for a certification vote. For employers, the

consequences of engaging in such activity are insignificant compared to the benefit of achieving their goal of worker intimidation and union avoidance. There are cases in which the most effective remedy is to certify the union because the true wishes of the employees cannot be revealed through a vote, and the unfair labour practices have made it impossible for the union to get enough membership evidence to apply for certification.

While some of the negative effects of rampant unfair labour practices seen in some organizing drives will be reduced or even eliminated with a move to card-based certification, there must be more of a risk to employers for engaging in anti-union behaviours that violate the *Code*. Under the present legislative and policy regime, there is little disincentive for such behaviours, given they will not result in any significant consequence even if a complaint is founded. As such, we recommend legislative change that entrenches remedial certification as a likely outcome in response to unfair labour practice violations.

Recommendation 8: Amend successorship provisions so that the certification follows a transfer of workers and work to reflect the modern realities of contracting, subcontracting, contract flipping, and modern forms of corporate transfer. Place the primary evidentiary burden on the employer where a successorship or common employer application is filed.

Successor rights are a necessary protection for workers and their unions. The practices of contracting out, contract tendering and contract flipping are used by employers to undermine the democratic rights of workers to join and remain in unions, and to undermine collective bargaining. In cases of contracting out, unions lose bargaining rights and negotiated agreements, and workers lose their jobs. Successor rights will help protect vulnerable workers.

There has been a rise in the vulnerability of workers in a number of sectors that are regularly subjected to the practice of contracting out, such as residential and long-term care in the healthcare system. We support the broadest possible extension of successor rights. That is to say, any work that is covered by a collective agreement should be protected by successor rights provisions.

When workers choose to exercise their constitutional rights to freedom of association by joining a union, they expect that they will be able to maintain that association at their workplace. They do not expect to lose their hard-fought rights through contract flipping, contracting out or transfer of workers or work functions that fall outside the Board's interpretation of successorship provisions in the *Code*.

The only truly effective way to protect workers' bargaining rights is to guarantee that their union certificate, their collective agreement, and their bargaining rights follow them when work is transferred from one company (or public sector organization) to another employer. The new employer will thus be responsible for upholding the terms and conditions of the collective agreement, and subsequently negotiating a new collective agreement upon its expiry.

As such, we recommend that an extension of collective bargaining rights and collective agreements in cases in which work is contracted out, contract flipping occurs; work or workers are transferred, and in all sale of business cases regardless of the form taken.

Furthermore, given that unions and workers do not have ready access to documentation required to establish successorships as this information is normally solely in the possession of employers, we

recommend that the *Code* be amended to place the evidentiary burden on employers, and require that they disclose all relevant documents, in cases where a successorship or common employer application is filed.

Recommendation 9: Repeal "the provision of education" as an essential service.

Section 72 of the *Code* creates a process whereby the Board may designate services essential where a potential labour dispute poses a threat to "the health, safety or welfare of the residents of British Columbia."

In previous years, "educational services" were included in the essential service provisions, however, this was removed via Bill 84 which replaced the *Industrial Relations Act* with the *Labour Relations Code* in 1993.

In 2001, the BC government amended the *Code* to add education as an essential service. To this end, ss.72(1)(a)(ii) and 72(2.1) were added, which reads:

> 72 (1) If a dispute arises after collective bargaining has commenced, the chair may, on the chair's own motion or on application by either of the parties to the dispute,
>
> (a) investigate whether or not the dispute poses a threat to
>
> …
>
> (ii) the provision of educational programs to students and eligible children under the *School Act*,
>
> …
>
> (2.1) If the minister
>
> (a) after receiving a report of the chair respecting a dispute, or
>
> (b) on the minister's own initiative
>
> considers that a dispute poses a threat to the provision of educational programs to students and eligible children under the *School Act*, the minister may direct the board to designate as essential services those facilities, productions and services that the board considers necessary or essential to prevent immediate and serious disruption to the provision of educational programs.

This amendment has been rife with difficulty since its enactment, as education does not lend itself to the same analysis as "health, safety and welfare" which are more logically candidates for protection as "essential" in the event of a work stoppage. This has led to protracted litigation before the Labour Relations Board and has fueled already heated labour disputes in the public education sector.

Furthermore, legislators must be cognizant of workers' constitutionally-protected right to strike, as a starting point. In our submission, "the provision of educational programs" is not truly essential as a standalone public service, and any real and significant threat to students' education posed by a protracted labour dispute is more appropriately dealt with under "health, safety and welfare"

provisions of s.72(1) and (2), which was the precise avenue for dealing with such threats prior to the enactment of ss.72(1)(a)(ii) and 72(2.1).

In 1993, following the repeal of "educational services" from the essential services provisions of the *Code*, the Board nonetheless concluded in *Bulkley Valley School District Number 54 (Re)*, BCLRB No. B147/93, that certain aspects of education may fall within the ambit of "health, safety and welfare" pursuant to s.72.

At issue in *Bulkley Valley* was whether certain educational services should be declared essential in order to protect grade 12 students' ability to graduate high school and complete their provincial exams. The Board concluded that, in exceptional circumstances, education may be an "essential service" under the "welfare" head of s.72:

> "Is education therefore capable of falling within the concept of welfare, notwithstanding the removal of "educational services" from Section 72? There may be exceptional circumstances in which education falls within the concept of welfare?
>
> It is our view education falls within the concept of a profound social and human need, and we draw support for this conclusion from the Supreme Court of Canada decision in *Jones v. The Queen, supra*…
>
> …
>
> If education therefore, can, under certain exceptional circumstances, fit within the concept of "welfare", do the circumstances of the affected Grade 12 students fit within this exception? We believe the potential impact of this dispute on Grade 12 students does fall within the concept of "welfare"."

The Board ultimately concluded that it could fall under this concept, and ordered that the matter be further investigated by an industrial relations officer.

Given the degree to which essential services legislation limits workers' constitutionally protected right to strike, given the protracted and complex legal disputes that have arisen under the current provisions related to "the provision of educational programs" as an essential service, and given that "health, safety and welfare" provisions will protect educational services where there is a real and substantial risk of significant harm, we recommend that ss.72(1)(a)(ii) and 72(2.1) be repealed and "provision of education services" no longer be included as an express ground for essential service designation under the *Code*.

Recommendation 10: Repeal restrictions on secondary picketing.

Secondary picketing is a constitutional right, as the Supreme Court has ruled. It is guaranteed by the *Charter* rights to both freedom of expression and freedom of association. It is perplexing that the BC *Labour Relations Code* continues to include restrictions on such a fundamental right. Throughout Canada, secondary picketing is regulated by the courts per the jurisprudence from the Supreme Court of Canada, and there is no suggestion that this causes any difficulty for industry.

Recommendation 11: Amend provisions related to common site picketing relief to comply with the right to strike under s.2(d) of the Charter.

Where picketing impacts "neutral third parties" who share a common site with a struck employer, the *Code* provides for relief for such common site employers under s.64. While employees who are on strike or locked out may picket at or near a site where they work under their employer's control and direction, on application the Board "must restrict the picketing in such a manner that it affects only the operation of the employer causing the lockout or whose employees are lawfully on strike, or an operation of an ally of that employer, unless it is not possible to do so without prohibiting picketing that is permitted by subsection (3) or (4), in which case the Board may regulate the picketing as it considers appropriate" (per s.65(7)).

The Board's approach to applications for common site relief is set out in *Sovereign General Insurance Co.*, BCLRB No. B451/94, wherein the Board set out a two-stage approach to applications for common site relief under the *Code*, still the leading case on the Board's policy in this area, as follows:

> "We come now to a more detailed examination of the Board's inquiry at both the first and second stage of Section 65(6). It might initially seem that there is very little distinction given the determination that the same options are available in both restricting and regulating picketing (i.e., time, place and manner). However, there is an important difference to which reference has already been made: at the initial stage, primary emphasis is placed on the protection of third parties -- the Board is directed to restrict the picketing in such a manner that it only affects the operation of the struck or locking out employer, unless to do so results in a complete prohibition of the picketing; at the second stage, regulation of picketing may result in third parties being affected.
>
> Except for the stipulation that restrictions on picketing not amount to a prohibition, the first stage adopts language found in the *Industrial Relations Act*. That is, both the former Section 85(5) and the current Section 65(6) contain an express direction that "...the board *shall* restrict the picketing in such a manner that it affects *only* the operation of the [primary employer]" (emphasis added). This language does *not* engage any of the discretionary factors which were previously adopted by the Board in cases such as *Vancouver Symphony Society, supra* (e.g., functional interrelationship or lack of "neutrality").
>
> Given this primary emphasis at the first stage on insulating third parties, we believe that there should be a concomitant obligation on persons seeking relief under Section 65(6) to specifically propose the minimum restrictions necessary for their protection. The onus will then shift to the union to demonstrate that these restrictions would amount to a prohibition, before the Board will move beyond the first stage.
>
> At the second stage, primary importance is no longer placed on the protection of third parties. Instead, the Board must balance (perhaps "weigh" is a more appropriate description) their rights with those of the striking or locked out employees. This requires a broader examination of the competing interests -- recognizing that in no circumstances will there be a complete prohibition of picketing. Although the right to picket may be diminished as well through regulation at the second stage, unlike the first stage, there may also be a

> continuing effect on third parties. Further, if no regulation short of prohibition is possible, the Board may exercise its discretion to deny relief entirely."

Thus, the Board's approach entails the "neutral" third party proposing picketing restrictions that would relieve them from being impacted by the labour dispute. Those proposals will be adopted by the Board unless they result in a complete prohibition on picketing, in which case the Board will restrict picketing geographically or temporally to limit the impact on the neutral third party.

The *Code* language related to common site relief, and the Board's approach to this language, are not consistent with workers' constitutionally-protected rights to strike and picket under ss.2(b) and 2(d) of the *Charter*. The starting point must be the right to strike and picket, and any restrictions must be minimally impairing of those rights, and demonstrably justified in a free and democratic society pursuant to s.1 of the *Charter*. Instead, the Board's policy and the language of s.64(7) limits picketing up to the point of complete prohibition. Clearly, this is not consistent with the *Charter* and ought to be amended as follows:

> (7) If the picketing referred to in subsection (6) is common site picketing, the board may only restrict the picketing in such a manner that is demonstrably justified in a free and democratic society.

Recommendation 12: Restore the definition of "strike" to include the intention to compel the employer to agree to terms of employment.

Prior to 1984, the definition of "strike" contained a subjective intention, the intention to compel, as follows:

> "strike" includes
>
> (i) a cessation of work; or
>
> (ii) a refusal to work; or
>
> (iii) a refusal to continue to work; or
>
> (iv) an act or omission that is likely to, or does, restrict or limit production or services,
>
> by employees in combination, or in concert, or in accordance with a common understanding, <u>for the purpose of compelling their employer to agree to terms or conditions of employment</u> or of compelling another employer to agree to terms or conditions of employment of his employees, and "to strike" has a similar meaning.

The current definition of "strike" in s.1 no longer contains this subjective intention to compel, and reads as follows:

> **"strike"** includes a cessation of work, a refusal to work or to continue to work by employees in combination or in concert or in accordance with a common understanding, or a slowdown or other concerted activity on the part of employees that is designed to or does restrict or limit production or services, but does not include
>
> (a) a cessation of work permitted by section 63(3), or

(b) a cessation, refusal, omission or act of an employee that occurs as the direct result of and for no other reason than picketing that is permitted under this Code,

and **"to strike"** has a similar meaning;

On the other hand, the current definition of "lockout" under s.1 still includes an intention to compel:

> **"lockout"** includes closing a place of employment, a suspension of work or a refusal by an employer to continue to employ a number of his or her employees, done to compel his or her employees or to aid another employer to compel his or her employees to agree to conditions of employment;

The definitions of "strike" and "lockout" are not balanced in the *Code*, meaning that employers can engage in conduct that would constitute a "lockout" (i.e., significant changes to terms and conditions of employment) but the Union is unable to prove the subjective element required to establish the employer's unilateral action constitutes an unlawful lockout. On the other hand, employees are prohibited from stopping or slowing down work, or limiting production, in combination or concert whether or not they intended to compel their employer to agree to terms or conditions of employment.

This results in a significant imbalance: whereas the Union must rely on the grievance process to deal with unlawful changes to working conditions rather than file an application alleging an unlawful lockout, the Employer can bring the Union before the Board and ultimately seek significant damages even where workers did not intend their conduct to amount to a "strike".

Thus, the definition of "strike" should be restored to the pre-1984 language in order to restore this balance. Alternatively, the intention element should be removed from the definition of lockout so that the two acts, "strike" and "lockout" are defined in parallel terms.

CONCLUSION

The BC *Labour Relations Code* clearly needs overhaul in order to restore balance and fairness in labour relations in our province. In many cases its provisions are also contrary to workers' constitutional right to freedom of association, as defined through recent Supreme Court cases. Furthermore, changes in the labour market, and the structure of employment relations exacerbate the limitations of the *Code*. A broad array of reforms, set out in this submission, is therefore necessary to redress the inadequacies of the *Code* and bring it in line with the realities of modern employment relations.

APPENDIX A: SUMMARY OF RECOMMENDATIONS

1. Restore Card-Based Certification, granting automatic certification to unions demonstrating more than 50% support from workers in a proposed bargaining unit. Certification votes will be held when applications for certification demonstrate between 40% and 50% support.

2. Reduce voting period from ten days to three days where a vote is required and expedite the adjudication of any bona fide objections raised in the certification process.

3. Eliminate the use of mail-in ballots except where the parties consent.

4. Extend the statutory "freeze" post-certification until the parties reach a first collective agreement.

5. Institute multi-employer, sectoral certifications ("Broad Based Bargaining") for traditionally difficult to organize sectors with 50 or less employees per worksite.

6. Restore provisions concerning communications such that employer communications are only permissible where they serve a legitimate business purpose.

7. Institute tougher penalties in relation to unfair labour practice violations, including the use of remedial certification.

8. Amend successorship provisions so that the certification follows a transfer of workers and work to reflect the modern realities of contracting, subcontracting, contract flipping, and modern forms of corporate transfer. Place the primary evidentiary burden on the employer where a successorship or common employer application is filed.

9. Repeal "the provision of education" as an essential service.

10. Repeal restrictions on secondary picketing.

11. Amend provisions related to common site picketing relief to comply with the right to strike under s.2(d) of the *Charter*.

12. Restore the definition of "strike" to include the intention to compel the employer to agree to terms of employment.

CLAC
better together

BC LABOUR RELATIONS CODE REVIEW

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INTRODUCTION

CLAC is pleased to make these submissions to the **BC Labour Relations Code Review Panel**.

Formed in 1952, CLAC is a national union representing over 60,000 workers in almost every sector of the economy. Based on values of respect, dignity, and fairness, CLAC is committed to building better workplaces, better communities, and better lives.

CLAC is generally supportive of the current labour law regime in the province, and its implementation by the Labour Relations Board and its administrative processes.

Labour legislation should not be subject to wild swings of the pendulum. Therefore, statutory change should be cautious, and when change occurs it ought to clearly promote the paramount purposes of modern labour relations policy. In our view, the core purpose of the Code is to foster unimpeded access to unionization where a majority of employees in a workplace wish to have such representation.

Please consider submissions as follows:

1. **Section 19 Raids**
    a. Open period frequency
    b. Protecting employee confidentiality
2. **Membership Evidence in Support of Certification**
3. **Representation Votes**
    a. Timelines
    b. Electronic voting
4. **First Collective Agreements**
5. **Composition of the Labour Relations Board**
6. **Labour Force Inclusiveness**

We address each in turn.

OUR RECOMMENDATIONS
Section 19 Raids

Open period frequency

There has been a gradual, significant decline in the percentage of BC's private sector work place represented by trade unions. BC's relative decline in the unionization of its workers has been greater than in any other province. Moreover, the decline in BC, unlike in the rest of Canada, has continued into this century.

Galarneau and Sohn Long Term Trends in Unionization

www.statcan.gc.ca/pub/75-006-x/2013001/article/11878-eng.pdf

Legislation may well be responsible for a limited role in this decline. BC's legislation compares favourably to other Canadian jurisdictions in most matters, including with respect to the ease of certification, and protections provided to organizers and employees to ensure that employer intrusions upon the process are limited to permissible freedom of expression.

As a practical matter, the ability of any union to engage in organizing campaigns is subject to the availability of resources, both human and financial. All organizing costs money and large organizing drives are very expensive. Realistically, employees are far more likely to engage in the decision-making process of whether to become unionized if they are being organized actively by professional representatives of trade unions.

In our view, the Labour Relations Board and its administrative personnel have met their respective obligations in administering the legislation to recognize and respect the limited resources of their stakeholders, including trade unions. Board processes are almost always extremely efficient, and when that it is not the case, the fault generally lies with others, not the Board or its personnel.

However, one of the features of BC's legislation that substantively encumbers access to unionization is the frequency with which trade unions can engage in raid campaigns under Section 19 of the Code.

In terms of organizing targets, a work place that is already unionized is the low hanging fruit. Organizers can be certain that these employees favour unionization, as that question has already been answered.

It would not be surprising if some unions expend more resources engaging in raid campaigns and defending against them than they do introducing and promoting unionization to unorganized work places.

We certainly respect the right of employees to have a reasonable opportunity to change their representation. However, there are sound reasons to limit this opportunity in a way that balances that right with the paramount goal of the Code: genuine access to unionization.

Our Recommendations
Section 19 Raids

The norm across other Canadian jurisdictions is to limit the right to raid to the third year following certification. We propose that this norm be adopted in British Columbia.

As stated earlier, organizing is expensive. As a practical matter, the legislation should not encumber a union put to that expense to defend its successful organizing efforts so soon after it has established its right to bargain collectively.

We note also that there is evidence to support the contention that raid activity will be on the rise going forward. There have been recent defections from various umbrella groups that typically have established no-raid pacts among their members.

Canada's largest private sector union, Unifor, has left the house of labour expressly because of restrictions imposed upon its ability to raid.

From the Unifor newsletter:

> *www.unifor.org/en/whats-new/news/facts-unifors-disaffiliation-clc*

In fact, Unifor's targets are US based unions. Besides Unifor, the four largest Canadian private sector unions are all US based.

> *https://www.canada.ca/en/employment-social-development/services/collective-bargaining-data/reports/union-coverage.html*

The BCNU has also decided in recent years to engage in a significant raiding strategy.

A non-union work force does not have genuine access to unionization when the opportunities to even meet its proponents are artificially limited. When unions are too busy annually raiding and defending raids, they don't have the financial or human resources to organize underserved non-unionized work places. In our view, the expansive statutory right to annual raiding constitutes such a limitation.

At the very least, the norm across other Canadian jurisdictions ought to be adopted in BC.

Pertaining to newly organized workplaces, there are other reasons why it is poor policy to permit a raid to occur only months following certification. Organizing campaigns usually create rifts among employees on either side of the issue. Employees who were opposed to unionization have not had much time to establish a rapport with their new representatives. The first collective agreement is often the most difficult to reach. It is the agreement most likely to create winners and losers as historical anomalies are remedied, seniority is defined, and wage rates are adjusted.

The first round of collective bargaining will address these issues of significance, but also set expectations and influence planning for successive rounds of bargain-

ing. Gains are often made over multiple renewals, but expectations are often very high following a certification drive. These realities also promote the likelihood of raiding activity sooner rather than later, even if the union has acted responsibly and competently. In short, raids are not team building exercises. The union is entitled to let the animosities, and the hard and hurt feelings, settle for a reasonable time before facing a raid.

Raids are certainly disruptive to the business activity and its profitability. Where profitability wanes, so too do opportunities for unions to increase the economic welfare of their members. Workplace disruption effectively takes money out of the pockets of employees.

It is illusory to think that employees do not engage in constant debate about the merits of a raid campaign during working hours. At the end of the day, the loss of productivity is a cost that is borne by both the employer and its employees. BC's legislation invites a substantive, annual intrusion upon the productivity of a business and the corresponding jeopardy to the economic well-being of the employees.

Rarely do democratic processes established by legislation contemplate a vote to replace duly elected representatives so soon after the first ballot has been counted. In fact, the trend has been to increase the time between elections, not to abridge it, including legislative change to enlarge the time between elections for municipalities and First Nations elective bodies.

Not only may raid applications during the early stages of a collective bargaining relationship have especially harmful and irreversible impacts upon a work place, they are also often seriously disruptive. Accordingly, in our view the raid period should also be changed for renewal agreements.

We support a raid period in the third year of the collective agreement, first or otherwise, during its seventh and eighth month. As stated earlier, while raids are disruptive, the same is equally true of the period when parties are engaged in collective bargaining, which most often occurs during the last few months of the collective agreement.

We anticipate a request that the Review Panel consider a return to the short-lived requirement that raids be confined to particular calendar months unrelated to the collective agreement. We oppose any such suggestion. The raid period should be based exclusively on the realities of the collective bargaining relationship. The seventh and eighth month best preserve the likelihood that there are no extraneous considerations while a raid is under way.

Bargaining proposals taken to the table by a union may well be seeking to advance the legitimate interests of certain employees in favour of others. This is more likely the case where the relationship is a recent one, and

the union is seeking to redress perceived uneven treatment within the work force. Raiding unions have an easy job of gaining a foothold by appealing to any group that feels disaffected during bargaining.

Protecting employee confidentiality

There is a second feature of the raiding legislation which unduly favours raiding unions over an incumbent.

For all other purposes of the **Code**, union membership in a certification application is not required to be disclosed to any person or entity other than the Board. The Board will never compel a witness in a hearing to disclose whether he or she signed a card or voted for or against a union.

Currently, the legislation requires that when an employee wishes to revoke support for a raiding union prior to the application being filed, that revocation must be disclosed to the raiding union.

In our view, union preference should always be treated as a private matter between the employee and his or her union of choice.

There are obvious reasons the current legislation does not permit employers the right to know which of its employees support a union in an organizing drive. These concerns include the potential for threats and intimidation. These concerns are no less real where there is competition between unions.

The current legislative scheme purports to endorse employee democracy within work places during certification efforts so as to determine the true wishes of employees. Insofar as raid campaigns are concerned, the reality is something quite different. There are concrete examples why union choice should remain confidential.

Many employees have more than one employer in a given 90 day period (during which membership is evidence of union support for certification), particularly in the service, retail health care and construction industries. Most unionized work places adopt a union or closed shop requirement to require that employees become members of the union to maintain employment. The membership card of an employee—who is a union member elsewhere—is currently valid evidence of support for unionization at any different work place operated by any different employer. A union in such circumstances can exercise economic control over that employee.

The object of a raid is to freely allow a majority of employees at a given work place to make a democratic choice with respect to union representation. Disclosure of an employee's true wishes to revoke support for unionization at a different work place is completely at odds with the respect for privacy otherwise afforded to employees.

As a result of the current practice, there are situations in which employees are compelled to sign membership cards during a

raid and, effectively, are unable to revoke their support because of concerns that they may be denied employment opportunities in the future, either with the raiding local, or their sister local/affiliates.

Similarly, where a member of a union relies upon that membership for health and pension benefits, but that employee does not want the union to become the bargaining agent at their current work place, revocation could of course have alarming consequences. The right to "revoke" is again illusory, even where no coercive or intimidating conduct is engaged in by the organizing union. That card will count as support for the application, even though a fair revocation process would permit that employee to express his or her true wishes to the contrary. There should be an avenue to limit revocation to the effect that membership cannot be used for the purposes of that application or that employer.

We support the right to revoke membership in confidence for the purposes of the specific application being considered before the Board.

We further support an amendment to provide that revocation of membership during an organizing drive is for the limited purpose of indicating a lack of support for the particular application in question or for the purposes of an application with respect to a particular employer.

OUR RECOMMENDATIONS
Membership Evidence in Support of Certification

We anticipate that there will be numerous submissions in support of card check certification in lieu of the current representation vote requirement. Should the practice of card check be adopted, it should only proceed if the following safeguards are introduced:

- The employer of the signee of the membership card be identified with reasonable certainty (e.g. corporate or trade name, or business address). As stated above, there are many cases where employees have joined a union that have nothing to do with support for unionization at other work places.

- Membership cards must be executed within 90 days of the date of application for certification. Alberta has established legislation to require that membership cards must be executed within the 90-day window preceding application, in order to ensure that the true wishes of employees are determined.

OUR RECOMMENDATIONS
Representation Votes

Timelines

Where a representation vote is required in respect of a Section 18 application, there is no particular rationale in most cases to schedule an in-person vote as late as 10 days after an application is received. We respect that there are administrative challenges on certain occasions. However, the actual work required to be carried out to schedule a vote does not take 10 days.

In our view, with the advance of modern communication techniques, 10 days is unnecessarily long and could allow undue employer influence in the certification process where employees are being newly introduced to the potential for collective bargaining. As such, we propose to amend to 5 days.

The requirement to conduct a certification hearing in every case to conclusively agree upon a Tentative Voters' List is not a compelling reason to delay the conduct of a vote. In many cases, no agreement is reached and the vote is ordered to proceed without incident in any event, with the voting constituency determined at a later date. It is almost always far easier to agree on the voters list after all the parties know who voted.

We support the current practice not to share the voters' list with an applicant for any certification application where threshold clearly has not been met. Where the issue of threshold is legitimately in question, the current practice, which we support, is that the applicant is provided access to the voters' list. Therefore, a quick vote is still possible while the threshold issue is being adjudicated.

We also propose that a Vice-Chair should have the discretion to order an in-person vote beyond the time set for in-person votes generally, where our proposed five-day rule is not achievable. Currently, parties must all agree to waive the ten-day rule. The advantages of in-person voting favour expanding the likelihood that representation votes will be conducted in person.

Electronic voting

No stakeholders in the certification process will argue that mail-in votes are a preferred democratic tool. They are administratively cumbersome to conduct and conclude, and they clearly fail to respect the expedition certification applications are entitled to expect. The process is exclusively in the hands of a third party.

We expect that it is less likely that an employee lacks access to a computer to cast an electronic vote than it is that he or she does not have a reliable postal address to receive a timely ballot.

In our view electronic voting programmes are as reliable as Canada Post, and an electronic vote can be concluded weeks earlier, ensuring expedited access to unionization where it is the will of employees to do so.

OUR RECOMMENDATIONS
First Collective Agreements

Section 55

This section requires that a union must conduct a successful strike vote prior to being eligible to seek first collective agreement arbitration. At the outset of a collective bargaining relationship, one of the very worst ways to promote a productive working relationship between a union and an employer is to conduct a strike vote.

In virtually every case where a Section 55 (1)(b) vote is conducted, the union will tell its members, "We cannot get to arbitration without a positive strike vote". Even if employees are not otherwise inclined to make such a serious economic threat against their employer, the legislation compels them to do so. In such circumstances, to the extent the legislation hopes to determine the true wishes of employees in the unit, the Section 55 (1)(b) strike vote is a fiction.

We are of the view that most employers are inclined to take a strike vote poorly. The reaction to it is rarely positive.

If a vote is required to determine employee true choice, a better ballot question would be

> *Do you favour the union making an application to the Labour Relations Board to appoint an arbitrator to determine the collective agreement or do you favour authorizing the union to engage in a strike.*

We note that Ontario has repealed the requirement to obtain a strike vote to seek arbitration.

OUR RECOMMENDATIONS
Composition of the Labour Relations Board

We support a balanced composition on the Board. While the Board's composition has historically drawn from both the union and the employer communities, there has been no apparent recognition of the fact that independent unions are a large and growing component of the union movement in BC. Much of the Board's case load involves independent trade unions as parties. We propose that to the extent that Board appointees are a reflection of its stakeholders, the size of the progressive, independent union community, particularly in wall-to-wall construction, demands that this community also be represented.

We are opposed to the return of the "member" position at the Board and its concomitant appointment of three person panels to hear original applications. This procedure was a very inefficient use of limited resources of all parties when it was previously in use. Scheduling difficulties alone, already a serious issue in multi-party adjudications, make the process unworkable.

OUR RECOMMENDATIONS
Labour Force Inclusiveness

It is increasingly common for project owners to seek assured labour stability and cost control prior to committing millions, and in some cases billions, of dollars to a project.

We support recognition of the viability of agreements made between unions and contractors to ensure cost control and labour stability. However, we are opposed to any legislative mandate that requires a craft-based construction model for projects, public or otherwise. Further, where Project Labour Agreements (PLAs) are in effect for public projects, such agreements should reflect the realities of the modern construction industry, and ensure that access to work is not restricted by, or limited to, members of select unions.

There have been proposals shared in the media to mandate specific terms and conditions for PLAs for infrastructure projects supported with public funding. A feature of many of these proposals is to restrict which contractors are entitled to bid on projects and the unions that are entitled to crew them. Naturally, these proposals are all self-serving, as in every case the proponent of the closed-shop PLA is always one of its principal beneficiaries.

When they were first introduced, the benefit of PLAs was to ameliorate the myriad of jurisdictional issues associated with craft based construction. However, the labour landscape has changed significantly in recent decades, to such an extent that the vast majority of British Columbia's skilled workforce works in open shop, or wall-to-wall environments (approximately 15% of the construction workforce is affiliated with traditional, closed-shop, craft construction unions). Modern PLAs should be relevant in their approach, ensuring that contractors and members of any union affiliation, as well as non-unionized contractors and employees, are able to apply their trade on public projects.

Modern PLAs should provide a framework for general working conditions and promote labour harmony, while preserving the fundamental right of employees to affiliate freely and without interference.

It is imperative that the Code protect the principle of freedom of Association; to legislate a craft-based construction model would certainly impede an employee's right to organize according to their will.

Further, jurisdictions that have imposed rigid labour relations structures based upon this increasingly unused historical practice have succeeded only to increase the cost burden upon the public at the expense of relatively few beneficiaries. As per the study released by Cardus, "Hiding in Plain Sight" (2014), municipalities experience cost savings attributed to competitive bidding at approximately 20 to 30 percent. Indeed, Cardus estimates that restrictive tendering practices in Ontario result in an excess burden, carried by taxpayers, of up to $238 million above market value each year. As a result, fewer tax

dollars are available to invest in new infrastructure projects, thereby limiting the long-term opportunities for economic advancement for workers. Such models do not truly benefit the public. For these reasons, Saskatchewan and Manitoba have, in recent years, made significant shifts away from such restrictive practices.

In summary, the practice of open bidding and procurement maximizes the full potential of our province's workforce, is fiscally responsible, and preserves an employee's right of freedom of association.

COALITION OF BC BUSINESSES

Advancing Labour Policies that Work

LRC Review Submission
From the Coalition of BC Businesses
19 March 7, 2018

To the Labour Relations Code Review Panel,

Thank you for the opportunity to make this submission on the Labour Relations Code Review.

As you may know, the Coalition of BC Businesses is an alliance of business and trade associations that collectively represent over 100,000 small and medium-sized businesses in BC. Over the past 25 years, we have worked collaboratively with our provincial government partners on a variety of labour issues to support British Columbia's small and medium-sized businesses as we embrace the changing world of work.

We are deeply concerned with several recent government labour policies that have dramatically increased costs for BC's small and medium-sized businesses. Between a sudden increase in minimum wage and a surprise new Employers' Health Tax without any consultation with BC's business community, small and medium-size businesses are facing serious financial challenges that will impact their ability to remain in business and to continue to employ British Columbians. Put simply, now is not the time to add further pressure on the businesses which are the economic drivers and primary employers in the province.

Rather, it is important to maintain and promote labour laws that allow BC businesses and their employees to respond with flexibility and creativity to the changing goods and services and labour markets, and to the increasing pace of technological change. "One size fits all" structures or the imposition of additional costs or rigidity will further impede the ability to BC's small and medium sized business to compete within Canada and on the global stage.

Turning to some of the issues we understand that the Review panel may be considering, the Coalition's submissions are as follows.

Certification:

The Coalition is concerned that the issue of union certification and the debate between secret ballot voting versus the "card system" is re-emerging. To remove the right of employees to vote on union certification would be undemocratic and vigorously opposed by BC's business community. In the Coalition's respectful submission, the primary goal of BC's labour laws should be neither to promote nor to discourage unionization per se, but rather to ensure that the true wishes of a majority of employees of a particular business enterprise, in terms of how they wish

to structure their relationship with their employer, are fully respected under the Labour Relations Code. The Coalition submits that the best way to do this is to maintain the secret ballot vote for all certification and decertification applications.

This view is shared by the majority of British Columbians. Recently, the Coalition commissioned a telephone survey conducted by Innovative Research to determine the views of British Columbians on a number of labour issues, including certification processes. The survey of 600 randomly selected British Columbians was weighted for age, gender and region using Statistics Canada's Census data.

The results of the survey showed that even among households in which at least one adult was currently represented by a union in their workplace, a substantial majority favoured keeping the secret ballot vote. 66% of households in which at least one adult worked within a public-sector union, and 72% of households in which at least one adult worked within a private sector union supported keeping the secret ballot for certification applications. Furthermore, 67%of non-union related households supported maintaining the secret ballot method, showing that the democratic value of a secret ballot vote is widely and diversely supported.

Decertification:

Whatever the method used for certification of a trade union for a particular business, the same method must be used to decertify. In a previous Coalition survey, it was found that "66% would support making rules for decertification the same as the rules for certification." Having a differential system for certification and decertification is both confusing to employees and is undemocratic. Employees should have the ability to reconsider decisions they have made with respect to the structure of the relationship with their employer on the same basis that those decisions were initially made.

Timing of Certification applications

We understand that some have suggested that the time frame for the Labour Relations Board to process certification applications should be reduced, potentially by reducing the current time frame from 10 days to 5 days. The Coalition disagrees with this proposal, as the current time frame already raises difficulties for the proper processing of certification applications, especially in more remote areas of the province, and a shorter time frame would only exacerbate these difficulties.

It is also vital to ensure, whatever time frame is adopted, that employees have access to full, accurate and objective information about the processes and implications of certification and/or decertification in order to properly formulate their decisions about unionization and collective bargaining. The Coalition submits that it cannot and should not be assumed that one source of

such information has more or less validity than another source or that employees are incapable of assessing the source of information.

Thus, the time for processing certification applications should ensure that there is time for employees to seek out and obtain from a variety of sources information about unionization and the collective bargaining process. It is of little value to employees to only obtain this information after a certification has been granted and the collective bargaining process is underway.

Collective bargaining:

It is vital that collective bargaining, and the resulting collective agreements, remain responsive to the needs and circumstances of individual employers and their businesses and employees. Any legislative provisions which undermine the ability for employers to negotiate terms and conditions which work for their specific businesses must be avoided.

Thank you again for the opportunity to offer our preliminary thoughts on these issues. We look forward to participating further in the Review Panel's processes and having an opportunity to respond to any questions you may have and/or to the submissions of other stakeholders.

Jeff Guignard
Chair, Coalition of BC Businesses

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March 19, 2018

Panel of Special Advisors
Labour Relations Code Review Panel

Construction Labour Relations Association of BC (CLR) is pleased to provide the attached submission to the Panel of Special Advisors. We appreciate the opportunity to submit and look forward to the results of Panel's review.

Sincerely,

Clyde H. Scollan
President and CEO

SUBMISSION TO THE LABOUR RELATIONS CODE REVIEW COMMITTEE

ON BEHALF OF

CONSTRUCTION LABOUR RELATIONS ASSOCIATION OF BRITISH COLUMBIA

The Construction Labour Relations Association of British Columbia (CLRA) is an organization of contractors established in 1969. Its primary objective is to bring labour relations stability and security to contractors in British Columbia's unionized construction sector. In its representative capacity, CLRA provides a unified voice for contractor employers in negotiating with the building trade unions which represent its unionized craft workforce.

The following submission is provided on behalf of CLRA's members. It is directed to the matters which your Committee will address pursuant to the terms of reference provided to your Committee by the Honourable The Minister of Labour on February 5, 2018. In particular, the issues which CLRA advances on behalf of its members fall within your mandate to review the *Labour Relations Code* (*Code*) and provide recommendations for amendments or updates to the *Code*. This mandate is focussed by the requirement in those terms of reference that the issues your panel will address must ensure workplaces which support a growing sustainable economy with fair laws for workers and business, and promote certainty as well as harmonious and stable labour/management relations.

Relevant Background

This submission is not the appropriate occasion for a lengthy review of the history of labour relations in the construction industry in British Columbia. It suffices to say that, commencing in 1978 with the Inquiry Regarding the Structure of Bargaining by Building Trade Unions [1978] 2 CLRABR 202, various processes have been directed to refining the structure of collective bargaining in the unionized construction sector (Building Trades Sector) with a view to the creation of a stable negotiating environment conducive to the maintenance of industrial peace while providing a fair wage to the unionized construction workers. The unions in the Building Trades Sector are certified on the basis of craft certifications.

Legislative changes and decisions of the Labour Relations Board (LRB) throughout the years have consisted of ongoing refinements to the bargaining structure initially set up in 1978. Those refinements to that bargaining structure have been effective to a point. As a measure of the

success of the bargaining structure, it should be noted that there has not been a strike or lockout in the Building Trades Sector for more than thirty years. However, the success measured by the absence of work stoppages is only part of the picture. Over the same thirty years there has been a continuing erosion of the market share of CLRA members which can be attributed, at least in part, to the issues related to the internal dynamics of the Bargaining Council as discussed later. Further, in saying that the initiatives over the years have been successful, we do not wish to be taken as saying further refinements in the bargaining structure will not be helpful in continuing to ensure and maintain the industrial stability which has been achieved. There is work that remains to be done.

The most recent detailed inquiry into the structure of bargaining in the Building Trades Sector was "*An Interim Report Regarding a Section 41 Inquiry into Labour Relations in the British Columbia Building Trades Sector of the Construction Industry*", prepared by Michael Fleming and issued on December 19, 2012 (the Fleming Report). The Fleming Report examines the state of the industry in detail, noting that since the initial formation of the Bargaining Council of British Columbia Building Trades Union (Bargaining Council) in 1978:

> 52 While there have been improvements in achieving labour relations stability in the Building Trades Sector, it remains characterized by its craft structure, with each union within the Bargaining Council acting very autonomously. It has remained a real challenge to reconcile that character with attempts to coordinate and achieve some measure of cohesiveness in multi-trade bargaining. This tension remains a central feature and challenge of the Sector.

The Fleming Report also traced the decline in market share of CLRA members from a high of 75% in the late 70's to the approximately 20% share which exists today. While some of that decline is attributable to external market forces, another significant element was the instability in the existing bargaining processes. The major proposals we advance will diminish the prospect of further erosion and help recapture market share for unionized building trades and employees.

The Fleming Report was intended to deal with three destabilizing factors in the Building Trades Sector. After a lengthy consultative process, Mr. Fleming identified three significant issues for the Sector and the parties. They were:

(1) The relationship between the constituents of the Bargaining Council and the CMAW and between CMAW and the B.C. Regional Council of Carpenters (BCRCC).

(2) How collective bargaining between the Bargaining Council and the CLRA should begin, continue and conclude.

(3) The need to develop consultative processes to deal with a range of matters between rounds of collective bargaining.

In terms of the first issue identified above, the Fleming Report indicated that the time was not yet right for a final resolution of that matter. CMAW had been included in the Bargaining Council as an interim measure and that status is subject to the LRB's retained jurisdiction to address instability arising from the rivalry between CMAW and the BCRCC.

With regard to the second issue, the Fleming Report indicated that the Bargaining Council essentially operated much more like a coalition than a true bargaining council envisioned under section 41 of the *Code* and, further, a lack of cohesiveness associated with this structure and related fragmentation was an impediment to the development of a vibrant and efficient labour relations framework (see para. 85). He made a number of recommendations with regard to the conduct of bargaining.

Mr. Fleming closed his report, noting:

> 123. The Building Trades Sector of the construction industry has a number of very positive attributes and plays an important role in the B.C. economy. However, it also faces significant challenges which, in my view, need to be very actively addressed by ongoing internal processes to explore realistic solutions to those important challenges.

Unfortunately, internal processes have not been successful in dealing with the refinements to the structure of bargaining necessary to meet the challenges arising from external market forces and building trade unions' inability to bargain together and conclude collective agreements in a timely fashion: Those concerns are set out in detail in the decision in CLRAA B34/2015. This

decision compelled the Bargaining Council to bargain a bargaining protocol to govern each round of collective bargaining and compelled it, like any exclusive bargaining agent, to supervise and coordinate negotiations for agreements to "enable" trade level agreements.

Recommendations

Section 41

Stability in the building trades sector is necessary, not only to prevent continuing erosion of the market share of unionized CLRA contractors, but to provide an opportunity for continued growth. Section 41.1 of the *Code* is the linchpin for that stability. Section 41.1 acknowledges the continuing status of the Bargaining Council as a certified council of trade unions under section 41 of the *Code* and authorizes the Bargaining Council to bargain on behalf of its constituent unions with CLRA. Section 41.1 is the "legal glue" that underlies the stability required for effective bargaining in the Building Trades Sector. It compels the Bargaining Council to deal with CLRA. Any initiative taken to diminish the legal relationship required by section 41.1 would return collective bargaining in the Building Trades Sector to the archaic, ineffective patterns of the past. Any such change would breed further instability. Respectfully, if the craft unit structure of the Building Trades Sector is to be maintained, the constituent elements of the Bargaining Council must remain legally obliged to be bound together for the purposes of bargaining with CLRA. To interfere with the existing legal requirements would destabilize the industry and would be inconsistent with your Committee's mandate.

Section 41.1(3) provides for an ongoing review of the Constitution and By-laws of the Bargaining Council to ensure that they are consistent with the stabilization intended by the creation of a council of trade unions under section 41. Consistent with our previous observation that the structure of the Bargaining Council must remain adaptable, we believe changes are necessary to protect against external commercial realities disrupting the current effective structure.

As noted in CLRAA, B91/2017 (PCA Decision) recent years have seen an increase in customers building major construction projects seeking Project Collective Agreements (PCAs) whereby a

collective agreement is entered into for the life of a project, thereby ensuring stability for its duration. This resulted in the PCA Decision declaring that the Bargaining Council had the authority to negotiate PCAs and bind its members based on fundamental majoritarian principles. However, there has been an increase in the formation of "coalitions" for the purpose of negotiating PCAs which are exclusionary by nature. The PCAs negotiated by these coalitions result in members of the Bargaining Council being excluded from the project and lead to an increase in instability between trades.

CLRA's collective agreements serve as the benchmark for the negotiation of PCAs with these coalitions. There is an obvious unfairness associated with CLRA collective agreements, negotiated using CLRA's expertise and paid for by the dues of CLRA's members, being used without the appropriate recompense being provided to CLRA. In addition, this undercutting of CLRA's role in the bargaining process with members of the Bargaining Council further increases the prospects for instability and contention between trades.

Currently there has been much public discussion of the use of a particular form of PCA (referred to as a Community Benefit Agreement (CBA)) on public infrastructure projects. The discussion focuses on the use of CBAs to ensure that, on these major public infrastructure projects, there are:

- industry standard safety rules and requirements,
- programs to advance women and First Nations,
- increased emphasis on training younger workers in the form of apprenticeships; and
- a guarantee of no labour disruptions to support project completion on time and on budget.

These policy objectives must be achieved in a manner which is congruent with the objects and policies of the *Code* as described in section 2 and in particular the need to:

- foster the employment of workers in economically viable businesses,

- encourage cooperative participation between employers and trade unions in resolving workplace issues, adapting to changes in the economy, developing workforce skills and developing a workforce and a workplace that promotes productivity, and

- recognizes the rights and obligations of employees, employers and trade unions.

The only effective mechanism for achieving the policy objectives outlined above in accordance with the objects and policy of the *Code* is to ensure that CBAs are both negotiated and administered by a prudent employer counterpart to the constituent members of the bargaining council and others. CLRA is the only existing, experienced unionized employer representative appropriate to that role. Centralized representation on the employer side during negotiation will alleviate the potential for "whipsawing" and intra-union rivalries. Further, centralized representation with CLRA as the recognized employer representative after the commencement of work on a PCA ensures consistency of interpretation on a project wide basis. The identification of CLRA by legislation as the recognized employer of bargaining council members for PCAs and CBAs will also provide consistency over the range of various types of infrastructure projects being contemplated. Simply put, it makes abundant sense to identify CLRA as the legislated employer component for CBAs. This designation will ensure the highest prospect of success of CBAs.

In light of the foregoing, CLRA recommends that section 41.1(2) be amended to provide that CLRA is the exclusive employer bargaining agent empowered to negotiate PCAs and CBAs with the members of the Bargaining Council.

Section 104

Given the unique craft union structure of the Building Trades Sector, the CLRA collective agreements contain, as part of their dispute resolution processes, references to industry panels of experts as a form of alternative dispute resolution (ADR). The purpose of these types of panels is to perform a form of "fact finding" done by persons conversant with the norms of the construction industry. Further, many CLRA collective agreements contain lists of named

arbitrators agreed upon between the parties. However, given the existence of the expedited arbitration process set out in Section 104 of the *Code,* all of these collective agreement provisions can be bypassed by the simple expedient of one of the parties filing an application under Section 104. The LRB does not invigilate and rule on complaints by someone who is a respondent to an application under Section 104 when they complain that the processes under the collective agreement have not been exhausted which, on its face, is a prerequisite for the use of Section 104. Rather, the Board simply appoints and then defers that jurisdictional objection to an arbitrator.

Respectfully, provisions of the *Code* ought not to be used to overcome the freely-negotiated provisions of a collective agreement or negotiated resort to ADR mechanisms unless there is a reliable body of evidence showing that the existing grievance procedure is being frustrated by delay. In those circumstances either party should have a right to apply to the Labour Relations Board for an order that s. 104 applies. The purpose of Section 104 is to avoid either party inappropriately delaying recourse to arbitration by inordinately delaying agreement to an arbitrator. The provisions of Section 104 of the *Code* ought not to be available in circumstances where there is no evidence of such harm. Without such a finding, the mischief which Section 104 was intended to protect against is not present and Section 104 applications simply become a method for a party to harass its opposite.

The Relationship between CMAW and BCRCC

In *United Brotherhood of Carpenters and Joiners of America,* No. B277/2007 the Board issued an order requiring CMAW and BCRCC to comply with a settlement agreement reached between them relating to the sharing of the craft of carpentry under a craft unit approach. One of the terms of that settlement agreement, which was given the Board's blessing, was that:

> (a) There will be no raid of the existing craft bargaining units or future craft bargaining units organized by the parties on a craft basis. This will not limit or restrict the ability of the parties to supplant craft units on a basis such as all-employer, wall-to-wall.

The introduction of two rival unions within a single craft upset the traditional model for bargaining in the building trades sector, where, normally, a contractor signatory to a craft collective agreement would access work and skilled workers through a single union. The extent to which the decision to permit two rival unions to share a craft upset the established industrial relations model to such an extent that, in a recent decision, the Labour Relations Board noted that it had become "axiomatic" that two unions sharing a craft creates instability.

In particular, the Board has also noted that the sharing of a craft of carpentry has had the effect of dividing signatory employers' access to skilled workers in the craft of carpentry because that employer is signatory to either a BCRCC or CMAW collective agreement. This has an effect on the competitive position of the various employers.

It is time for this instability to end. Further, it ought not to be the case that two parties can reach an agreement whereby employees, the beneficiaries of the *Code*, are prohibited from exercising their foundational right to choose which union they wish to belong to via the process of a raid. It is time for the *Code* to be amended to eliminate the restriction on raiding between CMAW and BCRCC in furtherance of allowing employees, if it is a reflection of their true wishes, to choose which of the two competing organizations they wish to belong. Raids should be permitted based on the scope of the certification order binding their employer. This will treat construction industry employees equally with all other unionized employees covered by the *Code*.

Jurisdictional Assignment Plan

One of the most significant achievements of the parties in the Building Trades Sector was the development of the Jurisdictional Assignment Plan (JAP). The JAP is a unique mechanism providing a domestic dispute resolution mechanism for the resolution of jurisdictional disputes between craft unions. Jurisdictional disputes were, until the formation of the JAP in 1978, the source of numerous work stoppages in the Building Trades Sector. Indeed, the JAP is so entrenched as a part of the framework of the Building Trade Sector collective bargaining in British Columbia that it has been recognized by the LRB as a board of arbitration under the *Code*.

However, the effectiveness of the JAP is being undercut because of the existence of a Canadian jurisdictional assignment plan. This allows parties the opportunity to ”forum shop” and, in some circumstances, by-pass the effective domestic jurisdictional assignment plan.

The *Code* should be amended to clarify that the only recourse, including recourse by way of reconsideration or appeal, of a British Columbia JAP decision is to the Labour Relations Board. There ought not to be an additional, ancillary avenue which is not subject to the *Code*.

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March 8, 2018

By email: LRCReview@gov.bc.ca

Labour Relations Code Review Panel

Panel Members: Barry Dong
Michael Fleming
Sandra Banister, Q.C.

RE: *BC LABOUR RELATIONS CODE*

I act for the Construction Maintenance and Allied Workers Canada. On its behalf and in response to the Panel's invitation I am making submissions on two matters. First the acquisition of bargaining rights and second the appropriate raid period in the construction industry.

THE ACQUISITION OF BARGAINING RIGHTS

It is my submission that the Code should be amended to permit the acquisition of bargaining rights through a card based system without the necessity of a vote.

A brief review of the background to this issue supports a conclusion that the necessity of a vote was largely politically driven and contrary to recommendations for labour law reform that had been made in September 1992.

The modern era of labour relations in British Columbia begins with the 1973 Labour Code which attempted to balance the interest of labour with those of management while safeguarding the rights of employees. From its introduction until 1984 there were few significant changes.

In 1984 the *Labour Code Amendment Act* was enacted and it changed the process by which trade unions became certified. Until that time unions could acquire a certification on the basis of signed membership cards. The 1984 amendment

provided that membership cards were not enough and employees were required to obtain union representation through a secret ballot vote. At the same time employers were able to obtain decertification after two years of not employing bargaining unit members.

In 1992 the government appointed a three person Committee with a broad mandate to recommend an overall industrial relations strategy for the Province. That Committee issued its report in September 1992. In reviewing the 1984 amendments it noted that the introduction of the secret ballot vote into British Columbia labour legislation constituted a departure from the norm in Canadian law where union support had traditionally been assessed on the basis of signed membership cards. Further, while the statute still retained prohibitions against employer interference with the certification process, after the introduction of the vote the raid of unfair labour practices by employers during organization campaigns increased dramatically. In addition, the rate of new certification dropped by approximately 50%. The Sub-Committee made a series of recommendations to the Minister of Labour including the threshold issue surrounding certification which was whether it should be granted on the basis of signed membership cards or a secret ballot vote.

In concluding that signed membership cards were the preferable approach it was noted that:

- The surface attraction of a secret ballot vote does not stand up to examination.
- When certification hinges on a campaign in which the employer participates the lesson of experience is an unfair labour practice is designed to thwart the organizing drive will inevitably follow.
- Once a vote was ordered this led to key union supporters being fired or laid off while threats of closure dominated the campaign.
- There was no compelling evidence that membership cards to not adequately reflect employees' wishes. In those cases where improper influence by a union during a certification campaign is established the Board has a plenary jurisdiction to dismiss the application or to order a vote.

It is to be noted that the current procedures and regulations regarding membership cards are enforced strictly in order to provide safeguards for the rights of employees and employers. This includes requirements that the cards be properly dated, refer to the correct union local and contain an acknowledgment of the consequences of signing the card.

To complete this historical review a new government came to power in June 2001 and introduced reforms to the Labour Code. Amongst other initiatives it reintroduced a mandatory secret ballot vote for union certification applications.

Insofar as other jurisdictions are concerned I note that the both the Provinces of Ontario and Alberta have recently modified their labour relations legislation to permit certification without a vote. In addition federally the *Canada Labour Code* amendments which introduced the requirement of the vote were short lived and were removed last year.

Accordingly, on the basis of the matters set out above, it is my submission that certification should be granted to unions on the basis of signed membership cards and not a secret ballot vote.

CHANGE IN UNION REPRESENTATION

Section 19 of the Code permits a vote to change union representation where more than 50% of the employees are in support. This change in union representation is commonly called a "raid". The Code restricts raid applications to the 7th and 8th month of each year of a collective agreement.

In the construction industry the building trades unions enter into standard collective agreements which have a standardized term running from May 1 in any particular year to April 30 of any particular year. The 7th and 8th months i.e. the raid period is therefore November and December.

This presents a difficulty for trade unions that are the subject of raids. November and particularly the latter part of December are when employers typically have little activity and have laid off many of their regular employees. An employer who had 50 employees during July and August could easily have as little as 5 employees in the last two weeks of December. The result of this is that the raiding union could obtain certification on the basis of an artificially low number of employees.

It is submitted that this is contrary to the majoritarian principles upon which the Code is based. In addition, it places unions in the construction industry in a far more vulnerable position than those in other sectors.

It is generally accepted that raid applications are inherently disruptive for employees, employers and trade unions. It is for this reason that the current provisions of the Code restrict the time within which raids may be brought thereby striking a balance between instability in the workplace and employees' rights to be represented by the union of their choice. Both these concerns could be better met in the construction industry by providing that raids may only occur during the 3rd and 4th month of each year of a collective agreement. This would enhance stability by ensuring that a raiding union was required to obtain a true majority of employees

and not an artificial level of support. In addition, it would ensure that employees who do not wish to change representation would have their voices heard.

SUMMARY

In summary, it is submitted that the Code should be amended to grant certification on the basis of signed membership cards. In addition s. 19 should be amended to establish the 3rd and 4th month of each year of a collective agreement as the raid period in the construction industry.

Yours truly,

LAUGHTON & COMPANY

BRUCE LAUGHTON, Q.C.

cs File:

April 6th, 2018

Labour Code Review Panel Hearings

Cranbrook, BC

"Unions are about fairness: workplace fairness; economic fairness; opportunity fairness; political fairness; and democratic fairness. Unions promote fairness, not just for their members, but for all Canadians"

- James Clancy

I am a Local President for BCTF and have the privilege of belonging to a Union where membership is compulsory and the benefits are tremendous. I am here today to support and concur with the BC Federation of Labour, The British Columbia Teacher's Federation and the East Kootenay District Labour Council's submissions concerning suggested changes to Section 3 of the Labour Code. However, I will speak to the Essential Services designation in particular as that pertains to my position as a public-school teacher in British Columbia.

In my roles as a member of the Executive Council for the BC Federation of Labour, a public school teacher and Union President for the BCTF and as an active member of the East Kootenay District Labour Council, I would like to reiterate and support the main points made by these organizations to this very panel for your consideration again:

- remove barriers for workers to exercise their constitutional right to join a union, including a return to signed union card certifications—a process already in place in eight Canadian jurisdictions;
- prevent employers from interfering in union organizing drives;
- end rampant "contract flipping" that enables employers to keep wages low for tens of thousands of workers; and
- ensure that the LRB has the financial resources it needs to do its job and make timely decisions.
- remove education's designation as an essential service thereby allowing the teachers to have the same right to strike as other unions as the need arises.

Education and Essential Services designation

In particular, in my role as a public-school teacher I would like to specifically address the BCTF's request that education be removed from the Essential Service legislation. I recently uncovered a brief done by the BC Federation of Labour in July of 2001 which addresses the very concerns I am addressing today. As events unfolded on the labour front in 2001, it became increasingly clear that the BC Liberal government's agenda was to limit and restrict the rights of unionized workers in many sectors. Education was no exception.

On July 16th, 2001 the BC Federation of Labour presented the brief to then Premier Gordon Campbell and Labour Minister Graham Bruce opposing the inclusion of education as an essential service among other concerns throughout the labour front in British Columbia.

In a letter to the Premier on that same date, the BC Federation of Labour warned about the concerns being brought forward here today - 17 years later. They suggested that the proposed changes to the certification laws would undermine their members' rights to freedom of association and that including education as an essential service would be equivalent to eliminating the right to strike for the K-12 sector and a denial of fundamental rights to teachers and support workers. Further, they warned that the changes proposed to the other sectors was a "direct attack on the longstanding rights of working people. The changes will take our province backward, not forward and that the changes would lead to confrontation instead of cooperation" which it certainly has.

As you are undoubtedly aware, in 1991 the word "welfare" was added to the Essential Services legislation in the statement "immediate and substantial threat to the economy and welfare of the province and its citizens." This addition to the Labour Code opened the door for the government to add the education sector as an essential service in 2001under the guise that the students' welfare would be at stake if they missed school as a result of job action. When the changes were announced, the speaker stated: "This amendment to the Labour Relations Code ensures that educational programs are protected in the event of a school strike or a lockout. This legislation is a statement of our principles. Education must come first, learning must continue, and students must be able to complete their school year, regardless of their age or grade level…. It is about recognizing that our children's right to an education must take precedence over labour disputes." This effectively took away the teachers' right to strike when the bargaining table was unproductive. These changes were actually contrary to international law. Essential Services are restricted under the international law "to those services that protect the life, health, and safety of citizens." As the BCTF submission states, The Freedom of Association Committee of the International Labour Organization has consistently held that governments cannot undermine the right to strike by characterizing education an "essential service." While education is obviously a very important service in all countries, the Committee has repeatedly held that it is not an "essential Labour service in the strict sense"— that is, not in the sense that justifies interference with the fundamental right of workers to collectively withdraw services.

The BCTF goes on to state that in this legislation, the union is free to engage in its strike (or the employer its lockout) provided that essential services are maintained. The levels of essential services can significantly undermine the bargaining power of the union and should only be used in "life and limb" situations, as reflected in international law.

I worked as a public-school teacher through the stripping of contracts, the "essential services" designation, the job actions in 2005, 2011 and was President during the 2014 job action which were all very demoralizing events in the lives of British Columbia teachers. For example, when teachers tried to withdraw from such 'essential services' as staff meetings and completing report cards, they were docked 10% of their pay. My question to the panel is how essential, are staff meetings and report cards to the life and limb of our students? I would suggest that respecting the

rights of unionized workers to strike for better working conditions is essential – not staff meetings!

Thank you for your attention to this submission. I look forward to being witness to the positive changes for workers in British Columbia as a result of the panel's findings.

My name is Andy Healey. I am a business agent on the staff of CUPE Local 1004 in Vancouver. I'd like to speak about my experiences with organizing workers and some of the difficulties that these workers are facing due to a few problems with the current iteration of the BC Labour Relations Code.

My experiences with organizing workers began when I was a worker at a unionized, non-profit social services and housing provider. There were certain work groups within this organization that were not part of the bargaining unit; home support workers, maintenance workers, IT support and pest control workers to name a few. At a time when the future of this employer was heading in a questionable direction, these workers reached out looking for help to get themselves some kind of job security. With the assistance and guidance of our local and the national rep assigned to the local, myself and another shop steward were able to bring these workers into the union by the relatively simple act of having them sign union cards. At the time, I now know, I was naive and ignorant. I thought that organizing non-union workers was simple: sign a card, take it to the Labour Board and the worker can find support and protection with everything that the collective agreement has to offer. What I didn't know was that since 1984, things haven't been this easy in British Columbia. Since that time, workers attempting to unionize have had to go through a two-stage process which includes a vote after card signing has been completed.

As my union involvement increased, I got trained by CUPE as a member organizer. It was then that I began to see the difficulties and roadblocks set

up in the process of union certification. Let me first state the obvious: workers don't attempt to organize themselves when their employer is fair, reasonable, law abiding and looking out for the workers' best interest. Workers are afraid to approach unions for assistance when there's a real threat of retaliation from their bosses. But they do it. Workers find the strength and courage to stand up to these unscrupulous employers but then they are often derailed between signing cards and taking part in the subsequent vote. In the time between the card signing and the vote, employers intimidate and infiltrate workers and scare them away from what is a legal and constitutional right in this province and country, the right to join and be represented by a trade union. When we have rights, those rights are meaningless if they can't be accessed. We need to bring back the simple process of card check certification.

In my role as business agent at CUPE 1004, I am currently in negotiations for two separate first collective agreements. In this context, I have come up against still more barriers. The statutory freeze period, where the terms and conditions of employment must not change until an agreement is ratified, needs to be extended up to the time when a first collective agreement is reached. We're dealing with employers who have consistently maintained unfair practices and disregarded even the basic tenets of the Employment Standards Act. They have no problem stalling bargaining to get past the freeze period. The workers are intimidated by these actions and again their fundamental and legal right to unionize is put in jeopardy. We need to give these workers the same rights as all other unionized workers, and in the

same way that our expired contracts are in effect until we negotiate a new agreement, these workers terms and conditions need to stay in tact until their first agreement is reached. If this were the case, we'd be looking at a situation that fosters stability and appropriate labour relations instead of giving the upper hand to employers, who most likely have a history of creating difficult and hostile working environments to begin with.

Another situation that I am currently concerned about is successor rights if a contract is flipped or work is contracted out. A tactic that we see is the employer threatening to give up the contract or in effect sell the company while the process of certification is ongoing. Workers rights need to be kept intact regardless of who runs the company or who controls the contract. If this were to be part of the Code, it would mean one less form of intimidation that could be used against workers who, by the very nature of their current situation, have already been pushed far enough.

There needs to be an easier way for workers who are in the transitory position of negotiating a first collective agreement to address and resolve disputes with the employer. The current recourse is the Employment Standards Act Tribunal, a lengthy and daunting process that again favours employers and hinders workers looking for their basic rights. I'm currently involved with a group of workers who are constantly having rules enforced on them that are contrary to the Act, like so called averaging agreements that are nothing more than a vehicle for the employer to force unpaid overtime almost up to the point of indentured servitude or being told they

need to repay time taken on holidays by working even more unpaid overtime hours. There must be a better way to resolve these issues while collective bargaining for their first agreement is ongoing. It's just another part of a system that heavily favours employers and obstructs the rights of vulnerable workers.

I'll finish by saying something that we should all be aware of. Unionized workers lead better lives than non-unionized workers. In areas with higher union density, economic and social conditions are better. Society as a whole benefits from unionization. From health and safety regulations to maternity leave, and child labour laws to the 5 day work week, the effect of unions on society as a whole is progressive and positive. We need to create a place where we can grow and foster this positivity even further, and reforming the Labour Relations Code is a step in that direction.

DigiBC

The Interactive & Digital Media Industry Association of British Columbia

Submission to the Labour Relations Code Review Panel

March 20, 2018

Formed in 1997 as New Media B.C., and now in our 20th year, **DigiBC** is the **Interactive and Digital Media Trade Industry Association of British Columbia.** We support companies falling into three verticals. The first is Interactive Digital Media (IDM) which includes Video Games, Augmented Reality (AR), Virtual Reality (VR), and Mixed Reality (MR). The second is Animation and Visual Effects (VFX), and the third is Digital Marketing sectors in the Province.

In 2017, DigiBC members created innovative products and services in video games across all Interactive Digital Media platforms (including Augmented Reality, Virtual Reality and Mixed Reality sectors), Animation and VFX, and Digital Marketing sectors. Member companies include home-grown B.C. success stories such as *Finger Food Studios, Next Level Games*, and *Atomic Cartoons* as well as industry-leading, multinational companies such as, *Electronic Arts*, *Microsoft*, and *Animal Logic*. All members are part of a vibrant, valuable ecosystem that supports companies of all sizes, from small startups to those employing thousands within the Province.

DigiBC wishes to thank the Panel for the opportunity to provide written submissions. We look forward to outcomes that deliver fair laws for workers and employers, ensuring continued growth in the IDM and Animation & VFX sectors for the short and long-term benefit and prosperity of the Province.

Overview of the Industry

The global video games industry now generates more revenue than both the movie and the music industry combined, with more than 2.2 billion gamers expected to generate over $108.9B in game revenues in 2017.

Importantly, a successful game employs a large team of engineers, artists, producers, project managers, business analysts, marketers, community managers and customer support professionals, and provides robust, ongoing economic value to the jurisdiction in which it is located.

Benefits of the IDM Sector for the B.C. Economy

The benefits of having a robust and sustainable IDM and Animation & VFX sector in the Province include:

1. IDM contributes significant economic value;
2. IDM provides significant well-paid, permanent employment opportunities across a uniquely broad spectrum of roles spanning both creative arts and technology;
3. IDM companies fuel a broader technology and innovation ecosystem;
4. IDM is appealing to youth and inspires young people to pursue STEM-based careers (also sometimes referred to as STEAM);
5. IDM clusters are located throughout the Province.

Economic Value and Permanent Employment Opportunities

The IDM and Animation & VFX sector is a clean, knowledge-based industry that employs a predominantly youthful workforce. The average age of employees in the sector is 31 years old. Our employees have an exceptionally broad spectrum of technological and creative skillsets and are paid very well compared with other industries. For example, the average full-time salary in B.C. for video game company employees in 2016 was estimated to be $87,810, which was almost twice the B.C.-wide average salary of $46,075.

Careers in the IDM and Animation & VFX sector also dispel any myth that 'art' and 'well-paid career' are incompatible. There is a wide array of career choices for artists, writers, musicians and designers across the IDM and Animation & VFX sector where multi-talented art and tech professionals work together to deliver the stunning products and services that our industry is known for.

The IDM and Animation & VFX sector is part of the broader technology industry in B.C. which is made up of over 1,150 companies, that employ over 16,500 people in predominantly full-time, family supporting jobs. In fact, based on a recent study undertaken by the Vancouver Economic Commission, it was found that "[i]n Vancouver, over 60 studios make up the VFX and Animation industry, comprising the world's largest cluster of domestic and foreign-owned studios."[1]

At the end of 2017, if the IDM and Animation & VFX sector continued to grow at the 2016 growth rate of 3%, we estimate over 6,000 full time equivalent jobs will exist in the Province just in Interactive Digital Media. If the VFX and Animation industries are included that number of full time equivalent jobs more than doubles. The total impact to the Province of just the Interactive Digital Media jobs alone in 2017 is estimated as follows:

- Total annual B.C. GDP = $1,080M
- B.C. taxes generated annually = $77M

[1] Vancouver Economic Commission, *The word is out that Vancouver is the place to be for VFX & Animation* (Vancouver: Vancouver Economic Commission, Digital Entertainment & Interactive, VFX & Animation), online: http://www.vancouvereconomic.com/vfx-animation/, (accessed March 19, 2018).

- 12,000 total FTE jobs (including direct and induced)

Fueling a broader technology and innovation ecosystem

A strong IDM and Animation & VFX sector underpins a broader technology and innovation ecosystem. This is because interactive entertainment represents a massive global market opportunity in its own right, but also because many of the skills at the heart of innovative technology companies are developed within a vibrant IDM and Animation & VFX sector.

Companies in the IDM and Animation & VFX sector also serve as a breeding ground for new, innovative companies in the wider technology industry. These companies collectively already boast over 500 new jobs. In total, we estimate that at least 20 companies and 700 new jobs have been created in the last five years in B.C. directly by video game company alumni starting new companies in the broader technology sector.

Appeal to Youth and Interest in STEM

The IDM and Animation & VFX sector also represents one of the most accessible faces of technology to the broader population. The natural 'curb appeal' of video games continues to motivate many young people to consider careers in technology.

The talent pool, skills and expertise that have been established here in B.C. thanks to our strong history of video game development are now of particular relevance in the rapidly emerging era of virtual reality, augmented reality and mixed reality technology and platforms.

B.C. is well-positioned to be a leader in this next generation of computing and to breed the cultural technologists locally as described above.

IDM and Animation & VFX clusters are located throughout the Province

The IDM and Animation & VFX sector has strong foundations in Vancouver and Burnaby and is expanding throughout the Province in places such as Port Coquitlam, Victoria, Kelowna, Parksville and Nelson. The mobile nature of the business ensures that there is opportunity for the IDM and Animation & VFX sector to spread to and cover every part of the Province.

IDM and Animation & VFX Sector – Lack of Union Representation - By Choice

It is important to understand the unique nature of the IDM and Animation & VFX sector. This is reflected in how workers engage with individual companies. Workers have significant flexibility in choosing not only where they work but how they work. They will frequently move from one employer to another and will often demand non-traditional types of working engagements like remote work or unusual working hours. Workers are looking for arrangements that fit with their own individual needs. Employers in the IDM and Animation & VFX sector must compete for

workers in this highly competitive environment. The result has been an industry that typically has excellent working conditions and high paying roles.

The lack of any meaningful presence by trade unions in the IDM and Animation & VFX sector (and the broader technology sector) is a deliberate choice by those workers and is not the result of a lack of access to representation or a dated Labour Code. The excellent working conditions, the high paying nature of the roles and the demand for a variety of non-traditional engagement models has simply meant that workers have chosen not to bargain collectively. It would be wrong to make assumptions or draw other conclusions based simply on the lack of a meaningful trade union presence in the sector.

IDM and Animation & VFX Sector – Highly Mobile and Sought After Businesses

Unlike most other sectors driving the B.C. economy, businesses in the IDM and Animation & VFX sector are highly mobile. Companies are highly sought after by governments in other Provinces and in other countries. Those jurisdictions have and continue to attempt to lure away employers by offering significant incentives like tax credits and similar measures. Ensuring we retain a competitive business environment in B.C. is paramount to not only the continued growth of the sector, but to simply retaining what we have created over the past 35 years.

Our Submission

This submission, while respecting the protected right to collective bargaining, directs consideration towards the importance of the IDM and Animation & VFX sector and the potential effects proposed changes to B.C.'s Labour laws may have on this vital part of the new and growing economy. In particular, we wish to share our perspective on the following two topic areas which we believe are likely to be raised by many stakeholders during the Panel's review.

1. Preserving the secret ballot process for certification
2. Sectoral Bargaining

1. Preserving the secret ballot process for certification

DigiBC believes the secret ballot process for certification should be maintained in B.C. and argues against any proposal to implement card-based certification. The secret ballot process protects the ability of workers to make informed, self-interested decisions, that are free from confrontation and pressure.[2]

A move towards a card-based certification process shifts the balance of power unfairly in the favour of union organizers.[3] The interests of employers and workers in B.C. will be impacted by a

[2] Canadian Chamber of Commerce, *Proposed Policy Resolutions Annual General Meeting*, (Fredericton, New Brunswick: Canadian Chamber of Commerce, 2017). Chapter 31, at 53-54 [*Policy Resolutions*]; Ontario Ministry of Labour, *Changing Workplaces Review Summary Report*, (Toronto: Ontario Ministry of Labour, 2017). Chapter 11.2, at 322 [*Ontario Report*].
[3] Policy Resolutions, *supra*, note 1 at 54.

process that is vulnerable to abuse, misinformation and intimidation all of which undermine the ability of workers to express their true opinions in a legitimate and democratic form.[4] We discuss some of these concerns further below.

The secret ballot voting system is critical in allowing workers to obtain the information they need regarding the benefits and costs of union representation and affords them the privacy to confidentially express their preferences on whether they wish to be represented by a union.[5]

Certification based on Misinformation and Undue Pressure

A card-based certification process will not always reflect the preference of workers regarding union representation. It opens the door for certification based on misinformation and undue pressure from unions or employees who are union supporters.[6] Under a card-based certification model, the union is often the only source of information for workers during the campaign and this denies workers the opportunity to have access to a full range of information, free from bias regarding the effects of certification. This one-sided method ultimately prevents workers from making balanced and informed decisions in relation to their vote.[7] Workers may sign union cards without being properly advised of the implications of that signature; for example, a worker may believe that they will still have the right to educate themselves and decide whether to cast a ballot for or against unionization when in fact the signature constitutes their vote.[8]

By contrast, the current secret ballot voting system discourages unions from taking advantage of inappropriate or biased methods of organizing and using misinformation to secure the support of workers.[9] It allows employees to vote their conscience – whether in favour of unionization or not – in a method which protects the privacy of their choice.

Intimidation, Undue Influence and the Confrontational Nature of Card-Based Certification

A secret ballot also ensures workers have the ability to make a clear decision privately, without fear of intimidation.[10] A card-based process, on the other hand, introduces the real risk of pressure tactics and confrontation. This is true even when workers are well informed. The use of pressure tactics by unions (or even co-workers) may cause workers to sign union cards under undue influence and contrary to their own wishes. Without a secret ballot vote there is no opportunity for workers to express those wishes free from that influence.[11]

A card-based certification system also has the potential to create hostilities between co-workers within a company. The pressure from union supporters on their co-workers to sign union membership cards, without those co-workers later having the option to make a truly private choice, creates potential conflicts between co-workers who must continue to work together after the

[4] *Ibid.*
[5] Policy Resolutions, *supra*, note 2 at 54.
[6] *Ibid.*
[7] *Ibid.*
[8] *Ibid.*
[9] *Ibid.*
[10] *Ibid.*
[11] *Ibid.*

certification campaign commences.[12] In the IDM and Animation & VFX sector, the work is by necessity complex and collaborative. This type of needless animosity would be devastating to the entire game making process. By contrast, a secret ballot vote is conducted in a neutral environment by the Board which means the process is less vulnerable to abuse, fraud and intimidation from union organizers.[13]

In other forums, supporters of a card-based certification have argued that the ability of employers to communicate with workers during the certification campaign leaves workers subject to intimidation by an abuse of employer power.[14] They assert that employers might threaten a worker's job security, wages, or the alteration of any number of conditions of employment if a union campaign is successful.[15] We believe that in those instances there are adequate remedies under the existing Code and these already protect against such unfair labour practices.[16] However, if there is evidence that this type of abuse exists and it is not being adequately addressed in the current Code, there is a more effective way for the Panel to deal with it. Rather than eliminating the democratic secret ballot process for all workers, we believe the Panel would be better served by simply looking at changes in the Code that bolster the remedies available to the Board in those limited circumstances where employers have acted improperly.[17]

Inconsistency with democratic norms

The legitimacy and credibility of the certification process are important factors in upholding the public's trust and confidence in the union certification process.[18] Replacing the current secret ballot voting system with a card-based certification model is inconsistent and with the norms for electoral processes in Canada.[19]

In sum, our first submission is that the Panel should reject any suggestion that B.C. move away from a secret ballot certification process. This process is essential in providing for an environment where workers can decide whether to be represented by a trade union free from, misinformation, undue influence or threats. Card-based certification unnecessarily subjects workers to direct potential pressure from co-workers and unions. Whereas, secret ballot voting safeguards workers from intimidation or pressure from union organizers, co-workers and even employers alike and helps ensure that their true preferences are represented.[20]

2. Sectoral Bargaining

DigiBC anticipates that the Panel will hear submissions urging it to consider some type of industry based or sector-based bargaining ("Sectoral Bargaining"). While this type of bargaining may be appropriate and useful in some industries, it is our view that it is impractical and inappropriate in

[12] *Ibid.*
[13] Policy Resolutions, *supra*, note 2 at 54.
[14] Ontario Report, *supra* note 2 at 321.
[15] *Ibid.*
[16] Labour Relations Code [RSBC 1996] c. 244, s.6.
[17] Ontario Report, *supra* note 2 at 321.
[18] *Ibid*, at 324.
[19] Policy Resolutions, *supra*, note 2 at 53.
[20] *Ibid,* at 54.

the IDM and Animation & VFX sector and in fact inappropriate for the entire technology sector in the Province. We discuss our position further below.

Lack of Collective Bargaining History

There are a limited number of examples of compulsory multi-employer Sectoral Bargaining that exist in Canada (such as in the construction industry or the film industry). Those limited examples demonstrate that there are many unique requirements that must exist for it to be successful. Key among those is the presence of an established history of collective bargaining.[21] It is simply not feasible to force employers in sectors with no meaningful prior collective bargaining history into a highly sophisticated multi-employer, multi-union collective bargaining regime. In other words, before mandating employers to bargain together, collective bargaining has to begin with individual employers.[22] An incremental, evolutionary approach is more likely to be successful than an imposed multi-employer model that has no foundational support.[23]

We note that no jurisdiction in Canada has imposed any form of mandatory multi-employer collective bargaining on employers in a sector that did not already have a meaningful history of collective bargaining.[24] The absence of established collective bargaining in the IDM and Animation & VFX sector would make it inappropriate for the Panel to consider it here.

Lack of Common Interest in IDM and Animation & VFX Sector

Sectoral Bargaining was previously discussed in B.C. in the form of the "Baigent-Ready model" in 1992. Under this model, it was proposed that sectors could be defined by geographic areas, such as a neighborhood, city, metropolitan area or province, that contained similar enterprises with employees performing similar work.[25] It is of note that the model was never accepted and that is true even though the economic circumstances for such a model were more favourable in 1992 than they are today. Today the economy is far more diverse and new industries such as the IDM and Animation & VFX sector and the wider technology sector offer a very different landscape. The diverse nature of employers who make up the IDM and Animation & VFX sector mean there is very little common interest among employers and that is a necessary pre-condition to any consideration of multi-employer bargaining.[26]

Following recommendations in Ontario

The impracticalities of Sectoral Bargaining, were discussed and summarized in the recommendations of the *Changing Workplaces Review Final Report*[27] in Ontario, which proposed amendments to Ontario's Labour Laws in 2017 (the "Ontario Report"). The recommendations from the Ontario Report rejected the model for many of the reasons we have already discussed

[21] Ontario Report, *supra* note 2 at 355-356.
[22] *Ibid.*
[23] *Ibid.*
[24] *Ibid.*
[25] *Ibid.*
[26] Ontario Report, *supra* note 2 at 356.
[27] Ontario Report, *supra* note 2.

above. We share their view and suggest there exists nothing unique in B.C.'s economy, or the IDM and Animation & VFX sector in particular, that would make it appropriate here.

Uncertainty and Disruption

Any scenario which forces a diverse group of employers with no established history of collective bargaining into Sectoral Bargaining is likely to be chaotic and highly disruptive. The transition process would be fraught with massive uncertainty.[28] There is a significant potential for that process to destabilize what is currently a growing and important part of B.C.'s new economy.

In sum, it is our view that the necessary requirements for Sectoral Bargaining simply do not exist in the IDM and Animation & VFX sector or the wider technology sector in this Province. As noted above, the IDM and Animation & VFX sector is made up of a very diverse group of employers which includes small startups, multi-national companies and everything in between. These employers have no established history of collective bargaining.[29] To simply assume that in these circumstances they could be forced into a multi-employer, multi-union collective bargaining regime is inappropriate.

Summary

Nurturing the continued growth of the IDM and Animation & VFX sector is critical for both the short and long-term benefit and prosperity of the B.C. economy. The IDM and Animation & VFX sector provides a work environment characterized by high paying jobs, excellent working conditions and significant flexibility for workers. This environment reflects the demands of workers in the new economy. In this new reality, workers have simply chosen not to be represented by trade unions. That choice is not the result of a lack of access nor outdated legislation but rather a decision the workers have made based on their unique reality. That choice should be respected as it would have been if they had chosen differently. We urge the Panel not to come to the process with pre-conceived notions about access or representation.

Again, we are grateful for the opportunity to participate in this process and look forward to the Panel's recommendations in August.

[28] *Ibid* at 355-356.
[29] *Ibid.*

LABOUR CODE REVIEW
RECOMMENDATIONS

A submission from
the Federation of Post-Secondary Educators of BC

MARCH 2018

FPSE Federation of Post-Secondary Educators of BC

CUPE1004

INTRODUCTION

The Federation of Post-Secondary Educators of BC (FPSE) is the voice of 10,000 faculty and staff at BC's teaching universities, colleges, institutes and private sector institutions. Our membership has been negatively impacted by changes to the administration of labour issues in BC since the last labour code review in 2003, and submits the following recommendations to the panel towards the shared goal of harmonious and stable labour/management relations.

BC FEDERATION OF LABOUR

We support of the recommendations of the BC Federation of Labour's submission on this topic, including:

- **Improve funding to the Labour Relations Board (LRB) to ensure expeditious and timely decisions;**
- **Restore the card check process;**
- **Amend the Labour Relations Code (LRC) so that when a membership vote is necessary an in-person vote is held within 5 days;**
- **Repeal changes introduced in 2002 to Sections 6 and 8 of the labour code regarding employer to employee communications (during and outside of unionization drives); and**
- **Restore the *Employment Standards Act* as a statutory minimum floor of rights.**

LABOUR RELATIONS BOARD

Our experience with the Labour Relations Board has made it clear that the board is not able to meet its functions at its current funding level. Workers in BC deserve a Labour Relations Board that is adequately funded, such that it is able to fulfill its role in facilitating labour relations operations in BC.

Our recommendations pertaining to the Labour Relations Board are:

- **Increase funding to the mediator system;**
- **The Labour Relations Board is the only system requiring faxed submissions. Funds must be allocated to update use of modern technology in Labour Board operations;**
- **The Labour Board serves an important educative purpose; as such, the board should have their educative powers expanded to train others to take their place as part of an overall succession plan.**

The most pronounced examples of Labour Board underfunding have been through the private sector member locals of our federation, mainly through the difficulty in signing a first collective agreement. Faculty at the Pacific Gateway International College (now Sprott Shaw Language College) experienced continual delays and stays by the board that allowed the employer to bargain in bad faith. This extended process resulted in a strike requiring support from our federation to prevent an end to the unionization drive. Stays and delays were also experienced by workers at the Vancouver English Centre (now bankrupt), and Hanson International Academy.

LABOUR RELATIONS CODE

In 2002, Sections 6 and 8 of the Labour Code were amended to expand employers' rights to communicate to employees beyond the scope of employer's business, and provide an exception to employer communication during the unionization process. It is our position that these changes are unnecessary

and provide an opportunity for employers to unduly influence worker choice regarding unionization, while stopping short of overt intimidation or coercion. We recommend that these legislative amendments be repealed, and that the language of both Section 6 and Section 8 revert to its original wording.

EMPLOYMENT STANDARDS ACT

Educators across BC bargain effectively for fair compensation, as a mix of pay, benefits, and types of professional and vacation leave. Under the changes to the *Employment Standards Act*, many of these bargained rights and benefits were retroactively undermined – a complete government over-reach interfering with workers' rights and compensation.

Current *Employment Standards Act* language is overly subjective, permitting employers to legally offer less than what workers agreed to at the bargaining table including annual vacation, seniority retention, and recall rights.

The *Employment Standards Act* needs to be changed immediately to become (in its entirety) a statutory floor of rights, with all provisions that allow less than what was bargained in a collective agreement to be updated to mandate benefits be offered at the level of the act or collective agreement, whichever is greater.

CONCLUSION

The Labour Relations Code, Labour Relations Board, and *Employment Standards Act* are all crucial pieces in ensuring a free and fair bargaining process that respects and enforces the collective agreements workers achieve. The underfunding of the Labour Relations Board, and the loosening of the *Employment Standards Act*, undermine workers' rights and faith in labour protections and enforcement in BC. This harm can be reversed by implementing the recommendations of the BC Federation of Labour and affiliates, including our federation. We are happy to elaborate on any of these points in an oral presentation.

FPSE Federation of Post-Secondary Educators of BC

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HEALTH SCIENCES ASSOCIATION
The union delivering modern health care

March 20, 2018

email: LRCReview@gov.bc.ca

Labour Relations Code Review Panel (Section 3 Committee)
Ministry of Labour

Dear Panel Members,

HSABC is a health sector union representing over 18,000 health science professionals, working in more than 100 professions at over 250 hospitals and agencies in acute care, long-term care, and community health (including child development centres and transition houses). We represent employees in the nurses, health sciences professional, community, and community social services sectors. We also represent health sciences professionals in the private sector. In addition to negotiating collective agreements for our members, HSABC is active on many other fronts, including health care policy, labour issues, occupational health and safety, wage equity, and women's issues.

On behalf of its members, HSABC is pleased to provide this submission in response to the invitation of the Section 3 Panel issued February 16, 2018.

Since the last comprehensive review of the *Code* in 2003, there have been significant and wide-ranging changes to the BC economy and workplaces since that consultation took place. There have also been significant changes to the legal landscape. Both types of changes need to be reflected in the *Labour Relations Code*.

In many ways, and on many levels, the current labour relations system is out of step with both the changing workplace of the 21st century, and the fundamental nature of employees *Charter* protected rights to freedom of association. We need a *Labour Relations Code* that more appropriately balances the interests and concerns of all its constituents, and a *Labour Relations Code* that reflects and can respond to the actual nature of the workplace.

We are pleased to submit these recommendations as part of the consultation under section 3 of the *Code*. We want to work together to ensure that workers in British Columbia have the same rights and protections enjoyed by other Canadians, and to ensure that workplaces support a growing, sustainable economy with fair laws for workers and businesses.

I therefore respectfully submit this report on behalf of HSABC and its 18,000 members.

Sincerely,

Val Avery

Val Avery
President
HEALTH SCIENCES ASSOCIATION OF BC
VA:ws
Attach.

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HEALTH SCIENCES ASSOCIATION
The union delivering modern health care

Submission to the Labour Relations Code Review Panel

Bringing back balance to labour relations in British Columbia

March 20, 2018

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Executive Summary

In order to take into account the changing nature of the BC economy and workplaces, and the needs and interests of workers in the context of their *Charter* protected freedom of association rights, the Health Sciences Association of British Columbia ("HSABC") recommends the following changes to the B.C. *Labour Relations Code* (the "*Code*"):

General Provisions

1. Properly and fully fund the Labour Relations Board.
2. Develop a model of sectoral bargaining, and ongoing review of the legislation.
3. Amend the *Employment Standards Act* to remove provisions that provide employers with the ability to negotiate standards lower than the *ESA* minimums into collective agreements.

Acquisition of Bargaining Rights

4. Reinstate card check where a union has simple majority support.
5. Statutorily reduce the length of time required to process certification applications through:
    a. Reducing the period of time between application and representation vote;
    b. Removing the ability of the Board to order mail-in ballots unless all parties consent;
    c. Return to a process of truly expedited oral hearings on certifications rather than first requiring written submissions; and
    d. Amending the *Code* to require that the processing and final decision of a certification application occur within 20 working days.
6. Extend the validity of signatures on union membership cards to six months.
7. Provide unions with the ability to apply for access to employee information where they are able to establish support of 20% of the employees in an appropriate unit.

Unfair Labour Practices and Employer Speech

8. Repeal Bill 42 provisions relating to employer speech.
9. Create more explicit requirements that the Board award remedial certifications when the employer commits unfair labour practices.

Variations of Certifications

10. Introduce more stringent procedures for decertification applications.
11. Eliminate partial decertification.
12. Charge procedures for change in union representation.

Successorship, Common Employer and True Employer

13. Repeal Bill 29 and Bill 94 in their entirety.
14. Expand the application of the *Code* to contract flipping and with respect to changes in private services providers

Background

HSABC is a health sector union representing over 18,000 health science professionals, working in more than 100 professions at over 250 hospitals and agencies in acute care, long-term care, and community health (including child development centres and transition houses). We represent employees in the, health sciences professional, nurses, community health, and community social services sectors. We also represent health sciences professionals in the private sector. In addition to negotiating collective agreements for our members, HSABC is active on many other fronts, including health care policy, labour issues, occupational health and safety, wage equity, and women's issues.

On behalf of its members, HSABC is pleased to provide this submission in response to the invitation of the Section 3 Panel issued February 16, 2018. In that invitation, the Panel noted the following:

> "We hope that the views provided will take into account the context of the changing nature of the BC economy and work places", and
>
> "We are particularly interested in whether you believe any changes to the *Code* are necessary to properly reflect the needs and interests of workers and employers in the context of our modern economic realities".

The last comprehensive review of the *Code* was done in 2003. There have indeed been significant and wide-ranging changes to the BC economy and workplaces since that consultation took place.

These changes include an ongoing shift from full time permanent jobs to part time and temporary jobs (contract, freelance, and other forms of precarious work). Precarious work is now the fastest growing sector of the labour market in Canada. The current statutory regime, based on a very different employment model, is failing to provide the most vulnerable employees with a realistic opportunity to organize and negotiate. This changing workforce requires fundamental changes to the *Code*.

In addition, there have been significant changes to the legal landscape in the 15 years since the *Code* was last reviewed. In 2007, the B.C. Supreme Court ruled in *Health Services and Support – Facilities Subsector Bargaining Association v. British* Columbia, 2007 SCC 27, that the collective bargaining process is protected by the freedom of association rights in s. 2(d) of the *Charter.* In the 2015 labour trilogy, the Supreme Court of Canada confirmed that freedom of association protects the right of employees to establish, belong to, and maintain a trade union; to join a trade union of their choosing that is independent from management, to engage in a meaningful process of collective bargaining, and to strike. In the 2016 *British Columbia Teachers' Federation v. British Columbia* decision (2016 SCC 49), the Supreme Court of Canada clarified the scope of the freedom of association protections attached to collective bargaining. Yet despite these significant developments in the law, the *Code* has not been reviewed to recognize these distinct *Charter* rights.

These changes, taken collectively, require fundamental changes to the existing labour law legislation to ensure that all workers, and in particular the most vulnerable, are provided with real access to union membership and collective bargaining. In the remainder of this submission, we will outline the changes that we seek to the existing labour law: changes that we see as responding to developments that have occurred, and that will assist the province of British Columbia in navigating the challenges of the modern economy.

General Issues and Provisions

1. Properly and fully fund the Labour Relations Board

The chronic and ongoing underfunding of the Labour Relations Board has been a significant impediment to a labour relations system that is properly reflective and responsive to the

needs and interests of all parties, but the impact of underfunding is disproportionately borne by unions and workers. The impact of underfunding has been felt in a number of areas.

For example, the underfunding of the Board in general, and Industrial Relations Officers (IROs) in particular has led to a situation where these officers of the Board are not able to carry out their duties effectively. IROs are responsible for investigating certification applications and producing reports, as well as holding and counting votes. As a result of underfunding and layoffs, the manner in which IROs conduct these investigations is extremely limited. Whereas in the past IROs routinely performed payroll inspections, these are not now conducted. The result is that the number of employees in the bargaining unit is determined solely on an employer's information, with the union having limited options for testing that information. We note in addition that the ability to review the employer's information is particularly important given the realities of the modern economy, where workplaces rely on larger pools of labour with more tenuous connections to the employer, and often in a more expansive geographic area.

Other results of the underfunding of the Board include the use of mail-in ballots as a rule rather than an exception, and the Board's reliance on written submissions rather than in-person hearings. Both of these concerns will be dealt with in more detail below, in the context of recommended changes to the certification process. However, it is important to see the issue as not only a legislative one, but also one of appropriate funding. Again, it needs to be kept in mind that what is at stake are freedom of association rights under the *Charter*.

2. Develop a model of sectoral bargaining, and ongoing review of the legislation.

In order to ensure that labour law and policy is responsive to the changing realities of the modern workplace, we recommend as follows:

a. The implementation of sectoral or franchisee based bargaining options. This concept is not new. For example, sectoral bargaining in the health sector is well

established, being in place since 1995. But even in the private sector, the concept is not new. Between 1973 and 1984 the Labour Code provided for a form of multi-employer certification. In the *Recommendations for Labour Law Reform* submitted by the Sub-committee of special advisers in 1992, two of the three members of the subcommittee recommended a return to a modified form of sectoral bargaining for those small enterprises where employees were historically underrepresented by trade unions (at p. 30). That report stated, in part:

> It is simply impractical and unacceptably expensive for unions to organize and negotiate collective agreements for small groups of workers if the dues cannot begin to cover the costs involved in developing separate collective agreements for each of their work sites. As a result, persons employed as clerical support staff in small business, farm workers or gas station attendants do not have any real prospect of ever being represented by a trade union under present labour legislation. Yet, these are the very workers who are most in need of trade union representation.

The advisors noted that they considered this recommendation as among the most important and significant they were making (p. 30). The recommendation was not implemented.

The issues flagged in the 1992 report have not dissipated. They have, indeed, increased as the modern workforce has become increasingly fragmented and stratified. Most recently, labour law reviews in both Alberta and Ontario have devoted significant discussion to potential uses of sectoral certification. While a full discussion of the possible types and models of sectoral certification is not within the scope of this submission, we strongly recommend that the Panel consider these options as changes necessary to properly reflect the needs and interests of workers in the context of our modern economic realities.

b. A more consistent review process under section 3, or the creation of a standing committee or task force. It is not possible for the legislation to keep pace with changes in the economy if it is only reviewed once every decade. To this end, we

recommend either the creation of a long-term task force to explore modern employment realities on an ongoing basis to ensure maximum responsiveness, or the use of regular section 3 panels to fulfil this purpose.

3. Amendments to the *Employment Standards Act*

A review of the *Labour Relations Code* cannot be undertaken outside of broader employment law context. Employment standards legislation exists to create a floor of minimum standards beneath which employers cannot go, and it is important for all workers. However, a significant legislative change wrought by the Liberal government in the early 2000s was to exclude employees covered by collective agreements from the minimum guarantees in significant sections of the *Employment Standards* Act. This means that unionized workers can potentially be working under conditions that are below the *ESA* minimum standards. In order to ensure that all employees in BC have the same basic entitlements and protections, we recommend the removal of the exclusions from the sections of the *ESA* that provide employers with the ability to negotiate standards lower than the *ESA*. The *ESA* should provide a common floor below which employees should not be permitted to fall.

<u>Acquisition of Bargaining Rights</u>

HSABC has a number of recommendations relating to the provisions of the *LRC* dealing with the acquisition of bargaining rights. Currently, the legislation provides for mandatory certification votes, to be held when a union is able to show 45% membership support. The vote is to be ordered within 10 days of the application, with the union being certified if it wins the majority of the vote. Our recommendations for reform are as follows:

4. Reinstate card check when the union has simple majority support.

From 1973 to 1984, and from 1993 to 2001, BC labour legislation provided for certification by card check. In periods, like today, where the legislation has been amended to provide for mandatory certification votes, rates of unfair labour practices have dramatically increased, and rates of certification have concomitantly decreased. This is not surprising: mandatory voting, especially when coupled with very few restrictions on anti-union campaigning by

employers, creates an environment where employers can use their inherent power advantage to induce fear and influence employee votes.

The mandatory certification vote requirements contained in the current *Code* fail to protect worker interests and freedom of association rights, and are out of step with the provisions in other provinces. In addition to the federal jurisdiction, five provinces allow for certification by card check. One additional province, Ontario, provides for certification by card-check in certain industries. Our recommendation is that the *Code* be amended to provide for this alternative as well.

In the alternative, we note that of the provinces that have mandatory membership votes, B.C. has one of the highest thresholds required before a vote will be ordered, at 45%. The *Canada Labour Code* provides for a vote if the Union can show support between 35-50% (with automatic certification over 50%). Other legislation provides for votes if a threshold of 40% support is reached. As a result, we recommend that if card-check certification is not reinstated, the threshold for the ordering of a vote be lowered, in line with the legislation in other jurisdictions.

5. Statutorily reduce the length of time required to process certification applications.

In order to prevent unfair labour practices and employer interference, on the one hand; and to minimize disruption to both employees and employers, it is necessary to process certification applications, and hold representation votes, in a truly expedited manner. This is not occurring.

Since 1993, there has been a significant increase in the number of days required to process a certification application. In our submission, this increase in the length of time acts to the disadvantage of workers and unions, as a faster processing of certification applications decreases the potential of unfair labour practices and employer interference. There are a number of legislative and policy changes which could effectively reduce this time period, including the following:

a. One driver of this overall increase is the length of time it takes to conduct the representation vote. The current 10-day period during which the Board has to hold a vote after an application for certification is submitted is significantly longer than what is provided for in other jurisdictions (generally five days). The length of time required may be understandable if the Board was actually investigating certification applications (for example by conducting payroll audits). But, as outlined below, the Board does not do this. There is therefore no reason for this significant period of time between the application and the vote: a period of time where employees are the most vulnerable to employer pressure and interference. As a result, HSABC recommends reducing this 10-day period to a maximum of two business days.

b. A further driver of the overall increase is the routine use of mail-in ballots by the Board. Mail-in ballots are not required to conform to the 10-day period. Although initially the purpose of the mail-in ballot option was to respond to exceptional cases where an in-person vote would not allow the voters to have a reasonable chance to cast a ballot, it has more recently become the norm, rather than the exception. Given that the Board itself has noted that the main reason for this increase in mail-in votes is lack of IRO resources, this recommendation is closely aligned with our general recommendation to appropriately fund the Board.

   As a result, HSABC recommends that the *Code* remove the ability of the Board to order mail-in ballots unless all parties consent or truly exceptional circumstances are established.

c. Yet another driver of increased processing time is a Board policy which was, in its conception, designed to expedite the process: the Board default to written submissions rather than an oral hearing. In practice, requiring an exchange of written submissions creates delay and additional costs to the parties. Further, the Board does not require an employer to establish a *prima facie* case for its objections before moving to a written submission schedule. This creates a clear incentive for employers, in particular, to raise objections at the Board to put pressure on the unions and delay the process.

HSABC recommends that the Board return to its previous process of quick oral hearings on certifications in cases where a party provides a *prima facie* case for any objections it raises, and furthermore, that oral hearings be required unless all parties expressly agree to move to written submissions.

d. Further, HSABC submits that the *Code* should be amended to require that the processing and final decision of a certification application occur within 20 working days after receipt of the application, placing an outer limit on the length of time such applications are outstanding. Such a provision was recently added to the Alberta legislation, requiring that the Board finish all considerations regarding an application for certification no later than 20 working days after receipt of the application (with authority in the Chair to approve an extension of the timelines). This would represent a vast improvement from the average of over 90 days that certification applications have been taking to complete more recently.

6. Extend the validity of signatures on union membership cards to 6 months.

Currently, signatures on membership cards are valid for 90 days. A longer time period is consistent with legislation in other jurisdictions, including Canada and Alberta (which implemented this amendment in its most recent labour law reform process). Again, such an extension is a recognition of the changing nature of the workplace, with workplaces relying on larger pools of part-time and casual workers in more geographically spread out workplaces. It is increasingly challenging to identify and access all employees of any given employer.

7. Provide unions with access to employee information where they are able to establish support of 20% of the employees in an appropriate unit.

Included in the recent amendments to the Ontario labour legislation was the addition of a process whereby unions with an appropriate level of support in the bargaining unit (20%) are able to obtain contact information for employees in the proposed unit in advance of a certification application. This information includes employee names, phone numbers and

personal e-mail addresses. There are, in addition, processes to ensure that employee privacy is maintained over the information in relation to the period of time the union can retain it, and the uses the union can make of it. In recommending this process, the authors of the *Changing Workplace Review* noted that, under the *Charter* guarantees of freedom of association, employees have a constitutional right to effective access to collective bargaining. Further, employees cannot band together to pursue their workplace goals if they don't know who the other employees are, how to contact them, or how many of them there are. Again, this type of diffuse and fragmented employer structure is an impediment to union certification and is a hallmark of the modern employment context, which the *Code* in its current form is not fully equipped to handle. As noted in the report:

> Workplaces can be large and geographically spread out and it can be very difficult and onerous, if not impossible, to know the number of employees and where they work. Moreover, in the changing workplaces of today, employees can be employed on numerous shifts, or on a part-time or temporary basis or away from the workplace altogether, and it can be difficult for other employees to know how and where to reach them. These many practical obstacles should not be placed in the way of the exercise of the constitutional right to freedom of association, especially when the employee contact information exists and can be easily provided.

The concerns outlined by the working group in Ontario, and accepted by the government when this provision was included in the legislation, are equally applicable in British Columbia. As a result, HSABC recommends that a similar provision be included in an amended *Code*, in particular in the absence of a mandatory card check system.

Unfair Labour Practices and Employer Speech

Bill 42, enacted in 2002, changed the unfair labour practice provisions of the *Code* to widen the ways in which employers can communicate with employees during an organizing campaign. Specifically, Bill 42 amended sections 6(1) and 8 of the *Code.* Prior to the amendments, s. 6(1) prohibited employer interference with trade unions. Section 8 provided that nothing deprived a "person" of the freedom to communicate to an employee a statement of fact or opinion reasonably

held with respect to an employer's business. The amendments specifically made s. 6(1) subject to s. 8, and amended section 8 to provide:

> 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.

Subsequent Board decisions have interpreted this provision in a manner that shifts the balance away from employee freedom of association in favour of employer freedom of expression. HSABC submits that this balance needs to be reassessed, especially in light of the Supreme Court of Canada's labour trilogy.

In addition to the amendments to s. 6 and 8 of the *Code*, another concern is the Board's reluctance to award meaningful remedies when employers are found to have breached the law, and specifically the Board's unwillingness to use the remedy of remedial certification. The combination of these issues: the expansive interpretation of the employer free speech provision, and the very restricted use of effective remedies, create real barriers to workers' access to collective bargaining. As a result, HSABC recommends the following amendments.

8. Repeal Bill 42 provisions relating to Employer speech.

The concept of employer speech as currently reflected in the *Code* is inconsistent with the principles articulated in the Labour trilogy. The most appropriate way to safeguard the rights of workers to organize is to repeal these provisions.

9. Create more explicit requirements that the Board award remedial certifications when the Employer commits unfair labour practices.

The Board must be able and willing to offer a meaningful remedy to workers seeking to join a union where employers unduly interfere with that choice. As outlined above, the right to choose a union is an issue of freedom of association, protected by the *Charter.* Remedial certification is the most meaningful and effective way to respond to employer violations of this right.

Variations of Certifications

HSABC also has a number of recommendations relating to the ongoing relationship between employers and unions through the variation of certifications.

10. Introduce more stringent procedures for decertification applications.

The *Code* currently prohibits applications for decertification during the 10 months immediately following the certification of the trade union. This provides some recognition of the fact that a union must be provided with time to develop and grow in its relationship as the representative of the employees. But HSABC is concerned that these provisions do not go far enough. In the *Changing Workplace Review Summary Report*, the authors noted that a decertification application should not have priority over mediation or first contract arbitration processes, and that such applications should be untimely until those processes are completed.

Similarly, HSABC recommends that priority be given to first collective agreement mediation and arbitration proceedings under Part 4, Division 3 of the *Code* over a decertification application, even if the decertification application is filed before the mediation process is triggered.

11. Eliminate partial decertification.

Partial decertification has been a contentious area of Board decision-making for some time, with the Board acting largely in a legislative vacuum. While the *Code* clearly outlines the requirements for decertification of an entire unit, it is silent on the issue of partial decertification. The result has been a shifting and unclear application of Board policy.

Given that partial decertification represents a significant alteration in a bargaining unit that has previously been found to be appropriate for collective bargaining, HSABC recommends that the *Code* be amended to preclude such applications from being brought. In the alternative, HSABC states that partial decertification is an area that would be better addressed through specific legislation than through the vagaries of Board policy, and that instances in which it would be allowed should be strictly circumscribed.

12. Change procedures for change in union representation.

Section 19 of the *Code* provides that the open period for an application for a change in union representation (raid) is the seventh and eight months in each year of the collective agreement or any renewal or continuation of it. Recent years have illustrated how the recurrence of the open period on a yearly basis has allowed for an ongoing cycle of raiding, in some cases sector-wide. This has brought significant levels of uncertainty and workplace disruption.

Other jurisdictions, such as Ontario and Canada, have less frequent open periods. In both cases, the legislation provides that, for collective agreements of three years or less, there is one open period: the three months before a collective agreement is set to expire. Where the duration of the collective agreement is more than three years, the open period is the last three months of the third year, and each subsequent year. In addition, in the Ontario construction industry, the open period is narrower: the two months preceding the expiration of a collective agreement, many of which are province-wide. In all these cases, this provides a period of stability after the negotiation of a collective agreement.

Given the level of uncertainty and disruption that can be caused by ongoing raiding, HSABC recommends that the open periods under the B.C. legislation be amended in a manner similar to Ontario and Canada, in the cases of unions certified under the Board's processes. The Panel may want to consider different procedures or provisions for unions that have been voluntarily recognized by the Employer.

<u>Successorship, Common Employer, True Employer: Health Sector and Social Services Context</u>

Bill 29, introduced in 2002, stripped collective agreement rights from employees in the health sector. Among other things, Bill 29 allowed health care and community social services employers to contract out a large number of services to private companies, who could then hire workers at much lower wages. It invalidated provisions in existing collective agreements which prohibited this contracting out, and which provided for employment security. Bill 29 also provided that two sections of the *Code* which normally protect workers (s. 35 (successorship) and s. 38 (common employer)) did not apply to health employers and contractors.

While the Supreme Court of Canada found that large portions of Bill 29 were constitutionally invalid, it did not find that all of its provisions were. The remaining pieces of Bill 29 continue to have a significant effect on health care unions and employees, as well as community social services unions and employees.

Bill 94, introduced in 2003, was to similar effect. That legislation has primarily been used for privatization in residential care and assisted living facilities but can also be used, by regulation, to designate a P3 facility as being outside of the public sector health bargaining structure established by the Korbin and Dorsey Commissions in the 1990s, intended to create industrial stability and reduce the proliferation of bargaining agents. Bill 94 also provides private sector entities operating in the health sector with exemptions to *Code* successorship and common employer provisions that are unavailable to any other industrial sector.

HSABC is concerned that Bill 94, and what remains of Bill 29, fundamentally weaken protections against contracting out and successorship; and that they continue to promote the privatization of our health care system. As a result of these concerns, HSABC recommends as follows:

13. Repeal Bill 29 and Bill 94 in their entirety.

The combined effect of Bill 29 and 94 is to allow employers to evade collective bargaining responsibilities and terminate employees in a manner that undermines the intent of successorship and common employer protection. This legislation has resulted in a reduction in wages, working conditions, and job security for workers in the health and community social services sectors, creating industrial instability and eroding the conditions of care for vulnerable patients and clients. HSABC recommends the repeal of both pieces of legislation in their entirety.

14. Expand the application of the *Code* to contract flipping and with respect to changes in private service providers.

In a number of sectors, services provided by third parties are periodically re-tendered in order to defeat collective bargaining. Current successorship legislation does not apply to contracting out or to contract flipping, and is silent with respect to changes in private

service providers. This means that certifications and freely negotiated collective agreement rights can simply disappear if a business decides to contract out or re-tender: even if the new service provider hires the same workers to provide exactly the same services.

The *Changing Workplaces Review – Summary Report* noted a similar concern in Ontario, recognizing that there are vulnerable workers in precarious work in this situation, and recommended that successor rights as a result of contracting out or retendering be applied in some industries, with an eye to future expansion.

Ultimately, the Ontario amendments provided for re-tendering to be deemed to constitute sale of a business in the building services industry. The legislation also includes a regulation making power that could result in the protection being extended to other service providers.

HSABC submits that a more expansive provision is appropriate for the BC context, and recommends that the application of s. 35 be broadened generally to prevent subverting collective agreements through contract flipping.

Conclusion

Above, we have highlighted the ways in which we believe the current labour relations system is out of step with both the changing workplace of the 21st century, and the changing legal terrain being hewn by the Supreme Court of Canada. We are hopeful that this review of the *Code* will yield amendments which will more appropriately protect the *Charter* protected rights of workers to choose to join a union and bargain collectively.

We thank you for the opportunity to provide these submissions.

LABOUR RELATIONS CODE REVIEW

Submission to the Special Advisers to the Minister of Labour

March 2018

The Hospital Employees' Union
www.heu.org

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Introduction

The Hospital Employees' Union is the oldest and largest health care union in British Columbia, representing 49,000 members working for public, non-profit and private employers.

Since 1944, HEU has been a strong, vocal advocate for better working conditions for our members and improved caring conditions for those who access health care services.

HEU members work in all areas of health care– acute care hospitals, residential care facilities, community group homes, outpatient clinics and medical labs, community social services agencies, and First Nations health agencies – providing both direct and non-direct care services.

The ability of health care and community social service workers to participate in the workforce, join and maintain their membership in a union, and secure and maintain collective bargaining rights, has been undermined over the past 16 years by government legislation designed to facilitate de-unionization, privatization and contracting out.

These include changes to *Labour Relations Code*, along with new laws such as the *Health and Social Services Delivery Improvement Act* and the *Health Sector Partnerships Agreement Act*.

HEU welcomes this opportunity to propose *Code* changes that will help bring balance back to the labour laws that so profoundly impact our members' working and caring conditions.

1) The right to join a trade union can be strengthened

There are several areas where the *Code* can be amended to give fuller and more robust effect to the Section 4 and *Charter* right of every employee to be free to be a member of a trade union and to participate in its lawful activities

Narrow the permissible range of "Employer Speech"

In the sensitive and critical period of time between the commencement of an organizing campaign and a representation vote in particular, the question arises as to the appropriate or permissible range of "employer speech" under Section 8 of the *Code*.

Amendments to Section 8 and Section 6(1) in the *Labour Relations Code Amendment Act, 2002* ("Bill 42") significantly expanded the ability of an employer to communicate anti-union views and sentiments to employees.

Section 3 of Bill 42 provided that Section 8 would be amended to read as follows:

> 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.

Section 8 previously provided that:

> Nothing in this Code deprives a person of the freedom to communicate to an employee a statement of fact or opinion reasonably held with respect to the employer's business.

Section 2 of Bill 42 amended Section 6(1) to read:

> Except as otherwise provided in section 8, an employer or a person acting on behalf of an employer must not participate in or interfere with the formation, selection or administration of a trade union or contribute financial or other support to it.

The former version of Section 6(1) said that:

> An employer or a person acting on behalf of an employer must not participate in or interfere with the formation, selection or administration of a trade union or contribute financial or other support to it.

The Board held that Section 8, as amended, allows an employer to express "views" which reflect personal bias and are uninformed and unreasonable; *Convergys Customer Management*, BCLRB No. B62/2003, 90 CLRBR (2d) 238 (upheld on reconsideration in B111/2003, 90 CLRBR (2d) 287) at paragraph 112.

In *Convergys*, the Board also held that Section 8, as amended, allows an employer to exert "undue influence" on employees because "undue influence" is a less overt, more subtle form of pressure than "intimidation and coercion" and is therefore not prohibited by Section 8; paragraph s 109, 110. As presently drafted, therefore, Section 8 prohibits little more than raw, blatant threats and coarse displays of employer power.

In *RMH Teleservices International Inc*., BCLRB No. B188/2005, 114 CLRBR (2d) 128 (leave for reconsideration of B345/2003, 100 CLRBR (2d) 95), the employer engaged in a political style anti-union campaign, complete with frisbees, sand pails (containing popcorn, apparently), chocolate bars and notepads, all bearing anti-union "messages". The employer also held a number of meetings with employees. The Board concluded that even if an employer's approach is accurately styled as an anti-union "campaign", that is permissible under Section 8 as long as there is no intimidation or coercion.

The amendments to Section 8 and Section 6(1) in 2002 drastically unleashed employer power in the context of an organizing campaign and very much tilted the balance toward employers.

The version of Section 8 that preceded the current provision was recommended in *A Report to the Honourable Moe Sihota, Minister of Labour: Recommendations for Labour Law Reform*, (September 1992) (the "Special Advisers Report, 1992"); see Appendix "A", Draft Labour Relations Code, Section 8.

The Special Advisers observed that:

> …one of the major impediments to union organization is employer opposition. That opposition can easily manifest itself during an organizing campaign when employer representatives express inappropriate opinions on the question of unionization. We accept the view that employers have a legitimate interest in whether their employees organize for the purpose of collective bargaining. On the other hand, we believe that employers must maintain a circumspect position during an organizing campaign to ensure that employees are able to freely choose whether or not they wish to belong to a trade union (page 20)

HEU accepts and support this view.

RECOMMENDATION 1.1

- Amend Section 8 to read…

  Nothing in this Code deprives a person of the freedom to communicate to an employee a statement of fact or opinion reasonably held with respect to the employer's business.

RECOMMENDATION 1.2

- …and Section 6(1) to read:

  An employer or a person acting on behalf of an employer must not participate in or interfere with the formation, selection or administration of a trade union or contribute financial or other support to it.

Prompt representation vote

As noted above, during organizing campaigns, HEU has faced significant employer resistance in the period between the filing of an application for certification and the representation vote, which is typically held on the 10th day after an application is filed.

There is no question that employer interference is a major impediment to union organizing; see the Special Advisers Report, 1992 and *Managing Change in Labour Relations: The Final Report* (February 25, 1998) (the "Section 3 Report, 1998").

Employer resistance is at its most fierce during the period of time leading up to the vote. The period of time in which employers may campaign against certification must be reduced to ameliorate the impact of such campaigns.

Section 8(5) of the Ontario *Labour Relations Act*, 1995, S.O. 1995, c. 1 provides that a vote must be held within 5 days of the date the application for certification is filed.

HEU acknowledges that this proposal requires the Province to provide sufficient funding to ensure that the *Code* is administered effectively, but submits that such funding is necessary but lacking at present.

RECOMMENDATION 1.3

- Amend Section 24(2) of the *Code* to provide for a representation vote within 3 days from the date the Board receives the application for certification, or in any event, not more than 5 days.

Limit mail ballots

The Board maintains that in-person representation votes are the primary and preferred means of canvassing employee wishes and that mail ballots are the exception e.g. *Walter Canadian Coal Partnership*, BCLRB No. B51/2014, 242 CLRBR (2d) 211; *TBS Transport Ltd*., BCLRB B93/2006.

HEU agrees with that approach.

Mail ballots mean a protracted process, and indeed, where large numbers of employees are involved, "protracted" might mean several weeks. This allows employers ample time to exercise their extensive right to communicate and bring pressure to bear on employees, even undue influence.

Unfortunately, in practice, the Board has been somewhat too inclined to invoke the exception rather than the rule. This gives rise to a concern that the Board's orders reflect the fact that the Province has not allocated sufficient resources for effective administration of the *Code*. Or, it may be that mail ballots are ordered because it is simply seen as more convenient to do so.

HEU's proposal is aimed at limiting the Board's discretion in this area.

RECOMMENDATION 1.4

- Amend Section 24(2) of the *Code* to read as follows:

> A representation vote under subsection (1) must be conducted within 10 days* from the date the board receives the application for certification or, if the vote is to be conducted by mail, because an in-person vote is not practicable, within a longer period the board orders.
>
> (*note our related recommendation in Recommendation1.3 above)

Provide for card-based certification

HEU submits that the Committee ought to recommend card-based certification to the Minister as a significant step toward restoring meaningful access to collective bargaining for workers in British Columbia. Card-based certification was a feature of labour legislation in British Columbia for many years.

There is no question that mandatory representation votes allow for inappropriate and unlawful employer interference in union organizing campaigns; see the Special Advisers Report, 1992 and

Managing Change in Labour Relations: The Final Report (February 25, 1998) (the "Section 3 Report, 1998").

Nonetheless, the BC Liberals eliminated card-based certification in Bill 18 on May 16, 2002.

In Alberta, recent changes to the *Labour Relations Code*, c. L-1 provide for card-based certification where the applicant union establishes that it has secured cards from 65 per cent of employees in the proposed unit. In Ontario, Schedule 2 of the *Fair Workplaces, Better Jobs Act* amends the *Labour Relations Act*, *1995* by adding Section 15.2 to provide for card-based certification in certain industries e.g. home care and community services industry, where the applicant union demonstrates 55 per cent membership support.

HEU's proposed change to the *Code* will bring it into line with "best practices" in progressive jurisdictions in Canada.

RECOMMENDATION 1.5

- Amend Part 3, Division 1 of the *Code* to restore card based certification where the applicant trade union can demonstrate 55 per cent membership support.

RECOMMENDATION 1.6

- Amend Section 24(1) of the *Code* to provide for a representation vote where the applicant trade union can demonstrate membership support between 45 per cent and 54 per cent.

2) Amend the Code limit to "raids"

The last several years have seen a significant amount of raiding activity in British Columbia. While HEU recognizes that workers have the right to select and to change bargaining agents, HEU joins with the labour movement in lamenting the increase in this kind of unproductive and divisive activity.

The Board has recognized that raids are inherently disruptive to employers, unions and employees e.g. *IHA (East Kootenay Regional Hospital)*, BCLRB No. B109/2013, 228 CLRBR (2d) 1 at paragraph 46.

Currently, Section 19 of the Code limits raid applications to the "open period" i.e. "…the seventh and eighth month in each year of the collective agreement or any renewal or continuation of it."

HEU submits that this limitation has not sufficiently prescribed raiding.

RECOMMENDATION 2.1

- Amend Sections 19(1), 19(2) and 19(3) of the *Code* to read as follows:

(1) If a collective agreement is in force, a trade union claiming to have as members in good standing a majority of employees in a unit appropriate for collective bargaining may apply to the board to be certified for the unit only once during the term of the collective agreement or any renewal or continuation of it.

(2) An application may only be made under subsection (1) during the seventh or eighth month in a given year in the term of the collective agreement.

(3) Despite subsections (1) and (2), an application for certification may not be made under those subsections at any time during the term of a subsequent collective agreement if a previous application resulted in a decision by the board on the merits of the application.

3) Facilitate the conclusion of first collective agreements

Extend the statutory "freeze" period

The period of time between the date of certification and the conclusion of a first collective agreement is a sensitive one. Section 45 of the *Code* maintains at least a measure of stability during that sensitive time but only for a period of four months. HEU's experience is that it invariably takes far longer to conclude a collective agreement than four months.

In the Section 3 Report, 1998, the Committee recognized this problem, and recommended that the statutory freeze period be extended to eight months, but on the basis that "the freeze should reflect the average length of time it takes to conclude a first collective agreement…"; Part Four "B", page 7.

RECOMMENDATION 3.1

- Amend Section 45(1)(b) of the *Code* to read:

…

(b) the employer must not increase or decrease the rate of pay of an employee or alter another term or condition of employment until

(i) a strike or lockout has commenced; or

(ii) a collective agreement is executed

whichever occurs first.

(ALTERNATE) RECOMMENDATION 3.2

- Amend Section 45(1)(b) of the *Code* to read:

…

> (b) the employer must not increase or decrease the rate of pay of an employee or alter another term or condition of employment until
>
> > (i) XX months [the average length of time it takes to conclude a first collective agreement]; or
> >
> > (ii) a collective agreement is executed
>
> whichever occurs first.

First collective agreement interest arbitration

While HEU favours the conclusion of collective agreements through free collective bargaining, HEU also recognizes the value of first collective agreement interest arbitration.

Nonetheless, HEU recognizes that there is tension between these concepts. In *Yarrow Lodge*, BCLRB No. B444/93, 21 CLRBR (2d) 1, the Board observed that:

> The philosophical opposition to the imposition of first contract is framed in terms of the significant, traditional values which we place on freedom to contract, free collective bargaining and the value of "private ordering" or self-government (page 24)

More specifically, the Board also made this observation:

> Another infringement on the principle of free collective bargaining inherent in compulsory arbitration is that it takes away a party's right to strike or lock out. First contract imposition certainly does this. However, on a closer examination of s. 55, it only places a partial infringement on these rights. First, under Section s. 55(7), the Associate Chair (Mediation) can direct the parties to in fact exercise their right to strike or lockout. Second, unlike compulsory arbitration schemes, any infringement under s. 55, which may or may not take place, is only for the period of the first contract (pages 25, 26)

And while the Board said that where neither the trade union nor the employer engages in 'impugned conduct", the recommended option should "invariably be strike or lockout" (pages 38, 39). That is not HEU's experience under Section 55.

In HEU's experience under Section 55, it unduly impedes the conclusion of a first collective agreement through private ordering. An application under Section 55 provides employers with a means to effectively nullify a strike vote. As soon as the trade union secures a strike mandate, the employer may all but set it at naught through an application under Section 55; see Section 55(1)(b) and Section 55(2).

HEU submits that after the parties have bargained collectively in good faith toward a first collective agreement, a trade union must be able to secure a strike mandate and continue with collective bargaining on those terms. And if need be, the trade union must be free to strike. The *Code* expressly contemplates, and provides for, economic pressure as an essential aspect of free collective bargaining; see Part 5 and Part 7.

Under this model, if the matter ends up before an interest arbitrator at a later date, the experience of the parties will be of greater assistance to her or him in applying the "replication principle" and what is "fair and reasonable in the circumstances"; see *Yarrow Lodge*, page 46.

Finally, in *Yarrow Lodge*, the Board bluntly stated that:

> Although it may seem self-evident or that we are simply stating the obvious, the policy of s. 55 is that the terms and conditions of a first contract are to be negotiated, not arbitrated (page 45)

HEU submits that its proposal is in keeping with this fundamental policy.

RECOMMENDATION 3.3

- Amend Section 55(1)(b) of the *Code* to read…

  55 (1) Either party may apply to the associate chair of the Mediation Division for the appointment of a mediator to assist the parties in negotiating a first collective agreement, if

  …

  (b) the trade union has taken a strike vote under section 60 and the majority of those employees who vote have voted for a strike and the period of 3 months referred to in section 60(3)(a) has elapsed

- …and delete Section 55(2) of the *Code*.

4) Enhance the Adjustment Plan provisions of the *Code* by providing for the possibility of binding adjudication

HEU has much experience in consultations with employers under Section 54 of the *Code*. While the provision is important and encourages discussion, it is sometimes the case that the outcome of the discussions is a forgone conclusion and the invitation to consult is merely *pro forma*.

And, as the Board has said many times, Section 54 does not require the parties to conclude an adjustment plan e.g. *Nanaimo Times*, BCLRB No. B321/979 (upheld on reconsideration in B370/97).

HEU proposes that Section 54 should include at least the possibility that an adjudicator might impose terms and issue a binding decision to conclude an adjustment plan. This would make it

more likely that an adjustment plan will emerge from the process and encourage the parties to seriously work toward their own deal.

RECOMMENDATION 4. 1

- Amend Section 54 of the Code by adding the following as sub-section (3)…

  If, after meeting in accordance with subsection (1), the parties have not agreed to an adjustment plan, either party may apply to the board for an order referring all or some outstanding issues to binding arbitration.

- …and re-number the current sub-section (3) as sub-section (4)

5) Amend Section 2 of the *Code* to underscore the Board's true mandate

In Bill 42 (2002), the provincial government re-wrote the "purposes" provision in the *Code*. The new provision imposed "duties" on trade unions, employers and the Board to foster employment in economically viable businesses, enhance productivity, and take economic conditions into account, among other things.

It is not clear what consequences might be visited upon "persons" who are in breach of these "duties". This term is not apt; a "purposes" provision is more appropriate.

As was said in the Special Advisers Report, 1992, "Canadian legislation has for the last 50 years encouraged collective bargaining by workers" (page 9) and "…the collective representation of employees by trade unions continues to be a socially desirable institution" (page 11).

Similarly, in the Section 3 Report, 1998, the Committee referred to "…the social consensus that collective bargaining is desirable". Indeed, the Committee found views questioning the existence of this consensus "disturbing"; Executive Summary, page 1.

HEU is of the view that this consensus continues to exist and that our *Code* must reflect it.

HEU is also of the view that negotiation and mediation ought to be emphasized in the "purposes" section. The Board must more robustly encourage mediation and that the position of Chair of the Mediation Division must be filled. To that end as well, HEU submits that members from the community should be utilized more often in adjudication given their practical experience and their ability to broker settlements.

RECOMMENDATION 5.1

Amend Section 2 of the *Code* by:

- …styling it as the "Purposes" section of the *Code*
- …adding the following as Section 2(a)

  (a) fosters and promotes collective bargaining as a socially desirable institution

- ….amending Section 2(h) to read:

  (h) encourages the use of mediation as a dispute resolution mechanism whenever possible

6) Consider amendments providing for broader based bargaining through multi-employer sectoral certifications

Section 40 of the *Labour Code of British Columbia*, 1973, c. 122 provided for multi-employer certification where the unit sought by the applicant trade union was appropriate for collective bargaining, where the majority of employees employed by the employers were members in good standing of the trade union and where a majority of the employers consented to the representation of the unit by one trade union.

This provision remained unchanged until about a decade later, when the government of the day enacted the *Labour Code Amendment Act*, 1984, c. 24. Section 5 of the *Act* amended Section 40 of the *Code* to provide that *all* employers covered by an application must consent to multiple employer certification and for representation votes.

That version of Section 40 somehow survived the introduction of the *Industrial Relations Reform Act,* 1987, c. 24 and lived on until it disappeared when the *Industrial Relations Act*, RSBC 1973, c. 122 was repealed under Bill 84 in 1992.

In other words, sectoral certification was a feature of the *Code* in British Columbia for almost 20 years.

And indeed, sectoral certification continues on in British Columbia in the *Health Authorities Act*, RSBC 1996, c. 180. Part 3 of that *Act* provides that province-wide, multi-employee bargaining units in the health sector are "appropriate" bargaining units and that associations of unions in the facilities subsector and community subsector must bargain collectively with HEABC.

In HEU's experience, this model provides for stable labour relations and collective bargaining when collective bargaining is given free reign.

In the Report of the Special Advisers, 1992, Special Advisers Vince Ready and John Baigent (with Tom Roper in disagreement) recommended that multi-employer certification should be re-introduced in these terms:

> We consider our recommendations in this area as among the most important and significant we are making. Our recommendations attempt to address the peculiar difficulties that workers in small businesses encounter in seeking union representation (page 30)

A general description of the model favoured by Baigent and Ready is set out on page 31 of the Report:

> The model we recommend would be available only in sectors which are determined by the Labour Relations Board to be historically underrepresented by trade unions and where the average number of employees at work locations within the sector is less than 50. A sector has two characteristics: a defined geographic area (e.g. Marpole, Burnaby, the Lower Mainland or the entire Province) and similar enterprises within the area where employees perform similar tasks (e.g. preparing fast food, child care, picking fruit or pumping gas). For example, a sector could consist of "employees working in fast food outlets in Burnaby".

An examination of the various models of sectoral certification is beyond the scope of this Submission but sectoral certification, as indicated by Baigent and Ready almost 25 years ago, is a pressing and important issue. If anything, the fragmentation of certain subsectors within health, for example long-term care and hospital contracted support services, has made workers even more precariously employed than they were 25 years ago.

RECOMMENDATION 6.1

- Strike a committee of special advisers under Section 3(1)(b) of the *Code* to examine and make recommendations as to possible amendments to the *Code* to provide for broader based bargaining through sectoral certification.

7) Amend the *Code* to provide for successorship upon contracting out in the health sector and the residential long-term care sector

HEU has steadfastly resisted contracting out in health care for decades to maintain quality public care and to protect hard won collective bargaining rights. But in 2002, the government of the day enacted the *Health and Social Services Delivery Improvement Act*, SBC 2002, c. 2, legislation which permitted health sector employers to contract out on a massive scale in the sector and layoff some 8,000 HEU members in a few short years.

Not only does the *Health and Social Services Delivery Improvement Act* open the door to widespread contracting out, it also expressly provides in Section 6(5) that the successorship

provisions in the *Code* do not apply to a service provider who enters into a contract with a health sector employer. This, of course, precludes any possibility that a trade union might apply to the Board and secure a successorship declaration. In the contracted Social Services Sector, the *Act* goes so far as to void successorship protection in the government contract tendering process that had been negotiated between the government and health care unions.

Sections 4(4) and 5(5) of the *Health Sector Partnerships Agreement Act*, SBC 2003, c. 93 extend the successorship exclusion further to preclude a finding of successorship when a designated private sector partner contracts out or where a contractor at a designated health care facility sub-contracts. Together, the *Health and Social Services Delivery Improvement Act* and the *Health Sector Partnerships Agreement Act* effectively withhold successorship protection from unionized employees in the health sector and at most seniors care facilities.

The Supreme Court of Canada ultimately found that the *Health and Social Services Delivery Improvement Act* violated the *Charter*, at least in part, but Section 6(5) survived HEU's *Charter* challenge; *B.C. Health Services*, 2007 SCC 27.

This legislation had an enormously detrimental impact on HEU members. Workers employed for many years by the health authorities or seniors care facilities suddenly found themselves unemployed in 2002-2003 and faced with the prospect of having to apply for their "old jobs" in the same facility. Those that were hired were required to serve a probation period. They had no union representation (initially, at least) and no collective agreement.

In addition to mounting a legal challenge to the legislation, HEU launched organizing campaigns across British Columbia and in the ensuing few years, re-organizing thousands of workers who were employed by contractors, many of whom had been members previously. HEU also negotiated first collective agreements with the contractors.

From time to time, however, health sector and seniors' care employers ended relationships with contractors and engaged new ones. The collective bargaining rights achieved by these workers and HEU were simply lost. Undaunted, HEU once again campaigned to re-organize the same workers who were now employed by the new contractors.

Workers formerly employed by the health authorities or seniors' care facilities and then by a contractor were yet again unemployed and faced with the prospect of applying for their "old jobs" with the new contractor. Workers that secured positions were yet again treated as "new hires" and placed on probation. And yet again, HEU organized them and negotiated "first" collective agreements with the new contractors.

This cycle continues.

In one seniors' care facility, the owner or operator engaged six (6) contractors in the period 2003 to 2015.

In addition to undermining trade union rights and workers' livelihoods, HEU considers the disruption occasioned by "contract flipping" to be inherently and profoundly damaging to patient care and seniors care. This is principally because this process seriously compromises continuity of care, which is particularly important in the residential long-term care sector.

HEU submits that an amendment to Section 35 of the *Code* is necessary and long overdue. The lack of protection under the successorship provisions in the *Code* when employers contract out has, in fact, been a point of contention for many years. But in the wake of the *Health and Social Services Delivery Improvement Act*, it is imperative and even urgent that the issue is addressed in health care.

The mischief that HEU's proposed legislative amendments aim to address was identified by the Board in *The Governing Council of the Salvation Army*, BCLRB No. B56/86, 12 CLRBR (NS) 185:

> The second category of decisions has involved not only an initial contracting out of work (see *Finlay Forest Industries*; *Electrohome Ltd*., BCLRB No. L279/82; *Charming Hostess Inc. et al*., [1982] 2 Can LRBR 409 (OLRB); and *Ontario 474619 Ltd*., [1982] 1 Can LRBR 71 (CLRB)) but also the "recapture" of work previously contracted out (see *VS Services Ltd.*, BCLRB No. 152/83; *Three Links Care Society*, BCLRB No. 373/83; and *Rozell Enterprises Inc*., BCLRB No. 137/85), and the transfer of work from one contractor to another (see *Metropolitan Parking Inc*., [1980] 1 Can LRBR 197 (Ontario LRB); *Empire Maintenance Industries Inc., supra*; *Cafas Inc*. (1984), 7 CLRBR (NS) 1 (CLRB); and *Terminus Maritime Inc. et al*, 83 CLLC para. 16, 029 (CLRB). For our immediate purposes, it is not necessary to make distinctions between these various permutations. The general theme of the decisions in this second category is that there has merely been a loss or transfer of work, and not a transfer of all or part of a business to which successorship applies. (pages 191, 192)

The Ontario Board recognized that the successorship provision as it existed in Ontario (and as it now exists in British Columbia) works an injustice nearly 40 years ago in *Metropolitan Parking*, [1980] 1 Can LRBR 197:

> In reaching our conclusion we are not unmindful of the rights of the employees and their union, nor have we rejected the applicant's contention that the "mischief" present here is virtually identical to that which Section 55 is designed to remedy. There is no doubt that the periodic retendering of the management contract can frustrate the employees' established collective bargaining rights, threaten their job security, and significantly undermine the possibility of establishing a stable collective bargaining relationship at the parking location. The need to continually reorganize the individuals employed at the site not only poses a problem for the trade union, but also for the Federal Government and any previously unorganized subcontractor who becomes the successful bidder. There may well be a new application for certification, a new round of bargaining and threat of industrial conflict and disruption of service each time a new employer takes over. This is obviously not the intention of the parties…but it will be the result of the transaction where the circumstances are similar to those existing in the present case. And, for

> the reasons which we have already set out, we do not think section 55, as presently drafted, can cover the situation. To so hold, in the present case, would be to root bargaining rights in the location, the employees or the work, rather than the "business". Whatever may be the case in other subcontracting situations, we do not think the change of subcontractors in the circumstances of this case constitutes a transfer of a business from one to the other (page 218)

In British Columbia, Bill 44 (1997) contained provisions to address these deficiencies in the building maintenance, food and security industries but the Bill was withdrawn. Instead, the provincial government appointed a Section 3 Committee to hear submissions and make recommendations regarding the issues addressed in the Bill.

In the Section 3 Report, 1998, the Committee chaired by Vince Ready recommended further study i.e. further study of a Provincial Government initiative *"…to provide successorship for contracted services for government operations*, including all government ministries, agencies, boards and commissions"; see page 3, Part Four "B". The Committee noted that this would include janitorial, food and security services.

"Further study" made sense in that milieu, but with the election of the BC Liberals in 2002, that initiative ended.

A Section 3 Committee subsequently appointed in late 2002 with a limited mandate merely outlined the debate around "successorship-contracting" and described it as contentious; see the *Report of the BC Labour Relations Code Review Committee*, April 11, 2003 (Daniel Johnston, John Bowman, Eric Harris, QC, Bruce Laughton and Marcia Smith).

The Province of Ontario moved to address the deficiencies in the legislation very recently. Schedule 2 of the *Fair Workplaces, Better Jobs Act*, SO 2017 c. 22 amends the *Labour Relations Act*, *1995* S.O. c. 1 by adding Section 69.1to provide for successorship where there is a loss or transfer of work but not a transfer of a "business" in the building services sector. A very similar provision was in place in Ontario from 1992 to 1995. Schedule 2 also provides for successorship in cases prescribed by regulation where the service providers receive public funds by adding Section 69.2.

These additions to the *Labour Relations Act, 1995* are intended to cover contracting out *and* re-tendering of contracts in building services; see *The Changing Workplaces Review, Summary Report*, page 27.

In the federal jurisdiction, the *Canada Code* provides that when work is re-tendered to a new contractor to provide pre-board security services, wages must not be reduced. Other jurisdictions e.g. Saskatchewan have had legislation similar to that in the Ontario in specific sectors.

RECOMMENDATION 7.1

- Amend the *Code* by adding Section 35.1 to provide for successorship upon contracting out in the building maintenance, food, security and health (including long term residential care) sectors

(CONCOMITANT) RECOMMENDATION 7.2

- To allow Proposed Recommendation 7.1 to become law, repeal Section 6(5) of the *Health and Social Services Delivery Improvement Act*, SBC 2002, c. 2

(CONCOMITANT) RECOMMENDATION 7.3

- To allow Proposed Recommendation 7.1 to become law, repeal Sections 4(4) and 5(5) of the *Health Sector Partnerships Agreement Act*, SBC 2003, c. 93

Conclusion

B.C.'s labour relations regime is in urgent need of rebalancing.

Changes to the *Code* and the introduction of other legislation over the past 16 years have not only disadvantaged health care and community social services workers' ability to join a union, but to maintain their union membership and collective agreement rights.

In this context, we urge the special advisers to consider amendments to the *Code* that recognize the additional barriers that face health and social services workers in exercising their *Charter* and *Code* rights.

It is our view that the range of recommendations contained in this report will also contribute to a more constructive labour relations climate with fewer Board applications and fewer protracted and costly Board proceedings.

Addressing concerns around successorship, limiting raids, and investigating multi-employer sectoral certifications will also, in our view, contribute to greater industrial stability in a sector that has been rocked by privatization, contracting out and reorganization.

Finally, changes to the Code and related legislation will reduce the chaos and instability that undermine the conditions necessary for good care in our residential care facilities, community agencies, hospitals and other settings.

Submission of ILWU Canada and the Retail Wholesale Union to the British Columbia Labour Relations Code Review Panel

March 2018

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Introduction

The International Longshore and Warehouse Union of Canada (ILWU) and its locals represent more than 6,000 workers in ports and marine transportation facilities on Canada's Pacific coast. While the majority of its members are certified under the *Canada Labour Code*, ILWU locals also represent provincially regulated workers in the marine industry.

The Retail Wholesale Union represents 1500 workers in BC in various industrial settings, particularly warehousing and transportation. RWU is an affiliate of ILWU Canada.

Both ILWU and RWU have long histories of advocating strongly for workers in this province, and extensive experience with the changing legal regimes here since the advent of modern labour relations legislation.

The most pressing concerns for ILWU and RWU and their members in the provincial sector relate to organizing and first collective agreement negotiations, so those issues will be the focus of this submission.

Principles of review

Canadian workers have a *Charter* right to access meaningful collective bargaining, as affirmed by the Supreme Court of Canada over a decade ago in *Health Services and Support — Facilities Subsector Bargaining Assn. v. British Columbia.*[1] This finding has been confirmed in various subsequent decisions, including *Mounted Police Association of Ontario v. Canada (Attorney General),*[2] where the Court held:

> 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.
>
> The right to a meaningful process of collective bargaining is therefore a necessary element of the right to collectively pursue workplace goals in a meaningful way (*Health Services*; *Fraser*). Yet a process of collective bargaining will not be meaningful if it denies employees the power to pursue their goals. As this Court stated in Health Services: "One of the fundamental achievements of collective bargaining is to palliate the historical inequality between employers and employees . . ." (para. 84).

The Court in *Health Services* relied in its analysis on principles of international law and the international agreements on freedom of association to which Canada is a party. These instruments include the International Labour Organization's (ILO's) *Convention (No. 87)*

[1] [2007] 2 S.C.R. 391 [*Health Services*].
[2] 2015 SCC 1, at para 68 [*Mounted Police*]

Concerning Freedom of Association and Protection of the Right to Organize.[3] As the Court put it in *Health Services*[4],

> Canada's adherence to international documents recognizing a right to collective bargaining supports recognition of the right in s. 2 (d) of the *Charter*. As Dickson C.J. observed in the *Alberta Reference*, at p. 349, the *Charter* should be presumed to provide at least as great a level of protection as is found in the international human rights documents that Canada has ratified.

In *Saskatchewan Federation of Labour v. Saskatchewan*, the Court took a similar approach, and determined that the right to strike was protected under the *Charter* in part because of the content of international legal instruments including decisions of the ILO's Committee on Freedom of Association.[5]

In 1998, the ILO adopted the *Declaration on Fundamental Principles and Rights at Work and its Follow-up* in Geneva. One of the effects of this Declaration, as summarized in *Health Services*, was that:

> The right to collective bargaining is a fundamental right endorsed by the members of the ILO [including Canada] in joining the Organization, which they have an obligation to respect, to promote and to realize, in good faith (ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up).[6]

We suggest it is appropriate that this Panel take direction in its approach from the Supreme Court of Canada and the ILO; the clear message of both is that workers' access to collective bargaining in Canada ought to be promoted and increased, not curtailed.

Certification

ILWU and RWU believe amendments to the *Code* are required to facilitate better worker access to unionization in British Columbia. The biggest barrier to certification under the current *Code* is the secret ballot vote system, as this Panel will no doubt hear from many unions. Research has demonstrated that under a card check certification system, unionization rates are higher, and a change from a card check system to a mandatory vote can suppress certification rates significantly.[7]

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[3] 68 U.N.T.S. 17 [*Convention No. 87*].
[4] *Health Services*, *supra*, at para 70.
[5] 2015 SCC 4, at para 69 [*SFL*].
[6] *Health Services*, *supra*, at para 77, citing B. Gernigon, A. Odero and H. Guido, "ILO principles concerning collective bargaining" (2000), 139 *Intern'l Lab. Rev.* 33, at pp. 51-52.
[7] *Recommendations for labour law reform: a report to the Honourable Moe Sihota, Minister of Labour / submitted by the Sub-Committee of Special Advisers, John Baigent, Vince Ready, Tom Roper*. Victoria, [B.C.]: The Sub-Committee, 1992, at 6 (*1992 Panel Report*); Chris Riddell, "Union Certification Success Under Voting Versus

On its face, the vote system may appear more democratic. That is certainly the most common argument made in support of mandatory votes by the employer community. However, that position is supported by neither the research on the subject, nor the practical experience of many unions, including the ILWU and RWU, which is that mandatory votes are transparently no more than a public policy against unionization.

Employers almost invariably seize the opportunity provided by the mandatory vote system to campaign against unionization in the workplace. A 2002 study on the subject, which we note was based on data collected from surveys completed by employers, concluded that about 80 percent of employers "openly oppose" a certification drive.[8] The author of the study points out that the criteria for what constituted non-resistance was very generous to employers and that the more egregious forms of employer interference were likely underreported in the study.[9] Twelve percent of employers admitted to unfair labour practices during the certification drive.[10]

Whether or not an employer crosses the line into illegal conduct during a certification drive, however, union suppression tactics by employers have been shown to have lasting effects, including on bargaining units where the certification drive is successful. Such effects include an increase in the rate of decertification in the first two open periods after certification and a lower success rate in concluding first collective agreements.[11]

Card Check vs. Vote - Recommendations of Previous *Code* Review Panels

Prior panels tasked with a review of the *Code* who turned their minds to the issue all recommended a card check system over a mandatory vote. Importantly, in addition to leading Union side lawyer panelists, these panels also were composed of high-profile neutrals such as Vince Ready and Stan Lanyon Q.C., and high-profile employer counsel such as Tom Roper, Q.C. and James Matkin Q.C.

Some of the observations and recommendations of those panels, arrived at after extensive public consultation and research, bear repeating here. The first *Code* review panel was the 1992 Panel. In the 1992 Panel Report, Special Advisers John Baigent, Vince Ready and Tom Roper

Card-Check Procedures: Evidence from British Columbia, 1978-1998" (2004) 57:4 *Industrial and Labor Relations Review* 493 **at 509**.

[8] Karen J. Bentham, "Employer Resistance to Union Certification: A Study of Eight Canadian Jurisdictions" (2002) 57:1 *Relations Industrielles* 159 **at 172**.

[9] Bentham 2002 at 174-175.

[10] Bentham 2002 at 172.

[11] Bentham 2002 at 181.

noted that a vote system had been first introduced in 1984 after over 40 years of a card check system in BC.[12] The panel observed:

> While the statute still retained prohibitions against employer interference in the certification process, after the introduction of the vote the rate of unfair labour practices by employers during organization campaigns increased dramatically. The rate of new certification dropped by approximately 50%[13]

With respect to the "threshold question" of whether certification should be card based or based on a secret ballot vote, the panel stated:

> The surface attraction of a secret ballot vote does not stand up to examination. Since the introduction of secret ballot votes in 1984 the rate of employer unfair labour practices in representation campaigns in British Columbia has increased by more than 100%. When certification hinges on a campaign in which the employer participates the lesson of experience is that unfair labour practices designed to thwart the organizing drive will inevitably follow... It is not acceptable that an employee's basic right to join a trade union be visited with such consequences and illegal interference. Nor is there any reasonable likelihood of introducing effective deterrents to illegal employer conduct during a representational campaign.[14]

The panel went on to list some "good reasons" for returning to a cark check system:

> First, there is no compelling evidence that membership cards do not adequately reflect employees wishes. In those cases where improper influence by a union in a certification campaign is established, the Board has a plenary jurisdiction to dismiss the application for certification or to order a secret ballot vote…
>
> Second, a representational campaign, hotly contested by both employer and trade union, all too often poisons the atmosphere and fosters mistrust between the parties. A campaign fraught with allegations of unfair labour practices results in an atmosphere in which collective bargaining is not likely to succeed. This is to no one's advantage.

In response to these recommendations, the government enacted legislation which changed the process of certification back to a card check system.

The next *Code* review panel, which included Vince Ready, Stan Lanyon, Miriam Gropper and Jim Matkin, wrote a report titled *Managing Change in Labour Relations* in 1998.

Despite backlash from the Employer community, the 1998 Panel Report did not recommend a return to a mandatory certification vote. The 1998 Panel stated the following about this issue:

> Employers responded negatively to our Discussion Paper proposal to not recommend a mandatory certification vote. They continued to advocate for a vote before certification

[12] *1992 Panel Report*, *supra*, at 5.
[13] *Ibid*, at 6.
[14] *Ibid*, at 26.

> because they believe that is the only way they can be assured that their employees truly want to organize. We did not hear from employees that they wished a certification vote. Because the employer directly controls the ability of any employee to maintain his or her livelihood and therefore holds the balance of power, we feel that the concerns of employees and their unions must take precedence in this case.
>
> We affirm our proposal in the Discussion Paper to not recommend a mandatory certification vote. We affirm the individual right, recognized provincially, nationally, and internationally, to join or form trade unions. Experience demonstrates that employers do seek to affect employees' right to choose. In our view, extending the certification process by introducing a mandatory certification vote would only further invite such illegal activity.[15]

The only *Code* review panel since was convened by the Liberal government and produced a report in 2003. Notably, it was not asked to opine on the card check vs. mandatory vote question, as the Liberal government had already reinstituted a mandatory vote system (contrary to the recommendations of the 1992 and 1998 Panels) soon after taking office in 2001.

As noted by the 1992 and 1998 Panels, mandatory vote systems invite, and result in, illegal employer interference in employees' rights to choose whether to have union representation in the workplace. Under mandatory vote systems, certification rates decrease significantly as outlined above.

The ILWU and RWU strongly believe that there is no place in the *Code* for a mandatory vote system in this era of an expansive, purposive approach to employee rights, where the focus is on increasing, not curtailing, workers' bargaining power.

Threshold for Card Check Certification

We suggest that if a union meets a threshold of 55% of membership cards, the union should be certified to represent the employees in collective bargaining. Where a union has between 45 and 54% of cards, a secret ballot vote should be scheduled.

Votes

In a situation where a secret ballot vote is ordered, the ILWU and RWU suggest, as a matter of Board policy, that more frequent use of the Board's power to grant automatic certification in response to employer unfair labour practices is warranted.

Such an approach, coupled with expedited hearings into unfair labour practice complaints under section 6 as well as section 5 of the *Code*, would help to mitigate the harm illegal

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[15] *Managing Change in Labour Relations – The Final Report – Prepared for the Minister of Labour Government of British Columbia by the Labour Relations Code Review Committee (Section 3 Committee) Vince Ready, Stan Lanyon, Miriam Gropper and Jim Matkin*, Victoria, [B.C.]: The Review Committee, 1998, at 51-52 ("*The 1998 Panel Report*").

employer practices cause to union organizing drives Our position is that unfair labour practices during a certification drive should be treated with the same urgency as Part 5 complaints.

The ILWU and RWU also would support a policy approach that mail in ballots are only used as a last resort. In our experience, mail in ballots are often used in multi-site workplaces where more than one poll will have to be arranged. We appreciate that setup of multiple polls entails more resources but in our view in person votes are far preferable to ensure the most employees possible cast a vote and to avoid delay.

Bargaining Unit Descriptions

The ILWU and RWU also support a policy approach that the Board scrutinize proposed bargaining unit descriptions, regardless of whether there are objections raised, to ensure that the unit applied for accurately reflects the scope of the unit. This would prevent employers and unions they may have a preference for from trying to interfere with employees' ability to choose their bargaining agent by describing a unit in an overbroad broad manner.

For example, the USW was involved in an application to represent certain employees of Ledcor at a mill in 2013. There was a pre-existing certification with Ledcor and CLAC, and Ledcor raised a province-wide bargaining unit description as a bar to the application. The USW understood there may have been as few as 4 employees in the unit, but CLAC and Ledcor refused to disclose the scope of the bargaining unit, and the Board did not require them to as a preliminary matter, as requested by the Union. This was in spite of Ledcor's acknowledgement that there were no employees working at and from its head office (which was what the certification order referred to). CLAC satisfied the Board that it represented "somebody" employed by Ledcor and that the operations were interdependent. The dismissal of the USW's application was upheld on reconsideration and judicial review.[16]

Leaving aside the ultimate outcome on the appropriateness of a unit applied for, an approach such as this, where the scope of a bargaining unit does not have to be clearly delineated and disclosed, impedes employees' ability to freely choose their bargaining agent.

Changes in Union Representation

The ILWU and RWU support revisions to s. 19 of the *Code* to reduce the length of the time bar between open periods for changes in union representation. While we recognize that there is some disruption inherent in a raid at a workplace, in our experience employers and incumbent unions can mount aggressive campaigns that can result in many of the same issues for the proposed new union as unions face during initial certification drives.

[16] BCLRB No. B124/2013, recon upheld in B171/2013, and aff'd in 2015 BCSC 622.

The time bar in that context is a significant barrier to changes in representation, as nearly two years must elapse before another attempt to change representatives can be made. A more equitable balancing of the interests of employers and incumbent unions with those of employees dissatisfied with their bargaining agent and the representative they wish to change to is to reduce the time bar so as to allow for an application under s. 19 once per year of a collective agreement, during the seventh and eighth month.

Time Lines for Decisions Under the *Code*

We believe that the decision time lines under the *Code* require revision to reflect that applications which effect access to bargaining be given priority and be decided expeditiously. While some steps were taken in that regard with the promulgation of the *Prescribed Time Limits for Decision Regulation*[17], we do not feel that the current regime achieves this important goal.

In circumstances where a vote is required on a certification application, the ILWU and RWU believe that the time line for a vote should be truncated. In the context of a vote, any amount of delay permits employers to interfere in an organizing drive. However, a shorter delay could mitigate that issue at least to some extent.

We suggest that a vote be required to be conducted within five days of the application, subject to a discretion on the part of the Board to extend the time line for an additional two days, in circumstances where it is practically impossible to arrange a vote within 5 days.

In our view, the 180-day window for decisions to be rendered on complaints under the *Regulation* is too lengthy, particularly with respect to unfair labour practice complaints during an organizing drive or unit appropriateness objections. As we argued above, we believe these issues should be treated with the same urgency as Part 5 applications. Once six months have elapsed since the date of a complaint, the relationship between the union and the employer can have incurred irreparable damage and employees can lose faith in the union as their advocate.

The ILWU and RWU advocate for a requirement that decisions on these types of applications be rendered within 30 days. The ability of workers to access collective bargaining in the short and long-term hangs in the balance during a drive. This fundamental right should be no less of a priority than an application by an employer to limit strike action.

[17] B.C. Reg. 372/2002.

Supervisor Access to Collective Bargaining

The ILWU and RWU do not feel that section 29 of the *Code* requires revision. However, this provision is rarely used. We would like to suggest that the Board adopt a policy of encouraging use of this provision to include supervisors in units with other employees where they do not perform a management functions. Like the employees they work with, supervisors who are not excluded by the *Code* have a fundamental right to access collective bargaining.

In addition, in our experience in BC workplaces, where supervisors are excluded from a unit it can create a tense dynamic. Supervisors often share a community of interest with employees. However, they can become aligned with management by default because they are not part of the union and therefore not subject to the protections of the *Code*. It has also been our observation that supervisory employees can act as leaders within a bargaining unit and help to facilitate positive labour relations with management, which has typically placed the employee in a supervisory role having decided that the individual is competent and demonstrates leadership.

Unfair Labour Practices

The unfair labour practice provisions of the *Code* (ss. 5, 6, and 9 in particular) are an insufficient check on the practice of illegal employer interference, particularly during organizing drives. We believe this is a result of both the structure of the *Code* and Board policy.

As a matter of policy, decisions of the Board under the previous Chair set the bar for what constitutes intimidation and coercion very high. Consequently, it has become acceptable for employers to exert a significant amount of influence over whether their employees choose unionization without running afoul of section 9 of the *Code* (and the criteria in that section as repeated in the standard for breaches of sections 5 and 6).

Delay is another significant issue with unfair labour practice complaints, often filed in the stage between when the certification application is filed and the vote. Submissions and litigation ensue. This not only taxes the resources of the parties and the Board, it also can create a climate of uncertainty for workers and a relationship between the union and the employer that begins in a state of conflict before all important first agreement negotiations are even underway. Such disputes go squarely against the purposes of the *Code* in that they foster the kind of acrimony that is the antithesis of the harmonious labour relations that the *Code* is supposed to advance. They also make the collective bargaining relationship less likely to succeed.

Leaving aside the time lines for litigation of unfair labour practice complaints, as a practical matter, employees are often reluctant to come forward during a certification drive to testify.

The *Code* of course prohibits reprisals. However, testifying at a hearing at that stage may have the effect of outing an employee as a supporter. In our experience, employees typically feel vulnerable given the uncertainty of whether the organizing drive will succeed. Therefore, in practice, it is difficult for unions to fully litigate unfair labour practice complaints at the certification stage.

As a consequence of these issues, we believe the following provisions require amendment.

Section 6 should be revised so that it has the same expedited hearing process as s. 5, particularly in relation to complaints during a certification drive. This would significantly mitigate the harm to new collective bargaining relationships that results from protracted litigation of complaints at such a pivotal time in the parties' relationship.

Section 6 would also benefit from being broken down into individual sections (rather than a series of sub sections), to make the section more clear and readable, particularly to a lay person who wishes to inform him or herself about the protections available to employees who may wish to join a union.

We believe section 7 should be amended such that it applies to employers as well. Captive audience meetings on company time are inherently coercive. Since it is the employees' right and choice whether to join a union, employers should not be permitted to express their views about unionization to employees while on paid time.

We suggest that section 9 of the *Code* be amended to provide as follows:

> A person must not use coercion or intimidation of any kind that could reasonably have the effect of interfering in the exercise of a person's right to choose to become or to refrain from becoming or to continue or cease to be a member of a trade union.

As a matter of Board policy, this provision should be interpreted more strictly as against persons who seek to pressure employees into a decision about whether to support unionization.

We note that these changes are consistent with principles summarized by the ILO Committee on Freedom of Association. In particular, we refer the panel to the following:

> 861. The existence of legislative provisions prohibiting acts of interference on the part of the authorities, or by organizations of workers and employers in each other's affairs, is insufficient if they are not accompanied by efficient procedures to ensure their implementation in practice.

(See the 1996 Digest, para. 763; and 333rd Report, Case No. 2168, para. 358.)[18]

Under the unfair labour practice provisions of the *Code* as they stand, the provisions require amendment to ensure not only that they prevent illegal interference, but also ensure that complaints can be efficiently adjudicated.

First Collective Agreement Negotiations

The ILWU and RWU believe an amendment to section 55 of the *Code* is warranted to remove the requirement for a strike vote prior to accessing Board intervention in first collective agreement negotiations. In our opinion, while we do not contend that parties should be able to access s. 55 processes prior to making real efforts to reach a collective agreement, the strike vote requirement is prohibitive. Our experience has been that in the context of first collective agreement negotiations, new union members can be reluctant to vote in favour of a strike in general. This is particularly the case in the context of s. 55 where there is a disconnect between the strike vote and what the union actually proposes to do, which is access the Board's services to help conclude a collective agreement, not go on strike.

We find support for this view from the comments of the 1998 Panel Report, which recommended that the strike vote requirement be removed from s. 55 for similar reasons. Those comments state, in part:

> Inexperience, fear, mistrust, and a general lack of cooperation often exist during first agreement negotiations. Under these conditions the parties may not be able to conclude a first collective agreement without assistance.
>
> Where collective bargaining fails to result in a first collective agreement, we believe the parties should be able to access the *Code's* first agreement provisions. However, the strike vote precondition raises two significant problems associated with this process. First, requiring a union to conduct a strike vote in order to access the first agreement process places the union in an incongruous position. It is required to ask the bargaining unit to support a strike, when in fact, what it wants is bargaining unit support to conclude a collective agreement. Employees new to collective bargaining may be understandably reluctant to support a strike vote, with its potentially significant economic impact on themselves and their families, but truly desire to conclude a collective agreement. Second, an early strike vote can sour negotiations from the employer's perspective as well.[19]

Consequently, the 1998 Panel recommended elimination of the strike vote requirement in s. 55, which it characterized as "misguided", despite criticism and opposition from the employer community. It recommended that the s. 55 med-arb process be made available after s. 74

[18] (ILO, Freedom of Association: Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO (5th rev. ed. 2006))
[19] *1998 Panel Report* at 18-19.

mediation has been exhausted and the Associate Chair of Mediation has exercised discretion to allow the parties to access s.55.[20]

The ILWU and RWU suggest that an amendment similar to the 1998 Panel's proposal be implemented whereby unions can access s. 55 when they have exhausted s. 74 without reaching a collective agreement. However, we do not believe that access to s. 55 should be conditional on an open-ended exercise of discretion by the Associate Chair of Mediation as that would lead to significant uncertainty for unions and employers. In the event you consider that a discretionary decision is appropriate, we suggest that should be based on some limited and specific factors that would guide parties as to how that discretion will be exercised, such as a requirement that the applying party has bargained and participated in mediation in good faith.

In our view, the requirement to exhaust mediation under s. 74 before resort is had to s. 55 would mitigate employer concerns about premature resort to med-arb in first collective agreement negotiations.

Decertification

The ILWU and RWU believe that in order to ensure that first collective agreement negotiations have a greater chance for success, applications for decertification under s. 33 of the *Code* and applications for certification under s. 18(2) should not be permitted until after the parties have reached a first collective agreement, unless the parties are denied first contract med-arb.

This is consistent with the approach in some other Canadian jurisdictions. For example, under the *Canada Labour Code*[21], ss. 38-39, decertification applications cannot be filed for one year after certification. More critically, a union in bargaining is protected from decertification. Thus, employers cannot use delay in bargaining as a tactic to encourage decertification before a first collective agreement is reached.

Under the *Labour Relations Act* in Ontario, first contract med-arbitration can only be denied if the Board believes there should be further mediation (in which case it still would not proceed with a decertification application at that time), the party applying for med-arb has breached its duty to bargain in good faith or otherwise because the Board considers that "the process that the process of collective bargaining has been unsuccessful because of the uncompromising nature of any bargaining position adopted by the applicant without reasonable justification".[22]

[20] *Ibid*. at 54-55.
[21] R.S.C., 1985, c. L-2.
[22] S.O. 1995, Ch. 1, Schedule A, s. 43.1.

Mergers or Amalgamations

As a matter of policy, the ILWU and RWU suggest that the Board adopt an approach under section 37 of the *Code* that requires a strong evidentiary basis before placing any reliance on claims about changes to the structure of the employer's business that bear on whether a runoff vote is held between incumbent unions.

This approach would prevent employers in the context of a merger or amalgamation from attempting to select the union that will represent their employees on an ongoing basis, by relying on speculative and potentially unrealized plans for their business that favour the position of one union over another.

Conclusion

The ILWU and RWU support the foregoing revisions to the *Code* and Board policy. We believe they are necessary in order to facilitate workers' access to free collective bargaining and decrease opportunities for employers to interfere in the exercise of workers' rights to choose to join trade unions and to participate in their lawful activities.

We emphasize that the approach we have outlined is consistent with the conclusions of the Supreme Court of Canada that access to meaningful collective bargaining is a *Charter* right. It is also in harmony with Canada's international obligations, which include promotion of and respect for human rights including the fundamental right to bargain collectively.

INTERIOR FOREST LABOUR RELATIONS ASSOCIATION

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March 19, 2018

Labour Relations Code Review Panel
Via Email: LRCReview@gov.bc.ca

Dear Panel,

Please accept this letter as our submission for comment on the BC labour code review.

The Interior Forest Labour Relations Association

The IFLRA is the primary bargaining representative for the Southern Interior forest industry. Currently we have 11 member companies, with 17 operations, who collectively employ approximately 2,900 workers in this region. Our membership consists of large multi-national companies as well as privately held companies working in the forest industry.

Our mandate not only includes representing our members in collective bargaining and assisting in contract administration, but also lobbying government for the preservation of their collective interests.

Introduction

On July 18, 2017, Premier Horgan presented a mandate letter to the Minister of Labour, Harry Bains, which, among other things directed that he ensure British Columbians have the same rights and protections enjoyed by other Canadians by reviewing the Labour Relations Code to ensure workplaces support a growing, sustainable economy with fair laws for workers and businesses.

In order to address this mandate, Minister Bains appointed a three member Labour Relations Code review panel, as you are obviously aware. It is important to remember that the appointment of the Review Panel supports commitments made by Government in the 2017 Confidence and Supply Agreement with the B.C. Green caucus. While the Review Panel is intended to be politically unbiased and independent of Government, any legislative changes will ultimately require the support of the B.C. Green caucus.

While we appreciate the opportunity to make submission on potential changes in the Labour Relations Code (the Code), we note that the Code has remained relatively constant since the 1992 revisions. The Code has received modest amendments in 2001, 2002 and 2003. In 1992, Vince Ready, John Baigent and Tom Roper engaged in a similar process under the NDP government of the day and made recommendations that were incorporated into the Code and more or less have withstood the test of time. Unlike many provincial jurisdictions, (e.g Saskatchewan, Ontario, Manitoba and Alberta) British Columbia has avoided swings in labour legislation with the changing of government. We encourage this

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Panel to exercise restraint in making any recommendations to the government that are based on the priorities of the political process as opposed to the more general principles of sound labour relations.

The Code is a key piece of legislation to enable a growing and diverse economy, encourage domestic and foreign investment and enable constructive collective bargaining. There are some provisions of the Code which currently work opposed to those objectives, in particular Section 68 (Replacement Workers). We understand that the elimination of Section 68 would not be considered by this Panel or the current government, but we raise this for a number of reasons.

Section 68 is somewhat unique in the legislative framework in Canada. Moreover, it has been interpreted literally which has resulted in BC having one of the most restrictive replacement worker prohibitions in those few jurisdictions that have these provisions. Accordingly, this is a significant benefit that trade unions have in British Columbia and it is in consideration of our unique picketing provisions, the absence of sectoral bargaining and a host of other considerations. Balancing the rights and obligations of the various stakeholders is a difficult and highly nuanced process. We raise this as a caution to move the pendulum to any appreciable degree to the left or the right.

When you consider the reforms enacted in other jurisdictions in Canada, you will note that many of the Provinces are simply leveling the table with our long standing Code provisions. This mitigates any need for any significant legislative change in BC.

Given there has been very little labour unrest since the last review, what needs to be changed?

Specific Topics

Certification Process

We understand that the NDP had a campaign promise to introduce or at a minimum consider a card based certification process. It is also our understanding that the Green party will not support any change from an open and free ballot. Accordingly, we are left with the sense that despite whatever the political objectives may be the certification vote will be a part of the future Code. In our view this is integral to the bargaining process and a fundamental right of all employees to cast a confidential vote, free from interference or intimidation.

Currently the campaign period is a maximum of 10 days and both unions and management enjoy freedom of speech to express reasonably held opinions. It is important that employees have a period of time to reflect upon their decision and to hear the argument for and against the benefits/challenges of collective bargaining. This is an appropriate structure for the acquisition of collective bargaining rights and should not be altered. Further any changes to limit employer free speech may be met with a Charter challenge.

We note in some jurisdictions that electronic balloting is being used for certification votes. We

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encourage the Board to consider this methodology as it would easier facilitate the collection of votes for shift workers and those away from work on any sort of leave.

Successorship

We understand there may be submissions to modify the successorship provisions to allow for successorship in contracted services. BC would join a minority of Canadian jurisdictions that enable a successorship where one contractor is replaced by another absent the usual criteria required in finding a successorship.

There are sound economic reasons to maintain a link between efficiency, job performance and job security. An interesting perspective can be gained by examining the impact of the Woodlands Letter of Understanding (WLOU) in the coastal forest sector. Once a company crew has been contracted out, the WLOU establishes a perpetual series of successorships as the work is contracted to one stump to dump contractor and then subsequently to another.

Absent any "skin in the game" those employees (the legacy employees) that enjoy perpetual successorship right have no incentive to innovate, be efficient or care whether their current employer is able to survive. They are content knowing that while this employer may disappear, they have job security as their seniority will be imposed on any subsequent contractor. It is difficult if not imposable to establish a joint vision, shared objectives or a sense of ownership in these circumstances. This does nothing to encourage or foster an efficient and cost effective industry. Practically, it is a human resource nightmare. Expanding the successorship provisions is a distinctly uneconomic and counterproductive measure.

Picketing

It is our submission that the balancing that was done in 1992 included the introduction of the replacement work prohibition (albeit not perhaps the literal treatment undertaken by the Board) and the restrictions on secondary picketing. Any opening up of secondary picketing would upset that balance and require the removal of the replacement worker prohibition to maintain balance.

Moreover, unlike the Replacement Work prohibition there are sound policy reasons not to expand the scope of permissible picketing. In the purposes section of the Code, in particular sections 2 (d), (e), (f) and (g) suggest that transposing a labour dispute wider than the parties immediately at odds would be contrary to the underlying principles of the Code. Further, one must be mindful of the tools the parties have to engage in collective bargaining. When the parties are at an impasse, there is the status quo or a labour dispute. The government has already intervened on the side of the trade union movement with the replacement work prohibition which significantly impairs an employer's ability to withstand a strike. There is no corresponding restriction on strikers from securing alternate employment. To further compound this inequity by providing the trade union movement with further tools to disrupt the employer would be grossly unfair and send a very poor message to investors in the province of BC. Changes of this nature would introduce significant uncertainty into the labour relations climate in BC.

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Our system of administering labour disputes has worked reasonably well. There is no need to alter the balance.

Section 54

There is no question that the objects of Section 54 are worthy and reasonable, namely to provide as much notice as possible of significant changes in the workplace. The purpose of the advanced notice is to provide an opportunity for the parties to meet and review alternative measures, or at least measure to ameliorate the impact of any significant decision. The challenge, especially in the resource sector is that changes can happen so quickly in the market that the provision of 60 days' notice is not reasonable or practical.

Currently our largest trading partner is both unpredictable and protectionist. The "America First" policy has resulted in very difficult trading relations, the imposition of countervailing and anti-dumping tariffs can and will have a significant impact on our members. This is a market force that we cannot control, we suggest nobody can predict with any certainty and has the potential to make our industry uneconomic. Our industry needs to be nimble to adjust to these changes in the market, to curtail and ramp up production when the opportunities for trade either diminish or flourish.

Accordingly, we would like to see the 60 days remain as the target notice period, but allow the Board more discretion to permit shorter notice periods and limit breaches to declarations in the appropriate circumstances.

Expedited Arbitration

Our suggestion is that any decision resulting from this process be non-precedent setting. It would be unfortunate for the parties to have significant matters determined by arbitrators foreign to the relationship, not familiar with the industry and perhaps not trusted by one or more of the parties. Given the expedited nature of the process, protections should be installed to account for the "rough justice". Therefore, the process is more amenable to discipline cases than contract interpretation cases.

Section 91 – Arbitration Decisions

Both parties have been frustrated by the delay in issuing arbitration decisions. Some delays have been clearly unconscionable. Generally, those Arbitrators lose their business once the delay in their writing becomes common knowledge. Accordingly, the market may impose the ultimate discipline for a consistently tardy Adjudicator. Nevertheless, it would helpful if the Code set some expectations as to when decisions should be delivered. Clearly the length of the deliberation is related to the complexity of the case, the number of hearing days and the scope of the argument. An expectation of a result in a simple case within 8 weeks is in our view, reasonable and inline with the community's expectations. There should be a 6 month deadline for all cases.

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Summary

Given the limited nature of this consultation we recommend further detailed consultations with the community in the event the Panel recommends specific changes to the Code, specifically prior to any amendments being legislated. It is difficult from our current perspective to anticipate where the Panel may be heading with its recommendations as such our submission may not be exhaustive.

We endorse the finding of the British Columbia Court of Appeal in its 2001 decision involving OPEIU Local 378 and the Labour Relations Board (2001 BCCA 433) in which the Court noted:

Under the Code, not only does the Board perform a managing and supervisory function in the context of the highly regulated, complex field of labour relations, but as part of its broad oversight mandate the Board is expressly charged in s. 2 with policy responsibility and development in a polycentric context, a context that demands a delicate balancing between different constituencies with different and competing interests. Through ss. 136-138, and s. 139(1)(q) in particular, the Legislature has recognized that, in discharging its oversight function, the Board is best equipped to resolve ambiguities and fill voids in the legislative language governing replacement workers in a way that makes sense in the factual context, in the context of the Code as a whole, and in the field of labour relations overall in the province.

In summary, the Code is a living document and the stewards of the Code, the Chair and Vice-Chairs are appropriately situated within the current legislative framework to maintain the focus and purpose of this critical legislation. It does not require major changes or amendments, in fact to do so would bring instability and uncertainty into our very competitive economy.

Thank you for your consideration of our observations, if you would like further information, please contact us at the number provided above.

Sincerely,

Jeff Roos
President
Interior Forest Labour Relations Association

KOSKIE GLAVIN GORDON

BY EMAIL

Email: glavin@koskieglavin.com

February 23, 2018

BC LABOUR RELATIONS BOARD
Suite 600 – Oceanic Plaza
1066 West Hastings Street
Vancouver, BC V6E 3X1

Attn: Labour Relations Code Review Panel

Dear Panel Members:

Re: Letter to Community regarding Section 3 Review

We write on behalf of our client, the International Alliance of Theatrical Stage Employees ("IATSE International"), in regards to the Panel's February 16, 2018 Letter to the Community. We are pleased to learn that the Minister of Labour has appointed the Panel to review the *Labour Relations Code* and to begin consultations with interested stakeholders.

IATSE International intends to make a fulsome submission to the Panel on behalf of its constituent BC locals. Unfortunately, the March 8, 2018 submission deadline is not feasible. We understand that the Panel will be undertaking in-person public consultations throughout the province in March and April. As the Panel's consultation process will extend past March 8, we respectfully request a general extension for written submissions to March 16, 2018. This extension will allow interested parties to be better positioned to provide helpful recommendations to assist the Panel's important work. Alternatively, we ask that the Panel grant a general extension for written submissions to March 12, 2018, the date when the public consultations are scheduled to begin.

Thank you for considering our request.

Yours truly,

KOSKIE GLAVIN GORDON
Per:

ANTHONY GLAVIN

AG/KLS/ks

cc: IATSE International (Attn: John Lewis / Julia Neville)

(121)(00LRB re s.3)

KOSKIE GLAVIN GORDON

March 16, 2018

Email: glavin@koskieglavin.com

VIA EMAIL

LRCReview@gov.bc.ca

LABOUR RELATIONS CODE REVIEW PANEL

Attention: Michael Fleming (Chair), Sandra Banister, QC and Barry Dong (Members)

Dear Sirs/Mesdames:

Re: Submission to the Labour Relations Code Review Panel from the International Alliance of Theatrical Stage Employees, Moving Picture Technicians, Artists and Allied Crafts of the United States, Its Territories and Canada

We are counsel for International Alliance of Theatrical Stage Employees, Moving Picture Technicians, Artists and Allied Crafts of the United States, Its Territories and Canada ("IATSE") and have been asked to make this submission in response to the March 1, 2018 invitation to the community from the committee of special advisors (the "Panel") appointed to review the British Columbia *Labour Relations Code*[1] ("Code").

IATSE is supportive of changes to the Code that enhance the rights and lives of workers.

I. Overview

Founded in 1893 when representatives of stagehands working in eleven cities met in New York and pledged to support each other's efforts to establish fair wages and working conditions for their members, IATSE has evolved to embrace the development of new entertainment mediums, crafts expansion, technological innovations and geographic growth.

Today, IATSE members in BC total 9330 (plus an over 5,000 working permittees) which individuals work in all forms of live theatre, motion picture, trade shows and exhibitions, television broadcasting, and concerts as well as the equipment and construction shops that support all these areas of the entertainment industry. Camera people and technicians, stage employees, projectionists, casino employees, studio teachers, as well as people working in wardrobe, lighting, art direction, set design and construction, special effects among other areas of motion picture, film, digital internet and television production are among our members. Virtually all the behind-the-scenes workers in crafts ranging from motion picture animator to theatre usher are represented by IATSE.

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

It is noteworthy that the Province's motion picture industry, of which IATSE Local 891 and 669 members comprise 8785 members and represent thousands of permittees in the bargaining unit, accounted for approximately $2.8 billion in direct spending in BC in 2017. From the early days, IATSE has actively participated in the development and growth of the film and television production industry in BC, and markets the Province as a premier film-making destination. Its members are critical to the success of the entertainment industry in this Province.

IATSE's motion picture Locals -- 891 and 669 -- are members of the BC Council of Film Unions, the Motion Picture Industry Association of BC, the BC Federation of Labour and the Canadian Labour Congress. IATSE Locals 118 and 168 are members of the latter two organizations and represent live performing arts and trade show technicians and permittees.

II. Summary of Recommendations

Organized labour has continued to see shrinking union density in both the public and private sectors since changes to the Code were implemented in 2001 and 2002 (Stats Can reports that union density in BC declined from over 36% in 1999 to approximately 31% in 2012 alone: see *Long Term Trends in Unionization, 2015)*. The negative effects of this trend for workers' terms and conditions of employment have been further compounded by dramatic changes in the economy and in the workplace (eg. advances in technology, globalization, rise in the prominence of non-standard employment relationships, greater workforce diversity, among others). Labour laws in British Columbia are out-of-date in ensuring that BC workers have the same rights and protections of other Canadian workers. Of critical importance is the need to eliminate barriers to unionization, prevent and remedy employer intimidation during organizing drives, and support means to achieve first collective agreements.

IATSE members working within the entertainment industry face unique workplace challenges which the current legislative framework in British Columbia is ill-equipped to address. As acknowledged by the Special Advisors recently in the *Changing Workplaces Review: An Agenda for Workplace Rights*[2] in Ontario the arts, entertainment, and recreation industry has one of the highest concentrations of vulnerable workers engaged in non-standard employment.

In light of the objectives noted above and the concerns specifically raised by the work and nature of our industry, IATSE supports the following changes to the Code:

1. Re-introduce card-based certification for all sectors. Alternatively, reduce the timeline to conduct a representation vote to two days from the date of application for certification.

2. Provide for early disclosure of employee lists and contact information where sufficient union support is established in a unit appropriate for collective bargaining.

3. Extend the time period that membership cards remain valid to six months.

[2] C. Michael Mitchell and John C. Murray, Special Advisors, *Changing Workplaces Review: An Agenda for Workplace Rights – Final Report*, May 2017 ("*Ontario Final Report*"), page 49

4. Modernize voting methods to provide for telephone and internet voting.
5. Strengthen the remedial certification provisions to effectively remedy unfair labour practices carried out by employers during certification campaigns.
6. Provide for interest arbitration to settle first contract disputes if first collective agreement is not concluded within 20 days of the appointment of a mediator.
7. Extend successor rights to protect workers where contracts are flipped (re-tendered).

Card-based certification and first contract arbitration legislation protects workers from employer intimidation, and the latter measure would also address prolonged negotiations for a first contract, allowing parties to arrive at a first contract in a timely manner.

III. Submissions on Recommendations

1. Re-introduce card-based certification. Alternatively, hold a secret ballot vote within two days from the date of application for certification.

IATSE recommends that card-based certification be re-introduced and the existing mandatory vote provisions be repealed. Where a union has the support of a simple majority (50+1%) percent of employees in a workplace as demonstrated by employees freely indicating their support for unionization with evidence of their membership at the date of the application, certification without a representation vote should be granted. Alternatively, a vote should be held within 2 days of the application being filed in order to minimize employer interference.

Implementing a certification model that facilitates the acquisition and preservation of bargaining rights is paramount. The BC Code should be brought into line with the mainstream of Canadian legislation and recent pronouncements by the Supreme Court of Canada respecting freedom of association and the right to bargain collectively.

The Supreme Court of Canada has recognized freedom of association under 2(d) as a fundamental *Charter* right that protects the dignity and autonomy of workers and entitles them to a meaningful system of collective bargaining if they choose: see *Health Services and Support - Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27 ("*B.C. Health Services*"); see also *Mounted Police Association of Ontario v. Canada (Attorney General)*, 2015 SCC 1 ("*Mounted Police*"), *Saskatchewan Federation of Labour v. Saskatchewan*, 2015 SCC 4 ("*Sask. Federation of Labour*") and other cases.

In *B.C. Health Services*, McLachlin C.J., writing for the majority, stated:

> [81] Human dignity, equality, liberty, respect for the autonomy of the person and the enhancement of democracy are among the values that underly the Charter: *R. v. Zundel*, [1992] 2 S.C.R. 731; *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203, at para. 100; *R. v. Oakes*, [1986] 1 S.C.R. 103. All of these values are complemented and indeed, promoted, by the protection of collective bargaining in s. 2(d) of the Charter.

> [82] The right to bargain collectively with an employer enhances the human dignity, liberty and autonomy of workers by giving them the opportunity to influence the establishment of workplace rules and thereby gain some control over a major aspect of their lives, namely their work ...
>
> [84] Collective bargaining also enhances the Charter value of equality. One of the fundamental achievements of collective bargaining is to palliate the historical inequality between employers and employees ....
>
> [85] Finally, a constitutional right to collective bargaining is supported by the Charter value of enhancing democracy. Collective bargaining permits workers to achieve a form of workplace democracy and to ensure the rule of law in the workplace. Workers gain a voice to influence the establishment of rules that control a major aspect of their lives ....

In *Mounted Police,* the Supreme Court of Canada found that the right to meaningful collective bargaining is an essential component of freedom of association. The majority in *Sask Federation of Labour* affirmed the goals underlying freedom of association: "[h]uman dignity, equality, liberty, respect for the autonomy of the person and the enhancement of democracy": at para. 53, quoting *BC Health Services* at para. 81 where the majority found that s. 2(d) of the *Charter* protects collective bargaining, and found that the right to strike was "essential to realizing these values and objectives" (para. 54).

Academics and those working in the field of labour relations have long-supported card-based certification in British Columbia. In *Reconcilable Differences*, Paul Weiler[3], Professor and former Chair of the British Columbia Labour Relations Board, considered the nature of the certification process and determined in the normal course it should be based on the union's membership majority in the unit as of its date of application. After reviewing the case for representation votes and the techniques used by employers to beat certification campaigns, he outlined the benefits of card-based certification as accomplishing desirable objectives:

> ... to facilitate the employee's choice of collective bargaining, to minimize conflict and damage from the employer wielding his economic power during the representation campaign, and to safeguard the future relationship of union and employer (difficult enough as it is in first contract negotiations) from being poisoned with charges and countercharges made during the heat of any such campaign[4].

Professor Weiler's conclusions are reflected in the following passage:

> ... I am heartily opposed to representation ballots conducted after a representation campaign. The employer has all the advantages, even when it behaves fairly: day-to-day contact with employees, the absence of the union from the plant, the lack of any tangible union benefits during the trauma of the representation contest, a gradual change over in the employee complement, with all the newcomers unilaterally selected by the employer. And the ugly fact of life is that too often employers do not behave. Forty years of legal enforcement has not stemmed the tide of unfair labour practices by employers right across North America[5].

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[3] P. Weiler, *Reconcilable Differences: New Directions in Canadian Labour Law* (Toronto: Carswell, 1980), pages 37-49
[4] *Ibid.*, page 42
[5] *Ibid.*, page 48

> I make no secret of my preference. Trade unions should be granted certification – that legal licence to bargain – on the basis of signed membership cards. ...

Similarly, the Special Advisors to the British Columbia Government on labour law reform in 1992[6] reached the same conclusion, unanimously recommending a return to card-based certification:

> The surface attraction of a secret ballot vote does not hold up to examination. Since the introduction of secret ballot votes in 1984, the rate of employer unfair labour practices has increased by more than 100%. When certification hinges on a campaign in which the employer participates, the lesson of experience is that unfair labour practices designed to thwart the organizing drive, will inevitably follow....Unions would sign up a clear majority of employees as members and a vote would be ordered. Then key union organizers would be fired or laid off while threats of closure dominated the campaign and the vote itself was viewed as a vote on whether to continue with employment rather than as a vote on redefining the employment relationship. It is not acceptable that an employee's basic right to join a trade union be visited with such consequences and illegal interference. Nor is there any reasonable likelihood of introducing effective deterrents to illegal employer conduct during a representational campaign.

Again in 1998, the Section 3 Review Committee[7] supported card-based certification, advising that a system of mandatory certification votes should not be re-introduced. At that time, unions applying for certification could receive automatic certification on the basis of membership cards alone where they applied with 55 percent or more of the bargaining unit. The Review Committee recognized that returning to a mandatory certification vote was problematic[8]:

> We do not recommend a return to a mandatory certification vote.
>
> Employers responded negatively to our Discussion Paper proposal to not recommend a mandatory certification vote. They continued to advocate for a vote before certification because they believe that is the only way they can be assured that their employees truly want to organize. We did not hear from employees that they wished a certification vote. **Because the employer directly controls the ability of any given employee to maintain his or her livelihood and therefore holds the balance of power, we feel that the concerns of employees and their unions must take precedence in this case.**
>
> We affirm our proposal in the Discussion Paper to not recommend a mandatory certification vote. We affirm the individual right, recognized provincially, nationally and internationally, to join or form trade unions. **Experience demonstrates that employers do see to affect employees' right to choose. In our view, extending the certification process by introducing a mandatory certification vote would only further invite such illegal activity.** [Emphasis added].

These considerations remain relevant and support a return to card-based certification in British Columbia.

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[6] V.Ready, J.Baigent, and T.Roper, *Recommendations for Labour Law Reform* (Victoria: Queen's Printer for British Columbia), September 1992, page 26 ("1992 Report")
[7] V. Ready, S. Lanyon, M. Gropper, and J. Matkin, *Managing Change in Labour Relations*, February, 25, 1998 ("1998 Report")
[8] *Ibid.*, Part Four: Final Recommendations, page 5

Other jurisdictions

Card-based certification is available in the majority of jurisdictions in Canada leaving British Columbia out of sync. Card-based certification is provided for, with some distinctions, in Alberta, Ontario, Quebec, New Brunswick, Nova Scotia, Prince Edward Island, Newfoundland & Labrador, Yukon, Nunavut, Northwest Territories and in the Federal jurisdiction. Generally, the threshold for automatic certification ranges from 50 percent to 55 percent, with some exceptions, for example, in Newfoundland and Alberta where it is more than 65%.

With the recent adoption of Bill 7 which eliminated the long-standing card check system that allowed unions to be certified with 65 percent membership support and introduced the mandatory vote model[9], Manitoba joined Saskatchewan (and BC) as the only other jurisdictions in Canada that does not provide for card-based certification in some form.

Among the jurisdictions which have recently taken steps towards card-based certification are Alberta, Ontario and Canada.

Card-based certification has been re-introduced in the federal jurisdiction based on the union having the support of a majority of employees in the unit on the date of the application for certification: section 28(c), *Canada Labour Code*, R.S.C. 1985, c.L-2.

Similarly, the right to card check certification based on an absolute majority of employees of an employer is found in the Quebec *Labour Code,* C.Q.L.R., c. C-27, section 21. If a majority (50% +1) of workers sign membership cards, the Commission des relations du travail (CRT) will certify the union automatically.

Following its labour legislation review (report published May 2017[10]), Ontario also moved to card-based certification for certain difficult to organize sectors (building services industry, home care and community services industry and temporary help agency industry: section 15.2). Prior to the amendment, universal card check certification had been abolished in 1995 and was later reintroduced only in the construction sector. With the recent revisions to the *Labour Relations Act*[11] in Ontario, if more than 55 percent of the employees in the bargaining unit are members of the trade union on the date the application is filed, the board may certify the trade union as the bargaining agent of the employees in the unit: section 15.2(16).

The certification sections of the Alberta *Labour Relations Code*[12] recently changed as well. Section 34(8) was added which provides that a certification vote is not required if more than 65 percent of employees in the unit support certification (have signed membership cards) at the time of application.

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[9] Section 40(1), *The Labour Relations Act,* R.S.M. 1987, c. L-10
[10] *Ontario Final Report, supra* (at footnote #1)
[11] *Labour Relations Act*, 1995, S.O. 1995, c. 1, Sched. A
[12] *Labour Relations Code*, RSA 2000, c L-1

As the Special Advisors to the government in Ontario recently recognized,[13] the card-based system is democratic as well as necessary to counteract employer misconduct in certification campaigns and helps to level the inherent employer-employee power imbalance because it measures support most commonly before the employer knows there is an organizing campaign, thereby assisting in ensuring employee choice and employee independence in selecting a bargaining agent is protected. Conversely, the mandatory vote process gives employers a greater opportunity to unfairly influence employee choice.

Similar to the construction industry, the operation of hiring halls and the wide-spread existence of pattern agreements in the entertainment industry is the norm.

The economic power imbalance in favour of employers and relative vulnerability of workers is compounded by the mandatory vote process under the current Code in BC. Card-based certification protects workers from intimidation and threats from anti-union employers, helping ensure that the true wishes of employees are recognized. As canvassed above, the Code should be brought into line with pronouncements by the Supreme Court of Canada respecting the right to access bargain collectively and to engage fully in freedom of association, and by amending our legislation to be more consistent with labour legislation elsewhere in Canada which provides for card-based certification.

Alternative recommendation: Representation vote to be held within 2 days of application

If the Code is not revised to include card-based certification and to eliminate the mandatory vote, IATSE recommends, as an alternative, that a representation vote be held within two days of the date of filing an application for certification. This will decrease the opportunity that currently exists for employers to unfairly influence employee choice.

Holding votes quickly is generally recognized as being very important[14]. Delays in certification votes, where votes are required, are correlated with lower success rates in union certification applications. Employer unfair labour practices increase dramatically the longer the certification vote process takes.

Currently, in British Columbia, a representation vote must be held within 10 days from the date of application for certification: section 24(2) of the Code. Our experience is that the norm is that the vote occurs on the 10th day and not sooner.

In other jurisdictions, the timeline to a vote is shorter and ranges between five to seven days in most jurisdictions:

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[13] *Ontario Final Report*, *supra* (at footnote #1), pages 317-318 and citing study by Professor Sara Slinn cited therein

[14] *Ontario Final Report*, *supra* (at footnote #1), page 341

In Manitoba, a vote by secret ballot is held within seven days after the day on which the application for certification is filed, subject to the board extending that timeline in exceptional circumstances: sections 48(3) and (4), *Labour Relations Act,* C.C.S.M. c.

In Ontario, the representation vote is to be held within five days (excluding Saturdays, Sundays and holidays) after the day on which the application for certification is filed, unless the board otherwise directs: section 8(5)[15].

In Nova Scotia, "[n]ormally" the board shall conduct a vote of employees in the unit applied for no more than five working days" after receipt of the application for certification: section 25(3), *Trade Union Act,* 1989, R.S.N.S., c.475.

In Newfoundland and Labrador, where a vote is taken it shall be conducted no later than 5 days after application for certification, excluding holidays and weekends, subject to exceptional circumstances: section 47(4) and (5), *Labour Relations Act,* R.S.N.L. 1990, c.L-1.

British Columbia's Code is clearly out of line with such jurisdictions.

The opportunity for employers to discourage employees from joining a union through fear and intimidation is amplified by the current 10 day period to conduct a representation vote. An expedited timeline, in addition to other changes to the Code, are necessary to mitigate these harms. Accordingly, IATSE recommends that should automatic certification not be introduced, the timeline to a vote under section 24 of the Code be shorten to two days.

2. Early Disclosure of Employee Lists and Contact Information

Closely related to card-based certification is the need for early disclosure of employee lists and contact information by employers. Where a union is able to demonstrate a threshold of 20 percent support of employees in the proposed unit, the employee list should be disclosed.

Ontario has recently made such amendments to its labour legislation. In the *Ontario Final Report* the Special Advisors made clear that access to employee information, allowing effective communication with the electorate, is critical to a fair certification vote[16]. The provision of such information was recognized as imperative to realizing the constitutional right of employees to effective and meaningful collective bargaining, and to enhance their bargaining strength, founded on the freedom of employees to associate[17]:

> ...Canadians in a workplace cannot exercise their constitutional right to associate for purposes of collective bargaining if they are unable to communicate with their fellow employees in the same workplace. Absent the ability to know who the other employees are and how they can be contacted, the constitutional freedom of association is potentially sterile and ineffective.

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[15] *Labour Relations Act* (Ontario), *supra* (at footnote #11)
[16] *Ontario Final Report*, *supra* (at footnote #1), pages 332-338
[17] *Ibid.*, page 332-333

...

> ... Being unable to determine who comprises the electorate and being unable to communicate with them, are barriers to achieving certification based on the wishes of a majority of employees in a secret ballot vote and is inconsistent with the principles of employee choice and independence. If the union cannot communicate effectively with the electorate, or if only the employer can communicate, there is a barrier to accessing meaningful collective bargaining.

Among other reasons supporting the disclosure of employee lists, the special advisors in Ontario also noted that it would help to achieve a culture of compliance and a broader knowledge of the rights of employees[18].

Academics have also commented on the importance providing more effective union access to employee information during organizing campaigns[19].

For IATSE, practical reasons for providing such information is compounded as workplaces in the entertainment industry can be large and geographically spread out, or subject to economic fluctuations impacting continuity of a regular workforce, making organizing workers more challenging.

Quebec is a jurisdiction which requires the provision of names and addresses before a vote, rather than before an application for certification[20]. As a result of recent amendments, Ontario now requires the provision of employees information *before* an application for certification is filed. BC should follow this precedent.

In Ontario, pursuant to section 6.1 of the *Labour Relations Act*, unions are now able to access employee lists and obtain employee contact information where the union can show it has achieved the support of 20 percent of employees involved. Unions must apply for this information no later than the day on which the application is filed: section 6.1(2)[21].

Allowing unions to access employee lists and certain contact information, provided the union can demonstrate that it has minimal threshold support is, as noted, consistent with the constitutional right to associate and to bargaining collectively. It is another measure which can be taken to assist in leveling the playing field which, under the current Code, is heavily weighted in favour of employers and against unionization.

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[18] *Ontario Final Report, supra* (at footnote #1), page 334

[19] For example see: Sara Slinn, Associate Professor and Co-Director of the Centre for Law and Political Economy at Osgoode Hall Law School, York University, *Changing Workplaces Review Research Projects Prepared for the Ontario Ministry of Labour, Collective Bargaining*, pages 18-19

[20] *Regulation respecting the exercise of the right of association under the Labour Code*, R.R.Q., 1981, C-27, r.4, section 15

[21] According to section 6.1(9) of the Act, job titles are not included in the mandatory content of employee lists, although they are included in discretionary content which the Board may order according to section 6.1(10) of the Act

3. Extend Period of Validity of Membership Cards to Six Months

IATSE recommends that the current validity period of membership cards be extended to six months and be brought into line with other jurisdictions.

Currently membership cards in British Columbia must be signed within 90 days of the application for certification: section 3, BC Reg. 7/93. In Alberta[22], Manitoba[23] and Ontario[24] an application for certification may be made where the membership evidence is signed and dated within 6 months of the application date. In Quebec membership cards do not expire: *Labour Code,* CQLR c C-27, s.36.1.

There is no evidence that membership evidence is inherently unreliable after 90 days. Extending the period of validity supports unionization and is necessary in some industries represented by IATSE where members may work for a variety of employers and direct contact with members is not always easily achievable in order to update membership through union cards.

For the foregoing reasons, IATSE recommends making necessary amendments under the Code and/or regulations to extend the period of validity for membership cards to six months.

4. Provide for Telephone and Electronic Voting

Options for voting should be modernized. If a representation vote is required, electronic voting on-line or by telephone should be available at the request of employees and their representatives.

In Ontario, the special advisors found that "limiting membership evidence to hard-paper copies is an anachronism"[25] and recommended the government and the Ontario Labour Relations Board should prioritize the provision of funds to modernize the electronic submission of electronic membership evidence as soon as possible[26]. In so doing, the Ontario special advisors also noted that the various advantages to holding votes electronically. Such alternative voting options offer freedom from any employer interference, assures privacy and the secrecy of the vote, and may facilitate voter participation once information on the means of voting can be standardized. Such systems are quick, efficient and affordable. The special advisors recognized further that "[i]f, in the future, all the information on how to vote can be standardized and transmitted quickly to all voters by email or other electronic means, electronic voting may be more common and replace workplace balloting altogether."[27]

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[22] *Labour Relations Code,* RSA 2000, c L-1, section 33(a)(ii)
[23] *Labour Relations Act*, CCSM c L10, section 45(2)
[24] *Rules of Procedure of the Ontario Labour Relations Board,* Rule 9.2, further to s.110(17), *Labour Relations Act* (Ontario), *supra* (at footnote #11)
[25] *Ontario Final Report*, *supra* (at footnote #1), page 339
[26] *Ibid.*, page 340
[27] *Ibid.*, page 342

In 2016, the BC Labour Relations Board acknowledged the validity membership cards submitted in support of an application for certification which were signed and dated electronically[28]. IATSE says this reflects a recognition of the need to modernize certification processes under the Code.

Other Canadian jurisdictions permit electronic voting. For example, the Canada Industrial Relations Board can order representation votes be conducted by electronic means pursuant to its powers under section 29(1) of the *Canada Labour Code*. That board has recognized safeguards that are in place to ensure the integrity of a representation vote is maintained such that the vote is reliable and reflective of the true wishes of employees: see, for example, *Canadian Airport Workers Union v. Garda Security Screening Inc.* 2013 FCA 106.

Electronic voting is particularly helpful where workers are dispersed and where workers are employed for shorter periods of time on productions as may be the case with IATSE members in the film and television industry not covered by the exclusive jurisdiction conferred on certain union members pursuant to the BC Council of Film Unions Master Collective Agreement. The same would be true of those members who work in stage theatrical assembly. Still this is not confined to IATSE members. The mere ease of voting by internet and telephone will very likely increase voter turnout. Furthermore, electronic and telephone voting assists in assuring the neutrality of the voting process and minimizes employer interference which again assists in ensuring the true wishes of employees are known.

For these reasons, IATSE recommends amending the Code to expressly allow for electronic and telephone voting.

5. Remedial Certification Language Must be Strengthened

The statutory language respecting remedial certification needs strengthening. Unions must be allowed to be certified without a vote when an employer engages in misconduct that contravenes the Code.

The exclusive right of trade unions to represent employees as bargaining agent is an essential principle underlying Canadian labour law and the Code: *Mounted Police*, *supra*.

The Code's current remedial provision[29] does not provide an effective remedy to unfair labour practices by employers that impact the rights of employees to freely and independently choose their bargaining agent. Remedial certification is used by the Labour Relations Board extremely infrequently, despite the continuing increase in incidences of unfair labour practices. This problem was recognized long ago when the Board concluded that remedial certification was not a working reality, a problem that continues today[30]. The problem persists.

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[28] *Working Enterprises Consulting & Benefits Services Ltd. (Re)*, [2016] B.C.L.R.B.D. No. 67

[29] Section 14(4)(f), Code

[30] P. Dickie, "The Crisis in Union Organizing under the BC Liberals", November 2005, page 15, referring to *Beechwood Construction Ltd.*, [1997] 2 Can LRBR 218 and *Cardinal Transportation BC Inc.*, BCLRB No. B344/96 (Leaver for Reconsideration of B463/94 and B232/94)

In BC, as in the federal jurisdiction[31], remedial certification *requires a finding that the union would have won the representation vote but for the employer's contravention*(s) of the Code. The BC Code fails to appreciate the fundamental power imbalance that exists between employees and employers, and the consequent need for administrative procedures that serve to protect the fundamental right of employees to associate together in unions. An effective remedial certification provision under the Code will help address this power imbalance in the employment relationship.

As recognized in Ontario's Changing Workplaces Review[32], the premise that a second vote for employer meetings is sufficient to counter the effects of employer misconduct is flawed:

> The premise that steps can be taken to ensure a second vote is sufficient to counter the effects of employer misconduct is flawed. While there may be rare cases where a union could win a second vote following employer misconduct, in our collective experience over a lifetime of practice, like scrambled eggs, the status quo ante cannot be restored and the second vote will generally be tainted by the misconduct. Employer conduct that is designed to raise or results in employee concern about the future stability or security of their employment leaves an indelible mark. Fear of supporting the union, or the hope of reward for voting against the union, which results from illegal threats or promises, is not likely rectified by a decision of a labour board finding unlawful conduct, even if coupled with a "mea culpa" statement made by the employer to employees as a result of a board order.

Rather, effective remedies for employer misconduct are required. In Ontario, the panel of special advisors recommended among other remedies that *where the true wishes of employees is unlikely to be ascertained*, remedial certification should follow[33].

In Ontario, the government has eliminated certain conditions for remedial union certification allowing unions to more easily become certified when an employer or an employer organization engages in misconduct in breach of the *Labour Relations Act*: section 11(2). Under the Ontario *Act*, there was a complete absence of remedial certification between 1998 and 2005, and since 2005, restrictive remedial certification was allowed where "no other remedy would be sufficient to counter the effects of the contravention". Noting that the number of remedial certifications since 2005 averaged three per year, Ontario's special advisors recognized the importance of strengthening the remedial certification provisions "because the rules for remedial certification strongly impact the conduct of the parties in the hundreds of certification campaigns that occur every year."[34] Remedial certification is available in various other jurisdictions in Canada, although the features of it vary[35].

The BC Code is not sufficiently robust to address pre-certification employer behaviour. Strengthening the remedial certification language will assist with remedying the high frequency of unfair labour practices committed by employers during the certification process, offences which are not easily remedied otherwise. To effectively remedy unfair labour practices

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[31] Section 99.1(b), *Canada Labour Code*, R.S.C, 1985, c.L-2
[32] *Ontario Final Report, supra* (at footnote #1), May 2017, page 321; and see *The Changing Workplaces Review, Summary Report*, May 2017, page 23-24
[33] *Ontario Final Report, supra* (at footnote #1), pages 314 -
[34] *Ibid.*, pages 314 and 315
[35] See for example, Newfoundland & Labrador, Nova Scotia, Manitoba and New Brunswick

occurring during organizing drives, typically occurring in close proximity to certification applications when the impact of such violations is the greatest, IATSE recommends the remedial certification language be strengthened to permit the Board to certify a union *where the true wishes of employees is unlikely to be ascertained* .

6. First Contract Interest Arbitration

IATSE recommends that first contract interest arbitration be made mandatory where a first agreement is not concluded within 20 days of the appointment of a mediator. This would enable unions to conclude an agreement when, after obtaining certification, they are met with intransigent employers who seek to delay the achievement of a first collective agreement.

Currently, the BC Code provides for an intensive mediation model[36] and only a limited opportunity for arbitration[37]. An administrative vehicle for the appointment of an interest arbitrator is essential and provides an alternative to a work stoppage. This would encourage parties to narrow the issues or spur settlement. The threat of an unfavourable arbitrated settlement would have a significant deterrent impact – to both unions and employers. The mediation stage should be kept to 20 days to provide an expeditious process that will help prevent long delays in reaching first agreements. Such delays inevitably assist employers when employees grow frustrated with the process, see no prospect of a collective agreement, and ultimate vote to decertify the union.

First contracts are among the hardest deals to negotiate. Having a prolonged strike while bargaining a first contract is difficult to undergo, particularly where there is precarious work. Where remedial certification results from employer misconduct during the certification process, the need for mandatory interest arbitration for first contracts becomes even more important to ensure meaningful access to collective bargaining.

Measures exist in other jurisdictions where either party may apply for arbitration where a collective agreement has not been reached in a set period of time. Alberta provides a favourable example.

Following Alberta's labour legislation review last year, unionized employees trying to obtain a first contract now have the option to apply for an imposed contract, allowing a period of stability following certification[38].

If New Brunswick's Bill 4 is passed (introduced by the New Brunswick government in the Fall 2017) which amends the *Industrial Relations Act* to include first contract arbitration, then Prince Edward Island will be the only jurisdiction without any kind of first contract legislation.

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[36] Section 55 –First Collective Agreement, Code
[37] Section 55(6), Code
[38] Division 14.1 First Contract Arbitration, *Labour Relations Code*, R.S.A. 2000, c. L-1

To conclude, IATSE recommends where a collective agreement is not concluded within 20 days of the appointment of a mediator under section 55, automatic access to first contract arbitration should be available.

7. Extend Successor Rights to Address Contract Flipping

Section 35 of the Code should be broadened to address and prevent the problem of subverting a collective agreement through contract flipping. Union membership is being undermined in BC by the prevalent practice of contract flipping where sub-contractors are utilized. As identified by the BC Federation of Labour[39], one of the most glaring gaps in BC's current successorship legislation is that it does not apply to contracting out or contract flipping which has allowed employers to exploit this weakness. Employees of sub-contractors are at risk of losing collective agreement protections when contracts are retendered.

Section 35 addresses successorship and stipulates that if a business or part of it is sold, leased, or transferred, the new owner is bound by any collective agreement in force at that business on the date of sale. Currently, in BC, successor rights do not apply to subcontracting. As a result, when new contractors are engaged, they have no obligation to re-hire workers, much less maintain their wages and benefits. Because collective agreements are deserted when contracts flip, workers must organize again. This also undercuts unions' ability to negotiate better wages and working conditions over time.

Ontario has recently extended its labour legislation to begin to address this issue, introducing protections against contract flipping to workers in the building services industry (specifically cleaning, food, and security services[40]), with the possibility of extending such protections to other services in the future[41]. As the special advisors identified some of the issues with re-tendering of contracts in their Final Report:

> We do conclude, however, that in industries mostly populated by vulnerable and largely unskilled workers, the constant re-tendering of contracts is, in many cases, not a mechanism aimed at achieving efficiencies through acquiring greater expertise or different methods of production but, rather, a mechanism to reduce costs by substituting a cheaper, non-union contractor for a unionized one. **The social cost and impact of this "efficiency" is borne by those least able to bear it, namely, the vulnerable and the precarious employees in that industry. If a union in collective bargaining negotiates improvements in the working conditions for the unskilled and vulnerable people it represents, these gains are negated by re-tendering. The effect of constant re-tendering is not only to keep compensation low but also to eliminate improvements achieved through collective bargaining.**
>
> ...

[39] BC Federation of Labour *Backgrounder*, Spring 2015, page 1
[40] Section 69.1(1), *Labour Relations Act* (Ontario), *supra* (at footnote #11)
[41] Section 69.2 includes a regulation making power which could extend section 69 sale of business protections to other types of service providers that "directly or indirectly receive public funds".

> This situation of contracting out and re-tendering is perhaps one of the best examples of a fissured workplace, creating competition among suppliers of low-skilled services on a constant basis to keep wages and benefits as low as possible. **Clearly, this is a major contributor to the continued presence of vulnerable workers in precarious work in some sectors. Stability and advancement through meaningful collective bargaining is not sustainable when the workers are unskilled and the lead employer can reduce costs, keeping them at rock-bottom through an endless series of re-tendering.** [Emphasis added].

Obligating successor employers in the contract services sector to uphold collective terms and conditions of employment and bargaining rights through the extension of the Code's successorship provisions would effectively thwart tactics used by employers to undermine bargaining rights by contract flipping. Such measures would have assisted IATSE members working at Rogers Arena when the arena tendered a commercial service agreement shortly after obtaining certification.

IV. Conclusions

Please note that IATSE has been asked by the Art Babbitt Appreciation Society to provide, as an appendix to this submission, a one-page description of the particularly vulnerable circumstances in which animation artists find themselves in British Columbia. We trust you will also give that your consideration.

IATSE appreciates the opportunity to be consulted and looks forward to providing any further information at public hearings or otherwise that the Panel or Ministry may require.

Yours truly,

KOSKIE GLAVIN GORDON
Per:

ANTHONY GLAVIN & PATRICIA DEOL

AG/ks

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Julia Neville, IATSE International Representative

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International Cinematographers Guild, IATSE Local 669

IATSE Local 118

IATSE Local 168

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March 16, 2018

Via E-mail: LRCReview@gov.bc.ca

Attn: Barry Dong, Michael Fleming and Sandra Banister, Q.C
LRC Review Committee

Re: Labour Relations Code Review Panel

Dear Panel Members:

Please accept this letter as the submission of the International Association of Heat and Frost Insulators and Allied Workers, Local 118 (the "Insulator's Union").

The Insulator's Union submits that there is a need for the *Code* to be rebalanced in a number of way but we will leave these general submissions to others. We intend to focus on construction. We are asking the Panel to recommend the immediate removal of Section 41.1 of the Code and the striking of a construction labour relations review panel.

Insulator's Union

The Insulators Union is a craft union construction union within the meaning of Section 21 of the Code. We are a group of approximately 500 journeypersons and apprentices working in the mechanical insulation industry in British Columbia, Yukon and the Northwest Territories. Members of the Union apply mechanical insulation during new construction and in existing structures. Mechanical insulation is used to control heat loss, to provide personal protection and to comply with environmental standards.

The Insulators Union is one of the few remaining true craft unions. All of our bargaining relationships are craft based and we do not represent members of other crafts.

Like most other building trade unions, we have a world class red seal training program and we provide health and welfare and pension benefits to our members.

In addition to these programs, we are also involved in a number of other initiatives designed to protect and promote the interests of our members. Properly installed, Mechanical Insulation provides significant environmental benefits and significantly reduces building operating costs. Through its "Green Jobs, Great Jobs campaign", the Insulator's Union and its employers work together to promote the use of mechanical insulation explaining its benefits to governments and construction groups. This initiative and other like it have raised the profile of the Mechanical Insulation Industry and promote the use of mechanical insulation installed by skilled journeyperson mechanical insulators.

Construction Labour Relations

Unfortunately, the current scheme of construction labour relations has inhibited these efforts and had other negative effects on the Union and its members. As the Panel knows, as a craft construction union, the Insulator's Union is required to belong to and bargain through the Bargaining Council of British Columbia Building Trades Unions.

Members of the Union work for approximately twenty two active contractors. Only three of these contractors are now members of the CLRA (employing approximately 10% of our members). For member contractors, terms and conditions of employment are set out in an agreement reached through the bargaining structure in place between CLRA and BCBCBTU ("the CLRA Agreement"). While other signatory contractors negotiate directly with the Insulators Union we have a collective interest in maintaining a single master agreement to standardise the terms and conditions of employment and so independent contractors continue to use the CLRA Agreement as a template and will not negotiate until that agreement is negotiated. While we could attempt to force independent contractors to negotiate independent agreements prior to the conclusion of the CLR agreement, this would result in there being multiple

(or at least two) different agreements and the terms and conditions for Insulators would no longer be standardised.

That leaves us a choice between two untenable options: have our members and our employers working under different agreements in competition with one another or bargain through the BCBCBTU.

As Chair Fleming recognised in his Interim Report regarding a Section 41 Inquiry into Labour Relations in the British Columbia Building Trades Sector of the Construction Industry, the current system of collective bargaining between BCBCBTU and the CLRA is profoundly flawed. That report was made in the context of a fixed legislative scheme that was designed to undermine and weaken the building trades.

The Legislation that created and supports this system(s) needs to be changed.

The Insulator's Union is committed to modernizing the industry in which it operates (and thereby protecting and creating work for its members). The present bargaining model acts as an impediment to its achieving this goal. The present bargaining model gives no opportunity to engage industry employers at the bargaining table or to otherwise address concerns through amendments to the terms and conditions of employment under which members work. This was noted by Chair Fleming at paragraph 70:

> "70 The existing collective bargaining structures and processes make it very difficult for the parties to development innovative solutions to the real challenges which exist in some segments of the building trades sector. This inability undermines the competitive position of the sector."

Under the current system, bargaining between the CLRA and the BCBCBTU takes years to complete. Unions are forced to accept whatever the CLRA is prepared to offer and have no mechanism to either engage their employers in meaningful discussion or to exercise any economic pressure on their employers.

In 2013, we applied under section 42 of the Code for consent to withdraw from BCBCBTU. Our application was dismissed in BCLRB No. B121/2014. At that time, the CLR was able to assert that it had 8 Insulation contractors as members and that those 8 contractors employed most of our members. As set out above, this is no longer the case. There are now only 3 Insulation contractors who belong to the CLR and they employ approximately 10% of our membership.

One of the impediments to leaving the Council was the decision of the board in *Bargaining Council of British Columbia Building Trades Unions and Construction Labour Relations Association*, BCLRB Letter Decision No. B115/2002 where a Panel of the Board gave reasons following its review of the BCBCBTU constitution after the repeal of Part 4.1 of the Code. One of proposals before the panel was an amendment to make membership voluntary. In a sparsely reasoned analysis the Panel relying on Section 41.1 ruled that membership was mandatory for unions which have a bargaining relationship with a member of the CLRA: "We find that mandatory membership in the Bargaining Council is directed by statute."

While the Insulators have always maintained that this decision was wrongly decided, no building trade union has ever been allowed to leave the Council. This interpretation of Section 41.1 of the Code gives the CLR a significant statutory advantage which they have used over time to slowly erode the rights of building trade unions and their members and prevent the engagement needed for progressive reforms.

Conclusion

The Bargaining Council was created in the late 1970s to moderate the power of craft unions. With that goal in mind, it was wildly successful. Unfortunately, this success came at a significant cost for workers and the industry in general. In what was once a thriving industry where employers had standardised agreements and almost all workers were well trained and enjoyed the benefits and protection of trade union representation, the construction industry is now a fragmented. Terms and conditions of employment vary greatly, employees have relatively few rights and

legitimate contractors are forced to complete with unprincipled contractors who use unions of convenience and under skilled workers.

These problems were recognised in the 1990s by the Construction Industry Review Panel and Legislative changes were introduced to address these problems. That Legislation was unfortunately short lived as the Liberal Government in 2001 removed almost all of the construction specific legislation in the Code leaving only Section 41.1 which was designed to undermine building trades union.

It is respectfully submitted that this intentionally unbalanced provision needs to be removed from the Code and we ask the Panel to recommend its removal along with the striking of a panel to perform a more general review of construction labour relations.

Yours truly,

Neil Munro
Vice President
BC Insulators

NM/vd

pc. BC Building Trades
Adam Van Steinburg, BCBCBTU
Executive Board Local 118

moveup

Written Submission to the Labour Relations Code Review Panel

Submitted by the

International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers (affiliated with the AFL-CIO and CLC)

Vancouver and Surrey, BC
March 28 – 29, 2018

INTERNATIONAL BROTHERHOOD OF BOILERMAKERS

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591–0.608

The International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers AFL-CIO ("Boilermakers International") makes the following written submission to the *Labour Relations Code* Review Panel in accordance with the direction of the Honourable Mr. Harry Bains, Minister of Labour.

Introduction

The Boilermakers International is a diverse union representing workers throughout the United States and Canada in industrial construction, repair, and maintenance; manufacturing; ship building and marine repair; railroads, mining, and quarrying; cement plants; and related industries. The Boilermakers International is structured in a manner which includes four international vice-presidents for sections of the United States and one international vice-president for Canada. The current International Vice-President for Canada is Mr. Joseph Maloney.

In Canada, the Boilermakers International, through the Canadian office led by International Vice-President, Joseph Maloney, is engaged in servicing, grievance handling, arbitration, craft jurisdiction-related expertise, organizing assistance, seminars, and both direct and indirect collective bargaining, and lobbying.

The Boilermakers International's structure also includes Districts. District Lodges are made up of a group of Local Lodges involved in the same industries. Through the District Lodge structure, the Boilermakers International provides administrative, servicing and coordination to Local Lodges. The District Lodge assists affiliated Local Lodges with organizing, collective bargaining, grievance and dispute settlement as well as providing training programs and engaging in legislative activities.

Members of the Boilermakers International are highly mobile and may be dispatched to work in both their "home" jurisdiction and elsewhere in Canada.

Recommendation: Amend the definition of "Trade Union"

The Boilermakers International proposes that the definition of "trade union" in section 1 of the *Labour Relations Code*[1] be amended to recognize national and international unions as "trade unions" for the purposes of the *Code*. This amendment would align British Columbia's labour legislation with **all** other Canadian jurisdictions (with the exception of Newfoundland & Labrador).

Section 1 of the BC *Labour Relations Code* defines "trade union" in this way:

> **"trade union"** means a local or Provincial organization or association of employees, or a local or Provincial branch of a national or international organization or association of employees in British Columbia, that has as one of its purposes the regulation in British Columbia of relations between employers and employees through collective bargaining, and includes an association or council of trade unions, but not an organization or association of employees that is dominated or influenced by an employer…

The Boilermakers International and the Boilermaker Contractors' Association propose that the definition be changed to read:

> **"trade union"** means an organization or association of employees, that has as one of its purposes the regulation of relations between employers and employees through collective bargaining, and includes an association or council of trade unions, but not an organization or association of employees that is dominated or influenced by an employer.

At present, British Columbia and Newfoundland & Labrador are the only jurisdictions in the country that restrict the definition of "trade union" to a "**local or provincial organization** or association of employees, or a **local or provincial branch** of a national or international" union.

Under this narrow definition, agreements concluded by unions based outside of the province are not enforceable as collective agreements in BC or Newfoundland and Labrador.

What this means is that workers in British Columbia are excluded from any direct representation by a national or international union, and national unions and international unions are prohibited from directly engaging in collective bargaining and enforcing the terms of collective agreements that are negotiated by them, even though they are enforceable elsewhere in the country.

Legislative history of BC definition of "trade union"

In British Columbia, the "provincially-focused" definition of "trade union" first appeared in the *Labour Relations Act* of 1954.[2] This act replaced the *Industrial Conciliation and Arbitration Act*[3] that had defined "trade union" as an "international, national, or provincial organization of employees, or a local branch chartered by and in good standing with such an organization".

[1] RSBC 1996, c. 244 s.1.
[2] SBC 1954, c 17.
[3] SBC 1948, c 155.
[4] *Industrial Conciliation and Arbitration Act Inquiry Act*, SBC 1951, c 39.
[5] British Columbia, Legislative Assembly, Industrial Conciliation and Arbitration Inquiry Board, *Report of the Industrial Conciliation and Arbitration Inquiry Board* (1952) (Chair: Arthur JR Ash).

In 1951, the government appointed an Industrial Conciliation and Arbitration Inquiry Board to examine the *Industrial Conciliation and Arbitration Act* and recommend amendments.[4] In its report,[5] the Board recommended that the definition of "trade union" be replaced by a "provincially focused" definition that ultimately appeared in the 1954 *Labour Relations Act*. The Inquiry Board did not, however, provide any rationale for this recommendation and there is no Hansard record of the legislative debates in connection with the new *Labour Relations Act*.

Since 1954, the definition of "trade union" in the legislation has remained substantially the same. Minor amendments were made to the definition in 1973[6] and 1996,[7] but the provincial focus of the definition has never been altered.

What all this means is that the continued advisability of recognizing only provincially based organizations as "trade unions" has gone unexamined in BC for more than 60 years. No legislative body appears to have studied the impact of this restrictive definition of "trade union" on labour relations in British Columbia. Rather, it appears that the Legislature has simply continued this definition without any examination of whether it meets the objectives of maintaining and growing the work opportunities for skilled workers in British Columbia in an increasingly national and global economy.

In our view, we respectfully submit that the time has come for British Columbia to permit workers in this Province to have the option of direct representation by a national or international union and access to regional or national collective agreements negotiated for application in multiple provinces or regions. We say that this is particularly so for highly mobile workforces such as our membership and in cases where no local union has "occupied" a particular field or sector through its local collective bargaining.

The "trade union" definition landscape across Canada

In the **Alberta** *Labour Relations Code*[8], a "trade union" "means an organization of employees that has a written constitution, rules or by-laws and has as one of its objects the regulation of relations between employers and employees" (section 1 (x)). **In Alberta, a national union or an international union falls within the definition of "trade union."**

In the *Saskatchewan Employment Act*,[9] a "union" "means a labour organization or association of employees that has as one of its purposes collective bargaining" and "is not dominated by any employers" (section 6-1 (1)(p)). **In Saskatchewan, a national union or an international union falls within the definition of "union."**

In the **Manitoba** *Labour Relations Act*,[10] a "union" "means any organization of employees formed for purposes which include the regulation of relations between employers and employees, and includes a duly organized group or federation of such organizations and for the purpose of this definition, an organization may be comprised only one employee" (section 1). **In Manitoba, a national union or an international union falls within the definition of "trade union".**

6 *Labour Code*, SBC 1973, c 122, s2(1).

7 *Labour Relations Code*, RSBC 1996, c 244, s1(1).

8 *Labour Relations Code*, R.S.A 2000, c. L-1.

9 *Saskatchewan Employment Act*, S.S. 2013, c. S-15.1

10 *Labour Relations Act*, C.C.S.M, c. L-10.

In the **Ontario** *Labour Relations Act*,[11] a "trade union" "means an organization of employees formed for purposes that include the regulation of relations between employees and employers and includes a provincial, national, or international trade union, a certified counsel of trade unions and a designated or certified employee bargaining agency" (section 1(1)). **In Ontario, a national union or an international union falls within the definition of "trade union".**

In the **Nova Scotia** *Trade Union Act*,[12] a "trade union" or "union" "means any organization of employees formed for purposes that include regulating relations between employers and employees which has a constitution and rules or by-laws setting forth its objects and purposes and defining the conditions under which persons may be admitted as members thereof and continued in membership" (section 2(1)(w)). **In Nova Scotia, a national union or an international union falls within the definition of "trade union".**

In the **New Brunswick** *Industrial Relations Act*,[13] "trade union" "includes any organization of employees formed for purposes that include the regulation of relations between employers and employees that has a written constitution, rules or by-laws setting forth its objects and purposes and defining the conditions under which persons may be admitted as members thereof and continued in such membership and includes a provincial, national or international trade union and a certified counsel of trade unions but does not include an employer dominated organization" (section 1(1)). **In New Brunswick, a national union or an international union falls within the definition of "trade union".**

In the **Prince Edward Island** *Labour Act*,[14] "trade union" or "union" "means any organization of employees formed for purposes that include the regulation of relations and collective bargaining between employees and employers and includes a counsel of trade unions…" (section 7(1)(m)). **In Prince Edward Island, a national union or an international union falls within the definition of "trade union".**

In the **Quebec** *Labour Code*[15] an "association of employees" means "a group of employees constituted as a professional syndicate, union, brotherhood or otherwise, having as its objects the study, safeguarding and development of the economic, social and educational interests of its members and particularly the negotiation and application of collective agreements" (section 1(a)). **In Quebec, a national union or an international union falls with the definition of "association of employees" that also includes "union".**

In the **federal jurisdiction**, under the *Canada Labour Code*[16] "trade union" "means any organization of employees or branch or local thereof, the purposes of which include the regulation of relations between employers and employees" (section 3(1)). The *Canada Labour Code* applies to private sector employees and employers in the federal jurisdiction and in the Yukon, Northwest Territories and Nunavit. **In Canada, within federal jurisdiction and in the territories, the definition of "trade union" includes a national or international trade union.**

[11] *Labour Relations Act*, S.O. 1995, s. 1, s. A.
[12] *Trade Union Act*, R.S.N.S. 1989 c. 475.
[13] *Industrial Relations Act*, R.S.N.B. 1973 c. I-4.
[14] *Labour Act*, R.S.P.E.I. 1988, c. L1.
[15] *SC.Q.L.R.* c. C-27. (English translation)
[16] *SR.S.C.* 1985, c. L-2.

"Trade Union" definition negatively impacts BC workers and contractors

The provincially focused definition of "trade union" in British Columbia operates to exclude national or international unions and from all of the duties, obligations, and protections enjoyed by trade unions by the *Labour Relations Code*.

In British Columbia, a certification may only be issued to a union which (1) is a **local or Provincial branch** of a national or international organization and (2) has as one of its purposes "the regulation **in British Columbia** of relations between employers and employees through collective bargaining".

Similarly, the Board will not recognize or enforce as a "collective agreement" any agreement negotiated by a national or international trade union.

"Collective Agreement" is defined by the *Labour Relations Code* in this way:

> **"collective agreement"** means a written agreement between an employer … and a **trade union**, providing for rates of pay, hours of work or other conditions of employment…"[17]

The practical result of the specific definitions of "trade union" and "collective agreement", is that any case where the union that is signatory to a collective agreement does not, itself, fall within the provincially focused definition of "trade union", the agreement negotiated by the union is not recognized as a "collective agreement" and may not be enforced under the *Labour Relations Code*.[18]

In other words, in British Columbia, unlike every other jurisdiction in Canada[19], a collective agreement negotiated by a national or international union is not an enforceable collective agreement.

Many national and international unions in Canada negotiate "Master" or "multi-province" collective agreements that set out terms and conditions of employment for unionized employees. Such "Master" collective agreements allow businesses operating in a number of provinces or territories to bid projects knowing, in advance, the labour costs that will apply to a prospective project. In our experience, one effect of this type of regional or national bargaining has been to enhance unionized contractors' ability to successfully bid on projects which, in turn, increases work opportunities to our members.

In British Columbia, the construction sector has become increasingly competitive with an increased percentage of the market share captured by non-union contractors. Similarly, the loss of work opportunities for the Boilermakers International's BC membership has been particularly acute in the maintenance sector, in large part because there is no "locally negotiated" collective agreement specific to the maintenance sector in force in British Columbia. Although the International has negotiated a "multi-province" Master agreement it is not legally able to make a maintenance agreement available to contractors bidding work in British Columbia.

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

[18] See: *Black & McDonald Ltd. -and- CLRA*, BCLRB No. 44/85: *Certain employees of Stearns -and- Carpenters, Local 2736*, BCLRB No. 112/85; *CLRA -and- Canadian Stebbins Engineering and Manufacturing Co. Ltd, et al.*, BCLRB No. 112/85; *CLRA –and- Canadian Stebbins Engineering and Manufacturing Co. Ltd, et al.* BCLRB No. 34/81; and, *CLRA –and- International Brotherhood of Painters* [1974] 1 CLRBR 530.

[19] (with the exception of Newfoundland & Labrador)

National and international unions are also better placed than some local unions to access sophisticated forecasting and labour cost information that allows the union to negotiate effectively with unionized contractors and their Associations so that agreements are tailored to the specific economic realities of specific regions and sectors. Outside of British Columbia, where such "Master" collective agreements are valid and enforceable, our experience is that unionized contractors are more competitive, and as a result, can provide greater work opportunities to union members. Workers in British Columbia are deprived of the benefit of these sorts of negotiations.

The Boilermaker Contractors' Association is made up of a number of member contractors, who carry on business in British Columbia and other regions in Canada. Members of the Boilermakers Contractors' Association bid on contracts, and when successful, provide employment opportunities to members of the Boilermakers International in a number of sectors, including construction and maintenance.

In Canada, the Boilermakers International negotiates with the Boilermaker Contractors' Association to settle the terms of a Master collective agreement, also known as a "Multi-Provincial Collective Agreement". This collective agreement sets out the terms and conditions of employment, under which member contractors of the Boilermaker Contractors' Association may employ members of the Boilermakers International. Through these negotiations, the union and the Boilermaker Contractors' Association take into account the competitive realities of the industrial and maintenance sectors and settle on terms which provide unionized contractors with a realistic opportunity to successfully bid on work, which will result in the employment of members of the union.

From the point of view of members of the Boilermakers International, this type of multi-provincial collective agreement not only permits contractors to bid projects with known labour costs that reflect the economic realities of the sector, but also recognizes that members of the Boilermakers International union are highly mobile and able to go where the work opportunities exist.

In our experience, the fact that our multi-provincial collective agreement is not available to Boilermaker contractors who bid on BC projects has contributed to a significant loss of work opportunities by unionized contractors, including those who are members of the Boilermaker Contractors' Association.

Attached to this proposal is Appendix "A", that is based on data tracked by the Construction Labour Relations Association in British Columbia for the year 2016. It details a sample of projects that were lost to non-union or non-building trades contractors in 2016. The estimated dollar value of projects lost to the non-union or non-building trade sector was over $1,000,000,000. Those "lost" projects represent a loss of 1.5 million hours of work for union members.

In British Columbia, our Local Lodge (recognized as a "trade union") under the *Code* has not negotiated a maintenance-specific collective agreement. This means that Boilermaker contractors in British Columbia must bid maintenance-sector projects based on the labour costs set out in the standard construction agreement, to which the local lodge is signatory. This construction agreement does not currently contain maintenance-sector specific terms and condition of employment.

This has contributed to a significant loss of employment opportunities for our union membership in British Columbia in the maintenance sector. In 2016, unionized contractors in the maintenance sector in British Columbia lost contracts with an estimated value of almost $79,000,000. This represents an estimated loss of 659,500 hours of work for unionized British Columbia workers, including members of our union. This has also contributed to a dramatic drop in the "market share" of work available to our members working in the construction sector in British Columbia (see Appendix "B") and a dramatic drop in the local union's membership at a time when our economy's demand for skilled trades is increasing.

Conclusion

British Columbia's prohibition against the direct involvement by national and international unions in collective bargaining is an anomaly in Canada.

This restriction, flows from the provincially focused definition of "trade union" which has not been the subject of any study or review for over 60 years. We believe that the time is right to revisit this restriction by amending the *Code* to bring it into line with all other jurisdiction in Canada (save for Newfoundland & Labrador).

We urge this Review Panel to include our proposal in your recommendations to the Minister.

Request to attend Hearing

We request an opportunity to participate in **your hearing on March 28 or March 29 at Vancouver or Surrey** to provide you with highlights of this submission and answer any questions the Panel may have.

On behalf of all members of the Boilermakers International, we thank the Review Panel for this opportunity to contribute to the improvement of labour/management relations and to the important work of reviewing and updating the provisions of the *Labour Relations Code*.

Mr. Joseph Maloney, M.S.C.
International Vice President (Canada)
International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers AFL-CIO, CLC

Appendix "A"

BC Industrial Projects and Maintenance Work:
Sample of Some Boilermaker Projects Lost to Non-Union or Non-Building Trades Employers in 2016

APPENDIX "A"

BC Industrial Projects and Maintenance Work

Sample of Some Boilermaker Projects Lost to Non-Union or Non-Building Trades Employers in 2016

November 2016

Owner/ Client	Name of Project	Location	Type of Work	Estimated $$ Value	Trades Breakdown	Estimated Manhours	Duration	Winning Non-Building Trade	Building Trades Employer	Comments
Spectra	Maintenance Turnaround	Cabin Lake North Gas Processing Plant	Annual Maintenance	$4,700,000.00	PF, BM, INS, OE, Lab, BL	25,000	August 16 - September 16	Clearstream	Yes	Lost based on pricing.
Spectra	Maintenance Turnaround	Dawson Creek Gas Processing Plant	Annual Maintenance	$3,000,000.00	PF, BM	17,500	August 16 - September 16	Viper	No	Work flowed to Viper based on cost advantage
Spectra	Maintenance Turnaround	Fort Nelson Gas Plant	Annual Maintenance	$10,000,000.00	PF,BM, INS, Lab	80,000	May 17 - June 17	Viper	Yes	Lost based on hourly unit cost
Spectra	Maintenance Turnaround	McMahon Gas Plant	Annual Maintenance	$25,000,000.00	PF,BM, INS, Lab	200,000	August 17 - September 17	Aecon Cannonbie	Yes	Lost based on hourly unit cost
Spectra	Maintenance Turnaround	Pine River Gas Plant	Annual Maintenance	$30,000,000.00	PF,BM, INS, Lab	300,000	April 17 - June 17	Quinn Contracting	Yes	Lost based on hourly unit cost
Alta Gas	Propane Export Terminal	Prince Rupert - Ridley Island	Capital Project- Balance of Plant	$500,000,000.00	PF, BM. MW, IW, IBEW, OE	500,000			Yes	Lost based on cost
PE - HSPP	EVAP/O2 Delig Project	Port Mellon Pulp Mill	Capital Project	$25,000,000.00	PF, BM. MW, IW, IBEW, OE	150,000		All Peace Contractors	Yes	Two UA PF contractors worked onsite, Mitchell and LML. Considerable Piping Hours were performed by All Peace Contractors.

APPENDIX "A"

Owner/ Client	Name of Project	Location	Type of Work	Estimated $$ Value	Trades Breakdown	Estimated Manhours	Duration	Winning Non-Building Trade	Building Trades Employer	Comments
Teck Metals	Dust Collection System	Teck Metals - Trail	Maintenance Capital	$100,000.00	BM/IW	1,000	2016	Venture	Yes	Low Cost, example of Maintenance Capital work issued during the year to Non Building Trades Contractors
Teck Metals	Acid Plant Piping	No. 1 and 9 Acid Plant	Maintenance Capital	$150,000.00	PF	1,500	2016	Venture	Yes	Low Cost, example of Maintenance Capital work issued during the year to Non Building Trades Contractors
Canfor Pulp	Maintenance	Prince George	Piping Tanks		P/F, B/M	2,500		CIP, Cobalt	No	Prince George area have many non- union company's biding on their work
Iberdrola	Green Energy Bio Mass Boiler	Ft Saint James	All Trades piping /	$200,000,000.00	P/F, B/M, M/W, IW, CP	100,000	2015 to 17	Steel Grid, Tyrod, Monter,	Yes	Mostly non-union they took over all piping
Iberdrola	Green Energy Bio Mass Boiler	Merritt	All Trades piping/ boiler	$200,000,000.00	P/F, B/M, M/W, IW, CP	100,000	2015 to 17	Steel Grid, Tyrod, Monter,	Yes	Mostly non-union they took over all piping
Paper Excellence	Maintenance	HSPP	Piping / Tanks Mechanical	$3,000,000.00	P/F , B/M , M/W	16,000		IYINISIW, West Coast Pre fab	Yes	Non Union
Harmac	Black Liquor Tank	Nanaimo	Tank Replacement	$1,000,000.00	B/M	2,500		Mainland Machinery	yes	Non Union
FMC	Maintenance	Prince George	Piping / Vessels	$1,000,000.00	P/F M/W, B/M	5,000		CIP	yes	Prince George area have many non- union company's biding on there work
Paper Excellence	Mill start up	Chetwynd	Piping, Mechanical/ Tanks	$2,000,000.00	P/F, M/W, B/M	11,000		All Peace	yes	Non Union

APPENDIX "A"

Owner/ Client	Name of Project	Location	Type of Work	Estimated $$ Value	Trades Breakdown	Estimated Manhours	Duration	Winning Non-Building Trade	Building Trades Employer	Comments
Canfor	Soap Recovery	Prince George	piping, tank work	$1,258,000.00	PF,MW,BM	6,000	4 Months	Central Interior Piping	Yes, just Cascade	
Totals				**$1,006,208,000.00**		**1,518,000**				
Maintenance Only										
Totals				**$78,950,000.00**		**659,500**				

Appendix "B"

Marketshare in 2017

APPENDIX "B"

MARKETSHARE 2017[1]

NTTF[2] paid hours for 2017	474,118
Less estimated 18.5% reduction for overtime	(87,712)
Total (estimated) Hours Worked 2017	386,406
Available Hours 2017	1,240,841
Estimated marketshare for 2017	31%

[1] Construction hours in British Columbia forecasted by Industrial Info Resources
[2] National Training Trust Fund - monthly recorded hour paid

IBEW British Columbia Provincial Council

March 19, 2018

Honourable Harry Bains
Minister of Labour
Provincial Legislative Assembly
Victoria, BC V8V 1X4

Dear Honourable Minister Bains:

Re: IBEW-BC Submission to the Labour Relations Code Review Committee

Introduction

The International Brotherhood of Electrical Workers in BC, constitute 12,000 trade unionists represented by five distinct local unions. We work in the diverse electrical industry, from generation, transmission, distribution, gas, ICI and residential construction, data/telecom, security, communications, environmental controls, marine shipbuilding, repair and maintenance, manufacturing, all three levels of government, and more.

The five local unions are; 213, 230, 258, 993, & 1003. The first IBEW Charter signed in British Columbia was in 1901, and we are one of the largest trade unions in British Columbia as recognized by the BC Federation of Labour.

2018 Section 3 Review

We would like to begin by thanking BC's new Government and the Minister of Labour for recognizing the need and initiating this review of BC's Labour Relations Code, (the Code). It's been about a decade and a half since the Provincial Government has bothered to take a real look at the Code, and on the heels of a number of Supreme Court cases reshaping the view of Labour Relations in Canada, our government ought to have considered these cases within the scope of the current Code, it appears that was not in the interests of our past Provincial Government.

...2

Our Nation has been built on the backs of the ebb and flow of worker's rights. The phenomena of those rights for the most part, appear to be typically based on the government of the day, and their relationship with one class of its citizenship or another.

The IBEW-BC Provincial Council are aware of the submission from the BC Federation of Labour and the document "Restoring Fairness and Balance in Labour Relations prepared by John MacTavish and Chris Buchanan on behalf of the BC Federation of Labour.

We echo the same concerns highlighted around the Acquisition of Bargaining Rights, in the delays created, due to an extended amount of time from the date of application to the date of a secret ballot vote as well as mail-in ballots cause, and the closure of Employment Standards offices around the Province, and decimated staffing levels of Industrial Relations Officers. Those delays have created an environment of employer intimidation and coercion, without any real ramifications to the employer. It is of our opinion, and more importantly the facts would support that opinion, that the introduction of the Secret Ballot vote requirement, along with employer forced, employee captive audience communications are in aid employers attempts to thwart the inherent rights of workers as laid out by the Canadian Charter of Rights and Freedoms.

And so, we say that Section 8 of the BC LRC and subsequent Regulations should be repealed, as well as Section 24 requiring a Secret Ballot Vote be conducted.

We are also highly supportive of Successorship Rights for workers when it is used by an employer to avoid its responsibilities to workers due to them exercising their right to associate.

Craft Construction Unionism

We are also aware of the submission by the BC Building Trades, calling for a separate review with the purpose to look specifically at the construction industry, and we are supportive of this approach as well.

The Construction Industry makes up a significant portion of British Columbia's and the Nation's economy. Approximately a quarter million British Columbian's pay their mortgages and feed their families at least in part, from their job in the diverse construction industry. Construction differs in many ways than any other industry, the work is temporary, transient, diverse, precarious, remote (or not), ever-changing, and the workforce have to accommodate for this environment. It is also characterized by a significant degree of specialization, is highly competitive, and sensitive to economic trends. An employer may have several craft workers at one location in the Province or may have one craft in 200 locations throughout the Province and each of those locations no longer than 3 days of work, (ie. 7-11 convenience store change outs).

As previously stated our Nation's highest courts have recently put a little more meat on the bone around Canadian's Right to Organize as described in the Canadian Charter of Rights and Freedoms. That being; the Right to Association and the Right to Collective Bargaining, (and the Right to seek a third party resolve in the event both parties agree to be at impasse in the collective bargaining process). When it is recognized and agreed to by industry experts that our previous government enacted legislation which had the impact of creating barriers specifically focused at the construction sector in context to those Charter Rights. We believe that intent to interfere with those Rights, should be enough to validate the need for a construction specific industry review on both aspects of construction craft bargaining, and craft organizing. Craft certifications are typical for the construction industry and an anomaly to all other industries, and labour/labor relations boards throughout North America.

However, we are not of the mind to stop there, as the construction industry is primarily and historically made up of craft unions and has a specific application process, wherein the BC Labour Relations Board has moved towards a policy that harms craft organizing in favour of an industrial approach. We say that policy's impact also bars Canadian's inherent Right to Organize into unions of their choice. We say that a policy developed to circumvent Canadian worker's Rights to Associate, is an affront on those workers. We say, It is not the choice of the BC Labour Relations Board through Policy, (*Cicuto and Sons, ILM, and more),* it is not the choice of Employers or Partisan Politics, that Right was written specifically as a Right extended only to workers as their Right in seeking union membership. To deviate in any way from that Right, is an attack on the Canadian Constitution itself.

There are plenty of examples of that bias written throughout BC's Labour Relations Board Decisions such as;

> *BCLRB No. B293/2005*
> *Para. 21*
> *This context supports the view that the Board expressed in its seminal decision on appropriateness, IML, that craft units are an "historical anomaly" and are "to be restricted, not expanded": Island Medical Laboratories Ltd., BCLRB No. B308/93 (Leave for Reconsideration of IRC No. C217/92 and BCLRB No. B49/93), (1993), 19 CLRBR (2d) 161 ("IML"), p. 199.*

A trade or labour union is an organization of workers who have come together to achieve common goals; such as protecting the integrity of its trade, improving safety standards, and attaining better wages, benefits (such as vacation, health care, and retirement), and working conditions through the increased bargaining power wielded by the creation of a monopoly of the workers. The trade union, through its leadership, bargains with the employer on behalf of its union members and negotiates with the employers certified or signatory to it. The most common purpose of these associations or unions is maintaining or improving the conditions of their employment. This may include the negotiation of wages, work rules, complaint procedures, rules governing

hiring, firing and promotion of workers, benefits, workplace safety and policies.

There is plenty of argument to say the best representative to understand and negotiate these nuances on behalf of a craft, is a representative that is highly reflective of that craft.

If the very Labour Relations Board is biased against craft unions, which it clearly has been and has stated as such, we say it needs a reset, and a new approach guaranteeing the Rights of workers to associate be free from employer's interference and/or interference from the BC Labour Relations Board itself.

In closing, again we would like to thank you, for your time and consideration in our interests and objections, and for showing the leadership in allowing for this review to occur.

Kindest Regards,

Phil Venoit, RSE
Chair – IBEW-BC

cc. Adam Van Steinberg, Business Manager IBEW Local 213
Doug McKay, Business Manager IBEW Local 258
Glen Hilton, Business Manager IBEW Local 993
Ray Keen, Business Manager IBEW Local 1003

PMV/jc
MoveUP

iuoe
LOCAL 115

March 19, 2018

VIA EMAIL

Labour Relations Code Review Panel
Barry Dong, Michael Fleming, & Sandra Banister, Q.C
LRCReview@gov.bc.ca

Dear Committee Members:

This submission is filed on behalf of the International Union of Operating Engineers, Local 115.

Our Union represents over 10,000 workers employed in construction, road building, transportation, waste management, mining, aviation and various other industrial sectors throughout British Columbia and the Yukon.

While we will focus our submissions on construction labour relations (as set out below, the Operating Engineers would like to see a construction industry review) the Union also requests that the Panel recommend a number of other changes in the *Labour Relations Code*:

- A return to Card Based Certifications: this will allow employees the freedom to choose to belong to a Union without employer interference
- A restriction on employer interference in certification drives (restore former Sections 6 & 8): our union has undertaken many organising drives which have been defeated by an aggressive employer campaigns against the Union. The so-called "employer free speech provisions" of the Code ignore the vulnerability of workers seeking to exercise their constitutional right to bargain collectively and ignore the power imbalance between workers and employers.
- Uniform Raid window in the Construction Industry: Construction is a seasonal industry and a fixed raid window should be established in the late spring or summer - employer dominated unions of convenience often set their raid window in construction for the winter months when few if any workers are employed – they also use the confusing and variable raid window rules to otherwise prevent workers from selecting a union of their choice
- Limits on the ability to contract below Employment Standards minimums: while this would require a change to the Employment Standards Act which may be beyond the scope of the Panel's mandate, the continued ability for disreputable unions and employers to contract below employment standards minimums negatively impacts the efforts of legitimate employers and unions
- The restoration of funding to the Labour Relations Board: this would allow for the return of part time members with expertise in the different sectors of the economy (i.e., wingers) and a full review and investigation of employer dominated unions of convenience
- Duties (Section 2): We seek a restoration of the focus on employee access to collective bargaining

International Union of Operating Engineers Local 115 | Brian Cochrane - Business Manager, Wayne Mills - President
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rise above.

- A prohibition on Partial decertification which is used by employers to divide groups of workers and which is conceptually inconsistent with the Union's obligation to represent bargaining units as a whole

Construction Labour Relations

Approximately half the members of the Operating Engineers work in the Construction Industry. The construction industry is a broad umbrella that captures a wide range of different workers and undertakings – there are however several common features of the industry that make it unique from a labour relations perspective.

The Labour Relations Code is largely designed for workers employed in fixed industries – industries with a fixed location and a relatively steady workforce. In contrast to fixed industries, the construction industry is project driven - once construction is completed the project concludes.

Another defining characteristic of the construction industry is mobility. Employers and employees move from project to project. Some employees move with their employer but many are employed for the duration of the project and have no expectation of moving on to the next project with that employer.

In many areas of the construction industry there are relatively low barriers for entry. Many construction employers have relatively little capital invested in their business - the primary asset of the business is the expertise of the owner – and that person enjoys the same mobility as others in the industry.

Frequently there are a number of different small employers employing members of different unions working on an integrated construction site. Traditional enterprise based bargaining creates a risk of industrial instability as a job action by one union or employer can shut down an entire project.

In addition to concerns about industrial stability, the standard labour relations model does not allow construction workers to have meaningful access to collective bargaining. Employees hired for a project have little time to organise a union and even if they are somehow able to do so, it can be very difficult if not impossible to conclude a collective agreement before the project is completed.

Finally, the Industry is beset by a vigorous underground economy and by employer dominated unions of convenience which are designed to inhibit the ability of construction workers to select a bargaining agent of their choice. Both of these factors make it difficult for legitimate employers with real unions to compete for available work.

Construction Labour Relations

In light of the unique nature of the construction industry other jurisdictions in Canada have enacted construction specific labour relations legislation.

In British Columbia, there are currently two provisions which deal with construction labour relations: Section 41.1 & Regulation 3.1. These provisions are the remnants of what was for a brief period a rational construction labour relations regime that flowed from 1998 report of the Construction Industry

Review panel (Lanyon & Kelleher) entitled looking to the Future: Taking Construction Labour Relations into the 21st Century. This was the last comprehensive review of construction labour relations in British Columbia.

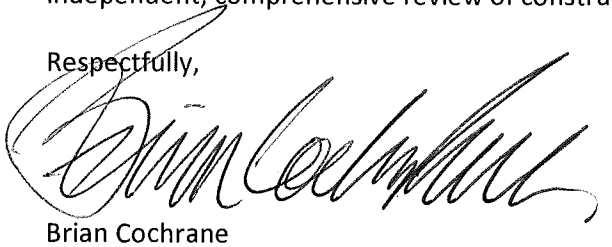
Under the heading "BCBCBTU Bargaining", the Kelleher and Lanyon Report noted that construction industry bargaining in 1998 was not effective. In their report, the Panel stated: "In our view the existing building trades bargaining council structure is not working effectively. The majority of building trades unions will accept this assessment. The current structure is inflexible and in some respects has proved unworkable."

Despite this assessment, when the Liberal Government was elected in 2001, it repealed most of the Legislation recommended by the Panel with the express intention of returning construction labour relations to the dysfunctional system in place before the Industry review. The Minister made the Government's intention clear in the Legislature: "Let's be clear on what we are doing here. We're returning the situation to pre-1998."

Predictably, the system of bargaining that followed the repeal of the 1998 Legislation has not been effective. This has been noted by both the Labour Relations Board and Panel member Fleming in his "Interim Report regarding a Section 41 Inquiry into Labour Relations in the British Columbia Building Trades Sector of the Construction Industry".

In light of the unique nature of the Construction Industry and the problems with the current system of construction labour relations (or more properly the lack of a coherent comprehensive system of construction labour relations) the Operating Engineers are asking the Panel to recommend an independent, comprehensive review of construction labour relations.

Respectfully,



Brian Cochrane
Business Manager

Kamloops and District Labour Council
Submission to the Section 3
Labour Relations Code Review Committee

March 20, 2018
Via Email to: LRCReview@gov.bc.ca

RE: SECTION 3 – LABOUR RELATIONS CODE REVIEW

Submission by: The Kamloops & District Labour Council

The Kamloops and District Labour Council represents approximately 13,000 working people, from 19 affiliates, including provincial, national and international public and private sector unions, covering the region from Valemount to Merritt, and Chase to Lillooet.

The Council would like to thank the committee along with the Labour Relations Board for the opportunity to make a submission on this important matter. The fact that stakeholders, such as our Council and its affiliates, are being given this opportunity, shows the current Government's willingness to listen and learn about issues within the code and how they affect working people.

Our submission will be broken down into five parts starting with a brief history, general, organizing, successorship and the construction industry.

Brief History:

The Labour Relations Code and its Board handle all matters related to Unionized workplaces that are provincially regulated, commonly referred to as "the Code" and the "LRB". Both are a reflection of the current government in power, policies of those governments and the administration of such. This is evident by each change in government in 1973(NDP), 1984(So-Cred), 1987(So-Cred) and 1991(NDP). Following the victory of the BC Liberals in 2001 and the passing of their Bill 18 in August of that same year, the continued trend and further escalation of de-unionization in this Province is well known. We intend to provide evidence of such and recommend changes that are not only wanted by Unions, but needed to protect and strengthen working class people in BC.

Although "flavour of the day" changes to labour relations aren't unique to BC, what are unique are the lasting effects that the previous BC Liberal Government was able to establish in the last 16 years. Bill 18 made significant changes, none of which had greater impact than the elimination of both card-based certification and sectoral bargaining in construction, along with establishing education as an essential service. These changes created the situation that makes BC unique today. Although national Union density dropped through the 1980's and 90's, BC is the only province where this trend continued into the 2000's. Unionization in BC by the end of 2016 was approximately 30%, which is below the national average, and is likely even less today.

General:

The Labour Relations Board has wide discretion over the rights of workers and how those rights are accessed. But during the BC Liberal's time in government, with chronic underfunding and understaffing, there had been a slow and steady drift towards irrelevance for the LRB.

Ongoing reviews and consultations with the labour relations community at large, such as the one being conducted now, had become non-existent under the previous regime. At one time the board used to hold meetings with Employers and Unions, which it stopped doing for a long period time. Additionally, the use of part-time members with expertise in various sectors of the economy tapered off and stopped.

This shift over the last 16 years is consistent with the BC Liberal's animosity towards workers. Furthermore, the undervaluing of the services the Board provides, such as mediation, has led parties to seek mediation outside of the Board, for example. This is not to say that there are not competent and hardworking individuals at the Board, but the lack of resources has effectively isolated the Board from the very community it seeks to represent.

Furthermore, there is a need for continuing reviews of the Code to reflect the evolution of the work environment in our province. There hasn't been a review in BC since 2003, despite significant changes to union rights, which were extended and clarified by the Supreme Court of Canada and now protected in the Canadian Charter of Rights and Freedoms.

Recommendation:

Encourage Government to restore greater levels of funding to the LRB. The lack of funding during the previous regime calls into question worker's ability to access their rights in a timely way or at all. Adequate funding would allow greater consultation with the labour relations market and the ability to reinstitute the use of Members. Lack of funding has led to major staffing shortfalls which, subsequently, result in greater delays in acquisition of workers' rights. Some of which we will continue to discuss below, including delays in mandatory votes or mail-in ballots. We believe that the Section 3 Review Committee should be instituted on a permanent basis to ensure that the Code is evaluated and updated continuously.

Organizing (Acquisition of Bargaining Rights):

Nowhere did the changes to the Labour Code by the BC Liberals have a greater impact than on the workers who are attempting to gain certification rights, or what is commonly referred to as the practice of Union Organizing. The abolishment of the card check system and a move to a mandatory vote system has always affected the number of annual unionized workers:

1974 – 1983 (NDP/Card-Check): 7411 average/year
1985 – 1992 (Socred/Mandatory Vote): 4106 average/year
1994 – 2000 (NDP/Card-Check): 8762 average/year

However, the desired impact of the BC Liberal changes was quite effective:

2002 – 2015 (BC Liberal/Mandatory Vote): 2526 average/year

Equally as disturbing, is the number of certifications granted by the board, which dropped from an average of 394/year from 1993 – 2000 to 85 per year from 2002 – 2015.

It is important to note that these stats, as harrowing as they are, are due to more than just the card-check system being abolished. In 2002, the BC Liberals made further amendments with Bill 42 which widened the ways Employers could communicate with employees during an Organizing campaign. These two changes have had the outcome the BC Liberals wanted and have slowed the rate of unionization in this province, while increasing the number of unfair labour practices significantly: From 0.89 per certification application (1992 – 2000) to 1.22 per certification application (2002 – 2015).

The real world application of this means that hiring a Union Organizer is a rare, and an expensive proposition for any labour organization to take on. In fact, organizing has become an expensive endeavour altogether; which in turn, has dissuaded smaller Locals over time. Even the larger Locals suffer; although organizing is a necessity, it has become a situation of trading excessive short term pain for the eventual long term gain.

An organizing campaign can be expensive even in Labour friendly environments, depending on a range of reasons including: the nature of the work, accessibility and locations of the job sites, the number of employees, etc. Add the likelihood of strong Employer resistance, dragged out over a minimum period of ten days, and it becomes certain that there will be at least one unfair labour practice complaint, resulting in a hearing, and most likely with counsel.

We would like to emphasize the “minimum” of ten days, from our experience. Lack of funding at the board has resulted in ten days being the standard, excluding those situations where statutory holidays or weekends cause an extension. Additionally it is becoming common place that rural locations (which can include cities such as Kamloops) are subject to mail-in ballots with 3 – 4 week delays in vote results. This situation was created to build tension and disruption in the workplace and ultimately impede a workers’ fundamental right to choose to unionize. Akin to other jurisdictions in North America, such as those with Right-to-Work laws, which blatantly attack Union purse strings, the attacks are business driven in an attempt to drive out competition.

To make matters worse, there have been several cases regarding Employer speech, which have rendered organizing campaigns completely unbalanced. *Convergys Customer*

Management Canada Inc. was the first of such cases which, among other things, established that while outright lies were not permitted, statements that were incorrect or unreasonable would be. Another was *RMH Teleservices International Inc.* in which the Board found that bringing in additional management, holding meetings to speak about the Union organizing campaign, awarding gifts with anti-union messaging and blatantly displaying anti-union imaging at the workplace was permissible under sections 6(1) and 8 of the code.

This ultimately means that virtually all speech is allowable, unless the Union can prove it is intimidation or coercion. Even when they can, the very likely result is the Employer attempting to settle the dispute rather than refer to a Board decision. A blatant threat to an individual that they will be laid off is not likely permissible, but statements about broader lay-offs, cost cutting measures and other methods of intimidation and veiled threats *are* likely to be permissible. Alternatively spreading false information about the Organizing Union is likely to be permissible, by simply pleading ignorance.

The final nail in the coffin is that regardless of everything that occurs during an organizing campaign, the likelihood of the Union applying and receiving remedial certification is remote. The committee would only have to look at the number of remedial certifications granted in recent years to understand this, but the average is less than two per year.

Recommendations:

The KDLC submits that the LRC must reinstitute a card-check certification system in lieu of the current mandatory vote system. Card-check is the most equitable way of proving the bargaining unit's desire to unionize their workplace.

We further submit that the Code be restored with section 6 & 8 language to its 1992 levels. Broadening Employer speech provisions has done nothing but intensify Employer resistance to organizing campaigns and the frequency of unfair labour practices. The system is already unbalanced in regards to which party has greater access and influence over the bargaining unit, and the two noted features above would only help to balance the scale.

We recommend an increase in the use of remedial certifications. Only then will there be deterrence to the ever growing trend of unfair labour practices.

Under a different organizing stream, we would like to draw your attention to the raiding periods within Section 19 of the Code. Employer dominated Unions of convenience are becoming an ever growing entity, particularly in the construction industry. These same Unions use the variable language in Section 19 as a means to restrict workers from selecting a Union of their choice.

In the construction industry, the most common scenario is where employer organized Unions align their raid periods with winter months, where work is either sparse or non-existent. During

these periods, the Employers ensure that only a core group of supportive workers are employed and rely on the economics of all the laid-off employees to deter any organizing activity. This makes a difficult campaign almost impossible considering the frustrations in organizing already mentioned.

Recommendation:

Set the raid period in Section 19 of the code to a consistent timeline in a calendar year, ideally in the late spring or summer months, in order to allow greater fairness for workers to choose which Union they want to represent them.

Successorship Rights

Successorship rights under the Labour Code provide for labour stability by allowing the bargaining agent to continue representing the employees under the same collective agreement rights and provisions when a business or service is sold or transferred. However, in 2002, the BC Liberals enacted the Health and Social Delivery Improvement Act (Bill 29) which not only allowed for mass contracting out of public health care services to private, for-profit contractors, but directly prohibited successorship rights from applying to contracts with a health sector employer. In 2003, the BC Liberals then enacted the Health Sector Partnerships Agreement Act (Bill 94) which further excluded successorship rights from applying to private health care employers that sub-contracted out facility services or flipped the contract in its entirety.

As a result, over 8,000 workers lost their jobs. Despite many of them working in the same job for decades, they were required to reapply for the same job at a substantially lower wage rate. They lost their benefits and seniority rights and had to go through a probationary period. Others weren't rehired at all. In the private long term care sector, this has resulted in job insecurity, wage suppression, and a complete lack of continuity of care for the residence particularly in the instances where a single facility has cycled through several contractors in a short period.

Recommendations:

To restore balance in the Labour Code and provide the basis for a work environment conducive to safe and continuous care of seniors, patients and residents, the KDLC recommends that Section 35 be expanded to provide for successorship rights in contracts covering building maintenance, food, security, health and long term care sectors, repeal Section 6 of Bill 29, of the Health and Social Services Delivery Improvement Act, and repeal Sections 4 and 5 of Bill 94, the Health Sector Partnerships Agreement Act.

Construction Industry:

The LRC is largely structured around workers within fixed industries, locations with steady workflow. In reality, the construction industry cannot be defined as one of those industries. Worker and Employer mobility is frequent and circulates around one particular project or sub-contracting specialty. The industry has minimal barriers to employment, but also minimal levels of stability. Organizing in construction is difficult due to the short duration of work and concluding Collective Agreements succinct to the completion of a project is largely unaccomplished. Add to this, the high use of Employer dominated Unions and the underground economy, and one can see the lack of construction related provisions within the Code.

The last comprehensive review of the construction industry was in 1998 by Stephen Kelleher and Stan Lanyon. This report is largely accepted by the Building Trades Unions within BC. Regardless of the details the report, the BC Liberals repealed most of the legislation recommended in order to re-establish the flawed system prior to this report.

This has led the current system to become inflexible and has become largely unworkable for most Trade Unions.

Recommendation:

In conjunction with ongoing reviews of the Labour Relations Code, we would submit that the panel recommend an independent and comprehensive review of construction labour relations.

Conclusion:

In conclusion we call on the panel to simply look at the evidence that is presented here, and in the multitude of other submissions that are likely to be presented. It is clear that the decline in Union density in BC is having a detrimental impact on the working class of this Province. The BC Liberals' systematic attack on Unions was effective, but yet we continue to fight on and survive.

The current NDP Government is making real and substantive changes that will make life more affordable for British Columbians, but we would suggest that giving people fair access to Union representation is one of the easiest and most effective solutions in making people's lives better. Acquiring bargaining rights, the subsequent job security, fair wages and benefits, can all have a huge impact on people's well-being.

We commend again, the panel and the current Government's willingness to review the code, and hope that these recommendations will be instituted. We ask simply that the Code be adjusted in a manner to level the balance of power that is currently clearly weighted in favour of Employers. Labour Unions have the ability to fix the problem; we just need to the tools to get it done.

Resources:

Restoring Fairness and Balance in Labour Relations: The BC Liberals' Attacks on Unions and Workers 2001-2016. John MacTavish and Chris Buchanan

Looking to the Future: Taking Construction Labour Relations into the 21st Century
Stephen Kelleher and Stan Lanyon

Other:

On the ground stories, reports and experiences of local Union workers and representatives.

MIGRANT WORKERS ALLIANCE FOR CHANGE
&
CAREGIVERS ACTION CENTRE

STRONGER TOGETHER:

DELIVERING ON THE CONSTITUTIONALLY PROTECTED RIGHT TO UNIONIZE FOR MIGRANT WORKERS

Bill 148 SUBMISSIONS ON

BROADER BASED BARGAINING

21 JULY 2017

worker groups and supported by community, provincial and national organizations. Member organizations of MWAC work primarily with racialized and low-waged migrant workers doing organizing and advocacy work as well as providing legal, employment and health related services.

The Caregivers' Action Centre (CAC) is a grassroots organization based in Toronto, made up of current and former caregivers, newcomers and their supporters. Since 2007, CAC has been advocating and lobbying for fair employment, immigration status, and access to settlement services for caregivers through self-organizing, research, and education.

MWAC and CAC have filed separate submissions which address the broad range of reforms to the *Employment Standards Act* and *Labour Relations Act* that are proposed in Bill 148. These joint submissions focus exclusively on the right to unionize and the right broader based bargaining structures that would make migrant workers' rights to unionize and bargain collectively effective in practice. The focus of this submission is on migrant caregivers and farmworkers who at present are explicitly excluded from the right to unionize. However, the principles addressed here are relevant for other sectors in which migrant workers labour and in which broader based bargaining may be appropriate. For a profile of migrant workers in Ontario, see **Appendix A.**

Two distinct reforms are required at this time:

1. The exclusion of domestic workers, agricultural workers and horticultural workers from the *Labour Relations Act* must be repealed.

2. The *Labour Relations Act* must be reformed to enable broader based bargaining that is responsive to the sectors in which migrant workers are employed.

B. Context of Migrant Caregiving Labour

The persistent failure of federal and provincial governments to adopt policies that support accessible and affordable public childcare, elder care and care for persons with disabilities has created and sustained an enduring reality in which significant socially necessary caregiving labour is performed in private homes.

For decades, this work has been performed by an overwhelmingly female, racialized workforce that is poorly paid, highly precarious, and often faces exploitative working conditions that fail to accord with minimum employment standards. Government

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Clinic of Ontario , Students Against Migrant Exploitation, Social Planning Toronto, UFCS, UNIFOR, Workers Action Centre and Workers United.

choices have also driven the growth of precarious home-based caregiving labour. Austerity measures over the past two decades have driven active changes in care policy and public funding that have shifted significant caregiving labour from public healthcare facilities into the private home, swelling the numbers of workers in this precarious sector. At the same time that this precarious workforce has been growing, the Auditor General noted that the acuity of care has risen as these caregivers are increasingly serving "a patient population with much more chronic and complex health issues."[2]

Finally, expanded transnational labour migration policies[3] bring thousands of migrant caregivers into the province each year with precarious temporary immigration status, on work permits that tie them to specific employers. These migrant workers, almost exclusively racialized women from the global south, form a significant constituency of home-based caregivers and are the workers who face the most precarious and exploitative working conditions. For these workers, the baseline precariousness that confronts all workers in the sector is exacerbated by the precariousness that is constructed through the transnational recruitment process and rules of the Temporary Foreign Worker Program.[4]

Formal labour migration programs specifically designed to import trained caregivers to Canada with precarious temporary status have been in place for more than 60 years.[5] Prior to WWII, domestic workers from the United Kingdom provided much of this labour but, as British citizens, they arrived in Canada as citizens. Since WWII, however, Canada's migrant caregivers have been predominantly racialized women who labour under restrictive conditions with temporary migration status.

Migrant caregivers work in their employer's homes providing care for children, the elderly and people with disabilities. Migrant caregivers are overwhelmingly racialized women from the global south. Over 90% are from the Philippines alone.[6]

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[2] Office of the Auditor General of Ontario, Special Report on Community Care Access Centres – Financial Operations and Service Delivery (September 2015) at p. 14.

[3] While migrant caregivers have entered Canada under the Live-in Caregiver Program and its predecessors since the 1950s, in the past decade the scope of work that they perform has expanded from childcare to encompass care of the elderly and persons with disabilities in private homes. Further policy changes in 2014, under the reconfigured Caregiver Program, now also permit healthcare facilities outside the private home to hire migrant caregivers to provide care to persons with high medical needs.

[4] See Fay Faraday, *Made in Canada: How the Law Constructs Migrant Worker Insecurity* (Metcalf Foundation, 2012); Fay Faraday, *Profiting from the Precarious: How recruitment practices exploit migrant workers* (Metcalf Foundation, 2014); and Fay Faraday, *Canada's Choice: Entrenched exploitation or decent work for Canada's migrant workers* (Metcalf Foundation, 2016).

[5] See Faraday, *Made in Canada*; see also Audrey Macklin, "Foreign Domestic Worker: Surrogate Housewife or Mail Order Servant?" (1992), 37 McGill Law Journal 681

[6] Philip Kelly et al, *TIEDI Analytical Report 18: Profile of Live-in Caregiver Immigrants to Canada, 1993-2009* (Toronto, TIEDI, March 2011).

Nearly half of all migrant caregivers who come to Canada work in Ontario.[7] Most of these care workers have university degrees. Many are trained as nurses, midwives, other medical professionals and teachers. Yet despite their socially critical work, they are denied the right to unionize. They are typically paid at or near the minimum wage, and in practice many are paid even below the minimum wage.

Tied work permits restrict migrant caregivers to working for a single employer. Under predatory recruitment practices migrant caregivers are regularly charged thousands of dollars in illegal fees (typically up to two years' wages or more in their home currency) to secure the minimum wage jobs they do in Ontario. These practices create extremely exploitative work conditions in which migrant caregivers are often "released on arrival" and forced into undocumented status; work under conditions of debt bondage; are forced to work excess unpaid hours with little time off; are forced to perform duties outside their contracts; and/or are subject to sexual and racial harassment.[8] Demanding fair treatment and contract compliance typically results in termination. Yet despite the way in which current law predictable structures their work as highly precarious and exploitable, these migrant caregivers who are most in need of collective representation are denied the right to unionize.

Most caregivers working in private homes are not unionized because the work structure differs from the standard employment relationship for which our current labour relations laws were designed. While caregivers typically work one-on-one in private homes, bargaining units are workplace-specific and s. 9(1) of the *Labour Relations Act* prohibits single-member bargaining units. More fundamentally, s. 3(a) of the *Labour Relations Act, 1995* expressly states that "This Act does not apply to … a domestic employed in a private home."

The lack of unionization in the sector, therefore, does not reflect workers' active choice to remain non-union; it reflects under-inclusive laws that fail to account for the structures of female-dominated care work. In fact, for decades migrant caregivers have organized through social/community networks and have been demanding the right to unionize. In particular, since at least 1993, migrant caregivers in Ontario have been demanding law reform to grant them access to the right to unionize through broader based bargaining structures.[9] Their continued exclusion raises serious concerns in light of the *Charter*'s guarantees for freedom of association and equality.

It must also be emphasized that the ILO's Convention No. 189 and Recommendation 201 on the rights of domestic workers expressly state that

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[7] Figures from IRCC demonstrate that consistently 48-49% of migrant caregivers each year work in Ontario.

[8] See Faraday, *Profiting from the Precarious*.

[9] Ontario District Council of the ILGWU and Intercede, *Meeting the Needs to Vulnerable Workers: Proposals for Improved Employment Legislation and Access to Collective Bargaining for Domestic Workers and Industrial Homeworkers* (ILGWU/INTERCEDE, February 1993).

government must take positive steps to enact legislation and adopt policies to enable and facilitate caregivers' organizing and right to bargain collectively.[10]

C. The *Charter* protected right to unionize can no longer be denied

The Supreme Court of Canada has clearly ruled that the right to unionize, the right to bargain collectively and the right to strike are fundamental constitutionally protected rights. They are all guaranteed as core elements of freedom of association under the *Canadian Charter of Rights and Freedoms*. Collective bargaining is recognized as "the most significant collective activity through which freedom of association is expressed in the labour context."[11] The Court has recognized that "the right to strike is an essential part of a meaningful collective bargaining process"[12] and that where strike activity is limited, "it must be replaced by one of the meaningful dispute resolution mechanisms commonly used in labour relations."[13]

Critically, the SCC has recognized that the central purpose of freedom of association is to mitigate power imbalances in society. In particular, from the SCC's earliest s. 2(d) jurisprudence in 1987 it has recognized that

> "Freedom of association is most essential in those circumstances where the individual is liable to be prejudiced by the actions of some larger and more powerful entity, like the government or an employer. Association … has enabled those who would otherwise be vulnerable and ineffective to meet on more equal terms the power and strength of those with whom their interests interact and, perhaps, conflict."[14]

In its most recent trilogy in 2015, the SCC confirmed that rectifying power imbalances is a central purpose of granting constitutional protection for freedom of association:

> "… 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

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[10] ILO Convention 189: *Convention concerning decent work for domestic workers, 2011*, Article 3; ILO Recommendation 201: *Recommendation concerning decent work for domestic workers, 2011*, Article 2.
[11] *Health Services and Support - Facilities Subsector Bargaining Assn. v. British Columbia*, [2007] 2 SCR 391, 2007 SCC 27, at para. 66 ("*BC Health Services*")
[12] *Saskatchewan Federation of Labour v. Saskatchewan,* 2015 SCC 4 at para. 3
[13] *Saskatchewan Federation of Labour*, *supra* at para. 25
[14] *Reference re Public Service Employee Relations Act (Alta.),* [1987] 1 S.C.R. 313 per Dickson C.J.C. at pp. 365-366

> 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."[15]

Beyond this, the SCC has recognized that absent legislative support workers generally are unable to unionize.[16] As a result, the Court has ruled that government has a positive obligation to take active steps to ensure that those who are vulnerable in fact have legislative support for effective and meaningful exercise of their rights to unionize and bargain collectively.[17] Instead, Ontario has explicitly denied those rights. Ontario's law is out of synch with its constitutional obligations.

The Changing Workplaces Review recognized that the current law reform initiatives must take place with reference to these constitutional obligations and principles. The Special Advisors recognized both "the scope of the constitutional right of all employees in Ontario to freedom of association" and "a constitutional mandate to government to eliminate barriers to the exercise by employees of their constitutional rights".[18]

It is from this appropriately constitutionally informed perspective and with explicit recognition of domestic workers' and migrant farm workers' marginalization in the labour market that the Special Advisors recommended that domestic workers and agricultural workers must be included in the *Labour Relations Act*.[19]

D. Bill 148 continues to deny domestic workers' rights

By maintaining domestic workers' exclusion from the *Labour Relations Act*, Bill 148 perpetuates the infringement of their rights to unionize, bargain collective and access an effective dispute resolution mechanism to advance and protect their workplace rights.

As the Court recognized in *Dunmore*, the very fact the law excludes them has a chilling effect and operates at an ideological level to treat caregivers' organizing efforts as illegitimate. As the Court stated in 2001 with respect to the denial of farm workers' right to unionize,

> "By extending statutory protection to just about every class of worker in Ontario, the legislature has essentially discredited the organizing efforts of agricultural workers. This is especially true given the relative status of

[15] *Mounted Police Association of Ontario v. Canada (Attorney General)*, [2015] 1 SCR 3, 2015 SCC 1 at para. 70
[16] *Dunmore v. Ontario (Attorney General)*, [2001] 3 S.C.R. 1016 at para. 35-36
[17] *Dunmore, supra* at para. 20-22, 25-28, 40-48, 66-67; BC *Health Services*, *supra* at para. 34
[18] *Changing Workplaces Review Final Report* at p. 285 [emphasis added]
[19] *Changing Workplaces Review Final Report* at pp. 286-288

Migrant Workers Centre Submission to the Section 3 Panel Reviewing the British Columbia Labour Relations Code

March 2018

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On February 6, 2018, the Minister of Labour appointed a three-member panel as a Labour Relations Code Review Panel (the "**Panel**") under Section 3 of the *Labour Relations Code* (the "*Code*"), with a broad mandate to review the *Code*.

In response to the Panel's invitation for input from stakeholders, the Migrant Workers Centre ("**MWC**") makes the following submission.

Summary of Submission

The MWC proposes that additions be made to the *Code* a system of broader based collective bargaining that would provide meaningful access to collective bargaining for migrant caregivers in British Columbia. The proposed system of broader based bargaining is patterned on the system utilized the publicly funded health and community social services sector. Generally, this system involves statutorily defined bargaining units, multiple employers represented by a single employer association and association of unions that are governed by articles of association. A similar system should be implemented in the caregiving sector in order to facilitate access to meaningful collective bargaining for migrant caregivers.

About the Migrant Workers Centre[1]

1. MWC, formerly West Coast Domestic Workers Association, is a non-profit organization dedicated to legal advocacy for caregivers and other migrant workers in BC. Established in 1986, MWC facilitates access to justice for migrant workers through the provision of legal information, advice and representation. MWC also works to advance the labour and human rights of migrant workers through public legal education and training, law and policy reform work and test case litigation.

2. The majority of MWC's clients are caregivers working in BC under the Caregiver Program. MWC also serves migrant workers working under the low-wage stream of the Temporary Foreign Worker Program (TFWP) in jobs in the service, hospitality, agriculture, construction and manufacturing industries, as well as under the Seasonal Agricultural Workers Program (SAWP).

3. MWC regularly partners with community organizations to deliver public legal education workshops and mobile clinics to migrant workers in the TFWP, CP and SAWP in communities around the province with limited access to services. Through this work, MWC has identified numerous gaps in the statutory regulation of employment that negatively impact these often isolated and vulnerable workers.

[1] The description of the MWC is taken nearly in full from the MWC's March 2018 report titled "*Envisioning Justice for Migrant Workers: A Legal Needs Assessment*" which was authored by Alexandra Rogers. See page 1.

[2] In the first 3 quarters of 2017 (January 1, 2017 – September 30, 2017), for example, Employment and Social Development Canada approved 1,149 positions for home child care providers and 317 positions for home support

Profile of Caregivers in British Columbia

4. The Caregiver Program is part of the Federal Government's Temporary Foreign Worker Program (the "**TFWP**").[2] The TFWP permits Canadian employers to hire foreign nationals to perform work, including caregiving work, in Canada.

5. The Caregiver Program has two streams: (1) caregivers for children under 18 years of age; and (2) caregivers for people with high medical needs, including persons over age 65 or people with disabilities and chronic or terminal illness.[3] The work takes place in private residence and often includes housekeeping and cleaning work.

6. Caregiving work is valuable work and helps British Columbia thrive, as it is the work that makes other work possible. Paid domestic work benefits families, employers, and the economy as a whole. With Canada's aging population and increasing life expectancies, the need for domestic workers will continue to grow.

7. The Caregiver Program used to be called the "Live-In Caregiver Program". However, in November 2014, Citizenship and Immigration Canada (now "Immigration, Refugees and Citizenship Canada" or IRCC) eliminated the live-in requirement. Despite these changes, employers continue to impose live-in arrangements.

8. Ontario recently engaged in an expansive review of its *Employment Standards Act* and *Labour Relations Act* culminating in Bill 148 - *Fair Workplaces, Better Jobs Act, 2017*. The review entitled the "Changing Workplaces Review" was led by Special Advisors, C. Michael Mitchell and John C. Murray.[4] A number of submissions focussed on Bill 148 and the Changing Workplaces Review focused on the situation of caregivers in Ontario.[5]

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[2] In the first 3 quarters of 2017 (January 1, 2017 – September 30, 2017), for example, Employment and Social Development Canada approved 1,149 positions for home child care providers and 317 positions for home support workers in British Columbia under the Temporary Foreign Worker Program. See Employment and Social Development Canada, *Temporary Foreign Worker Program 2017 Q3* at <http://open.canada.ca/data/en/dataset/e8745429-21e7-4a73-b3f5-90a779b78d1e?_ga=2.24247994.1239877317.1512578766-536812370.1481074597>

[3] IRCC: https://www.canada.ca/en/employment-social-development/services/foreign-workers/caregiver.html

[4] C. Michael Mitchell and John C. Murray, *The Changing Workplaces Review – Final Report* (May 2017 (the "**Ontario Review**"). See pages 286-288 for the Special Advisors' review of the situation of domestic workers employed in the home. < https://files.ontario.ca/books/mol_changing_workplace_report_eng_2_0.pdf>

[5] See for example: (1) Caregivers' Action Centre, *Submission by the Caregivers' Action Centre: Ontario's Changing Workplaces Review Consultation Process* (September 18, 2015) and (2) Workers' Action Centre and Parkdale Community Legal Services, *Phase 1 Review of ESA and LRA Exemptions* (December 7, 2017).

9. The comments of the Migrant Worker Alliance for Change and the Caregivers' Action Centre describing the context of migrant caregiving labour are relevant to this Panel's deliberations because they are equally applicable to migrant caregiving in British Columbia.[6] Please see Appendix "A" to this Submission for an excerpt of these comments.

10. As is the case in Ontario, migrant caregivers in British Columbia are women of colour from developing nations. They face marginalization and vulnerability as workers because of multiple employment and social insecurities: the temporary nature of their immigration status, work visas that are tied to a single employer, low-wage precarious jobs, language barriers, geographic isolation, family separation, and a lack of familiarity with their rights and obligations under Canadian law. As a result, they are particularly vulnerable to labour exploitation and discrimination based on gender, class, race, and nationality.

The Importance of Access to Collective Bargaining

11. Access to collective bargaining remains a fundamental purpose of the *Code*: section 2(c) of the *Code*. The BC Labour Relations Board's leading decision on certification sets this out when it describes the history and purpose of certification:

> Simply put, an employee, in the absence of a collective agreement, has no vested rights. The ability of an employee to not simply accept what is offered but to be able to bargain what he or she considers to be desirable in order to provide protection from material and legal insecurity, directly results in that employee having greater rights, voice and dignity (see Paul Weiler in Reconcilable Differences, (Toronto: Carswell Company Limited, 1980, pp. 15-33).
>
> Finally, a collective bargaining relationship that achieves a greater balancing of the power between employers and employees, that vests employment rights in employees, that allows decisions to be challenged and disagreements to be [7]settled by neutral arbitrators, without economic disruptions, establishes the rule of law in employer-employee relationships.
>
> This, as Weiler notes, is "...intrinsically valuable as an exercise in self-government" (p. 33).[8]

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[6] Migrant Worker Alliance for Change and the Caregivers' Action Centre, *Stronger Together: Delivering on the Constitutionally Protected Right to Unionize for Migrant Workers, Bill 148 Submissions on Broader Based Bargaining* (July 21, 2017) <http://www.migrantworkersalliance.org/wp-content/uploads/2017/07/MWAC-and-CAC-Bill-148-Broader-Based-Bargaining-Submissions-21-July-2017.pdf> (the "**MWAC/CAC Submission**)

[7] *Mounted Police Association of Ontario v. Canada (Attorney General)*, 2015 SCC 1 at para. 58.

[8] *Island Medical Laboratories*, BCLRB No. B308/93 (Leave for Reconsideration of IRC No. C217/92 and BCLRB No. B49/93) ("***IML***")at p. 8-10.

12. Since the Board's decision in *IML*, the Supreme Court of Canada issued a new labour trilogy constitutionalizing the right to join a union, the right to collective bargaining and the right to strike under section 2(d) of the *Canadian Charter of Rights and Freedoms*. The decisions underpinning the new labour trilogy all speak to the importance of meaningful access to collective bargaining as an exercise of the fundamental freedom of association.

13. The freedom of association is the means by which vulnerable workers are able to band together in order to ameliorate their working lives:

> 58 This then is a fundamental purpose of s. 2(d) - to protect the individual from "state-enforced isolation in the pursuit of his or her ends": *Alberta Reference*, at p. 365. The guarantee functions to protect individuals against more powerful entities. By banding together in the pursuit of common goals, individuals are able to prevent more powerful entities from thwarting their legitimate goals and desires. In this way, the guarantee of freedom of association empowers vulnerable groups and helps them work to right imbalances in society. It protects marginalized groups and makes possible a more equal society.

14. The Migrant Worker Alliance for Change and the Caregivers' Action Centre provide a thorough summary of the *Charter* jurisprudence which supports access to meaningful collective bargaining for migrant caregivers.[9] Please see the excerpt at Appendix A to this Submission.

15. In addition to the Board and the Supreme Court of Canada, Article 3 of the International Labour Organization's Convention 189 on the rights of domestic workers expressly makes it an obligation of signatories to respect, promote and realize the fundamental principle and right at work to "freedom of association and the **effective recognition** of the right to collective bargaining." Although Canada has not ratified Convention 189, a number of top source countries for the Caregiver Program, including the Philippines, are signatories.[10]

The *Code* Does Not Provide Meaningful Access to Collective Bargaining for Caregivers

16. The *Code*, as it is currently structured, does not provide meaningful access to migrant caregivers. The *Code*'s Wagnar Act structure is designed to facilitate unionization and collective bargaining at single large worksites, like the large industrial factories that were prominent in the first half of the 20th century.

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[9] *Supra*, Note 5 at p. 7-8.

[10] http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO:11300:P11300_INSTRUMENT_ID:2551460:NO

17. The *Code* has not been designed or adjusted to account for the growth of smaller employers and worksites. The Special Advisors in the Ontario Review framed the problem as follows:

> We have pointed out, above, and in our Interim Report, that the current *Wagner Act* single employer and single enterprise model of certification does not provide for effective access to collective bargaining for a large number of employees of small employers and employers with multiple locations. Organizing and bargaining individual contracts in thousands of small locations is inefficient, expensive and impractical. The single employer recommendations, above, address the single and multiple location issues of larger employers, but not the issue of many individual small employers, thus leaving a significant vacuum in many areas where collective bargaining is unlikely to take root. In Ontario, the union coverage rate in the private sector is below 7% in workplaces with fewer than 20 employees. Like the majority of Special Advisors in British Columbia, we share the concern about the nature of the problem but, unlike them, we have concluded that providing a multi-employer bargaining framework is not practical at this time.[11]

18. Of course, the inability of the *Code* to provide meaningful access to collective bargaining for employees at small workplaces extends to migrant caregivers. Indeed, the primary reason why the *Code* does not provide meaningful access to collective bargaining for migrant caregivers is the fact that these workers often are the only employee of their employer. Couple that with the fact that the worksite is the private residence of the employer. These conditions simply do not make it viable for unions to organize these workers into bargaining units as currently envisioned and required under the statutory framework of the *Code*.

19. The specific problems associated with providing collective bargaining to migrant caregivers were identified not long after the release of the Baigent, Ready, Roper 1992 Report.[12] The seminal analysis on broader based bargaining for migrant caregivers remains the report released by Intercede and the Ontario District Council of the International Ladies' Garment Workers' Union (the "**Intercede Report**").[13] The Intercede Report identifies three key features of migrant caregiving work that puts meaningful collective bargaining out of reach for migrant caregivers:

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[11] *Supra*, Note 3 at p. 352.

[12] Baigent, Ready and Roper, *A Report to the Honourable Moe Sihota, Minister of Labour: Recommendations for Labour Law Reform* (September 1992).

[13] Intercede and the Ontario District Council of the International Ladies' Garment Workers' Union, *Meeting the Needs of Vulnerable Workers: Proposals for Improved Employment Legislation and Access to Collective Bargaining for Domestic Workers and Industrial Homeworkers* (February 1993) <http://equalpaycoalition.org/wp-content/uploads/2016/01/Meeting-the-Needs-of-Vulnerable-Workers-1993-Intercede-and-ILGWU-1993-Report-C1497550xA0E3A.pdf>

a. Exclusion from the Ontario Act and the Ontario Act's requirement for at least two persons in a bargaining unit. This is not a concern in BC. Caregivers as a class of workers are not excluded from the *Code*. Furthermore, the Board has confirmed that the *"Code* contemplates the possibility of certifying a bargaining unit of one person."[14]

b. The inherent vulnerabilities associated with being a migrant caregiver (eg. sole employee at the worksite, worksite as residence, cultural and linguistic barriers, precarious immigration status, etc.) exacerbate the inequality of bargaining power that is inherent in any employment relationship. This makes collective bargaining at a single worksite completely impractical.

c. Trade unions, for the most part, do not have the resources to negotiate and administer multiple collective agreements at single-employee worksites. That is simply not feasible.[15]

20. Aside from the first concern, the concerns cited with respect to access to collective bargaining in the Intercede Report remain relevant today in the British Columbia context.

Broader Based Bargaining is Needed

21. Although the Special Advisors in the Ontario Review rejected broader based bargaining on the basis that Ontario simply did not have experience with these type of bargaining structures, the same cannot be said for British Columbia.

22. One of the primary reasons for extending broader based bargaining to other sectors of the economy, including the caregiving sector, is the fact that we have experience with broader based bargaining in health care and community social services in British Columbia.

23. The MWC advocates for adding provisions to the *Code* which would create broader based bargaining for migrant caregivers in a system that is patterned on the *Health Authorities Act* (the "***HAA***") and the *Community Social Services Labour Relations Act* (the "***CSSLRA***").

Health Sector and Community Social Services Sector

24. Broader based bargaining is not new in British Columbia. Broader based bargaining is used in the publicly funded health sector and community social services sector. The *Code* does not specifically provide for broader based bargaining in these sectors. Instead, specialized

[14] *Fleetwood Sausage,* BCLRB Decision No. B364/2000 (upheld on reconsideration in BCLRB Decision No. B104/2001) at para. 104.

[15] *Supra*, Note 11 at p. 26.

sectoral labour relations legislation (ie. the *HAA* and the *CSSLRA*) created the broader based bargaining systems in these sectors that have been in place for approximately two decades.

25. Part 3 of the *HAA* sets out a system for health sector labour relations that was first conceived by Arbitrator James Dorsey, QC as part of his recommendations to government in 1995.

26. Section 19.4 of the *HAA* sets out five appropriate multi-employer bargaining units in the health sector (residents, nurses, paramedical professionals, facilities subsector and community subsector).

27. Section 19.4(3) of the *HAA* requires that all unionized employees in the health sector. The "health sector" is defined as all employers who are members of the Health Employers Association of BC ("**HEABC**"). Generally, this includes employers who receive public funding to provide health in BC.

28. Additionally, unions representing unionized health sector employees under the *HAA* must be members of bargaining associations (eg. the Community Bargaining Association): section 19.9. These bargaining associations are governed by articles of association which set out rules for negotiating and administering the sectoral collective agreement for each of the five statutory bargaining units.

29. Vice-Chair Saunders (as he then was) provides the following description of the multi-employer health sector labour relations:

> **22** I begin by briefly elaborating on the two tier representational model established under Part 3 of the Act. Bargaining unit structure and union representation in the health sector is more complicated than in the usual private sector context. The "first tier" of health sector representation is relatively simple; the "second tier" is less so.
>
> **23** With respect to the first tier, which concerns collective agreement negotiation, there are five statutorily mandated bargaining units. Each of those units has its own statutorily mandated bargaining association. Each of those bargaining associations negotiates a collective agreement with HEABC and each of those collective agreements covers all of the employees in that first tier bargaining unit. Thus, for example, the Facilities Bargaining Association negotiates the Facilities Collective Agreement which covers employees of PHC in the facilities subsector bargaining unit ("FBU").
>
> **24** With respect to the second tier, which concerns collective agreement administration, multiple unions belong to each of the bargaining associations. Those member unions are certified to represent employees within a second tier unit. Pursuant to that certification entry, the union administers the

collective agreement on a day-to-day basis with the "collective agreement employer": *Interior Health Authority, et al.,* BCLRB No. B97/2012, at para. 45. IUOE's second tier unit includes employees at two of PHC's worksites as noted above.[16]

30. A similar scheme was implemented in the community social services sector in 2003. Following the recommendations of public administrator, Peter Cameron, the government of the day enacted the *CSSLRA*. The effect of the *CSSLRA* was to consolidate a number of individual bargaining units held by a number of bargaining agents into three bargaining units. A system similar to the *HAA* was implemented involving a multi-employer agent and union bargaining associations.

31. Section 2 of the *CSSLRA* makes the Community Social Services Employers' Association ("**CSSEA**") the bargaining agent for all community social services providers who are members of CSSEA and who have unionized employees. Membership in CSSEA is tied to a number of criteria, including the percentage of funding received by the social services agency in question.

32. Section 4 of the *CSSLRA* requires the formation of a bargaining association (eg. the Community Social Services Bargaining Association or CSSBA) composed of unions representing employees in one or more of the three statutory bargaining units under section 3 of the *CSSLRA* (eg. Community Living Services, Aboriginal Services and General Services).

33. The CSSBA negotiates a single collective agreement with CSSEA for each of the three statutorily mandated bargaining units. It also plays a role in collective agreement administration on major issues impacting the entire bargaining unit. The conduct of the CSSBA with respect to negotiating and administering sectoral collective agreements is governed by articles of association.[17]

Past Proposals for Broader Based Bargaining for Migrant Caregivers

34. The Baigent, Ready and Roper Report, the MWAC/CAC Submission and the Intercede Report and Quebec's 2009 *Home Childcare Providers Act* ("***HCPA***") also provide fruitful guidance on tailoring a broader based bargaining system for migrant caregivers.

35. Osgoode Hall Professor Sara Slinn reviewed these broader based bargaining models in her report for the Ontario Review.[18]

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[16] *Providence Health Care Society (Mount Saint Joseph Hospital)*, BCLRB No. B31/2014

[17] *Centaine Support Services Inc.*, BCLRB No. B118/2008 at para. 24.

[18] Sara Slinn, *Changing Workplaces Review Research Projects: Collective Bargaining* (November 30, 2015) <http://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=1177&context=reports>

36. Professor Slinn described the Baigent-Ready Model as follows:

> The Baigent-Ready model is based on "sectors", which are defined geographic areas, such as a neighbourhood, city, metropolitan area or province, containing similar enterprises with employees performing similar work. An example of such a sector would be "employees working in fast food outlets in Burnaby" (Government of British Columbia, 1992, pp. 31). This model would apply only to sectors the labour board declares to be "historically underrepresented by trade unions", and when the average number of full-time employees, or the equivalent number of part-time employees, at all work locations within the sector is less than 50. Therefore, the model targets small workplaces with low rates of unionization.
>
> Initial sectorial certification would operate as follows. If a union had support from at least 45% of employees at each work location within an eligible sector, the union could apply for certification of that multi-workplace bargaining unit. If the board declares the sector historically underrepresented, is satisfied that requisite support exists, and that the unit is appropriate for collective bargaining, then it would order a representation vote of all employees in the unit…The Baigent-Ready model contemplates that multiple unions may be certified within a single sector, each union administering its own collective agreement. The majority of the sub-committee explained: "This feature has several advantages. It ensures that unions who are certified within a sector are not granted a monopoly on representation rights while offering employees within a sector the option of choosing from more than one union" (Government of British Columbia, 1992, p. 31).

37. Professor Slinn's summary of the HCPA is also worth reproducing:

> The HCPA established a new sector-based collective bargaining regime for home childcare workers in the province. Associations are certified, based on majority support, as exclusive bargaining agents for home childcare workers (who are deemed to be "own-account self-employed" workers) in a given territory who are affiliated with the same home childcare coordinating office. Certified associations' rights and obligations include defending and promoting "the economic, social, moral and professional interests of home childcare providers" and bargaining a "group agreement" under the HCPA, and they may bargain in groups of associations.

> Negotiations take place between the Minister Responsible for Childcare Services and associations, and may be initiated by either side…[19]

38. The MWAC/CAC Submission proposes the following three elements for broader based bargaining for caregivers:

> The necessary elements of a broader based bargaining system would include:
>
> i. designation of the regions for bargaining (whether it is on a provincial basis or designated regions with the province);
> ii. designation of an employer bargaining agent; and
> iii. recognition of workers' bargaining agents, including the ability of migrant workers' unions to operate union hiring halls.[20]

39. The Intercede Report proposed the following structure for broader based bargaining for domestic workers:

> 1. For the purposes of certification, domestic workers would be organized into two separate sectors, live-in and live-out workers.
>
> 2. Domestic workers would be then classified on the basis of geographic or regional designation (ie. the Greater London area or some other region that makes sense).
>
> 3. The certification process would be initiated by the signing of a majority of domestic workers registered in a specific geographical region.
>
> 4. Once a preponderance of a regions have been certified, a conference would be called by the Ministry of Labour between the employers and union representatives regarding extension of the collective agreement to all domestic workers.
>
> 5. Collective agreements would be enforced through monthly reports submitted by the employer, the Union's inspection of the employer's records, and collective agreement negotiations.[21]

MWC Proposal for Broader Based Bargaining

40. The sectoral bargaining structures in the health sector and community social services sectors in this province provide a strong basis on which to extend broader based bargaining

[19] *Ibid*, at p. 82
[20] *Supra*, Note 5 at p. 11.

[21] *Supra*, Note 12 at 78-79.

in other sectors, including the private caregiving sector. This is particularly so given the underlying similarities between health, social services and caregiving work.

41. Additionally, the Baigent-Ready Model, the MWAC/CAC Submission, the Intercede Report and Quebec's *HCPA* provide fruitful guidance on tailoring a broader based bargaining system for migrant caregivers.

42. Based on the foregoing, I provide the following recommendation for adding provisions in the *Code* to facilitate broader based bargaining for migrant caregivers:

    a. Multi-employer and multi-union bargaining associations should be statutorily created for the private caregiving sector. Those associations should be similar in structure to HEABC and CSSEA (on the employer side) and the various bargaining associations (on the union side).

    b. Statutory bargaining units defined by geographic regions should be created. For example, a sample bargaining unit could consist of all caregivers working in private residences in Burnaby, BC.

    c. Certification would have two phases:

        i. The first phase is at the level of an individual employer and worksite. An individual union (eg. the BCGEU, HEU, CUPE, USW, UFCW etc.) would apply for certification.

        ii. The second phase is at the sectoral level. This involves all worksites in the broader geographic region defining the bargaining unit. Before sectoral bargaining structures via the employer and union associations are implemented, the unions having certified the individual worksites would have to show that a majority of the caregivers within the geographically defined bargaining unit support unionization.

    d. Once two-phase certification is achieved, the "first tier and second tier" labour relations scheme utilized in health care would apply. At the first tier, the employer and union bargaining associations would negotiate a single sector-wide collective agreement which would apply all employers with employees in the broader geographically defined bargaining unit. At the second tier, the individual unions in the bargaining association would then be responsible for day to day administration of the collective at the individual worksites wherein they have certified as bargaining agent.

    e. Collective bargaining and collective agreement administration by constituent unions in the bargaining associations would be defined by articles of association.

43. The advantages of this proposed system is that it is largely based on a model that has already been implemented in British Columbia for decades.

44. Additionally, employers of caregivers are already required to participate in uniform legal processes as part of being legally eligible to hire and employ migrant caregivers. For example, all migrant caregiver employers have to apply for a Labour Market Impact Assessment from Employment and Social Development Canada prior to being eligible to apply for a work permit for a migrant caregiver. Additionally, employers of caregivers are required under section 15 of the British Columbia *Employment Standards Act* to register live-in domestic workers with the Employment Standards Branch (the "**ESA Registry**").[22]

45. The additional step of registering with an employer association is comparable to the LMIA and ESA registration process. Moreover, it is a paltry requirement when compared to the principle of affording collective bargaining to a vulnerable group of workers.

46. Additionally, the ESA Registry provides a ready-built employee list for the Board to assess whether there is sufficient support within the entirety of the statutorily created and geographically defined bargaining unit described above to warrant certification on a sector-wide basis.

Conclusion

There is a need to address the vulnerabilities in the working lives of migrant caregivers. Access to meaningful collective bargaining is a means to address these vulnerabilities. Unfortunately, the current system Wagner Act model under the *Code* does not provide meaningful access to collective bargaining for migrant caregivers.

In these submission, the MWC has proposed additions to the *Code* which could provide meaningful access to collective bargaining for migrant caregivers. The MWC proposal does not re-invent the wheel. Instead, it makes use of existing legal mechanisms (eg. the *HAA*, the *CSSLRA*, the LMIA and the ESA Registry) to facilitate broader based bargaining for migrant caregivers.

Migrant Workers Centre
Per:

Rene-John Nicolas
Board of Directors

[22] https://www2.gov.bc.ca/gov/content/employment-business/employment-standards-advice/employment-standards/specific-industries/information-for-domestic-workers-and-their-employers

2018

B.C. Labour Code Review Submission

DAVID BLACK, PRESIDENT, MOVEUP

SUBMITTED: MARCH 19, 2018

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USW 2009

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Summary

MoveUP (the Movement of United Professionals) is asking the B.C. provincial government to restore balance to the B.C. Labour Relations Code. Over the last decade and a half, the Labour Code, and with it labour relations, has become unbalanced and increasingly favours employers over employees.

We at MoveUP believe that this balance is an important part of the fabric of a civil society that builds trust and gives all members a sense of fairness within society and within government regulations. A balanced labour code can provide social license and fosters greater social cohesion between employees and employers but also the general public. It is to that end that we provide some feedback on the existing process and subsequently provide key recommendations to re-balance the B.C. Labour Relations Code (Code).

Summary of Recommendations

Rebalance Labour Code

1. To amend section 2b of the Code to restore balance by ensuring the governing principle is about fostering balanced labour relations and not using labour relations to economically support business.
2. To ensure a viable process in section 3
    a. for an ongoing review of the Code not just every 15 years.
    b. The representation on the committee be balanced to include all key stakeholders
3. Support the work of the Labour Relations Board by encouraging government to properly fund the board so that critical services like certification votes are not delayed, or conducted by mail, simply because of a lack of resources.
4. Ensure effective and timely decisions by extending the timelines for decisions provided by vice-chairs to those given by arbitrators. s. 91, s. 128, s. 159.1.

Unfair Labour Practices

5. Avoid infringement of workers' Charter right of association by increasing the use of remedial certification in cases of unfair labour practices. s. 14.

Acquisition of Bargaining Rights

6. Repeal of the Employer Speech provisions during organizing drives, because they infringe workers' Charter rights to choose to join a union. s. 8.
7. Clarify when open (raiding) periods fall by setting them in a regular period in the calendar year, rather than the anniversary of the collective agreement - which is often unknown to interested parties. s. 19.
8. Restore a system of union certification on the basis of membership cards alone. s. 24.
9. Establish faster timelines to ensure labour peace by causing more expeditious voting. If certification votes are necessary, the application threshold shall be in line with those in other Canadian provinces. The timeline for a vote on any issue shall be not more than two working days. s. 24.

a. Improve and modernize the card signing process to ensure secure but efficient use of systems—such as electronic card signing—is possible to more adequately match the current ways that most members of society function.

10. Upon the completion of a certification
    a. increase the time period for completion of a first contract to more than 4 months
    b. if there is violation of the Code and regulations during that period to ensure enforcement and allow for immediate forced mediation of a first contract.

Successorship Rights

11. Broaden Section 35 to strengthen successorship rights to prevent subverting collective agreement obligations through contract flipping; and Repeal s. 6 of Bill 29-*Health and Social Services Delivery Improvement Act, 2002* and s. 4 and 5 of Bill 94- *Health Sector Partnerships Agreement Act, 2003.*

Replacement Workers

12. Protecting workers' Charter-protected collective bargaining rights, including the right to withdraw their labour by re-committing to British Columbia's laudable ban on replacement workers. s. 67.

Essential Services

13. Restore Charter-protected collective bargaining rights to teachers by removing education as an essential service. s. 72.

Variations of Certifications

14. Correct issues with partial decertification applications by extending the rules and timelines for full certifications to this type of application s. 142.

Returning to Balance

MoveUP is calling for a number of changes to the B.C. Labour Relations Code which will restore balance to labour relations in B.C. and help foster a stronger civil society where all members are treated equally under the law. These include:

a) meaningful remedies for unfair labour practice;
b) improvements to the regulation of workers' right to choose to join a union (including the repeal of employer speech provisions and automatic certification);
c) faster timelines when a vote must be conducted by the Board;
d) stronger successorship language to prevent contract flipping being used to reduce union representation and to drive down wages in some of British Columbia's key sectors;
e) a continued ban on replacement workers during labour disputes;
f) meaningful bargaining rights for teachers; and
g) fairness during partial decertifications.

The success of these changes relies on sufficient funding for the labour relations system which is regulated by the Code, so that workers can be confident that their Charter rights will not be infringed through deliberate underfunding.

Background

In 2015, the Supreme Court of Canada released a landmark trilogy of cases which clarified the character and scope of a number of important union rights (*Saskatchewan Federation of Labour v. Saskatchewan, Mounted Police Association of Ontario v. Canada, and Meredith v. Canada*) (known as "The New Labour Trinity"). These cases together extend *Canadian Charter of Rights and Freedoms* protection to common labour activities such as the right to choose a union, the right to bargain collectively, and the right to strike.

In British Columbia, these rights are regulated by the *B.C. Labour Relations Code* ("the Code"), which is administered largely by the Labour Relations Board. One of the chief purposes of the Code in our view, and of the board's role in overseeing union-employer relations in British Columbia, is to ensure labour peace in the province. This peace is the result of an historic compromise whereby union workers and employers in the province agreed to be ruled by the board in exchange for union recognition, stability for viable businesses, and the timely resolution of disputes.

For the last 16 years however, the B.C. Liberal government has employed a number of tactics to disrupt the fine balance upon which the compromise, and labour peace in the province, are predicated. A series of legislative changes shifted the playing field in favour of employers and business interests, resulting in hardship and instability for workers in a number of sectors. The Code was not reviewed to recognize workers' distinct Charter rights during that time, even while aspects of Bills 27, 28 and 29 restricting union rights were struck down by the Supreme Court of Canada.

The disparity between top and bottom income earners has been growing in recent decades. This disparity has a deleterious effect on the economy, and society. Organizations like the OECD[1], the World Bank and the IMF[2] have recognized that this is a serious and growing problem that needs to be addressed. They have identified declining rates of unionization as a

[1] 2012, OECD, "Reducing Income Inequality While Boosting Economic Growth: Can It Be Done?," https://www.oecd.org/eco/growth/49421421.pdf
[2] 2015, International Monetary Fund, "Power From the People," http://www.imf.org/external/pubs/ft/fandd/2015/03/jaumotte.htm

factor in this growing discrepancy in incomes, and have noted that increasing rates of unionization is one possible means to reverse this growing[3] gap[4].

Any changes to the Code must be made in a fashion that is mindful both of the nature of the historic compromise embodied by the Code and the labour relations regime it creates; and of the newly-recognized Charter rights of working people to choose a union, to bargain collectively, and if bargaining fails, to strike.

Key Recommendations

Rebalance Labour Code

1. **Restore balance to governing principles**
   The B.C. Labour Code in 2002 included a dramatic shift in the governing principles in section 2b that shifted the Code from a focus on labour relations to a Code that was now devised to support the economic viability of a business. It is not the purpose of regulation to prop up businesses, but rather to provide a stable, fair and consistent focus on balanced labour relations. As such *we recommend taking out section 2b of the Code* "(b) fosters the employment of workers in economically viable businesses." This amendment will start to create that balance at the core of the Code.

2. **Ensure a viable and balanced future process**
   a. **Ongoing review of Labour Code (s. 3)**
      For the last 15 years, the B.C. government has not had the benefit of an ongoing review of the labour Code that seeks to find balance and improvements to the Code. We are pleased that the B.C. government has begun this process to review the Code and we recommend that this not simply be a once-in-15-years-experience, but an ongoing process that engages all the stakeholders. B.C. Liberal changes to the Code tilted the playing field away from one where working people could choose to join a union, to bargain and to exert their combined economic power, without undue employer interference. Given the recently clarified Charter character of these rights, these kinds of changes cannot be made based on political whim. We would feel most comfortable that an expert panel continue to evaluate the Code and the regime it creates and *we recommend the Section 3 Review Committee continue to be tasked with the work of labour relations improvement on an ongoing basis*.

   b. **Finding ongoing balance (s. 3)**
      Once again for the last 15 years, the B.C. government has not provided balance in the review of the labour code. Labour relations in B.C. function well when all key stakeholders that directly work with the Code and the system are involved. This

[3] 2016, Alana Semuels, "Fewer Unions, Lower Pay for Everybody", The Atlantic, https://www.theatlantic.com/business/archive/2016/08/union-inequality-wages/497954/

[4] 2017, Vaughan-Whitehead, Daniel, United Nations International Labour Organization, "Inequalities and the World of Work: What role for industrial relations and social dialogue?." http://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---travail/documents/meetingdocument/wcms_544236.pdf

includes: Employers/Employer Associations, Unions/Employees, Government, and Arbitrators. *We recommend that future processes include and balance representation from all key stakeholders so that they may work together to review and build a better system.*

3. **Proper funding**

The success of a system and organization relies on good and balanced structures, policies and systems, but they also rely on proper funding to do the work needed--in this case to provide a functional and balanced labour relations system in B.C. Sadly, sixteen years of underfunding have reduced the capacity of the board to deliver the certainty upon which the parties are entitled to rely, and upon which British Columbia's labour peace rests. This raises a significant access to justice issue.

In our experience, the Charter rights of B.C. workers to choose a union has been impaired by chronic underfunding of the Labour Relations Board, and for Industrial Relations Officers charged with conducting certification votes. We hear reports of mail-in ballots being used instead of in-person votes, purely for budgetary reasons, or due to understaffing. As then-Chair Mullin wisely stated in Norbord, "An expeditious vote in a certification application helps to ensure employees are able to express their wishes freely. It is generally accepted that delay between the date of application and the date of a vote can impede the ability of employees to exercise their fundamental right to choose. Similarly, worksite disruption, tension, and the potential for unlawful interference can be prolonged by several weeks or more where a ballot is conducted by mail" (at para 27). Adequate funding is essential to protecting workers' Charter right to organize. *We recommend a review of funding to ensure that it allows for a fair and balanced process and decisions.*

4. **General - Timely decisions (ss. 91, 128, 159.1)**

One factor that also skews the potential of bias to one side or the other is the lack of timely decisions. Our experience has been unacceptable delays when awaiting arbitrators' decisions on often critical workplace matters. An arbitrator's decision can have significant impact on a worker's situation, and the absence of timelines for arbitrators leads to an access-to-justice concern. *We recommend applying the timelines set out in the Code for decisions from vice-chairs to apply equally to decisions given by arbitrators*.

Unfair Labour Practices

5. **Unfair Labour Practices and Remedial Certification (s. 14)**

When employees are affected by an unfair labour practice, a vote would be unlikely to disclose their true wishes. Unfair labour practices, and the conditions leading to them, have a chilling effect on workers in the context of their choice to join a union. Given that the right to choose a union is a Charter-protected right to associate, we submit that remedial certification is the most meaningful way to make these workers whole in the face of unfair labour practice whereby the employer seeks to interfere. *We recommend that the board be able to offer a meaningful remedy to workers seeking to join a union when employers unduly interfere with their choice*.

Acquisition of Bargaining Rights

6. Employer speech (s. 8).

One of the more egregious B.C. Liberal changes to B.C.'s labour regime was to grant employers the unfettered ability to dissuade workers from improving their wages and working conditions by joining a union. This advantage was extended to employers, but not to unions. The changes in Section 8 gave government sanction to the employer's right to infringe a worker's Charter right to associate through captive audience meetings, and constant anti-union messaging in the workplace. The same sanction to these tactics was not extended to unions. The concept of employer speech is incompatible with the principles articulated in the recent Supreme Court decisions. The only way to safeguard the rights of union workers to choose to organize, and to choose between unions is to repeal Section 8 of the Code. *We recommend the repeal of Section 8 of the Code.*

7. Open (raiding) period (s. 19).

The right to choose to join a union, or to choose between unions, is a Charter right belonging to workers. Members of certain organizations may not agree that their bargaining agent is sufficiently free from the influence of an employer. They may feel that they are represented by bargaining agents which lack sufficient democratic traditions, or which are of an unduly sectarian character. Workers in this situation may not be able to ascertain when the anniversary of the collective agreement falls in the calendar year because of a lack of transparency from their bargaining agent. This impairs their ability to choose another union under Section 19 of the Code which states that this period of choice (the "open period"') shall fall in the 7th and 8th months of the collective agreement. *We recommend that the open period set out in Section 19 be reset to a regular place in the calendar year to give working people some certainty of when the open period will fall.*

8. Membership cards (s. 24)

One key element in creating a balanced labour code is to ensure the systems we have do not unfairly ask workers to jump through extra hoops and thus create barriers for fair participation. Sadly, the B.C. Liberal government altered the Code to require working people to jump through extra hoops to join a union. In fact, changes to the Code by the previous government meant that workers have to choose to join a union twice. The first time they choose by signing a membership card with a certified bargaining agent. They are forced to choose a second time by forced by a mandatory certification votes held some time later.

This change represented a departure from the Canadian tradition and imported a process more familiar to American labour relations. As a result, the rate of unfair labour practices increased dramatically, and the rate of certification fell by approximately 50%[5]. In our experience, the requirement for a certification to confirm a worker's choice to join a union--essentially a second vote--granted employers a de facto campaign period to oppose unionization. A 1992 report of special advisers to B.C.'s—then labour minister—noted with disapproval that "secret ballot votes and their concomitant representation campaigns invite

[5] 1992 Code review report, p 6 "Since the introduction of secret ballot votes in 1984, the rate of employer unfair labour practices has increased by more than 100%" (1992 report p 26).

an unacceptable level of unlawful employer interference in the certification system"[6]. This, coupled with the employer speech provisions discussed earlier, led to an astronomical increase in unfair labour practices associated with union organizing drives. Workers seeking to join a union were unclear about what signing a union card actually meant. The rate of unionization in British Columbia plummeted. We submit that the right to associate belongs to the worker; and employers ought not be given a special opportunity to infringe upon this Charter right. Further, the choice of a union is the result of a dialogue between workers and a trade union, and ought not be unduly fettered by the requirement that workers confirm their initial decision to sign a membership card by also participating in a certification vote. *We recommend to the committee that we restore a system of union certification based on membership cards alone.*

9. Threshold for certification and faster vote (s. 24)

Obviously, there are very specific occasions that will require a vote of workers in order to confirm a certification. This will arise when the number of memberships fails to surpass an application threshold. The general average in common law jurisdictions is 50%+1, even in those jurisdictions that have automatic certification. *We recommend 50%+1 as an appropriate threshold for automatic certification.* In the case when this threshold is not met, we recommend a reduction in the prescribed time to conduct a vote from within ten days currently set out in the Code to not more than two working days. Following Norbord, we insist that this vote should be conducted in person unless mutually agreed to by all parties. We note the rise in mail-in ballots that took place under the B.C. Liberal government. This method of voting adds additional delay and increases the margin of error and fraud, and was clearly being used as a cost-containment measure due to lack of appropriate human resources to fairly administer the Code. *We would welcome changes that allow this vote to take place at a location convenient to the workers away from the employer's premise, including any government office.*

a. Our world is changing. The way we communicate and make decisions is slowly modernizing and so should our regulations and practices. *We recommend that the card signing process be improved and modernized to ensure secure but efficient use of systems such as electronic card signing is possible to more adequately match the current ways that most members of society function.*

10. New Contracts (s.55)

Once a certification is completed the next stage is to negotiate a mutually agreed upon contract between the two parties. This is also a point where the Code has been tilted in favour of employers where employers run out the clock or violate Code or regulations with impunity.

a. Increase time period for new contracts

Sadly a tactic that is used to disrupt the completion of a first contract is where employers run out the proverbial clock of negotiations (set at 4 months*). We*

[6] 1992 report, p 26.

recommend increasing the time period for completion of a first contract to more than 6 months.

b. Enforcement of rules and forced mediation

Sadly, some employers get away with violating workers' rights by violating the Code and regulations during that period of negotiating a first contract. This creates an unlevel playing field. *We recommend that LRB staff be empowered (meaning: authorizations and time to do the work) to enforce the Code and regulations. We also recommend that the Labour Relations Board be given the right to impose contracts, or provisions of contracts, in these circumstances.*

Successorship

11. Successorship Rights (s. 35, Bill 29, and Bill 94)

Successorship can be understood as the principle that workers' rights and benefits that come from their union membership and their collective bargaining agreement are not lost as a result of business operation changes. Successorship laws are meant to provide job security and make sure that employers cannot undermine the efforts of workers to organize and bargain collectively simply by selling off all or parts of their business.

Successorship provisions of the B.C. Labour Relations Code stipulate that if a business or part of it is sold, leased, or transferred, the new owner is bound by any collective agreement in force at that business on the date of sale. Wages, benefits, and rights contained within the collective agreement apply to the new employer and bind them to the same extent as if they had signed the original agreement with the employees and their union. They are considered the "successor" employer.

However, the B.C. Liberals took further steps to limit successorship in health care by passing Bills 29 and 94, which limit the application of Section 35 of the Code. These laws have allowed employers to evade collective bargaining responsibilities and terminate employees in a manner which undermines the intent of successorship protection in the first place. Current successorship legislation does not apply to contracting out or to contract flipping, and is silent with respect to changes in private service providers. As a result, legally obtained certifications and freely negotiated collective agreement rights simply disappear as a result of a business decision to contract out. This has become a feature of work in British Columbia for many health care, utility, food service and construction workers.
The application of Section 35 of the Code is limited in the health sector by the Health and Social Services Delivery Improvement Act (Bill 29) and the Health Sector Partnership Agreement Act (Bill 94). Bill 29 prevents Section 35 of the Code from applying to an entity that contracts with a health sector employer. This means that a person who contracts with a health sector employer cannot be determined to be the successor of that employer.
Bill 94 extends that protection against a finding of successorship to designated private sector partners. This means that an entity that contracts with a private employer who is in a P3 (Public Private Partnership) arrangement with a health sector employer cannot be determined to be the successor of that private employer.

As a result of these changes, we have seen a reduction in wages and working conditions for workers in these sectors, and a loss of industrial stability across the sectors because of the high turnover this produces. The advantages of this system go entirely to employers, while workers see their Charter rights to organize to improve their working conditions eroded by the architecture of the Code. The absence of successorship provisions in the Code encourages employers to exploit these conditions, resulting in greater insecurity for workers and the services they deliver to B.C.'s public.

In order to level the playing field, *we recommend that the application of Section 35 be broadened to prevent subverting collective agreements through contract flipping.*

Replacement Workers

12. Replacement Workers (aka Scabs) (s. 67)

A mature system of collaborative labour relations involves concerted collective bargaining in good faith. Should the parties reach an impasse, they then seek to increase their bargaining power by exerting economic pressure either by withdrawing their labour, or by locking out their workers, as regulated by the Code and the Board. In other jurisdictions, the power of one party is unfairly undermined by allowing employers to hire replacement workers to do bargaining unit work. British Columbia should be proud of its continued ban on replacement workers. *We recommend no change to this section of the Code, and respectfully submits that any amendment would run counter to the good faith spirit of labour relations and would threaten British Columbia's economic stability and labour peace.*

Essential Services

13. Essential Services (s. 72)

We do not take issue with a system which determines that some services are so essential to the preservation of life that workers in these areas are not able to withdraw their services when collective bargaining between evenly matched parties reaches an impasse. Our affiliates participate willingly in making essential services decisions, often erring on the side of undue designations in the name of expedience. We do, however, take issue with the historical abuse of the essential services designation in British Columbia which, at times, designated teaching assistants, and K-12 teachers to be essential.

In light of this, and recent jurisprudence from the Supreme Court of Canada condemning the B.C. Liberal infringement of the Charter-protected collective bargaining rights of classroom teachers, *we recommend that education be removed as an essential service, and that the committee recommend a tightly restricted use of essential services designations outside of the health care sector.*

Variations of Certification

14. Variations of Certification- Partial decertification applications (s. 142)

We are for the most part satisfied with the rules and timelines in place for dealing with certain employees' applications to decertify bargaining units. While we feel this type of application is more often than not brought forward or funded by employers, each case

should be decided on its merits before a vice-chair of the Board. Our affiliates have raised concerns for many years about the process for partial decertification applications conducted under Section 142, when certain employees seek to have an existing certification altered to exclude some, but not all, union members.

Matters conducted in this way are not expedited in the same manner as full decertifications, and the rules for such applications are opaque. *We recommend that the Code be amended to prevent applications for partial decertifications from being entertained by the Board. In the alternative, we ask that such matters be resolved using the same rules provided for in Division 2 of the Code.*

Legislation

- Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c. 11.
- Bill 29, Health and Social Services Delivery Improvement Act, SBC 2002 c. 2.
- Bill 94, Health Sector Partnerships Agreement Act, SBC 2003 c. 93.
- Labour Relations Code RSBC 1996 c. 244.

Jurisprudence

- Meredith v. Canada (Attorney General), 2015 SCC 2.
- Mounted Police Association of Ontario v. Canada (A.G.), 2015 SCC 1.
- Norbord Inc. v United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, Local Union Number 1-425, 2016 CanLII 23791 (BC LRB), Retrieved from: <http://canlii.ca/t/gpqtl>.
- Saskatchewan Federation of Labour v. Saskatchewan, 2015 SCC 4.

Reports

- Restoring Fairness and Balance in Labour Relations: The BC Liberals' Attacks on Unions and Workers 2001-2016. MacTavish J, and Buchanan C. Retrieved from: http://bcfed.ca/sites/default/files/attachments/lrb%20paper.pdf
- Recommendations for Labour Law Reform: A Report to the Honourable Moe Sihota Minister of Labour. John Baigent, Vince Ready, Tom Roper (Sub-committee of Special Advisers). September 1992.
- Managing Change in Labour Relations - The Final Report prepared for the Minister of Labour, Government of British Columbia. Labour Relations Code Review Committee (Section 3 Committee). February 25, 1998.

SUBMISSION ON THE BC LABOUR RELATIONS CODE REVIEW

By:

BC Chamber of Commerce

BC Hotels Association

Canadian Federation of Independent Businesses

Canadian Franchise Association

Canadian Home Builders Association

Canadian Manufacturers & Exporters

Greater Vancouver Board of Trade

Independent Contractors and Businesses Association

New Car Dealers Association of BC

Restaurants Canada

Retail Council of Canada

Tourism Industries Association of BC

Urban Development Institute

March 20, 2018

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Canadian Home
Builders Association

Greg Wilson
Director, Government Relations, BC
Retail Council of Canada

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Divisional VP, BC
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Jim Humphrey
Chair
Tourism Industries Association of BC

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SUBMISSION ON THE LABOUR RELATIONS CODE REVIEW

BACKGROUND AND CONTEXT

We are pleased to make this joint-submission to the Labour Relations Code Review Panel (the "Panel").

Together, the organizations signing this submission account for a substantial proportion of the private sector economy in British Columbia. We have a shared interest in growing the BC economy for the benefit of our employees, their families and the communities in which we do business. The opportunities, investment and jobs that flow from our members' companies are the foundation for the prosperity and quality of life we all enjoy in British Columbia.

At the outset of our submission, we believe it is important that the Panel be mindful that the Code Review is not merely an academic exercise happening in isolation of the broader investment and job creation environment. Major changes to the Code will have an enormous impact on BC's reputation as a place where businesses can invest capital, create opportunities and develop talent. Further, changes in the Code will have an out-sized impact on small and medium-sized businesses in our province. These businesses are the real drivers of our economic activity and changes that inhibit their growth or make it more difficult for them to succeed will hurt our long-term prosperity.

Though BC's economy has of late performed well, there are "head-winds" forming. In 2017, BC experienced strong real GDP growth of about 3.4 percent, the government's recent budget forecast expects this to drop back considerably in 2018 to an estimated 2.3 percent. At the same time, the new provincial government has put in place a wide array of new tax increases which – taken together with substantial tax reductions in the United States and general uncertainty over NAFTA negotiation outcomes – gives credence to the view that tougher times are ahead for BC's small, open, trade-exposed economy. Against this backdrop, the Panel's operating assumption regarding the level of economic activity going forward should not be the *status quo*.

The Panel should also take note of the myriad of policy and program reviews the provincial government is currently undertaking and the implications this uncertainty has for business investment and growth. We caution against approaching the Code review in isolation from the many others government has underway.

In the next section, we note that BC has enjoyed a long period of labour relations stability with very few noteworthy work stoppages, an enviable record engineered in no small way through past consultative Code reviews in 1992-93 and 2002. Overall, as we state in our submission, the Code is working – and working well. We urge the Panel to maintain the general balance and fairness that underpins the current Code, especially against the backdrop of internal and external factors which point to more challenging times ahead.

THE REVIEW MANDATE

The Review Panel's mandate, as expressed in the terms of reference, is directly relevant to the work of the signatories to this submission and their members in British Columbia. The core of the Panel's mandate is to ensure the workplaces of British Columbia support a "growing, sustainable economy with fair laws for workers and businesses." The mandate is placed within the context of

the changing economy, workplaces, and workforce in British Columbia over the last several decades, a context which is uniquely instructive and relevant to the present review.

That context, going back over several decades of labour relations in British Columbia, starts with the failed attempt at labour relations reform in 1987 with Bill 19. Bill 19 produced the *Industrial Relations Act*, Industrial Relations Board, and labour's boycott of both. That attempt at reform failed because of its lack of consultation and of its one-sided nature (in that case, in favour of management). Interestingly, an attempt at labour law reform from the opposite side of the political spectrum a decade later in 1997 through Bill 44 failed for the very same reasons: lack of consultation and the reforms being one-sided in nature (in that case, in favour of labour).

Those attempts at reform stand in marked contrast to the consultative process in 1992 which led to the 1993 reforms of the Code. The nature of the 1992 review process and the terms of its mandate were notably similar to your own mandate. The 1992 review mandate was "to create fair laws which will promote harmony and a climate conducive to the encouragement of investment" in the province. The goal was to "ensure that the Province maintains and enhances its competitive position in the world market place." The Report[1] that followed also noted the changing nature of the economy and its businesses and workplaces at that time. The Report summarized the context by noting "the economy of the Province has experienced the upswing of the 1970's, the downturn of the 1980's and the struggle to pull out of the global recession in the 1990's." The globalization of economic competition was noted, as well as the evolving structure of the economy and the demographics of its workforces.

In response, the Report, and the subsequent legislative reforms, introduced new concepts for our approach to labour relations. They included, for instance, a specific direction that the Board encourage the "resolving of workplace issues, adapting to changes in the economy, developing workforce skills and promoting workplace productivity" (section 2(1)(b)). These are very real-world concerns consideration of which is required to address the very real-world problems which were facing workplaces and workforces in the province.

Unfortunately, in the decade that followed, neither the Board nor the province itself came to grips with these problems or the Report's recommendations to address them. The result was that BC became a have-not province within Confederation. That was a significant fall from BC's earlier economic status. To be sure, labour relations and the Code was only one factor contributing to this situation, but it was a factor and thus part of the context which this Review Panel is now tasked to consider.

The response in 2002 produced something quite unique in British Columbia labour relations and politics. The legislative reform of the Code in 2002 supported and buttressed the 1992-3 reforms. To reinforce the importance of addressing the problems being faced in the province, the Code was amended to direct the Board to exercise its powers in a manner that "fosters the employment of workers in economically viable businesses" (section 2(b)). This was made an express duty of the Board in all matters before it.

It is remarkable that in the usually fractured, polarized world of BC labour relations and politics, essential, fundamental reform had, in effect, been agreed upon between the left (the NDP in 1992-3) and the right (the Liberals in 2002). There remain disagreements over voting and speech rights, but the agreement on the need for reform overall in the Code was truly exceptional, positive, and encouraging.

[1] John Baigent, Vince Ready, Tom Roper, *Recommendations for Labour Law Reform*, September 1992.

In response, the Board took up the challenge of interpreting and applying the fundamental reforms to the Code which had been incorporated in 1992-3 and further buttressed by the 2002 amendments. That substantively-oriented exercise was completed in the several years following 2002 through policy decisions of the Board. Noteworthy for the current review process is that these policy decisions were rendered by three-person reconsideration panels which had a labour-management balance, most often including the Chair of this current Review Panel as a co-author and signatory to those decisions.

Following this substantive work, the Board focussed on bringing in procedural reform through the timelines regulation. Under that regulation, matters at the Board are to be resolved or decided within 180 days of the application or complaint. That reform, too, was the result of an extensive consultation process.

This is the unique context in which your review is to be undertaken. Over the past decades there has been fundamental substantive and procedural reform of the Code, which was the product of consultative processes and unprecedented support from both the left and right of British Columbia politics and labour relations.

In light of that exceptional context, we submit you should be respectful of those developments, the consultation which led to them, and the broadly-supported approaches within them.

In this context, BC has regained its proper place with a leading economy; British Columbians have jobs and opportunity, and our society has the means to support the health, education, and social and government services that we all need and want.

There is also a broad demographic component to this. Young workers are seeking more choice and flexibility about how and where they work. Is anyone speaking with them and asking them what they want? Policy changes must not be directed by views which may be out of sync with the realities of workplaces that are changing rapidly because of new technologies and young people who have decidedly different views of work. Any changes to the Code must look to the future, not the past; in consultation with those who will be most affected by those changes and what they really want; and mindful that whatever changes are made will signal to international and domestic investors whether British Columbia is open to capital investment, entrepreneurial effort, and the development of new talent.

The current Code has for the most part worked. British Columbia has a high wage economy with jobs and opportunity. We have not had a major private sector work stoppage in over two decades. In that time, major labour relations conflicts have generally been between government and public sector unions. The Code and the Board have operated outside of that environment. Aside from government-public sector labour disputes, British Columbia has experienced relative labour peace, with a decline in adversarial labour relations, which is consistent with the positive public policy reforms enacted in the 1992-93 and 2002.

THE CODE

Against this backdrop, we recommend that the vast majority of the provisions in the Code should be sustained. We offer the following comments on specific provisions of the Code.

Sections 1 and 139(a) – determining who is the employer – Defining who is the employer has proved problematic, particularly in respect to project labour agreements. BC Hydro and the BC government have both attempted to contractually designate who is the employer of the employees

on large projects in order to dictate the union choice of these employees. This is quite contrary to the Code, as later Board decisions have noted. An employee's choice to be represented, or not, by a union, or by which union, is the employee's right – not an owner's or the general contractor's right, and certainly not the government's right. Former Labour Board Chair Paul Weiler explained that employee choice is the "fundamental premise" of the Code. Indeed, this is strengthened by recent freedom of association cases under the Charter of Rights and Freedoms (the "Charter"). If an owner, general contractor, or government wishes to achieve certain socially-desirable hiring goals on a project – for instance, enhancing the representation of women, members of Indigenous communities, or apprentices in the workforce –that can be accomplished legitimately through the commercial contracts for the project. It cannot be achieved by violating the employees' right of choice under the Code. The Review Panel should clarify this and put an end to governments dictating employee choice on large construction projects through project labour agreements. If this approach is used again, the result will likely be protracted litigation before the Board and the courts over the fundamental right of choice of an employee under both the Code and the Charter. That would be destabilizing and would bring the Code and the administration of the Code into disrepute.

The employees' right of freedom of association under section 2(d) of the Charter strongly supports this view. The Supreme Court of Canada has held that the Charter protections in 2(d) must be consistent with Canada's international obligations,[2] in particular the International Labour Organization (ILO) Convention (No. 87)[3] to which Canada is a party (ratified March 23, 1972). The ILO's Committee on Freedom of Association (CFA) interprets Convention No. 87 as requiring that in labour relations systems which give a representational organization exclusive bargaining rights, the union must "be chosen by a majority vote of the employees in the unit concerned."[4] This requirement to objectively verify the employees' wishes through an election is described by the CFA as "an essential safeguard" in the process of certifying a union as the exclusive bargaining agent of the employees.[5] Thus, freedom of association under the Charter includes the right of employees to express their wishes on exclusive representation by a bargaining agent through a vote. The use of project labour agreements to effectively remove employees' right to choose their exclusive bargaining agent is not only clearly contrary to the Charter but also to the fundamental premise of employee choice in the Code.

Another manner in which the rights of autonomy and self-determination can be undermined is through legislated sectoral bargaining schemes. These schemes violate the Code principle that employees and the parties be given a direct voice in the terms and conditions which will govern employment. Only in this way will they be able to ensure their employment relations and collective agreements reflect the needs and circumstances of their individual businesses. This is currently reflected in the 1992-3 ("cooperative participation") and 2002 (fostering "the employment of workers in economically viable businesses") reforms in the Code. These directions should not be undermined.

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[2] *Health Services and Support-Facilities Subsector Bargaining Association v. British Columbia*, 2007 SCC 27, paras. 71 & 76; and *Saskatchewan Federation of Labour v. Saskatchewan*, 2015 SCC 4, para. 67.

[3] International Labour Organization's (ILO's) Convention (No. 87) Concerning Freedom of Association and Protection of the Right to Organize, (1948) 68 U.N.T.S. 17.

[4] *Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO* (5th rev. ed. 2006) (the "Digest") para. 969. This requirement was applied by the CFA in the Delta Airlines decision of the CFA: ILO Committee on Freedom of Association, Complaint against the United States, Case No 2683, Report No. 357, June 2010.

[5] Ibid., para 969.

This is particularly imperative for small and medium-sized businesses. They are the engine of economic growth and job creation in our economy. It is imperative that they should not be over regulated. Their success is needed to provide opportunities for people to support their families and build their communities.

Legislated sectoral bargaining removes the ability of employees and their employers to directly address the individual needs and circumstances of their businesses. It thereby inhibits their ability to succeed. It does so by ignoring and negating the key insights in the 1992-93 and 2002 reforms. Legislated sectoral bargaining would be a step back in time, not forward. It is noteworthy that the previous attempt at forced sectoral bargaining in Part 4.1 of the Code was a failure and the sectoralism which remains in the CLR-Building Trades situation is still replete with difficulties and declining market share despite multiple efforts to rescue it.

The parties themselves are the best monitors of their relations. If they feel their best chance for success is some form of sectoral arrangement, they can voluntarily agree to and arrange that. The reality is that, particularly in the private sector, they do not.

Further, if it is felt that certain publicly-funded services have problematic labour relations, the answer is not a one-size-fits-all amendment to the Code affecting all parties, including the critically-important private sector. Instead, the proper response would be for government to identify those specific problematic situations and address them through the mandate and funding of the applicable commercial contracts. That would surgically, as well as transparently, address the issues without causing harm beyond the specific circumstances.

Accordingly, improper attempts to dictate employee choice or the parties' labour relations through either project labour agreements or legislated sectoral bargaining should be rejected.

It is important to note that labour relations has evolved in important ways – workers want more flexibility and more choice and employers are structuring their businesses to be more flexible and to be able to respond more rapidly to changes in technology that are driving changes in customer needs and desires.

Sections 6, 8, and 9 – speech rights – The Legislature has twice directed the Board that there are to be meaningful speech rights in the Code, including for employers. The first time was in the 1993 provisions of the Code, based on the statutory language recommended in the 1992 Report. When the Board did not give effect to this statutory language in its *Cardinal/Klassen*[6] decision, the Legislature responded in 2002 by amending the statutory language to make it clearer. Thus, the Legislature has made this direction to the Board from both sides of the political spectrum, and as a result the Board gave effect to the Legislature's direction in its *Convergys*[7] decision.

But even so, speech rights in both the Code and Board's decisions have always been subject to the restriction that the speech not be intimidating or coercive. The Board has properly given effect to this, too (*RMH*[8]).

Speech rights are not just a Code right; they are a Charter right and freedom of expression is one of the most significant among Charter rights. The right also includes, as noted by the Board in

[6] *Cardinal Transportation BC Inc*. BCLRB No B344/96 (Reconsideration of BCLRB Nos. B463/94 and B232/95).

[7] *Convergys Customer Management Canada Inc,* BCLRB No. B62/2003 (Leave for Reconsideration No. BCLRB B111/2003).

[8] *RMH Teleservices International Inc.,* BCLRB No. B188/2005 (Leave for Reconsideration of BCLRB No. B345/2003).

SimpeQ[9], the right of a listener to hear the message; not forced listening, but the right to hear the speech in order to make an informed decision.

The statutory language and the Board's decisions under it are consistent with the Charter, its values, and fundamental precepts in our democratic society. Those precepts include the right of expression, the right to hear expression and the freedom from forced listening, intimidation or coercion. The Code's provisions and the Board's interpretation of them are consistent with this and the Code's provisions should not be altered.

Section 14(4)(f) – remedial certification – Though you will undoubtedly hear from some stakeholders that they are unhappy with the Code's and the Board's approach to remedial certification, it must be remembered that such unhappiness is longstanding and goes back decades. The Code's and the Board's approach to remedial certification is equally longstanding. This is because remedial certification is an extreme measure and it has properly been reserved for extreme circumstances in both the legislation and the Board's decisions. It would not be appropriate to amend this longstanding approach that has been accepted by so many leading labour relations practitioners.

Section 24(1) - the right to a certification vote – As noted above, the right of employee choice is the fundamental premise of the Code and is guaranteed by the right of freedom of association in the Charter. It is also consistent with the fundamental belief in our society in secret ballot votes. That is how we govern ourselves in such important matters as whom we elect to government and whether we wish to be represented by a union or not. Any recommendation to remove the right to a certification vote would be contrary to this fundamental principle in the Code and the constitutional guarantees in the Charter.

Secret ballot votes are also helpful, and often necessary, from a practical labour relations perspective. As experienced leaders and representatives on all sides of the labour relations community will acknowledge, a secret ballot vote in a certification application often clears the air as to whether the employees truly want to be represented by the union or not. This process serves to legitimize the results for all parties and fosters confidence in the labour relations system. If the employees choose in favour of the union in a Board or government-supervised secret ballot vote, that process can remove the employer's doubts about the employees' true wishes and eliminate any suspicion that the employees were coerced or pressured into that choice. It also, importantly, allows all parties (employer, employees, and union) to accept the results. This is especially important in a small business context where there is a close relationship between the employer and the employees.

Once the air is cleared with a supervised secret ballot vote, labour relations can then properly move on to the next step, which is the negotiation of a collective agreement. Without this degree of transparency, that crucial next step can remain clouded and even spoiled by suspicions and mistrust.

Employee Lists – The overriding interest at issue in considering employee lists is the employees' privacy rights. The longstanding approach of the Board respects the employees' privacy rights by ordering an employee list be disclosed only when absolutely necessary for the determination of an issue under the Code, typically when determining the threshold in a certification application. We submit that this is the appropriate approach and it should not be altered.

[9] *SimpeQ Care Inc.*, BCLRB 161/2007 (Leave for Reconsideration BCLRB No. B171/2006).

The Board has stated that a "critical concern" when considering the rights and obligations of the parties in the Code "is respect for the employees."[10] That respect is reflected in the section 2(a) amendment to the Code which specifically requires the Board to recognize "the rights and obligations of employees," as well as those of unions and employers. This led to common-sense determinations protecting the rights of the employees in both *RMH*[11] and *SimpeQ*. In *SimpeQ* the Board explained that any analysis in this area should start by considering the impact on the employees and their rights.[12] We say this should apply to the question of employee lists as well. The privacy rights of the employees should continue to be respected.

We add that placing the institutional interests of unions over the privacy rights of employees would be inconsistent with the current values and concerns in our society. As a society, we have a growing concern over infringement upon individual privacy and have taken extensive steps to protect that privacy. Ordering broader access to employee lists would be directly contrary to that societal goal. To do so would blatantly and improperly favour the institutional interests of one group under the Code, the unions, over the individual privacy rights of another group under the Code, the employees.

Sections 24(2) and 33(2) – ten days for a vote – An essential part of the employee's right of choice, including in the context of a vote, is to have the proper time to "make inquiries and assess the views" being put forward.[13] Any contemplated abridgment of the 10-day provision in the Code must take into account all the parties' (including the employer's) right of speech, the employees' right to hear, and, concomitantly, the employees' right to have the proper time and opportunity to "make inquiries and assess the views" being put forward.

An individual's choice as to whether or not to be represented by a union is an important one. It affects many matters, including whether the individual can represent themselves, make decisions and speak on their own behalf in employment matters affecting them. Most employees have busy lives, typically with family responsibilities in addition to work obligations. On both counts, they should be afforded the proper time and opportunity to review, research, consider, and discuss with others what is before them. In our view, the 10-day period in the Code is the shortest period of time which should be allotted for this purpose.

Sections 35, 38 and 139(a) – successorship, common employer and true employer – For the reasons we have expressed above in relation to legislating a sectoral bargaining scheme, we also submit that any attempt to force sectoralism through the distortion of the successorship, common employer and true employer doctrines should be resisted by this Review Panel.

Section 55 – mediation/arbitration of first collective agreements – This provision and its application by the Board has been viewed as a model approach by other jurisdictions. This first collective agreement provision is part of the fairness and balance which emerged from the 1992-93 process. Any suggestion that the provision and its interpretation should be adjusted to the advantage of unions would undermine the fairness and balance in this provision and the acceptability of it. In our view, that should be resolutely resisted by this Panel. Consistent with our belief that employers and employees should have the right to determine their own employment terms, we submit that any changes contemplated to this section should only be in the direction of the autonomy of the parties.

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[10] *SimpeQ Care Inc.*, *supra*, para. 86.
[11] *RMH*, *supra*, paras. 87-88.
[12] *SimpeQ Care Inc.*, *supra*, para. 89.
[13] *SimpeQ Care Inc*, *supra*, para 85.

Section 68 – replacement workers – Like others in the employer community and many neutral observers, we believe the Code's replacement worker provision is not appropriate. As Chair Weiler explained long ago, the union's right to strike is not balanced by the employer's right to lockout; rather it is balanced by the employer's right to continue to operate during a labour dispute. Section 68 of the Code wrongly impinges on the right to continue operations in the face of a strike.

Having said that, the restriction on replacement workers in section 68 does provide a fair counter-balance to the restrictions on picketing in Part V of the Code. In that regard, you may hear from the union community that they feel the picketing provisions of the Code are too restrictive. They are restrictive, but the restrictions were brought about piece-by-piece as a result of hard-earned experience in which the workplaces and workforces of BC were unduly harmed under previous picketing provisions. The classic example of this is from the forest industry. Previous picketing provisions allowed a striking union to picket the entire operations of the employer. For the integrated forest companies, which dominated both the industry and the economy of the province at the time, this meant that striking sawmill workers could also picket the non-struck pulp mills, and striking pulp workers could picket the non-struck sawmills. This proved harmful not just to the employers but also to the non-striking workers and the economy of the province itself. Restricting picketing to sites where the striking employees actually worked was necessary.

The current picketing provisions in the Code are the very sort of legislated scheme expressly allowed by the Supreme Court of Canada in *Pepsi.*[14] Further, in the BC Code they are uniquely balanced by the most restrictive replacement worker provision in Canada, if not in all Wagner Act labour codes. To be fair and balanced, any amendment of the Code's current picketing provisions would also require the removal of the replacement worker provision.

Section 72 – essential services – The essential services provisions in the Code were originally co-designed, interpreted, and applied by Chair Weiler. They are fair and balanced and would meet any Charter challenge in that regard.

Chair Weiler has been cited with approval by the Supreme Court of Canada many times in labour relations and constitutional matters. There is a needed balance in section 72 of the Code between union strike and picketing rights and the public interest in the right of healthcare patients, certain students, and others needing essential services in respect to their health, safety, or welfare.

The recent Supreme Court of Canada decision in the *Saskatchewan Federation of Labour* case is clearly distinguishable. It is difficult to see how the government in Saskatchewan would have thought that the essential services legislation they devised was fair and balanced or would meet Charter scrutiny. That is not the case with section 72 of the Code. As a result, in our view section 72 of the Code should remain as it is.

Part 8 - arbitration - Strong arguments could be made for reform of the arbitration provisions in the Code. Such reform could include: specific timelines instead of the process in section 91; removing the endless and costly jurisdictional difficulties regarding sections 99 and 100 of the Code; and making section 104 a truly expedited process in practice.

Section 115 – appointments to the board – It is important that the appointments to the Board be balanced. Currently there are four adjudicators at the Board from the union community and two from the employer community. That is inappropriate and needs to be remedied.

[14] *R.W.D.S.U., Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd.*, 2002 SCC 8, paras. 16,85-86 and 107.

As well, the appointments must be individuals who are knowledgeable, experienced, and have the confidence of the community. The Board has recently lost two experienced adjudicators. The employer community needs to be confident that the Vice-Chairs appointed to replace these individuals are knowledgeable and experienced in Code matters and will be fair and balanced when adjudicating.

Section 115 also provides for the appointment of Members. We are not in support of the appointment of Members. The Board has successfully reformed its procedures and decision-making to comply with the timelines regulation requiring that matters before the Board be resolved or decided with 180 days. Adding the calendars of two more individuals as Members to this tight timeframe would be impractical.

Further, if Members are to be reintroduced into the Labour Board's proceedings, then they should represent not just two of the constituencies in the Code, but all three. Section 2(a) recognizes that the Code deals with the rights and obligations of *employees*, as well as employers and unions. This was a necessary and welcome revision to the Code in 2002 as the practice of labour relations had become too closed and captive to solely the interests of unions and employers. It is important to recognize that labour relations is not just about unions and their relations with employers; in fact, as we have seen, the fundamental premise of the Code is *employee* choice.

If panels at the Board are to include Members they must include Members representing employee interests as well as Members representing unions and employers. However, this would produce a four-person panel and that is simply not workable.

It is telling that only rarely do parties in labour relations arbitrations choose to use "wingers" at arbitration. It is too expensive and cumbersome, with arbitration already being too costly and full of delay, contrary to its roots and original thrust to be less formal, quicker, and more practical than formal litigation. On this basis too, therefore, Members should not be added to the functioning, timely labour relations system at the Board.

CONCLUSION

In conclusion, we respectfully submit that the Code as it is currently written has for the most part served the province well. British Columbia has enjoyed relative labour peace and economic prosperity for the past two decades as a result.

Workplaces have evolved and continue to change rapidly as technology and new generations of workers demand flexibility, choice and innovative workplaces. Any changes to the Code need to be cognizant of this change and ensure that opportunities for BC's economy to attract investment, talent and jobs are not compromised in the process.

The current Code is the result of a uniquely consultative process in 1992/93 which was supported and further advanced by the 2002 amendments.

All of this calls for circumspection and restraint on the part of the Panel.

APPENDIX

ABOUT THE SIGNATORIES

BC Chamber of Commerce

The BC Chamber is the province's largest and most broadly-based business organization driving insights to its partners, government and Chamber network. With 36,000 members hailing from every nook and cranny of the province, the BC Chamber knows what's on BC's mind.

BC Hotels Association

The British Columbia Hotel Association is the advocate and spokesperson for the interests of the Hotel Industry throughout British Columbia.

The BCHA has over 600 hotel members and 200 associate members, representing an industry with revenue in excess of $3.2 billion, 80,000 rooms and more than 60,000 employees. We are a significant component of BC's $13.8 billion tourism trade and have members in almost every community throughout BC.

Canadian Federation of Independent Businesses

CFIB is Canada's largest association of small- and medium-sized businesses with 109,000 members across every sector and region, including 10,000 in B.C.

Canadian Franchise Association

The Canadian Franchise Association (CFA) helps everyday Canadians realize the dream of building their own business through the power of franchising. CFA advocates on issues that impact this dream on behalf of more than 700 corporate members and over 40,000 franchisees from many of Canada's best-known and emerging franchise brands. Beyond its role as the voice of the franchise industry, CFA strengthens and develops franchising by delivering best-practice education and creating rewarding connections between Canadians and the opportunities in franchising. Founded in 1967, CFA consistently advances and supports the franchise community, and is the essential resource for information, insight, and expertise through its award-winning education, events, services, and websites: www.cfa.ca and FranchiseCanada.online.

Canadian Home Builders Association

CHBA BC is the provincial voice of the residential construction industry in British Columbia representing more than 2,000 member companies through an affiliated network of nine local home building associations located throughout the province. The industry contributes over $23.1 billion in investment value to British Columbia's economy creating 158,000 jobs in new home construction, renovation, and repair - one of the largest employers in British Columbia.

Canadian Manufacturers & Exporters

Canadian Manufacturers & Exporters (CME) is the country's leading trade and industry association serving as the voice of 2,500 manufacturers directly and thousands more through our expanded network of the Canadian Manufacturing Coalition. Since 1871, we have been focused on growing Canada's manufacturers and exporters and we are member-driven and supported. CME has offices, representation and members from coast to coast.

Greater Vancouver Board of Trade

Since its inception in 1887, the Greater Vancouver Board of Trade has been recognized as Pacific Canada's leading business association, engaging members to impact public policy at all levels of government and to succeed and prosper in the global economy. With a Membership whose employees comprise one-third of B.C.'s workforce, we are the largest business association between Victoria and Toronto. We leverage this collective strength, facilitating networking opportunities, and providing professional development through four unique Signature Programs. In addition, we operate one of the largest events programs in the country, providing a platform for national and international thought leaders to enlighten B.C.'s business leaders.

The Independent Contractors and Businesses Association

The ICBA has been a leading voice in the construction industry for over 42 years, representing more than 2,000 members and clients who collectively employ over 50,000 workers. Since its inception, ICBA has been a strong advocate for balanced public policy for British Columbia workplaces, responsible resource development, and a growing and vibrant economy for the benefit of all British Columbians. ICBA believes strongly in building a skilled workforce and is a leading sponsor of apprentices in BC with more than 1,200 sponsored apprentices currently in 24 trades.

New Car Dealers Association

The NCDA, formerly known as the British Columbia Automobile Dealers Association, was established in 1995 as the industry association representing new car and truck dealers in BC. The NCDA's primary purpose is to advocate on behalf of the new car and truck dealers with respect to legal, environmental, consumer and government issues associated with new and used vehicle sales, parts and service in BC. The NCDA owns and operates the Vancouver International Auto Show, the most attended consumer show in Western Canada. The NCDA has 389 member dealerships doing business in 55 communities throughout BC, representing approximately 97 percent of the new car dealers in the province. BCs New Car Dealers support 30,000 family supporting jobs and generate over $16 Billion in retail sales, almost 20 percent of all retail sales in BC.

Restaurants Canada

Restaurants Canada is a national, not-for-profit association representing Canada's diverse and dynamic restaurant and foodservice industry. With more than one million employees; 80,000 locations; and 18 million customers a day, the restaurant industry is the number one source of first jobs for young people. We help build neighbourhoods, drive tourism, and fuel Canada's agri-food production.

Restaurants Canada members comprise 30,000 businesses in every segment of the industry, including restaurants, bars, caterers, institutions and their suppliers.

Retail Council of Canada

Retail is both Canada's and British Columbia's largest employer with over 360,000 British Columbians (May 2017) working in the retail and wholesale trade alone. The sector generated payroll over $10 billion (2016) and $84 billion in sales (2017) in British Columbia. Retail Council of Canada (RCC) members represent more than two-thirds of retail sales in the country. RCC is a not-for-profit industry-funded association and represents small, medium and large retail business in every community across the country. As the Voice of Retail in Canada, we proudly represent more than 45,000 storefronts in all retail formats, including department, grocery, specialty, discount, independent retailers and on-line merchants.

Tourism Industries Association of BC

The Tourism Industry Association of BC (TIABC) advocates for the interests of British Columbia's $17 billion visitor economy. As a not-for-profit tourism industry association, TIABC works collaboratively with its members – private sector tourism businesses, industry associations and destination marketing organizations – to ensure the best working environment for a competitive tourism industry. TIABC's vision is for the tourism industry to be recognized as one of British Columbia's leading and sustainable industries.

Urban Development Institute

The Urban Development Institute (UDI) Pacific Region is a non-profit association of the development industry and its related professions. With over 750 corporate members, UDI Pacific represents an industry that annually contributes almost $23 billion in direct GDP and 233,000 jobs to the B.C. economy. Our members build residential, industrial, office, retail, institutional and resort projects throughout the Province. Since 1972, the Pacific Region has been dedicated to fostering effective communication between the industry, government, and the public; and aims to improve both housing and job opportunities for all British Columbians. UDI Pacific also serves as the public voice of the real estate development industry, communicating with local governments, the media, and community groups. UDI concentrates its activities in three primary areas: government and community relations, research, and professional development and education.

Ellen Oxman

President

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PO Box 822, STN A, Nanaimo BC V9R 5N2

Nanaimo, Duncan and District Labour Council Submission to the British Columbia Labour Relations Code Review

Authority

The following document is respectfully prepared and submitted by the Nanaimo, Duncan and District Labour Council (NDDLC) and is intended to support the submission made by the BC Federation of Labour (BCFed) and the individual submissions made by its affiliates.

Nanaimo Duncan District Labour Council is an affiliate of the Canadian Labour Congress and represents over 30 Union Locals and 12,000 unionized workers from Qualicum Beach to Mill Bay, BC on Vancouver Island.

Introduction

A 2016 report produced for the BC Federation of Labour describes the importance of the fundamental right of workers to join and be represented by unions as "enhancing human dignity, equality, liberty and autonomy, increasing prosperity, leading to higher standards of living and contributing to the economic health of a country".

In addition, the report states that "when governments deny the ability of workers to come together to collectively bargain, either directly or indirectly, such as by creating practical or economic barriers to unionization, they are not only attacking unions but also undermining our society, our Canadian values, our democracy and our prosperity".

The BC Liberal government undermined many parts of the labour code during their 16 years in office and in doing so they undermined the very fabric of our society in British Columbia. It is the sincere hope of the NDDLC that this review will produce recommendations for revisions to the code that will undo the damage that was done by the Liberals and go even further to make improvements to the code that are consistent with our Canadian values.

Submission

The NDDLC submission to the BC Labour Relations Code Review includes but is not limited to the following points:

- Unionization Process - simplify, make fairer, return to card-check certification process.

Our members tell us about the difficulties organizing under the current system. Having a majority of the workers sign cards to join a Union is only the beginning of a long and often stressful process between the employees and employer. Organizers have had to repeat the process over and over again which makes it more difficult for the workers on site supporting the union and some workers have lost their jobs over their involvement in the process. This shouldn't be happening but sadly it is.

- Successorship Provision - add to the code to stop employers from contracting out work to avoid contract obligations.

We have had reports of this happening with a variety of employers from health care to transport and delivery drivers. This practice pushes down wages, loss of jobs, and reduced services.

- Subversion Prevention Provision - add to the code to stop the subversion of collective agreements through contract flipping.

This practice is very common in our area and we have reports of it happening far too often from our delegates especially Hospital Employee Union who represent a large portion of health care workers at senior facilities. Their members are forced to apply for jobs they held with the previous contract provider often at a lower rate of pay and with reduced or eliminated benefits. This has a detrimental effect on the workers and on the patients they serve. We have been advocating against this for many years.

- Sections 6 and 8 of the Code - repeal and restore to 1992-2002 language.

- Bill 29 in Health Care – repeal.

A 2017 report from the Canadian Centre for Policy Alternatives – Privatization & Declining Access to BC Seniors' Care- called for the urgent need for policy changes. The report which used data from 2001 to 2016 revealed a decline in access to residential care and assisted living, decline in access to home health services and a clear link in the increase in privatized facilities with the reduction of care.

We have had first hand reports to our Labour Council from workers and their families who have been deeply affected by the move to privatize care home facilities.

- Labour Relations Board and Employment Standards Branch - return responsibility for funding to the Ministry of Labour and substantially increase funding to both.
- Labour Relations Officers - increase the number to expedite decisions on certifications.

Conclusion

The NDDLC appreciates the opportunity to provide this submission regarding the labour code review and recommends that the review panel seriously consider the issues raised in this submission. We are confident the panel will recommend revising the code in a manner that is consistent with our Canadian values respecting the dignity, equality, liberty, and prosperity of all British Columbians.

Respectfully submitted,

Ellen Oxman

Ellen Oxman
President, Nanaimo Duncan District Labour Council

Balance at Work

Restoring Balance, Respect and Fairness to the British Columbia Labour Relations Code

New Westminster & District Labour Council Submission to the BC Labour Relations Code Review Panel

March 2018

Prepared by Janet Andrews

Executive Summary

The New Westminster & District Labour Council is pleased to have this opportunity to present our recommendations for changes to the *British Columbia Labour Relations Code* to the Review Panel. We see a strong, balanced and fair Labour Relations Code with robust support from the Ministry of Labour to be the foundation for a successful economy that works for everyone in British Columbia. Our recommendations are guided by the following principles:

- Respect for all working people and their Charter Right to join a union.
- Maintain a functional Labour Relations Board with improved, transparent, and consistent processes that promote trust and stability

NWDLC's Recommendations

Respect for all working people and their Charter Right to join a union

1. A regular review of the Labour Relations Code to allow for ongoing improvements and amendments that recognize the changing nature of work. S3
2. Reinstate card-based certification. S24
3. Repeal Employer Speech provisions during union organizing drives. S8
4. Use remedial certification as a remedy in cases of Unfair Labour Practice Complaints. S14
5. Strengthen Successorship Rights to deter contract flipping and repeal S.6 of Bill 29 -*Health and Social Services Delivery Improvement Act*, 2002 and S. 4 and 5 of Bill 94- *Health Sector Partnerships Agreement Act*, 2003.
6. Remove education as an Essential Service. S72
7. Retain and re-commit to the ban on replacement workers during lockouts or strikes. S68

Maintain a functional Labour Relations Board with improved, transparent, and consistent processes that promote trust and stability

1. Encourage the government to adequately fund the work of the Labour Relations Board so that critical services are delivered in a timely, appropriate manner.

2. Ensure timely arbitration processes by instituting timelines for arbitrators. S91, S128, S159.1
3. Establish shorter timelines where certification votes are necessary. S24
4. Establish a consistent timeline for open (raiding) periods that is known to all parties. S19
5. Repeal the process for partial decertification. S142

Introduction

The New Westminster & District Labour Council is a community-based central labour organization representing trade union members at the local level. We are a chartered organization of the Canadian Labour Congress, Canada's national voice for workers and their families. Our goal is to ensure our communities and our elected representatives at all levels of government in Canada respond to the needs of all people and workers, both union and non-union. We represent more than 60,000 union members in fourteen municipalities in the Lower Mainland, and this submission continues our proud union tradition of workers speaking out on issues affecting them in their workplaces and in their communities.

A thorough review of the regulations which govern Labour Relations in British Columbia, with a balanced approach that includes the needs of both workers and employers, and which examines the role of government, is long overdue. We welcomed the commitment to working people embodied in the mandate letter to Minister Bains that stated:

"It has never been more important for new leadership that works for ordinary people, not just those at the top. It is your job to deliver that leadership in your ministry." [i]

And included as a priority to:

"Ensure British Columbians have the same rights and protections enjoyed by other Canadians by reviewing the Labour Code to ensure workplaces support a growing, sustainable economy with fair laws for workers and businesses."

We believe our recommendations to the Review Panel will promote certainty as well as stable and harmonious labour/management relations. It is unfortunate, in our view, that for the last sixteen years the BC Liberals sided with employers and the business community at the expense of workers, upsetting the balance of labour relations in BC. Legislative changes have disadvantaged workers and infringed on

their Charter rights; processes for enforcement and investigation have been underfunded, slow, inconsistent and lacking in transparency. This has led to a critical lack of trust and the belief of working people in BC that their needs are less important than those of their employer and they are not likely to get a fair, balanced or timely hearing on their issues.

It is our hope that the Labour Relations Code Review Panel will first and foremost seek to restore the trust of working people in the Labour Relations Code by returning it to a state of balance between the needs of business and the needs of working people, respecting that the contributions of *both* parties are the foundation for a successful economy and a healthy society.

Our Recommendations

Respect for all working people and their Charter Right to join a union

1. A regular review of the Labour Relations Code ("the Code") to allow for ongoing improvements and amendments that recognize the changing nature of work. S3

Given that the current review is the first since 2003 under Section 3 of the Code, we feel it is important that there be a strong commitment to regular reviews that include consultations with employers, workers and their unions on an ongoing basis. The changes in technology alone in fifteen years are staggering, there must be a commitment to keep the Code up to date as a living document that is responsive to the changing nature of both work and Canadian society. Such a panel must be balanced in its approach and grounded in experience and expertise. Harmonious labour relations are not served by changes made to advantage a particular side, in response to a political ideology, or to address generally issues impacting only a single sector which may lead to unintended consequences elsewhere. Expertise and consideration are also required to ensure that changes to the Code are consistent and not in conflict with the *Canadian Charter of Rights and Freedoms* and other legislation. For these reasons it is our recommendation that an expert panel remain in place to examine labour relations on an ongoing basis.

2. Reinstate card-based certification. S24

When the BC Liberals eliminated card check certification shortly after coming to power in 2001, and without consultation with workers and unions, they effectively forced workers to join a union twice. Workers express a desire to join a union by signing a card, and then have to reaffirm that desire in a vote at a later date. In their 2016 paper *Restoring Fairness and Balance in Labour Relations,* John MacTavish and Chris Buchanan examined four distinct periods in recent history and determined that rates of

certification for two periods with mandatory voting had significantly fewer certifications, and conversely higher rates of Unfair Labour Practice complaints than the two periods where card check certification was in place[ii]. It was their conclusion that reduced rates in certification resulted in reduced access to collective bargaining for workers. In view of the Supreme Court of Canada's 2015 decisions clarifying the right of workers to choose to belong to a union[iii], we believe returning to a system of card check certification best upholds workers' rights under the Charter and reflects their desire to exercise these rights in a straightforward manner.

Workers often seek to unionize in workplaces where there is discrimination, harassment, and lack of access to wage and other improvements and there is also both a fear and a risk of reprisal by the employer for taking this step. Workers should not fear to exercise their protected rights, and the process of joining a union should not be onerous. In fact, the delay and additional administration required by secret ballot votes would only appear to serve the employer who may seek to inhibit or delay the process. In a 1992 report it was noted that *"The simple reality is that secret ballot votes and their concomitant representational campaigns invite an unacceptable level of unlawful employer interference in the certification process."*[iv]

3. Repeal Employer Speech provisions during union organizing drives. S8

Similarly to the move away from card check certification, the BC Liberals' addition of Employer Speech provisions to the Code undermines the already expressed choice of the workers to join a union, invites interference from the employer by allowing for 'captive audience' situations, and disregards the fact that employers already have access and the ability to speak to their workers at any time prior to the start of an organizing drive. Conversely, unions are not afforded similar access, so this provision is not balanced in its approach in addition to infringing on the workers' Charter rights as clarified by the Supreme Court in *Mounted Police Association of Ontario v. Canada*. Section 8 also does not account for the fact that the employer is in a position of power that is reinforced by the provision to express what is almost guaranteed to be negative or anti-union sentiment regarding the workers choice to join a union, or their choice between unions. The workers are seeking empowerment, to have a voice by bargaining collectively and to gain union protections at work. Employer speech, like secret ballot voting, seem to act more as a remedy for employer neglect and inattention to the conditions of their workplaces, instead of meaningful additions to balanced labour relations. For these reasons we recommend the repeal of all employer speech provisions during organizing drives from the Code.

4. Use remedial certification as a remedy in cases of Unfair Labour Practice Complaints. S14

Unfair Labour Practice complaints expose situations where the employer has acted in such a way as to infringe on the workers' Charter right to choose to join a union. We believe with such infringement there should be meaningful redress and so we recommend that remedial certification be the means for such redress. In the wake of such employer actions, a vote gives more space to a party who has already acted in bad faith, and by this point workers may not feel able to express their true desire without fear. Again, given that the Supreme Court decisions in 2015 effectively extended the *Canadian Charter of Rights and Freedoms* to include common labour activities, Unfair Labour Practice in this context is an infringement on workers' rights and remedial certification serves to balance the scales. It also offers a deterrent to bad behaviour from employers facing a union organizing drive in their workplace.

5. Strengthen Successorship Rights to deter contract flipping and repeal S.6 of Bill 29 -*Health and Social Services Delivery Improvement Act*, 2002 and S. 4 and 5 of Bill 94- *Health Sector Partnerships Agreement Act*, 2003.

The sweeping changes implemented by the BC Liberals' Bill 29 in 2002 fundamentally altered successorship rights and has negatively impacted workers in the healthcare sector. Where Successorship is understood to be the continuation of bargaining agreements and representation for workers in the event of a sale of business so that there is continuity and job security, this change in the healthcare sector has brought about a race to the bottom for workers where wages, rights and protections have been eroded. It has also burdened unions with reorganizing the same workers each time the contract is 'flipped' and has resulted in high turnover which negatively impacts patient quality of care. In a 2007 Tyee article, the Supreme Court's decision was highlighted, noting that: "The section 2(d) infringement is not justified under s. 1 of the Charter. While the government established that the Act's main objective of improving the delivery of health care services and sub objectives were pressing and substantial, and while it could logically and reasonably be concluded that there was a rational connection between the means adopted by the Act and the objectives, it was not shown that the Act minimally impaired the employees' s. 2(d) right of collective bargaining. The record discloses no consideration by the government of whether it could reach its goal by less intrusive measures. A range of options were on the table, but the government presented no evidence as to why this particular solution was chosen and why there was no meaningful consultation with the unions about the range of options open to it. This was an important and significant piece of labour legislation which had the potential to affect the rights of employees dramatically and unusually. Yet, it was adopted rapidly with full knowledge that the unions

were strongly opposed to many of the provisions, and without consideration of alternative ways to achieve the government objective, and without explanation of the government's choices. [143 144] [147] [149] [156] [158] [160 161]"[v]

That there were alternatives available and there was no meaningful consultation with workers and their unions underlines the way in which the Code can be manipulated to serve a political ideology rather than a reasoned and considered approach to promoting balanced labour relations. The same article at the time quoted Carolyn Askew, a union-side labour lawyer for more than 30 years, who said Bill 29 was a disgrace. "*The bill itself was a shocking and cruel attack on long serving employees in healthcare," she told the Tyee. "It was an attack on patients too, an attack that changed the workforce from one that was well paid, experienced and valued into a constantly shifting cast of itinerant workers. This is not what patients want or what they need. Patients need stability of care, and Bill 29 undercuts that stability."*[vi]

We strongly recommend that the statutory exemptions in health care be repealed, specifically Sections 6 of Bill *29 Health and Social Services Delivery Improvement Act* and of Section 4 and 5 of Bill 94 *Health Sector Partnerships Agreement Act,* and that Section 35 of the Code be broadened to prevent employers from jettisoning collective agreements and their obligations through contract flipping.

6. Remove education as an Essential Service. S72

While the right to strike has been recognized as a Constitutional right by the Supreme Court in *Saskatchewan Federation of Labour v. Saskatchewan, 2015 SCC 4*, we also understand that there are some services which are essential to the preservation of life and safety, and that workers in those sectors are not able to withdraw those services when collective bargaining fails to reach agreement. Education, however, is not such a sector. The designation of K-12 teachers and classroom assistants as essential seems more like expediency and deliberate disregard for the Charter rights of these workers than a considered and measured approach under the Code. It is understandable that the province wants to avoid potential disruptions caused by a strike, however this is precisely the point of workers being able to withdraw their services, that the potential for such a drastic action provides them with a strong position to meet the employer at the table as equal parties in bargaining. We strongly recommend the removal of the essential service designation from teachers and workers in education in order to avoid what is an unnecessary infringement on their collective bargaining rights. Further, we seek that the Code strictly confines essential service designations to the healthcare and emergency services sectors for the preservation of life and safety, that there be no abuse and unnecessary infringement on workers' Charter right to strike.

7. Retain and re-commit to the ban on replacement workers during lockouts or strikes. S68

Balanced labour relations require a balance of power between the parties. There can be no meaningful negotiation without a parity of leverage, and so we recognize that the right to withdraw labour is a way for workers and unions to exert economic pressure when collective bargaining reaches an impasse. The ability of an employer to use replacement workers in the event of a strike or lockout upsets the balance at the bargaining table and unfairly undermines workers and their unions. Submissions to labour code reviews from other jurisdictions in Canada[vii] rightly cite the strength of our current ban on replacement workers in BC as providing a fair system based on good faith and respectful labour relations. We recommend no changes to Section 68 and that the ban on replacement workers in BC continue to be upheld.

Maintain a functional Labour Relations Board with improved, transparent, and consistent processes that promote trust and stability

1. Encourage the government to adequately fund the work of the Labour Relations Board so that critical services are delivered in a timely, appropriate manner.

In *Restoring Fairness and Balance in Labour Relations*, MacTavish and Buchanan noted in 2016 that "A perfect storm exists of an underfunded, remote, and diminished Board that does not instill confidence that rights will be protected, and a government that openly attacks and denigrates those rights. Under the BC Liberals, it has become increasingly irrelevant and isolated from the community it is supposed to serve."[viii] If harmonious labour relations rely on a balanced and fair Code, administered by an impartial and respected Labour Relations Board ("Board") relied upon by both workers and employers, it follows that the Board must be adequately resourced and staffed. That has not been the case for the last sixteen years, and the result has been a slow, understaffed, under resourced Board that is impairing instead of promoting workers' access to justice. Using mail-in ballots instead of in-person votes solely for budgetary reasons or understaffing does not respect the workers' right to join or choose a union. MacTavish and Buchanan also note that "…the Board's routine use of mail ballots due to IRO lack of resources has become such a pressing threat to workers' right to join a union that a reconsideration panel of the Board was forced to address it head-on."[ix] Providing adequate staffing and resources for the Board demonstrates a respect for and commitment to workers' right to organize and their status as equal partners in the labour relations relationship in the province.

2. Ensure timely arbitration processes by instituting timelines for arbitrators. S91, S128, S159.1

Issues proceeding to arbitration often have significant impacts on workers, and a lack of regulated timelines can exacerbate these impacts and raise the issue of access to justice for the workers involved. Issues at arbitration can involve disputed wages, benefits, and unjust terminations and the lack of timely resolution to these issues can create a hardship for the worker. For these reasons we recommend instituting timelines for arbitrators similar to those in already in place for vice-chairs for decision making on critical workplace issues.

3. Establish shorter timelines where certification votes are necessary. S24

For reasons already stated, we believe it does not serve justice and the fair exercise of workers' rights to unionize as recognized under the *Canadian Charter of Rights and Freedoms* to have delays in the certification process. The decision to exercise these rights is not lightly made and represents a step into an often unknown realm for workers, with the prospect of a different dynamic in their relationship with the employer. To introduce further uncertainty by having delays in the process, during which there is sure to be communication, if not negative pressure from the employer, creates stress and a chilling effect for the workers. We believe where there is a 50% plus one threshold met certification should be automatic, in cases where this threshold is not met, the Board should facilitate an in person vote at a site away from the workplace within two working days. The site of the vote would ideally be a government office or other neutral place, so long as there is no hardship imposed on the worker in time or distance. Alternatives should be avoided unless mutually agreed by the parties. As MacTavish and Buchanan noted "Until recently, the Board's policy meant that it would rarely order mail ballots, given that certifications (in theory) are supposed to be processed on an expedited basis. Recently, however, mail ballots have become the norm rather than the exception, allowing employers even more time to wage anti-union campaigns and to improperly interfere in organizing efforts."[x]

4. Establish a consistent timeline for open (raiding) periods that is known to all parties. S19

Because there may be situations where workers have concerns that their bargaining agent is not free from influence by the employer, are unduly sectarian in nature or do not appear to have democratic, transparent processes, members may wish to exercise their right to choose another union as their bargaining agent. Workers in these situations may not be able to find out when the anniversary of their collective agreement falls to exercise this right under Section 19 of the Code, and so we recommend fixing the open period for collective agreements to set and clear dates in the calendar. The current

language for the open period is entirely dependent on the worker knowing the anniversary of their agreement, which in some cases they may not be able to easily ascertain.

5. Repeal the process for partial decertification. S142

The process for decertification or the termination of bargaining rights is clear in Part 3, Division 2 of the Code, and as such we feel the practice of conducting partial decertification under Section 142 is both inconsistent with this provision and lacking in transparency. We would recommend that partial decertification be prevented by the Board, failing that, that they be conducted in the same manner as laid out for full decertification so that the processes remain transparent and that workers can trust the matter receives due process in a clearly defined way.

Conclusion

In the past sixteen years, working people have been negatively impacted both by changes to provisions in the Labour Relations Code which have unfairly advantaged employers and by a failure to address the changing nature of work and workplaces. We are pleased to see that a meaningful consultation process has begun, and one which working people can have confidence that their voices are being heard. We believe this process, together with our recommendations, many of which simply repeal the erosions that have undermined labour relations in BC in recent years, will allow workers to again feel confident in trusting in the fairness and balance of both the *BC Labour Relations Code* and the BC Labour Relations Board. We view the rebuilding of this trust and relationship as the new foundation for future prosperity for workers and stable and harmonious labour relations for employers, and a successful economy for our province.

We would like to thank the British Columbia Labour Review Panel for their commitment to this process and their time in considering the recommendations we have put forward. Our recommendations are consistent with other central labour bodies in BC and speak to the priorities of our affiliated unions and the issues that are important to working people. We are happy to answer any questions or elaborate further, and are committed to supporting this process to ensure a balance and fair outcome for working people in British Columbia.

Endnotes:

[i] Mandate letter to Hon. Harry Bains, MLA Retrieved from: https://www2.gov.bc.ca/assets/gov/government/ministries-organizations/premier-cabinet-mlas/minister-letter/bains-mandate.pdf

[ii] Restoring Fairness and Balance in Labour Relations: The BC Liberals' Attacks on Unions and Workers 2001-2016. MacTavish J, and Buchanan C. Retrieved from: http://bcfed.ca/sites/default/files/attachments/lrb%20paper.pdf

[iii] Mounted Police Association of Ontario v. Canada (A.G.), 2015 SCC 1

[iv] John Baigent, Vince Ready & Tom Roper, A Report to the Honourable Moe Sihota: Recommendations for Labour Law Reform (Sub-Committee of Special Advisors: September, 1992).

[v] *Campbell Government violated Charter Rights: Supreme Court,* Tom Sandborn, The Tyee, June 8, 2007.

[vi] Ibid.

[vii] Ontario Nurses' Association, *Submission to Changing Workplaces Review, Ministry of Labour – September 18, 2015*

[viii] Restoring Fairness and Balance in Labour Relations: The BC Liberals' Attacks on Unions and Workers 2001-2016. MacTavish J, and Buchanan C. Retrieved from: http://bcfed.ca/sites/default/files/attachments/lrb%20paper.pdf

[ix] Ibid.

[x] Ibid.

INTRODUCTION

Hello I am Ian Gordon the president Of the North Okanagan Labour Council and member of CUPE 3523 Central Okanagan school workers, and my co presenter is Carole Gordon former NOLC president, member of the BCTF, local 23 Central Okanagan Teacher Association.

Our labour council is a collection of over 40 affiliated public and private unions in the Okanagan valley between Peachland and Armstrong representing over 10,000 members. We meet monthly, share union and worker experiences, and advocate for all workers, both unionized and non-unionized

We recognize that individual unions and the BC Federation of Labour have made, or will be making, submissions to the Review Committee. Those submissions contain much more history and details specific to those unions. While we agree with the submission of the BC Federation of Labour, we want to provide a perspective reflective of the Okanagan.

We must start by thanking you for this opportunity to present today. As it has been 15 years since the last review, we can't stress enough that a review of the Labour Relations Code, as per section 3, needs to happen more frequently.

Much can happen in 15 years. There have been 4 provincial elections, 3 premiers, even more Ministers of Labour, and over 5 different North

Okanagan labour council presidents. Thousands of jobs have been privatized in this region, many have flipped employers & contracts, and there has been extensive work to protect the rights of those workers as their collective agreements were vapourized. Dozens of times we have been called to support a union's job action, including walking the picket line, or in some cases an employers' lock out of its employees. Recent Supreme Court of Canada rulings have affirmed the right to join a union, engage in meaningful collective bargaining, and the right to strike when bargaining reaches an impasse. So much has happened that requires reflection and consultation.

In addition to the need for regular review, it is essential that more funding be provided to initiate and complete the work of the Labour Relations Board. This includes enough resources so that certification votes are not delayed or conducted by mail for cost efficiency purposes.

More human resources are also needed to ensure workers' rights to fair and timely resolution, so that timelines for arbitrators' decisions can align with those of the vice-chairs.

Continuing on to specific aspects of the Code, we can start by affirming our support for the ban on replacement workers in section 67. However, our concerns can be summarized in 3 areas: organizing & certification, successorship, and essential service.

Organizing & Certification

A large percentage of the Okanagan is employed in precarious work, especially the retail and hospitality sector, where part-time work with no job security and low wages are common place. While unionization can be more difficult, it can also be more necessary for vulnerable workers, especially where a significant power differential exists between the employee and employer. In personal situations, we speak about the culture of consent – where there is a power differential, consent can't truly exist. In work situations, when the employee signs a card to join a union, the Labour Code gives the employer, the person holding all of the power, ample time and access to convince the employee otherwise. The same vulnerability that caused them to seek out a union does not disappear in the time between signing the card and the secret ballot.

To this end, we have a few recommendations:

Section 14 -- Employers should not be able to unduly interfere with a person's Charter-protected right to choose a union. Where employees are affected by unfair labour practices, remedial certification is the only answer.

Section 8 needs to be repealed – The Liberal government granted the employer unfettered ability to dissuade employees from joining a

union. This advantage was not granted to the union. The employer can conduct captive audience meetings and disperse anti-union messaging IN THE WORKPLACE. Sanctioning of these tactics was not extended to the union. Employer speech is not aligned with recent Supreme Court decisions that protect the rights of workers to organize and choose between unions. Section 8 has to go.

Section 19 – The open period for workers to choose between unions needs to be set to a regular place in the calendar year in order to avoid confusion. Transparency needs to exist to ensure workers can avail themselves of their Charter right to choose between unions.

Section 24 -- We recommend 50% +1 as an appropriate threshold for automatic certification using membership cards alone. The Liberal government brought in a two-step process of certification: signing a membership card and casting a ballot at a later date. This resulted in a higher rate of unfair labour practices and significantly lower rate of unionization. The period between signing the card and the secret ballot intensified the vulnerability of the worker and gave an unfair advantage to the employer for whom the right to association does not exist. If it is a Charter right to choose to join a union, why must a worker in British Columbia be forced choose twice?

We concede that where the 50% +1 threshold is not met, a vote of the workers may be required to confirm certification. In these cases, we recommend a reduction in the prescribed time to conduct a vote from within ten days currently set out in the Code to not more than two working days. As previously stated, this should be an in-person vote only unless agreed to otherwise by all parties.

Successorship

Successorship is the principle that workers' rights and benefits that come from their union membership and their collective bargaining agreement are not lost as a result of business operation changes. Successorship laws provide job security and make sure that employers cannot undermine the efforts of workers to organize and bargain collectively simply by selling off all or parts of their business.

Successorship provisions of the BC Labour Relations Code stipulate that if a business or part of it is sold, leased, or transferred, the new owner is bound by any collective agreement in force at that business on the date of sale. Wages, benefits, and rights contained within the collective agreement apply to the new employer and bind them to the same extent as if they had signed the original agreement with the employees and their union. They are considered the "successor" employer.

However, the BC Liberals took further steps to limit successorship in health care by passing Bills 29 and 94, which limit the application of Section 35 of the Code. These laws have allowed employers to evade collective bargaining responsibilities and terminate employees in a manner which undermines the intent of successorship protection in the first place.

Current successorship legislation does not apply to contracting out or to contract flipping, and is silent with respect to changes in private service providers. As a result, legally obtained certifications and freely negotiated collective agreement rights simply disappear as a result of a business decision to contract out. This has become a feature of work in British Columbia for many health care, utility, food service and construction workers

The application of Section 35 of the Code is limited in the health sector by the Health and Social Services Delivery Improvement Act (Bill 29) and the Health Sector Partnership Agreement Act (Bill 94).

Bill 29 prevents Section 35 of the Code from applying to an entity that contracts with a health sector employer. This means that a person who contracts with a health sector employer cannot be determined to be the successor of that employer.

Bill 94 extends that protection against a finding of successorship to designated private sector partners. This means that an entity that contracts with a private employer who is in a P3 (Public Private Partnership) arrangement with a health sector employer cannot be determined to be the successor of that private employer.

As a result of these changes, we have seen a reduction in wages and working conditions for workers in these sectors, and a loss of industrial

stability across the sectors because of the high turnover this produces. The advantages of this system go entirely to employers, while workers see their Charter rights to organize to improve their working conditions eroded by the architecture of the Code. The absence of successorship provisions in the Code encourages employers to exploit these conditions, resulting in greater insecurity for workers and the services they deliver to BC's public.

In order to level the playing field, we recommend that the application of Section 35 be broadened to prevent subverting collective agreements through contract flipping. This will also require the repeal of the statutory successorship exemptions in health care; specifically, a repeal of Sections 6 of Bill 29 and of Sections 4 and 5 of Bill 94

*What we just read was directly from the BC Federation of Labour submission to this Committee. To honour the workers whose collective agreements were vapourized over the past 15 years, their history and the role the Labour Relations Code and legislation played in it, needs to be repeated in every room in this province. In the health care sector, this is primarily a women's issue. And while we have seen housing prices, both rental and ownership, skyrocket along with utilities in the Okanagan, most of these workers went from above living wages to minimum wages, seniority meaning something to being non-existent,

and from a pension leading to security in retirement to wondering if they'll ever be able to afford to retire at all. It has to stop. Because working FOR the public, shouldn't give you less rights if government privatizes your job.

Education as an Essential Service

We understand that there are some services so essential to the preservation of life that workers in these areas are not able to withdraw their services when bargaining reaches an impasse. The levels of essential services can significantly undermine the bargaining power of the union and should only be used in "life and limb" situations, as reflected in international law.

However, in 2001, the BC Liberal government extended essential services legislation to education and while education is very important to society, it is NOT a "life and limb" service.

In 2002, the ILO noted that the education sector is not an essential service in the strictest sense of the term and stated that the Canadian government should repeal the legislation so that teachers can exercise their right to strike in accordance with the freedom of association principles.

In 2015, the Supreme Court of Canada ruling on essential service aligned with that of the ILO but the BC Liberal government made no move to amend the *Code* in accordance with the *Charter*.

WE recommend that education be removed as an essential service, and that the committee recommend a tightly restricted use of essential services designations outside of the health care sector.

CONCLUSION

Other groups may ask to keep the status quo, believing labour relations stability has been achieved. They want the status quo because it is working for them at the cost of their workers. What has this so-called stability looked like? BC unions have taken employers all the way to the Supreme Court of Canada – and won. But how many other workers and unions wanted to fight but couldn't afford the time, energy, and money? The Courts and International Labour Organization have shown there was not real stability but, in many cases, the suppression of workers – their voices, rights, pay, working conditions. When the Labour Code is not balanced it becomes a tool of suppression of one of the groups you oversee.

We are hopeful the committee will recommend to government a set of Labour Relations Code and other legislative changes to bring that balance – a level playing field – in order to fully protect the Charter rights of working people to choose to join a union, bargain collectively AND keep their collective agreement until THEY choose to give it up, and strike if necessary. The welfare of workers in the Okanagan, many of them our most vulnerable, depend on those changes.

Thank you for your time.

P|E|A

BC's Union for Professionals

March 20, 2018

Email: LRCReview@gov.bc.ca

Labour Relations Code Review Committee (Section 3 Committee)
Ministry of Labour

Dear Committee Members,

The Professional Employees Association (PEA) is a trade union representing more than 2600 professionals in BC. The PEA supports the BC Federation of Labour Submission to the *Labour Relations Code* Review Committee Regarding Proposed Changes to the *BC Labour Relations Code.*

We believe that leveling the playing field between workers and employers requires changes to the *BC Labour Relations Code* as put forth in the BC Federation of Labour submission. In particular, the PEA would recommend "card check" as opposed to the two stage process currently in the *Code.* As well, our members working for the province of BC have been dramatically impacted by job cuts and reduced budgets. The PEA supports the provision of additional resources so the Labour Relations Board can ensure the administration or the *Labour Relations Code* is not unduly hampered from a lack of staff and other supports.

We are hopeful that the Section 3 Committee will make a series of recommendations supporting matters raised by the BC Federation of Labour and as a result, will enable a more fair environment for workers in BC. There is no question, that working people in BC will be better served as a result.

Sincerely,

Scott McCannell
Executive Director

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March 20, 2018

BC Labour Code Review Panel
Sent by email: LRCReview@gov.bc.ca

Dear Panel Members,

On behalf of the membership and Board of the Progressive Contractors Association of Canada (PCA), thank you for the opportunity to present our thoughts and recommendations on the Government of British Columbia's Labour Relations Code Review.

Introduction

PCA members are leaders in non-residential construction across Canada, including construction of many of BC's major projects such as the Port Mann bridge, the Sea-to-Sky highway, Site C, numerous Water & Sewage Treatment facilities and many hospitals and schools throughout the province.

Our members have been vital contributors to BC's labour and construction picture for the last 30 years, and employ thousands of British Columbians. We remain committed to being a positive and substantial presence in BC's construction industry now and in the future.

Our Association members are eminently qualified to speak to the need (or absence of need) for change in BC's Labour Relations Code. As major employers in BC, we are concerned that substantial Labour Code change—especially if it has the effect of changing the labour relations climate in BC or privileging one labour model over another—will do irreparable harm to this province, its economy, and its workforce.

PCA has actively participated in Labour Code review processes in other jurisdictions, including Ontario's Changing Workplaces review and, most recently, Alberta's review of its Labour Code and Employment Standards legislation. In both those reviews we were able to provide practical advice and feedback. We are eager to follow the same path here in BC and would welcome the opportunity to meet directly with the Review Panel.

We recognize that the call for these submissions is an important first step in this review, along with the town hall meetings that are being planned. However, we respectfully suggest that, should the Review Panel identify areas that it feels need further policy development, the Panel should identify these specific areas so that the labour relations community can make submissions knowing the initiatives that the Panel may be considering for recommendation. It is our respectful view that this is the only way that the Panel can be assured that it has engaged in a meaningful consultation.

PCA is pleased to see, and agree with, the general tenor of~~,~~ the terms in your mandate letter. We fully appreciate that the terms include the recognition that "there have been significant changes in the workplaces, economy and workforce of British Columbia over the past several decades." One of the most significant changes is the proportion of workers who no longer work under the traditional building trades model. Today, of the 90,000 people working in **non-residential** construction, roughly 30,000 are unionized. Our members represent roughly one-third of all unionized construction in the province. Important to note, the number of non-residential construction workers is expected to increase tremendously in BC over the next few years, and we expect PCA members will employ many of them.

We also appreciate that the terms of reference state that changes to the Labour Code should "…ensure workplaces support a growing, sustainable economy with fair laws for **workers and businesses**." PCA member companies completely support fairness for workers. We believe "fairness" means paying workers competitive wages and benefits and, most important, keeping them working. This can only be accomplished if there is an economic environment in BC that supports investment and thriving businesses. We believe that fairness for workers and businesses is best arrived at through stronger, more collaborative partnerships between workers and employers, rather than what can sometimes become a more adversarial relationship. Therefore, our proposal will focus on encouraging initiatives that foster collaboration, cooperation and build trust, and discourage proposals that undermine the collaboration, cooperation and trust so necessary to British Columbia's long-term economic well-being.

<u>BC Labour Code: Need for Continuity and Change</u>

Overall, PCA believes that British Columbia's Labour Code has served the people of this province well. While we acknowledge that some things have changed since the Labour Code's last revisions, we believe that the Code, as it currently stands, gets the balance between worker and company rights just about right, and has contributed to a lengthy period of labour peace. It is no coincidence, in our view, that the current labour-management climate has contributed to this province's current prosperity. The existing labour stability and predictability is critical to continued economic investment in British Columbia, and we are concerned about how possible changes to the labour code might discourage investment.

In your considerations, PCA urges you to consider our perspective on the following aspects of BC's Labour Code:

Section 8 – Right to Communicate

We believe the current policies are working and should not be changed, for the following reasons:

First, the Code already safeguards unions and union members against intimidation or coercion, thereby guaranteeing the freedom of expression that are their Charter rights. This has been underlined by case law from the Labour Relations Board (LRB) which has

issued decisions with clear guidance about what is and is not acceptable. And there have been relatively few cases where the LRB has had concerns that individual rights of free expression have been at risk.

Second, we believe that changes to Section 8 may be contrary to Section 1 of the Charter of Rights and Freedoms. Seeking to further restrict employers' right to communicate may constitute an unjustified restriction on their Charter rights, and would very likely be challenged in court. We believe there is no basis for further restriction on expression rights or their elimination.

PCA recommendation #1: no changes be made to the current regime related to Right to Communicate.

Section 19 – Open Period – 7th and 8th month.

BC's current Open Period happens within the 7th & 8th month of each year of a collective agreement. The Open Period is an opportunity for competing unions to "raid" a workforce. It should be noted that BC, with its annual open periods, is an outlier among its provincial counterparts. For most other jurisdictions in Canada Open Periods typically fall during the last two months of a two-year or three-year collective agreement.

From PCA members' perspective annual Open Periods are unnecessary, are disruptive and impede the productivity of any construction project. Excessive union raiding activity on or around a job site not only disrupts the workforce, but imposes significant costs through supervision of visitors, additional safety briefings, personal protective equipment, escorts around the project, and time with the workforce away from their regular duties

Union raids often involves highly aggressive and confrontational tactics and can have a direct negative impact on the morale of the workforce and the public perception of the project itself. Project Investors and Project Owners want to know that they can rely on labour stability during the course of a multi-year project, and that the project schedule and budget will meet required targets. All of those critical project elements are in jeopardy due to the uncertainty and instability created by BC's yearly Open Period.

PCA recommendation #2: that the Labour Code be amended so the Open Period falls during the last two months of a Collective Agreement, at a minimum every 3 years.

Section 24 (1) – Representation Vote Required

PCA believes that the current labour voting processes have served BC's labour market well and should not be changed. In particular, we object to proposals for automatic certification, either through card-based certification (certification occurring without a vote when a union signs up a given threshold of workers within a bargaining unit — e.g., greater than 50%) or imposed certification based on alleged unfair labour practices committed by an employer. We believe that both are undemocratic and undermine employees' representational rights and freedom of association.

The fundamental problem with card-based certification is that it removes the democratic right of employees to vote for or against a union. Card-based certification allows unions to get signatures and unionize an employer without employees necessarily knowing what they are signing or being fully informed as to the consequences of signing. Employees may sign because of peer pressure or fear of offending a union organizer or coworkers—common realities in workplaces. Employees also could be improperly coerced into signing, although we recognize there are provisions to make that illegal. Experience proves that signing a card does not mean the signer would vote the same way. This is true not only for certification and revocation votes, but in any election —a person's initial inclinations may change once they have more facts. The truest, safest, and fairest way to determine what employees want is a secret ballot vote.

Another critical point to make about the problem of card-based certification is that workers commonly belong to more than one union. In that environment, it is not an accurate premise that union membership means employees support certification of any particular employer. That is, displaying a card in a particular union is not an endorsement of that union in the present circumstances as employees will have. That employee could easily have membership in other unions at the same time. Furthermore, automatic certification would distort labour relations outcomes. Certification orders would be granted in cases where a secret ballot vote would lead to the opposite outcome. This is contrary to competitiveness, fairness, worker mobility, and investor confidence and is therefore contrary to the interests of workers and the public.

In Canada, certification usually requires employee affirmation through a vote, which is an important safeguard. BC, Saskatchewan, Manitoba, Newfoundland, Ontario (non-construction), and Nova Scotia (non-construction) all currently require a secret ballot vote, as does the Canada Labour Code. Card-based certification is not a mainstream process in Canada and should not be adopted in BC. The trend over the last few decades has been towards mandatory votes, not away from them.

The International Labour Organization (ILO) Committee of Experts has stated that safeguards should attach to compulsory recognition of unions, including "the representative organization to be chosen by a majority vote of the employees in the unit concerned." Automatic certification is inconsistent with the freedom of association because it forces employees to be associated with a union without the safeguard of a vote.

PCA recommendation #3: that the Labour Code retain current requirements for a representation vote, and reject any move towards automatic certification.

As noted above, PCA is not in favour of providing unions with the opportunity for automatic certifications (or card check). However, if the panel determines that automatic certifications should be permitted, PCA suggests that the following guidelines be established as the requirements and procedure for an automatic certification.

Membership in a union should not be taken as proof of or an indication of support in the union for the following reasons:

a. Most bargaining units and collective agreements require the employee to be a member of the union to remain employed, regardless of support.
b. In the construction industry many trades people are members of multiple unions in order to increase their employment opportunities.
c. Some employees in the construction industry only keep their membership active and current to remain in good standing for the union's pension plan and/or benefit plan even when they are not working for an employer not certified to that union.
d. It further may be that the employee supports a union when working for one employer but when working for a different employer the employee may not support the union.

Therefore, the following requirements should be created to ensure that the employees true wishes are being heard.

1. *"Fresh" and "Legitimate" Evidence*

   Given that union membership cards are not a clear indication or proof of a support of that union worker's intention, the evidence should be in the form of an individual petition that the employee signs and acknowledges that they are allowing the union to file a certification application of their behalf. We would be happy to consult with you on appropriate form that should take.

   Furthermore, any evidence – preferably a petition form but even in the case of using membership cards – that the Labour Board requires to show employee support should be "fresh". By this we mean that the evidence should be gathered within ninety (90) days of the certification application. This shows that this is the current wishes of the employee.

   Lastly, employees should have the right to 'rescind' the support at any time during the ninety (90) day period. See point 3 below.

2. *Evidence at or above seventy-five percent (75%)*

   Whether the preferred course of action is a petition form or membership cards, the threshold to waive an employee's fundamental right to a secret ballot vote should be significant. PCA proposes a minimum threshold of 75%.

3. *Rescind Support*

   Employees additionally require a clear and straightforward process to rescind their support before the union submits the certification application. This allow would employees the right to change their mind before the application. Once the application

has been filed the ability to change their mind no longer is permitted. This should apply whether the preferred process is by petition form or membership card.

Ideally employees should be able to send the Labour Board a form that rescinds their initial petition form with the union. The Labour Board would then send this form to the union (and only the union) so that the Employer is not aware of who supports or who does not support the union.

Section 24 (2) - Vote conducted within 10 days

Timeliness is a key consideration for all parties when it comes to Labour Relations activities. Ensuring a reasonable time frame is followed is important to employees who have requested a change, either certification or decertification, and the Employer who that affects. Unions also have their own agenda on whether they want a long or short time frame depending if they are incoming or potentially outgoing union.

Reasonable time frames for the Employer and the Employees would be in the range of 7 to 10 Business Days. Employers large or small, have different impacts of an application. Large Employer need time and manpower to pull the data out of complicated systems, check the data for accuracy, and may have to work with remote offices as sometimes the back office functions exist outside of the geographical regions. Small Employers need to pull staff away from their existing work to dedicate time to the effort, and may need to spend extra time to understand what is being asked and how they may be impacted by the labour relations code. Seven to Ten Business days is also reasonable as it is a usual time frame that an employee can expect to see the impact of changes in their workplace, mainly, a wage increase. If an Employer increases an employees' wage on the first of the month (for example, October 1st), then the employee will not actually see the new pay cheque and increased financial gain until October 11th, 9 days later, when he/she receives the weekly payroll deposit.

PCA recommendation #4: that the Labour Code retain current requirements for a vote conducted within 10 working days.

Sections 35-38 – Successor Rights, Mergers and Common Employer provisions

These sections govern the nature of the relationship between the employer and the respective union when two companies are involved, either through the future purchase or acquisition of a new company, or possibly a previous relationship between two companies that are currently considered separate. The industry term for two legally separate entities that might share a similar history and/or name is 'double breasting'.

<u>If removing the ability of employers to double-breast their operations is being considered, PCA strongly opposes such measures</u>. BC construction and maintenance organizations have engaged in double-breasting for decades. Changing the rules at this point would cause massive instability in the industry, which is not in the public interest. It would cause great

uncertainty and prompt unnecessary litigation. It would divert resources from their best economic use. It would also make BC less attractive as a place to operate compared to many other jurisdictions where double breasting is also available. This issue is a major concern to the construction industry.

PCA recommendation #5: no change be made to existing Successor Rights, Mergers and Common Employer provisions.

Sections 41-44 – Registration, certification or accreditation of councils of trade unions or employer associations

We believe these sections as currently written are effective and strike a balance between employer and employee rights. Specifically, we believe the voluntary nature of membership in employer associations in section 43 is particularly important as it allows employers to decide if they want to be part of a master agreement or go it alone. This is a critical element in maintaining flexibility for employers in bargaining and maintaining competitive advantages.

Furthermore, we believe a change to the Code that would prohibit wall-to-wall certifications or multi-trade certifications would be very harmful to the industry, and quite possibly unconstitutional (ie. contrary to freedom of association).

PCA recommendation #6: no change be made to existing registration, certification or accreditation of councils of trade unions or employer associations

Section 55 – First Collective Agreement

PCA believes that the current regime for establishing a first collective agreement is working well and should not be changed. In particular, we reject any move towards First Contract Arbitration, which allows a party to a round of collective bargaining for a first collective agreement to require arbitration rather than the normal recourse of strike or lockout. We reject the concept for the following reasons:

It is arguably contrary to the *Charter of Rights and Freedoms*. If the right to strike is a fundamental Charter right so, too, is the right of employers and employees to establish – or not establish – a collective agreement.

Requiring arbitration interferes with an employer's right to lockout, which is the flip-side of the right to strike and arguably a fundamental right also.

Arbitration often leads to collective agreements that are more expensive than they otherwise might be. It compels parties to enter an agreement they might not otherwise make.

Arbitration often skews collective bargaining. Rather than bargaining to get a deal, parties often bargain to best position themselves for arbitration. Fundamentally, arbitration results in a different process and often a different result than free collective bargaining. It is an interference for the sake of unions, not workers.

PCA recommendation #7: the Labour Code retain current requirements for arriving at a first collective agreement.

Other – Project Labour Agreements/Community Benefits Agreements

The Government of BC has given ample evidence of their intent to apply Project Labour Agreements (PLA), also called Community Benefits Agreements (CBA), to major public infrastructure expenditures in the future to ensure various social and labour policy outcomes. (It should be noted that PCA members are leading innovators in the areas of training and hiring under-represented worker groups such as First Nations and women, and apprentice training.) If that is indeed the case, then the Government may ask you to consider including language to that effect in the Labour Code. (This is the case in seven Canadian provinces and the Government of Canada.)

In various Canadian jurisdictions – including British Columbia – PLA's have been used as a means of restricting labour choice by designating a single "employer" that has entered into collective agreements with identified building trades. In practice the result has been to privilege one particular labour model – usually those affiliated with the Building Trades – at the expense of all the others. PCA strongly rejects the rationale behind restrictive PLA's: in our view they are regressive, inhibit competition, impair overall competitiveness, and are quite possibly unconstitutional. All qualified British Columbians should be able to share in work commissioned and funded by the public purse.

Should the Government insist upon pursuing PLA's for public infrastructure investments PCA asserts that all PLAs – whether governed by the Labour Code or not – must be subject to the following three conditions:

a) Workers must be free to choose the union they wish to work for;
b) All qualified companies must be allowed to bid for work, regardless of labour model they employ;
c) Bidding should be as competitive as possible (open to all qualified companies and workers regardless of union affiliation or lack thereof) so as to bring the best value for taxpayer dollars.

Conclusion

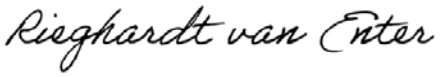
Overall, PCA believes that the province has been well served by its existing labour relations regulatory regime, and extreme changes will only harm the province in its delicate economic and fiscal situation. No one wants or needs a renewed round of labour unrest that will harm

British Columbia workers the most. As a result, we urge caution and prudence in the matter of Labour Relations Code review.

PCA largely supports leaving the legislation as it is; however, if there are to be changes, they should be modest and seek to avoid damaging investor confidence by way of increasing uncertainty, instability, unfairness, or regulatory burdens. Further, changes should not occur without clear and comprehensive discussion of the issues and specific proposals.

One final point: while PCA appreciates the opportunity to be consulted in the current review, we are concerned that the open-ended approach taken by the government, compounded by the compressed timetable that has been set for the present review, creates an environment of instability and uncertainty. If the government does proceed with changes, we ask for the opportunity to consult over the specific proposed changes.

Respectfully Yours,



Rieghardt van Enter
BC Director
Progressive Contractors Association of Canada (PCA)

cc. Paul de Jong, President, PCA
Darrel Reid, VP Public Affairs, PCA

PPWC
Public and Private Workers of Canada
National Office

Affiliated to the
Confederation of Canadian Unions

March 13, 2018

By email: LRCReview@gov.bc.ca

Labour Relations Code Review Panel

Panel Members: Barry Dong
Michael Fleming
Sandra Banister, Q.C.

RE: BC LABOUR RELATIONS CODE

I am the First Vice-President of the Public and Private Workers of Canada (PPWC). On its behalf and in response to the Panel's invitation I am making this submission regarding the acquisition of bargaining rights in British Columbia.

THE ACQUISITION OF BARGAINING RIGHTS

It is the PPWC's submission that the Code should be amended to permit the acquisition of bargaining rights through a card based system without the necessity of a vote.

A brief review of the background to this issue supports a conclusion that the necessity of a vote was largely politically driven and contrary to recommendations for labour law reform that had been made in September 1992.

The modern era of labour relations in British Columbia begins with the 1973 Labour Code which attempted to balance the interest of labour with those of management while safeguarding the rights of employees. From its introduction until 1984 there were few significant changes.

In 1984 the *Labour Code Amendment Act* was enacted and it changed the process by which trade unions became certified. Until that time unions could acquire a certification on the basis of signed membership cards. The 1984 amendment provided that membership cards were not enough and employees were required to obtain union representation through a secret ballot vote. At the same time employers were able to obtain decertification after two years of not employing bargaining unit members.

In 1992 the government appointed a three person Committee with a broad mandate to recommend an overall industrial relations strategy for the Province. That Committee issued its report in September 1992.

In reviewing the 1984 amendments it noted that the introduction of the secret ballot vote into British Columbia labour legislation constituted a departure from the norm in Canadian law where union support had traditionally been assessed on the basis of signed membership cards. Further,

while the statute still retained prohibitions against employer interference with the certification process, after the introduction of the vote the raid of unfair labour practices by employers during organization campaigns increased dramatically. In addition, the rate of new certification dropped by approximately 50%. The Sub-Committee made a series of recommendations to the Minister of Labour including the threshold issue surrounding certification which was whether it should be granted on the basis of signed membership cards or a secret ballot vote.

In concluding that signed membership cards were the preferable approach it was noted that:

- The surface attraction of a secret ballot vote does not stand up to examination.
- When certification hinges on a campaign in which the employer participates the lesson of experience is an unfair labour practice is designed to thwart the organizing drive will inevitably follow.
- Once a vote was ordered this led to key union supporters being fired or laid off while threats of closure dominated the campaign.
- There was no compelling evidence that membership cards to not adequately reflect employees' wishes. In those cases where improper influence by a union during a certification campaign is established the Board has a plenary jurisdiction to dismiss the application or to order a vote.

It is to be noted that the current procedures and regulations regarding membership cards are enforced strictly in order to provide safeguards for the rights of employees and employers. This includes requirements that the cards be properly dated, refer to the correct union local and contain an acknowledgment of the consequences of signing the card.

To complete this historical review a new government came to power in June 2001 and introduced reforms to the Labour Code. Amongst other initiatives it reintroduced a mandatory secret ballot vote for union certification applications.

Insofar as other jurisdictions are concerned I note that the both the Provinces of Ontario and Alberta have recently modified their labour relations legislation to permit certification without a vote. In addition federally the *Canada Labour Code* amendments which introduced the requirement of the vote were short lived and were removed last year.

Accordingly, on the basis of the matters set out above, it is the PPWC's submission that certification should be granted to unions on the basis of signed membership cards and not a secret ballot vote.

In Solidarity,

Gary Fiege
PPWC
First Vice President

March 2018

Submission to The Labour Relations Code Review Committee regarding proposed changes to the BC Labour Relations Code

Public Service Alliance of Canada, BC Region

Who We Are

The Public Service Alliance of Canada BC Region represents 18,000 workers employed in large and small communities throughout British Columbia.

PSAC BC members work for the federal government, agencies, and crown corporations and in the transportation, security, and community service sector.

Nationally, the Public Service Alliance of Canada is one of the country's largest unions, representing over 180,000 workers in every province and territory in Canada and in locations around the world.

Recommendations

The Public Service Alliance of Canada BC Region wholeheartedly agrees with the submission provided by the BC Federation of Labour and in doing so recommends the following items:

General

1. Continue the ongoing review of the Code by allowing the Section 3 committee to be seized of the question of labour relations improvement on an ongoing basis – rather than every 16 years. s.3.

2. Support the work of the Labour Relations Board by encouraging government to properly fund the board so that critical services like certification votes are not delayed, or conducted by mail, simply because of a lack of resources.

3. Ensure effective and timely decisions by extending the timelines for decisions provided by vice-chairs to those given by arbitrators. s. 91, s. 128, s. 159.1.

Unfair Labour Practices

4. Avoid infringement of workers' Charter right of association by increasing the use of remedial certification in cases of unfair labour practices. s. 14.

Acquisition of Bargaining Rights

5. Repeal of the Employer Speech provisions during organizing drives, because they infringe workers' Charter rights to choose to join a union. s. 8.

6. Clarify when open (raiding) periods fall by setting them in a regular period in the calendar year, rather than the anniversary of the collective agreement - which is often unknown to interested parties. s. 19.

7. Restore a system of union certification on the basis of membership cards alone. s. 24.

8. Establish faster timelines to ensure labour peace by causing more expeditious voting. If certification votes are necessary, the application threshold shall be in line with those in other Canadian provinces. The timeline for a vote on any issue shall be not more than two working days. s. 24.

Successorship Rights

9. Broaden Section 35 to strengthen successorship rights to prevent subverting collective agreement obligations through contract flipping; and Repeal s. 6 of Bill 29-Health and Social Services Delivery Improvement Act, 2002 and s. 4 and 5 of Bill 94- Health Sector Partnerships Agreement Act, 2003.

Replacement Workers

10. Protecting workers' Charter-protected collective bargaining rights, including the right to withdraw their labour by re-committing to British Columbia's laudable ban on replacement workers. s. 67.

Essential Services

11. Restore Charter-protected collective bargaining rights to teachers by removing education as an essential service. s. 72.

Variations of Certifications

12. Correct issues with partial decertification applications by extending the rules and timelines for full certifications to this type of application s. 142.

The Public Service Alliance of Canada BC Region echoes the rationale for all these recommendations as outlined by the BC Federation of Labour in the written submission they provided to the Committee.

Thank you for the opportunity to contribute to this important process.

THE Research Universities' Council OF BRITISH COLUMBIA

SUBMISSION TO THE SPECIAL COMMITTEE TO REVIEW THE LABOUR RELATIONS CODE

March 19, 2018

Introduction

The Research Universities' Council of British Columbia (RUCBC) represents the interests of BC's research universities. RUCBC's mandate is to identify issues facing the universities, provide system wide leadership in the development of relevant public policy and communicate on behalf of the university system. RUCBC also provides a coordinating forum for its member universities and acts as a provincial focal point for working with the Government of British Columbia and provincial or national bodies associated with universities.

The recommendations contained in this submission reflect the consensus view of the members of RUCBC with respect to the *Labour Relations Code* ("LRC"). We also believe that these recommendations have broad support within the post-secondary education sector.

We believe that the LRC works well in providing governance to the relationship between unions and employers. The provisions set out in the LRC, for the most part, properly balance the interests of unions and employers through the collective bargaining process and other tenets of labour-management relationships. Our submissions are based on our observations of what has worked well and our experiences with various processes where the modification, or addition, of certain provisions would be increase the effectiveness of this legislation.

Certification Process

Under section 39 the LRC instructs that votes must be by secret ballot, including certification votes. It is our submission that the current confidential voting process be maintained for applications for certification. The secret ballot vote is a cornerstone of democracy.

We also submit that the Board's processes and procedures need to be modernized. It is important that all employees have a say in a certification vote, and the Code should facilitate this goal by ensuring that employees have many ways to cast their ballot, including by secure electronic voting.

Section 2 and 8

We submit that Sections 2 and 8 are very important provisions and should be retained. The ability for unions and employers to communicate on an equal footing with members and employees respectively is critically important.

Expedited Arbitration

The parties to a collective agreement should be able to contract out of Division 4 of the Code by agreeing to their own forms of Expedited Arbitration and their own list of expedited arbitrators within their collective agreement. This will ensure that the parties are able to mutually determine their arbitration processes and which arbitrators will be empowered to interpret their collective agreement and resolve their disputes. This is fundamental to the arbitration process.

Appeals of Arbitration Awards

The current standard of review in s. 99 of the Code is amorphous, difficult to apply, and inconsistent with modern standards of review. Further, under the existing s. 99 standard of review, unreasonable decisions of arbitrators stand so long as there is no denial of natural justice and the decision is not inconsistent with the principles expressed or implied in the Code. This is not fair to the parties and generally brings the administration of justice into disrepute.

We submit that s. 99 should be replaced with the modern Dunsmuir standard of review, where reasonableness (with due deference to the arbitrator) is the general standard, and correctness is the standard for questions of law and areas that are outside of the expertise of a labour arbitrator.

By adopting this standard, the Code would be brought into line with modern conceptions of the standard of review.

Further, we submit that the appeal process should be more streamlined, with an appeal from an arbitrator's decision being heard by a panel of the Board, and from there a party may apply for judicial review. We would propose that there be no reconsideration hearing by the Board.

We also submit that s. 100 should be repealed, and all appeals of arbitrator's decisions should go directly to the Board.

Replacement Workers

Section 68(1)(a) is unwieldy and does not strike the right balance between the rights of employers and the rights of unions. Often the strike or lockout occurs years after notice to commence collective bargaining was given. By then, many managers who were employed on the date on which notice to commence bargaining was given are no longer employed by the employer, and therefore the employer's ability to legitimately operate during a labour dispute is unfairly curtailed. The result is that the replacement worker provision operates in a manner that is not fair for employers, as unions are able to bring disproportionate economic pressure on employers.

We propose that s. 68(1)(a) be replaced with the following: "who is hired or engaged after the date that is 3 months before the issuance of strike or lockout notice".

Consolidation

There have been significant changes in workforces, workplaces, and in the economy in British Columbia over the years. This means that bargaining unit structures that may have been appropriate at one point in time are simply no longer appropriate, as the dividing line between different groups of employees diminishes or is eliminated through technological advancements and other changes.

The Code does not reflect this reality, as it makes it extremely difficult for employers with multi bargaining unit structures to establish that that structure is no longer appropriate in order to consolidate. The hurdle of establishing that there is industrial relations instability is incongruous, as it seems to disadvantage those employers who strive to resolve workplace disputes and issues in a cooperative manner with their bargaining agents. Further, it is also incongruous that the Board would permit bargaining unit structures that are no longer appropriate to be maintained, only because those structures were set in place in some cases many decades ago.

We submit that the Code should contain provisions that allow employers and unions in multi-bargaining unit structures to obtain consolidations by showing that the existing bargaining unit structure is inappropriate. This, rather than industrial relations instability, should be the driving factor in consolidation applications, as this will make for harmonious and stable labour/management relations.

Essential Services

As institutions of higher learning, Universities are the lifeblood of the new economy, and are essential to support a growing and sustainable economy in British Columbia. In our submission, s. 72(1)(a) of the Code should be amended to add a new subsection (iii) to cover students and research at Universities. The education of University students should not be put in jeopardy due to a labour dispute, nor should important research projects many of which represent years and years of important work (much of which benefits society significantly) that may all be jeopardized due to a labour dispute. The protection of University students and research is no less important than s. 72(1)(a)(ii) which covers primary and secondary students.

Chapter 5

Diversifying Political Action in Retail

In recent years, there has been a marked increase in efforts to organize retail workers and improve retail work. There has also been an expansion and diversification of the routes and vehicles being used to unite workers and advocate for change. Both in North America and around the world, innovative structures and strategies are being developed and used. Accordingly, in retail, *organizing* is not merely a synonym for *unionizing*. This chapter highlights a number of the contemporary forms of political action being used in retail.

Workers have a rich history of uniting through various kinds of organizations. These include formally recognized labor unions, community unions, groups for unemployed workers, poor workers' organizations, networks, coalitions, and workers' centers (Black 2012; Choudry and Thomas 2012; Cobble 1991a; Coulter 2012a, 2012b; Cranford and Ladd 2003; Fine 2006; Finkel 2006; Luce 2004; Nussbaum 2007; Tait 2005). In other words, organizing has never simply been a synonym for unionizing, across sectors. The relationships between formal unions and other organizational formats have varied and continue to vary. There can be collaboration and solidarity, tension and criticism, or more extensive hostility and sabotage. Of course, unions themselves are heterogeneous in a number of ways, including the robustness of their finances and their political orientation. Consequently, the degree of connectivity with and support for non-unionization-focused forms of organizing in retail varies.

K. Coulter, *Revolutionizing Retail*

Many of the newer strategies being employed stem, in part, from the challenges of unionizing retail workers. As evidenced by the previous chapter, corporate hostility to unions and the powerful union avoidance strategies that result are particularly significant challenges. The United Food and Commercial Workers Union (UFCW) has tried a number of strategies to unionize Walmart stores, but as explained in chapter 4, no significant inroads have been made yet (Adams 2005). A store in Weyburn, Saskatchewan, a community with a long history of progressive politics and leaders, did organize in 2004, but lengthy legal disputes ensued. UFCW Canada Local 1400 was ultimately recognized as the bargaining agent by the Saskatchewan Labour Relations Board four years later, but negotiations dragged on and no collective agreement could be secured. Workers were frustrated by the delays. Moreover, during such a long period, significant turnover occurred. In this context, in 2010, a decertification vote was held, and workers voted in favor of decertification. The union appealed the vote, however. In 2013, the Supreme Court of Canada ruled that the union's appeal would not be heard, and the results of the decertification vote were recognized. Arguably, delays and lengthy legal proceedings could be seen as another form of union avoidance.

Given the substantial and multifaceted challenges, union representatives, community organizers, and scholars have reflected on ways to tackle the unfriendly retail giant (Rathke 2006). Campaigns like Wake-up Walmart and Walmart Watch have been developed in order to educate, engage, and build networks among those interested in improving the conditions and practices at Walmart. Small associations for Walmart workers were created in both Canada and the United States. Community-based coalitions have organized against Walmart, as well. Some have provided support for workers seeking to organize, and some have fought against Walmart locations being erected in their communities. People's concerns stem from the impact of a store opening on local, small businesses; Walmart's environmental and animal welfare record; its emphasis on foreign-made products and the working conditions in those factories; and the lack of living wages paid by the company, among other issues (Adams 2005). In other words, Walmart's actions inspire a lot of anger and collective action of different kinds.

And Still We Rise

Arguably, the current organizing approach seeks to harness, combine, and further develop dimensions of these different strategies. OUR Walmart (the Organization United for Respect at Walmart) was founded in 2010 and has been growing in size and prominence since then. In the simplest of terms, it is an organizing vehicle used to propel workers who want to make change at work even though they are not currently in a union, to foster supportive community, and to promote a culture of activism. This approach could be and is sometimes called *minority unionism*, but I have argued that the term *store-based network* is more accurate (Coulter 2013b). Terms like *workers' network*, *workers' organization*, and, potentially, *workers' movement* also apply. While terminology and framing do matter and help shape perceptions among workers and the public, more broadly, even more important is the work being done on the ground.

OUR Walmart field directors and organizers work daily with worker-organizers and activists in more than 40 chapters across the United States. In early 2013, an organization in Québec was also established, called Notre Walmart (*notre* is French for "our"). Notre Walmart is in the very early stages of organizing, but organizers report that there is interest from workers at over 30 stores (Laprade 2013). The US chapters are more established and becoming even more well-known as different forms of political engagement are pursued.

Workers take action at the store, community, and corporate level. The approach is both responsive, stemming from particular challenges or issues that arise in stores, and proactive, emphasizing workers' power and their ability to change the company's practices. Issues raised to date include poverty wages, a shortage of hours, the cutting of hours, racial and/or gender-based discrimination, and a need for workers to be free to organize and speak out without harassment or reprisal.

I have argued that the overarching emphasis of the organization is that unity plus collective action equals change (Coulter 2013b). A simple but powerful illustration of this approach occurred when a greeter was denied a stool by the managers at his store, despite the fact that the corporate handbook permits seating for greeters.

In many other cases, this worker would simply have been forced to accept the decree issued that denied him the chance to sit down. However, OUR Walmart members learned of what had happened and began a sit-in protest (a particularly fitting tactic given the situation). Likely wanting to avoid a negative public relations debacle within which Walmart was highlighted for denying someone in need the chance to get off his feet, the company did not call the police. Instead, the worker was granted the right to use a stool. This example may seem simple, but it clearly illustrates the approach being emphasized through OUR Walmart. Workers learn firsthand that by uniting and taking action together, they get results. Thus, workers see not only that they have collective power, but that they can make change.

Accordingly, a multifaceted set of actions has been pursued, including information pickets at stores, marches, and caravans, the latter drawing on the tradition of civil-rights-movement activism and the Freedom Riders convoys which went to the most segregated and racist US states in the 1960s. The OUR Walmart caravans have gone to the company's shareholders meetings, allowing workers to share their stories in communities along the way and to voice their concerns directly to corporate executives and the shareholders. Again enlisting the longer history of African American activism, the song "Keep Your Eyes on the Prize" was sung at caravan events and updated to include the lyrics "I'll be buried in my grave, before I'll ever be a Walmart slave. Keeping our eyes on the prize and holding on. The one thing we did right was the day we decided to strike. Keeping our eyes on the prize and holding on."

Shareholders meetings for many publicly-traded companies are a large spectacle, and the majority or dominant shareholders—in this case, the Walton family—still wield more power than the hundreds or thousands of individuals who own some stock. Many Walmart shareholders seem fairly content with the low-wage, low-cost business model and the profits it accrues for them. Nevertheless, workers' voices would be absent if this kind of political action did not occur. It also means shareholders cannot say they did not know of the conditions at the stores or of the poverty of the workers.

In the fall of 2012, workers in more than two dozen Walmart stores in the United States walked off the job. The majority were members of OUR Walmart. Interestingly, a few workers, including

those at a store in Oklahoma, engaged in a day of action on their own, complete with homemade signs, without ever having talked to an organizer. This suggests that courage and collective action foster courage and collective action. At the same time, an organizational framework is more likely to encourage and support workers who want to stand up for themselves, and the importance of what Alan Sears (forthcoming) calls the "infrastructure of dissent" is clear.

The October actions served as a springboard for an unprecedented and historic series of actions at more than 1,000 stores on "Black Friday" (the day after Thanksgiving in the United States and the beginning of the profitable Christmas shopping season). For example, in the San Francisco Bay Area, different kinds of actions were being planned based on what the members wanted and felt was possible given their particular location and community. Some were going to release balloons with political messages inside their stores, others were planning to distribute leaflets to shoppers, and/or rallies were being organized. In all instances, coalitions with local labor councils, community groups, religious leaders, and progressive politicians were being established and solidified. Even with a supportive network, there is still worry among some Walmart workers about the consequences of taking action. However, striker Dominic Ware had this to say about fear: "I have no fear of being retaliated against . . . because the whole reason that I'm speaking out is bigger than me . . . I'm more scared about my son one day having to work for Walmart" (Eidelson 2013a, n.p.).

Some of the "Walmart Strikers" were terminated or otherwise disciplined (Eidelson 2013b). OUR Walmart has condemned all forms of alleged retaliation against workers for engaging in political action. The right of all Walmart workers to self-advocate is a core pillar underscoring the entire organization. Moreover, OUR Walmart members and organizers maintain ties with those workers who have been terminated, supporting them personally, involving them in organizing, and fighting for their reinstatement. Given the high turnover rate in retail as a result of termination and worker exit, such a commitment takes on even greater significance (Rathke 2006).

Retail workers, unions, and their supporters around the world have expressed solidarity with the US-based Walmart strikers. In this spirit, UNI Global Union facilitated international days of

action to support change at Walmart, and events were organized in Argentina, Chile, Brazil, Nicaragua, South Africa, India, Canada, and the United Kingdom, among other countries. Notably, some or many retail workers, even those at Walmart stores, are unionized in a number of these places. In nations that have strong union cultures and/or governments that require foreign companies to respect existing collective agreements if seeking to do business in the country, Walmart has been forced to bargain, work with unionized workers, and follow national laws.

OUR Walmart continues to organize and expand, as new chapters are established and committees set up. Local efforts are bolstered by web and social-media strategies, which link workers with each other, educate the broader public, and share actions with the broader network of supporters. Workers' messages and the organization's emphases vary. In some instances, the message is that workers do not only want to gain greater respect, they want to help the company do better and be better. In other cases, the language is much more critical and highlights the widespread poverty wages, corporate greed, the extreme wealth of the Waltons, and the disconnect between the company's rhetoric and its behavior. Overall, the tone and emphases of both the organization and the workers involved include critique, as well as a desire for collaboration.

Complementary organizations also exist, broadening the angles from which workers within and beyond the company are contesting Walmart's practices. For example, Making Change at Walmart supports the work of OUR Walmart and, in particular, engages those who do not work in the company but wish to see improvements therein. Coalitions between store and warehouse workers are also being established and expanded to foster unity and solidarity across the supply chain, such as with Warehouse Workers United. At the same time, legal battles continue through the National Labor Relations Board in the United States, provincial labor boards in Canada, and private law suits. Walmart is the target of many law suits alleging discrimination, particularly based on gender and disregard for environmental regulations, and the company has been found guilty of many violations by courts (Adams 2005; Featherstone 2004; Lichtenstein 2009). Walmart has also sued the UFCW, the union that finances OUR Walmart (Gordon 2013).

The UFCW's role in financing and coordinating OUR Walmart is clear, but the focus is not the establishment of a union. Given the many challenges of organizing Walmart, an unconventional approach is a smart, strategic decision. The action-oriented framework facilitates the building of workers' confidence and consciousness and has helped gain tangible victories. Given the significant barriers to organizing Walmart workers, the UFCW could have opted to pursue organizing routes that are more likely to lead to new members, more quickly. Instead, the union has demonstrated a commitment to creative mobilizing and organizing. The history of organizing at Walmart is still being written because it is still made by the women and men committed to a better future for workers in the company.

Engaging and mobilizing workers across geographic regions around a specific store chain is a framework that has been applied beyond Walmart. For example, the strategy is being used by the UFCW to support workers of the Dutch food retail company, Ahold, as well. The company has many unionized stores globally, including in the United States. Two nonunion banners, Martin's and Giant-Carlisle, operate in Southern states, in particular. Consequently, the I Hold campaign was developed to support these predominantly racialized and feminized workers and argue that all workers within the Ahold enterprise should have the same standards and protections. At the same time, through the use of the name, I Hold, the campaign is not simply playing on the name of the company, but highlighting the different things workers "hold," including knowledge, power, and experience.

Similarly, UFCW Canada created a network called Ask Target for Fairness in response to corporate actions. Large and profitable US-based retailer Target moved into Canada in 2012. The company replaced more than 140 existing Zellers department stores with Target locations. However, Zellers workers were informed that they were losing their jobs and only that they were welcome to reapply for work in the Target stores. The workers were not provided with any guarantee of similar positions, recognition of seniority, or any of the modest increases in wages and benefits they may have earned through collective agreements or decades of service. The UFCW formally represented workers in 16 Zellers stores. In these low-cost department stores, some people had been working in the same store for 10 or 20 years. One woman from

Niagara Falls, Ontario, who spoke out against the job losses, had been working in her community store for 38 years. Some workers who asked for reference letters to help them with their job searches shared what the company provided in response with me. The letters provided by the company were comprised of one short paragraph indicating that the individual had worked in the store, in specific positions, and for how long. There was no mention of performance or commentary on workers' skills. The workers saw this as yet another indication of how little their years of work were appreciated.

In contrast, the union worked with any interested employees to try and gain guarantees from Target for all Zellers workers, whether they were UFCW members or not. The parent company, HBC, issued a letter forbidding Zellers workers from talking to the media, but a small number spoke out nevertheless and felt buoyed by the support from the union (Kopun 2012). The campaign's efforts focused in particular on raising workers' issues through social and mainstream media, petitions, community rallies, presentations at shareholders meetings, and direct conversations with human-resources representatives from Target. Target eventually agreed to guarantee Zellers workers interviews, but nothing more. As Target stores opened across the country, Target Canada's president, Tony Fisher, would not comment on how many Zellers workers were actually hired, nor would he provide any information about how many full-time jobs there were in Target stores for Canadians, period (Kopun 2013; Strauss 2013).

Each example of the store-based network strategy demonstrates interactive, participatory avenues for worker engagement and community education. There are other organizational variations on the idea of engaging retail workers in networks across space, as well. For example, the Food Chain Workers Alliance is a US-based coalition that unites food retail workers with those involved in the growing, production, and storing of food. Clearly, a network or coalition framework is a vehicle, and the specific content and focus are shaped by the social actors involved and the issues being tackled, among other factors. The vehicles can be proactive and/or responsive, and usually are both.

Overall, although aware of the challenges and cognizant of workers' legitimate worries, there is a real sense of excitement within labor organizations about the prospects of making change

through unconventional organizing frameworks and the accomplishments that have already solidified small victories for workers. OUR Walmart organizer Alan Hanson (pers. comm.) says, these approaches "are the most exciting things happening in the labor movement and the only way we're going to organize retail."

Retail Workers Unite

The Retail Action Project (RAP) is another interesting example of contemporary organizing and political action in retail. It differs from the networks mentioned in a few ways, including in terms of scope and structure. RAP is based in New York City, a place mentioned often in this book because it has a long history and vibrant contemporary cultures of political action in retail and beyond. In 2005, RAP began as a community labor coalition linking the Retail, Wholesale, and Department Store Union (RWDSU) and the Good Old Lower East Side community group. Early efforts focused on supporting predominantly young and immigrant workers, often as they fought against wage theft and discrimination. Wage theft is illegal and can take various forms, including paying workers less than the minimum wage, not paying for the total number of hours worked, and naming a position an internship. Young workers, recent immigrants, or undocumented workers can be particularly vulnerable to wage theft since unscrupulous employers may presume such groups do not know their full rights, have the resources to defend themselves, and/or be susceptible to threats. RAP has worked with the attorney general's office to investigate retail workers' cases. Retail workers at a number of stores have won settlements, including Yellow Rat Bastard workers who were paid $1.4 million in owed wages. Similarly, $950 thousand was paid to more than 100 workers at Mystique, and workers at Scoop were paid an undisclosed amount. Shoe Mania workers won $1.15 million and shortly thereafter joined the RWDSU.

Since its early days of political action, RAP has grown in size and prominence, and it became an advocacy organization in 2010. Housed in the heart of Manhattan, RAP's small office is busy and bustling. This is a reflection of the diverse kinds of activities being pursued, work being done, and people involved. RAP has a small waged staff, paid and voluntary worker-organizers and trainers, and many volunteers. RAP members do not come from a

single store or chain, but rather the retail sector as a whole. They may be moving between retail jobs, currently unemployed but looking for work in retail, or long-serving workers in nonunion stores. In other words, the New York retail sector is the basis for unity. Accordingly, RAP is a sector- or occupation-based organization (Coulter 2013b). There are different ways for workers to be engaged. Workers join the network to keep informed and can attend events of their choice. Particularly active workers can also become involved as organizers, trainers, or members of the leadership board or board of directors.

Structurally, RAP is akin to a workers' center model seen across North America, exemplified by the Restaurant Opportunities Centers, Workers' Action Centers, and Migrant Workers Centers (e.g., Black 2012; Choudry and Thomas 2012; Cranford and Ladd 2003; Fine 2006). RAP has very diversified funding sources, including private foundations, union support, and contributions from members and private donors. Its actions are diverse. The organization provides practical and professional assistance services to bolster participants' abilities to gain and maintain retail work, including through help with résumé writing, job searches, customer-service training, and legal referrals. The office also provides workers with access to tangible essentials like computers and printers. These kinds of resources should not be assumed to be easily accessible for all people, particularly those who are unemployed or earning poverty wages.

Some labor advocates may balk at the idea of a workers' organization providing customer-service training. Yet RAP executive director, Carrie Gleason (pers. comm.), recognizing the diverse skills required in retail, as outlined in chapter 2, says the following: "Low wages in retail are often justified by the claim that retail is a low-skilled job. Yet, working on the shop floor is often fast-paced, physical work that demands emotional intelligence and significant multitasking within rigid expectations. Through our professional development programming and services, RAP supports workers' career advancement, and shifts public perception[s] about the value of work."

Moreover, some seeking work in New York retail may have recently immigrated to the United States and thus be facing cultural and/or linguistic barriers to finding even low-wage jobs. Accordingly, customer-service training, provided by a worker-friendly

organization, could be viewed as helping these people gain a greater chance of getting a foothold into waged work. At the same time, if a worker comes to RAP for customer-service training, this can lead to increased engagement with the organization and its more explicitly political projects. For example, while at the RAP office in 2011, I spoke with two workers who had initially come to RAP for professional help but had become politicized over time, and RAP staff told me that this is common. When workers enter RAP, they step into a welcoming space and community, where they are respected and valued, something that can stand in stark contrast to their experiences in the city and economy more broadly. They also become involved with an organization pursuing many projects, many of which take the idea of respecting individual people as retail workers and translate that into political action that promotes policies to enshrine and legislate greater respect at a broader level.

In that vein, other educational initiatives at RAP include workers' rights and organizing training, as well as media skills development. Moreover, RAP is always building campaigns. Often, individual workers' concerns are the catalyst, particularly when a pattern is evident or a particularly problematic employer identified. Recently, workers at both Juicy Couture and Victoria's Secret have brought their concerns to RAP, seeking to amplify their message and learn from RAP staff and activists, for example. Sustainable scheduling, or "just hours," has been a key focus, as workers seek to combat the expansion of part-time positions and the hiring of new part-time workers when existing employees are seeking more hours. Multifaceted action plans are developed, combining media and social-media strategies, participatory events, and community engagement. A growing and diverse coalition, which includes workers' organizations of various kinds, community groups, and research institutes, has formed to fight for a fair work week. RAP also partners with researchers in universities to conduct much-needed studies about retail workers and the sector (Luce and Fujita 2012). As implementation of the Affordable Care Act progresses, RAP is launching a Healthcare Access Program and will be actively engaged in enrolling as many of the 75,000 uninsured New York retail workers as possible.

Indeed, in only a few years since the organization's establishment, RAP members have already engaged in many forms of political action and been very visible around the city at political

and cultural events, including labor demonstrations, commemorative events honoring workers' organizing and resistance, and Pride marches. RAP has engaged in political theater at fashion events, hosted art displays, and facilitated media productions. RAP also has organized protests, particularly at workplaces seen as violating labor law and workers' rights.

It is precisely the degree of collaboration, community, and constant political engagement that makes New York City a symbol of hope for retail workers. As a major global city within which the retail sector plays such a prominent role in the economy and, simultaneously, a place with a very high cost of living, the need to raise the region's retail standards cannot be denied. The complementary forms of political action being pursued and coalitions being formed in New York make the city stand out as being at the forefront of the struggle to revolutionize retail. Indeed, retail worker advocates are front and center in many examples of political action in the city. They also bolster campaigns for other groups of low-wage workers, including car-wash workers, or "carwasheros" as they are sometimes endearingly called. Retail workers' unions and organizations are actively fostering a culture of solidarity and activism and pursuing social change at local, workplace, and governmental levels. Notably, retail workers' organizations in New York City have targeted public policy and government as routes to improving retail work, a dimension to which I will return below.

Spaces of Solidarity and Struggle

Retail worker advocates are continually reflecting on and assessing their strategies, as well as thinking about scale and how efforts should be coordinated both spatially and conceptually to be most effective. This process of reflection has contributed to the framing of organizing based around a shared retail company, wherever it operates, as well as on activism that is focused within a specific geographic space, like a city. Put another way, scale has been incorporated in different ways, simultaneously.

Size and place are also reflected in organizing that hones in on a very specific, local space of retail work—the mall. In the United States, the RWDSU developed a community-engagement campaign centered on and around the Queens Center Mall in Queens,

New York. The mall is located in an ethnically-diverse and primarily low-income community and, with more than 3,000 people working therein, it serves as a major employer in the area. The mall is a space within which multiple workplaces are housed, as well as a center of community commerce. In other words, as is the case in communities across North America and around the world, many residents worked and/or shopped at the local mall.

Moreover, like many retail establishments, the mall's parent company had received tax credits and other public subsidies. The RWDSU has consistently argued that when private employers benefit from public money, that places even greater social responsibility on the retailers. Companies' bottom lines benefit from such subsidies and from paying less in taxes into the public purse. As a result, there is no reason such companies should be poverty-wage employers.

This premise has been used to mobilize people in interesting ways. For example, when developers sought to remake the Kingsbridge Armory in the Bronx into a retail establishment, drawing on extensive public subsidies as part of the process, workers and their allies argued that the organization should sign an agreement that guaranteed living wages and protections for any workers who wanted to organize a union in the workplaces that would be created. In other words, community members did not simply want retail jobs; they wanted retail jobs that paid family-sustaining living wages and afforded workers the right to organize without interference. Their organizing and lobbying for a "Community Benefits Agreement" and the developer's refusal to sign such an agreement contributed to a 45–1 vote against redevelopment by the New York City Council (Busecma 2009). This example suggests not all communities want retail jobs at any cost and that some people are willing to forego immediate poverty-wage jobs in favor of a longer-term strategy to reshape retail positions and transform lousy jobs into good jobs.

In that vein, the Queens Center Mall campaign built directly on the energy and momentum of the Armory redevelopment rejection. The campaign sought to promote progressive change across stores and, at the same time, challenge dominant perceptions of malls as exclusively for-profit spaces. The campaign had three goals. First, all employers should pay living wages. Second, all employers should remain neutral if workers sought to organize. Third, space

in the mall should be allocated for not-for-profit community needs, like ESL classes, job training, and community-group meetings. Workers, community members, and politicians were all engaged through meetings, rallies, and petitions, among other strategies. The campaign is less active now, and efforts are being channeled more to other campaigns, but Phil Andrews (pers. comm.), director of the Retail Organizing Project at the RWDSU, says this: "Because the odds are firmly stacked against retail workers and their unions, every opportunity to work with community, faith and public officials must be taken. In addition, it's necessary to focus on targets and campaigns that have significant leverage points—in this case, the fact that public subsidies supported a project that created mostly low-wage jobs and provided no benefit to the community." Whether malls continue to be used as springboards for organizing in New York or other communities is yet to be determined, but the strategy undoubtedly offers a way of emphasizing the importance of retail jobs and workplaces in communities of all sizes. Such strategies can also be used to foster worker-shopper solidarity, educate the public, and build worker power.

Notably, the South African Commercial, Catering, and Allied Workers' Union (SACCAWU) has also sought to harness the potential of the mall as a space for organizing through mall committees. The committees stemmed from the union's gender-equity initiatives and were conceptualized as a way to expand the focus beyond existing unionized workplaces within the malls. The idea was for stewards to reach out to precarious, often women, workers in neighboring, nonunion stores and build political action from the issues workers were directly confronting. A key goal was for the committees to open spaces where workers could raise issues beyond the walls of their workplaces (Kenny 2009b, 2011). The organization format and degrees of formality varied substantially across malls because of local circumstances and social actors' own personalities and emphases. Bridget Kenny (2011) has assessed the accomplishments and limitations of the strategy in the specific political, historical, and cultural conjuncture of that country and also raises questions of cross-cultural applicability about how "politics" is conceptualized by workers and unions and how union structures can be used to support workers' challenges that extend beyond their workplaces. This highlights another way to think about scale and builds on feminist scholars' emphases on the

interconnectedness of "public" and "private" spheres (Bezanson 2006; Glazer 1993; Luxton and Corman 2001).

These sorts of strategies provide further evidence to disprove the claim made in many corporate antiunion materials that unions are simply interested in collecting dues. The data from the retail terrain disprove this assertion, as more unions commit to initiatives that do not generate dues revenue or promote unionization. Indeed, all forms of retail organizing are very resource-intensive work. The newer, innovative organizational formats suggest that retail unions are serious about making change in the sector and are willing to broaden and diversify their approaches to that end. Non-unionization-focused forms of organizing do not provide workers with the protections and benefits of a collective agreement or the substantial resources of formal union membership. Yet these frameworks do provide workers with a collective framework for learning about politics and power and exploring ways to win improvements. In some ways, political action not concentrated on unionization allows for a greater focus to be placed on understanding and education, thereby building workers' consciousness and power in the longer term. Given the state of retail work and the cultural devaluation of retail workers, I believe these forms of political action play an important role in fostering much-needed social and cultural change. Legal scholars like David Doorey (2012) are also beginning to analyze how new labor laws could provide graduated forms of protection for workers to recognize and advance these sorts of organizational vehicles.

The network-type approaches are easily implemented across geographic space but necessarily require resources to be spread, as a result. A sector-based organization like RAP is well suited to urban centers within which many retail workers are located. Other locally rooted strategies, like mall committees or campaigns, offer a way of promoting worker unity and social change applicable in various communities, including in smaller towns with one mall.

The organizing vehicles also illustrate different ways to think about membership and representation. Given the high employee turnover rate and varied workplace structures in retail, sector-based forms of representation make sense (Coulter 2011; Ikeler 2011). In that vein, RAP offers one model for engaging retail workers regardless of the store in which they work. Formal unions would be well served to not only support initiatives like OUR Walmart,

RAP, and community-rooted mall campaigns, but to seriously reflect on ways to expand how retail worker representation is conceptualized. The retail sector can be defined and approached in a number of ways, including in a city, region, or national context.

Moreover, the diverse and multileveled community of retail action seen in New York City suggests retail workers' organizations can and should play a prominent role in advocating for changes in how retail work and workers are perceived more broadly. Various retail workers' organizations in Europe have already put this idea into action, as well. For example, Mandate trade union in Ireland has launched both a Respect Retail Workers campaign to engage workers and the broader public, as well as a Fair Shop campaign to recognize those retailers who engage in collective bargaining and provide better retail jobs. In Britain, Check Out LGBT, a coalition involving retailers and retail workers' organizations, has recently been established to promote both workers' and shoppers' rights and combat homophobia. These examples illuminate some of the ways educational and activist campaigns can foster connections between retail workers and shoppers and how retail worker advocates can strive to shape cultural ideas about rights, consumption, and work.

Social Change

When it comes to better retail jobs and a more ambitious, holistic approach to workers' well-being, it is the Nordic and Scandinavian countries of northern Europe that stand out. In Sweden, for example, retail jobs are considered good jobs (Andersson et al. 2011). How people define "good jobs" varies within and across cultures. At minimum, material conditions of work, such as wages, benefits, and hours, usually matter. Often factors like job stability, scheduling predictability, and income security will figure in people's conceptualizations of job quality. Sometimes experiential dimensions like feeling respected and valued are highlighted, as well. In certain cases, people will consider what the work accomplishes or does to benefit others as part of their assessments of the relative quality of a job. The Swedish workers and researchers with whom I spoke argued that all these levels are important in Sweden. In a comparative perspective, the mere fact that retail jobs in Sweden are well paid stands the country in stark contrast to most other national

contexts. The inclusion of broader measures of worker well-being makes the Swedish context even more noteworthy. To fully understand retail work in Sweden, both the specifics of the sector and the broader national context need to be outlined.

To start with wages, retail workers in Sweden make significantly more than their counterparts in most other countries. In comparison to the average earnings for a retail worker in the United States, for example, the average Swedish retail worker makes at least 40 percent more. Retail workers' wages in Sweden increase for every year of service, but even at starting or entry levels, the pay is sufficient for supporting oneself and any dependents. At the same time, retail workers are given extra pay for working "uncomfortable hours"—that is, evenings and weekends. For evening and weekend work, every shift is paid at least time and a half (150 percent of the normal wage). In some instances, the pay is double time (200 percent of the normal wage). This extra pay is to recognize that workers are being asked to take time away from homelife to work and thus should be provided extra compensation.

In the Swedish retail sector, schedules are generally drawn up annually, at the beginning of the fiscal year. Put another way, workers often know their work schedules for the entire year, regardless of whether they are part-time or full-time employees. Newer hires who begin positions partway through the year will only know their shifts for the remainder of the fiscal year, and in practice there are still instances when schedules may change. Yet there is little scheduling volatility and, overall, substantial notice and predictability. Workers are not sent home without pay if the store is less busy, either. When I asked those working in retail about being sent home, let alone being sent home without pay, it seemed a very foreign prospect that was met with great surprise.

These differences—better wages and more predictable scheduling—capture two of the most common complaints retail workers outside of northern Europe have about their jobs. In contrast to retail workers in North America, for example, Swedish retail workers have income that is both sufficient for maintaining a decent standard of living and reliable. Moreover, they can predict and plan both their pay and their schedules. As a result, education, child care, leisure activities, and other elements of life, like medical appointments, can not only be afforded, but can be planned and secured.

These conditions did not spontaneously appear, however, nor were they proposed by Swedish retail employers. They were gained through political action. Sweden's largest retail union, Handels, was founded in 1906, and smaller retail workers' organizations existed even earlier. Over the course of the twentieth century, workers in retail and across sectors organized at a number of levels and established strong, robust unions and labor federations. The role of electoral politics was also taken seriously, and workers played an integral role in progressive parties, particularly the Social Democratic Party, which governed the country for much of the twentieth century. Swedish people sought to build a society within which people's welfare, in a broad sense, was prioritized. In that task, they recognized the need for strong unions to protect and advance workers' interests and proactive, progressive public policy that guarantees rights to all citizens, regardless of where or whether they work for wages.

Similar social visions exist in other Scandinavian countries like Denmark, Norway, Iceland, and Finland; thus this socioeconomic and political approach is called the *Swedish model*, or the *Nordic model*. Concisely, the model is underscored by a social-democratic approach to society, politics, and the economy. As such, it is driven by a commitment to reciprocity, collaboration, equality, and solidarity. Sweden is a capitalist country, but it is quite different from most countries' versions of capitalism in a number of ways. There are for-profit businesses, including massive global corporations, and entrepreneurial innovation is encouraged. Financial organizations rank Sweden as among the best places to do business, including the World Economic Forum, which consistently places Sweden above the United States in its global competitiveness rankings (Schwab and Sala-i-Martin 2012). In Sweden, corporations are not worshiped as a sacred, unfettered group above the law or social responsibility, however. Instead, both the idea and practice of social and economic partnership are promoted, and unions, employers, and government are seen as integral to the Swedish model. Accordingly, workers are widely represented by strong and coordinated unions across job categories. About 70 percent of all Swedish workers are currently union members (Kjellberg 2011). Virtually every occupational group in Sweden is unionized and protected by a collective agreement. For example, a majority of frontline retail workers in stores are represented by

Handels. At the same time, certain sales workers and many managers, as well as the workers of all kinds in retailers' corporate offices, are represented by a different union, Unionen. In other words, the salespeople are unionized, but so too are the store managers and the retail company's office workers, whether they be in the mailroom, accounting department, human resources, or any other white-collar position.

Employers, too, are formally united into associations, usually based on sector. In this context, collective bargaining is normal, regular, and widespread, and it occurs at the national level. Thus, when Handels bargains with the retail employers' association, Svensk Handel, to negotiate the collective agreement for the retail sector, the contract covers the country as a whole and all sizes of stores therein. As a result, the same wage rates, benefits, and standards apply across retailers. Thus, the collective agreement governs the wages and conditions of work across the retail sector. Workers who join the union gain additional protections and benefits, more generous insurance programs, and the opportunity to contribute to their union and the Swedish labor movement more generally. There are about 150,000 frontline retail workers (called "blue collar workers" regardless of the store in which they work) in Sweden. Currently about 60 percent of them have joined Handels in order to be full union members. Union representatives continuously engage in major recruitment drives at the store level in order to gain new members and talk with existing members. For example, in a weeklong campaign in early 2013, representatives from Handels spoke to 10 percent of all workers and visited almost one-third of all the workplaces. Successive, effective collective bargaining, including some strikes, along with workers who are actively engaged in local clubs and the national union, have created the good conditions retail workers in Sweden enjoy today. Not all groups of workers have gained the same precise protections, and Handels's record speaks to its history of ambitiously fighting for more rights, protections, and guarantees for those in retail.

As is the case in all countries, Swedish unions are not homogeneous, nor entirely united in their politics (Ekdahl 1992). Some, including Handels, have been more militant and politically engaged. Sweden is often heralded for being one of the most, if not the most, equal country in the world in terms of both class and gender (Lister 2009). At the same time, a majority of retail workers in Sweden

are women, and in contrast to some other workers' organizations, Handels continues to advance the need for greater equality between genders in theory and in practice (Briskin 1999b). For example, the union is currently engaged in internal debates about whether further requirements should be placed on the parental leave program so that men are required to use half of the time, in order to enshrine an equitable distribution of days away from work.

Paid parental leave is not something widely afforded to retail workers in countries like the United States, but it is the norm in Sweden. In fact, all Swedish workers are entitled to 480 days of paid parental leave. They are also guaranteed at least five weeks of paid vacation per year and paid sick days (at full pay), regardless of whether they are part-time or full-time. Swedish workers also are guaranteed unemployment insurance and pensions, the funds for which come from employers and the public coffers. These guarantees are enshrined in national law, as public policy, and considered social rights and/or citizenship rights. In North America, right-wing interests criticize universal social programs, like social security, by trying to create a negative association with the word *entitlement*. In Sweden, the idea of being entitled to specific rights and programs is viewed positively, as an expression of a shared commitment to everyone's well-being and a reflection of widespread social solidarity. Such guarantees are a point of pride in Sweden, providing peace of mind and contributing to the high standard of living for all workers, including those in private sector service work like retail.

Not all of the programs Swedish people access are directly tied to work, but they improve the standard of living for workers nevertheless. This is indicative of a more holistic approach to people's well-being and the policies reflect the fact that workers' lives are not only affected by what happens within their physical workplace. For example, because of public funding, child-care fees for parents whose children are in daycare are nonexistent or minimal, and primary health care and postsecondary education are free. Everyone with the ability and interest can study at college or university without paying tuition fees. As a result, these policies substantially lower the proportion of income workers must allocate to health care and/or education for themselves or their dependents. In order to provide such public programs, Swedish people pay income tax rates between 29 and 60 percent, which fund the welfare state

or social state that delivers services without discrimination based on income or class. Stefan Carlén (pers. comm.), chief economist and head of the Organizing and Research Department at Handels, explained that most people pay income tax of about 30 percent and that the higher rates are only for those with very high incomes. Because the wage floor is relatively high and incomes much more equitable, those working in retail are not living in poverty, required to take on two or three jobs, or struggling to make ends meet. In sum, retail workers in Sweden benefit from three levels of protection: union membership, the collective agreement for the retail sector, and national policies.

While there is a widespread commitment to partnership, unions still have to bargain hard to improve the conditions for their members. In this task, solidarity among groups of workers continues to be important. For example, when the 2012 round of collective bargaining between Handels and the retail employers' association began to stall, other unions announced their commitment to engage in "sympathy strikes" to support the retail workers. In other words, these are strikes not for workers' own specific bargaining or conditions but entirely in support of other workers—in this case, retail workers. The construction workers' union and the forestry/paper workers' union both set a day when they would strike if an agreement was not reached for the retail workers. The forestry/paper workers' union's commitment gained particular attention because those are the workers responsible for manufacturing toilet paper within Sweden, and a strike would have contributed to a shortage. Moreover, Torbjörn Johansson, a spokesperson for the construction workers' union, expressed not only worker solidarity, but recognition of the highly feminized nature of retail work: "It's obvious that we as construction workers must support our wives, girlfriends, daughters and friends in their fight for equal pay" (The Local 2012 n.p.).

At the same time, while employers undoubtedly advance their own interests, there is evidence that a commitment to being good employers and managers is not merely rhetoric in the Swedish context. Thomas Andersson and Stefan Tengblad (2007) situate current approaches to business leadership within the longer history of labor-management cooperation and power sharing at work. They explain that both the idea and practice can be understood through the Swedish word *medarbetarskap* and argue that

it is best translated into English as "co-workership." Managers and leadership matter, they argue, but co-workership is characterized by the building of relationships of trust and openness, cooperation, meaningfulness, and agency. This approach to daily employment relations and broader work life is different from a company's rhetorical assertions of valuing its employees, but denying their knowledge, value, and contributions, in practice. Instead, co-workership is interwoven with the larger Swedish cultural commitment to "cooperation, distributed responsibility and fair treatment" (Andersson et al. 2011, 254), an organizational and interpersonal reflection of the Swedish model more generally. In contrast to the neoliberal push for the ideas and priorities of business to be implemented in the public sector, the Swedish model fosters a private sector that takes ideas of cooperation, fairness, and social responsibility seriously. This translates into greater willingness to contribute to the public resource pool through taxes, to collective bargaining, and to a retail sector within which more managers see salespeople as coworkers, rather than subservient, easily replaceable employees. Academic research (that is, not research conducted or largely funded by retail employers) has found that retail workers in Sweden are much more satisfied with their jobs in comparison to countries outside of northern Europe. The most recent data suggest "retail work can be perceived and experienced as socially rewarding . . . with decent working conditions, development opportunities and favourable compensation and benefits" (Andersson et al. 2011a, 253). In other words, retail jobs are considered good jobs in Sweden not only because of their material conditions, the higher wages, overtime pay, and so forth, but because workers feel they have more say and control over their jobs and that their knowledge is recognized and valued. The relatively higher-quality experience of retail work does not stem from one single policy or dimension, but rather from the combination of unionization, collective bargaining, public policy, and management practices. This holistic, multifaceted approach both reflects and reproduces the Swedish promotion and prioritization of social solidarity.

The Swedish case offers a compelling example of how complementary forms of political action at workplace and governmental levels have positively affected retail work and workers. At the same time, no country is a flawless utopia, nor a static, unchanging

entity. Two recent elections have brought center-right politicians to power, who have begun to implement neoliberal policies, such as privatization, and undermine the Swedish model (Sandberg 2013a). Moreover, some scholars and union representatives alike argue that both the Social Democratic Party and sections of the Swedish labor movement have become more passive or centrist, or more complicit with neoliberal aspirations and language (Östberg 2012). Precarious work is on the rise, and retail work itself is becoming a site where precariousness is being both expanded and contested (Engstrand 2011). The present and future of the Swedish and Nordic models are being analyzed and debated, as Swedish citizens decide what the next chapter in their national story will be (Sandberg 2013b). In recent years, the neoliberal turn in Sweden has led to increased unemployment, some erosion of the country's universal social programs, and escalating debates about immigration and racial diversity. Swedish retailers, like Ikea, have also been the target of increased criticism and political action globally, as retail workers outside Swedish borders struggle to gain greater respect and better conditions (UNI Global Union 2013b).

Nevertheless, the conditions for retail workers in Sweden continue to offer a stark contrast with most other national contexts. However, the future of retail work and whether the supportive social system that bolsters workers' quality of life will be maintained, changed, or dismantled is directly dependent on the choices and actions of the Swedish people. For their part, through Handels, Swedish retail workers are actively engaged in discussions about politics, social policy, and society, seeking to play a greater role in current public debates about the future of their country.

Pushing the Boundaries

Workers' and unions' active engagement in the broader political arena and the larger social context has played a significant role in creating the higher standard of living Swedish retail workers enjoy. Given the low levels of retail unionization in countries like the United States and Canada, strengthened employment standards and public policy would lift the low-wage floor and promote universal standards that benefit all workers, especially low-wage private sector service workers. Promotion of legislated living wages is one example of political action that is already underway, as

worker-advocates argue that the minimum pay required by law should be enough for basic needs and dignity (Luce 2004; Coulter 2012a, 2012b). Catherine Ruetschlin (2012) argues for a $25,000 per year floor for retail workers in the United States employed at companies with over 1,000 employees. Bills targeting large retailers, specifically those with sales in excess of $1 billion, have been proposed. In 2006, Chicago's city councilors voted for such a bill, but the city's mayor at the time, Richard Daley, vetoed it. In July of 2013, city councilors in Washington, DC, passed a similar living-wage bill for large retailers, enshrining a wage floor of at least $12.50 per hour. Walmart made its opposition to the initiative in DC clear and threatened to pull out of plans to build new stores in the area if the law is passed, and, ultimately, the mayor vetoed this bill, as well (Davis and Debonis 2013; Debonis 2013).

Recent campaigns across urban centers in the United States have begun to make the case for guaranteed paid sick days for all workers, as well. Retail worker advocates have supported and advanced these kinds of policy-focused political action. The campaigns have highlighted the importance of paid sick days as both a workers' issue and a public-health matter, to prevent the spreading of germs to shoppers and products, including food. If public policy is strengthened and expanded so basics like paid sick days are a right, retail workers will see a tangible improvement in their quality of life and, so too, will precarious workers across sectors. Undoubtedly, policy improvements are an important step, and any legislative changes would also need to be enforced and offenders prosecuted. But concerted, coordinated campaigns to improve employment standards should be expanded, and politicians who support these kinds of measures, supported. Universal public-policy guarantees would play an important role in improving workers' lives and complement ongoing efforts to organize retail workers. Moreover, policy-focused campaigns foster greater awareness and dialogue in the public arena about retail workers' conditions, rights, and lives. Accordingly, diverse forms of political action are mutually reinforcing.

Long-standing and newer cooperatives also offer food for thought. Cooperatives are formed when people unite through a jointly owned enterprise that is democratically controlled. Cooperatives can be for consumers, workers, producers, shared services, or a combination thereof. They can be built from scratch, an

evolution of an existing enterprise, or created from the remains of a bankrupt or abandoned business. Decisions about products, daily operations, pay, distribution, and all aspects of the business can be made democratically in cooperatives. Different versions exist across Canada, in the United States, and around the world, including in Spain, where Mondragon, the largest cooperative in the world, operates. There are about 350 food retail and wholesale cooperatives of different kinds in the United States (Deller, Hoyt, Hueth, and Sundaram-Stukel 2009). In Canada, the long-established Co-operative Retailing System services more than 500 communities, particularly in the western prairie provinces (Federated Co-operatives Limited 2009). Profitable Florida-based grocery chain, Publix, also offers an alternative retail model. It is not a cooperative, but its stock is entirely owned by current employees and retirees (Plerhoples 2013). These enterprises challenge conventional ideas about hierarchy, business organization, work life, and economic success. The strengths and weaknesses of cooperatives have been debated by scholars from a number of perspectives (Birchall and Ketilson 2009; Cheney 1999; Kasmir 1996; Ness and Azzellini 2011). The specific roles cooperative and other forms of employee ownership and/or control play and could play in improving retail workers' lives warrant greater study.

Overall, it is clear that retail workers and their organizations are developing, exploring, and implementing a range of strategies to promote change. Some of the organizational shapes are updated versions of strategies used historically; others borrow from other sectors; and certain strategies are innovative routes, unique to retail, which reflect the structure of the industry and distribution of workplaces. The snapshots presented in this chapter do not capture the full range of strategies being used regionally or globally, and each approach highlighted deserves far greater scholarly attention. Yet, together, the cases highlighted reveal that this is an interesting and important historical moment for those actively engaged in promoting change in retail and for all those interested in the future of not only retail work, but work itself. The simultaneous pursuit of multiple strategies facilitates greater unity, awareness, and engagement among retail workers. Diverse forms of political action intended to improve the sector and build workers' power challenge the social and economic devaluation of both retail work and workers.

In fact, the battle over retail work is at the heart of the larger struggle over the future of work and economics. In many ways, the retail terrain is emblematic of the larger socioeconomic questions that need to be asked and answered. Are we heading to a future wherein the majority of people are confined to have-little or have-not status and to feeling not only economically stressed, but personally strained and disrespected? Without question, retail workers and their allies want to build a future where the answer is no. In the next and final chapter, I assess the breadth of the political action explored in this book. I consider the accomplishments, challenges, and possibilities of political action and whether we are in the process of revolutionizing retail work.

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Labour Relations Code Review Panel
Michael Fleming (Chair)
Sandra Banister, Q.C., (Member)
Barry Dong (Member)

March 20, 2018

The Retail Action Network Submission to the Labour Relations Code Review Panel

Dear Committee Members,

On behalf of the Retail Action Network we are pleased to submit the following recommendations to you as part of your consultation under Section 3 of *Labour Relations Code* (the "Code").

The Retail Action Network

The Retail Action Network ("RAN") is a community based workers rights organization fighting for workplace justice, increased wages, and better conditions for non-unionized retail, food-service, and hospitality workers ("RFH workers") in the Greater Victoria region of BC. We support workers who experience wage theft, workplace harassment, bullying, and discrimination. We also support workers who want to unionize and connect them with unions who can help. Our work also includes organizing worker-led campaigns to publicly pressure bosses to cease abusive or exploitative behavior; connecting workers with advocacy and legal services; delivering workers' rights workshops in the community in high schools and for vulnerable segments of the population; and advocating for systemic legal and policy change. RAN is often the first point of contact for workers facing injustice. RAN is the only organization of its kind in BC to help voice the concerns of non-unionized RFH workers.

Our knowledge of workplace conditions experienced by RFH workers comes from the questions and concerns we receive from workers daily and from the ground-breaking research we conducted in 2015 with the Vancouver Island Public Interest Research Group (VIPIRG).[1] Retail,

[1] Hardman, Stefanie. (2016) "Part-time, Poorly Paid, Unprotected: The Experiences of Precarious Work in Retail, Food-service, and Hospitality in Victoria, BC." When RAN began, in the fall of 2015, we partnered with the Vancouver Island Public Interest Research Group (VIPIRG) to conduct ground-breaking community-based research examining workplace conditions faced by RFH workers in Greater Victoria. The report has been included with our submission as an addendum. Available online: https://vipirg.ca/publications/2017/3/16/new-vipirg-report-part-time-poorly-paid-unprotected-experiences-of-precarious-work-in-retail-food-service-hospitality

food-service, and hospitality work is a paradigmatic example of precarious work. Most RFH workers rely on minimum wage.[2] In addition to low wages, workers in these industries receive little or no benefits such as paid sick days, or health and dental benefits; work part-time and unstable shift work; and have little job security. Unionization rates for RFH workers are low,[3] and consequently workers must rely on the inadequate BC *Employment Standards Act* ("the ESA") to provide a floor of working conditions, including setting minimum wages.

RFH workers who want to unionize to improve their working conditions often face great challenges to doing so. High labour turnover, small workplaces, the franchisee-franchisor business model, a large proportion of part-time work and seasonal work, a disproportionate number of young workers, and highly insecure working conditions characterize many food service and retail workplaces making it very difficult for these workers to unionize. Because of all of these factors, workers in RFH experience a sectoral disadvantage when it comes to forming and maintaining a union.

The existing low union density in RFH workplaces also makes unionizing difficult because workers are unfamiliar with unions, often do not know about their right to unionize, how to unionize, or what benefit unionizing can bring. If unionization is going to be a real and meaningful option for RFH workers, then changes to the Code must account for the specific sectoral challenges RFH workers face. Workers in RFH workplaces are often perceived to be "unorganizable," but the barriers they face in accessing unionization are not insurmountable.

We have focused our submission on five areas that would improve the ability for RFH workers to exercise their right to unionize:

(1) Return to card-based union certification
(2) Unfair labour practices and remedial certification
(3) Allow unions to access employee list
(4) Make unionization accessible to workers in franchised businesses

While we focus our recommendations on these specific areas, we have also reviewed the submission this Panel received from the BC Federation of Labour. We also wish express our support of the BC Federation of Labour's Recommendations that we do not speak to in this submission.

Return to Card-Based Union Certification

[2] The retail trade sector and food and accommodation sector have the largest proportion of workers paid at minimum wage. Galarmeau, Diane and Eric Fecteau. (2014) "The Ups and Downs of Minimum Wage." Available Online: http://www.statcan.gc.ca/pub/75-006-x/2014001/article/14035-eng.pdf

[3] In 2013, only 9% of accommodation and food-service workers had union representation and fewer than 14% of retail workers were members of a union. Meanwhile the provincial rate of unionization in BC is 31.5%. See Hardman, Stefanie note 1 at p. 6.

Your review panel has been tasked with ensuring BC's labour code is consistent with best practices elsewhere in Canada. Only two other jurisdictions (Manitoba and Saskatchewan) require a representation vote. If changes to the Code are going to ensure people in BC have the same access to labour rights and protections enjoyed by other Canadians we must return to card-based union certification.

We know that requiring a mandatory vote after workers have signed membership cards dramatically increases unlawful labour practices, decreases rates of certification, and reduces workers access to their constitutionally guaranteed freedom of association.[4]

Requiring workers to vote 10 days after an application is made to the Labour Board invites the employer to interfere with the certification process. Possible employer interference is magnified for RFH workers because of highly precarious scheduling practices in the sector and the many subtle ways employers can intimidate workers. For example, an employer could cut someone's shifts last minute, send them home from a shift early (saying the business is not busy enough), schedule them "on call," assign them to a work in a section of a restaurant that is less profitable, etc. All of these precarious scheduling practices are normal in the restaurant and retail industry, and so it is easier for an employer to disguise these employment reprisals and union interference tactics as regular business practices.

Moreover, for workers in small RFH workplaces the interference that comes with the delay between signing membership cards and voting can be intensified by the interpersonal relationships that often characterize employer/manager employee relations (e.g. *"we're all a big family here").*

The secret ballot vote also makes the process of unionizing difficult because it puts enormous pressure on organizing workers to keep the campaign secretive. The secrecy makes workers feel cautious and introduces even more fear into what is actually a lawful process. Workers should not have to fear exercising their legal right to unionize.

The mandatory vote makes it harder for workers to join unions and easier for employers to unlawfully pressure and intimidate employees into not doing so. We recommend that the Panel restore card based union certification to make the freedom to associate a real and meaningful right for all workers.

Unfair Labour Practices and Remedial Certification

Unfair labour practices severely impact workers ability to unionize and can strike fear into workers who wish to attempt unionization in the future. Because of the serious implications of unfair labour practices we recommend meaningful remedies for workers when employers interfere with the unionizing process. When employers interfere with the ability of workers to

[4] MacTavish, John and Chris Bouchanan (2016). "Restoring Fairness and Balance in Labour Relations." Available Online: http://bcfed.ca/sites/default/files/attachments/lrb%20paper%20-%20final%20with%20pullout%20quotes.pdf

form a union, remedial certification should be the response. Remedial certification can be a strong deterrent and proactively give the Code teeth.

Allow Unions to Access Employee List

We recommend that unions be granted access to employee lists after demonstrating a threshold of 20 percent support of employees in the proposed bargaining unit. An employee list with all contact information should be given by the employer within a time period that is reasonable.

Having an employee list is especially relevant for workers in the RFH industry because there are often many part-time or seasonal workers working irregular shift-work. It is unlikely and unpractical to expect that workers will know everyone in the workplace. It is also imperative that unions have access to regularly updated employee lists, since employee turnover in the RFH industry is high.

We recommend that a reasonable timeline for disclosing the employee list is less than 1 week after a union makes an application to the Board. The ability to access updated employee lists as needed should be built into the legislation to be sensitive to industries with high employee turnover.

Make Unionization Accessible to Workers in Franchised Businesses

As mentioned in the introduction, the move from corporately owned enterprises to the franchisee-franchisor model is another hurdle to unionization workers in the RFH industries face. We recommend that the Code be amended to allow for broader based bargaining. Different franchisees of the same franchisor in a similar geographical location should be treated as single employer with multiple locations. As the recent *Ontario Changing Workplaces Review*: An agenda for Workplace Rights (Final *Report)* articulated:

> Competitors in an industry may operate either through a corporate model or a franchise model, or a combination of both, and there is no good public policy reason to treat one model differently from the other. So, for example, take three business competitors, which are large purveyors of fast food. One operates only corporate stores or locations. A main competitor in the same market, and selling similar products under a different brand, uses a franchise model where all of the locations are operated by franchisees. A third competitor uses a combination of corporate-owned stores and franchised stores. Should the different organizational models for selling three competing brands in the same market mean that one should be subject to unionization under a set of rules that are not applicable to the other two? Is it fair to employees of the many franchisees of the same franchisor that they have no effective access to collective bargaining while the employees of a competitor, who has multiple or some corporate locations, do? We think the answer to that question is obvious. (pg. 358)

Adopting such a policy would help facilitate meaningful access to unionization for industries such as RFH that face significant structural barriers to unionization. Amending the Code to make

unionizing more accessible to people working in franchised businesses will allow the Code to be more responsive to the fissuring of the economy.

Conclusion

Workers employed in retail and foodservice work face significant sectoral disadvantage when it comes to exercising their rights to unionize. High labour turnover, small workplaces, the franchisee-franchisor business model, a large proportion of part-time work and seasonal work, a disproportionate number of young workers, and highly insecure working conditions are a few common features of RFH work that make the process of unionizing challenging for workers, and unions trying to organize them. One's access to labour law and collective bargaining power should not depend on the sector within which they work.[5] We know that the social location of workers often influences their position and experience in the labour market. For example, low-wage food service and retail work is disproportionately comprised of women and racialized minorities. But the challenges to unionization for workers in RFH workplaces can be mitigated by amending the Code to account for these sectoral disadvantages. Labour law, if it is to be fair and accessible, should facilitate workers to challenge systemic labour market disadvantages, not reproduce them.

[5] For a discussion on how labour law reproduces labour market inequality see Judy Fudge "Rungs on the Labour Law Ladder: Using Gender to Challenge Hierarchy" (1996) Saskatchewan Law Review, 60:237-264. Available online: http://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=1784&context=scholarly_works

Part-time, Poorly paid, Unprotected

Experiences of precarious work in Retail, Food Service, & Hospitality in Victoria, BC

VIPIRG
The Vancouver Island Public Interest Research Group

RETAIL ACTION

[Spring 2016]

The **Retail Action Network** is a network of workers and labour activists that fight for workplace justice, increased wages, and better conditions for retail, food service, and hospitality workers.

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The **Vancouver Island Public Interest Research Group (VIPIRG)** is a non-profit organization dedicated to research, education, advocacy, and other action in the public interest.

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Acknowledgement

This work has been conducted on unceded and unsurrendered Coast Salish territories, specifically of the Lekwungen and W̱SÁNEĆ people. We would like to acknowledge the connection between ongoing settler colonialism and the forms of capitalism that produce the working conditions we are addressing in this report.

This report resulted from a collective effort of people involved in precarious and low-wage work in retail, service, and hospitality as well as the Retail Action Network and the Vancouver Island Public Interest Research Group. We would like to thank all of the workers who participated for sharing their experience, insights, and stories.

Report written in spring 2016 by Stefanie Hardman of the Vancouver Island Public Interest Research Group (VIPIRG)
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Background of this Report

Retail Action Network

The Retail Action Network (RAN) formed in September 2015 to call attention to workplace justice issues in the retail, food service, and hospitality industries[i] in the Greater Victoria region of British Columbia. **We are a network of workers and labour activists that fight for improved working conditions, better wages, and workplaces free from harassment and discrimination.**

Research

In addition to our workers solidarity actions and campaign, the Retail Action Network immediately undertook a community-based research project starting in the fall of 2015. **Our goal was to hear directly from workers in the retail, food service, and hospitality industries about the types of workplace conditions and issues they face.**

With the help of the Vancouver Island Public Interest Group (VIPIRG), we designed a survey and held focus groups to find out more about the experiences of waged workers in retail, food service, and hospitality in Victoria.

Until now, little work had been done to illuminate these struggles of retail, food service, and hospitality workers in Victoria, where the issues take on a heightened importance: **the low-wage work of retail, food service, and hospitality industries employ nearly one-fifth of the workforce in Victoria,[1] a city where the cost of living is high and constantly increasing.**

We talked to over fifty workers whose experience collectively spanned various roles at different workplaces in diverse sectors of the retail, food service, and hospitality industries, and found they faced common issues and themes. **This research process allowed for different and individualized experiences of injustice in the workplace to be connected to each other and to the broader systems of power that have fostered that injustice.**

This report

In this report, we begin by setting the context of living and working in Greater Victoria, examining low wages, high cost of living, and employment trends, particularly in relation to work in the retail, food service, and hospitality industries. **We characterize retail, food service, and hospitality work as "precarious work," providing workers with very little in the way of wages, benefits, job security, stability, protection, or basic respect and dignity**. Existing employment standards are not adequate to protect workers in retail, food service, and hospitality. The key contribution of this report is its **exploration of key areas of concern – low-wages, lack of benefits, unstable scheduling practices, unfair job expectations, disregard for workers' health and safety, poor treatment, workplace justice – through the workers' own experiences and voices**. We would like to thank these workers for sharing their experiences with us. By bringing these various and similar experiences together, we hope this report will help provide a grounding to fight for workplace justice.

[i] A note on terminology: We use the terms "retail, food service, and hospitality" to refer to the industries in which we are working. When it comes to retail, we are referring to stores that sell a variety of consumer goods. Food service and hospitality includes cafes, restaurants, take-out food services, bars, hotels, other lodging services, and more. The official categories according to the North American Industry Classification System (NAICS), used by Statistics Canada, are "retail trade" (code 44-45) and "accommodation and food services" (code 72). WorkBC has combined retail trade with wholesale trade ("Wholesale & Retail Trade"), which means their statistics give a different (& inflated) impression of the industry standards.

Summary of our findings

- Retail, food service, and hospitality workers face **precarious working conditions**:
    - They face **job instability and insecurity**; earn **low wages**; often **don't receive benefits** like paid sick days, vacation, or health benefits; are typically **not unionized**; have **minimal control** over their work conditions; and face **poor treatment** by their employers.
- Low wages, combined with unstable and part-time hours, make it **difficult for workers to afford basic living expenses** in Victoria.
- **Employers demand flexibility** and availability from workers, while **offering them little in return** in terms of livable wages and job security.
- **Existing Employment Standards are inadequate** to care for the needs and interests of workers in retail, food service, and hospitality in Victoria.
- Workers commonly **feel exploited, disrespected, and taken advantage of** by their employers in retail, food service, and hospitality in Victoria.
- There is often **little opportunity for workers in retail, food service, or hospitality in Victoria to leverage workplace or legislative power in their favour**, even when employers are blatantly disregarding existing employment standards.
- Many workers enjoy aspects of their jobs, but **would like to see some changes to working conditions** in order for them to do their jobs well, with higher wages ranking as the foremost priority.

Workers in retail, food service, and hospitality are structurally rendered vulnerable by legislative and workplace practices. **The precarious working conditions faced by these workers have been produced – and they can, and must be, changed in order to work towards greater workplace justice.**

Context of Working and Living in Victoria

Wages and Costs of Living

Minimum wage

As of April 1, 2016, **BC has the lowest minimum wage in the country**[2] at $10.45 an hour, and $9.20 an hour for alcohol servers. The current **Fight for $15** campaign across the United States and Canada calls to the difficulties of living on a low wage, and demands an increasing the minimum wage to $15 an hour. **Approximately 27% of workers in BC – more than 500,000 people – earn less than $15 an hour.**[3]

Minimum wage is paid in retail, food service, and hospitality more frequently than in other industries. In 2013, across the country, about 27% of workers in accommodation and food services and 17% in wholesale and retail trade earned minimum wage.[4] Both of these rates are much higher than the total percentage of minimum wage earners across Canada and across industries (6.7%), making it clear that **retail, food service, and hospitality workers are paid the minimum wage much more commonly than workers in other industries**.

Living Wage

Even a $15 minimum wage is still not enough for low-wage workers to maintain a decent standard of living in Victoria, where the cost of living is high and ever increasing. The 2015 "Living Wage"[ii] for Greater Victoria is $20.05/hour.[5]

Many residents of Victoria are not making a Living Wage. Nearly half of residents working full-time are paid below the $20.05/hour rate.[6] **Withholding the level of income required to afford basic living costs in Victoria from many residents is a significant and increasing concern**. The Victoria Foundation's *Vital Signs 2015* report lists the "adoption of a 'living wage'" as crucial to improving the quality of life in Victoria.

Cost of living in Victoria

The number one issue in Greater Victoria in 2015 is "Cost of Living", according to respondents of the Victoria Foundation's *Vital Signs* report – and this has been ranked the foremost issue of the region since 2009. The cost of rent alone is high and increasing rapidly. In April 2015, the average rent for a private apartment in Greater Victoria was $918 (up from $904 in 2014).[7] According to the *Vital Signs* report's calculations, **even people working full-time at minimum wage cannot find affordable housing**[iii] **– they would have to spend 50% of their income to rent a bachelor apartment in Greater Victoria**, leaving little money for other basic costs such as food and transportation.

[ii] The Living Wage is "the hourly wage that two working parents with two young children must earn to meet their basic expenses (including rent, child care, food and transportation), once government taxes, credits, deductions and subsidies have been taken into account," according to the Community Social Planning Council.

[iii] Using the definition of "affordable housing" as spending no more than 30% of gross monthly income on housing, a definition supported by BC Housing: http://www.bchousing.org/Initiatives/Providing/Subsidized

Workplace precarity in retail, food service, and hospitality

Importance and precarity of service sector work

The retail, food service, and hospitality industries are the largest industries in BC, employing almost a quarter of BC's workforce. The retail industry employed about 15% of the province's working population in 2013, while accommodation and food service industries employed about eight percent. Although these industries are the backbone of BC's economy, the workers within these industries are not often afforded treatment that recognizes their importance with respect. In fact, **workers in the retail, food service, and hospitality industries are vulnerable workers in precarious employment.**

Workplace precarity in the food service industry in Victoria has previously received national attention. In 2014, three McDonald's locations in Victoria were exposed for abusing the national Temporary Foreign Worker Program (TFWP) to source cheap labour for industries and positions for which it was not intended, which called attention to similar abuses across the country.[8] **The exploitation of workers in retail, food service, and hospitality is unfortunately widespread beyond the abuses of the TFWP.**

Workers in the retail, food service, and hospitality industries are structurally being rendered vulnerable workers in precarious employment. According to the Law Commission of Ontario, **"precarious work is characterized by job instability, lack of benefits, low wages and degree of control over the process. It may also involve greater potential for injury."**[9] Those who are working in such conditions are considered to be "vulnerable workers" – not because of characteristics of the workers themselves, but rather because of the vulnerability of the employment situation they are in. Low wages and job insecurity are key factors that create worker precarity.

Aspects of precarious work

Low-wages

Workers in retail, food service, and hospitality in BC make well below the provincial average, according to WorkBC, and there is also a gendered wage gap. In the accommodation and food services industry in BC, men make on average $15.21 per hour (compared to a provincial average of $26.36), while women make on average $13.50 per hour (compared to a provincial average of $22.05). It is particularly important to note the gendered disparity in pay, since women make up a majority of the workforce in this industry.[10]

Part-time work

In addition to low hourly wages, **part-time work is common in retail, food service, and hospitality – of particular concern is involuntary part-time work**. While some workers may be seeking part-time employment, many are simply unable to find full-time employment. This involuntary part-time work makes up a significant, and increasing, portion of employment in retail, food service, and hospitality.

In 2014, over a quarter of all workers in Greater Victoria were involuntary part-time workers. They wanted full-time work but couldn't find it due to reasons beyond their control.[11]

There are more part-time workers in retail, food service and hospitality than other industries. According to WorkBC, 40.7% of accommodation and food services workers and 26.7% of Wholesale and Retail Trade workers are part-time, as compared to the provincial average of 21%.[12]

The prevalence of involuntary part-time work means workers in these industries often cannot access the number of hours they are seeking – they work a lower number of hours, and at a lower wage, than other industries. In 2015, the average number of hours worked per week was 41.5 for mining, oil and gas extraction, 37.5 for manufacturing, but only 26.3 for retail and 23 for accommodation and food services.[13]

Temporary, Seasonal, and Casual Work

The accommodation and food services industry, in addition to offering low-wages and part-time hours, is also unstable in that it is **sensitive to tourism activity**. In 2013, temporary and seasonal jobs in accommodation and food services represented about 19% of all jobs in the industry in BC – much higher than the provincial average of 11.4%.[14]

Why part-time is a problem

Part-time, temporary, and casual forms of work have increased over the past several decades, which means precarious work is on the rise. These types of work lack security and provide workers with limited benefits. According to the Law Commission of Ontario, part-time work is also a contributing factor to income inequality.[15]

Sometimes part-time work is not qualified by the number of hours worked, but it is a status that devalued labour by excluding workers from benefits and job stability. The Retail Action Project out of New York City found that "many so-called part-time workers are working full-time hours (a median of 35 hours a week during high seasons) while being excluded from the entire benefit structure of health insurance, paid time off and sick days."[16]

Multiple jobs

With the high cost of living and the low wages in Victoria, some need to take on multiple full- or part-time jobs in order to make ends meet. **Nearly a quarter of Greater Victoria residents held multiple simultaneous jobs in 2014**: 17% had two jobs, and 6% had three or more jobs, either full- or part-time.[17]

Across the country, the numbers of retail workers with simultaneous jobs have been increasing. According to a 2015 Statistics Canada Labour Force Survey, the number of retail workers working multiple jobs increased by 3,500 between 2011 and 2015.[18]

Lack of Unionization or Worker Protection

Retail, food service, and hospitality workers are much less likely to be unionized than workers in other industries. While 31.5% of workers in BC belong to a union, this provincial average is more than double the percentage of unionized retail workers. Moreover, unionization rates are dropping. Between 2008 and 2013, union membership for retail workers fell by 3.3%, leaving fewer than 14% of retail unionized.[19] Only 9% of workers in accommodation and food services had union coverage in 2013.[20]

The low and shrinking unionization rates mean a growing number of workers are left without protection to fight for justice, dignity, or improved conditions in the workplace. Non-unionized retail, food service, and hospitality sector workers are left waiting for minimal, incremental wage increases under the Employment Standards legislation, or the simple benevolence of their employers.

The inadequacy of the Employment Standards Act

In the absence of a union to help negotiate better working conditions and protections, workers in retail, hospitality, and food service rely on inadequate Employment Standards legislation to regulate the labour market. **The basic standards established within the *Employment Standards Act (ESA)* are often inadequate and fail to address many concerns workers in these industries face, leaving workers without protection**. Some of the precarious workplace conditions we highlight are actually legal, according to the ESA. For example, the minimum wage established in the ESA is far below a living wage, and it allows for an even lower wage for liquor servers.

Enforcement of the existing, inadequate Employment Standards poses challenges that leave workers vulnerable. Navigating the process of filing a complaint can be difficult, and it can take a long period of time for assessment or resolution. Workers living on low wages may not have substantial financial savings to rely on while awaiting the assessment of a claim for owed wages. Furthermore, **the onus of enforcing the ESA and documenting concerns is on the worker**, even though the workers faces power imbalance both with regard to their employer, and with regard to navigating the legal system.[21]

Global context

While this report focuses on retail, food service, and hospitality workers in Victoria, the issues facing these workers reflect broader global trends, and connect local workers in Victoria to worldwide struggles. **These trends are fundamentally connected to the context of neoliberal capitalism, built on and perpetuating ongoing systemic colonialism, racism, and patriarchy**. Although the report does not cover these complex issues of oppression in any depth, the experience of local precarious work conditions connect with broader global inequality through the various unequal relationships throughout the chain of production and consumption. From the extraction of resources and the exploitation of indigenous communities, to the global inequity in manufacturing and production, to the distribution to various points of consumption, and to the waste produced by this cycle of consumption, **there are important connections to be made between the struggles of workers here in Victoria and to global exploitation.**

Research Process

Methodology

Community-based action research

This report is part of a community-based action research project, where the research design and process has included the involvement of Retail Action Network members and workers in retail, food service, and hospitality. The data collection, analysis, and report writing has been conducted by the Vancouver Island Public Interest Research Group (VIPIRG), in consultation with the Retail Action Network, the Community Social Planning Council (CPSC), and Together Against Poverty Society (TAPS).

Community-based research is an attempt to work against exploitative research practices, and emphasize collaboration and co-creation of knowledge between research 'participants' and researchers. Rather than research *on* it is research *with* the people affected by a particular issue. **The impetus to explore these issues came directly from our personal experiences and struggles working in retail, food service, and hospitality** and from a desire to bring together and strengthen the voices of others who have had similar experiences of workplace injustice. The results of this research will be used by the Retail Action Network in ongoing campaigning and organizing to fight for better working conditions and workplace justice.

Our questions & concerns

Our research was driven by a few key questions:

- What issues are retail, food service, and hospitality workers in Greater Victoria facing in their workplaces?
- What wages are they earning? How many hours are they working? What benefits are they receiving?
- What sort of scheduling practices are employers using?
- Are employers abiding by existing employment standards?
- What do workers feel and do when they face a workplace injustice?
- What types of workplace practices allow workers to feel valued? What types of workplace practices make workers feel devalued and degraded?
- What is the distribution of power like in these workplaces?
- What would workers like to see changed? What are some steps forward?
- We focused on some key areas:
    - Wages & benefits
    - Scheduling
    - Job expectations
    - Health & safety
    - Discrimination & harassment
    - General distribution of power and treatment of workers in the workplaces

Research methods

To answer the questions and concerns outlines above, we used two key research tools: surveys and focus groups.

In order to investigate these issues with workers, we used two key research tools:

1) The **survey** – A wage-workers survey, which involved a series of mostly yes/no or quantifiable questions about wages, scheduling, benefits, and other workplace practices, was completed by more than 50 participants. The survey provided space for participants to provide information about the three most recent workplaces.

   Surveys were distributed in a variety of ways: they were available at participating local organizations (TAPS, CSPC, VIPIRG); distributed on campus at the University of Victoria; circulated throughout the Retail Action Network, and our personal connections within the industries; and available at RAN events.

   We selected the responses that fulfilled all of our criteria:

   i. Work experience within the past five years;
   ii. In retail, food service, or hospitality;
   iii. Within Greater Victoria.

   This selection process resulted in analysing information from 53 workplaces and 37 participants.

2) **Focus groups** – We held six different two-hour dinner and discussion focus group sessions involving 22 participants. The sessions were held at TAPS and CSPC offices. We spread the word about the focus groups to survey participants, through social media, through the Retail Action Network, and on online job searching forums.

   Conversations during focus groups were semi-structured: they were facilitated, but also casual and dialogical, with topics arising organically throughout the conversations. Often the experience voiced by one worker would trigger another person to share their similar experience. Several participants commented that it felt therapeutic to have the opportunity to discuss shared workplace woes with other people who could understand and relate. Participants received a $15 stipend, bus tickets, and a meal as a thank you for their time and for letting us learn about their experiences.

Who we talked with

Throughout our surveys and focus groups, we heard from a variety of people who shared the experience of working in retail, food service, and hospitality in Greater Victoria. We talked with servers, baristas, sales associates, cashiers, stock people, line cooks, grocery clerks, bussers, bakers, dishwashers, and more.

The demographics of our survey respondents is as follows:

- We talked to a broad range of ages, with our youngest participant at 18-years-old and our oldest participant at 67-years-old. The average age of participants was 31.7 years old.
- The majority of respondents (61%) identified as a woman/female, with 19% identifying as male, and 11% identifying as non-binary or trans.
- Twenty-two percent of respondents identified as a person of colour.
- Eight percent identified as indigenous.
- Most participants were not currently students. Less than half of the respondents were enrolled in full- or part-time studies.
- Fifty-eight percent had completed some or all of an undergraduate program.

Findings

What we heard from workers

- Retail, food service, and hospitality workers face **precarious working conditions**:
    - They face **job instability and insecurity**; earn **low wages**; often **don't receive benefits** like paid sick days, vacation, or health benefits; are typically **not unionized**; have **minimal control** over their work conditions; and face **poor treatment** by their employers.
- Low wages, combined with unstable and part-time hours, makes it **difficult for workers to afford basic living expenses** in Victoria.
- **Employers demand flexibility** and availability from workers, while **offering them little in return** in terms of livable wages and job security.
- **Existing Employment Standards are inadequate** to care for the needs and interests of workers in retail, food service, and hospitality in Victoria.
- Workers commonly **feel exploited, disrespected, and taken advantage of** by their employers in retail food service, and hospitality in Victoria.
- There is often **little opportunity for workers in retail, food service, or hospitality in Victoria to leverage workplace or legislative power in their favour**, even when employers are blatantly disregarding existing employment standards.
- Many workers enjoy aspects of their jobs, but **would like to see some changes to working conditions** in order for them to do their jobs well, with higher wages ranking as the foremost priority.

Workers in retail, food service, and hospitality are structurally rendered vulnerable by legislative and workplace practices. **The precarious working conditions faced by these workers have been produced – and they can, and must be, changed in order to work towards greater workplace justice.**

Low Wages

Workers in retail, food service, and hospitality in Victoria earn very low wages (see Fig. 1 for wage breakdown). Low wages are especially relevant in a city such as Victoria, with a high cost of living. It is very difficult to meet basic life expenses in Victoria off these wage rates. **Focus group participants felt the minimal rate of pay was especially disproportionate given what was expected of them** (to be constantly available, to work hard, and to put up with poor treatment from management and customers).

> "You can't survive on [minimum wage]. Everybody will agree to that."

- **Nearly all respondents, 96%, were making under $15.**
- Approximately a third of workers who responded to the survey were making minimum wage.
- **Zero workers we talked to earned the living wage for Greater Victoria (at least $20.05).**
- Very few workers received raises throughout their time of employment.
    - 78% responded that they had not received a raise.

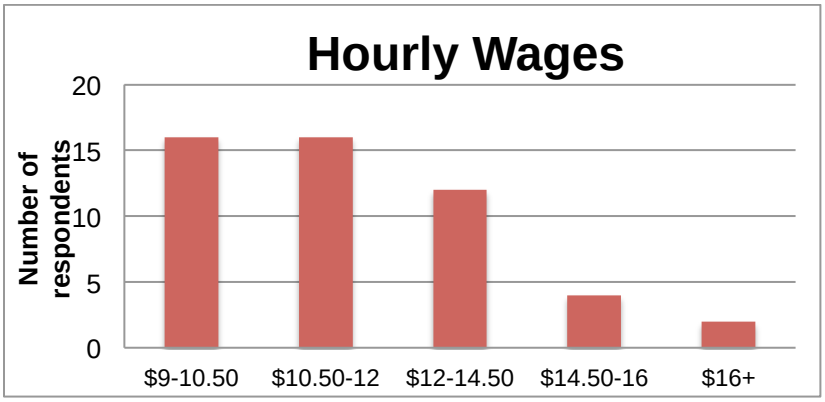
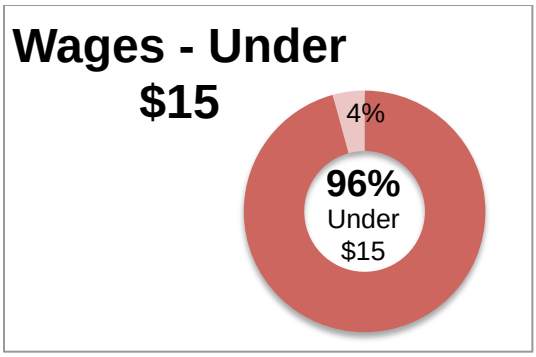


Figure 1 Wages earned by workers who filled out our wage-workers survey.



> "They're paying you dickidee-doo, why would you go out there and work your ass off? Why would you give 200% to somebody that's trying to squeeze you?"

Figure 2 Percentage of workers (96%) who made under $15.

Wage theft

Workers talked about the various ways their employers deprived them of their already low wages by engaging in practices of wage theft:

- Expecting workers to **come in early or stay late** without pay. (Such as to open up, do cash out, or closing tasks.)
    - **42%** of respondents said they have worked off the clock without pay
- **Poor record-keeping by employers** leading to less pay. For example, employers not properly keeping track of hours; not providing workers with a paystub to verify their hours worked or rate of pay; and making supposed 'mistakes' on paycheque (which one participant noted would always result in less pay than deserved, never more).
- **Unregulated tips**, such as no documentation or accountability about how tips distributed. This allows employers to get away with shady practices. Some workers reported employers stealing tips from workers.
- **Missing overtime or holiday pay**. Several workers shared employer expectations that overtime would not be paid at the overtime rate. One worker in the restaurant industry commented, "You know you just don't get it – it's not even a question." Another worker in clothing retail shared a story about an employer who asked to split up a long work day (of 18 hours) into multiple days, to avoid paying overtime.
    - **41%** of respondents were not paid overtime pay when earned
- **Paying below minimum wage rates**. We encountered several employees being paid the outdated minimum wage rates, after they went up in September 2015.

> "Maybe to them it's not a lot, but to me it's my grocery money."

In the workers' own words:

- "You get what you pay for when you're buying things. Why not when you're employing people?"
- "Retail isn't rocket science but it doesn't mean you're not working hard and shouldn't get paid well."

Lack of Benefits

In addition to low wages, **the workers we talked with seldom received benefits from their workplace**. The most common offering by employers, beyond wages, was staff discounts. Only a handful of workers had some amount of medical or dental coverage, while next to none had costs such as transportation or childcare covered. Paid sick days or parental leave were also extremely rare.

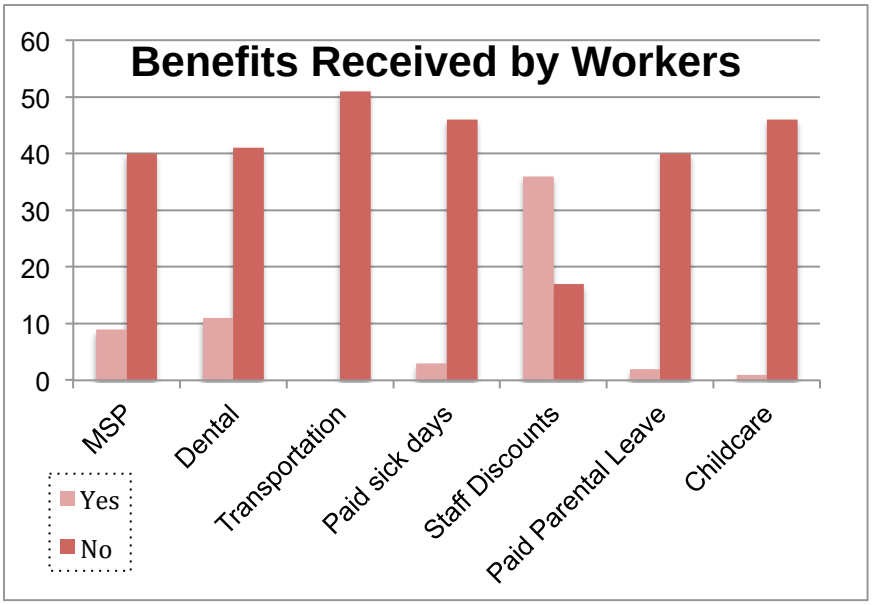


Figure 3 Benefits received by workers

Lack of paid sick days

> "If you're making minimum wage, you can't afford to be sick."

Paid sick leave was an issue that came up continually during our focus group discussions. Only three of the 53 workplaces in our survey offered paid sick days. **Without paid sick days, staying home sick from work means missing out on pay the workers expected to earn and rely on to live.**

Even if a worker can afford to stay home to take care of their health, in most work places that we heard about, the responsibility is on the worker to find a replacement for their shift – this means calling coworkers to cover their shift, and coming in to work if they are not successful at doing so.

Workers often expressed fear of losing their job or losing work hours over taking a sick day. One worker shared a story of demotion following a brief sick leave, even though he had a doctor's note:

> **"I was a Dairy Manager [in a grocery store]. I was told 'you cannot be sick. You cannot be sick.' But I had a legitimate illness. I went in to go see a doctor. I was off for 2 days. I came in, and I had been demoted, taken out of my position, and told I was going to be a 'Floater'. Previous to that I was a Supervisor, and then a Manager of a department."**

In addition to impacting workers, the practice of people working while sick—especially in customer service and food service positions—is a public health issue that concerns everyone. **Providing paid sick days can prevent the spread of illness, speed up recovery, and reduce health care costs.**

Unstable Scheduling Practices

Scheduling practices were a cause of frustration for many workers we talked to. Retail, food service, and hospitality industries are dominated by part-time employment, where the worker is often seeking more hours to afford their cost of living. **Employers frequently make demands of worker flexibility and availability, while providing no security, stability, or predictability in return**. While some workers may choose this type of work due to its flexibility, the flexibility in this sector seems to be driven primarily by employer needs with little regard for workers' lives outside work or need to earn a livable wage.

Involuntary part-time work

Most workers we talked to were part-time employees, and **many were seeking more work hours, making them involuntary part-time workers**. The need to increase their hours of work, meant workers had to make themselves available for work at any point in time, and jump at an opportunity to take a shift last-minute.

> "When I applied, it was with the understanding that it would be 40 hours a week. But there is no such thing at the grocery store or in retail."

Part-time status is often **excluded from the employment benefits and security** that have traditionally been associated with full-time work. Even workers who were technically working full-time hours often did not receive benefits. Many felt that this part-time status was deliberate on the part of their employer, so they did not have to provide any benefits or provide any sort of security.

Last-minute, on-call, and fluctuating scheduling

> "Your life is in limbo for $10.25* an hour."

Last-minute scheduling is a very common practice in these retail, food service, and hospitality jobs. Many workers talked about receiving their scheduling only a day or two in advance. This last-minute scheduling rendered workers unable to make plans in their lives, including doctor's appointments, and other non-work obligations, and left them not knowing how much pay they would earn the next week.

One worker shared her experience of waiting up, tired and wanting to go to bed, on a Sunday night to find out if she worked the next morning:

> **"You'd find out on a Sunday night, sometimes not until 10-11pm at night, what your schedule was for the week, starting the following Monday morning [next day]. So you're tired and wanting to go bed, but you know you couldn't."**

Even when schedules are released to workers, they often end up changing throughout the week, including the day of, and sometimes without the worker even being alerted to the change. Workers talked about being blamed for not knowing about last-minute schedule changes, or for the discrepancies between online schedules and those posted in the workplaces.

> "What? I'm on call? How do I live? I don't know if I'll be working tomorrow."

On-call scheduling

On-call scheduling is the increasingly prevalent practice of scheduling a worker to be "on-call" for a particulate date and time. To be on-call means a worker must wait until the day to see if they are needed at work. This requires a worker to reserve their day for work, in the hopes that they will be called in and given hours – but sometimes they are not. Depending on

the workplace, the worker either calls in or shows up to the workplace at the scheduled time to find out if they will be working that day. Nearly a third of workers we heard from have been scheduled on-call shifts. While on-call scheduling is not at all ideal, many workers talked about needing to take the shifts whenever offered, with the hope to increase their hours as a matter of survival.

"You just work as much as you can, because don't know if the next day you'll only work 2 hours."

Open-ended shifts
Common in the food service industry, "open-ended" scheduled shifts don't include an end time, which means a worker doesn't know when they will be done and how many hours they will work and be paid for. With the practice of open-ended scheduling, employers can avoid guaranteeing workers a certain number of hours and pay, while exploiting workers labour power for as long as they can if needed.

There are a variety of ways that workers end up working and being paid for less hours than they were scheduled. One of the common ways is a just-in-time adjustment of hours, being let off early or being asked to start late. A majority of workers we talked to, 57%, have had this experience. As a result of being let off early or being asked to stay late, **71% lost hours**, and therefore wages, they expected to have.

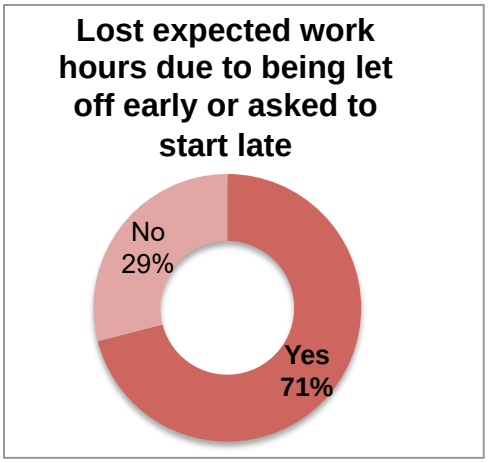


Figure 4 Percentage of workers who lost work hours they expected to have, as a result of being let off early or being made to start late.

These flexible scheduling practices benefit the employer by allowing them to pay for only as much labour power as needed, however they can be severely detrimental to workers. **Workers have very little choice over the amount and timing of work hours, and are often expected to remain available for work at the employers request, leaving them with little stability as far as both earnings and schedule are concerned**. Workers are essentially held captive without being afforded the guaranteed means of survival.

In the workers' own words:

"I was hired part time, but I asked my manager [if I could] pick up more shifts. He would never add me to the schedule. He would just call me every day and be like, 'can you be here in half an hour?' And I couldn't, because I have a life, and I make plans, and I was in school at the time. Then, because I couldn't take 3 or 4 shifts in a row, he got mad at me, saying I shouldn't have asked for more if I couldn't schedule my life around this minimum wage job."

Unfair Job Expectations

Although the workers in these industries are paid low wages, and are involuntarily limited to part-time hours and status, **employers still maintain unfair job expectations of worker availability, commitment, and performance – without offering much in return to the worker, such as compensation, stability, or even opportunity for advancement**.

Many workers talked about the **unclear and potentially intentionally vague job descriptions they have been expected to perform, leaving them confused about what their job is and if they are doing it well**. Workers also talked about the lack of opportunity for advancement, coupled with the expectation of high degree of performance.

Representing the company

Many of the workers we talked to in retail, food service, and hospitality spoke knowingly of the employer's implicit expectation that the worker would relinquish their personal identity to represent the brand. Several noted that this expectation – a form of **emotional labour,**[22] **requiring workers to perform or suppress certain emotions for the sake of their job** – was disproportionate for the rate of pay they received. Some workers even noted that this performance of emotional labour could actually impact their ability to protect themselves, thereby putting their safety in jeopardy:

> "When you're working any job where you have to deal with customers, there is a 'persona'. You no longer have an identity; you are the company. Everything that you say and do -- and you're told that -- has to be a portrayal of the company. So you can't stand up for yourself, because you are always supposed to be putting this company before you. This company is not a person, you can't hurt a company -- all you can do is hurt its profits. But you're actually putting yourself at risk."

Uniforms

Employee uniforms are the visible display of representing the company or brand. There were a variety of complaints about the ways that uniforms functioned in their workplaces.

Spending money on uniform

There is a common expectation that workers are to buy their own uniforms. While employers occasionally provide parts of a uniform, workers are expected to purchase other pieces of the uniform. Moreover, in almost all cases, workers were responsible for cleaning their own uniforms. This expectation to purchase and maintain a company uniforms contravenes the BC Employment Standards Act:

> ***Special clothing***
> ***25*** *(1) An employer who requires an employee to wear special clothing must, without charge to the employee,*
> *(a) provide the special clothing, and*
> *(b) clean and maintain it in a good state of repair, unless the employee is bound by an agreement made under subsection (2).*[23]

Even when there wasn't an 'official' uniform, workers talked about their employers expectations that they wear company apparel, or generally present oneself in a particular way (getting hair done, nails done, wearing nice shoes) – but on the low-wages workers received, this was difficult to do.

Gendered uniforms
Particularly in the food service industry, there are different uniforms or clothing expectations based on the perceived gender of the worker. One worker talked about the expectations to conform to their perceived gender, even though they did not identify with it. Many other workers talked about the widespread expectation that women wear objectifying uniforms when serving, such as short skirts and low-cut tops. This was seen by workers to be discriminatory and degrading.

Nametags
To many workers, the requirement of wearing nametags represented a power imbalance in relation to the customers – having someone automatically know their name without giving it, and not knowing theirs in return. Several workers commented that customers would frequently use their names when giving the worker a hard time or getting angry at them, which made the interaction feel more abusive. Workers also commented on receiving uncomfortable attention from customers if their name did not match their perceived gender, or if they had names that were uncommon in the white European world.

Disciplinary Measures

Very few workers seemed to have formalized performance reviews or disciplinary measures at their workplaces. The most common disciplinary measures seemed to involve depriving a worker of shifts. Some workers shared the fear of calling in sick, in anticipation of being punished with less hours or undesirable shifts the following week.

> "You'd be punished by not being able to pay rent. It's really shitty power move by an employer when it comes down to survival."

Tacit firing
Several workers shared the experience of not being fired directly but rather being given no shifts on the schedule, which effectively and immediately denies the worker of their employment and their wages. According to workers, it is a fairly common practice: employers often don't tell the worker why it's happened or even have a conversation about it – all of a sudden the worker is without a job, even though they haven't officially been fired. When an employer terminates a worker who has been employed for longer than three months, the worker is entitled to either notice or severance pay, according to the BC Employment Standards Act. In the case of tacit firing, employers can be successful at circumventing the existing Employment Standards.

Training inadequate

> "I would have preferred if you had showed me how to do it

Workers spoke of the lack of training they received. **Many workers felt as though they were simply thrown into their jobs without adequate training.** In several cases, workers were unclear about their job expectations or how to do their job well.

Some workers brought attention to an aspect of training – worker rights – that employers may have intentionally omitted:

> **"They never tell you about your rights, and what is entitled to you. If you don't ask, they're not going to give it to you – and they can get away with it, because you haven't asked for it."**

Disregard for Workers' Health & Safety

Occupational health & safety

There are particular types of occupational health and safety concerns that arise in retail, food service, and hospitality work that put workers at risk, including standing for long periods of time, absence of breaks, and discrimination and harassment. One of the most common workplace hazards discussed by workers we talked to may be surprising to those who have not worked in these industries; the **customers posed a significant safety concern for workers**. Workers also reported inadequate training, accountability, or enforcement when it came to workplace safety concerns.

Lack of training about safety

Precarious workplace conditions frequently pose increased safety concerned. **Many workers we talked to reported inadequate training, accountability, or enforcement when it came to workplace safety concerns**. They often did not receive training in the first place, and rarely knew who to go to report workplace safety concerns or hazards. The employer frequently ignored any safety concerns that were brought to their attention by the workers we talked with. This leads to workplaces that are unsafe and ill-equipped or unwilling to properly train workers in a way that protects their health and safety.

> "On a body my age, at 55 years old, it's hard. It's hard to be standing in one place for eight hours. The first two days I was there, I couldn't walk."

Standing for long periods of time

Standing throughout the entirety of a shift is common in retail, food service, and hospitality work, but it is not something that everybody is able to do without it having an impact. Often sitting, or even leaning against a counter or wall, is not permitted. This makes these forms of work inaccessible and represents an occupational health and safety concern.

Absence of Breaks

Breaks at workplaces in retail, food service, and hospitality are often short, if they are available at all. Workers who work longer than five consecutive hours are entitled to a half-hour unpaid break by the ESA, but **this break is minimal and may not always be practiced**. According to many workers, half an hour is a short period of time to acquire and consume a meal. Furthermore, these breaks may not actually be available if the workplace is busy; a worker may work throughout their break, or be called back to work once they have taken their break. The overall culture of workplaces in these industries does not often encourage or allow for proper breaks.

The **lack of breaks is significant because not taking breaks can be an every day stressor and can impact workers health. It can also potentially put workers at serious risk of injury**, especially if working with equipment or machinery.

> "I worked a 9 hour shift on Saturdays. I guess we were probably allowed to get breaks, but the culture in that bakery was that we wouldn't. We would maybe stop moving and stand there and eat some food at one point. But we'd never sit down for a break, ever."

Customers as a threat to safety

Customers were the most common workplace safety issue discussed by the workers we talked with. **Workers reported that customers could be verbally abusive, aggressive, homophobic, and racist. Workers also shared that customers commonly sexually harassed them**. Many workers felt underprepared by their employer to be able to handle customers who are verbally abusive and aggressive.

> "They never warned you about customers who would be verbally abusive. You don't know how to protect yourself."

Workers called attention to the expectation by the employers that they would just "take" this treatment, and there was a fear of being reprimanded or losing their jobs if they did stand up for themselves.

> **"Well, the policy is to suck it up. There's no policy because it's expected that you'll just take it."**

Discrimination & Harassment

Although we heard about several instances of discrimination and harassment, we suspect **discrimination and harassment might be more common in retail, food service, and hospitality in Victoria than we currently have evidence to support**. We know that, when it comes to larger trends, marginalized people disproportionately bear the brunt of the precarity of these forms of work. Women, racialized people, indigenous people, newcomers, people with disabilities, and youth are some of the marginalized groups who are overrepresented in these precarious forms of employment.[24]

The **gendered disparity in pay, with men earning significantly more than women in these industries and others**, is just one element of the widespread injustice on the basis of identity. Several workers explained the gendered division of labour within their workplaces. Women are more commonly in the customer service oriented roles, like servers and cashiers, while men were more likely to be in positions like stockers, back-of-house, in the kitchen. In a few workplaces, this gendered division of labour also demonstrated a gendered difference in pay, with women getting paid less. Some workers also commented that there is also a racialized division of labour within their workplaces.

Workers shared experiences of discrimination faced in their workplaces. Such experiences are linked to vulnerability. As one worker suggested**, the more a worker needs the job, the worse an employer treats them**. For instance, we heard of employers seeming to favour immigrant workers because they were easier to exploit, given that they may be more afraid to stand up for themselves, and may not know their rights or be in a position to exercise them. We heard of younger people being taken advantage of more often, and broader trends support the fact that young people are paid significantly lower wages.[25] In addition, one worker, who had a disability and could not access the employee washroom located at the bottom of stairs, had to go elsewhere to use a washroom and they were required by their employer to clock out when doing so.

Overall Poor treatment

A ubiquitous theme was overall poor treatment of workers by employers. **Workers felt taken advantage of and exploited by their employers**, asked for an unreasonably high level of availability and dedication without behind rewarded with decent wages, job security, or basic dignity and respect. **Workers described feeling powerless, used, exploited, and replaceable**.

In the workers' own words:

- "I kind of feel like all minimum wage jobs are pretty crappy."
- "As a service worker, you give up power as you enter your job."
- "I usually feel exploited as a worker in the service industry. A lot of just feeling used, feeling down, trying to get out, and get something else."
- "They squeeze you like a lemon."
- "I've always felt 100% replaceable."
- "It's a two way street: You're working because you need the job and the money and they give you the job because they need somebody to do the job. But obviously, it's not the way they look at it. It's like they're doing you a favour..."
- "If you need the job, then you've gotta take this [poor treatment]"
- "They want you to think you have freedom. But if you really need the job, you're doomed. Because they are going to push you and push you and push you. There's no end, really, to that."

Incompetency and abuse of power by employers, managers

Another common experience workers shared was feeling that their **employers and management were not competent at their jobs and that they abused the power they held over workers**. Several workers felt that they were blamed for issues that were within the organization or company as a whole. **Poor communication** between the employer or management and staff was also commonly brought up throughout our sessions, which made it harder for workers to understand the expectations of their jobs and do them well. While a handful of people had supportive employers or managers, many workers felt **unsupported by their employers**. They described that employers or managers were never there when you needed them to help resolve a concern or to stand up for the worker when they were facing abuse from customers.

> "What do you do when you have an ineffectual manager or supervisor? You go to them with a concern expecting help, and you a) get no help; b) get verbally abused; or c) get a complaint against you."

High turnover

> "The turnover is so great because they treat people so bad that nobody stays there."

Perhaps the high turnover rate in these industries has been used as a justification for not treating workers well: people don't stay in these jobs long anyhow; these are transitional jobs so they don't have to be good jobs; workers aren't loyal so they shouldn't be rewarded with decent treatment; etc. But the **high turnover rates are largely an indication of poor employment situations, not a reflection on individuals' work ethic or the respect they are deserving of**. The average length of employment, according to our wage workers survey, was just over 8 months. Although several people reported staying in positions for longer than two years, the most frequent response was under 6 months. Many workers recognized the high turnover rate at their workplaces, and associated poor treatment and unjust workplace conditions with the high number of workers entering and leaving.

> "I worked there for three years -- never got seniority, never got a raise, never got a thank you. Nothing."

At least one worker shared a positive workplace experience, where good treatment and working conditions have encouraged workers to stay. But in many cases, loyalty or commitment was not rewarded.

Workplace justice

What prevents workers from standing up for themselves

Needing the job and its income for survival means workers are often afraid of risking their employment by standing up for themselves or asking for what they are owed, even when their employers are in clear contravention of existing Employment Standards. These forms of low-waged precarious employment often involve living paycheque-to-paycheque without any savings to fall back on. Some workers talked about being made to feel like their employer is doing them a favour simply by employing them, so they are made to feel ungrateful or greedy for asking for things that are due to them by law.

> "I still want to work in retail, because I do like people and I like the job."

Several workers highlighted the **importance of support** in bringing up concerns to their employer:

> "Part of it is having people who have your back, so that you have that feeling of support -- that you're not in this alone. There are people who are fighting the same fight. There's a great deal of courage that can be found in a unity like that."

Limitations of the Employment Standards System

The BC Employment Standards Act (ESA) is meant to protect workers but falls short in many cases, particularly for those working in retail, food service, and hospitality. Some of the unfair and unstable workplace practices we have highlighted in this report are technically legal, according to the ESA. Even if workers do wish to file an Employment Standards complaint for workplaces operating in contravention of the ESA, the process of filing a complaint is difficult, there is not adequate support, and resolution may take a long time or may never come. Existing Employment Standards leaves retail, food service, and hospitality workers in precarious workplace conditions.

Inadequacy of the existing Employment Standards Act

The ESA currently offers a minimum wage that is the lowest in Canada, and far below a living wage. An unfair and detrimental except for liquor servers mean they get an even lower minimum wage, at $9.20 per hour. Some workers, in their three-month "probationary" period, are not afforded full protection under the ESA can be fired without cause, notification, or compensation. There is no provision for paid sick days. The ESA fails workers on the regulation of scheduling, with no guarantee for stability of hours (no protection for hour cuts below 50%) and no protection from on-call scheduling.

Complications of filing an Employment Standards complaint

Even if a worker wishes to file a claim against an employer who is not meeting their basic legal duties, it is not an easy process. Many workers are deterred from even taking this action, due to the intimidating power imbalance between workers and employers. The social construction of the worker-employer relationship as a private matter is also a barrier, as noted by an Employment Standards Advocate at the Employment Standards Legal Advocacy Project (ESLAP) at Together Against Poverty Society (TAPS).

The complaints process is rife with power imbalance and offers little support. In order for a worker to pursue their employer, the worker must be comfortable communicating their issues in terms of

legal jargon, they must produce evidence that their employer neglected their responsibility, and they must detail and defend their experience of potentially traumatic incidents to a government authority, often with the perpetrator of their workplace abuse present. The onus for enforcement of employment standards regulations rests with the worker, who has the least power.[26] If workers need assistance with the filing an Employment Standards complaint, TAPS is the only organization in the BC Employment Standards Branch jurisdiction specifically providing that support.

Employment Standards Branch priorities:
According to the Employment Standards Advocate at TAPS, the Employment Standards complaint process tends to focus on unpaid wages rather than resolution of all standards including scheduling, record keeping, and other non-monetary contraventions. While unpaid wages are certainly a priority, workers deserve to have assurance that all employment standards in the ESA will be protected and enforced.

Timelines and time commitments:
The timelines and time commitments associated with filing an Employment Standards claim is one of the key challenges to this system working towards workplace justices. There are deadlines for workers to file a complaint after the incident, but no guarantee of the procedural timelines of the Employment Standards branch.

As explained by the Employment Standards Advocate by email,

> "The timelines and time commitment required by employment standards in BC are not accessible for most low-income workers, especially folks who need language, health-related, or communications accessibility. **Many workers end up deciding that the process is not worth their energy in terms of compensation or a sense of justice.** We have many clients who have to prioritize their immediate personal, family, health and income needs above the arduous process of Employment Standards complaint. However our caseload also shows us how strong the need for basic standards for hours, pay, and the employment relationship is strongly needed – judging by the number of employers who, for example, pay below minimum wage, don't give breaks, or keep large numbers of staff on-call, without benefits."

Outcomes:
The outcomes for workers, after all that effort, can be unrewarding. There is a pressure on complainants to participate in a mediation process, which can require as much of the worker as a hearing, but which encourages a worker to settle for less than they earned. Occasionally this process is useful, but often it is not, according to the Employment Standards Advocate. They also noted that there is no effective remedy with teeth for employer who retaliates, besides a lengthy process of adjudication and fines.

The existing Employment Standards system leaves workers in precarious workplace conditions, and offers little support or protection.

What would improve workplace conditions

Among the workers we spoke with there was a clear consensus that wages are too low, and that this should be improved through policy change: **BC's provincial minimum wage needs to be increased**. There was a strong desire for what their job demands to be matched with an appropriate wage. Benefits were another key component to compensating workers adequately.

> "A shift in the way people think about workers in general. It's kind of dehumanizing sometimes. More than just a living wage, you should be treated with human dignity."

In addition to wages, the workers we talked with also greatly stressed the importance of **feeling respected and treated with dignity by their employer**. Workers expressed wanting to be recognized as a whole person, rather than simply a service provider. **Many felt deprived of this at their current or recent workplaces**.

> "If you want me to feel this loyalty to this company, then treat me like I'm a part of it."

As a part of basic dignity and respect, **workers wanted to be recognized as an integral part of the workplace, and they wanted to see their voices included in decision-making and daily operations**. They spoke of wanting to see mutual respect and community within the workplace, with time and space devoted to coming together to develop strategies for the workplace. Workers also wanted support from their employers when they faced challenges or hazards within the workplace.

Working towards Workplace Justice

Closing notes by Retail Action Network Organizer, Eric Nordal:

It is evident that retail, food service, and hospitality workers in this province are being exploited by their bosses and being failed by Employment Standards in BC. As workers in these industries, we face many challenges that continue to make our working lives more precarious and less valued every year.

Through the Retail Action Network, we are fighting for change to happen for workers that are in these positions, and have identified the services and the campaigns that are essential for a successful worker's movement to take shape here in the Greater Victoria area. There are three main areas of focus that our organizing is dedicated to:

(1) Build Community

One of our main focuses is to build a community of support that will fight for increased wages, improved working conditions, and equality in the retail, food service, and hospitality sector. We understand that precarious employment and difficult living conditions can have a destabilizing effect on families, friends, and communities as a whole. It is important to us that we focus on rebuilding a community that can provide one another with support in difficult times, as well as to build towards something more transformative and representative of our needs not only as workers, but as an entire community.

From this understanding of our need to rebuild our communities, we:

- Host monthly social events called Working Class Wednesday where workers in retail, food service, and hospitality gather for food and entertainment with a focus on workplace justice and building solidarity amongst an entire industry.
- Host an annual MayWorks festival that connects the arts and culture communities with the local worker's movement in Victoria.
- Look forward to building a worker-led and operated cafe, retail space, and / or Worker's Action Centre where we can showcase the highest standards of employment while offering a space for workers to find support through advocacy and education.

(2) Win Victories

Winning victories for workers that are facing exploitation from their bosses is an essential part of the organizing that we doing. Too often, workers face mistreatment at work, and end up walking away without any sense of justice. As outlined in this report, this is due almost entirely to a failing legislative body to regulate these injustices, as well as an unchecked power imbalance that shapes most workplaces in retail, food service, and hospitality. It is important for us to win victories in these situations so that workers know that there is a way to get support through community mobilizations, to practice and build our collective strength as a community, and to put business owners on notice that it is not going to go unnoticed if they mistreat their workers.

From this understanding of our need to win victories for workers, we:

- Have put together a "flying squad" that mobilizes through direct actions and social pressure campaigns to support workers that are being mistreated by their employers.
- Provide guidance and support for workers in navigating the Employment Standards Act in partnership with our friends at the Employment Standards Legal Advocacy Project.

- Look forward to organizing workplaces from within by running long-term campaigns to unionize or change employment practices at some of the most exploitative workplaces in the region.

(3) Raise the Standards

Retail, food service, and hospitality workers are disproportionately affected by the lack of protections through BC's Employment Standards Act. As outlined in this report, many instances of abuse and mistreatment by employers is not considered to be in contravention of the ESA. The current legislation is lacking decent standards and has completely ignored certain issues altogether. As workers, it is important that we raise the standards and re-write legislation and employment practices through our experiences as those most at risk of abusive relations with employers. It is our understanding that we can do more than observe unfair practices, we can organize and actively change them, both at a provincial level, and more directly within workplaces.

From this understanding of our need to raise the standards in BC and within workplaces, we:

- Have identified the major concerns that workers face in retail, hospitality, and food service through the publication of this report and with the research done by the Vancouver Island Public Interest Research Group.
- Are developing a call for changes to legislation within the Employment Standards Act that not only addresses wages, but a broad range of working conditions.
- Look forward to pushing for changes around specific policies within workplaces in the Greater Victoria area by identifying current standards and using a range of organizing techniques to make measurable improvements to precarious retail, food service, and hospitality workers.

The Retail Action Network is thankful for all of the workers who shared their experiences and stories with us throughout this research process. We will continue to organize with and for retail, food service, and hospitality workers in the years ahead and in order to effectively fight for workplace justice, increased wages, and improved working conditions for those in our communities.

References

[1] Statistics Canada (2006). "Experienced labour force 15 years and over by industry, by census metropolitan areas (2006 Census) (Kelowna, Abbotsford, Vancouver, Victoria)." http://www.statcan.gc.ca/tables-tableaux/sum-som/l01/cst01/labr87g-eng.htm

[2] CBC News (2016). "B.C. minimum wage now the lowest in Canada" http://www.cbc.ca/news/canada/british-columbia/bc-minimum-wage-lowest-canada-1.3515923

[3] McLeod, Andrew (2015). "BC Now Has Lowest Minimum Wage in Canada." *The Tyee.* http://thetyee.ca/News/2016/04/01/BC-Minimum-Wage/

[4] Galarneau, Diane and Fecteau, Eric. Statistics Canada. "The ups and downs of minimum wage." http://www.statcan.gc.ca/pub/75-006-x/2014001/article/14035-eng.htm

[5] Community Social Planning Council of Greater Victoria (2015).*Working for a Living Wage Report: 2015 Update.*

[6] Victoria Foundation (2015). *Victoria's Vital Signs 2015*.

[7] Ibid.

[8] CBC News (2016). "McDonald's foreign worker practices halted in face of investigation." http://www.cbc.ca/news/canada/mcdonald-s-foreign-worker-practices-halted-in-face-of-investigation-1.2619431

[9] Law Commission of Ontario (2012). *Vulnerable Workers and Precarious Work*.

[10] WorkBC (2013). Industry Profile: Accommodation and Food Services. https://www.workbc.ca/Labour-Market-Information/Industry-Profiles/1

[11] Victoria Foundation (2015). *Victoria's Vital Signs 2015*.

[12] WorkBC (2013). *Industry Profiles*. https://www.workbc.ca/Labour-Market-Information/Industry-Profiles.aspx

[13] Statistics Canada. "Weekly hours of hourly paid employees, average, by industry." http://www.statcan.gc.ca/tables-tableaux/sum-som/l01/cst01/labr81a-eng.htm

[14] WorkBC (2013). Industry Profile: Accommodation and Food Services. https://www.workbc.ca/Labour-Market-Information/Industry-Profiles/1

[15] Law Commission of Ontario (2012). *Vulnerable Workers and Precarious Work*.

[16] Retail Action Project (2012). *Discounted Jobs: How Retailers Sell Workers Short.*

[17] Victoria Foundation (2015). *Victoria's Vital Signs 2015*.

[18] Statistics Canada. "Labour force survey estimates (LFS), multiple jobholders by North American Industry Classification System (NAICS), sex and age group." http://www5.statcan.gc.ca/cansim/a26?lang=eng&id=2820031

[19] WorkBC (2013). Industry Profile: Wholesale and Retail Trade. https://www.workbc.ca/Labour-Market-Information/Industry-Profiles/18

[20] WorkBC (2013). Industry Profile: Accommodation and Food Services. https://www.workbc.ca/Labour-Market-Information/Industry-Profiles/1

[21] Workers' Action Centre (2015). Still working on the edge: Building decent jobs from the ground up.

[22] Centre for Social Epidemiology (2011). "Emotional labor," *Unhealthy Work.* http://unhealthywork.org/emotionallabor/emotional-labor-a-short-definition-from-muntaner/

[23] *Employment Standards Act*. http://www.bclaws.ca/Recon/document/ID/freeside/00_96113_01

[24] Law Commission of Ontario (2012). *Vulnerable Workers and Precarious Work*.

[25] WorkBC (2013). Industry Profile: Accommodation and Food Services.

[26] Workers' Action Centre (2015). *Still Working on the Edge: Building decent jobs from the ground up.*

March 20, 2018

Labour Relations Code Review Committee
Ministry of Labour

email: LRCReview@gov.bc.ca

RE: Submission on Necessary Amendments to *Labour Relations Code*, RSBC 1996, c 244

Submission by Service Employees International Union Local 2, Brewery, General & Professional Workers' Union, SEIU Local 2 ("SEIU")

Dear Committee Members,

SEIU's Justice for Janitors is a movement of workers that has successfully organized to improve wages, benefits, and job security for thousands of janitors across Canada. SEIU's Justice for Janitors model aims to create stability and raise industry standards for workers by organizing across a city or market.

Our comments regarding barriers to freedom of association are drawn from decades of assisting cleaners and other working people to organize and fight for labour rights. These submissions speak directly to the first of the conventions recognized by the International Labour Organization (ILO), considered as fundamental to the protection of basic workers' rights: Freedom of association and the effective recognition of the right to collective bargaining.

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I. BARRIERS TO FREEDOM OF ASSOCIATION

a. Board Policy After Island Medical Laboratories Ltd ("IML")

Freedom of association requires that all workers are able to freely and voluntarily establish and join groups for the promotion and defence of their occupational interests. In British Columbia this right has been severely undermined through Labour Board policy, which could be easily addressed through an amendment to the Code.

Following *Island Medical Laboratories Ltd. v. H.S.A.B.C.*[1] the Labour Board has adopted an approach which distinguishes an initial application for certification relating to an employer and a second or additional stage of certification in respect to that employer. In a first application, access to collective bargaining is the most important principle in determining appropriateness, whereas in considering an application for a second unit with the same employer, industrial stability is the most important principle in determining appropriateness, with a presumption against multiple units. What this has meant in the "second application" cases is that if an applicant union cannot overcome a presumption against fragmentation, the labour board will deny the application on the basis that the incumbent union would be a better representative. In order to overcome this, the applicant union needs to apply for the existing unit or a larger unit.

Following *Island Medical Laboratories Ltd.* the Labour Board has adopted an approach which classifies sections of the workforce in a way that gives paramountcy to industrial stability over the right of freedom of association and to freely choose representation. By strongly favouring incumbent unions over additional bargaining agents this policy creates incentives for employers to seek out relationships with friendly unions who will be content with narrow bargaining rights. These relationships can be established by the establishment of a Voluntary Recognition with a small portion of the workforce. Such small units have low labour relations impact while effectively providing the employer a form of insurance against their workers organizing with other bargaining agents. The presumption against proliferation as it is applied by the BC Labour Board is at odds with worker choice. This policy cannot co-exist with the right of freedom of association. This prioritization of employer's interests over freedom of association is unique to BC and must be reversed.

SEIU's experience is that insistence upon employer-wide bargaining units runs the risk of discouraging collective bargaining and disincentivizes union organizing altogether.

Example A: Cascades Recovery

In 2017 a group of transportation employees at Cascades Recovery Inc (a large recycling company), organized and filed to be certified with SEIU. The application was objected to by both the Employer and by another bargaining agent. The other bargaining agent represents a small group of plant workers at Cascades, who organized in 1993. Since 1993 no further efforts to organize workers at Cascades had been made. SEIU argued that the failure of the other

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[1] *Island Medical laboratories Ltd. v. H.S.A.B.C.* (1993), 94 C.L.L.C. 16,040, 19 C.L.B.R. (2d) 161, 1993 CarswellBC 3610, [1993] B.C.L.R.B.D. No. 329 (B.C. L.R.B.).

bargaining agent to act to organize any other Cascades employees provided clear and sufficient evidence from which to conclude that the incumbent union is not a reliable route to accessing to collective bargaining by members of the proposed unit. The other bargaining agent did not make submissions regarding the rights of the ununionized workers but rather argued that adding a second bargaining unit would destabilize the existing relationship. The labour board accepted this argument and concluded that "the concerns about industrial stability outweigh the objective of access to collective bargaining." The transportation employees in the proposed bargaining unit continue to be unrepresented presently.

Denying the application of the Transportation Division employees sent a clear and concerning message that there is no down-side to sitting on bargaining rights indefinitely. Dismissing SEIU's application in favour of the possibility that the other bargaining may elect at some point in time to represent the proposed bargaining unit has the potential to discourage organizing efforts not just by SEIU but by trade unions generally.

If incumbent unions can indefinitely sit on bargaining rights then it follows that employers who wish to avoid active unions in their workplaces can simply voluntarily recognize a single site with a union fostering a workplace which may well sit dormant for years without active representation of its employees. No union will expend organizing efforts to assist unrepresented employees if the presumption created by IML cannot be overcome even where the facts demonstrate the incumbent union is not a realistic route to collective bargaining. The policy of the Labour Board left these workers with no route to collective bargaining and no ability to freely choose a bargaining agent.

Example B: Best Service Pros and CLAC

In February of 2017, the cleaners at Capilano University voted to unionize with SEIU Local 2 to fight for much needed improvements at their workplace. Best Service Pros, the contracted cleaning company at Capilano University, raised legal objections to the cleaners' union application with SEIU, holding up a 10-year Voluntary Recognition Agreement with CLAC as a barrier to their right to join SEIU. Through the ensuing legal dispute SEIU became aware that in 2016 Best had approached CLAC to enter into a voluntary recognition agreement for Langara College prior to hiring any workers at the Langara account.

As a result, the parties were forced to engage in a prolonged legal dispute. After a long and frustrating wait for the cleaners, in June 2017, the Labour Board decided to unseal their ballots and the cleaners won their right to join SEIU Local 2.

SEIU was able to overcome the policy against proliferation only because at the time that Best approached CLAC there were already bargaining relationships between Best and other bargaining agents. The Board concluded that the decision to pursue a relationship with a new bargaining agent was contrary to assertions of concerns about industrial instability caused by the proliferation of bargaining agents. However, had CLAC been Best's only bargaining relationship, the workers at Capilano University may well have been refused their right to freely choose a bargaining agent. Our experience at the Labour Board suggests that these workers would have been denied their right to unionize if Best had only a single existing bargaining relationship with CLAC.

b. VRAs as Bars to Organizing in the Context of IML

In a context where having a single union relationship provides security against further unionization, Employers are incentivized to seek out voluntary recognition agreements with Employer-friendly unions. We call for amendments to ensure such arrangements are truly representative of employees and are arm's length from employers. This would bring British Columbia into line with labour legislation elsewhere in Canada. Currently there is no mechanism for workers to challenge such voluntary recognition agreements. We urge the committee to consider the creation of such a mechanism.

- The definition of "collective agreement" be amended to make express that the trade union party must "represent employees of the employer" (Ontario).

- A requirement that voluntary recognition agreements be filed in order to have effect (Nova Scotia, PEI).

- The removal of the words "Except as otherwise provided in section 8..." from the s. 6(1) prohibition on employer participation in the formation, selection or administration of a union.

- An express power conferred on the Board to deem a collective agreement void if an employer participated in the administration of the union, or where it is influenced by the employer such that its fitness to represent employees in collective bargaining is impaired (Ontario and Alberta).

- A provision allowing any employee in the unit, or a trade union representing such an employee, to challenge the voluntary recognition during its first year, with the parties to any such agreement bearing the onus of showing that the union was entitled to represent the employees at the time the agreement was entered into (Ontario, Nova Scotia and with broadly similar provisions in Canada [federal provisions]).

c. Lack of Effective Remedies to Employer Unfair Labour Practices

Section 14 of the Code sets out the powers of the Board to remedy unfair labour practices. Under subsection 14(4)(f), it is open to the Board to order certification if it is of the view that but for the unfair labour practice, "the union would likely have obtained the requisite support." However, in practice these remedial certifications are unobtainable. For example, In 2013, 73 applications for remedial certification were made and none were granted. In 2014 one application was granted out of 18 and in 2015 only a single remedial certification application was granted.[2]

Union drives are often fraught with tension and fear. For workers who have been subjected to an onslaught of threats, intimidation and coercion from their employer a mere "cease and desist" order posted in the worksite does nothing. Employers in BC have become accustomed to the unlikelihood of remedial certifications and therefore may chose to hit their workers "hard

[2] BC Labour Relations Board, Annual Report (2015), available online at; http://www.lrb.bc.ca/reports/.

and fast." A serious employer campaign of intimidation will cost the employer very little, making the legal fees of a potential unfair labour practice complaint a small price to pay to avoid unionization. Giving the labour board direction to use this remedy more frequently will discourage such rash behaviour on the part of employers.

II. BARRIERS TO COLLECTIVE BARGAINING

The right of workers to bargain freely with employers is an essential element in freedom of association. Collective bargaining is a voluntary process through which employers and workers discuss and negotiate their relations, in particular terms and conditions of work.

a. Raids do not result in a new opportunity to Collectively Bargain

In situations where employers have sought out employer-friendly unions they may pursue lengthy Collective Agreements in order to provide themselves cost certainty. Workers who reject such arrangements by changing bargaining agents during a raid period will find themselves bound by the same terms and conditions. This disincentivizes the free choice of bargaining agents.

In British Columbia the open period is the seventh and eighth months of each year of the collective agreement. If the board renders a decision on the merits of an application, another application for certification may not be made within 22 months. This provision creates the opportunities for raids more often than in other Canadian provinces. However, Section 27(1) c provides that "If a trade union is certified as the bargaining agent for an appropriate bargaining unit ... (c) if a collective agreement binding on the unit is in force at the date of certification, the agreement remains in force." SEIU's experience is that the survival of the incumbent Collective Agreement serves to undermine the ability of workers to collectively bargain. As the law currently stands there is no limit on how long the term of a Collective Agreement can be. Long term contracts can continue to bind regardless of representation of the membership.

In our view, the competing interests of industrial stability and the right to collectively bargain would be more effectively balanced by adopting the federal approach: If there is a collective agreement in force with respect to any of the employees in the unit applied for, the application can only be made during the last three months of the agreement or during the last three months of the third and succeeding years of the agreement.

In the case of Best Service Pros and CLAC, the Collective Agreement has a ten year duration: June 1, 2016 to July 31, 2026. Significantly, this is a first collective agreement for these parties. This voluntary arrangement was negotiated and entered into without the participation of any of the impacted workers. Further, SEIU is currently before the Labour Board arguing that Employer influence has tainted the ratification process.

When workers covered by this agreement began organizing efforts to leave CLAC both the employer and CLAC brought forward Section 27(1) c to discourage worker efforts, by communicating to workers that it would be pointless to change union representation as the collective agreement would remain in place. The attached flyer features Section 27 (1) C in bolded and capitalized font. The flyer was distributed to workers in the context of a campaign to displace CLAC. A copy of this flyer is attached a "Appendix A."

b. Variances do not result in a new opportunity to Collectively Bargain

The policy of the Board has been to encourage single bargaining representatives to represent all-employee bargaining units. In large, complex worksites, it is unrealistic to organize all the workers at one time. The solution then is to organize an initial group of workers, and then to vary in additional employees of that Employer. However, where a group of employees chooses to unionize by joining their already unionized co-workers they do not enjoy automatic access to a collective bargaining process. Regardless of the differences between the employees and the existing bargaining right they are expected to accept the existing Collective Agreement, negotiated and ratified before they unionized. Without the right to negotiate a new agreement, and the corresponding right to strike if they are unable to reach an agreement, these workers are not able to realize the benefits of unionization. SEIU submits that a mechanism should be created to allow collective bargaining following successful variance applications.

III. PROHIBITIONS AGAINST SOLICITATION

The restrictions on union organizing are excessive to the point that they interfere with workers right to organize at work, undermining their freedom of association. In stark contrast, since the 2002 amendments, employers in BC are granted extensive leeway to engage efforts to persuade their employees against unionization.

In 2002, the Legislature amended sections 6(1) and 8 of the Code to allow Employers to express "views" to employees on topics such as "matters relating to an employer, a trade union or the representation of employees by a trade union" (Code, Section 8). Prior to this change employers in BC were held to the same standard as in other provinces, limited to neutral and accurate descriptions about the certification and collective bargaining process or to commentary on its business.[3] In every BC organizing campaign that SEIU has engaged in, workers have been subjected to on-shift meetings where upper management attempts to instill anti-union sentiments in their employees. SEIU has observed union supporters in their work places being named and discredited by management in captive audience meetings. In every union organizing campaign SEIU has observed Employers use their right to express "view" to undermine unionization efforts and discredit the union.

By contrast, during working hours employees are prevented from engaging in organizing activities. The labour board has determined that "organizing activities" includes:

- having conversations about unionization that go beyond merely stating that membership cards should be signed during non- working hours
- asking a co-worker if they have had the opportunity to sign a membership card
- disseminating pro-union materials

While employers are explicitly permitted to use work time to persuade their employees against unions, any conversations between workers on the job which goes beyond casual conversation and becomes an attempt at persuasion are not allowed under the Code.

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[3] Re *Excell Agent Services Canada Co.* BCLRB No B171/2003 at paragraph 35

Union organizers face significant challenges in making initial contact with workers. In order to make initial contact with workers organizers will visit worksites and hand out contact information outside of shift times. Whereas in other provinces the actual location of union organizers while they conduct this outreach falls into the realm of trespass law, in BC section 7 (1) specifically prohibits organizing at the employer's place of employment. As a result, Employers are able to access unfair labour practice complaints as a mechanism to intimidate union organizers from making initial contact.

CONCLUSION

The Labour Relations frame work in British Colombia gives unfair advantages to Employers, undermining the fundamental rights of workers to freely associate and to bargain collectively. The Committee has an important opportunity to recommend meaningful changes to the BC NDP that could serve to redistribute the power between employers and working people. We appreciate the Committee's attention and would be happy to provide further details or clarifications as needed.

All of which is respectfully submitted

Teacher Staff Union

c/o 100 – 550 West 6th Avenue, Vancouver, BC V5Z 4P2

March 15, 2018

Labour Relations Code Review Panel
Via email: LRCReview@gov.bc.ca

Dear Panel,

I represent the Teacher Staff Union (TSU) at the British Columbia Teachers' Federation (formerly Unifor Local 464). We wish to alert you to two decisions of the BC Labour Relations Board that we believe highlight a necessary change to the BC Code.

B94/2017 and B135/2017 both involve a National Union, Unifor, that unilaterally revoked a Local charter to the detriment of the members in those Locals. In our case, in a letter dated November 14, 2016, we were advised that the Unifor National Executive Board voted unanimously to revoke our Local's charter because the interests and loyalties of our employer, the British Columbia Teachers' Federation did not match their own. At that time, a Unifor National Representative was preparing for arbitration on our behalf for a December 12, 2016 hearing. The members of our Local had to quickly secure outside counsel and our employer's counsel questioned the validity of the upcoming arbitration given that we were no longer a chartered Local.

Despite numerous attempts to contact Unifor, it took filing a complaint with the BC Labour Relations Board to get any real response from the national union. These cases went in Unifor's favour because the Board does not have jurisdiction under Section 10 to review a national union's decisions. This is outlined in *Booker* by Vice-Chair Terai:

> "Unifor is a national union and is or was the parent union to Local 468-W. As a national union, Unifor is not a local or Provincial organization in British Columbia. It therefore does not fall within the definition of "trade union" under Section 1 of the Code. Accordingly, I find the present application seeking to have the Board determine whether Unifor has acted in breach of Section 10 of the Code does not fall within the Board's Jurisdiction. On this basis the application is dismissed."

Certainly, this is a flaw in the BC Code. The unilateral actions of Unifor put our Local and the employment relationship with the BCTF in jeopardy. National unions play a significant role in unionized work, often providing support for grievances and arbitrations, providing training to local shop stewards, and providing strike pay during labour disputes. Certainly, our members had paid significant dues to Unifor's targeted funds in these areas, and since November 14, 2016, the Local and members have had no access to them.

The Panel's terms of reference direct you to, "...assess each issue canvassed from the perspective of how to "ensure workplaces support a growing, sustainable economy with fair laws for workers and business" and promote certainty as well as harmonious and stable labour/management relations." If national unions are able to escape their core responsibilities, workers can face serious consequences in an unstable labour relations environment.

Thank you for considering our submission, and I look forward to seeing the outcome of the significant work you are undertaking.

Sincerely,

Chris Harris, President
Teacher Staff Union (TSU)
Phone: 604-871-1833; email: *charris@bctf.ca*

20180315 Letter to LRC Review Panel
CH:TSU/pb:tfeu

Teamsters Local 213

Affiliated with the International Brotherhood of Teamsters, Teamsters Canada and the Canadian Labour Congress.

Bryan W. Savage
E. Casey McCabe

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EMAIL/FAX TRANSMITTAL SHEET

DATE: March 20, 2018

FAX TO: Labour Relations Review Panel

EMAIL: LRCReview@gov.bc.ca

FROM: E. Casey McCabe, Director of Legal Services

NUMBER OF PAGES TRANSMITTED (including covering sheet): # ___3___

RE: ***Amendments to the British Columbia Labour Relations Code Section 3***

MESSAGE: Attached is Teamsters Local Union No. 213's March 20, 2018 supplemental submission with respect to Labour Code Amendments.

IF ALL PAGES ARE NOT RECEIVED, PLEASE CALL Lorraine at:

Phone (604) 876-5213 Fax (604) 874-6459

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MoveUP:lg
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2017-2007

Teamsters Local Union No. 213

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E-mail: team213@teamsters213.org

March 20, 2018

By email: LRCReview@gov.bc.ca
Labour Relations Review Panel

Dear Sirs/Mesdames:

Re: Amendment to the British Columbia Labour Relations Code – Section 3

Please accept this letter as a supplement to Local 213's previous submission on changes to the Labour Code.

Local 213 suggests that Section 55 of the Code be amended to delete the requirement under Section 55(1)(b) that the Union take a strike vote under Section 60 before it can apply for first agreement arbitration. The problem is that by definition the bargaining unit has no history of collective bargaining with their employer yet the employees are expected to give the Union a strike mandate in order to get into the Section 55 process. It is very intimidating to the employees who have chosen to seek representation through negotiation rather than confrontation. For this reason Section 55 is another example of bias toward the employer which undermines the rights found in Sections 2 and 4.

Yours truly,

TEAMSTERS LOCAL UNION NO. 213

E. Casey McCabe
Director of Legal Services

MoveUp:lg
2017-2007/
Supplemental

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cc: Walter Canta, Secretary-Treasurer
Teamsters Local 213

cc: Ray Zigmont, President
Teamsters Local 213

cc: Tony Santavenere, Construction Assistant
Teamsters Local 213

Terrace District Teachers' Union
4733 Park Avenue,
Terrace, B.C.
V8G 1W2
(250) 635-4659

April 12, 2018

Labour Relations Code Review Panel

Dear Panel members:

I am writing on behalf of the Terrace Teachers' Union in order to bring two issues to your attention: the fact that education is not an essential service, and the need for more arbitrators in our province. These two factors will dramatically change the face of education because the collective bargaining process will become more effective.

In 2001, when education was declared an essential service by the provincial government, the British Columbia Teachers' Federation and its locals were hamstrung. No longer could teachers bargain at the provincial and local level with assurances that there was effective job action. One wonders how education, important as it is, is a life and limb service. It was left to the Labour Relations Board to determine the level of service that teachers could provide while undertaking job action. The BCTF could only perform a "controlled strike". Without the consequence of a full withdrawal of service, the other side of the table never bargained in good faith.

Historically, this was not the case in Terrace. There were three notable strikes with the full withdrawal of service in 1981, 1989 and 1991. The first strike was a landmark in the history of the BCTF because teachers in Terrace were able to include personnel practice language in the collective agreement. This was a first in British Columbia. The strikes of 1989 and 1991 placed our current class size and composition language in the collective agreement. None of this language, which is so essential to the working conditions of teachers, would be in place if education was deemed an essential service. The local teachers' union would not have been taken seriously by the employer if a third party determined the nature of the job action.

Secondly, there is a need for more arbitrators in British Columbia. The lack of arbitrators has made a hollow victory of the decision by the Supreme Court of Canada to restore language stripped from the collective agreements of teachers. In 2002, the Liberal government stripped class size and composition language from our collective agreements. The limit to the total number of students in a class as well as the number of special needs students were agreed to in bargaining up to 2002 and created reasonable working conditions for teachers. In 2016, the

Supreme Court of Canada restored that language and there was the hope that the working conditions of teachers that were lost would be restored.

It has not been smooth to return to what was. Many school boards are unable or unwilling to reduce class sizes and adhere to the restored language. As a result, BCTF has filed a number of arbitrations, but these will not be heard in a timely manner because of a lack of arbitrators. At a local level, grievances that go to arbitration, including those related to class size and composition, wait for years before they are heard. Thus, in many districts, teachers are still working under conditions before the language was restored. It is essential to find more arbitrators to address this problem.

It is for these reasons that there must be a change for teachers to the Labour Relations Code. Education need not be an essential service. More arbitrators have to be hired to address grievances. If this occurs, teachers' collective agreements can be negotiated in good faith, and the language in the agreements can be more effectively uphold.

Sincerely,

Michael Wen
President,
Terrace District Teachers' Union

THE ART BABBITT APPRECIATION SOCIETY

February 24, 2018

To the Panel Members; Barry Dong, Michael Fleming, and Sandra Banister.

As President of The Art Babbitt Appreciation Society (ABAS), I am writing this submission letter pertaining to the upcoming Labour Relations Code Review. ABAS is a grassroots organization made up of animation artists working to unionize the Animation and Visual Effects sector in Vancouver with the help of IATSE. We consider this the best path to deal with an industry that is rampant with scandal and illegal employment practices, the most pressing of which are wage theft - most commonly through overtime abuse - and incredibly low wages, that sometimes fall well below the minimum wage.

Wage theft happens in our industry in many ways. We have been forced to sign fraudulent time sheets; we have been pressured or bullied into working past 8 hours with zero overtime compensation; we have been fired and let go without having been given the proper disciplinary measures or severance; and worst of all, we have seen all of this become normalized. Unfortunately, the culture of our industry has grown into a culture where our rights as workers are being ignored.

We currently see no other recourse to secure our rights and a liveable financial future than by forming a union. Our greatest challenges with the Labour Relations Code relate specifically to the forming of a union, as it is especially challenging due to a few factors unique to our industry. Animation artists usually work short contracts of 6-8 months, and jump from studio to studio with regularity. In addition, we must organize not by studio, but by production and season as well, as each is incorporated and staffed as its own entity. While a large majority of our sector would like to see a union, getting those people together on the same season of the same show at the same time, is quite a challenge. Repealing the certification vote and returning to automatic certification would absolutely help streamline the process for us.

Therefore, we ask that you look at these two key issues in your review:

- Removal of the Certification Vote/Automatic certification
- Expanding the 90 day window for Union Authorization cards

Sincerely yours,

President, The Art Babbitt Appreciation Society

This email was received from the following 93 individuals.

For 16 years, it's been hard for workers to get a fair treatment in BC. Our employment laws have been tilted in favour of employers for too long. Now your government has a chance to level the playing field for working people as you review the Labour Relations Code.

I believe that significant improvements need to be made to the Labour Relations Code to restore balance and fairness for workers. We need to:

- remove barriers for workers to join a union;
- prevent employers from interfering in organizing drives;
- end rampant contract flipping that enables employers to keep wages low and work unstable; and
- ensure that the Labour Relations Board is properly resourced so that it can do its job.

These changes are urgently needed because workers are struggling in our province. They need better wages and protections on the job. I urge you to take these critical steps to help ensure that all jobs in BC are good jobs.

Please do the right thing for workers in BC!

Write in – Emails:

Peter Euler
Darren Gregory
John Shayler
Gerald Waterous
Audrey Silver
Michael Wicks
John Shayler
Janice MacMillan
Tricia Ewanchuk
Jasvinder hayer
Jody Greenough
Matt Baker
cheylyne murphy
Brandon Dyck
Sam Brownlee
Lorraine Webb
Peter Richmond
Murray Smith
Bruce Gunn
Joyce Graham
Jeannette Horsfield
Roy Bizzutto
Joel Barnabe

Nadia Lago
Michael Kennedy
Apenisa Anthony Brown
Jeff Kelly
Marg Beddis
Wanda Coxon
Peter McGahon
Michael O'Neill
Diana Perez
Sal Ruffolo
Wes Bauder
James Ferris
Allan Kassian
Robert Peebles
kelly toland
kelly toland
Larry Bisset
Janice Neden
Nadine Erickson
Donna French
Tony Plourde
Kelly Davison
Sarita Stad
Stephen Baldin
Paul Van Vliet
Mike Bagg
Suzette Cullen
Kimm Davis
Terry Wilson
Kathlyne Maki-Banmen
David Towsley
Ron Klein
Cynthia THOMPSON
Janis Cooper
Sandy Bauer
Don Barkley
Glenn Smith Dusty Kelly
Marion Pollack
Annette Webber
Diane wood
Eric Nordal
Gordon Swetlishoff
Douglas Thompson
Michelle Chapman
Peter Euler

Erik Grebliunas
Vivienne Webster
Sussanne Skidmore
Shane Turch
Ron Williams
Brian O'Rourke
Fran Kwiecien
Sharon Lethbridge
Toni Murray
Doug Ford
LARRY WALSKE
rory richards
Georgina Anderson
Lars Friis
Robert Austin
Brian Foley
Norm Vipond
Vivienne Webster
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Written submission to the Labour Relations Code Review Panel

Submitted by: David Huxtable (PhD), Legal Advocate, Together Against Poverty Society, Victoria, BC

Introduction

I am a legal advocate in the Employment Standards Legal Advocacy Project (ESLAP) at Together Against Poverty Society. ESLAP supports low-waged, non-unionized workers by providing public education and advice on the BC Employment Standards Act, and by assisting them file complaints with the Employment Standards Branch. This program grew out of TAPS' work in helping low income individuals obtain justice through various administrative laws that govern their lives. In addition to Employment Standards, TAPS provides direct legal advocacy services in regards to welfare/disability benefits, and tenancy rights. TAPS has provided free, face-to-face legal advocacy and education for over 25 years, serving over 5,000 people annually.

In my work, I speak to many workers on a range of employment-related issues. The commentary I make below is based on the conversations I regularly have with low-income, often vulnerable, workers. I do not represent unionized workers. However, I have had many conversations with workers, both unionized and not, that I believe speak to two important positions put forward by the BC Federation of Labour and other worker-supporting organizations. The first position is to amend Section 3 of the Employment Standards Act so that unionized workers in BC will once again have access to the very basic rights afforded to non-union workers. The second position is that the Labour Relations Code be amended to protect vulnerable low-waged workers from intimidation when they attempt to exercise their right to form or join a union.

Amend Section 3 of the *Employment Standards Act* to restore ESA protections as the statutory minimum for all workers

In my work as an advocate for non-union workers, I have taken a number calls from unionized workers. Some of these calls involve complaints about losing grievances that the worker thought should have been won. Some calls are from workers who don't know who to call in their union, or to complain that their union representative did not call them back quickly enough. However, a number of my calls have been from members of unions who want to complain that they are not protected from basic minimums under the ESA. The most recent was from a member of the Christian Labour Association of Canada (CLAC), who called to complain that her employer had her working one hour shifts on a regular basis. When she complained to her employer, she was told that the union had negotiated a one hour

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minimum on calls outs. Section 34 of the ESA provides a minimum two hours pay, once a worker has reported to work. Other CLAC members have complained to me about excessive hours without overtime pay – again, apparently agreed to by their union, and enshrined within a collective agreement.

I have had to explain to these workers that, while pre-2002 versions of the Act contained a "meet-or-exceed" provision, Section 3 (2) now *excludes* union members from the most basic protections found within the *Act*, including all of Part 4 (Hours of work or overtime), Part 5 (Statutory holidays), and Part 7 (Annual vacation or vacation pay), if their collective agreement "contains any provision respecting a matter" covered by that part of the *Act*. Similarly, Section 3 (4) excludes union members from almost all of Part 3 (Wages, special clothing and records), if their collective agreement "contains any provision respecting a matter" covered by that part of the *Act*.

Prior to 2002, unions could only negotiate workplace conditions that met or exceeded the bare minimum offered under the Act. It is an obscene fact that employers in BC who wish to see their workers excluded from the protections under the ESA can now do so by offering voluntary recognition to a compliant, employer-friendly union, such as CLAC. Changes to the language in Sections 6 and 8 of the Code, provided by Bill 48, in 2002, make such a scenario all the more likely, as employers are largely free to encourage their employees to join a union that the employer finds agreeable.

Restoring restrictions on employer intimidation

Workers bring to our office a range of workplace issues and problems. Many of these issues can be resolved through the ESA. Some can be resolved through a referral to the Human Rights Tribunal or to WorkSafe BC. However, many, very legitimate concerns brought to our attention can only be addressed through the process of unionization and collective bargaining. Issues around unfair scheduling, arbitrary management decisions, or favoritism – to name just a few – are issues that currently can only be dealt with by workers who are organized to collectively negotiate the terms and conditions of their work. I have discussed the process of unionization with many, many, low-income workers. The response I get to almost every single offer to put them in contact with a union is fear. Sometimes a palatable sense of terror. Paraphrases of comments I have heard many times:

- "My boss won't allow that to happen."
- "My boss would kill me if I tried to join a union."
- "I would lose my job."
- "We tried that once. My boss called us together and said he would close the shop if we did."
- "Someone else tried that once. But they were fired."

Labour codes in North America were brought into being to regulate the struggle between what is often perceived as two powerful forces: capital, and organized labour. Putting aside the erroneousness of this power analysis, there is a good reason behind the push to make it easier for workers to start a union and harder for an employer to interfere: the workers who are trying to start a union are not yet organized, and not yet protected by collective agreement. In fact, they are at their most vulnerable. This vulnerability should outweigh academic or philosophical concerns about an employer's right to "free speech."

As noted by the submission prepared by MacTavish and Buchanan, Bill 42 "widen(s) the scope of permissible employer speech," allowed in an employer's efforts to intervene during a union drive. This is because the former (pre-Bill 42) limitations on employer speech were designed in such a way that an employer could communicate facts or opinions on their business. This allowed, for example, an employer to tell employees that the business could not afford wage increases, regardless of whether or not the workers joined a union. The qualification of Section 6 (1), and the changes to Section 8, brought into force by Bill 42, now allow for an employer to communicate anything – fact or fiction – to employees that they believe to be forming a union, so long as the employer does not intimidate or coerce those employees. It is clear from *Convergys Customer Management Canada Inc*. and *RMH Teleservices International Inc*. that the Board currently holds a very narrow understanding of what constitutes intimidation and coercion.

The submission made by the BC Chamber of Commerc, and other employer associations, asserts that the changes brought in by Bill 42 are consistent with the Charter, and represent a constitutionally coherent balance between freedom of association and freedom of speech, because the employer is not allowed to use intimidation and coercion. There are two problems with this assertion. The first is that the balance between employer speech and an employee's right to association with their fellow workers has not been tested by the Supreme Court. The second problem is that the "views" of an employer regarding the workplace are always coercive. Workers are dependent upon waged work for survival. When one individual has the power to interfere with the ability of another individual to continue working for wages, there is no balance in the expression of their individual views. Low-income workers are particularly vulnerable in this regard as even a temporary loss of employment can have catastrophic implications, including homelessness. Employees – particularly those not yet covered by a collective agreement – are not, in practice, free to challenge the speech of their employer on the topic of unionization, or any other workplace topic. To suggest otherwise is either dishonest or naïve.

The broad scope given to employers to express their views allows for employers to not only argue against unionization, but also to encourage employees to sign up with a particular union. It is clear from the conversations I have had with poorly represented unionized workers that there are cases where employers have pre-emptively approached the union, and then encouraged their workers to vote for that union. Whether by design or by accident, the changes brought about by Bill 42 have encouraged a situation where employers can pre-empt a worker-driven organizing drive by initiating a drive in collusion with a union that agrees to a weak contract. As mentioned above, in some cases these agreements actually deprive workers of their statutory minimums under the ESA.

Changes to the process of union certification brought about by Bill 18 exacerbate this problem. The card-check process that once existed, allowed workers to organize quietly, quickly, and, therefore, with less fear of confrontation with their employer. The new system has allowed for the certification process to take an average of over three months. As noted by the submission by MacTavish and Buchanan, the introduction of a mandatory vote is not the only variable in extending the amount of time it takes to certify a union (6). Nonetheless, it is an important variable in producing a long, drawn out confrontation with the employer, and acts as an impediment to low-income workers starting a union.

Vulnerable workers need to organize in a quiet, low-key manner so as to avoid a drawn out confrontation with their employer, and thus risk the loss of their employment. Against this need, is a shallow, self-serving argument by employer groups that conflates democracy with a secret ballot vote.

The submission of the Chamber goes so far to suggest that there is a "fundamental belief in our society in secret ballot votes," and conflates joining a union with electing a government, as if a union had anything near the power of a state. Once again, they float unsubstantiated constitutional theory in arguing that "(a)ny recommendation to remove the right to a certification vote would be contrary to this fundamental principle in the Code and the constitutional guarantees in the Charter" (8). As the case with their earlier cited argument about constitutional balance, this has not been tested in the Supreme Court of Canada, despite well-organized and well-funded anti-union business organizations in Canada, and despite the fact that the card-check system still exists in Manitoba, Quebec, Newfoundland, New Brunswick, and Prince Edward Island. Democracy involves a voice as well as a vote, and workers vote to join a union when they sign a union card, and they vote not to join a union when they refuse to sign a card.

Finally, and in a similar vein, I would like to address another unsubstantiated argument put forward by employer organizations: that the secret ballot prevents people from being coerced or threatened by union organizers or coworkers. I have never had a worker suggest that they did not want to talk to a union because they were afraid of being bullied by an organizer, or that their coworkers will be upset with them. Nonetheless, I feel this needs to be addressed because it has been put forward by some – including the BC Green Party Leader Andrew Weaver, who suggested that his "first-hand experience" of the union drive proved to him that some people feel "pressured" by their colleagues to sign a union card.[1] What is missing from this hyper-ventilated argument is evidence that union organizers or coworkers have some form of coercive power over an individual at work. It is unfortunate that some highly vulnerable tenured faculty felt peer-pressure during the union drive there. Undoubtedly, there were some hurt feelings. However, none of them faced the wrath of their employer; none faced dismissal for organizing a union; none of them faced any threat to their livelihood. This is not the case for low-income workers who are brave enough to start a union drive under the current legislation. The ability to organize quietly, and to present an employer with a *fait accompli* is essential to meaningfully extending the right to organize to the most vulnerable workers in BC.

Contrary to the assertions of the employers groups in BC, the Supreme Court has upheld a number of limitations to such constitutionally protected rights as the right to speech. Canada has human rights legislation that, in part, protects vulnerable populations from hate speech. At one time, the Labour Relations Code of BC had similar restrictions on the speech rights of employers; the right to speak did not over-ride the right to associate free from intimidation These *constitutionally valid* protections still exist elsewhere in Canada, because the Supreme Court *has* determined many times that the abstract concept of freedom needs to be balanced against the concrete realities of unequal power in Canadian society. They need to be returned to the Code in BC.

[1] http://vancouversun.com/news/politics/b-c-greens-kill-ndps-proposed-change-to-unionized-secret-ballots

Make it Fair: Restoring Balance, Fairness and Opportunity in B.C.'s Labour Market

March 20, 2018

Submission by Unifor to the B.C. Labour Relations Code Review

LRCReview@gov.bc.ca

Attn: Michael Fleming (Chair)
Sandra Banister (Member)
Barry Dong (Member)

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About Unifor

Unifor is the largest private sector trade union in Canada. We represent 315,000 private and public sector employees in in all regions of Canada, working in over 20 defined sectors of the economy, including resources, manufacturing, hospitality and transportation.

We thank the Panel of Special Advisors for the opportunity to participate in this important process, and for your attention to our views. Representatives from Unifor and its local unions will participate in the community hearings to be held as part of this process.

Overview: Inequality and the Changing Nature of Work

It is no secret that the nature of work is changing. Disintegrating business norms coupled with lagging government regulation and technological change have eroded employment quality for many British Columbia workers. Non-standard employment is increasingly the norm in all jurisdictions. This is evident in labour market research focused at the national level as well as at provincial and regional jurisdictions[1] which finds that work has become less stable and more precarious across the country. This is in part the result of employment growth in the low wage service sector but there is ample evidence to show that non-standard work is spreading to industries that have not traditionally been recognized as creating precarious and/or non-standard work. Research has also found that insecure and precarious work has profound negative consequences on individuals and families regardless of income and it negatively affects both individual and societal well-being.

In addition to the growing sense of insecurity in the labour market, British Columbia is also home to elevated levels of income inequality which is causing uncertainty and angst for people across the province. According to the BC Poverty Reduction Coalition, "inequality in BC is the highest in Canada and is increasing at a faster rate than most other places in Canada. In the last 10 years, the average household income of the top 1% in BC has increased by 36% while median incomes have stagnated. As with insecure and precarious work, inequality is linked to multiple health and social problems[2]."

In British Columbia, one of the most prominent factors in the increase in precarious work has been temporary employment. Since the global recession in 2008-09, permanent work has increased by 13% but temporary work, including contract, casual and seasonal employment, has increased by 33%[3]. Similar trends can be seen in the growth of part-time work and involuntary part-time work. Over the last two decades the share of workers whose hours vary from week to week has grown and the share of workers who are classified as working poor has intensified as well. 7.2% of British Columbians working outside of Metro Vancouver work and live in poverty. In Metro Vancouver that share rises to nearly 9%[4]. These trends are not new, but the level of precarity and the consequences of precarity have been intensifying.

These trends and their consequences provide ample reason for government to intervene and find solutions that can increase employment security and decrease inequality across British Columbia.

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[1] See the following to name a few: DePratto & Bartlett. *Precarious Employment in Canada: Does the Evidence Square with the Anecdotes?,* May 2015; Ivanova & Tiessen, *Labour Market Insecurity in Canada: A look at provincial level trends,* Forthcoming; Lewchuk, Lefleche, Procyk, Cook, Dyson, Goldring, Lior, Meisner, Shields, Tambureno & Viducis, *The Precarity Penalty: The impact of employment precarity on individuals, households and communities —and what to do about It,* May 2015; and Tiessen, *Seismic Shift: Ontario's Changing Labour Market,* March 2014.

[2] BC Poverty Reduction Coalition,. *Factsheet on Poverty and Inequality in BC* (May 2016) *(http://www.bcpovertyreduction.ca/wp-content/uploads/2016/07/Factsheet-2016-05-03.pdf)*

[3] Statistics Canada, 2018. Labour Force Survey CANSIM Table 282-0080

[4] Iglika Ivanova, CCPA, 2016. *Working Poverty in Metro Vancouver*

Globally, one of the strongest contributors to decreased precarity and healthy levels of income inequality is the rate of unionization.

Reforming B.C.'s Labour Code

Labour law serves two purposes. The first is a remedial purpose. It identifies unfairness, imbalance, or injustice and tailors a solution to that problem to achieve a balance between the interests of workers and those of employers. Labour law also serves an aspirational function. Statutes are the manifestation of our values. In labour law, those values are linked to the freedom of association that is protected by s. 2(d) of the *Charter of Rights and Freedoms*.

In 2015, the Supreme Court of Canada reaffirmed in a series of decisions (*Saskatchewan Federation of Labour v. Saskatchewan*, *Mounted Police Association of Ontario v. Canada*, and *Meredith v. Canada*), that for workers to fully exercise their freedom of association, they must be free to join and belong to a union of their choosing, and have the right to engage in a meaningful process of collective bargaining. A fair and balanced statutory labour regime is essential for the protection and promotion of the right of all workers to freely associate.

Unifor submits that the current review of the *Code* ought to consider these questions about the two roles of legislation: **does our current labour regime strike a just balance; and does it reflect and promote *Charter* values*?*** With these questions in mind, the following are Unifor's recommendations about how to strengthen worker access to unionization and collective bargaining for a fairer and more equal labour market in BC

Summary of Unifor's Key Recommendations

1. Amend s. 24 of the *Code* to bring back card-based certification.
2. Amend s. 24 of the Code to require that where a vote is necessary to resolve an application for certification, it must be held within five working days from the filing of an application.
3. Extend broader based collective bargaining structures within the private sector.
4. Repeal section 8 of the *Code* and restore section 6(1) to the version that predates the Bill 42 amendments.
5. Amend section 35 of the *Code* to deem a sale of business to have occurred for the purposes of s. 35(1) of the *Code* where an employer that provides services to a client ceases to provide those services, and another employer begins to provide the same services to the client.
6. Amend the *Code* to allow trade unions to apply to the BC Labour Relations Board to direct the employer to provide early disclosure of employee lists and employee contact information during organizing campaigns.
7. Add to the *Code* a provision requiring that all collective agreements entered into after January 1, 2019 must contain a process to identify, evaluate and rectify any systemic gender-based wage gaps, including a process for independent arbitration of any differences.
8. Extend the freeze period provided for the negotiation of a first collective agreement in Section 45(1) of the Code.
9. Amend the *Code* to allow access to interest arbitration to settle all labour disputes that extend beyond 180 days.

The Acquisition of Bargaining Rights

1. Amend s. 24 of the *Code* to bring back card-based certification.

We know that access to union representation and collective bargaining is the most effective measure to improve working conditions, to create greater employment stability and to combat inequality. However, over the last two decades the rate of unionization in British Columbia has fallen from 36% in 1998 to 30% today. It is now below the national average.

Significantly, it was nearly two decades ago when the *Code* received its last substantive revision, by a newly-elected BC Liberal government in 2001. One of those revisions was the reintroduction of a mandatory vote requirement in all applications for certification. This has undeniably led to a marked reduction in the number of certification applications, and a reduced success rate of certification applications.

As MacTavish and Buchannan so clearly illustrate in their 2016 report *"Restoring Fairness and Balance in Labour Relations,"* that during those periods with a mandatory vote the annual number of workers organized is less than half the level when compared to period with card-based certification procedures.

British Columbia Certification Process and Workers Organized, 1974-2017		
Period	**Certification Process**	**Annual Workers Organized**
1974-1983	Card check	7,411
1985-1992	Mandatory vote	4,106
1994-2000	Card check	8,762
2002-2017	Mandatory vote	2,477
Source: J. MacTavish and C. Buchanan, Restoring Fairness and Balance in Labour Relations: The BC Liberals' Attacks on Unions and Workers 2001-2016, BC Federation of Labour, November 2016 (updated with 2016 and 2017 data).		

Among the 112 certification applications filed on average each year over the last decade, 37, or fully one-third, were not granted. The rate of successful certification remained largely consistent throughout this period[5].

This begs the reasonable question: how is it that in one-third of cases where workers have signed sufficient cards to secure a vote, something happens during the voting process to result in a failure to gain a majority for certification? The answer is systematic employer interference with the ability of employees to freely express their wishes about unionization.

The academic literature has demonstrated that management opposition – whether measured by unfair labour practices or by less egregious tactics – is more effective at deterring successful outcomes of certification applications under a mandatory vote procedure than under card-based procedures[6] . Professor Chris Riddel's study of the impact of unfair labour practices on certification applications in British Columbia lends itself to a number of important findings:

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[5] British Columbia Labour Relations Board, Annual Reports, selected years. Online: http://www.lrb.bc.ca/reports/

[6] Chris Riddell, 2005, "Using Social Science Research Methods to Evaluate the Efficacy of Union Certification Procedures", 12 Canadian Labour and Employment Law Journal 313 at 505, 509

- The presence of an unfair labour practice allegation correlates with a reduced likelihood of a successful certification by 21 per cent.[7]
- The severity of the unfair labour practice has a role to play in the efficacy of the tactic in reducing successful certification applications:
    - Dismissal tactics are effective, and the more employees that are terminated the more effective the tactic is in reducing a success rate of a certification application.[8]
    - Group coercion including distribution of anti-union memos or newsletters, or anti-union meetings is also a tactic that demonstrably deters successful certifications.[9]
- Specific private sector industries (namely manufacturing, construction, primary resource industries and the hotel/restaurant industry) demonstrate more statistical vulnerability to unfair labour practices.[10]
- The smaller the unit, the greater the likelihood that unfair labour practices will deter successful union organizing.[11]
- The earlier the unfair labour practice is committed, the greater its effect in reducing the chance of a successful certification.[12]

These results are alarming, and indicate that despite the outcome of an unfair labour practice application, employer resistance to organization in the form of unfair labour practices has long-lasting damaging effects which may be beyond the power of a Labour Relations Board to remedy.

In order to significantly diminish the opportunity for unlawful employer interference in union organizing campaigns, and in order to increase access to collective bargaining and the percentage of unionized workers in BC, a return to card-based certification is required.

2. Amend s. 24 of the Code to require that where a vote is necessary to resolve an application for certification, that it is held within 5 working days.

In order to rectify the imbalance of power and limit the effects of an employer's anti-union tactics can have on a successful organizing attempt, the period of employer campaigning following an application for certification must also be eliminated.

The most practical method by which this threat of undue influence could be eliminated is the reintroduction of card-based certification. However, it is crucial that if a mandatory vote requirement is retained, or in other cases where a vote is necessary, the time between the filing of an application for certification and the vote must be shortened considerably. Unifor proposes that this time period be shortened to five working days.

Delay in the processing of applications for certification enables employers to conduct hostile and destructive anti-union campaigns during organizing drives. The number of days it takes the Labour Relations Board to process a certification application has more than tripled, from an average of 28.7 days in the 1993-2000 era to a whopping 94.4 days in the BC Liberal era spanning 2001-2015 (MacTavish and Buchanan, supra, at p. 6). This is simply unacceptable. Systemic delay in the processing of

[7] Chris Riddell, 2001, "Union suppression and certification success", Vol 34(2) Canadian Journal of Economics 396 at 405.
[8] *Ibid*, at 405, 406.
[9] Ibid.
[10] *Ibid*, at 407.
[11] Ibid.
[12] *Ibid*, at 408.

applications for certification represents a significant obstacle for workers seeking the benefits of unionization and access to collective bargaining, and these barriers must be eliminated.

3. Extend broader based collective bargaining structures within the private sector, including by enacting mechanisms that would enable unions to bargain with franchisors and multiple franchisees as a single employer.

The decline in unionization in BC has been concentrated in the private sector. The rate of unionization in the private sector two decades ago was already too low at 23%, but it has since fallen by nearly one-third to just 17% today. In comparison, the unionization rate in the public sector has remained relatively stable at close to 80% over this period.

Possibly the most important change to address labour market inequity and to enable large numbers of BC workers the opportunity to enjoy decent work, would be to recommend changes to the *Code* to expand broader based collective bargaining structures.

Broader based bargaining structures are not new and in fact are well established in BC's tradition and current practices. Construction certification and sectoral bargaining are long established norms of labour relations. Public sector bargaining structures in education and health care are also proven mechanisms for providing decent work. The broad based social and political movement to raise wages for Personal Support Workers and Early Childhood Educators are two examples.

Broader based bargaining is absent only from the private sector economy and in particular its precarious sectors. Business strategies and the failure of public policy have allowed this anomaly to become the norm. An examination of Labour Relations Board certification statistics is revealing in terms of sectors of the economy largely shut-out of access to collective bargaining, not only by a weak certification process, but also reflecting the need for policies to support broader-based bargaining in several sectors of the economy.

Consider that among the 1.3 million private sector workers in BC without a union, fully one third (or 445,000), are found in just two sectors: retail and hospitality. A closer look at these two sectors brings focus to some of the many barriers workers in BC face to gaining access to collective bargaining.

Retail is BC's largest source of employment. With 336,000 employees, the retail sector accounts for more than twice the number of jobs as manufacturing (161,000), and is not far from being as large as health care (256,000) and education (150,000) combined. Despite its central role in BC's labour market, just 15% of the retail workforce is unionized, a rate that has remained largely unchanged over two decades despite employment growth of more than a third.

BC's hospitality sector (restaurants, fast food, and hotels), employs 169,000 workers, or 1 of every 12 jobs in the province, and is largely defined by part-time jobs, temporary work and low pay. Despite these conditions, unions have been unable to systematically expand access to collective bargaining in the sector, and today just 6% of workers in hospitality are unionized. Remarkably, the situation has actually worsened. The rate of unionization is half today what it was two decades ago. The lack of good jobs for the next generation is a widely held concern, and for good reason. Just 10% of private sector workers in BC under the age of 25 are unionized.

It is stunning to see that in the hospitality sector over the last five years a total of just five bargaining units were certified by all unions for a combined 269 workers, despite there being 158,000 unorganized workers in the sector. Similarly, LRB statistics show that in the retail sector only five bargaining units were certified over the last five years for a grand total of 158 workers, in a sector that has more than a quarter of a million unorganized workers[13] *()*.

That means that just ten bargaining units with a total of 427 workers in retail and hospitality have been certified in the last five years. If this review of the BC Labour Code is looking for evidence of system failure, look no further[14].

It is clear that BC's labour laws have not kept pace with the evolution of the private sector economy, or changes in the nature of work, and it is no coincidence that workers without meaningful access to collective bargaining are highly concentrated in sectors defined by precarious work and low pay.

Unifor's recent contribution to the Changing Workplaces Review[15] process in Ontario included extensive submissions about forms of broader-based bargaining. We proposed novel forms of employee and trade union participation. We proposed that sectoral councils comprised of employers, unrepresented employees and trade unions should have a role in developing sector-specific labour standards tailored to the economic realities of different sectors.

Unifor also proposed measures that would assist employees in precarious employment in franchised and similar businesses by permitting and encouraging broader-based bargaining units. We said this (at p. 105):

> *"While sectoral standards should reflect a broad community of interest between all workers, unionized and non-union, the institutions of collective bargaining must also adapt to the growing fragmentation of labour markets through the specific application of multi-employer certifications and bargaining rights. These include measures to enable organization and collective bargaining by workers in franchise operations, as well as within the growing workforce of self-employed and single dependent contractors."*

According to Franchise Canada, the franchise industry in Canada generates $68 billion in revenue on an annual basis. 57% of all franchisors operate at least one location in British Columbia – that's 437 brands and thousands of locations across the province. There is little information available regarding exact numbers of franchise operators in British Columbia[16] . It has been Unifor's experience that franchisors protect their franchisee information in order to limit communication between franchise owners. However, we do know that nearly half of all franchises are in the food services industry – which has very low union density in the province and typically involves low-pay and unstable, precarious work.

We therefore also propose an amendment to the *Code* giving the Board express authority to consolidate bargaining units of employees of several franchisees, even where individual ownership may be different, by deeming all of these entities a single or common employer.

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[13] *British Columbia Labour Board, Annual Reports, selected years http://www.lrb.bc.ca/reports/*
[14] Ibid.
[15] Unifor, *Building Balance, Fairness, and Opportunity in Ontario's Labour Market, Submission by Unifor to the Ontario Changing Workplaces Consultation* (September 2015). Link here.
[16] Canada Franchise Association, 2017. *2017 Accomplishments Report*

Unfair Labour Practices – Employer Communications

4. Repeal section 8 of the *Code* and restore section 6(1) to the version that predates the Bill 42 amendments.

In 2002, the BC Liberal Government in Bill 42 revised sections 6 and 8 of the *Code* related to unfair labour practice provisions. Those changes greatly expanded the opportunity for employers to influence employees' decisions about union organizing.

After the Bill 42 amendments, section 6(1) contains the same wording as before, but is preceded by, "Except as otherwise provided in Section 8." The revised section 8 reads as follows:

> *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.*

The Labour Relations Board has chosen to interpret s. 8 in a manner that has been greatly detrimental to the ability of employees to exercise rights protected by the *Code*. The revisions in 2002 dramatically shifted the balance of employee freedom of association in favor of employer freedom of expression. [17]

Overt opposition by employers to union certification is pervasive in Canada. In a survey of employers across eight Canadian jurisdictions [18]:

- 88 per cent of the respondents engaged in actions designed to limit employees' ability to communicate amongst themselves or with union organizers;
- 68 per cent communicated directly with employees regarding certification applications (most often through captive audience speeches); and
- Approximately one-third engaged in forms of employee surveillance and tightening working rules.

More distressingly, of the employer representatives surveyed, 12% admitted to engaging in unfair labour practices during the organizing drive (Not surprisingly, the author raised concerns that the respondents in the sample likely understated their degree of resistance towards certification).[19]
Apart from the effect of this period of employer campaigning on the successful rate of applications, further research has demonstrated that employer opposition to certification applications can have deleterious effects on bargaining relationships where union applications eventually succeed. The same author said this:

> *If, during the organizing drive, the employer engaged in actions commonly recognized as unfair labour practices, the probability of concluding a collective agreement decreased in the industry model by 14 percentage points, the likelihood of encountering serious bargaining difficulties increased in both models by 30 to 35 percentage points and early decertification increased by an amazing 46 to 57 percentage points, increasing the probability of early decertification from the mean of height percent to as high as 65 percent.*[20]

[17] MacTavish and Buchanan, supra, at p. 9
[18] Karen Bentham, 2002, "Employer Resistance to Union Certification", Vol. 57(1) Relations Industrielles/Industrial Relations 159 at 172, 174.
[19] Ibid.
[20] *Ibid*, at 179

Revoking s. 8 of the *Code*, and restoring s. 6(1) to the version that predates the 2002 amendment, is an important and necessary step in restoring the balance between the freedom to associate and the freedom of expression in workplaces across BC. At a minimum, if section 8 is not repealed, it should be returned to the version that existed prior to the Bill 42 amendment.

Successor Rights and Contract Flipping

5. Amend section 35 of the *Code* to deem a sale of business to have occurred for the purposes of s. 35(1) of the *Code*, where an employer that provides services to a client ceases to provide those services, and another employer begins to provide the same services to the client.

This subject might more politely be called "contract retendering" but Unifor prefers to describe it as "contract flipping". It refers to the practice of providing services by way of contractors that are periodically replaced during retendering processes so that a contractor and its employees are replaced by another contractor and its employees. Sometimes, the same employees can reapply for their employment under new terms and conditions.

In Ontario, the Changing Workplace Review advisors in their Final Report at p. 410 said this about the practice:

> *We do conclude, however, that in industries mostly populated by vulnerable and largely unskilled workers, the constant re-tendering of contracts is, in many cases, not a mechanism aimed at achieving efficiencies through acquiring greater expertise or different methods of production but, rather, a mechanism to reduce costs by substituting a cheaper, non-union contractor for a unionized one. The social cost and impact of this "efficiency" is borne by those least able to bear it, namely, the vulnerable and the precarious employees in that industry. If a union in collective bargaining negotiates improvements in the working conditions for the unskilled and vulnerable people it represents, these gains are negated by re-tendering. The effect of constant re-tendering is not only to keep compensation low but also to eliminate improvements achieved through collective bargaining.*

The practice is of course common in the building services sector (for example, cleaning, security or food services) but also in other areas including warehousing and transportation. Unifor's experience is that this practice has been corrosive to the quality and security of employment in many sectors of the economy. A result of this practice is that the bargaining rights, and the gains obtained by collective bargaining, are lost when a contractor changes.

Making the successor rights provisions of the *Code* apply in the event of a sale of business apply also where there is a contract retendering would protect the continuity of union bargaining rights and collective agreements. This is now implemented in Ontario for the building services sector (i.e. food, security, cleaning services) but Unifor would favour a broader application of this protection.

Access to Employee Lists and Employee Contact Information

6. Amend the Labour Relations Code to allow trade unions to apply to the BC Labour Relations Board to direct the employer to provide early disclosure of employee lists and employee contact information

The *Code* does not currently provide the ability for unions to access lists of employees in workplaces for organizing. Unions rely on the knowledge of employee organizers to count the number of employees in a given workplace, and to identify and describe the appropriate bargaining unit. This organizing model creates unnecessary obstacles to employee organization that are particularly apparent in larger workplaces or workplaces with multiple locations. Employers have unfettered access to workers at workplaces while union representatives are barred from most workplaces. The exclusion of union representatives has historically been justified on the basis of an employer's property rights. However, such rationalizations entirely ignore workers' *Charter* right to freedom of association. This imbalance in communicative access undermines the ability of workers to effectively exercise their rights because absent information, there can be no informed choice.

To avoid situations where unions are forced to organize without adequate information regarding the proposed bargaining unit, Unifor proposes that the *Labour Relations Code* be amended to allow unions to apply to the Labour Relations Board to seek a direction that an employer must disclose a list of employees in a proposed bargaining unit, subject to a demonstration by the union that it has the support of 20 per cent of the workers in the proposed bargaining unit. That is the threshold enacted in Ontario after the recent Changing Workplaces Review process. In Ontario, section 6.1 of the *Labour Relations Act, 1995* now sets a very low threshold for the appropriateness of a proposed bargaining unit at this stage. The bargaining unit that is the subject of employee list application need only be one that "could be" appropriate for collective bargaining[21].

No proprietary or privacy objections outweigh the important public policy reasons for supporting this legislative change. The right to choose to belong to, and participate in a union is a right possessed by workers, not employers.

This particular amendment would ensure that unions could provide workers with information, where a threshold level of interest in unionization has been demonstrated. This would not give unions an unfair advantage. Rather, it would give unions a fair opportunity to provide workers with access to information to permit them to make informed decisions about their democratic rights, regardless of whether those decisions are made in support of or in opposition to unionization.

Gender Wage Gap

7. Add a provision to the *Code* mandating that all collective agreements entered into after January 1, 2019, must contain a process to identify, evaluate and rectify any systemic gender-based wage gaps, including a process for independent arbitration of any differences.

Despite the progress that has been made, women still face a significant gap in their wages compared to men. A recent report from Vancity Credit Union has put special emphasis on the additional challenges to financial health and well-being women face as a result of the gender wage gap. Their report also found that women in BC face a larger wage gap than women in other provinces. This finding is consistent with data from the Conference Board of Canada[22].

[21] See for example *Grocery Gateway*, 2018 CanLII 7337 (ON LRB).
[22] Vancity, 2018. *Money Troubled: Inside B.C.'s financial health gender gap*

On average, women in BC are paid less per hour than the national average for women. Women's average annual employment income is 35% less than men in BC ($34,149 vs. $52,171). This gap translates into increased stress and a decrease in financial well-being as women have fewer financial resources.

Belonging to a union and setting wages through collective bargaining tends to reduce the gender wage gap, though it doesn't erase it completely. 2017 Statistics Canada data shows the wage gap is significantly reduced for women who are covered by a union. The average hourly wage gap of non-unionized women compared to non-unionized men is 20%. The average hourly wage gap for unionized women vs. unionized men is 8%. On a weekly basis, non-unionized women earn only 70% of what non-unionized men earn while unionized women earn 80% of what unionized men earn[23].

In the absence of any existing legislation focused on eliminating the gender wage gap in BC, the *Code* should be amended to include a provision requiring that all collective agreements entered into after January 1, 2019, must contain a process to identify, evaluate and rectify any systemic gender-based wage gaps, including a process for independent arbitration of any differences.

Collective Bargaining – First Collective Agreements

8. Extend the freeze period provided for the negotiation of a first collective agreement in Section 45 (1) of the *Code.*

Service of notice to bargain a first collective agreement after certification effectively freezes the existing terms and conditions of employment for only 4 months. This freeze should be extended until the conclusion of the first collective agreement or until the commencement of a lawful strike or lockout.

The time during which the first collective agreement is bargained is the most vulnerable to employer delays and interference. If the working conditions are not frozen until the conclusion of the first agreement, then delay becomes the strategy of some employers in the hopes that the clock will run out and they can use the threat of adverse changes to working conditions to encourage a decertification application. As well, if the employer is able to change terms and conditions of employment without the union's agreement, the effectiveness of the newly certified union is totally undermined.

Strike/ Lockout – Interest Arbitration in Long Disputes

9. Amend the BC Labour Relations Code to allow access to interest arbitration to settle labour disputes that extend beyond 180 days.

Under the *Code,* the BC Labour Relations Board cannot compel parties to resolve their disputes by way of interest arbitration except in the narrow case of a first collective agreement. Even mature bargaining relationships can produce intractable impasses. In order to avoid the financial and human costs of lengthy disputes, Unifor proposes that the *Code* be amended to permit access to interest arbitration to resolve all lengthy disputes.

The introduction of a mechanism to settle long labour disputes is not without precedent in Canada. Section 87.1 of Manitoba's *Labour Relations Act* currently provides a mechanism to have the Manitoba Labour Relations Board settle the provisions of a collective agreement where a dispute has been ongoing for at least 60 days and the parties have worked with a conciliation officer or mediator to settle the

[23]Statistics Canada, 2018. *Labour Force Survey CANSIM Table 282-0073*

terms of a collective agreement for at least thirty days[24]. The *Annual Reports* of the Manitoba Labour Relations Board[25] indicate that applications under s. 87.1 are filed infrequently. Thus, the availability of access to interest arbitration after a long dispute does not encourage long disputes in order to access interest arbitration at the end. As well, the Manitoba experience does not suggest that parties are motivated to not negotiate their own collective agreements. It is desirable however, that a remedy be available in the rare cases in which labour disputes continue for a very long time.

Unifor therefore proposes that the *Labour Relations Code*, be amended to include a mechanism to allow a party to apply to settle a collective agreement through interest arbitration where a strike/lockout has been ongoing for at least 180 days.

Conclusion

The recommendations above are for the most part modest ones that are made in the context of the present limited consultation process. These recommendations are important to remedy some of the ways in which BC's labour relations system has been overtaken by changes in the work and changes in business organizations. Unifor looks forward to participating in the community hearings to be held as part of this process.

[24] *Labour Relations Act,* CCSM c L10, s. 87.1.

[25] Manitoba Labour Relations Board. *Annual Reports*, 2001-2012. Online: https://www.gov.mb.ca/labour/labbrd/publicat.html; Only five applications under s. 87.1 were filed in Manitoba from 2001-2012.

UNITED ASSOCIATION
of Journeymen and Apprentices
of the Plumbing and Pipe Fitting Industry
of the United States and Canada

Proudly Canadian
Canadian Piping Trades

Steve Morrison
Director of Canadian Affairs | International Vice-President | District 6

March 20, 2018

Via Email (LRCReview@gov.bc.ca)

Michael Fleming, Chair
Sandra Banister, QC, Member
Barry Dong, Member
Labour Relations Code Review Panel
Province of British Columbia

Dear Mr. Fleming, Ms. Banister, and Mr. Dong:

I serve as Vice-President and Director of Canadian Affairs for the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL-CIO and CLC ("United Association"), an international union that maintains its main headquarters in Annapolis, Maryland and its Canadian Office in Ottawa, Ontario. The United Association and its affiliated local unions represent persons employed in the plumbing and pipefitting industry throughout Canada and the U.S. Three of the United Association's affiliated locals are based in British Columbia: Local 324, Local 170, and Local 516. United Association members perform their craft in a large variety of industrial, commercial, and residential settings and on both private and public sector work sites.

I respectfully submit this letter in support of the "Written Submission to the Labour Relations Code Review Panel" presented by the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers (affiliated with the AFL-CIO and CLC) ("IBB"). The IBB's excellent "Written Submission"- which recommends that the definition of a trade union included in section 1 the BC Labour Code be broadened to include national and international unions- reflects the views and position of the United Association. Like the IBB, the United Association is a building trades union with a venerable and proud history in North America. And like the IBB, the United Association believes that the above-described amendment to the Code would serve the best interests of workers in BC and the needs of the province's growing economy.

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Steve Morrison
Director of Canadian Affairs | International Vice-President | District 6

The United Association requests the opportunity to have a representative present at the Review Panel's March 28 hearing in Vancouver. In addition, please contact me at any time if you wish to obtain further information and perspective from the United Association.

Thank you for your time and consideration in this matter.

Sincerely,

S Morrison

Steven Morrison
Vice-President and
Director of Canadian Affairs
United Association

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UNITED ASSOCIATION
of Journeymen & Apprentices of the
PLUMBING & PIPEFITTING
Industry of the United States and Canada
Local Union 170 - Affiliated with AFL-CIO-CFL

March 20, 2018

Labour Relations Review Panel
Via Email: LRCReview@gov.bc.ca

In response to the Panel's invitation for submissions for recommendations to changes to the BC Labour Code, we submit the following recommendations and feel they are necessary to properly protect the needs and interests of workers and are in keeping with the mandate of the Review Board to "ensure workplaces support a growing, sustainable economy with fair laws for workers and business".

UA Local 170 represents approximately 4,000 Apprentices and Journeypersons in British Columbia working in the Red Seal trades of Plumber, Steamfitter/Pipefitter, Sprinklerfitter, Gasfitter, Instrumentation & Control Technicians, and Welders. Our members are encouraged with the steps taken to review the Code and submit our recommendations based on issues faced by the members or potential members in our industry. We believe the following changes should be considered to improve fairness for all workers.

1. **Eliminate mandatory representation votes in favour of card-based certification (Section 24)**

Bill 18 (2001) removed the process of card-based certification in favour of a mandatory vote process. Currently, once the union can establish 45% membership support, a vote is required to ultimately determine certification. There has been much research conducted over the years on the effect of moving to a system of mandatory votes (not only in BC but in other provinces) and the studies all show that the number of workers certified drops substantially, while the incidence of unfair labour practices during certification increases. This is due mainly to employer's coercion tactics and effectively reduces the employee's right to collective bargaining. We recommend restoring the previous system of union certification based on membership cards alone.

2. **Limit Employers ability to communicate regarding the certification process (Section 8)**

Section 8 has posed problems for many workers as it gives Employers the ability to express their "views" on workers' wishes to certify. The employer – employee relationship is not an equal one. The Employer is in a position of influence and authority. Any communication to a worker about an employer's opposition to certification will certainly dissuade a worker from promoting, pursuing or agreeing to certification, as the employer has the ultimate influence over the worker's current or future employability. Verbal coercion is not necessary in a relationship between an employer and employee, it is inherent in the relationship that an employer has the ultimate ability to determine an employee's future employment.

3. **Reduce wait time for certification vote (Section 24(2))**

Where a certification vote is required, we recommend that the current wait time be reduced to no more than 2 days. This will limit the time for any possible employer interference or unfair labour practice with respect to the organizing process.

4. **Increase remedial certifications (Section 14)**

We recommend that the Board increase the use of remedial certifications, where it has been established that an unfair labour practice has transpired. Currently this section is not enabled sufficiently to detract an employer from interfering with the worker's right to collective bargaining.

5. **Establish a standard provincial agreement**

Drawing from Ontario's system of single-trade, multi-employer, province-wide bargaining where parties to a new bargaining unit become bound to one standard agreement, and whereas all the construction unions are already affiliated with the BC Building Trades Unions, with one standard collective agreement for each trade; we recommend that once certification is established, the parties become bound to the standard provincial agreement in force. Due to the temporary nature of employees in our industry, most of our workers are not on a jobsite long enough to participate in negotiating their first collective agreement. Having one standard agreement, which can be ratified immediately upon certification would enable workers to immediately benefit from their decision to certify.

6. Separate panel review of the construction industry

Notwithstanding point 4 above, the construction industry is unique in that employment is often of a temporary nature. Employees are often hired on a project for a specified amount of time with no expectation of permanent employment. The industry is very cyclical and unpredictable, often driven by projects which are influenced by government, private investors and economic conditions. Because of this, it is very difficult to organize workers in this industry as they are not working on a project long enough to complete an organizing process. The previous legislation had some limited language specifically addressing sectoral certification in the ICI construction industry. Unfortunately these provisions were removed in 2001. We recommend that due to the unique nature of the workers and employers in this industry a separate panel be appointed to review how the issues faced by workers in our industry.

I thank you for the opportunity to make recommendations on behalf our membership and look forward to the Panel's recommendations.

Sincerely,

A.D. Al Phillips, RSE
Business Manager & Financial Secretary

ADP/eds
moveUP

1518 UFCW

WE FIGHT FOR FAIRNESS
Ivan Limpright, President & Kim Novak, Secretary-Treasurer

March 20, 2018

Email: lrcreview@gov.bc.ca

Labour Relations Code Review Panel
Michael Fleming (Chair),
Sandra Banister, Q.C., (Member)
Barry Dong (Member)

Dear Sirs/Mesdames:

Re: Submission to the Labour Relations Code Review Panel from the United Food and Commercial Workers International Union, Local 1518 (UFCW 1518)

This submission is made on behalf of the UFCW 1518 in response to the invitation for submissions by the panel of special advisors (the "Panel") appointed by the Honourable Minister of Labour, Harry Bains, to review the *Labour Relations Code* (the "*Code*").

We thank the Panel for the opportunity to provide it with our insight as to what minimum changes need to be made for a more balanced *Code* which addresses the modern needs of workers and their unions.

1. UFCW 1518

We trace our roots to 1899 when a group of retail clerks in Vancouver met to discuss how they could improve their working conditions. Today, we represent over 20,000 workers in a diverse range of industries including community health, seasonal agriculture, and professional services.

2. Introduction

Undoubtedly the Panel will receive a large number of very well-crafted submissions from the community. The submissions of the BC Federation of Labour and unions will more than adequately cover a wide range of deficiencies in the current *Code*. Rather than speak a little about a large number of topics, we believe it is important to focus on a few key concepts and then provide specific recommendations encapsulating those concepts.

We believe that the Panel ought to

(1) Ensure the *Code* captures constitutional developments since 1992;
(2) Ensure the *Code* provides meaningful access to collective bargaining;
(3) Ensure the *Code* protects workers in new forms of businesses, including franchised and contract services; and
(4) Ensure the *Code* captures the BC Federation of Labour recommendations in *Restoring Fairness and Balance.*

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3. Ensuring the *Code* captures constitutional developments

In 1992, when the government enacted the *Code*, no one could question the importance of labour rights in Canada. However, at that time, labour rights were not recognized as constitutional rights.

So, while the government of the day carefully set out a fair and balanced approach to labour relations, it did not do so from the perspective that labour expression and collective action were rights guaranteed under the *Charter*.

UFCW 1518 was fortunate enough to help usher in a new era of the Supreme Court of Canada re-examining labour rights as being constitutional rights. UFCW 1518 went before the Supreme Court of Canada to argue successfully that the definition of picketing contained in the *Code* was unconstitutional: *U.C.F.W. Local 1518 v Kmart Canada*, [1999] 2 S.C.R. 1083. Since that time the Court has held

- collective bargaining is a fundamental constitutional right
- collective action, such as striking, is a constitutional right.

In *Health Services and Support - Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27, the Court recognized that collective bargaining is protected by the fundamental *Charter* right freedom of association. The Court held in paragraph 82:

> The right to bargain collectively with an employer enhances the human dignity, liberty and autonomy of workers by giving them the opportunity to influence the establishment of workplace rules and thereby gain some control over a major aspect of their lives, namely their work.

The Court commented on the importance of collective agreement being an association protected right under the Charter at paragraph 85:

> Finally, a constitutional right to collective bargaining is supported by the *Charter* value of enhancing democracy. Collective bargaining permits workers to achieve a form of workplace democracy and to ensure the rule of law in the workplace. Workers gain a voice to influence the establishment of rules that control a major aspect of their lives.

The Court concludes, at paragraph 86, “Recognizing that workers have the right to bargain collectively as part of their freedom to associate reaffirms the values of dignity, personal autonomy, equality and democracy that are inherent in the Charter”.

In *Saskatchewan Federation of Labour* v. Saskatchewan, 2015 SCC 4, the Court of held that the right to strike is an associational activity protected by section 2(d).
These three landmark decisions profoundly alter our understanding of the purpose of the *Code*, which provides the statutory access to constitutional rights of expression and association. These decisions also demonstrate a need to change the essential elements of the *Code* to provide greater access to those rights and greater opportunity to exercise those rights. It is not enough to

merely talk about the importance of *access to* and *exercise of* constitutional rights; this Panel has to ensure that the *Code* not only meets but exceeds what is constitutionally required.

General review of the Code to enhance access to and exercise of Charter *rights*

This is the first review of the *Code* after the Supreme Court Canada fully and forcefully determined freedom of association for the purpose of collective bargaining and the right to strike as constitutional rights.

Because of these landmark legal developments, the Panel needs to review **all** sections of the *Code* to revise and enhance access to collective bargaining and the exercise of constitutionally protected right of picketing and striking.

Changes to the *Code* ought to expressly provide that the revisions ensure workers have actual, meaningful access to collective bargaining and not simply theoretical access. Changes to the *Code* ought to strengthen the ability of unions and their members to exercise their right to strike.

Some might fear that enhancing the opportunities for unions and their members to strike and communicate about their labour dispute might lead to more strikes or more detrimental impacts on the economy. However, that is not necessarily the case. Collective agreements are typically much longer than in the past, reducing the opportunity for a labour dispute. But, also, it may lead to the end of prolonged strikes, such as what we have witnessed, such as at IKEA.

Changes to Section 2: the duties

One small but significant change that ought to be made is to amend section 2 of the *Code* to expressly take into account the constitutional developments when interpreting and applying the *Code*.

Section 2 places obligations on the Board and persons exercising powers and performing duties under the *Code*. Section 2 at minimum needs to be revised to include the following duty:

> (a.1) Recognizes the constitutionally protected freedom of association and freedom of expression of trade unions and their members;

This change will make significant steps when it comes to interpreting the rest of the *Code* in light of the Supreme Court of Canada's decisions over the past fifteen years.

Changes to section 66

When the Legislature enacted the *Code* in 1992, it did not have the benefit of knowing that the activities listed in the section are constitutionally protected rights of association and expression. We propose that section 66 provide as follows:

66. No action or proceeding may be brought for
    (a) ~~petty~~ trespass to land which a member of the public ordinarily has access
    (b) interference with contractual relations, or
    (c) Interference with the trade, business or employment of another person resulting in a reduction in trade or business, impairment of business of opportunity or other economic loss

    Arising out of collective bargaining, strikes, lockouts or picketing permitted under this Code or attempts to persuade employees to join a trade union made at or near but outside entrances and exits to an employer's workplace

The original intent of the phrase "petty trespass" was to ensure that courts would not intervene when the only unlawful conduct by a union was trespassing. However, the inclusion of the word petty has caused considerable confusion in the Courts and even more confusion among employers who believe peaceful attendance exceeds the scope of what constitutes petty. The removal of the word "petty" would still restrain conduct that is not peaceful but provides a clearer intent of the original statute and better protection for the constitutionally protected speech.
Further, there has been confusion surrounding when the rights are triggered. Unions and their members have, or ought to have, the right to communicate about a collective bargaining dispute prior to a strike or lockout occurs. This change would eliminate any doubt that unions and the workers have the right to leaflet about their collective bargaining dispute on land which the public ordinarily has access to without needing to commence a strike or lockout. Such a change is consistent with the public interest being served by minimizing disruption caused by strikes and lockouts, and the public interest being served by lawful leafletting about a labour dispute without the need for a union to trigger a strike or an employer to lockout.

Conclusion

The most important task for this Panel in its review is to instil into all parts of the *Code* the findings of the Supreme Court of Canada in the recent cases. The purpose of statutes such as the *Code* is to allow access to and exercise of constitutional rights. Therefore, the current barriers to access to collective bargaining and the current restrictions on the exercise of rights under the *Code*, which were created when labour rights were not constitutional rights, needs to be changed.

4. Ensure the *Code* meets the need for meaningful access to collective bargaining

What has been lost on earlier panels, but will not be lost on this Panel, is that there are unnecessary barriers that prevent employees from meaningful access to collective bargaining. Unless those barriers are eliminated, or at least diminished, many employees will not be able to access their constitutional right of association not because the employees do not want to be unionized but because of a number of impediments that they face.
UFCW 1518 recommends that there be at least four changes to the *Code* to allow meaningful access to collective bargaining:

(1) Access to the employee list
(2) Return to card-based certification
(3) Change to the maximum time for a vote
(4) Restoring prohibition to anti-union campaigning

Access to the employee list

Where a union is able to demonstrate a threshold of 20 percent support of employees in the proposed unit, the employee list and contact information should be disclosed within a reasonable period of time.

One of the most fundamental changes to the economy over the past 25 years has been changes to the workplace and the workforce. As technology advances, the notion that there is a single work location where all the employees attend and know each other is antiquated. It is no longer realistic to premise access to the constitutional right of collective bargaining and freedom of association on the theory that co-workers know each other, they know where each of them works, and even how to contact each other. Sometimes this occurs because the workforce is spread across a large geographic area and number of worksites. Sometimes this occurs because the workforce is composed of a large number of part-time, casual, temporary or auxiliary employees. Sometimes this occurs because employees do not even regularly attend their worksite; instead, they receive their direction from their employer through email, texting, smartphones and other devices.

Therefore, the *Code* should be amended to include an administrative process similar, but not identical, to that recently enacted in Ontario: section 6.1 of the *Labour Relations Act*, 1995, S.O. 1995, C. 1. In short, once a trade union can establish it has achieved 20 percent membership support, the Board ought to disclose to the union a list of employees with contact information. Unlike Ontario, there ought not to be any attempt to adjudicate bargaining unit appropriateness or fix the proposed bargaining unit description as this creates unnecessary legal disputes, costs, and delay. This administrative process is not to pre-determine appropriateness, but to ensure that modern workers have meaningful access to their rights under the *Code*.

Further, unlike Ontario, there should be a time by which the Board must determine and provide the employee list. It should take a reasonable period of time, no longer than a week, from the date of the union's application for the Board to determine whether the union has at least 20 percent support. The legislation ought to require appropriate safeguards about protecting the information and limiting the use of the information to address privacy concerns with this process. The public policy interests must be balanced against privacy interests.

Return to card-based certification

UFCW 1518 recommends that card-based certification be restored, bringing B. C. in line with the majority of jurisdictions in Canada. The majority of Canadian jurisdictions employ card-based systems. Card-based certifications are available in the federal jurisdiction and all three territories, Newfoundland and Labrador, New Brunswick, PEI, Quebec, and Alberta. In addition, card-based

certifications are available for certain industries in Ontario and Nova Scotia. Saskatchewan and Manitoba are the only other jurisdictions that require a representation vote in all instances. The Code should be made more consistent with labour legislation elsewhere in Canada be reinstating card-based certification.

Opponents of card-based certifications raise false allegations about the reliability of card-based certification or concerns about the conduct of unions. Mandatory vote systems are a demonstrated invitation to improper and unlawful employer conduct that prevents the exercise of constitutionally guaranteed freedom of association by employees. For example, in 1992 the province's Committee of Special Advisors charged with examining overall industrial relations strategy for B.C. unanimously recommended a return to the card-based certification:

> The surface attraction of a secret ballot vote does not stand up to examination. Since the introduction of secret ballot votes in 1984 the rate of employer unfair labour practices in representation campaigns in British Columbia has increased by more than 100%. When certification hinges on a campaign in which the employer participates the lesson of experience is that unfair labour practices designed to thwart the organizing drive will inevitably follow. The statistical profile in British Columbia since the introduction of the vote was confirmed by the repeated anecdotes our Committee heard in its tours across the Province. It is also borne out in decisions of the Board and Council. Unions would sign up a clear majority of employees as members and a vote would be ordered. Then key union supporters would be fired or laid-off while threats of closure dominated the campaign and the vote itself was viewed as a vote on whether or not to continue with employment rather than as a vote on redefining the employment relationship. It is not acceptable that an employee's basic right to join a trade union be visited with such consequences and illegal interference. Nor is there any reasonable likelihood of introducing effective deterrents to illegal employer conduct during a representational campaign. A shorter time framework will not deter an employer intent on "getting the message" to his employees. Neither is the imposition of fines and/or the expeditious reinstatement of terminated employees likely to introduce attitudinal or behavioural changes in employers intent on ensuring that their employees do not join unions. The simple reality is that secret ballot votes and their concomitant representation campaigns invite an unacceptable level of unlawful employer interference in the certification process.

Reinstating card-based certification is the restoration of a democratic means of accessing constitutional right to collective bargaining.

Change to the maximum time for a vote

Even with the restoration of card-based certification, there will still be instances in which a vote must be held. The current ten-day time for a vote is unnecessarily long. The maximum length has turned into the *defacto* time: so votes are commonly held on the ninth or tenth day. There is essentially no instance in which the time for the vote is less than seven days.

There is no longer any reason that a vote cannot earlier than seven days. Therefore, the *Code* should be changed so that a vote ought to be held no later than five, or seven days, from the date of the certification application.

Previously, technological and administrative reasons existed why a vote might need to take up to ten days to occur. In 1992, when the ten-day limit was set, facsimiles were new, few people had email, and cell phones did not exist. It would take time to contact and coordinate inspection of payroll records, membership cards, and schedule a vote.

With the ease of communication and lack of payroll inspection, ten days is no longer needed for an IRO to prepare a report and conduct a vote. An IRO's report ought to take no more than three to four days to be prepared and provided to the Board. Therefore, a vote should be scheduled no more than five to seven days from the time of application.

Thus, a minor but important change to the *Code* is to adjust the maximum time for a vote to better reflect the technological developments and administrative changes, such as no payroll inspection.

Eliminate anti-union campaign

UFCW 1518 recommends that section 8 be changed by reinstating the previous wording of Section 8 of the *Code*. Doing so will help to address employer interference during certification campaigns and assist in levelling the inherent employer-employee power imbalance in the employment relationship that has been recognised as an improper barrier to access to collective bargaining.

Previously, the Code contained the following prohibition:

> An employer or a person acting on behalf of an employer must not participate in or interfere with the formation, selection or administration of a trade union or contribute financial or other support to it.

In the ten years or so that the *Code* provided this limitation, the Board found that the wording placed significant restrictions on an employer attempting to influence a decision by employees whether or not they would join a union.

The current section 8 of the *Code* has allowed employers to conduct anti-union campaigns during working hours at work. It has long been recognized that the power imbalance inherent of the employer-employee relationship has an especially intimidating impact on employees. That is why the Code had restricted the anti-union campaigning that is presently permitted.
As currently provided, the Code legislatively, and we submit improperly, enshrines unequal access to the employees. Section 7 restricts unions from entering the campaign. Therefore, employers enjoy unfettered access to employees to conduct anti-union campaign at work on company time.

Employers typically perform anti-union campaigning at work on company time while unions are not permitted to counter such conduct.

One option to eliminate the legislated power imbalance would be to remove 7(1) in its entirety, thereby allowing unions to be able to counter the anti-union campaign. Doing so would mean both unions and employers would be allowed to campaign on company time and company property. But that option is not the preferred option as it would create a greater impact on the employees and the workplace.

The preferable solution is to reinstate the reasonable restriction against anti-union campaigning found in the prior section 8. Therefore, UFCW 1518 urges the immediate reinstatement of the old language.

5. Ensure the *Code* protects workers in new forms of businesses, including franchised and contract services

Protecting workers in franchised businesses

Since 1992, there has been a discernible change in the nature of the economy and workforce. One such development is the growth of franchised businesses. In such arrangements, the decision-making for the business is shared by both the franchisor and franchisee, and there is a shared community of interest of the employees working for the different franchises.

The *Code* and the Board's policy of true employer and common employer do not adequately protect workers in this new and prevalent business structure.

Therefore, this panel ought to recommend changes to the Code, similar to the recommendations found in the recently released Final Review of the *Ontario Labour Relations Act*: The Changing Workplaces Review: An agenda for Workplace Rights, at pages 357-361. The only substantive change we would make to those recommendations would be the inclusion of the franchisor in the new bargaining structure. UFCW 1518's specific recommendation would be:

> The *Code* would require certified, or voluntarily recognized, bargaining units of different franchisees of the same franchisor by the same union in the same geographic area, required to bargain together centrally, with representatives of the franchisee employers in that area and the representatives of the franchisor, as set out below:
>
> a) An employer's organization, composed of representatives of the franchisees, will represent the franchisee employers at the bargaining table. The Board should be given the authority to require the formation of an employer bargaining agency and set its terms, if necessary. The employer's organization to bargain centrally would remain so long as the union held bargaining rights.

b), the Board would have the authority, if requested by a party involved, to direct that the terms of a collective agreement between a franchisee and a union could be extended to apply, with or without modifications, to a newly certified bargaining unit involving the same union and a different franchisee (in the same franchise organization). The Board would also have the power to require that the franchisee employers bargain centrally.

c) In exercising its authority, the Board should consider whether the proposed terms and bargaining structure contribute to the development of an effective collective bargaining relationship and serve the development of collective bargaining in the sector/industry.

d) Each franchisee would have individual responsibility for compliance with the resulting collective agreement and would sign an agreement binding on its location(s). In this model, agreements by the parties to distinct provisions applicable to some but not other franchisees can be dealt with in collective bargaining.

e) Multiple locations owned by the same franchisee, a common situation in the franchise industry, could be consolidated as a single bargaining unit by the Board in appropriate circumstances pursuant to the recommendation on newly certified locations of a single employer, but that employer would also participate in central bargaining under this recommendation as a franchisee of the same franchisor. Similarly, if corporate stores owned by the franchisor of the franchisees governed by central bargaining were certified, these could be consolidated as a single bargaining unit of the same employer pursuant to the recommendation on newly certified locations of a single employer as well. In addition, if it was the same union as the union centrally bargaining with the franchisees that certified the franchisor, collective bargaining with the franchisor employer would be part of the franchisee central bargaining process.

f) In centralized bargaining, any strike or ratification vote would involve the entire constituency of bargaining units and not the individual bargaining units.

This proposed change would meet the purpose of the *Code* by putting in place a rational structure that would place the entire employer at the table with the employees and their union to bargain all terms and conditions of employment of their workplace instead of allowing fragmented bargaining that undermines the rights of employees.

Protecting workers in contracted services

As with the development of franchised businesses, since 1992 there has been an explosion of contracted services, including in building maintenance, food, security and health. While contracting out and contract flipping has existed for years, changes in the economy and workforce have led to a tremendous development on the frequency of such occurrences. Labour legislation

in Canada has been slow to evolve to prevent the harm caused to the employees and the public by contracting out and transferring of work between contractors.

Nearly 40 years ago, in *Metropolitan Parking*, [1980] 1 Can LRBR 197, the Ontario Labour Relations Board recognized that the successorship provision as it existed in Ontario (and as it now exists in British Columbia) was deficient:

> In reaching our conclusion we are not unmindful of the rights of the employees and their union, nor have we rejected the applicant's contention that the "mischief" present here is virtually identical to that which Section 55 is designed to remedy. There is no doubt that the periodic retendering of the management contract can frustrate the employees' established collective bargaining rights, threaten their job security, and significantly undermine the possibility of establishing a stable collective bargaining relationship at the parking location. The need to continually reorganize the individuals employed at the site not only poses a problem for the trade union, but also for the Federal Government and any previously unorganized subcontractor who becomes the successful bidder. There may well be a new application for certification, a new round of bargaining and threat of industrial conflict and disruption of service each time a new employer takes over. This is obviously not the intention of the parties…but it will be the result of the transaction where the circumstances are similar to those existing in the present case. And, for the reasons which we have already set out, we do not think section 55, as presently drafted, can cover the situation. To so hold, in the present case, would be to root bargaining rights in the location, the employees or the work, rather than the "business". Whatever may be the case in other subcontracting situations, we do not think the change of subcontractors in the circumstances of this case constitutes a transfer of a business from one to the other (page 218)

In 1997, our Provincial Government introduced legislation to address some of these issues: Bill 44. However, the Government subsequently withdrew Bill 44 and appointed a Section 3 Committee to hear submissions and make recommendations regarding the issues addressed in the Bill. Subsequent Section 3 committees have all held that this a pressing issue that needs to be addressed. But what has prevented protecting these workers has been political pressure by the employer community, plain and simple. Everyone knows the problem; and everyone knows the solution. It is time to protect these workers from the harm caused by contracting out and contracting flipping.

Ontario has now taken steps to address the deficiencies in the successorship provisions of its legislation: see sections 69.1 and 69.2 of the *Labour Relations Act*, 1995, S.O. 1995, C. 1.
Therefore UFCW 1518 recommends a change to section 35 of the *Code* to provide for successorship upon contracting out in the building maintenance, food, security and health (including long-term residential care) sectors in keeping with the Ontario model.

Further, the Panel may wish to recommend the repeal of repeal Section 6(5) of the *Health and Social Services Delivery Improvement Act*, SBC 2002, c. 2, and the Repeal Sections 4(4) and 5(5) of the *Health Sector Partnerships Agreement Act*, SBC 2003, c. 93.

Conclusion

The Code needs to address the needs of the modern workers by addressing issues impacting tens of thousands of workers working for franchised businesses and contracted services. This Panel ought to facilitate meaningful collective bargaining rights for these workers and protect them dealing with fractured businesses.

6. Adopting the BC Federation of Labour recommendations

In a recent paper, *Restoring Fairness and Balance in Labour Relations***,** the British Columbia Federation of Labour set out some proposed legislative changes that ought to be implemented immediately. Given the limited time and space, we will not elaborate further other than to say the BC Federation of Labour's conclusion is based on the experience and insight of a large number of unions and workers in this Province. The proposals, of course, were intended to be immediate steps while a section 3 committee, or another panel, considered more significant changes. So the proposals ought to be viewed as the first steps, not the all steps, that this Panel ought to take.

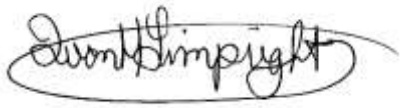
Further, we have reviewed the BC Federation of Labour's submission to this Panel. We join in and adopt its recommendations.

7. Conclusion

Since 2002, the B.C.'s labour laws have been unbalanced, favouring employers over workers. As the economy has evolved and technology has developed, the failure of B.C.'s labour law to change has compounded the inequity.
This Panel's recommendations must restore fairness and balance to our labour laws. Employees in the modern workforce must have access to their fundamental freedoms to associate, recognized by the Supreme Court of Canada as a critically important constitutional right – the right to organize, to engage in meaningful collective bargaining and to strike.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Yours truly,



Ivan Limpright
President

IL/sk
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Submissions by the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (United Steelworkers) to the Review Panel under Section 3 of the British Columbia *Labour Relations Code*

March 19, 2018

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Submissions by the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (United Steelworkers) to the Review Panel under Section 3 of the British Columbia *Labour Relations Code*

Who We Are

The United Steelworkers is an international trade union with over 220,000 members in Canada, approximately 30,000 of whom work in British Columbia. Steelworkers are men and women of every social, cultural and ethnic background in every industry and job. From our roots in core industrial sectors such as mining and steel, the USW has grown into the most diverse union in British Columbia, representing employees in all areas of manufacturing. As a result of mergers with the Industrial Wood and Allied Workers (IWA) and the Telecommunications Workers Union (TWU), we also have a significant presence in the forest and telecommunications industries, along with a rapidly growing membership in the service sector in workplaces like call centers, retail stores, hotels, banks and nursing homes. Across the country, our Union has been at the forefront of organizing security guards, taxi and truck drivers, and university employees. Workers from coast to coast to coast have sought membership in our union in large numbers over the last twenty years. As a result, we are acutely aware of the importance of a worker's right to join a trade union of their choice without fear of intimidation or coercion, and our experience with varying labour relations regimes across Canada gives us valuable insight into which systems operate fairly and effectively, and which do not.

The Changing Nature of the BC Economy and Workplaces

The world of work has changed dramatically over the last fifty years and our members have experienced these changes first-hand. Fifty years ago, the majority of our members were hired by local employers fresh out of high school or college, and stayed working for that employer until they retired – with a solid pension and health care benefits that allowed them to live with dignity.

Today, there are fewer jobs in traditionally higher-paying sectors like transportation, telecommunications, and resource extraction[1]. The jobs that remain in these industries are less stable as employers increasing rely on contracting out (or contracting in, through the use of

[1] Over the last two decades in Canada, the number of low-paying jobs has grown faster than both mid-paying and high-paying jobs; in 2015, low-wage jobs grew at twice the rate of high-paying jobs. The result is that "the fastest growing segment of the labour market is also the one with the weakest bargaining power": Benjamin Tal, "Employment Quality – Trending Down", *Canadian Employment Quality Index*, March 2, 2015, p. 2-3.

temporary agency employees) in an effort to reduce labour costs and increase profit[2]. At the same time, wages have stagnated, benefit coverage is more restrictive, defined benefit pension plans are being eliminated for younger workers and pension benefits cut for senior employees.

While jobs in manufacturing and resource extraction have declined, there has been a corresponding increase in service-sector positions characterized by low wages, weaker benefits, less job security, more limited training, and reduced opportunities for career development. At the same time, we have seen a steep rise in self-employment and contract work in the province, as fewer British Columbians enter into "traditional" employer-employee relationships. These trends, coupled with a low union density rate brought about by 15 years of unbalanced labour policy, have produced growing levels of income inequality.[3]

Unions in a Changing Economy

It is critical that workers have a collective voice as they navigate these dramatic economic changes. Access to collective bargaining "enhances the human dignity, liberty and autonomy of workers by giving them the opportunity to influence the establishment of workplace rules and thereby gain some control over a major aspect of their lives, namely their work...."[4]. Represented employees are better off than their non-union counterparts. Union members have a significant wage advantage over corresponding non-union employees. This is especially so for historically disadvantaged groups, like women and aboriginal workers, for whom unionization helps mitigate systemic wage disparities[5]. Union members are also more likely to have access to health and welfare benefits and pension income upon retirement.

Unionization is a benefit not only to union members, but all Canadian workers. Economic gains won at the bargaining table have a positive effect on the terms and conditions of employment of non-union employees in the same industry, as employers match union wages and working

[2] Temporary employment in British Columbia grew from 24% of permanent new jobs between 2004 and 2013 to 40% of new employment created between 2009 and 2013. See Andrew Longhurst, *"Precarious: Temporary Agency Work in British Columbia"*, July 2014, p. 5-6.
[3] In British Columbia, the Gini coefficient (a measure of income inequality) grew from an average of .29 over the 1980s and 1990s to .33 between 2000 and 2009. Further, BC has the largest income gap among the Canadian provinces as measured by comparing the lowest and highest 20% of earners. See BCStats, "Mind the Gap: Income Inequality Growing", *Business Indicators, Issue: 12-01*, p. 2-3.
[4] *Health Services and Support – Facilities Subsector Bargaining Assn*. v. *British Columbia*, [2007] S.C.J. No. 27.
[5] BC union members make on average $5.39/hour more than their non-union counterparts. Unionization also narrows the systemic wage gap between men and women, with female union members earning on average $6.84/hour more than their non-union male counterparts. The impact on indigenous workers is similar, with indigenous union members making on average $6.51/hour more than non-indigenous, non-union employees. See research summarized by the Canadian Labour Congress at http://canadianlabour.ca/why-unions/provincial-and-territorial-breakdown/british-columbia.

conditions in order to attract and retain employees. Further, union-led campaigns for law reform have improved the lives of employees by pursuing public policy which protects workers, not just profit. The USW was instrumental in the passage of the Westray amendments to the *Criminal Code*, which impose significant penalties on employers whose criminal negligence results in the death or injury of their employees. The USW also successfully lobbied for the introduction of the federal *Wage Earner Protection Program Act*, which provides a fund for employees left unpaid by an insolvent employer. These positive gains for employees are made possible by a strong trade union movement built by employees who have exercised their right to bargain collectively.

Recommendations

Access to collective bargaining is more important than ever in today's workplace and economy. However, the current *Labour Relations Code* undermines workers' ability to access their right to bargain collectively. The USW therefore proposes, in addition to the recommendations made by the British Columbia Federation of Labour, that the Government make the following changes:

1. Foster certainty and efficiency in the certification process by restoring card-based certification;

2. Ensure fair treatment of workers by amending sections 6(1) and 8 of the *Code* (employer interference in certification process);

3. Restore balance to the *Code* by amending the purpose clause to reflect the interests of both employers and workers;

4. Bring BC in line with other jurisdictions by extending the period for which membership evidence is valid; and

5. Create stability and security for vulnerable and precarious workers by ensuring access to successorship and common employer provisions of the *Code*.

We will address each of these recommendations in turn.

Recommendation 1: Foster certainty and efficiency in the certification process by restoring card-based certification

To protect the right of employees to join unions if they so choose, while minimizing the opportunity to commit unfair labour practices, the *Code* should be amended to restore card-based certification. Such an amendment would also mitigate the delay and uncertainty that is invited by mandatory votes.

Card-based certification was the norm in British Columbia from 1973 to 1984 and again from 1993 to 2001. However, a few short months after being elected in May 2001, the BC Liberal Government passed Bill 18 which, among other things, eliminated card-based certification in favour of mandatory representation votes. Notably, they did so without consulting the public or the labour community.

The implementation of a mandatory representation vote process in British Columbia has had serious consequences for labour relations in the province. Since its implementation, the number of employees in BC who have been able to exercise their right to join a trade union has declined. Indeed, today British Columbia has below-average union density compared to other jurisdictions in Canada.

The Union's public polling data indicates that the drop in union organizing cannot be explained by a decrease in employee interest in joining unions. Recent polls conducted by the USW show that in 2015, nearly three in ten (28%) non-union employees who are eligible to join a union want one. When asked if they would join a union if they were guaranteed there would be no reprisal against them by their employer that number jumped to 40%.[6]

Further, studies conducted by labour relations experts support the view that mandatory representation vote regimes are deeply undemocratic in their treatment of employees and provide greater opportunity for employer interference in employee free choice.

In 1992, the NDP government appointed a three-person panel, comprised of Vince Ready, John Baigent, and Tom Roper, Q.C., to review the Province's labour laws. The panel's report was critical of mandatory representation votes, observing that they open the door to illegal employer interference in the selection of a trade union:

> The surface attraction of a secret ballot vote does not stand up to examination. Since the introduction of secret ballot votes in 1984 the rate of employer unfair labour practices in representation campaigns in BC has increased by more than 100%.

[6] Vector Poll, *The Vector Poll on Public Opinion in Canada*, United Steelworkers, July 2015, p. 39.

...

> The simple reality is that secret ballot votes and their concomitant representational campaigns invite an unacceptable level of unlawful employer interference in the certification process.[7]

In 1995 the federal government asked a commission chaired by Andrew Sims, Q.C. to review possible amendments to the *Canada Labour Code*. The Sims Commission considered whether to move away from a card-based certification system and require mandatory representation votes. The commission rejected such a change, and in doing so concluded:

> We are not convinced that the statute should make representative votes mandatory. The card-based system has proven to be an effective way of gauging employee wishes and we are not persuaded that it is unsound or inherently unconvincing to employers. It requires a majority of all workers, not just those who vote. It reduced the opportunities for inappropriate employer interference with employees' choice.[8]

The same conclusion was reached three years later, in 1998, when the BC Government struck a Section 3 committee (comprised of Vince Ready, Stan Lanyon, Miriam Gropper, and Jim Matkin). The committee had this to say about mandatory votes:

> We continue to believe that the risk of increased incidence of unfair labour practices during certification outweighs any advantage in using the secret ballot during the certification drive. We believe that other responses from the public research – namely that 74% of the respondents supported tough penalties against companies who engaged in unfair labour practices during union organizing as well as legal protection for employees before their first agreement – lend support to our conclusion.[9]

More recent empirical evidence supports the conclusion that employer interference with employee choice is more effective when governments remove the right of employees to join trade unions by means of card check and introduce mandatory representation votes instead. In a 2004 study reviewing twenty years of certification procedures in British Columbia, UBC researcher Chris Riddell found that not only did certification success rates decline by almost 20% following a move from card-based certification regimes to mandatory representation votes, but management

[7] John Baigent, Vince Ready & Tom Roper, *A Report to the Honourable Moe Sihota: Recommendations for Labour Law Reform*, (Sub-Committee of Special Advisors: September, 1992).
[8] Andrew Sims, Rodrigue Blouin and Paula Knopf, *Seeking a Balance, Review of Part 1 of the Canada Labour Code*, 1995 Report for the Federal Minister of Labour, p. 62.
[9] Vince Ready, Stan Lanyon, Miriam Gropper & Jim Matkin, *Managing Change in Labour Relations: The Final Report*, (Section 3 Committee, February 25, 1998), p. 7.

opposition, as measured by unfair labour practices, was at least twice as effective in the voting regime as in the card-check regime.[10]

A similar conclusion was reached in an earlier study by former British Columbia Labour Relations Board Chair Stan Lanyon and his colleague Robert Edwards, who collected data that confirmed a link between abandonment of card-based certification and a rapid rise in the successful use of illegal tactics by employers against organizing employees. As a result, the authors concluded:

> The use of representation votes as a condition of certification does not further democratic rights, but instead serves the interests of the employer who would wish to influence his employees' decision on the question of union representation.[11]

Findings in research studies conducted in Ontario mirror the conclusions reached in other jurisdictions. In her study of Ontario's labour laws following the introduction of a mandatory vote system, York University Professor Sara Slinn found evidence that the legislative change to a mandatory vote system had a disproportionate impact on weaker and more vulnerable employees:

> It is clear that the overall proportion of certification applications resulting in a certificate being issued is substantially lower in the Bill 7 period then in the Bill 40 period. It is also apparent that the characteristics of applicants seeking certification, and of those units granted union certification are significantly different....The apparent shift under the Bill 7 period towards larger bargaining units, and away from part-time units and the service sector, is a matter of concern to both policy-makers and unions. The majority of job growth in the private sector is in smaller workplaces and in the service sector. <u>This shift therefore suggests that Bill 7 has had a disparately negative effect on relatively weaker employees, such that employees who may most benefit from unionization are less able to access union representation.</u>[12]
>
> [emphasis added]

The Union is well aware of the opposition in the employer lobby to the return of card-based certification. Employers and other supporters of the mandatory vote system advance the pretense that representation votes are democratic and equivalent to any other kind of election process, including political elections or referenda. Despite a superficial and simplistic similarity, there is no equivalency between a political election and a union representation vote. Union representation

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[10] Chris Riddell (2004) "Union Certification Success under Voting Versus Card-Check Procedures: Evidence from British Columbia, 1978-1998", *Industrial & Labor Relations Review*, Vol. 57, No. 4, article 1, p. 509.

[11] S. Lanyon & R. Edwards, "The Right to Organize: Labor Law and its Impact in British Columbia" in S. Hecker & M. Hallock, eds., *Labour in a Global Economy: Perspectives from the U.S. and Canada*, (Eugene, OR: Labor Education and Research Center, University of Oregon, 1991).

[12] Sara Slinn, "The Effect of Compulsory Certification Votes on Certification Applications in Ontario: An Empirical Analysis", 10 *Canadian Labour and Employment Law Journal* 399 at p. 428-429.

votes are unlike any other kind of “election” because of the inherent coercive power that employers hold over employees – the power to control employees’ pay, hours and working conditions or even to deprive employees of their livelihood.

In an election when voters choose their Member of the Legislative Assembly, they determine who will represent citizens within the context of a democratic system, and, indeed, which party will form the government. In a union representation vote, the issue is not which “party” will direct the enterprise, but instead whether employees will have democratic bargaining and representation rights at all. A successful union organizing campaign does not allow workers to choose a new workplace “government”. A successful union campaign leaves the employer in the position of governance, with employees now simply securing legal guarantees of basic rights of “voice and vote”.

The comparison between a political election and a union representation vote breaks down further still if one considers the actual circumstances in which a union representation campaign occurs. In theory, employees are supposed to be allowed to engage in union-related communication in the workplace during non-work time, but, given the reality of most workplaces, this right is elusive at best and non-existent in most instances. The right of employees to communicate with each other about union membership is severely restricted by the inherent characteristics of most workplaces and by management directive and actions. The actual environment and context in which employees consider union membership is far different from that which the *Code* seeks to establish. The *Code* provides a range of freedoms and rights that may be clear and self-evident to legal practitioners but which are all too often chimerical when workers attempt to put them into practice in the real world.

For example, as the Board’s jurisprudence makes clear, absent extraordinary circumstances, employees cannot be prevented from taking part in discussions and other activities regarding unionization that take place in the workplace before and after working hours, or during lunch periods or coffee/rest break times, even if they are paid for such lunch or break times. But in most workplaces, employees know full well that ‘in reality’ they have no such right and that their union-related communication or activity in the workplace is not adequately protected. Employees know viscerally that indeed most employers actively discourage such activity and will not in any way countenance union discussion in the workplace at any time.

On the other hand, employers and managers have easy and unrestricted access to employees while they are at work. Employers and managers maintain full control of the workplace. They know the number of employees in the workplace, and can easily speak with them in person or by means of electronic or other forms of communication which they control. As well, employers and managers have the home addresses and telephone numbers of employees, allowing easy contact with employees when they are not at work. Employees and their chosen unions have no such lists and no equal capacity to communicate, either in or out of the workplace. Union-related communication between employees in the workplace is most often hidden in furtive conversations where employees hope they are out of sight of managers or away from the increasing presence of electronic surveillance. Often, such communication is relegated to conversations in the local Tim Horton's as employees look over their shoulders to keep an eye out for supervisors, or the handing out of flyers on the edge of company parking lots.

And even if employees are able to start talking about unionizing and trying to build a support level that would get them a vote, in many instances they are faced with the important question "How do we know how many people actually work here?" Only employers know the actual number of employees that they employ. Employees and their chosen unions, especially in larger or dispersed workplaces, begin and often end campaigns with no firm knowledge about how many employees there actually are. This challenge is aggravated in workplaces with complex shift arrangements and by the increasing use of contractors and temporary or casual labour arrangements. And if a vote eventually happens, it is most often held in the workplace, an environment fully controlled by the employer and to which the union is given only brief access solely in the voting area. Meanwhile, the employer remains free to campaign throughout the rest of the workplace at all times prior to and during the vote.

Contrast all of that with elections for political office. Far from having to sign up a significant percentage of electors (as in union organizing campaigns), candidate eligibility in a political election is achieved with a nominal number of signatures from people in the riding. Candidates operate from identical voters' lists with equal contact information and campaigns operate under common spending limits. Voters are under no fear that voting for a certain candidate or party might actually place them in danger of losing their employment. Balloting takes place on neutral ground and campaign activities are banned from the entire area. And the winner actually takes office, whereas a successful union vote merely provides employees with the right to bargain.

Furthermore, as a tool of progressive public policy, card-check certification procedures promote healthy relationships between employers and employees by helping to avoid a pitched battle between management and workers during a certification campaign. In a representation vote, voting in favour of the union is often characterized by the employer as tantamount to a vote "against" the employer. Therefore, card-check certification procedures promote healthier labour relations in the workplace by avoiding the workplace polarization that often results from anti-worker campaigns encouraged by a vote-based system.

In summary, there is just no basis for stating that British Columbia's current vote-based system for achieving union representation is democratic. Indeed, the evidence suggests that mandatory representation votes are precisely the opposite: such regimes give employers better and more effective opportunities to thwart employee wishes and affect the outcome of certification applications. The only procedure for the selection of a trade union that takes into account the fundamental realities of the employment relationship is a card-check certification regime such as currently exists in Quebec, Alberta, Ontario (for certain sectors), and federally.

Recommendation 2: Ensure fair treatment of workers by amending sections 6(1) and 8 of the *Code* (employer interference in certification process)

The 2002 amendments to sections 6(1) and 8 of the *Code* (the so-called "free speech" provisions) unfairly tilted the balance of power in favour of employers. A return to the pre-amendment language would safeguard workers' constitutional right to freedom of association and would foster harmonious labour relations by keeping divisive campaigns out of the workplace.

Prior to 2002, the *Code* simply prohibited employers from interfering with employees attempting to unionize. The *Code* provided that an employer "must not participate in or interfere with the formation, selection or administration of a trade union or contribute financial or other support to it." While section 8 entitled employers to express certain views about their business, that right was a limited one, allowing employers to "communicate to an employee a statement of fact or opinion reasonably held with respect to an employer's business" [emphasis added].

As a result of Bill 42, however, section 6(1) was made expressly subject to section 8, which, in turn, greatly expanded the scope of what employers were permitted to say and do. The new language provided that "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."

Thus, Bill 42 allowed employers to campaign against unions by saying anything they want, including about unions generally, provided that the statement can be characterized as a "view" (which is broader than the predecessor "statement of fact or opinion reasonably held").

In the litigation that followed in the wake of Bill 42, the Board construed these changes in a way that was especially problematic for trade unions. In *Convergys Customer Management Canada Inc.,* BCLRB No. B62/2003 (upheld on reconsideration: BCLRB No. B111/2003), the Board held that the amendments meant that employers could make statements that were incorrect or unreasonable (as long as the statement is not an outright lie). For instance, it was open to the employer to imply that the union is dishonest and untrustworthy, even if that "view" was an inaccurate and unreasonable one.

That expansive view of the Bill 42 amendments was cemented by the reconsideration panel in *RMH Teleservices International Inc.*, BCLRB No. B188/2005 [partially overturning BCLRB No. B345/2003], in which the Board bluntly stated that the effect of these amendments was to permit employers to undertake "political style anti-union campaigns" and that this is even the case during working hours.

It is difficult to overstate the impact of these changes to the *Code*. Prior to 2002, workers could exercise their right to discuss and debate the merits of unionization and, if enough employees chose to become members, they could become certified often before the employer ever found out, preserving their ability to exercise their right to decide whether to form a union in a context that was untainted by the employer's influence. With the elimination of card-based certification and amendments to sections 6(1) and 8 of the *Code*, the employer will usually have at least 10 days' notice prior to a vote (or more, if the Board orders a mail ballot, which has become more prevalent in view of the Board's under-funding) to engage in an outright anti-union campaign in which the employer can say or do almost anything with impunity. It has become "open season" on trade unions.

The result has been a stunning 78% decline in the number of certifications granted annually (comparing the Board's statistics for the card check period of 1994-2001 to the period after Bills 18 and 42).

Consider that statistic in view of the fact that the right to bargain collectively is an exercise of workers' constitutional right to freedom of association. A labour relations scheme which dramatically limits the ability of workers to exercise that fundamental right is unfair, unbalanced, and outdated. The *Code* must be amended to protect the right of workers to freely associate – and bargain collectively, if they so desire – unimpeded by the influence of those who write their paycheques. The *Code*, and the manner in which it has been interpreted, has failed to keep pace with modern Canadian labour law jurisprudence. The Supreme Court of Canada, in *Health Services and Support – Facilities Subsector Bargaining Assn*. v. *British Columbia*, 2007 SCC 27, recognized that collective bargaining and the right to be represented by a trade union promotes democracy and reflects Canadian values such as dignity and equality. More than ten years later, it is time to modernize the Labour Relations *Code* to reflect those values.

Recommendation 3: Restore balance to the *Code* by amending the purpose clause to reflect the interests of both employers and workers

The "purposes" section of the Labour Relations *Code*, which guides the interpretation of the *Code* and the development of the Board's policy, is – as a result of Bill 42 – imbalanced, and should be amended to more fairly reflect the values of workers (not just employers).

In 2002, section 2 of the *Code* was amended to place additional emphasis on developing "workplaces that promote productivity", and an additional purpose was added at the behest of the employer community: the Board's duties must now be exercised in a manner that "fosters the employment of workers in economically viable businesses" [emphasis added].

The USW understands well the need for employers to be "economically viable". The difficulty with this amendment is not the addition of this language *per se*, but the fact that it imbalances the purpose clause by adding language which reflects only the interests of the employer community without consideration for the values and objectives of labour.

A healthy and robust labour relations regime is one in which larger social objectives are furthered by carefully balancing the sometimes conflicting interests of business and labour. That is why the *Code* must be interpreted through a lens which recognizes and values the needs and interests of workers as equal partners in an economic relationship.

To restore balance to section 2 of the *Code*, the simplest solution is to remove the one-sided amendments brought by Bill 42. Alternatively, the USW recommends that section 2 be amended to

reflect the values of working people – values that are held in tension against the employer objectives of "productivity" and "economic viability". For instance, those exercising duties under the *Code* should be required to exercise those powers in a manner which promotes workers' "dignity, equality, and liberty", and which "fosters the employment of workers in safe and healthy workplaces". These are values broadly shared by ordinarily British Columbians and their inclusion in the "purposes" clause would help to restore balance to a system which for 16 years has been unfairly tilted in favour of the employer community.

Recommendation 4: Bring BC in line with other jurisdictions by extending the period for which membership evidence is valid

Extending the "lifespan" of membership evidence is necessary in order to reflect the increasingly precarious nature of modern employment and to ensure that British Columbian workers have the same opportunities for union representation as those enjoyed in other Canadian jurisdictions.

Presently, an application for certification must be supported by membership evidence that is no more than 90 days old (see section 3(c) of the *Labour Relations Regulation*, B.C. Reg. 9/93). This is out of step with the realities of modern workplaces and with the regulations in Alberta, Ontario, and the federal sector, all of which have undergone recent reviews.

The 90-day life of a membership card serves as a barrier to accessing collective bargaining rights. Workplaces are increasingly decentralized and "virtual", making employee contact more challenging. The quintessential industrial worksite – the large, single-location site with a "front gate" outside of which union campaigners may make contact – is becoming increasingly rare. Of the remaining workplaces that fit that description, they are often in remote regions that are inaccessible by trade unions absent an access order from the Board. All of this makes for longer campaigns that stretch beyond the 90 day period during which membership evidence is valid.

This is compounded by the increasingly precarious nature of work. As noted at the outset of our submissions, temporary work and the use of contractors is on the rise. The rate of turnover we see at workplaces is higher than ever. By the time an employee signs a union card, his or her term may be coming to an end. Ironically, this frustrates workers' access to collective bargaining in some of the workplaces where there is the highest need for a collective voice.

The current 90-day expiry period for membership evidence is short compared to most of the other Canadian common law jurisdictions:

Jurisdiction	Expiry Date
Canada (Federal)	6 months
British Columbia	90 days
Alberta	Six months
Saskatchewan	90 days
Manitoba	Six months
Ontario	One year
New Brunswick, Newfoundland and Labrador, Nova Scotia, and Prince Edward Island	Approximately 3 months

We note that in the jurisdictions where reviews have more recently occurred (Alberta, Ontario, and federally), membership evidence is valid for six months to a year. It is only Saskatchewan and the Maritime Provinces that have a shorter expiry period.

Extending the expiry period to six months would be consistent with Alberta and the Federal sector, and would modernize the British Columbia system by reflecting the structure and organization of today's workplace. It is a small measure which would have a meaningful impact on the ability of workers to obtain union representation if they so choose.

Recommendation 5: Create stability and security for vulnerable and precarious workers by ensuring access to successorship and common employer provisions of the *Code*

Expanding the application of sections 35 and 38 of the *Code* and extending their application to the health services sector would foster labour relations stability and protect workers' access to collective bargaining.

At the same time that working people have operated under a labour relations scheme that has been tilted in favour of employer interests, employment security has declined. As described earlier in these submissions, employment in today's workplace is markedly less secure than that of earlier generations, as employers turn to contracting out and the use of temporary workers to cut costs and enhance profits. This is a significant threat to labour relations stability and undermines the benefits for which workers negotiate collectively. The cruel irony is that if employees do manage to unionize despite a mandatory vote after ten days of openly anti-union campaigning by their employer (now permitted under section 8 of the *Code*), and are able to secure a first collective agreement, the employer can effectively circumvent that agreement by re-assigning work to contractors or related entities. The employees' right to bargain collectively is undone, in effect, by the stroke of the employer's pen.

The use of contractors and related entities is especially widespread in certain sectors such as forestry, where the increasing reliance on contractors has seriously undermined negotiated collective agreement entitlements and generated significant conflict and litigation, which does nothing to further stable and harmonious labour relations in the sector.

The problem is especially acute in the case of "contract flipping". Where employees work for companies which contract with other entities for the provision of services, and that fixed term contract is then re-tendered and awarded to another company, the employees are terminated without any continuing rights, notwithstanding that the work continues to be performed, often in a near identical fashion. In some cases, the laid-off employees of the "losing" contractor take "new" jobs working for the "successful" contractor doing the identical work, but do so as notional new hires, losing the benefit of the collective agreement that governed their previous relationship.

What is so troubling about the "contract flipping" issue is that many of the workers in the contract services sectors are low-wage workers, often racialized, female, immigrant workers, and otherwise marginalized. These are the workers who stand to gain the most from collective bargaining, and where unionization serves the broader social purpose of narrowing systemic wage disparities. It is these workers who are most likely to lose what they gain through contract flipping.

Although this issue has gained prominence over the past 15 years in health care and other public services sectors, it has also emerged, as noted, as a significant issue in the logging and forestry industry since the early 2000s. In that sector, our members face losing decades and decades of hard-fought gains in their collective agreement simply because the Government removes forest land from a TFL and transfers it to another entity, or because a licensee sells forest lands to another licensee (where no equipment is sold as part of the transaction), or where a Bill 13[13] contractor sells their volume of work to a licensee. In each case, the place and scope of the work remains the same. Nonetheless, these situations are not generally captured by the successorship provisions of the *Code* as it presently worded, and as a result, workers are left with no rights in respect of the harvesting work that continues on these lands.

While sections 35 and 38 of the *Code* (the successorship and related employer provisions) are intended to remedy the mischief which flows from contracting out and contract flipping, they are generally ineffective in doing so as they are of relatively narrow application. We recommend that

[13] *Timber Harvesting Contract and Subcontract Regulation*, B.C. Reg. 22/96.

these provisions be expanded to address the growing use of contractors, and to mitigate the harm that flows from contract flipping. In the case of the forestry sector, in particular, the current provisions do not reflect the unique characteristics of that industry, where it is the forest land *per se* (rather than, for instance, equipment) which is the defining features of a business. We therefore also suggest that these provisions be amended to reflect the distinct structure of the forestry sector such that successorship runs with the harvesting work attached the land on which the work occurs. While it is beyond the scope of these submissions to propose specific statutory language to reflect these concerns, we are happy to do so if it would assist the committee.

At the very least, whether sections 35 and 38 are expanded as recommended, it is imperative that full access to these protections be restored for workers in the health services sector. In 2002, the previous government enacted the *Health and Social Services Delivery Improvement Act* (Bill 29), which, among other things, exempted sections 35 and 38 from application to health sector employers and their contractors. As a union representing a growing number of health care employees, we know that these workers are among the most marginalized. The limitations that Bill 29 has placed on their rights are especially oppressive.

Restoring the full application of the *Code* to health services workers and expanding sections 35 and 38 to address the growing problems of contracting out and contract flipping would create stability and security for vulnerable and precarious workers by ensuring that collectively bargained rights continue in the face of employer reorganization.

Conclusion

British Columbians deserve decent work. Fair, balanced labour laws which reflect the modern economy and workplace are crucial to achieving that goal. In the USW's view, implementing the above recommendations will ensure that BC workers have the same rights and protections as those enjoyed by other Canadians, will create fairness for working people in BC, and will better reflect the way the economy and workplace have changed since BC's last review of the *Code*. Ultimately, we submit that these changes will help provide British Columbians with decent and sustainable work so they and their families can live with dignity.

Presentation to Labour Code Review Panel – April 6, 2018

WHO WE ARE

USW Local 1-405 is an amalgamated local union covering the East and West Kootenays. West to Castlegar; South to the Canada/U.S. border; East to the B.C./Alberta border and North to the Columbia Valley region to Golden, BC. First chartered in 1944 as an I.W.A Local Union, we have been in the past primarily a forestry worker union. In the early 1970's our Local began branching out by organizing Credit Unions and has since further branched out via organizing and mergers to represent workers in Insurance, Hotels, Ski Hills and Municipalities at the City of Kimberley.

Since 2012 I have occupied my current position of Local Union Financial Secretary and Business Agent to 12 of our 20 certified operations to USW Local 1-405. Of the 12, 11 of the certifications I service are classified as "non-traditional" or outside the forest industry.

Of our 1300 members at USW Local 1-405, fully 40% of our membership is now non-traditional or not based in the forest industry. Our number one goal within our Local Union is to maintain and service our membership but also to grow that membership by organizing the unorganized.

RESTORING BALANCE TO THE LABOUR CODE

For the past 17 years, since the unilateral changes made by the former BC Liberal government - without consultation of the public or labour movement - the addition of mandatory representation votes has had a serious impact on our ability to successfully organize.

Since then our ability to organize has been severely impacted. It's become extremely difficult due to the added hurdle of a representative vote that was added to the code in 2001. This extra step of adding the representative vote after our union organizers had reached a threshold of signed cards by the workforce gave the employer an added layer of security from a union organizing their workplace: time.

Part 3; Division 1 – Section 24 of the B.C. Labour Code dictates that a representative vote must be held within 10 days of the application by the Union representing 45% of the employees; or if a mail-in ballot is ordered, within a longer period the board orders.

It is within that section that I will focus our Local Union's experience and issues with organizing over the past 17 years. Specifically, the past six years in my current position with the Local Union.

ORGANIZING

2014 Example - A drive in 2014 to organize a restaurant adjacent to our certified operations at a Ski Resort and a Hotel that had 45 employees, 90% of which were women, and 32 had signed membership cards, over 71% of the employees. Following the application made by the Union, the employer – an employer that was the

owner of the adjacent properties represented by USW Local 1-405 – contested the application claiming our Union wasn't an appropriate bargaining agent. Secondly, the employer objected to an in-person vote and took the position that a mail-in ballot was appropriate.

The subsequent delay between application and, finally, an in-person vote some ten days later following application, the vote was a tie, 18-18. Following that vote the Union filed Unfair Labour Practices complaints shortly after it was discovered the employer was threatening to close down the restaurant (it is still open to this day); firing a worker that was a vocal supporter of the union organizing the restaurant and announced a unilateral wage increase of $3 across the board for all restaurant employees.

All these instances occurred during the period of time the Union signed over 71% of the employees to a membership card and the first vote. Subsequently, because of the Unfair Labour Practices complaints filed, the BCLRB ordered a re-vote; a ½ hour paid meeting of the staff with the Union and a confidential settlement offer to the employee that was fired. The subsequent re-vote, held a month later, saw the vote fail by 3 votes, 18-15.

Clearly in this instance card-based certification was the first vote by the employees to join our union. Only after coercion; fear tactics and out and out threats – enabled by the time between the application with 71% of the employees signing membership cards submitted January 29, 2014; the unfair labour practices of the employer through the first ten days to February 6 and the ordered re-vote March 6, 2014, that fear, intimidation and threats were enough to sway the vote.

2016 Example – A drive began March 31, 2016 at a Pole Yard in Brisco, BC. By April 16, 16 cards had been signed by the 20 employees, 80% of the employees. Following application for certification by the Union that week, the employer then contested the voting rights of three members on the voting list and objected on the grounds that a mail-in ballot would be appropriate. Following an in-person hearing at the BCLRB May 3, it was determined that the voting list was set and that a mail-in ballot was ordered. It would be counted May 27, 2016, a full 41 days after application had been made by the Union with 80% of the employees signed to membership cards. During this time the owner actually fired the manager that was causing some problems and then met with each and every employee asking not to vote for the union now that the manager was gone. The employees still had issues with their wages – which were far below standard in the industry – job posting language; seniority; pension contributions, among others. The owner, in making his rounds to sway employees during this time, even accosted two employees who were supportive of the Union. Yelling, screaming and swearing at them.

All during the time frame of card-based certification and a mail-in ballot.

Fortunately for the workers, the vote went in favour of joining the Union by a 12-8 margin. A secondary application, as the three voters noted above were deemed part of a different business of the owner's, adjacent to the pole plant containing five workers, resulted in a tie, 2-2. That part of the application was not successful. Prior to the mail-in ballot, three of the five workers at that location were in favour of the union and had signed cards.

2017 Example - A drive is currently underway and continues for a Sawmill Operation north of Creston, BC. The drive has been ongoing for some time, but the current owner also ran three other Sawmill Divisions in the region, closing one in late 2015. Six months later that company announced the purchase of this non-union mill and subsequently doubled the workforce, going from approximately 60 workers to 120. The Union was only able to achieve 33% of the employees signing cards. And while this isn't example of representative votes held after a period of time the union applied for certification, it is an example of fear tactics used by employers to scare employees away from signing membership cards.

A young woman, in her late 20's, single mother of two children was an active supporter of the Union and a member of the inside committee. She was asked to appear before you to tell her story of being part of a union drive and talking to fellow co-workers about joining our union. She was terminated during this time for, what the Union believes, but unfortunately cannot prove, was trumped up cause. She has since found new work but was now so disillusioned with the process and fearful of reprisal that she decided against appearing before this panel due to fear of her new employer finding out she was part of an inside-committee of a unionization drive.

CONCLUSION

These examples are but a few of the many, many examples that workers face while trying to organize their workplace. Fear; Intimidation; Threats – all traits that in the workplace Union abhors and fight hard to eliminate. Unionization in the workplace does many things for workers but ultimately it provides balance. It provides fairness. It provides a voice. Besides improved wages, benefits and pensions, it provides a sense of empowerment. By restoring card-based certification as the only requirement to meet the test of unionized representation in the workplace, it will give thousands of workers in my region and across B.C., a greater chance at balance and fairness in the workplace.

It is stated by those against card-based certification that without a representative vote it is an affront to democracy. When we go to the polls as citizens to elect our representatives in government there is no one there threatening our livelihoods if we don't vote a certain way. That is what is currently happening in workplaces looking for representation by a union and it is that, that is the actual affront to democracy.

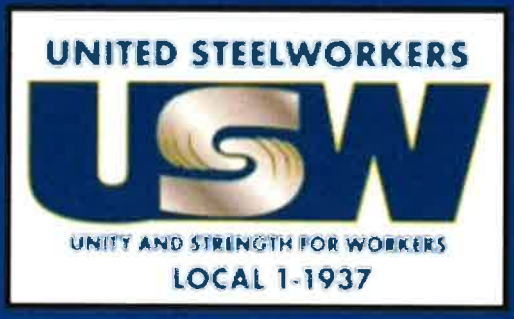
Workers have a right to choose and that right must be unfettered by employer interference and coercion. Eliminating a representative vote following card-based certification will go a long way to accomplishing that.

Respectfully submitted,

Jeff Bromley

Financial Secretary/Business Agent

USW Local 1-405 - Kootenays



UNITED STEELWORKERS LOCAL 1-1937

BRIAN BUTLER, PRESIDENT
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SUBMISSION TO:
THE LABOUR RELATIONS CODE REVIEW COMMITTEE
MARCH 16, 2018

RE:CHANGES TO THE BC LABOUR RELATIONS CODE

UNITED STEELWORKERS
USW
UNITY AND STRENGTH FOR WORKERS
LOCAL 1-1937

UNITED STEELWORKERS, LOCAL 1-1937

Affiliated with AFL-CIO-CLC

SERVING MEMBERS THROUGHOUT COASTAL BRITISH COLUMBIA

March 16, 2018

Re: Labour Relations Code Review Panel

Dear Panel Members,

Workers in every industry in both the private and public sector have suffered due to the complete imbalance of the BC Labour Code over the past sixteen (16) years which favours employers over workers.

The coastal forest industry is one of those industries where workers have suffered the most. From a non-union forest worker exercising their legal right to organize only to be intimidated and given false information, to organized workers losing their jobs due to poor successorship rights that don't allow their collective agreement rights to continue with a new land owner or steward, and to everything in between, workers are seeking fairness and balance in the Code.

We know central labour bodies such as the BCFED or our own USW District 3 will cover more issues than we do in this submission and their submissions are important. Our submission we believe is equally important and hits on some key issues that coastal forest workers feel are long overdue to be addressed in a meaningful way. Some of the issues we address may be unique to coastal forest workers (of which there are many both organized and unorganized); we hope you will give your time and consideration to these important issues.

We also appreciate the opportunity to address them with you in writing and in person at the regional meetings that have been set.

Yours Sincerely,

Brian Butler
President

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BB/cm
USW 1-1937

Who are the United Steelworkers Local 1-1937?

United Steelworkers Local 1-1937 is an amalgamated Local Union that proudly represents 6500 men and women in all sectors of the economy, but primarily in the forest industry. Our Local Union resides inside a large geographic area that encompasses all areas of coastal British Columbia including all of Vancouver Island, all coastal islands including Haida Gwaii and the mainland coast from the Alaskan State border south to the Washington State border.

Background:

The coastal forest industry has completely changed from the stable industry it was from the 70's through the 90's. In the early 2000's the provincial government appointed Don Munroe to facilitate binding mediation to end a coast-wide forest industry strike. This appointment led to the industry being changed from one of stable integrated forest companies (Fletcher Challenge/BCFP, Doman, Pacific, Macmillan Bloedel / Weyerhaeuser) to one where licensees were allowed to contract out their work to woodlands contractors, many of whom had never worked in a Unionized environment or under a collective agreement. This new model for the coast of BC has been extremely detrimental to labour relations.

While too many to list, we will identify some its detrimental effects here:

Bargaining:

Prior to 2003, the vast majority of forest companies bargained in an accredited organization, known as Forest Industrial Relations (FIR) while coastal Local Unions of the IWA/USW bargained as a single unit. Since that time, all major coastal licensees have left industry wide bargaining under FIR and have bargained independently. To try and hold sector bargaining together, and for the benefit of good labour relations, the Union has operated on the basis of asking contractors to sign "me too" agreements. Under these agreements, contractors can forego bargaining and simply agree to work under the terms of the largest collective agreement on the coast, which is currently between Western Forest Products (WFP) and United Steelworkers (USW) Local 1-1937. The problem with this approach is that the contractors are asked to voluntarily sign the "me too" agreement; it is not required that they do. Serious labour relations problems and many labour disputes would result if every small contractor decided to bargain independently. Currently, the vast majority of contractors sign the same WFP agreement via a "me too" agreement. Those that don't are larger companies that have collective agreements that virtually mirror the WFP agreement.

Enforcement:

The enforcement of collective agreements becomes increasingly difficult when the number of independent contractors in the forest sector increases as it has done since 2003. As already mentioned, small contractors are less sophisticated and have, in many cases, very little knowledge of the collective agreement and the provisions within it. Moreover, it is easier to isolate and intimidate workers the smaller the contractor is; where there is no longer strength in numbers, workers are more easily prevented from exercising their rights. The combination of less sophisticated and sometimes very aggressive employers has led to the number of grievances skyrocketing, notwithstanding the numerous violations that occur on a daily basis that are not advanced to arbitration because they are unreported or because no members are willing to testify as a result of intimidation. Even in clear cut violations of the collective agreement, which are numerous, the contractors (many backed by the licensees who are not supposed to be involved in grievances) drag out grievances to arbitration that in the past were easy to resolve. We have also experienced several cases where the contractors have arbitrators rule against them and they simply ignore the award. When they are forced back to the arbitrator and made to sign a consent award, they later ignore the consent award. This type of action by an employer was unheard of prior to the change to the coast contractor model.

Organizing:

A workers' right to join a Union is also very much impacted in the contractor model now in place on the coast. Contractors that are Unionized are avoiding the Union by setting up a second company that is owned by the same people, uses the same equipment and shares the same employees. They promise Unionized workers that they can go work for the nonunion side if there is no work at the Union side, which some workers may see as a benefit, but in reality they are working often with no overtime provisions and rely on the benefit layoff coverage of the Union side.

Also, even with nonunion contractors that are standalone operations, the small size of the contractors makes organizing difficult, especially if they hire retired Union members who are collecting their pension and would have to stop their forest industry pension if they were to go to work in a Union operation.

We would now like to turn to several provisions of the Code, which we feel need to be revised or repealed.

SUCCESSORSHIP RIGHTS (Section 35)

The USW seeks changes to the currently one-sided Labour Relations Code, so that workers retain successorship rights and their collective agreement rights when forest tenure reform and forest tenure transfers are acted on by government.

One glaring inequity that coastal forest workers have suffered is under Section 35 of the Labour Relations Code, where workers have not been granted successorship rights (with their collective agreement rights intact) in the many cases when government reformed forest tenure and/or transferred forest tenure rights since 2001.

It is only fair and equitable that when forest lands change hands, and those same forest lands continue to be harvested by a new owner or licensee, that workers should have successorship rights and their collective agreement rights maintained.

In numerous cases during the previous government's time in office, lands were transferred out of Tree Farm License's (TFL's) and into BC Timber Sales (BCTS). Unionized workers have been stripped of their jobs (successorship) and their collective agreement rights because it was deemed a "business" was not sold to the new steward of the Crown Land.

The current language of Section 35 of the BCLR Code states "If a business or a part of it is sold, leased, transferred or otherwise disposed of, the purchaser, lessee or transferee is bound by all proceedings under this Code before the date of the disposition and the proceedings must continue as if no change had occurred". In the forest industry in BC, the Crown forest tenure is the primary asset of the business yet it is not viewed as being the business (or even a part of the business) to trigger successorship under Section 35. The forest industry is a unique and renewable industry that does not operate like a normal business and as such should have protections unique for its workforce when new management of the major asset (the Crown forest tenure) is put in place. It should not matter if the new entity harvesting the Crown forest tenure buys logging equipment from the previous entity, has its own logging equipment or hires a contractor to harvest the timber; successorship rights need to apply to protect the workforce.

The USW believes, by extension of the foregoing, successorship rights for workers should not be lost when government resolves matters of First Nations treaty rights or when the government makes land settlement agreements with First Nations. We have

the same belief regarding the transfer of forest land between licensees as well as when contractors sell Bill 13 rights to licensees.

These type of settlements, should not be made on the backs of unionized workers, who have been the only stakeholder that have had their rights taken away when the previous government negotiated settlements that removed a defined forest land area or cubic metre volume of timber from a TFL or Timber Supply Area (TSA) or through BCTS.

Our Union has long held a commitment supporting reconciliation and strongly believes in more equitable opportunities for all workers, including First Nations workers, and therefore wants to see all parties dealt with fairly in the process of reconciliation. Why should workers lose their jobs when the group gaining rights to the forest land will be hiring a contractor to harvest the forest themselves?

It is without a doubt that the loss of jobs in coastal BC forests due to the lack of successorship rights has been significant for unionized workers and has had detrimental effects for themselves, their families and the rural communities in which they live.

Applying successorship rights to transfers, sales or settlements involving Crown tenure promotes continuity and security for the workers and their families and provides the same for the community and small businesses that succeed when taxes and disposable income remain in the community. It is often found that employees of nonunion contractors who bid for work through BCTS or from a licensee are far more transient than the workforce that is tied to the land base by certification or those protected by their employer's Bill 13 rights.

We urge the panel to recommend changes to Section 35 of the code to ensure that forest workers' rights to work and rights to their collective agreement continue when their working land base is transferred, sold or made part of a settlement to another party, even if no logging equipment or non-timber assets are acquired as part of the transaction.

We also would urge that you recommend that successorship rights should apply to any BCTS lands that were once harvested by Unionized workers when they are put up for bid under BCTS and where they are removed from the BCTS program and reintegrated with existing or new TFL's in the future.

COMMON EMPLOYER (Section 38)

The treatment of Common Employer Applications from Unions at the BC Labour Relations Board has been one-sided in favour of employers for too long.

Where the USW has made application in instances of a "double breasted" employer ("one union operation and one nonunion operation owned by the same principle and closely tied") which routinely transfers equipment and employees between the two operations, we have been unsuccessful in convincing the LRB that they should be treated as a single employer. Why?

While we don't have a definitive answer, it may be and is widely believed to be that over the past sixteen (16) years the balance of the board discretionary decisions tilts largely in favour of employers through appointments made by the previous "business friendly" government.

The language of Section 38 states "If in the board's opinion associated or related activities or businesses are carried on by or through more than one corporation, individual, firm, syndicate or association, or a combination of them under common control or direction, the board may treat them as constituting one employer for the purposes of this Code and grant such relief, by way of declaration or otherwise, as the board considers appropriate". This language leaves too much discretion to the board in our opinion and needs to have some clear guidelines to ensure fairness.

The reason why employers in the forest industry double breast their company is very clear; they wish to avoid the Union collective agreement in areas where they believe they don't need a Union affiliation to bid for the work.

We urge the panel to find balance and fairness by amending Section 38 to add some certainty by adding particulars that demonstrate common employers and limiting the discretion in Common Employer cases. Areas that can add some certainty in relation to the forest industry are when both businesses are in the same industry, regularly share or transfer equipment between businesses and transfer employees between businesses.

MEMBERSHIP CARDS - AUTOMATIC CERTIFICATION (Section 24)

It is our belief that if workers truly have the right to choose to belong to a Union then that right should not be infringed on by employers having the right to dissuade them from belonging to a Union.

As it is now, workers have to choose to belong to a Union twice. Once when they decide to belong to a Union and sign a check off card acknowledging they want to be represented by a Union, and a second time in a secret ballot vote once the employer is made aware of the work force's desire to join a Union and has had significant time to pressure the worker to not join a Union. This is wrong. When a worker buys fire insurance, no one later makes wild statements that fire insurance is a waste of money and that you should not buy it and then mandates that they have a secret ballot vote on whether they truly wanted to have fire insurance in the first place. It's nonsensical.

In this day and age, there should be a clear path for workers to freely and easily access their right to join a union; it should not be a choice fraught with fear, intimidation and threats to their job security. Otherwise, their right to freely join a Union is not really their right.

It is clear that the number of successful applications for certification has dropped significantly since the code contained a provision for automatic certification in the 1990's. It is clear that, as by its design, the elimination of the automatic certification provision has drastically and negatively affected the right of workers to organize.

We also wish to point out that all organizing drives are not the same. It is much different organizing a Union in a University, for example, than it is to organize a Union in an industrial setting such as a logging operation, manufacturing plant or in a remote location. Organizing etiquette in a professional setting is much different than in blue collar workplaces where it is common for workers to face many forms of threats to their job security.

We ask that the panel recommend the restoration of a system of Union certification on the basis of card signing rather than relying solely on the secret ballot votes. If there is truly freedom of association in our Province then let's give workers that right.

EMPLOYER "FREE SPEECH" PROVISIONS (Section 8)

The previous government did many things to support its friends in business. One of the most glaring things they did in support of business and to unbalance the Labour Code was the expansion of "free speech" rights under section 8. This provision, as interpreted by the Board, has operated to allow employers to hold captive audience meetings and to extend their anti-union messaging during organizing drives for the sole purpose of reducing the number of successful organizing campaigns. It should be pointed out that these were rights given to employers that were not given to the Union. The answer of how to fix this inequity is not to give the Union the right, but to take the ability of the employer to coerce and intimidate workers away. While coercion is prohibited by the Code, our experience is that this is precisely what s. 8 permits.

In one recent organizing campaign in our Local Union an employer had mandatory captive audience meetings in which the workers were told the Union dues would be over $300 per month, the operation would have to close due to the financial pressures and that the Union would demand mandatory drug testing of the workers if it were to get in (these statements were actually made).

It is our hope that the panel will recommend that Section 8 be stricken from the Code.

CONCLUSION

For the past sixteen years, our Local Union and Unions in general have had no voice when it comes to the Labour Relations Code or any of the many amendments made to it over that time. This lack of inclusion was hardly the format for sound or fair labour relations in our opinion.

Despite this, we are very hopeful that government (through the LRB Review Panel) will finally hear workers' voices. We believe it is necessary for you to hear from all sides prior to making fair and balanced recommendations to the Minister of Labour. We are also hopeful that this will not be the last time that all stakeholders are heard and only marks the first of many times the Code is reviewed to ensure fairness for workers.

Finally, if there are any issues that we have addressed in this document in which the panel would like more clarity on, please ask.

UNITEHERE! LOCAL 40

BC Labour Relations Code Review

BC Labour Relations Code Review Panel:

Michael Fleming (Chair)
Sandra Banister, Q.C. (Member)
Barry Dong (Member)

April 12, 2018

Submission by
UNITE HERE! Local 40
Robert Demand, Executive Director

UNITE HERE Local 40 represents over 7,000 hospitality workers across the Province of British Columbia working predominantly in airport food service and hotels. Our members also work in gaming, golf clubs, legions, college cafeterias and construction camps. UNITE HERE represents the interests of hospitality workers who are long-term professionals – cooks, cashier, servers, engineers, front desk agents and room attendants – in BC's booming tourism sector.

According to Destination BC, the tourism industry generated $17 billion in revenue in 2016, which is a 40% increase over revenues generated a decade ago. Last year, a BC Chamber of Commerce survey ranked tourism as BC's most important sector over the next decade.

Another sign of the dramatic growth in tourism can be measured at key airports in Vancouver (YVR) and Victoria (YVJ). Both airports are reporting record passenger volumes and the need for major expansion projects.

Today, what our members and tens of thousands of unorganized airport and hotel workers have in common is that while their skills and labour are integral to the tremendous economic success of BC's tourism economy, they and their families struggle to keep up with the soaring cost of living and the insecurity of a rapidly changing economy. Hospitality workers are seriously disadvantaged by the current BC Labour Code and denied their Charter rights to freely join a union and truly bargain collectively. Without these fundamental rights, hospitality workers and other private and public sector workers will see their economic security continue to move steadily backwards.

UNITE HERE is looking to this Panel and the Provincial government to make the necessary changes to BC's Labour Code to ensure working people's constitutional rights to join a union, to bargain collectively and to strike are protected, particularly given significant changes in work and employment in the 21st century.

UNITE HERE fully supports the submissions made by the BC Federation of Labour and the BC Building Trades. In particular, we support their specific recommendations for changes to the existing Code, the call for a separate panel to review construction labour relations, and for increased funding and support of the BC Labour Relations Board.

In addition, we are making the following recommendations to the Panel to protect the right of every working person to join a union, achieve a first collective agreement and to enjoy the stability of ongoing collective bargaining.

Protecting the right to join a union and achieve a first collective agreement

To ensure that working people are free to make the choice to join a union, the Code needs to be changed to provide a process free of unnecessary delays or coercion.

To achieve these goals, UNITE HERE believes that card based certification should be restored if a union can show that it has a minimum of sixty (60%) percent support.

If a secret ballot election is required, we believe that there should be speedy, in-person elections within three (3) days achieved by modifying Section 24. There should be no mail ballot elections unless the union and employer mutually agree. To allow for speedy elections and to reduce post-election disputes and delays, we believe that voting lists should be determined by payroll audits conducted in person by Industrial Relations Officers (IROs).

To combat coercion and to protect the constitutional right to join a union, we believe that the current form of employer "free speech" and anti-union captive audience meetings must stop. To achieve this end, we recommend the Province restore the prior Section 8 language and amend Sections 2 & 3 of Bill 42 to eliminate speech and mandatory meetings that are designed to intimidate, coerce and to interfere with the formation, selection and administration of a union. Last, if unfair labour practices occur due to employer interference, the Board will order a remedial certification. s. 14.

Joining a union is only the first step for working people to address their concerns about workplace treatment, safety, respect and economics. They know that they have only won when they reach a first contract. To this end, we believe that Section 45's statutory "freeze" on existing terms and conditions should be extended until a first collective agreement is concluded.

For each of these recommendations to work, proper funding of the BC Labour Relations Board is required. Workers need a Labour Board with enough IROs to carry out immediate, in-person investigations and to conduct votes. There also need to be enough Vice Chairs to hear cases, have time to deliberate and then provide timely decisions.

Protecting the right to ongoing collective bargaining

For decades, changes in BC Labour Code and other legislation have favoured certain employers over BC workers and small businesses. By design, past labour code changes have resulted in weakening a working person's right to join a union or achieve a contract. Simultaneously, there has been increased use of contracting out of public and private sector jobs. This has resulted in an alarming decrease in new certifications and a significant drop in private sector union density.

Today's workplace has also changed dramatically. For example, the creation of more part-time jobs and the rising use of new technology is creating more precarious work, greater income inequality and rising levels of poverty for children and the elderly. Our Labour Code needs to change to address the realities of BC's and Canada's economy.

UNITE HERE believes that this Panel and the Provincial government need to strengthen and protect collective bargaining rights. When these rights are protected, working people will have a greater voice and power in their economic lives and will benefit not only themselves but their families and communities across BC. We believe that the three key areas to address are extending successorship rights to deal with contract flipping, guaranteeing the right to join or leave a bargaining association, and protecting the right to strike.

Successorship

Our experience is that the initial contracting out of workers and then subsequent retendering of contracted work, or contract flipping, was designed to eliminate union certification and to replace existing workers with new, lower wage workers. UNITE HERE believes, like other Unions, that Section 35 of the code needs to be rewritten so that successorship protection applies to workers whose jobs are contracted out, retendered or contracted back into a business so that the wages, benefits and rights of their collective agreement are binding on any new employer. We recommend that the code is broadened in a similar fashion to what has been implemented in Ontario to provide successorship for building maintenance, food, security and health (including long term residential care) sectors.

UNITE HERE also supports the repeal of statutory successorship exemptions in health care and the repeal of Section 6 of Bill 29 – Health and Social Services Delivery Improvement Act and Sections 4 and 5 of Bill 94 – Health Sector Partnership Agreement Act.

Right to Join and Leave a Bargaining Association

Employers have the right to make changes in operation or ownership of their businesses to satisfy their economic needs. We believe that unions and their members must have a parallel bargaining right to be able to deal with changing businesses. Unions need the right to negotiate directly with an employer and this may mean that bargaining within a bargaining association is no longer appropriate. In the hospitality sector, we have seen huge changes over the last twenty years in the ownership and management of hotels as well as changes in service levels and standards. Bargaining associations that made sense twenty, thirty or forty years ago do not necessarily make sense today given changes in the industry. While employers have enjoyed the unilateral right to join or leave a bargaining association, the union has effectively been locked into bargaining relationships that constrain its ability to fairly bargain over changes affecting workers in their workplaces. This is detrimental to workers and needs to change

Currently the Labour Code & Section 43(6) speaks only to accredited bargaining associations. Section 43 (6) provides a relatively simple statutory escape from an accreditation order for any employer named in the order. If the employer satisfies two simple qualifications, the Board must grant the application. It is important to note that this language is mandatory – in the strongest possible terms, it "must grant" the employer leaving an accredited bargaining association. There is no equivalent unilateral right for a union certified to the accredited employer. This same problem exists with a non-accredited bargaining association for a union.

The result is that the union and its members are bound to a specific employer in an indentured relationship.

There is currently no statutory escape for the union or its members to leave a bargaining association. We believe that Section 43 (6) should be broadened to ensure a union the same unilateral right as an employer to leave either from an accredited or non-accredited bargaining association that employers have under the labour code. That is, if they have been subject to either an accredited or non-accredited bargaining association for at least two years, and have given nine months' notice to the bargaining association that they wish to no longer negotiate with a specific bargaining association, then the Board must grant the order. That will better ensure workers' right to freedom of association under section 2(d) of the Charter.

Right to Strike

We believe that all Unions must have the right to strike. This is fundamental to our ability to fairly sell our labour and guarantee years of labour peace and stability to employers in exchange for the best possible collective agreement. We believe that a cornerstone to this in BC is to continue the protection against replacement workers to do bargaining unit work during a strike, so we recommend there be no change to Section 68. We also believe that the Labour Code Section 65's restrictions on secondary picketing should be repealed and modified to ensure workers the right to freedom of expression under sections 2(b) & (d) of the Charter.

Lastly, UNITE HERE supports the repeal in Section 72 of the designation of K-12 classroom teachers and assistants as an essential service and the greater restriction on the use of essential services designations outside of the health care sector.

In conclusion, UNITE HERE thanks the Panel for hearing our submission and we are willing to provide any further clarification or input that can help with this review and to implement much needed changes to our BC Labour Relations Code.

Contact:
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UNITE HERE Local 40
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Vancouver & District Labour Council

March 19, 2018

Labour Relations Code Review Committee
Ministry of Labour

Email: LRCReview@gov.bc.ca

Dear Committee Members;

On behalf of the Vancouver and District Labour Council, I write to share our views on the Labour Relations Code for consideration in your ongoing review.

It is our belief that in considering the Labour Relations Code it is critical to keep in mind that the nature of our economic system is such that employers are imbued with nearly boundless rights over the workers they employ, except where limited by applicable laws, regulations, and collective agreements.

In providing a legal framework for the relationship between employers on the one hand, and workers and their unions on the other, it is critical that Labour Relations Code brings fairness and balance.

Instead, over the past sixteen years, British Columbia's labour laws and their application has perpetuated and intensified an imbalance which is today skewed radically in favour of employers.

Workers who attempt to exercise their constitutional right to form a union are routinely faced with captive audience communications and meetings, threats, bribes, and any number of other tactics aimed at stopping unionization efforts.

When workers and their unions seek the assistance of the Labour Relations Board, they find it starved of resources. This can hinder enforcement and add to the imbalance favouring employers.

Our affiliate unions have also experienced "contract flipping" which today has become a notorious tactic of employers to maximize profitability while keeping wages low and preventing workers from fully exercising their constitutional rights to union representation and collective bargaining.

Meanwhile our economy is changing, largely to the detriment of workers. The rapid introduction of automation, proliferation of part-time and casual jobs, promotion of low wages, and attack on employment standards in recent years means that unions are needed just as much as ever.

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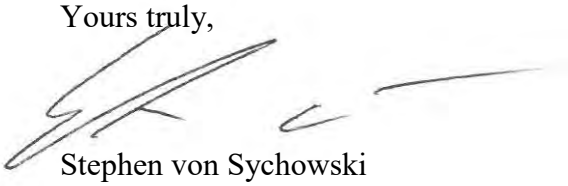
Suite 170—111 Victoria Drive, Vancouver, BC, V5L 4C4
Phone: 604.254.0703 Email: office@vdlc.ca Wesbsite: www.vdlc.ca

To: Labour Relations Code Review Committee
Re: VDLC Submission

Unions promote good jobs, and fairer, safer workplaces. We need a Labour Relations Code that ensures the rights of workers to obtain and maintain union representation and engage in collective bargaining.

To that end, we are pleased to submit our recommendations to you as part of your consultation under Section 3 of the Labour Relations Code. Our submission is respectfully made on behalf of our affiliated unions and their approximately 60,000 affiliated members.

Yours truly,



Stephen von Sychowski
President

Vancouver and District Labour Council
Labour Relations Code Review
Submission

Our Position

The Vancouver and District Labour Council calls for a number of changes to the Labour Relations Code which will help to promote fairness and balance. These include:

- meaningful remedies for unfair labour practices;
- improvements to the regulation of workers' right to choose to join a union (including the repeal of employer speech provisions and automatic certification);
- faster timelines when a vote must be conducted by the Labour Relations Board;
- stronger successorship language to prevent contact flipping;
- continuing the ban on replacement workers during labour disputes;
- meaningful bargaining rights for teachers; and
- fairness during partial decertification.

In order for these changes to be meaningful and successful it is imperative that the Labour Relations Board be sufficiently funded and will consistently and transparently enforce these changes as well as existing worker rights.

Recommendations

1. Ongoing Review

   The Vancouver and District Labour Council is pleased to participate in this long over-due review of the Labour Relations Code. The last review took place in 2003, during that time the BC Liberal government unbalanced the labour relations regime heavily in favour of employers and allowed this unfair situation to continue for fifteen years while the economy changed rapidly all around us.

   That's why, while we welcome this review, we believe that in this rapidly changing economy it is critical that the Section 3 Review Committee continue to be seized of the question of labour relations improvements on an ongoing basis.

2. Proper Funding

   The experience of the labour movement in British Columbia, and around the world, shows that while good labour laws are important, enforcement is critical if those laws are going to be meaningful and carry their intended effect. Years of underfunding has created a serious access to justice issue. Delays in certification votes, and the use of mail-in ballots, can allow employers weeks or more to engage in anti-union activities including unlawful interference in order to sway the outcome against unionization. We need adequate funding to ensure that workers have timely access to justice if their rights are infringed upon, and a timely process for certification which minimizes the opportunity for unlawful interference.

3. Timely Decisions (ss. 91, 1278, 159.1)

   Often there are significant delays in receiving arbitrators' decisions. This can create access to justice concerns and can compound impacts on workers and prolong workplace tensions unnecessarily. We recommend applying the same timelines set out in the Labour Relations Code for decisions from vice-chairs to arbitrators as well.

4. Unfair Labour Practices and Remedial Certification (s. 14)

   When employers unduly interfere in the Charter right of workers to form a union, a vote will be unlikely to disclose the true wishes of the workers. It is therefore clear to us that the fairest and most meaningful method of making workers whole in the fact of unfair labour practices is remedial certification. This would truly remedy the unfair labour practice(s) in question, while serving as a strong deterrent as well.

5. Acquisition of Bargaining Rights – Employer Speech (s. 8)

   It is our position that Section 8 of the Labour Relations Code must be repealed. This BC Liberal addition to the Code grants employers unfettered ability to dissuade workers from forming a union. Employers have constant access to workers and can use captive audience meetings and constant anti-union messaging to promote their aims. The same access and tactics were never made available to unions. Section 8 is an infringement of worker's Charter right to associate which should not be allowed to continue.

6. Acquisition of Bargaining Rights – Open (raiding) Period (s. 19)

   Section 19 of the Labour Relations Code states that the "open period" during which members of certain organizations may determine to change their bargaining agent is during the seventh and eighth month of the collective agreement. This can cause a lack of clarity as to when this period occurs or may not be readily available to the workers due to a lack of transparency by their bargaining agent. We therefore recommend that the open period laid out in Section 19 be set at a regularly occurring time in the calendar year.

7. Acquisition of Bargaining Rights – Membership Cards (s. 24)

   The current requirement, implemented by the BC Liberals, to have a certification vote impinges on the right of workers to join a union. Following the implementation of this change, unfair labour practices rose dramatically and certifications dropped by approximately 50%. The effect of the requirement to hold a vote is that workers, having already made the decision to sign a union card, are subject to a de-facto campaigning period leading up to the vote wherein employers engage in the types of activities discussed in 4 and 5 above in order to change the outcome of the vote.

We recommend that union certification based on membership cards alone be restored.

8. Acquisition of Bargaining rights – Threshold for Certification and Faster Vote (s. 24)

We recommend 50% +1 as an appropriate threshold for automatic certification based on membership cards alone. In cases where this threshold is not met, we recommend that a vote be held within two working days, rather than the current rather lengthy ten days. We also recommend that the vote be held in person rather than by mail-in ballot unless mutually agreed by all parties. These changes will facilitate a timely decision on certification applications and avoid the de-facto campaigning period mentioned in 7 above which impinges on the rights of workers to freely join a union.

9. Successorship Rights (s. 35, Bill 29, and Bill 94)

The successorship provisions of the BC Labour Relations Code stipulate that if an employer sells, leases, or transfers, all or part of their business, then the new owner is bound by any existing collective agreement at the at the date of sale.

However, the existing successorship protections were undermined by the BC Liberals when they passed Bills 29 and 94, which limited the applicability of successorship in the health sector. Current successorship legislation does not apply to contracting out or contract flipping and does not address changes in private service providers.

As a result, certifications and collective agreements are simply disappeared through contracting out. This has created instability and precarity for workers and a reduction of wages and working conditions.

To address this, we recommend the application of Section 35 be broadened to prevent subverting collective agreements through contract flipping. We also recommend the repeal of Section 6 of Bill 29, and Sections 4 and 5 of Bill 94.

10. Replacement Workers (scabs) (s. 67)

The Vancouver and District Labour Council supports the continuation of British Columbia's ban on the use of replacement workers. In jurisdictions where no such ban exists, the power of unions to exert economic pressure in a labour dispute is unfairly undermined by the ability of the employer to hire replacement workers to do bargaining unit work. Meanwhile no similar tactic exists that can be exercised by unions in the case of a lockout. We therefore recommend no change to this section of the BC Labour Relations Code and note that a change to this section would run counter to the spirit of good faith, and put economic stability and labour peace in peril.

11. Essential Services (s. 72)

While we acknowledge that on rare occasions there may be a need for essential services designations due to the fact that some services are essential to the preservation of life. However, historically essential services designations have been abused and mis-used to undermine the exercise of legitimate rights by working people and their unions, for example in the case of teachers and teaching-assistants.

We recommend education be removed as an essential service and that the use of essential services designations be tightly restricted to those services which are absolutely necessary for the preservation of life.

12. Variations of Certification – Partial Decertification Applications (s. 142)

The Vancouver and District Labour Council is concerned about the existing process for partial decertification applications conducted under Section 142. Such applications are not presently expedited in the manner that full decertification applications are, and the rules are unclear. We recommend that the BC Labour Relations Code be amended to prevent such applications from being entertained by the Labour Relations Board. At minimum, we believe such applications should be resolved using the same rules provided by Division 2 of the Code.

Conclusion

We thank the Committee for its work in conducting this much needed review of the BC Labour Relations Code. We are hopeful that the recommendations of the committee will reflect the changes we need in order to have a fair and balanced approach.

All of which is respectfully submitted.

Vancouver Committee for Domestic Workers and Caregivers Rights (CDWCR)
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Submission to BC Labour Relations Code Review Advisors

March 19, 2018

Overview:

Established in 1992, the Vancouver Committee for Domestic Workers and Caregivers Rights is a community-based, non-profit organization that provides assistance to foreign domestic workers and caregivers in seeking improvements to their employment conditions and immigration status.

CDWCR's mission is shaped by the belief that foreign domestic workers and caregivers provide valuable service to Canadian families and contribute to the economic, social, cultural and polical fibre of the Canadian society. CDWCR aims to foster justice and equality and collectively empowers caregivers and domestic workers. CDWCR values the importance of inclusiveness and diversity in promoting human rights.

CDWCR, through its Caregivers Network (Care-Net) Project holds series of workshops for caregivers and domestic workers on various topics such as Immigration, Employment Standards, financial basics, and self care. The goals of these workshops are to educate caregivers particularly those newly arrived caregivers under the Temporary Foreign Worker Program (TFWP), and proactively assist them while they are settling and adjusting in Canada.

CDWCR membership includes caregivers, former caregivers and domestic workers, and community supporters. The organization's board of directors is composed mainly of caregivers and domestic workers.

Caregivers as defined in the British Columbia Employment Standards Act (ESA Section 1) fall under the "Domestic". As per the definition in the ESA, "domestic" means a person who (a) is employed at an employer's private residence to provide cooking , cleaning, child care or other prescribed services, and (b) resides at the employer's private residence – although most newly arrived foreign caregivers no longer live in their employer's homes.

Under s. 14 of the Act, an employer of a domestic is required to provide an employment contract setting out the conditions of employment, including the duties to be performed.

A domestic must also be registered in accordance to s.15 of the Act and s.13 of the Employment Standards Regulation.

Caregivers prior to November 2014 (from 1992) were coming to Canada through the Canadian Immigration Live-In Caregiver Program (LCP). Caregivers who arrived in this program were required to complete two years employment before they became qualified to apply for permanent residence. Caregivers were required to live in their employer's home.

In November 2014, the Conservative Federal government replaced LCP with a new Caregiver Program, 5-year pilot project, with two pathways available for foreign caregivers to apply for permanent residency. The first one is the Caring for Children Pathway - a pathway to permanent residence for caregivers who have provided child care in a home. The other pathway is the Caring for People with High Medical Needs Pathway - a pathway to permanent residence for caregivers who have provided care for the elderly or those with disabilities or chronic disease in a health facility or in a home. Under this new Caregiver Program, in-home caregivers arrive in Canada through the Temporary Foreign Worker Program (TFWP). They are no longer required to live in their employer's home. In order to qualify to apply for permanent residency under the new Caregiver Program, they are required to complete twenty-four months of either in-home childcare or in-home/facility care for people with high medical needs, and meet certain level of education and language proficiency.

For over 45 years, foreign caregivers continue to arrive in Canada as temporary foreign workers with temporary immigration status. Their temporary immigration status make them vulnerable to abuses - abuses that are mainly related to labour issues, like working long hours, not receiving overtime pay and not receiving proper wages; and some are mental and physical abuse. Although, caregivers (domestics) are protected under the Employment Standards Act, many caregivers who faced abuse, are not filing any complaints for fear of losing their employment and their immigration status.

Currently, under B.C. labour legislation, a bargaining unit consists of one employer and their employees. But in the case of in-home caregiver and domestic worker, a bargaining unit would consist of one employer and one worker, a worker who works in isolation from other workers of the same kind of work. The current BC Labour Code's definition of a bargaining unit makes it almost impossible for in-home caregivers and domestic workers to organize as a union. Their isolation and dispersion make it very difficult for unions and advocacy groups to make contact with them and service their needs.

Rationale of the Central Registry:

In 1993, CDWCR submitted a proposal to Employment Standards Act Review Committee to include the protection of domestic workers in the Employment Standards Act and to include the formation of the Central Registry for in-home caregivers and domestic workers – both of which were included by the then BC New Democratic Party government. Soon after, the BC Liberal Party government cut the provincial budget

including that of the Employment Standards Branch, leaving ESA as just an Act, without budget for implementation and enforcement. Its Central Registry is inadequate and not utilized in the current system.

In-home caregivers and domestic workers are extremely vulnerable to employer exploitation and abuse unless they are provided with information and advocacy to enforce their rights as workers. A complete Central Registry of workers and their employers is important for the Employment Standards Branch to have so education, information dissemination and employment standards' enforcement can be accomplished. The Central Registry is an immediate and efficient way to ensure precarious workers have the same protections as that of other workers. It would facilitate the long-term goal of self-organizing and a meaningful right to collective bargaining.

But the Central Registry is only the first step. The next step, and the most important one, is the establishment of sectoral certification and sectoral bargaining. A province-wide mandatory broader-based bargaining is a necessary requirement if workers employed in precarious, non-standard jobs are to benefit from collective bargaining. A complete Central Registry, adding sectoral bargaining into the Labour Code, and the establishment of a Tri-partite Standards Committee for in-home caregivers and domestic workers would make union organizing a reality for these workers. The Tri-partite Standards Committee would be able to negotiate, set, and enforce employment standards for this sector of workers.

1. In-home Caregiver and Domestic Sector

There would be one province-wide domestic service sector -- which would address the specific needs and conditions of both live-in and live-out caregivers and domestic workers in B.C. This sector would comprise of all households and employment agencies who employ or contract with domestic workers.

2. Standards to be Regulated

The standards to be regulated would include wages and terms and conditions of employment such as hours of work and overtime, living conditions, paid statutory holidays and vacations. The Tri-partite Standards Committee would be empowered to establish benefits such as pensions and health and welfare plans coverage. It could also be empowered to oversee the Workers' Compensation Act as they apply to in-home caregivers and domestic workers.

3. How Standards Would be Set

a) Tri-partite Standards Committee

A Tri-partite Standards Committee would be established and charged with the

responsibility for setting labour standards. It would also be responsible for enforcing and maintaining standards, assisting in administering the Employment Standards Act and regulations, dealing with complaints, administering a Central Registry, hiring inspectors, initiating prosecutions under the Act, and administering any benefit plans.

The committee would have equal employer and employee representation and would be chaired by a neutral third party, to be appointed by the Employment Standards Branch.

b) Setting up the Tr-partite Committee

Employee Representation

Advocacy groups should play a prominent role on the committee. Once a union is organized, it would also be represented on the committee. Legislation should simply specify the total number of employee representatives and leave the composition of that representation and the nomination process open.

Employer Representation

In order to ensure that a system of sectoral regulation works, that it enjoys legitimacy among employers, and that it can be said that the standards negotiated are representative, it is important to have some kind of organized mechanism and organizational base from which to nominate employer representatives. A legislative "push" would be required to promote the formation of such an organization. The fact that a serious attempt is to be made to regulate and enforce standards on a sectoral scale might impel employers to see it as being in their interests to get organized. However, this process is unlikely to occur spontaneously without some kind of push.

The government should require employers to form appropriate organizations within a specified time frame and offer assistance to facilitate this process.

The associations would be responsible for nominating representatives to negotiate on behalf of all employers, the schedules of wages and employment standards.

c) Negotiation and Enforcement of Standard

Negotiating Standards

Within one month after the Tri-partite Standards Committee is set up it would be responsible for entering into a process of negotiation around a schedule of labour standards. Deadlines would be set for the different stages of the process to ensure matters proceed expeditiously.

A binding dispute resolution process would be provided. In order to ensure a link

between labour standards and collective bargaining, negotiators must be directed to take account of wages and conditions achieved for unionized workplaces in the sector (if there are any).

Enactment of Standards in Law

Since the product of all this will be statutory standards governing the entire sector, the government must give final approval to the schedules and enact them as regulations. Timelines should be set on this approval process in order to avoid a situation where the schedules are outdated by the time they're approved. Proposed schedules should not be altered without consultation with the committee.

4. Definitions

As per the definition in the ESA, "domestic" means a person who (a) is employed at an employer's private residence to provide cooking , cleaning, child care or other prescribed services, and (b) resides at the employer's private residence. However, considering the changes in the Caregiver Program, caregivers are no longer required to live in the employer's private residence. The definition should remove the requirement that the worker must be residing at the employer's private residence; instead "In-home Caregiver" should be considered and be included in the "Domestic Sector".

5. Employment Standards Benefits which Depend on Continuity of Service

In order to ensure in-home caregivers and domestic workers are not deprived of employment standards benefits because they do not work long enough for a single employer, a worker should be deemed to have been continuously employed for the purposes of Employment Standards Act benefits as long as she had worked in the sector. This would apply as long as her employment had not been interrupted for more than a specified period of time, eg. one year. The number of hours worked for various employers should be combined for purposes of overtime. Employers would pay a pro-rated levy into an employment standards benefit fund covering overtime premiums, severance benefits, etc. Costs would be pro-rated to employers on the basis of number of hours worked. This would be coordinated by the Central Registry.

6. Registration of Workers

Improvement of the Central Registry

Registration of all in-home caregivers and domestic workers would be mandatory. Employers of in-home caregivers and domestic workers would be under a legal obligation to register with the Central Registry and to provide the names and addresses of the workers employed by them. To ensure completeness, workers would be permitted to register. The legal standards which prevail should be sent to each worker in the registry - in the language they request. The registry would be under the supervision of the Tri-partite Standards Committee and the Ministry of Labour. It

should be accountable to in-home caregivers and domestic workers and function as an agent for these workers in enforcing terms and conditions of employment. As a first step, in-home caregivers and domestic workers should be legally entitled, though not compelled, to rely on the registry as an agent in dealing with any employment-related disputes with their ,employer. If a worker chooses to be represented by the registry, her employer would then be under a legal obligation to deal with the registry, rather than directly with the worker, to resolve a dispute.

The Central Registry could provide, in multi-languages, information on employment rights, counselling and advice, information and referrals to social and community services, and operate a drop-in centre. It could also establish and administer group benefit plans and pension plans. Employers would remit pro-rated amounts for each employee depending on how many hours they worked. The registry could also be a place where employers could informally advertise for workers, for example with a job board that people could consult.

7. Registration of Employers

The names and addresses of all employers, householders and employment agencies, must be provided to a central agency operated by the Tri-partite Standards Committee. This would help to keep track of problem employers and identify patterns of abuse. This would improve the quality of monitoring and enforcement.

8. Enforcement

The Tri-partite Standards Committee would have a primary responsibility to investigate and prosecute standards and registry violations. Inspectors who have a knowledge of this particular sector should be appointed by the committee and they should have the powers available to Employment Standards Branch officers under the Employment Standards Act. Small employer payroll contributions could be levied to provide sufficient funding to ensure aggressive inspection and investigation. In addition, all fines and penalties collected should be used to finance the Tri-partite Standards Committee. Moreover, these fines should be substantial enough to deter avoidance.

Unions and/or advocacy groups should be given access to the registry to further ensure that minimum standards are adhered to. Unions and advocacy groups should be entitled to investigate and file complaints of minimum standards violations in order to preserve the anonymity of in-home caregivers and domestic workers.

SUMMARY/CONCLUSION

The current Central Registry of domestic workers and caregivers should be improved and enforced which would:

- require employers to register, to obtain a permit, to register the in-home

caregiver and domestic worker they employ -- such permits could be suspended or terminated as a deterrent to abuse and especially repeated abuse;

- provide information to domestic workers on their rights and protections;
- provide an integrated approach to collective bargaining and minimum standards benefit coverage: medical, dental, extended health, pension, and long term disability;
- act as advocate for domestic workers in dispute with their Employer; provide intervention; and
- standardize wages, benefits and working conditions across B.C.