



Labour Relations Code Review 2024

Replies to Submissions

Table of Contents

All Nations Union (the “ANU”)	1
BC Building Trades and the Bargaining Council of BC Building Trades Unions (BCBCBTU) BC Employment Standards Coalition (BCESC)	11
BC Federation of Labour (“BCFED”) – Submission 1	19
BC Federation of Labour (“BCFED”) – Submission 2	145
British Columbia General Employees’ Union (“BCGEU”).....	164
Business Council of British Columbia (BCBC)	168
Canadian Animation Guild, The International Alliance of Theatrical Stage Employees, (IATSE) - Local 938	181
Canadian Association of Counsel to Employers (CACE).....	187
Canadian Federation of Independent Business (CFIB)	191
Canadian Union of Public Employees British Columbia (CUPE BC).....	195
Centre for Future Work.....	203
Confederation of University Faculty Associations of British Columbia (CUFA BC).....	224
Construction Labour Relations Association of British Columbia (CLR).....	227

Council of Forest Industries (COFI)	228
Health Employers Association of British Columbia (“HEABC”).....	237
Hospital Employees’ Union (HEU)	241
Independent Contractors and Businesses Association (“ICBA”)	249
Interior Forest Labour Relations Association (IFLRA) and the Council on Northern Interior Forest Employment Relations (CONIFER).....	283
International Longshore and Warehouse Union - Canada (ILWU - Canada).....	287
Post Secondary Employers’ Association (PSEA).....	304
Progressive Contractors Association of Canada (“PCA”)	307
Seaspan Shipyards.....	311
Service Employees International Union Local 2 (SEIU Local 2).....	314
Simon Fraser University – Campus Unions (CUPE 3338, Polyparty, TSSU, and SFUFA)	325
UBCP/ACTRA	327
United Association of Journeyman and Apprentices of the Plumbing & Pipefitting Industry of the United States and Canada, Local 170 (“the Union”)	330
United Brotherhood of Carpenters and Joiners of America (the “Carpenters Union”).....	340
United Fishermen and Allied Workers’ Union-Unifor (UFAWU-Unifor)	343
United Steelworkers District 3.....	354
Vancouver and District Labour Council	359
 <u>Individual Replies to Submissions</u>	
Anonymous Submission.....	361
Jason Arnold – USW	381
Zelda Sun	383

Submission to the Minister of Labour on Behalf of All Nations Union (“ANU”)

Re: Labour Relations Code Review 2024

On behalf of the All Nations Union (the “ANU”), Canada’s first Indigenous-led union, we write to provide the following submissions in relation to the Ministry of Labour’s 2024 review of the *Labour Relations Code*, RSBC 1996, c. 244 (the “**Code**”).

A. Overview of Submission

From the perspective of the ANU, it is fundamentally important to ensure that the *Code* can no longer be used as a vehicle for undermining or compromising the rights and interests of Indigenous persons and First Nations; rather, it must become a vehicle for the concrete realization of those rights and interests in the context of labour relations.

Consistent with the principle of reconciliation, the *Code* should expressly recognize and affirm the rights of Indigenous persons, in order to ensure those rights are reconciled with, and not subordinated to, the essential labour rights of workers conferred by the *Code*.

To that end, the ANU has three concrete proposals for the amendment of the *Code* that are necessary to achieve this objective:

- **ANU Recommendation #1:** Express recognition and incorporation of the protections of the United Nations Declaration on the Rights of Indigenous Peoples (“**UNDRIP**”) into the *Code* itself, both as a substantive safeguard for Indigenous persons, as well as a core principle of interpretation and application of the *Code*;
- **ANU Recommendation #2:** Express protection for agreements and arrangements entered into by Indigenous governments, which should be shielded from being undermined or compromised by the operation of the *Code*; and
- **ANU Recommendation #3:** Express protection for Indigenous persons and businesses under the *Code* ensuring their ability to participate in projects without being forced to join designated unions or being deprived of their existing workforces.

In the ANU’s view, there may be many other changes to the *Code* that may prove to be beneficial and necessary to fully achieve the type of true reconciliation to which the BC Government has repeatedly and consistently committed itself.

However, adopting these three concrete recommendations as a starting point is essential to achieve the overarching goal of reconciliation in the context of the *Code* and labour relations in BC, and should be a top priority of the 2024 review committee.

We will elaborate on these recommendations below, beginning with a brief outline of the ANU and its expertise in relation to these matters.

B. Background to the ANU

As the original stewards of this land, Indigenous peoples have a deep-rooted commitment to sustainability, community, and collaboration. The ANU seeks to fulfil these core commitments, and to promote other core Indigenous values – such as honesty, respect, dignity and unity –in representing our members and negotiating with employers.

At the ANU, we strive to live and uphold these values in our day to day operations, as we work to change the narrative of labour relations. Our mission and objective is to move away from top-down, ego-driven ideological battles and hostility between unions and employers, and towards practical, collaborative solutions that actually benefit workers and create sustainable jobs and economic opportunities within our communities.

As an Indigenous-led Union that welcomes members of all backgrounds, we understand the needs of both the Indigenous communities and non-Indigenous communities of which our members are a part.

To that end, ANU treats workers as family, providing exceptional health and dental benefits, fostering lifelong learning through safety-focused professional development, securing lucrative pensions for the future, and promoting social responsibility while safeguarding the environment.

Supporting our communities also involves recognizing the unique needs of Indigenous owned and operated businesses, which are essential to creating economic opportunities within our communities, and to promoting our self-sustainability.

We also recognize the need to support our Indigenous governments in promoting our communal interests, including in their efforts at negotiating agreements with governments and private entities, to promote self-governance and economic sustainability of our communities as a whole.

Although Indigenous-led, and steeped in Indigenous values, we welcome into the ANU family workers from any background. We stand firmly against discrimination of all kinds and offer unwavering support to all of our members.

As Canada’s first Indigenous-led Union, with leaders and members imbedded in both Indigenous and non-Indigenous communities alike, we are in an ideal position to speak to the needs of Indigenous workers and communities, and how best to reconcile those rights and interests with the interests of the broader workforce and society.

C. Submissions

i. Reconciliation as the Guiding Principle

As an Indigenous-led union representing a diverse range of workers, and that values a modern, collaborative approach to labour relations, the ANU recognizes that no single set of interests can dominate in the labour relations sphere. Fortunately, there is a well-

established principle that can guide necessary changes to our system of labour relations in this context: the principle of reconciliation.

The principle of reconciliation seeks to foster “a mutually respectful long-term relationship” through the “reconciliation of aboriginal peoples and non-aboriginal peoples and their respective claims, interests and ambitions”.¹

The imperative of reconciliation arises in the shadow of a long history of public authorities in Canada ignoring and neglecting the rights and interests of Indigenous peoples, and treating those rights and interests as unworthy of consideration in the context of public decision-making.²

This history of neglect includes decision-making in the context of the drafting, amendment, interpretation and application of the *Code*.

Reconciliation has been described by Canadian courts as a “shared responsibility” of all Canadians,³ and the courts have emphasized that “there is a deep and broad public interest in reconciliation with... Indigenous peoples”.⁴

This point was emphasized by the Court in *Restoule v. Canada (Attorney General)*:⁵

[56] It is obvious to anyone who has followed the news and current events in this country over the last decade that there is a deep and broad public interest in reconciliation with our Indigenous peoples. Whether one works in government, the resource sector, the social justice sector, the economic development sector, the social welfare sector or in almost any other area of endeavor, the question of how we as a country or as a community, a school, a church or a business can better understand the history and current relationship the colonial settlers had and have with the Indigenous peoples in Canada has taken on an unprecedented significance and attracted an unprecedented level of attention. [emphasis added]

¹ [Beckman v. Little Salmon/Carmacks First Nation](#), 2010 SCC 53, para 10; [Mikisew Cree First Nation v. Canada \(Minister of Canadian Heritage\)](#), 2005 SCC 69, para 1.

² See e.g. [R. v. Sparrow](#), [1990] 1 SCR 1075, para 50 (QL) (noting that for many years “the rights of the Indians to their aboriginal lands -- certainly as legal rights -- were virtually ignored”, and in cases where they were addressed, the decisions “were essentially concerned with settling legislative jurisdiction or the rights of commercial enterprises”).

³ [Redmond v British Columbia \(Forests, Lands, Natural Resource Operations and Rural Development\)](#), 2020 BCSC 561, para 42.

⁴ [Restoule v. Canada \(Attorney General\)](#), 2018 ONSC 114, para 56. See also [Redmond v British Columbia \(Forests, Lands, Natural Resource Operations and Rural Development\)](#), 2020 BCSC 561, para 38.

⁵ [Restoule v. Canada \(Attorney General\)](#), 2018 ONSC 114, para 56.

Public bodies and agencies should be at the forefront of pursuing reconciliation, as part of their public interest mandate.

As recently explained by Justice Feehan of the Alberta Court of Appeal, statutory decision-makers with a public interest mandate have a particularly strong obligation to pursue reconciliation:⁶

[117] While reconciliation is a foundational objective of s 35, it is part of the broader public interest and also applies to cases impacting Indigenous peoples outside the constitutional context. In *Restoule v Canada (Attorney General)*, 2018 ONSC 114, paras 56, 58, the Court recognized that reconciliation must always be addressed in consideration by authorized government entities of the public interest: “... there is a deep and broad public interest in reconciliation with our Indigenous peoples”. See also *Redmond v British Columbia (Forests, Lands Natural Resource Operations and Rural Development)*, 2020 BCSC 561, para 38. The relationship between the Crown and Indigenous Peoples is a fundamentally important part of the foundation of this country and goes to the “heart of its identity”: *Southwind v Canada*, para 60.

[118] Any consideration of public goals or public interest must “further the goal of reconciliation, having regard to both the Aboriginal interest and the broader public objective”: *Tsilhqot’in Nation*, para 82. Reconciliation requires justification of any infringement on or denial of Aboriginal rights, paras 119, 125, 139, and meaningful consideration of the rights of Indigenous collectives as part of the public interest.

[119] As this Court said in *Fort McKay*, the direction to all authorized government entities to foster reconciliation particularly requires that they consider this constitutional principle whenever they consider the public interest, para 68, and requires the Crown to act honourably in promoting reconciliation, such as by “encouraging negotiation and just settlements” with Indigenous peoples: *Mikisew Cree*, para 26; *Fort McKay*, para 81.

(...)

[121] An administrative tribunal with a broad public interest mandate, such as the Commission, must address reconciliation as a social concept of rebuilding the relationship between Indigenous peoples and the Crown by considering the concerns and interests of Indigenous collectives. This includes consideration of the interests of Indigenous peoples in participating freely in the economy and having sufficient resources to self-govern effectively.

[122] To determine how a decision could impact the imperative of reconciliation, the Commission should ensure that it is responsive to the submissions of

⁶ [AltaLink Management Ltd v Alberta \(Utilities Commission\)](#), 2021 ABCA 342, paras 118-119, 121-122, per Feehan JA, concurring. See also [Redmond v British Columbia \(Forests, Lands, Natural Resource Operations and Rural Development\)](#), 2020 BCSC 561, paras 38-42.

Indigenous collectives which appear before it. It may also choose to consider non-binding sources of domestic and international law and policy, such as the *United Nations Declaration on the Rights of Indigenous Peoples Act*, GA Res 61/295, UNGAOR, 61st Sess, Supp No 53, UN Doc A/61/295 (2007) 1, which came into force in Canada on June 21, 2021 and imposes obligations on the federal government: Bill C-15, *An Act respecting the United Nations Declaration on the Rights of Indigenous Peoples*, 2nd Sess, 43rd Parl, 2021, c 14; see also Sam Adkins et al, “UNDRIP as a Framework for Reconciliation in Canada: Challenges and Opportunities for Major Energy and Natural Resources Projects”, (2020) 58:2, *Alta L Rev* 339, 359–365. [emphasis added]

Consistent with this obligation, the rights and interests of First Nations, including their rights to self-governance, their social and economic rights, and rights pertaining to the development of their lands, “cannot be interpreted narrowly or technically, but must be given full effect in order to promote the process of reconciliation”.⁷

It follows from the above principles that, in considering amendments to the *Code*, a primary objective should be to foster and support the imperative of reconciliation.

To that end, the ANU has the following three recommendations that it submits are essential to achieving this essential objective in the public interest.

ii. **Recommendation #1: Incorporate the UNDRIP into the Code**

The ANU submits that the most fundamental and essential change to the *Code* necessary to promote true reconciliation in this context is to fully incorporate UNDRIP into the *Code*.

By that we mean that UNDRIP should expressly recognized in the *Code* as both as a means by which Indigenous persons and communities can oppose the use of the *Code* in a manner that would harm their rights and interests as Indigenous persons, and as an important lens and commitment through which the *Code* must be interpreted and applied.

In this respect, we would emphasize section 3 of [Declaration on the Rights of Indigenous Peoples Act](#), SBC 2019, c 44 (“*DRIPA*”) imposes the following obligation on the BC Government:

3. In consultation and cooperation with the Indigenous peoples in British Columbia, *the government must take all measures necessary to ensure the laws of British Columbia are consistent with the Declaration.*

In our view, amendments to incorporate UNDRIP expressly into the *Code* are essential to meet this commitment, and to demonstrate the importance of the rights and interests protected by UNDRIP.

⁷ [Taku River Tlingit First Nation v. British Columbia \(Project Assessment Director\)](#), 2004 SCC 74 (CanLII), [2004] 3 SCR 550, para 24.

It could be argued that under *DRIPA*, as well as the obligation in the *Interpretation Act* providing that “(e)very Act and regulation must be construed as being consistent with the Declaration”,⁸ the rights and interests protected by UNDRIP are already given sufficient protection.

However, in our view, that is not sufficient to fully ensure that the *Code* is consistent with UNDRIP, or to fulfil the Government’s commitment in section 3 of *DRIPA*.

First, it provides no direct protection for the rights in UNDRIP, and therefore does not guarantee that the *Code* will not be used in such a manner to undermine or compromise the rights of Indigenous persons as guaranteed in UNDRIP.

In order to achieve that objective, the protections in UNDRIP must be given express recognition and protection, ideally in a manner that reconciles those rights within a particular statutory regime. That is what section 3 of *DRIPA* contemplates, and what the ANU’s recommendations seek to achieve in the context of revisions to the *Code*.

Second, without express recognition in the *Code*, there remains a risk that UNDRIP will not be taken seriously by those tasked with administering the *Code*, notwithstanding *DRIPA* and the *Interpretation Act*.

This was demonstrated in the *Newcrest Red Chris Mining* decision,⁹ in which a First Nation – Tahltan First Nation – was denied standing to even provide submissions in relation to a matter that, the Tahltan claimed, could severely impact its interests in relation to its title land.

Although the Tahltan expressly relied upon their rights in UNDRIP, *DRIPA*, and the *Interpretation Act* (see *Newcrest Red Chris Mining*, paras 13-19), those submissions were essentially ignored in the Board’s reasoning denying them standing (see *Newcrest Red Chris Mining*, paras 37-53).

In our view, neglecting or overlooking these essential rights and interests would not be possible if UNDRIP were more expressly incorporated into the terms of the *Code*.

There are a variety of ways that this recommendation could be put into operation in the *Code*. In our view, that should begin with express recognition of the rights and interests of Indigenous persons in section 2.

We submit that, along with the other fundamental duties under the *Code*, section 2 should provide that the board and other persons empowered by the *Code* must exercise their powers and perform their duties in a manner that “acknowledges, respects, and promotes

⁸ [Interpretation Act](#), RSBC 1996, c. 238, s. 8.1(3).

⁹ [Newcrest Red Chris Mining Limited v United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, Local 1-1937](#), 2023 BCLRB 10 (“*Newcrest Red Chris Mining*”).

the rights and interests of Indigenous persons, including the rights set out in section 35 of the *Constitution Act* and the UN Declaration of the Rights of Indigenous Persons”.

In addition, the ANU recommends that a provision be added to the *Code* that gives Indigenous persons an express right to rely on the protections set out in UNDRIP in seeking or opposing relief under the *Code*, as well as in the context of collective agreement arbitrations.

Finally, there should be a provision that provides that, wherever reasonably possible, the terms of the *Code* and of collective agreements must be interpreted and applied, and any discretion under the *Code* or collective agreements must be exercised, in a manner that is consistent with UNDRIP.

These three measures, taken together, would go a considerable distance to meaningfully fulfilling the Government’s commitment and obligation in section 3 of *DRIPA*, and achieving reconciliation in the context of labour relations.

iii. **Recommendation #2: Expressly Recognize the Rights of Indigenous Persons Guaranteed by Agreement**

Second, the ANU submits that the *Code* should include an express recognition of the rights and interests of First Nations over their historical and title lands, including any arrangements entered in furtherance of those rights and interests, and providing that the *Code* provisions cannot be exercised in a manner that would diminish, undermine, or compromise those rights, interests, or arrangements.

Indigenous governments are often empowered to enter into agreements involving their historical territories and title lands. These agreements can take many forms, from wide ranging nation-to-nation agreements, such as final land claim agreements, to agreements between First Nations and industry participants or proponents pertaining to specific projects or developments, such as impact benefit agreements.

These agreements often provide important rights or commitments to benefit and protect Indigenous communities and their way of life, including essential commitments to environmental protections, protections for historical landmarks and cultural heritage sites, as well as essential funding, economic benefits, and employment opportunities for Indigenous communities to promote their self-sufficiency.

In the ANU’s view, these essential agreements and arrangements, often entered into pursuant to the constitutional rights of First Nations, should not be compromised or undermined by the application of the *Code*.

We therefore recommend that provision should be added to the *Code* providing that, wherever reasonably possible, the *Code* and collective agreements should be interpreted in a manner to avoid a conflict with arrangements or agreements entered into by Indigenous communities on behalf of their members, and that in the event of a conflict, the arrangement or agreement entered into by the Indigenous government should govern.

iv. **Recommendation #3: Recognize the Rights of Indigenous Persons to Choose Their Own Representation**

Indigenous workers face unique barriers to finding stable employment, obtaining key skills and training, and progressing within their chosen professions. The needs, desires, values, and commitments of many members of Indigenous communities do not always match the assumptions of the broader Canadian public and workforce. Ensuring their ability to remain with employers and unions of their choosing is important to ensure that Indigenous workers are given every opportunity to succeed.

Similarly, the promotion of Indigenous owned and operated businesses is critical to advancing the interests of Indigenous persons, as well as the broader self-sustainability of Indigenous communities. We must build up that economic capacity in order to achieve sustainability within our communities. However, this cannot be done when the mechanisms in the *Code* are used to undermine the stability and viability of these businesses.

Given the importance of promoting Indigenous owned businesses and Indigenous participation in the workforce to the project of reconciliation, every step should be taken to ensure that they are not disadvantaged or harmed through the operation of the *Code*.

One key example of how the *Code* can be used to undermine the needs and interests of Indigenous workers and employers is through collective agreements for projects that limit participation to members of certain designated unions. These agreements typically require Indigenous workers to join these designated unions to work on these projects, interfering with their existing representation or collective agreements, and require Indigenous businesses to give up their existing workforces and employment terms as a condition of participation on these projects.

In effect, these arrangements often impose the economic development goals of the government and traditional unions onto Indigenous communities, rather than reflecting the needs and desires of these communities, which they are able to define for themselves.¹⁰

Inevitably, such agreements fail to take into account the actual needs of Indigenous persons and communities, and rely on flawed or inaccurate assumptions about how Indigenous groups may be able to or want to participate in economic development.¹¹

Forcing Indigenous workers into employment and union relationships that do not reflect their desires or values, or that may expose them to discrimination or a diminution of status, can be extremely counterproductive to their development and progression within their chosen professions or trades. Likewise, depriving Indigenous owned businesses of their

¹⁰ Jodi Miles, and Lisa Berglund, [B.C's community benefits agreement makes assumptions about economic justice for Indigenous workers](#), Policy Options, October 18, 2021.

¹¹ See Jodi Miles, and Lisa Berglund, [B.C's community benefits agreement makes assumptions about economic justice for Indigenous workers](#), Policy Options, October 18, 2021.

stable workforces and existing collective bargaining relationships can often harm the viability of those businesses.

In both case, such measures are corrosive to the principle of reconciliation, particularly where the projects in question are tied to the traditional territories of the Indigenous workers or businesses.

For these and other reasons, it is essential for Indigenous persons to have the freedom to choose their preferred employers and union representation. They should not be forced through any arrangement authorized by the *Code* to join particular unions or be hired by particular employers as a condition of working on particular projects.

Rather, they must have the unimpeded freedom to choose for themselves whether to join a union, by whom to be represented, and with which employers they choose to work.

By the same token, Indigenous owned or operated businesses must be able to obtain work on projects while maintaining their existing workforces, which are often made up of workers from within their communities, in whom they have established relationships of trust and confidence. They should not be forced into artificial employment or collective bargaining arrangements designed to promote the interests of the government and certain designated unions at the expense of the rights, interests, and needs of Indigenous communities themselves.

Therefore, the *Code* should be amended to include provisions that protect Indigenous workers and Indigenous businesses from being forced into particular union, employment, or collective bargaining relationships as a condition of working on certain projects.

D. Conclusion

In a recent decision, Justice Kent discussed “the importance of moving along the path to reconciliation”, and observed that “(t)hat path is not a straight one, nor is it an easy one. It is not a pleasant amble through the woods. It will continue to be tough slogging as we get it right.”¹²

The BC Government has repeatedly committed to this principle of reconciliation, and has taken some important (albeit tentative) steps to formalize those commitments, such as the enactment of *DRIPA*.

It is now time to put these commitments into effect, not only for the benefit of all Indigenous workers BC, but in the public interest in seeing meaningful reconciliation achieved in our lifetimes.

The ANU submits that adopting these three key recommendations, at least as a starting point, will demonstrate a clear commitment to the rights and interests of Indigenous

¹² [837386 Yukon Inc. v Yukon \(Government of\)](#), 2023 YKSC 19, para 9.

persons in the context of labour relations, and will represent an important step towards reconciliation.

DocuSigned by:
Mary French
259B1F518CE34F0...

Mary French
President
All Nations Union

JOINT SUBMISSION BY THE BC BUILDING TRADES & BCBCBTU

Reply Submission to the Labour Relations Code Review

May 2024

AUTHORITY

This submission is respectfully submitted on behalf of the 20 local craft construction unions that represent more than 40,000 highly skilled unionized construction workers in B.C.



The BC Building Trades provides coordination and support to affiliated construction unions.

BCBCBTU

Bargaining Council of
BC Building Trades Unions

The Bargaining Council of BC Building Trades Unions is the exclusive bargaining agent in negotiations with CLR for member unions with craft bargaining units in ICI construction.

#207-88 Tenth Street, New Westminster, BC V3M 6H8

BCBCBTU

Bargaining Council of
BC Building Trades Unions



The BC Building Trades and the Bargaining Council of BC Building Trades Unions (BCBCBTU) appreciates the opportunity to respond to submissions made to the Labour Relations Code Review Panel.

The BC Building Trades is the umbrella organization for the 20 local unions that work in British Columbia's building, construction and maintenance sectors. We represent more than 40,000 highly skilled unionized construction workers in this province.

The BCBCBTU is a council of trade unions under the *Labour Relations Code*. We are the exclusive bargaining agent in negotiations with the Construction Labour Relations Association of B.C. (CLR) on behalf of our member unions with craft bargaining units in ICI construction.

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.

The special nature of the construction industry and the unique labour relations setting that it produces must be recognized in any consideration of changes to the *Code*.

The Construction Labour Relations Association of B.C. has made several recommendations that we feel would harm the labour relations environment and infringe on worker rights with respect to picket lines.

We welcome this opportunity to provide our feedback to the BC Labour Relations Code Review Panel.

Sincerely,

BRYNN BOURKE
Executive Director
BC Building Trades

GEOFF HIGGINSON
President
Bargaining Council of BC Building Trades Unions

Jurisdictional Assignment Plan

CLR's Submission states:

"CLR recommends that the Code be amended to provide that the only recourse from a JAplan decision, including recourse by way of reconsideration or appeal, is to the Labour Relations Board. There ought not to be an additional, ancillary avenue which is not subject to the *Code*."

Our Position

The BC Building Trades and the BCBCBTU disagree with the requested amendment to the *Code*. The JAplan was jointly created by the BC Building Trades and the CLR and is administered by the Society for the Jurisdictional Assignment Plan of the B.C. Construction Industry. The members of the Society are directors appointed in equal number by the BCBT and the CLR. The JAplan was born in the late 1970s of a cooperative effort between the CLR and the BC Building Trades to address a recognized problem, avoid government regulation and remain part of the North American-wide system of dispute resolution.

The JAplan Memorandum of Understanding provides:

Article III

It is recognized by both parties that due to time loss, wildcats, disruption of work continuity and the ensuing poor publicity that there is a real and ever-present danger of governmental intervention in the question of construction jurisdictional disputes.

Article IV

It is further recognized that the already existing interventions by governments in certain other jurisdictions have not been found satisfactory or desirable by either Employer or Employee organizations. It is agreed that a mutually acceptable Plan freely negotiated by both parties is a preferable resolution to the problem.

The JAplan in British Columbia is and always has been part of a larger international system of dispute resolution. It is "within and supplementary to" what is now the "Plan for the Settlement of Jurisdictional Disputes in the Construction Industry" (the "Building Trades Department's Plan" or as the CLR calls it the "Canadian jurisdictional assignment plan"): Memorandum of Understanding establishing the Jurisdictional Assignment Plan, Article II.

The JAplan does not and was not intended to supplant the Building Trades Department's plan. As set out in Article VII of the memorandum of agreement:

There is agreement by both parties that a local board of adjudication, operating on a basis independent of the central Impartial Jurisdictional Disputes Board [the then dispute resolution body under what is now the Building Trades Department's Plan], or its successor [now an arbitrator appointed under the Building Trades Department's Plan], has inherent dangers that are unacceptable to either party. Firstly, such a Board would run contrary to the expressed wishes of larger

National or International organizations. Secondly, such a Board, working singly here or followed by similar Boards in other political jurisdictions would have the ultimate effect of splintering the “work jurisdiction” of all Trades and would hence lead to subsequent complexity of assignment for other than possibly local Contractors. It is understood that the office of Umpire will closely follow the precedents and systematic decisions of the Impartial Jurisdictional Disputes Board, or its successor, in order that systematic, orderly and unified progress will take place in British Columbia that is not in conflict with the greater jurisdictions of the International Unions or National or International Contractor Associations.

The Procedural Rules of the JAplan, Article X provide:

Any party or person bound by a decision of the Umpire may apply for a jurisdictional award to the Impartial Jurisdictional Disputes Board, or its successor, created by the Building and Construction Trades Department, AFL-CIO, [i.e., an arbitrator appointed under the Building Trades Department’s Plan] and such person or party shall be bound by all of the Procedural Rules and Regulations of the said Impartial Jurisdictional Disputes Board, or its successor, so far as may be applicable, and shall be bound by any decision of the said Impartial Jurisdictional Disputes Board, or its successor, (including any decision of the international appeal board provided therein) as if such decision were a decision of the Jurisdictional Assignment Umpire of the British Columbia Construction Industry.

The CLR is asking the Panel to undermine the twin pillars of the JAplan: self-regulation while remaining part of a larger North American-wide plan. CLR wants the Government to intervene in the Plan and eliminate the connection to the larger North American-wide Plan.

The unspoken impetus for this request is the modernization of the Building Trades Department’s assignment criteria.

The work assignment criteria in the JAplan are set out in Article VII of the Procedural Rules of the JAplan:

PROCEDURES TO BE USED BY THE UMPIRE

Decisions of Record and Agreements of Record established by or recorded by the Impartial Jurisdictional Disputes Board, established international trade practice, Prevailing Practice as defined, together with a reasonable acceptance of considerations for efficiency and capacity to furnish construction services to the public at reasonable cost, shall be accepted by the Umpire as factors in assigning work, (see also Article VII, 2(h) of the Procedural Rules and Article VII of the Memorandum of Understanding).

The work assignment criteria in Article VII of the Procedural Rules of the JAplan came from and were substantially the same as the work assignment criteria in the 1977

Building Trades Department plan. Since 1977, the Building Trades Department criteria have changed while the BC JAplan criteria have remained the same.

The Building Department Plan lists the work assignment criteria in Article V Section 8:

In rendering his decision, the Arbitrator shall determine:

(a) First whether a previous agreement of record or applicable agreement, including a disclaimer agreement, between the National or International Unions to the dispute governs;

(b) Only if the Arbitrator finds that the dispute is not covered by an appropriate or applicable agreement of record or agreement between the crafts to the dispute, he shall then consider [other assignment criteria] ...

In the result, there now are a number of differences in the work assignment criteria. For example, the Building Trades Plan now gives greater prominence to agreements and the “prevailing practice in the locality” than those factors receive under the B.C. JAplan.

Returning to the B.C. JAplan, Article VII of the Memorandum of Understanding requires the BC Umpire to follow the decisions rendered under the Building Trades Department Plan:

... It is understood that the office of Umpire will closely follow the precedents and systematic decisions of the Impartial Jurisdictional Disputes Board, or its successor, in order that systematic, orderly and unified progress will take place in British Columbia that is not in conflict with the greater jurisdictions of the International Unions or National or International Contractor Associations.

The B.C. Umpire is thus both bound by the now outdated work assignment criteria of the BC. JAplan and the revised work assignment criteria under the Building Trades Department Plan.

The CLR and the Building Trades unions have addressed this issue in a number of different forums – including in bargaining. The CLR likes the outdated assignment criteria from the 1970s and has tried unsuccessfully to lock in those criteria.

The JAplan has worked well for decades by providing an effective framework for resolving jurisdictional disputes. As recognized in Article IV of the JAplan, past government interventions in other jurisdictions have not been found satisfactory by both sides, which is the reasons that both sides agreed that a freely negotiated plan is preferable. CLR now seeks to undo that agreement before this Committee.

Definition of Strike

CLR's Submission states:

"CLR recommends that this Committee not make any recommendation to amend the definition of "strike" which would have the effect of permitting provincially regulated employees to refuse to cross a federal picket line."

Our Position

The BC Building Trades and the BCBCBTU agree that the Committee ought not to make any recommendations to amend the *Code* definition of "strike". However, we say so for very different reasons.

In the recent decision in *Vancouver Shipyards Co. Ltd., 2022 BCLRB 146* the reconsideration panel of the Board unfairly held that Section 1 of the Code does not include federal picket lines.

This case was extremely damaging to the workers effected in the shipyards. Workers were pitted against workers. In one case, a wife was forced to cross the picket line of her husband. And the unions faced crushing penalties if they did not advise their provincially regulated members to cross the picket line.

Bill 9, the *Miscellaneous Statutes Amendment Act, 2024* recently amended the definition of 'strike' in the Labour Code, ensuring that provincially regulated workers can choose to respect the picket lines of federally regulated workers or that of another province.

We support the passage of this legislation and the revised definition of strike.

Section 41

CLR's Submission states:

"CLR recommends that Section 41.1(2) be amended to provide that CLR is the exclusive employer bargaining agent with the sole authority to bargain PCAs/PLAs with the members of the Bargaining Council."

Our Position

The BC Building Trades and the BCBCBTU disagree with CLR's recommendation.

CLR is a voluntary association of employers. For good reasons, the *Code* does not require any construction employer to engage CLR as its bargaining agent and as far as we know no construction employers are calling for the amendment of section 41.1(2) to impose CLR as their bargaining agent with respect to PCAs/PLAs. This, we say, speaks volumes. Construction employers are of course free to engage CLR as their bargaining agent with respect to PCAs/PLAs if they so choose, but there is no reason to compel construction employers to do so.

CLR's unparticularized assertion that "exclusionary coalitions" have excluded BCBCBTU members from PCAs/PLAs is inaccurate. PCAs/PLAs are typically negotiated by the BCBCBTU. If any BCBCBTU members are unfairly excluded from a project, they have resource pursuant to the duty of fair representation provision of the *Code* in that regard. The fact that no BCBCBTU member unions appear to assert such exclusionary practice before this Committee or to the Board also speaks volumes.

It is also unclear how CLR's engagement as the employer bargaining agent could affect conduct on the union-side of the bargaining table.

The Relationship between CMAW and BCRCC

CLR's Submission states:

"CLR recommends that the Code be amended to remove the restriction on raids between CMAW and BCRCC so that employees may choose which of the two competing organizations they wish to belong to."

Our Position

The prohibition on raids is something that BCRCC and CMAW expressly agreed to (see in BCLRB No. B277/2007 at para. 21). It is one of a number of conditions required by the Board that facilitate the sharing of the representation of the craft of carpentry on the BCBCBTU. Another condition required by the Board is that the existence of the two carpenter unions not significantly undermine the functioning of the BCBCBTU (BCLRB No. B135/2015).

The removal of the restriction on raids recommended by CLR without revisiting the status quo of the sharing of the representation of the craft of carpentry between CMAW and the BCRCC (which was recently dissolved) is in our submission ill advised as it would potentially undermine the industrial stability of the ICI construction industry and the functioning of the BCBCBTU.

In Conclusion

The CLR is asking the Review Panel to recommend a fundamental change to the JAplan. CLR is seeking to change it from a voluntary plan that is part of a larger evolving plan to a plan stuck in the 1970s that is no longer consistent with the North American-wide system of dispute resolution. The CLR has been trying to get the Building Trades to agree to this change for a few years now – including making bargaining proposals to this effect – but they have not been successful. The BC Building Trades and the BCBCBTU vehemently oppose this change.

The BC Building Trades and the BCBCBTU support the recently amended definition of strike and submit that no further revisions are necessary in that regard.

With respect to section 41.1(2) there is no reason whatsoever to impose CLR as the exclusive employer bargaining agent with respect to PCAs/PLAs. There is no evidence of the exclusionary practices asserted by CLR and the fact that no construction employers or trade unions appear to be calling for this speaks volumes.

With respect to the restriction on raids between BCRCC and CMAW, it is something that they expressly agreed to, and the legislature should not step in to undo this agreement – particularly given its importance to the sharing of the craft of carpentry on the BCBCBTU.

/JL MoveUP



WORKER RIGHTS IN THE GIG ECONOMY

ENSURING EQUAL EMPLOYMENT STANDARDS
PROTECTIONS FOR ALL WORKERS



WORKER RIGHTS IN THE GIG ECONOMY: ENSURING EQUAL EMPLOYMENT STANDARDS PROTECTIONS FOR ALL WORKERS

September 2022

An executive summary of this report is available at bcfed.ca/precariouswork



BC Federation of Labour
5118 Joyce Street
Vancouver, BC V5R 4H1
t: 604.430.1421
bcfed.ca

The BC Federation of Labour represents more than 500,000 members of affiliated unions, working in every sector of the economy and every corner of the province.

The BCFED has a long and proud history of fighting for the rights of all working people.

The goals of the BCFED are best exemplified by the slogan: *"What we desire for ourselves, we wish for all."*

The BC Federation of Labour's work spans across the territories of two hundred and three First Nations that make up the area colonially known as the province of British Columbia. Our office is located on the unceded and traditional territory of the Halq'eméylem speaking peoples, including xʷməθkʷəy̓əm, Skwxwú7mesh, sə́lílwətaʔt, qiqéyt, kʷikʷə́ləm, and Stz'uminus First Nations. As part of our ongoing commitment to build meaningful relationships with the original peoples of these lands, the BCFED's reconciliation plan framework can be found at bcfed.ca.



Contents

Introduction.....	4
Gig and platform workers	5
Proliferation of gig work	6
Claimed advantages of gig work.....	7
Why do companies misclassify workers?	9
Gig workers face a long list of challenges.....	10
Cost of misclassification	20
Gig companies push back	23
Policy solutions	24
Conclusion	29
Appendix 1: Jurisdictional comparisons	30
References.....	31
Glossary	35



Introduction

THE BC GOVERNMENT HAS COMMITTED to developing a precarious work strategy. The BC Federation of Labour believes that a critical first step in that strategy is to address the underlying cause of precarious work: the misclassification of employees as independent contractors.

Misclassification deprives workers of employment standards protections including paid sick leave, minimum wage provisions, termination and severance requirements, and more. It puts employers who treat their workers fairly at a competitive disadvantage. When workers are misclassified, there are significant consequences for them and their families. And it deprives government of badly-needed revenue. These consequences have a ripple effect on our broader communities, economy, and social programs.

Addressing misclassification is a simple first step for the BC government because it relies on the current protections in place for workers. It does not require developing a new system or an elaborate set of rules. It works because it strengthens and reinforces the clear set of rules that already applies to the majority of workers in our province.

The employer-worker relationship is changing. According to preliminary results from the Understanding Precarity in BC Project's precarity survey (Strauss et al., forthcoming):

- 53% of workers do not have one employer that they expect to be working for a year from now and that provides 30 hours of work and pays benefits;
- 27% of workers do not receive any form of benefits from their employer;
- 46% lack extended health coverage and 41% lack dental benefits;
- 27% of women and 31% of men worked multiple jobs in the last three months — that number jumps to 33% for racialized workers; and
- 24% of men reported that 50% or more of their work is on-call.



Gig and platform workers

GIG WORK IS A FORM OF NON-STANDARD WORK where a worker is defined as an independent contractor or freelancer. Some workers choose this classification, but more often than not, workers are told they do not qualify or cannot work for a company as an employee. Gig work is not something new. It has been a long-used tactic by employers, and it affects a wide range of workers. Historically, we have seen misclassified workers in areas such as the construction trades, visual effects, graphic design, high technology, taxi industry, domestic work, hair styling, and personal care.

The BC Building Trades has been battling this issue for years. The BCBT's 2022 *Report on the Underground Economy* outlines the ongoing impact on workers, industry, and government. It estimates 14,000 workers are misclassified in the construction industry alone, with misclassification being highest among drywallers, painters, flooring installers, and tile installers (BCBT 2022).

With the emergence of app-based technologies, misclassification has grown and expanded into new areas. Ride hailing and food delivery are commonly understood as gig work. But platform-based gig work is performed in a variety of areas including personal shopping and chores, moving, yardwork, minor home improvement, and pet care.

More recently, gig work has been growing into a variety of professional roles including copy editing, translation, human resources, and graphic design. Some gig workers even provide caregiving and other health care services.

The “gigification” of work is steadily moving into new sectors and tasks as companies see an opportunity to capitalize on consumer demand and reduce overhead costs.

Given the expansion of and the popular interest in digital platform services, this paper predominantly focuses on examples from these industries.

With the emergence of app-based technologies, misclassification has grown and expanded into new areas. This paper predominantly focuses on examples from these industries.



Proliferation of gig work

THERE IS LIMITED DATA on the number of workers who are engaged in gig work in BC. Based on the growth in platform services and consumer uptake, however, it is fair to say that more workers than ever are engaged in gig work.

A Statistics Canada study using tax data found that gig work in Canada increased from 5.5 per cent of workers in 2005 to 8.2 per cent in 2016 (Jeon, Liu, & Ostrovsky, 2019). It shows British Columbia as having the highest number of gig workers in Canada, with 8.7 per cent of men and 10.7 per cent of women employed in gig work. Gig work is increasing at a greater rate in the metropolitan area of Vancouver than in Montreal and Toronto. Vancouver is currently the only studied area where more than 10 per cent of workers are engaged in gig work. This study covers tax data up to 2016 only — employment trends and the number of platform companies have significantly changed since then, so this almost certainly underestimates the current number of gig workers in BC.

In the Statistics Canada study, Jeon, Liu, and Ostrovsky (2019) found that the industries with the highest percentages of gig workers are professional, scientific and technical services, health care and social assistance, administrative support, waste management, and remediation services and construction. The study also confirms that gig workers tend to be lower paid — their income more often falls into the two lowest-income quintiles. Their data also shows that women are more represented in gig work than men.

The prevalence of gig work is supported by a more recent report (2021) from Payments Canada that estimates more than one in ten Canadian workers (13 per cent) are employed in the gig economy and one in three businesses (37 per cent) hire gig workers (Payments Canada, 2021).

Using a conservative 9.7 per cent prevalence rate and the March 2022 Labour Force Survey data that shows 2,737,800 employed workers in BC, we can estimate there are 265,500 or more workers in BC employed in the gig economy (Government of British Columbia, 2022).

In the US, where platform-based, gig-work companies have been operating longer, the Gig Economy Data Hub estimates between 25 and 35 per cent of workers earn all or some of their income in the gig economy (Gig Economy Data Hub, n.d.).



Claimed advantages of gig work

PLATFORM COMPANIES ARGUE that there are a number of advantages for workers in the gig work structure. They say workers can set their own hours, have the flexibility to meet other life needs, and earn pay quickly (Uber, n.d.-a).

Platform companies have resisted compliance with existing labour and employment laws, arguing that workers themselves do not want to be employees because it infringes on the flexibility enjoyed by workers. Yet there is nothing stopping an employer providing similar flexibility to workers covered by the *Employment Standards Act* (ESA).

And much of that “flexibility” disappears under real-world conditions.

Take the case of a ride-hail driver. Theoretically they can choose when to work, but if a driver wants to make a profit, they need to drive evenings and weekends, when there is a concert or an event, or when the weather is bad. Their schedule is significantly controlled by consumer demand and weather.

Companies exert control over workers’ schedules too. They use promotions and pay differentials to direct when and where ride-hail drivers work. Platform companies essentially schedule workers through peak pricing, multi-trip “bonusing” and weekend targets to control when workers can pick up profitable jobs (Uber, n.d.-b; Sun, Z., Xu, Q., & Shi, B., 2020; Meyer, C., n.d.; Lyft, 2019). Regular rates are low; to make ends meet, workers must accept work that qualifies for these pay differentials.

Uber calls its program “surge pricing.” When there are more customers, the price of a ride goes up to attract more drivers. Lyft calls its program “Personal Power Zones,” which are located in areas or at times where there is high demand (Lyft, 2019). If drivers pick up a ride in a purple zone, then drivers will receive a higher rate of pay. Pink zones offer the highest pay rate. Successive rides trigger higher payouts. Lyft says, “The longer you stay in the pink zone, the bigger your bonus gets” (Lyft, 2019). Workers who leave the zone will lose the pay differential.

These kinds of successive-trip pay differentials fly in the face of gig company claims that their model is designed to be flexible to workers looking to pick up the occasional job. These pay differentials demonstrate that companies assign profitable work to workers who work longer, continuous shifts,

In the US, the Gig Economy Data Hub estimates between 25 and 35 per cent of workers earn all or some of their income in the gig economy.

rather than just picking up a ride here and there. Lyft's website says, "you'll lose our bonus if you go offline, cancel or miss the next ride request" (Lyft, n.d.-a).

Workers need to seek out higher-paying fares because many companies entice new drivers with promotions and incentives (Lyft, n.d.-b; Uber, n.d.-c). These incentives are temporary, and when the promotions expire, workers find they are earning far less. The idea of a bonus fare is a misnomer — drivers need to pick up rides that offer wage differentials to make ends meet.

With platform companies holding all the cards in terms of pricing, workers have no control over how much they earn, even for working the same number of trips or hours. In Ontario, Minister of Labour Training and Skills Development Monte McNaughton cited a situation where "There was one worker that made \$1,500 one week and the next week, for the same hours, made \$500" (CBC, 2022). With no consistency or predictability with regard to earnings, workers may find themselves unexpectedly trapped into working extra days and hours just to make their monthly bills.

Workers also lose out on other key protections that provide genuine flexibility. For example, misclassified workers do not have access to paid sick leave, vacation days, or statutory holiday pay. Access to paid leave is critical for workers' physical and mental health and for their relationships with family and in their communities. Not being able to take a day off when you are sick or plan a paid vacation is not very flexible — and it puts our workplaces and communities at risk.

Platform companies say their workforce is made up of part-timers earning "extra" cash as if that is an excuse to offer them inferior work conditions. In fact, for an increasing number of workers, income from gig work is critical to their financial stability. Workers may work full-time for one company or cobble together work from multiple platform apps to earn a full-time living.

Whether gig work is a full-time or part-time job, workers who do platform work have a right to be treated with respect and dignity.

Platform companies want regulators to see them as tech companies, not service providers, and certainly not employers. They say they sell a technology service that workers can use to connect with customers. Workers, they say, benefit from their app because they get access to a customer base they may not have been able to attract on their own. They also benefit from the massive investment in traditional and social media advertising.

But these companies would not have any revenue without these workers. A ride-hail app is worthless without drivers and a delivery service does not function without cyclists and drivers. No company can run a task-providing app without workers to perform those jobs. A platform company is no more purely a tech company than an insurance company is purely an office management company; the services they sell, and the workers who deliver them, these primarily define them.

Why do companies misclassify workers?

MISCLASSIFICATION IS A DELIBERATE CHOICE made by employers so they can gain market advantage, maximize profits, and minimize responsibility. When a company is permitted to misclassify workers, they get an unfair advantage over the competition and get out of paying their fair share of the costs of doing business in our province and country.

The biggest advantage for these companies is lower overhead costs. They avoid paying the employer share of payroll expenses such as Employment Insurance (EI) and Canada Pension Plan (CPP) contributions, and into other programs like the employer health tax. They do not have to administer a health and safety program or pay Workers' Compensation Board (WCB) premiums. They eliminate *Employment Standards Act* (ESA) obligations like statutory holiday and vacation time. The BC Building Trades report estimates the labour cost advantage to be 20 per cent for companies that misclassify workers (BCBT, 2022).

When factoring in other savings, companies can reduce their cost even more. The BC Building Trades estimate did not include the cost of other worker rights such as the new provision for up to five days of paid sick leave, or liabilities for compensation for length of service. And companies can save even more because they do not need to spend as much on human resources and payroll staffing.

By misclassifying workers, companies retain absolute control of all the terms and conditions of employment, as their workforce has virtually no ability to unionize and bargain collectively. This means inferior pay, benefits, and working conditions for workers.

The competitive advantage these companies gain is significant. If the BC government is not willing to stop this practice and enforce a level playing field, what is the incentive for employers to classify their workers correctly?

By misclassifying workers, companies retain absolute control of all the terms and conditions of employment, as their workforce has no ability to unionize and bargain collectively. This means inferior pay, benefits, and working conditions for workers.



Gig workers face a long list of challenges

GIG COMPANIES WANT WORKERS to make an expensive trade-off — and while they trumpet so-called flexibility, they never talk about what workers lose in exchange. Here's where misclassified workers are missing out.

NO CONTROL OVER TERMS AND CONDITIONS OF WORK

Most gig workers have no control over their terms and conditions of employment. The companies impose take-it-or-leave-it terms and conditions and leave no room to negotiate. Despite touting flexibility, their contracts are not very flexible at all. The companies set remuneration rates that vary based on factors determined solely by the company. They control the advertising, allocate the work, and can terminate workers from using their services without compensation for length of service.

Workers have no input or control in how the app algorithms work. These trade secrets are highly guarded by platform companies. Workers are left at the mercy of a programmer's code to access work and for compensation. For example, earnings for drivers are highly controlled by the company. According to Nicole Moore, a volunteer organizer with Rideshare Drivers United, companies frequently change terms and conditions:

When I started driving, I was guaranteed 80% of the fare. If that's where we were right now, you would see a very different equation on the road. Drivers are seeing 20, 30, 40% of the fare at times (Bursztynsky, 2021).

Additionally, workers are required to agree to non-negotiable terms and conditions of employment and onerous contracts that dictate how disputes are handled. For example, Uber contracts contained a clause that required disputes to be arbitrated under a specific set of rules and only in the Netherlands. A worker had to take a challenge to Canada's Supreme Court to get an order that their case could be heard in Ontario (Uber Technologies Inc. v. Heller, 2020).

Often companies require workers to agree disputes will be handled through an internal process or individual adjudication rather than a formal legal proceeding. These agreements often prohibit any

type of group or class action (DoorDash, n.d-a); Érudit, n.d.). And of course, without a union there is no grievance or arbitration process. Though these types of clauses have been successfully challenged in some jurisdictions, workers may feel bound to the process specified in the agreement and may not have the resources to fund a legal challenge.

NO PROACTIVE ENFORCEMENT TO PREVENT MISCLASSIFICATION

Though current BC employment laws may in fact cover the majority of these workers, there has been no proactive enforcement from the Employment Standards Branch (ESB) or clear direction to employers on how to classify these workers. Add that it will take years for a worker to get a determination on employment status and any determination will be challenged to the highest court. BC's ESB currently has wait times of over a year to have a complaint heard by an officer.

Additionally, workers are fearful to come forward as they cannot afford to lose their jobs and financial security. They fear repercussions from their employers, not to mention the significant challenge for an individual worker to stand up to a multinational company. These powerful companies have deep pockets and top legal teams. The current class action case filed in 2017 by David Heller, a former driver, alleging he and other drivers were misclassified as independent contractors and denied employment rights by Uber, has already gone through extensive legal proceedings and the main case is still waiting to be heard five years later (Uber Technologies Inc. v. Heller, 2020). Needless to say, individual workers are left with little chance to successfully make their case.

Only aggressive proactive investigation and enforcement of the employment conditions of platform companies will begin to address the misclassification of gig workers.

NO EMPLOYMENT STANDARDS ACT COVERAGE

When workers are misclassified as independent contractors, they are not being guaranteed minimum employment standards. Ensuring that these workers are properly classified would solve the following problems.

No minimum wage or time worked guarantees

There is no guarantee of minimum wage or what constitutes time at work. For example, most platforms pay for "active" time worked only, when workers are actively driving a passenger, performing a task, or biking to deliver a meal. However, much of a worker's time is spent preparing materials, getting from one location to the next to pick up the job, waiting for an order to be prepared or a customer to show up, or performing upkeep and maintenance on equipment. Platform companies only pay for a fraction of the time gig workers work.

Yet these in-between times account for a significant share of workers' time. A 2019 study commissioned by Uber and Lyft found that 28 to 37 per cent of the distance driven by ride-hail drivers was covered while waiting or searching for a ride request (Fehr and Peers, 2019). And while kilometres covered doesn't directly correlate to time, it does provide insight into the significant amount of uncompensated time drivers spend logged into the app.

Even when companies share earnings data — like the recent report produced by Accenture for Uber suggesting drivers in Vancouver net \$25 per hour — it is based on only a fraction of the time actually worked. Further, these estimates only account for some operating costs and omit others, including the most significant: the cost of vehicle ownership (Accenture, 2021-a).

In contrast, Ontario Minister of Labour, Training and Skills Development Monte McNaughton said in his ministry's investigation into working conditions in ride hailing, drivers reported earnings as low as \$3 or \$4 per hour (CBC, 2022), well below the \$15 per hour minimum wage in Ontario.

No regulation of hours of work and overtime

There is no regulation of hours of work or overtime for gig workers. When demand is high, workers who take on long hours are not receiving overtime compensation. Many ride-hail drivers report they put in 80-hour weeks or more to make ends meet or to access multi-trip bonuses to help them pay their bills (Rodino-Colocino, 2019).

However, these long hours are not always reflected in individual company statistics as they do not track hours spent working for their competitors. Many drivers work for multiple apps to make ends meet, switching between ride hailing and food delivery for example.

Companies know that working long hours is a problem and can compromise safety. In 2018, Uber announced it would be enforcing a mandatory break after 12 straight hours of driving (CBC, 2018). However, the system does not track time that drivers may be working for their competitors. It also does not provide workers with overtime pay.

Termination without cause and no right to compensation for length of service

Many platform companies rely on a customer review system and retain the ability to both prioritize the allocation of work and to terminate workers based on this and other data points. This system means workers can be deactivated (terminated) by the platform company at any time.

Workers have little and usually no control over reviews. Current and former TaskRabbit employees, commenting on the site Indeed.com, report they have no ability to respond to bad reviews and their ratings suffer if they refuse a job (TaskRabbit employee reviews, n.d.). They also report little follow up from the company when they want to challenge a bad review, customer complaint, or payment dispute.

And when a worker is terminated without ESA protection, the company does not pay them compensation for length of service, and they are unlikely to qualify for Employment Insurance. Workers are left with no pay and little recourse to pursue an unfair termination.

NO COMPENSATION FOR BUSINESS EXPENSES

Workers covered by the ESA cannot be charged for an employer's business expenses:

Deductions 21 (2) — An employer must not require an employee to pay any of the employer's business costs except as permitted by the regulations (Employment Standards Act, 2022).

Yet gig workers are stuck footing the bill for all kinds of business expenses. Platform companies do not provide compensation for workers' fuel, most insurance costs, maintenance expenses, equipment, or any other legitimate business expenses.

This negatively impacts the wages earned by workers and distorts workers' perception of their take-home earnings. In a video on Uber's website, driver Laurel Chase speaks directly about the challenges she faces budgeting and managing car maintenance and repairs. She says,

...As amazing as Uber is in regards to the flexibility of your time and making your own money, budgeting is on a different level because we still have to maintain our vehicles, make sure that they're clean, they're gassed up and if anything needs to be fixed etc. etc. ... But for me it's when you make it, then it's like, okay, do I have any car expenses? So it's like automatically I need to, I know that my car, my vehicle needs to be on the road. So I have to keep my vehicle in functioning form. So you are making, but at the same time it is going right back out. So you're not seeing anything going into a savings so to speak... (Uber, n.d.-d).

The Accenture profile, commissioned by Uber, reports on working conditions for drivers in BC. The report estimates drivers' earnings and makes it clear that Uber considers drivers to be on the hook for their expenses. Further, the report fails to account for the most significant cost of driving — purchasing a vehicle. The report assumes that drivers already own a vehicle suitable for transporting passengers (Accenture, 2021-b).

However, Uber's own website (Uber, n.d.-e) acknowledges that not all prospective drivers already own a car, or if they do, that the vehicle is suitable and meets the company's qualifying criteria (Uber, n.d.-f) for transporting passengers. To address this, Uber has rental car agreements with both Hertz and Avis. The website says, "We launched the Vehicle Marketplace program to help drivers without access to a qualifying car find an opportunity to earn with Uber" (Uber, n.d.-g).

While some may choose to rent, other drivers may choose to upgrade by purchasing a new vehicle in order to meet the criteria, transport more passengers, or ensure better reviews for cleanliness, condition, and comfort of their riders.

Cars used for ride hailing will depreciate more quickly due to excessive mileage and drivers may also buy cars more frequently and do more maintenance due to the wear and tear of continuous driving. Workers also solely bear the brunt of price shocks — like rising gas prices. None of these legitimate business costs are compensated by companies.

Some companies require workers to purchase other types of equipment. SkipTheDishes requires its couriers to have two types of thermal bags to transport deliveries. Workers can either buy a bag from

SkipTheDishes or have another thermal bag approved based on a specific set of criteria (SkipTheDishes, n.d.-a).

TaskRabbit's site makes it clear to prospective customers that Taskers are independent contractors and that their equipment needs will vary (TaskRabbit, n.d.-a). But they do provide a detailed list of recommended equipment for Taskers (TaskRabbit, n.d.-b). The list includes various types of cleaners, a tool kit, and a ladder, power drill, and dolly. None of these items are provided by TaskRabbit.

NO HEALTH AND SAFETY PROTECTIONS OR COMPENSATION FOR INJURY OR OCCUPATIONAL DISEASE

When workers are misclassified, there are no health and safety standards or rules in place. This means there are no industry standards established by the Workers' Compensation Board. Employers are not advising workers of hazards, conducting risk assessments, outlining safe work practices, or providing training. Businesses with gig workers are not required to include them in health and safety committees.

As a result, it is possible for entire industries to operate without any health and safety standards at all. On-the-job safety is left to the workers; it is essentially a free-for-all. It places all the responsibility for safety on the worker and none on the employer. For example, during the COVID-19 pandemic each worker was responsible for developing and implementing their own COVID-19 safety protocols.

Gig workers do not have the right to refuse unsafe work. Workers providing home repair, moving, maintenance, and similar services through companies like TaskRabbit may find themselves in unsafe working conditions and feel pressured to complete unsafe work, due to fear of a negative review. In app-based employment, negative reviews can have significant consequences for future employment and even result in termination from the app. This pressure to complete jobs is especially high when workers first start with a new company and are trying to build an online reputation.

Misclassified workers lose out on compensation in the case of injury. While businesses may save big bucks by avoiding required contributions to the WCB, workers bear the financial risk. Workers have identified this as a big concern. In one of Uber's own promotional videos, a driver, Laurie Pringle, talks about her fear of being in a serious car accident while working and not having sufficient coverage. She talks about the need for critical benefits and protections for her and her family. She says,

...we're lucky but uh I know when you are out on the road, these days, we pass by a lot of terrible car accidents out there, and you don't want to think that if someone were hurt while driving for Uber or something else in their job regardless of where they work there wouldn't be adequate benefits to support them as they recover and need to get back to full health (Uber, n.d.-h).

While workers have the option to purchase Personal Option Protection (POP) from the WCB, coverage is limited, and few workers know about its availability. Uber's car insurance may cover drivers like Laurie in certain situations, but she wouldn't have the option of a WCB claim and may not be sufficiently covered depending on the type of work she is doing when the accident occurred. More on this below.

Misclassification also puts consumers at risk of liability. When a homeowner hires a worker to perform a task and the worker is injured, the homeowner may face a lawsuit or a ruling from WCB that they are liable to pay a fine.

UNDER-INSURANCE AND PERSONAL LIABILITY

Workers may find they lack appropriate insurance to protect them in case of an injury or accident involving themselves, a customer, or a member of the public.

According to ICBC, ride-hail drivers are on the hook for insurance costs unless they have a trip accepted or are actively engaged on a trip (ICBC, n.d.-a). Once a driver accepts a trip, the ride-hail company's insurance policy applies, but the time spent between trips is not covered. In the case of an at-fault accident, collision coverage for Uber, for example, has a \$2,500 deductible.


TaskRabbit does not provide any insurance coverage for Taskers for personal injury, property damage, or any other legal liability (TaskRabbit, n.d.-c). Instead, they offer to assist with disputes with a Happiness Pledge. The pledge is available to users and clients to resolve issues at TaskRabbit's "discretion on a case-by-case basis." There are hard caps on payouts — a maximum of \$10,000 for most areas (TaskRabbit, n.d.-d) and a long list of terms and conditions to be eligible for payment.


According to the company's website, SkipTheDishes drivers are independent contractors responsible for their own insurance (SkipTheDishes, n.d.-b). In BC, commercial-delivery-vehicle insurance may be required to perform deliveries. This insurance can be significantly more expensive than business-use insurance and many drivers may not be aware of the requirement, leaving workers under-insured and possibly unprotected (CBC, 2020-a) in case of a serious accident. The impact could be financially devastating.


While the DoorDash website says it provides vehicle insurance for workers "on an active delivery," the extent of coverage and whether it applies in Canadian jurisdictions is unclear. Its website says, "You are considered on active delivery from the time you accept a delivery request until the time your customer receives their order, or the order is canceled" (DoorDash, n.d.-b). It is not specified whether the insurance complies with ICBC requirements for commercial delivery vehicles. DoorDash's contract states that workers are responsible for their own insurance and the website clarifies its insurance only kicks in if the worker's personal insurer denies the claim. The insurance does not cover driving to pick up an order or an event occurring between leaving a vehicle and delivering an item to someone's door. The coverage also does not apply to deliveries performed on bikes or scooters.


Workers may find they lack appropriate insurance to protect them in case of an injury or accident involving themselves, a customer, or a member of the public.


INSURANCE PROTECTION SUMMARY


UBER 			
Vehicle insurance provided?	Yes	WCB or non-vehicle personal injury or liability insurance provided?	No
<p>Coverage: Commercial auto applies when ride request is accepted or when transporting passengers, collision with \$2,500 deductible (Uber, n.d.-i).</p>		n/a	
<p>Notes: Personal insurance required when app is active, but no trip accepted, coverage does not include provision of a rental car to ensure drivers can continue to earn.</p>			

LYFT 			
Vehicle insurance provided?	Yes	WCB or non-vehicle personal injury or liability insurance provided?	No
<p>Coverage: Commercial auto applies when ride request is accepted or when transporting passengers, collision with \$2,500 deductible (Lyft, n.d.-c).</p>		n/a	
<p>Notes: Personal insurance required when app is active, but no trip accepted, coverage does not include provision of a rental car to ensure drivers can continue to earn.</p>			

SKIPTHE DISHES 			
Vehicle insurance provided?	No	WCB or non-vehicle personal injury or liability insurance provided?	No
<p>Coverage: n/a</p>		n/a	
<p>Notes: ICBC website says: "Your vehicle may need to be rated in a delivery rate class depending on what else you use the vehicle for and how often you use the vehicle for delivery" (ICBC, n.d.-b).</p>			

DOORDASH 			
Vehicle insurance provided?	Unclear	WCB or non-vehicle personal injury or liability insurance provided?	No
Coverage: ?		Notes: Contract explicitly states: “CONTRACTOR agrees that CONTRACTOR will not be eligible for workers’ compensation benefits through DOORDASH, and instead, will be responsible for providing CONTRACTOR’s own workers’ compensation insurance or occupational accident insurance, if permitted by law” (DoorDash, n.d.-d).	
Notes: Contract states drivers are responsible for their own insurance. But another page states commercial auto insurance is provided but only if your claim is rejected by your personal insurance. It is not clear if this applies in Canada (DoorDash, n.d.-c).			

TASK RABBIT 			
Vehicle insurance provided?	No	WCB or non-vehicle personal injury or liability insurance provided?	No
Coverage: n/a		Notes: TaskRabbit offers a Happiness Pledge to compensate losses including property damage, theft, or bodily injury during the performance of a task not otherwise covered by personal insurance. This policy requires claims within 14 days and has hard caps of \$10,000 (TaskRabbit, n.d.-e).	
Notes: n/a			

INSTACART 			
Vehicle insurance provided?	No	WCB or non-vehicle personal injury or liability insurance provided?	No
Coverage: n/a		Notes: Contract states workers are responsible for the following coverage: WCB, disability and health insurance, EI, CPP, liability insurance, commercial automobile insurance, GST (Instacart. n.d.-b).	
Notes: Contract states that “securing and paying for automobile insurance in coverage amounts consistent with legal requirements, including any required no fault automobile insurance or commercial liability insurance” (Instacart, n.d.-a) is the responsibility of the worker.			

NO BENEFITS

The vast majority of platform companies do not offer employees extended health or dental benefits or life insurance, yet access to benefits is a priority for workers.

In response to this pressure from workers, platform companies are devising complex plans so as to appear as though they are addressing this demand from workers. However, these companies aim to do so without incurring the true costs of running an effective benefits program or making contributions to federal benefit programs like EI and CPP.

Schemes like Uber's Flexible Work+ propose an explicit trade-off: swapping employment protections for participation in a forced-savings benefit program (Archer and Mandryk, 2022). While such programs may offer a tantalizing headline, the fine print tells a different story. As explained by lawyers Simon Archer and Josh Mandryk, this is an expensive trade-off for governments and a "bad deal for workers." Workers lose out on access to employment protections like minimum wage, overtime, and statutory holiday pay. Governments give up their share of payroll taxes, EI, and CPP contributions — contributions that could add up to more than double what Uber is willing to contribute to the benefits plan.

In return, workers would participate in a savings plan and allocate a percentage of their earnings to a benefit type of their choosing. But the benefits on offer may provide little value to workers. Flexible Work+ (Uber, 2021) does not guarantee a defined benefit plan in exchange for contributions, e.g., \$500 a year for physiotherapy. The program would be available only to workers who meet a particular threshold for hours worked, potentially leaving many workers without access to any benefits. And it is not clear how employer contributions would be applied. Will Uber match employee contributions 50/50 or will they contribute at a lower rate?

To truly make a difference for workers, benefit plans must be built on top of basic employment rights.

“ Uber kept dropping prices every season to gain more ridership to satisfy their growth, and it didn't matter to Uber if the driver is not even making minimum wage... And the worst part is, they call us partners, [but] they make the rules, set the price, and they even choose the cars you can use.”

— Fawzi Kamel, Uber driver, who spoke to former UBER CEO about changes in driver remuneration (Andrews, T. & Larimer, S., 2017).

LIMITED ACCESS TO EMPLOYMENT INSURANCE AND RETIREMENT SECURITY

Independent contractors lose out on access to critical supports and programs. For example, they have limited access to Employment Insurance. The government loses employer contributions critical to the health of the program. Workers are only eligible to buy into special coverages at their own cost and receive no compensation during a work slowdown or when laid off.

Workers also see reduced CPP benefits. Again, employer contributions are not made on their behalf. Workers will pay the full share out of their pocket, and their contributions are likely to be smaller as they are calculated based on net income. This incentivizes maximizing write-offs in order to minimize income tax, but the long-term consequence of lower-reported income is a lower pension.

As a result, workers may end up on other programs like social assistance and disability as well as other government-funded and community-coordinated programs. These programs generally provide a smaller benefit, and the full cost of these programs is borne by taxpayers, not the platform companies who should be responsible for making contributions.

COMPARISON OF EMPLOYEE AND INDEPENDENT CONTRACTOR RIGHTS

Employment right in BC	Employee	Independent contractor
\$15.65/hr minimum wage	Yes	No
Overtime pay	Yes	No
Employment Insurance	Yes	(worker can pay in for limited coverage)
Workers' compensation	Yes	(worker can pay in for limited coverage)
Five paid sick days	Yes	No
Five days domestic and sexual violence leave	Yes	No
Statutory holiday and vacation pay	Yes	No
Right to refuse unsafe work	Yes	No
Right to a join union	Yes	No
Notice/compensation for length of service (severance)	Yes	No
Compensation for business expenses	Yes	No
Employer contribution to CPP	Yes	No

*Adapted from Economic Policy Institute (Rhinehart, McNicholas, Poydock, & Mangundayao, 2021-a).



Cost of misclassification

PRECARIOUS WORK IS A DETERMINANT OF POPULATION HEALTH

Multiple studies have found that precarious work is associated with a number of health issues (van der Noordt, IJzelenberg, Droomers, Proper, 2013) including both mental and physical illness (Gunn, Håkansta, et al., 2021). Additionally, given that precarious work is more likely to impact workers of intersecting identities, it can compound existing health inequities in our communities.

Here in Canada, the Poverty and Employment Precarity in Southern Ontario (“PEPSO”) study (Lewchuk-Lafèche et al., 2015) found that employment precarity was strongly associated with “poorer mental health” and that for low-wage, precarious workers it “is associated with poorer general health and with poorer mental health.”

A recent research article citing two Italian studies focused on the male population determined that “precarious employment contributes through financial strain to reduce the mental health related quality of life and to increase mental disorders such as symptoms of depression or dysthymia” (Ferrante-Fasanelli et al., 2019).

Knowing this, decision makers have a responsibility to shape public policy to deliver better health outcomes for workers and reduce the negative impact of systemic discrimination.

CONSEQUENCES FOR COMMUNITIES AND GOVERNMENT

It is not just workers who suffer. We all pay the price when workers are misclassified.

All work should be good work. The pandemic cast a light on all the essential work performed in our communities. We saw the critical role of front-line service work, the need for resilient supply chains and how many low-wage workers have been keeping our communities safe and our economy running. The BC government has an obligation to ensure that all workers are treated with fairness and dignity. Workers need to be protected from exploitation and must have access to a pathway to justice.

Misclassification distorts the economy and allows some companies to gain advantage by gaming the system. This hurts companies that are complying with our laws and paying their fair share. It makes it harder for legitimate actors to compete.

Misclassifying workers has a broader impact — it destabilizes the social safety net by underfunding some government programs and relying on other programs to fill the gaps. This shifts costs from business to taxpayers.

Many government programs rely on an economy of scale to deliver benefits at an affordable contribution rate; misclassification depletes the participation base. This includes programs like EI, Workers' Compensation, and CPP. Businesses contribute lower payroll and income taxes, and workers make lower contributions to EI, CPP, and income tax as well. The BC Building Trades estimate a loss of \$115.4 million annually in direct program revenue to the government (BCBT, 2022). This is for one sector alone.

In many cases, a lack of coverage shifts costs onto other government programs. For example, injured workers without WCB coverage do not receive compensation for health care costs they incur as a result of a workplace injury. When a WCB claim is accepted, the health care system is compensated for the cost of treating the illness or injury. When WCB coverage does not apply, the health care system must absorb the costs. Further, workers who suffer long-term illness or become disabled as a result of an injury may require other provincial and federal programs such as disability assistance, social assistance, and other community supports. These programs are funded by taxpayers rather than employers.

There are other examples of this shift in responsibility. During the pandemic, the federal government needed to act quickly to expand EI coverage to thousands of independent contractors who lost their jobs. Due to their employment status, they did not qualify for coverage under the current EI rules. Workers needed support and the EI program stepped up. However, independent contractors and more significantly their employers did not contribute to the EI system to cover the cost of these payouts.

Misclassifying workers has a broader impact — it destabilizes the social safety net by underfunding some government programs and relying on other programs to fill the gaps. This shifts costs from business to taxpayers.

NO ACCESS TO THEIR CHARTER RIGHT TO JOIN A UNION

When workers are misclassified as independent contractors, they may lose out on their right to join a union. Without a union, gig workers lack the power to improve their pay and working conditions, have no representation, and lack a binding and balanced dispute resolution mechanism.

While platform companies tout the benefits of their employment model, there is growing global evidence that workers are not satisfied with their working conditions and want to see improvements:

- Canadian Pizza Hut delivery drivers allege they were misclassified and filed a lawsuit (Mojtehedzadeh, 2022);
- A class action lawsuit alleging misclassification has been filed against Uber and Uber Eats and will be heard in Canada (Samfiru Tumarkin, LLP, 2021; Fric, L., Rowe, M.A., Scott, L., 2021);
- In September 2021, a group of DoorDash employees in California protested outside CEO Tony Xu's home to demand better wages and working conditions (Leahy, G., 2021);
- Canadian couriers working for Foodora joined Gig Workers United and won the right to unionize before the company shuttered its Canadian operations (CBC, 2020-b);
- US app-based workers engaged in a one-day strike over their working conditions (Paul, K., 2021); and
- South African drivers in Gauteng engaged in a three-day strike over misclassification and working conditions (Khumalo, S., 2022).

It is already extremely difficult for low-wage workers to form a union. Multinational corporations have deep pockets and lots of tools to fight back. That is why it has taken decades, a pandemic, a new president, and multiple attempts to unionize the first corporate Starbucks coffee shops and an Amazon warehouse in the US (Isidore & O'Brien, 2022). The first Canadian corporate Starbucks was unionized in 2021 in Victoria.

It is no small feat to stand up to a multinational corporation and win. And gig workers face an even bigger hurdle — workers who are classified as independent contractors are unable to unionize unless they are successful in challenging misclassification first. Further, gig workers do not have a central dispatch or common work location, making it difficult for them to connect with each other to organize.

While gig workers have had some victories around the right to unionize, they have been only partially successful. In the UK, Uber drivers were found to be workers but not full employees (Uber BV and others v Aslam and others, 2021). This gives drivers access to some basic rights like minimum wage, statutory holidays, some hours of work protections, and the right to unionize, but not full protection through minimum employment standards (Government of United Kingdom, n.d.).

In Ontario, bicycle couriers employed by Foodora were found to be dependent contractors (White, R., 2020). Under Ontario laws, dependent contractors are not covered by their employment standards laws but are entitled to unionize and have access to other rights like notice of termination (Cavalluzzo, 2019).

As noted throughout this document, the impact of a lack of employment standards coverage is significant. In 2018, the BC government brought in legislation to ensure that all employees, including those covered by a collective agreement, would have access to minimum employment standards. But if workers are not classified as employees, even if they win the right to bargain a collective agreement, the floor will not apply. These workers are stuck negotiating from a weaker position — either from zero or from a set of reduced rights, rather than being able to build up from a floor established in the applicable employment legislation.



Gig companies push back

PLATFORM COMPANIES HAVE SHOWN they will go to considerable lengths to avoid the responsibility of being employers. In January 2020, the California government brought in a new law, AB-5 (Assembly Bill 5, 2019), designed to protect gig workers and give them access to employment standards protections. It included bringing in a new test, the ABC test,^a to determine whether a worker is an employee or independent contractor. The legislation enshrined employee status for most gig workers.

But gig companies fought back.

In California, platform companies funnelled \$204 million into Proposition 22 (n.d.), a ballot measure designed to counteract AB-5 legislation. They proposed Proposition 22 to exclude app-based drivers and food delivery workers from basic employment rights and prevent new laws that allow unionization from being brought in. Then they marketed the ballot measure as a tool to help the very workers it would hurt.

Marketing focused on centring the voice of workers and on issues like access to a livable wage. Yet once it passed, workers would have fewer employment protections. Companies like Uber and Lyft also threatened to leave California if the ballot measure was lost (Hussain, Bhuiyan, & Menezes, 2020).

The ballot measure did indeed succeed, but the fight for workers' rights did not end there. Workers took a case forward challenging the law. The Alameda Superior Court of California recently overturned Proposition 22, finding it unconstitutionally denied employment rights to workers (Chen, B., & Padin, L., 2021; *Castellanos vs. State of California*, 2021).

California brought in a new law to protect gig workers and give them access to employment standards protections. But gig companies fought back.

a A: The first person is free from the direct or indirect control and direction of the second person in connection with the performance of the work, both under the terms of the contract for the performance of the work and in fact. B: The first person performs work that is outside the usual course of the second person's business. C: The first person is customarily engaged in an independently established trade, occupation or business of the same nature as that involved in the work performed.



Policy solutions

THE RAMPANT MISCLASSIFICATION OF WORKERS is a system-wide problem that requires concrete action on behalf of the government. The impact is too great and too widespread to ignore.

The BC government must adopt a multi-prong approach that strengthens legislation and regulations and ensures compliance through a rigorous program of enforcement.

WE ARE CALLING ON THE BC GOVERNMENT TO:

1. Implement the ABC model as the legal test for determining employee status

The ABC test, first used in California, is now the gold standard for determining who is an employee. The ABC test is superior to the previously-relied-on Common Law test, as it presumes employee status unless three clear conditions are met (see page 23). The ABC test is easier to apply, reflects changes in our modern workplaces, and recognizes the differential power between workers and employers.

Twenty-one US states use the ABC test to determine eligibility for unemployment insurance, or access to basic employment standards. Six of those states — California, Connecticut, Massachusetts, Nebraska, New Jersey, and Vermont — apply the ABC test for both unemployment insurance and access to basic employment standards (Rhinehart, et al., 2021-b).

The BC government must adopt a multi-prong approach that strengthens legislation and regulations and ensures compliance through a rigorous program of enforcement.

The ABC test, first used in California, is now the gold standard for determining who is an employee.

In Canada, the Ontario NDP tabled a bill called the *Preventing Worker Misclassification Act, 2021* (Bill 28, 2021) in an unsuccessful attempt to bring in the ABC test. We recommend the following test is used for coverage under the *Employment Standards Act* and *Workers Compensation Act*.

The person doing the work will be considered an employee unless the employer shows:

- A: The worker is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact;
- B: The worker performs work that is outside the usual course of the hiring entity's business; and
- C: The worker is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed.

2. Reverse the onus of proof so workers are considered employees unless the employer can prove otherwise

The government should reverse the onus of proof so that it falls to employers to prove that a worker is not an employee. This would send a strong message to employers that are misclassifying workers. It means an employer would have to produce clear evidence to establish that the worker is not an employee. This also supports balance in the workplace, as reversing the onus recognizes that employers hold more power over terms and conditions of employment: employers do the hiring and they for the most part set the terms and conditions of employment in lower-wage and non-unionized workplaces.

The *Canada Labour Code* was amended by the federal Liberal government to bring in this change as follows:

Marginal note: Burden of proof— 167.2 If, in any proceeding in respect of a complaint made under this Part, the employer alleges that the complainant is not their employee, the burden of proof is on the employer (Canada Labour Code, 2021-a).

This change has been in force since January 1, 2021.

Additionally, the Wynne government in Ontario brought in a similar law as part of the reforms recommended by the Ontario Changing Workplaces review. These improvements have since been repealed by the Ford government.

From Ontario's now-repealed bill 148:

Onus of proof— (2) Subject to subsection 122 (4), if, during the course of an employment standards officer's investigation or inspection or in any proceeding under this Act, other than a prosecution, an employer or alleged employer claims that a person is not an employee, the burden of proof that the person is not an employee lies upon the employer or alleged employer (Bill 148, 2017).

3. Eliminate exemptions and carve-outs to the *Employment Standards Act*

There should be one set of rules that applies to all workers. That is the strongest basis for building compliance. The BC government must resist the urge to create new carve-outs as they erode protections for all workers by creating a lack of clarity about which rules apply in which scenario. In BC, we have seen direct evidence of this in the abuse of the ESA's high-tech exemption, confirmed in a 2018 determination won by film animators (Employment Standards Branch, 2018).

Getting rid of the sexist server wage was an important step, but many other exemptions remain. Farmworkers are excluded from many protections including minimum wage, overtime, and statutory holiday pay. High-tech workers are excluded from a host of provisions including hours free from work, overtime, and statutory holiday pay (Government of British Columbia, 2016). The BC government should continue to remove exclusions contained in the ESA and regulations, including the high-tech exemption and exemptions for farmworkers.

We strongly oppose the creation of a third category of worker with fewer rights. We believe the majority of gig workers are misclassified and should be covered by the full protection of the ESA.

4. Develop a robust plan for education and enforcement, including high penalties for employers found to knowingly misclassify workers

Laws are not effective without enforcement. The government must clearly communicate its expectations of employers.

This can be achieved through an express prohibition on misclassification. Again, an example is included in the *Canada Labour Code*:

Prohibition— 167.1 An employer is prohibited from treating an employee as if they were not their employee in order to avoid their obligations under this Part or to deprive the employee of their rights under this Part (Canada Labour Code, 2021-b).

To support a prohibition on misclassification, the government has a responsibility to sufficiently resource the ESB and hire and train more enforcement officers to enforce the law. This must include education coupled with clear directives, compliance blitzes in problem sectors, and random spot checks.

There should be one set of rules that applies to all workers. That is the strongest basis for building compliance. The BC government must resist the urge to create new carve-outs as they erode protections for all workers by creating a lack of clarity about which rules apply in which scenario.

Enforcement needs to be coupled with stiff penalties. Financial penalties for businesses are an effective way to deter abuse. However, in BC, officials continue to be reluctant to issue penalties even for flagrant violations. Penalties are also not increased based on the number of employees impacted. So an employer that underpays 100 employees is treated the same way as an employer with a single violation. Further penalties only increase for violations of the same provisions of the ESA. Employers can violate different sections of the ESA within a three-year period and not see their financial penalties increase.

The BC government should:

- Ensure that penalties for a contravention of the ESA increase in proportion to the number of employees affected;
- Require penalties to increase every time any provision of the ESA is violated by an employer; and
- Increase penalty amounts in the regulation retroactively and on a go-forward basis by at least the rate of increase in the annual BC inflation rate since 2001 — 39.3 per cent in 2021 (will exceed 40 per cent in 2022).

5. Identify sectors where worker classification is abused and legislate employment standards coverage

The government should provide clear direction to workers and businesses. It can remove confusion by establishing sectors where workers are classified as employees. While the steps above will be effective, they still require challenges to be brought forward or proactive enforcement to be conducted by the ESB. This will take a significant amount of resources and, given the experience in other jurisdictions, workers will be tied up fighting legal challenges for years. This can be avoided by providing direction, through legislation and regulation, to workers and employers.

6. Take concrete action to end discrimination in workplaces to support the rights and full participation of workers who are Indigenous, Black, racialized, neuro-diverse, women, two-spirit, gender diverse, diverse in sexual orientation, or living with a disability

Though data on the demographics of gig workers is limited, we know that workers from equity groups are over-represented in low-wage and precarious work in general (Block et al., 2019). There are a number of actions the BC government can take to address discrimination in the workplace, including bringing in pay equity legislation, ensuring that translation services are available at the Employment Standards Branch, providing additional resources to the Human Rights Commission and Tribunal, and advocating for the federal government to provide migrant workers with permanent residency upon arrival and open work permits.

The BC government must also continue with important work like development and implementation of the Gender Based Violence Action Plan, the implementation of the Declaration Act Action Plan, and using the data collected as part of the *Anti-racism Data Act* to make informed decisions on the effectiveness of government programs for racialized British Columbians.

Though data on the demographics of gig workers is limited, we know that workers from equity groups are over-represented in low-wage and precarious work in general. There are a number of actions the BC government can take to address discrimination in the workplace.



Conclusion

MISCLASSIFICATION OF WORKERS is a widespread and growing problem with significant consequences for workers, business, our communities, and government programs. It cannot be effectively challenged by individual workers or small groups of workers. Fixing misclassification will take strong policy leadership from the BC government.

In particular, the BC government needs to take six concrete actions to stop misclassification:

- Implement the ABC model as the legal test for determining employee status;
- Reverse the onus so workers are considered employees unless the employer can prove otherwise;
- Eliminate exemptions and carve-outs to the *Employment Standards Act*;
- Develop a robust plan for enforcement, and establish high penalties for employers who are found to knowingly misclassify;
- Take action to end discrimination in workplaces to support the rights and full participation of workers who are Indigenous, Black, racialized, neuro-diverse, women, two-spirit, gender diverse, diverse in sexual orientation, or living with a disability; and
- Identify sectors where worker classification is abused, and legislate employment standards coverage. There are some sectors that require crystal-clear guidance to keep workers from being tied up for years fighting legal challenges.

Misclassification of workers is a widespread and growing problem with significant consequences for workers, business, our communities and government programs. It cannot be effectively challenged by individual workers or small groups of workers.

Appendix 1

JURISDICTIONAL COMPARISONS

ABC test or similar used to determine employment rights (Rhinehart et al., 2021-c)	Reverse onus
<ul style="list-style-type: none">■ California■ Connecticut■ District of Columbia (construction)■ Illinois (construction)■ Maryland (construction and landscaping)■ Massachusetts■ Nebraska■ New Jersey■ New York (construction)■ Vermont	<ul style="list-style-type: none">■ <i>Canada Labour Code</i>■ Ontario (repealed by Ford government)■ Australia (<i>Fair Work Act, 2009</i>)■ European Union — Directive of the European Parliament and of the Council

References

- Accenture. (2021-a, b). The driver experience: Profile and earnings of drivers on Uber in Vancouver between July 2020 and June 2021. uber.com/en-CA/newsroom/a-closer-look-at-earnings-for-drivers-using-uber-in-canada/
- Andrews, T., & Larimer, S. (2017). 'I must fundamentally change and grow up': Uber CEO Travis Kalanick's big apology. [washingtonpost.com/news/morning-mix/wp/2017/03/01/i-must-fundamentally-change-and-grow-up-uber-ceo-travis-kalanicks-big-apology/?variant=c44b726edf25a662](https://www.washingtonpost.com/news/morning-mix/wp/2017/03/01/i-must-fundamentally-change-and-grow-up-uber-ceo-travis-kalanicks-big-apology/?variant=c44b726edf25a662)
- Archer, S. & Mandryk, J. (2022). Uber's Proposal for Portable Benefits Is a Poison Pill. jacobin.com/2022/02/uber-gig-worker-portable-benefits-flexible-ontario-doug-ford
- Assembly Bill 5. Worker status: employees and independent contractors, Cal. Assemb. 5, (2019). leginfo.ca.gov/faces/billTextClient.xhtml?bill_id=201920200AB5
- BC Building Trades (BCBT). (2022). The underground economy in British Columbia's construction industry: Assessing the Impact. bcbuildingtrades.org/wp-content/uploads/2022/04/2022-Underground-Economy-Report.pdf
- Bill 148, An Act to amend the *Employment Standards Act*, 2000 and the *Labour Relations Act*, 1995 and to make related amendments to other Acts, 2nd Session, 41st Legislature, Ontario, 2017. (Repealed, Bill 47, 2018). ola.org/en/legislative-business/bills/parliament-41/session-2/bill-148
- Bill 28, An Act to amend the *Employment Standards Act*, 2000 with respect to the employer-employee relationship, 2nd Session, 42nd Legislature, Ontario, 2021. ola.org/en/legislative-business/bills/parliament-42/session-2/bill-28
- Block, S., Galabuzi, G. & Tranjan, R. (2019). Canada's Colour Coded Income Inequality. Canadian Centre for Policy Alternatives. policyalternatives.ca/publications/reports/canadas-colour-coded-income-inequality
- Bursztynsky, J. (2021). Why many Uber and Lyft drivers aren't coming back. cnbc.com/2021/07/04/why-many-uber-and-lyft-drivers-arent-coming-back.html
- Canada Labour Code* (2021-a, b). (R.S.C., 1985, c. L-2). laws-lois.justice.gc.ca/eng/acts/l-2/page-22.html#h-342171
- Castellanos v. State of California. RG21088725. (Calif. Sup. Ct., 2021). s3.documentcloud.org/documents/21046905/prop-22-unconstitutional.pdf
- Cavalluzzo. (2019). Employees, dependent contractors and independent contractors: What's the difference? What misclassification can mean to you. cavalluzzo.com/resources/blog/post/item/employees-dependent-contractors-and-independent-contractors-what-s-the-difference
- CBC. (2018). Uber's new feature will force drivers to take break after 12 straight hours. cbc.ca/news/business/uber-safety-driver-break-1.4544816
- CBC. (2020-a). Meal delivery drivers often not insured if using personal car, broker warns. cbc.ca/news/canada/kitchener-waterloo/food-app-delivery-drivers-may-not-be-insured-1.5574785

- CBC. (2020-b). Foodora couriers are eligible to join union, labour board rules. [cbc.ca/news/canada/toronto/foodora-couriers-are-eligible-to-join-union-labour-board-rules-1.5475986](https://www.cbc.ca/news/canada/toronto/foodora-couriers-are-eligible-to-join-union-labour-board-rules-1.5475986)
- CBC. (2022). Ontario set to introduce 'historic' new legislation to give gig workers \$15 minimum wage. [cbc.ca/news/canada/toronto/ontario-legislation-gig-workers-minimum-wage-1.6366844](https://www.cbc.ca/news/canada/toronto/ontario-legislation-gig-workers-minimum-wage-1.6366844)
- Chen, B., & Padin, L. (2021). Prop 22 was a failure for California's app-based workers. Now, it's also unconstitutional. nelp.org/blog/prop-22-unconstitutional/
- DoorDash. (n.d.-a,d). Independent contractor agreement – Canada. help.doordash.com/dashers/s/ica-ca?language=en_US
- DoorDash. (n.d.-b,c). Does DoorDash have auto insurance? help.doordash.com/dashers/s/article/Does-DoorDash-have-auto-insurance?language=en_US
- Employment Standards Act* ([RSBC 1996] Chapter 113). [bclaws.gov.bc.ca/civix/document/id/complete/statreg/00_96113_01#section21](https://www.bclaws.gov.bc.ca/civix/document/id/complete/statreg/00_96113_01#section21)
- Employment Standards Branch (ESB). (2018). Determination: Cinesite Vancouver, formerly known as Nitrogen Studios Canada Inc. and Third Party Complaint ER#426308. drive.google.com/file/d/1adi2nB7oMhpxAF1nh74lCT2VrfrVY3qu/view
- Érudit. (n.d.) Access to justice for gig workers: Contrasting answers from Canadian and American courts. erudit.org/en/journals/ri/2020-v75-n3-ri05572/1072349ar/
- Fair Work Act*. (No. 28, 2009) Sect. 361. www5.austlii.edu.au/au/legis/cth/num_act/fwa2009114/s361.html
- Fehr and Peers. (2019). Estimated TNC Share of VMT in Six US Metropolitan Regions. fehrandpeers.com/what-are-tncs-share-of-vmt/
- Ferrante-Fasanelli et al. (2019). Is the association between precarious employment and mental health mediated by economic difficulties in males? Results from two Italian studies. bmcpublichealth.biomedcentral.com/articles/10.1186/s12889-019-7243-x
- Fric, L., Rowe, M.A., & Scott, L. (2021). The ride isn't over: Uber v Heller certified as a class action. osler.com/en/blogs/classactions/august-2021/the-ride-isn-t-over-uber-v-heller-certified-as-a-class-action
- Gig Economy Data Hub. (n.d.). How many gig workers are there? gigeconomydata.org/basics/how-many-gig-workers-are-there
- Government of British Columbia. (2016). High Technology Companies Factsheet. <https://www2.gov.bc.ca/gov/content/employment-business/employment-standards-advice/employment-standards/forms-resources/high-technology-companies>
- Government of British Columbia (2022). Labour force statistics highlights. www2.gov.bc.ca/assets/gov/data/statistics/employment-labour-market/lfs_highlights.pdf
- Government of United Kingdom. (n.d.). Employment status. gov.uk/employment-status/worker
- Gunn, Håkansta, et al. (2021). Initiatives addressing precarious employment and its effects on workers' health and well-being: a protocol for a systematic review. systematicreviewsjournal.biomedcentral.com/articles/10.1186/s13643-021-01728-z
- Hussain, S., Bhuiyan, J., & Menezes, R. (2020). How Uber and Lyft persuaded California to vote their way. latimes.com/business/technology/story/2020-11-13/how-uber-lyft-doordash-won-proposition-22
- ICBC. (n.d.-a). Insurance and licensing requirements for ride-hailing. icbc.com/insurance/commercial/Pages/ride-hailing.aspx

- ICBC. (n.d.-b). Auto Insurance. [icbc.com/FAQ/Pages/insurance.aspx](https://www.icbc.com/FAQ/Pages/insurance.aspx)
- Instacart. (n.d. a-b). Contracts-Canada. [shoppersinstacart.com/contracts](https://www.shoppersinstacart.com/contracts)
- Isidore, C., & O'Brien., S. Amazon and Starbucks union votes are small wins – but important ones – for US labor. [cnn.com/2022/04/13/business/amazon-starbucks-union-votes/index.html](https://www.cnn.com/2022/04/13/business/amazon-starbucks-union-votes/index.html)
- Jeon, S., Liu, H. & Ostrovsky, Y. (2019). Measuring the gig economy in Canada using administrative data. www150.statcan.gc.ca/n1/pub/11f0019m/11f0019m2019025-eng.htm
- Khumalo, S., (2022). 'We are not making any profit' – Uber, Bolt drivers on strike. [news24.com/fin24/companies/we-are-not-making-any-profit-uber-bolt-drivers-on-strike-20220322](https://www.news24.com/fin24/companies/we-are-not-making-any-profit-uber-bolt-drivers-on-strike-20220322)
- Leahy, G. (2021). DoorDash drivers go to CEO's door to demand fair wages and working conditions. [48hills.org/2021/09/door-dash-drivers-demand-that-they-get-fair-wages-and-working-conditions/](https://www.48hills.org/2021/09/door-dash-drivers-demand-that-they-get-fair-wages-and-working-conditions/)
- Lewchuk-Lafleche et al. (2015). The precarity penalty, The impact of employment precarity on individuals, households and communities—and what to do about it. [pepso.ca/documents/precariety-penalty.pdf](https://www.pepso.ca/documents/precariety-penalty.pdf)
- Lyft. (n.d.-a). Earn More When It's Busy With Bonus Zones. [lyft.com/hub/posts/bonus-zones](https://www.lyft.com/hub/posts/bonus-zones)
- Lyft. (n.d.-b). Earn a 25% power driver bonus on all rides* for the first 3 months when you become a Lyft driver, [lyft.com/driver-bonus](https://www.lyft.com/driver-bonus)
- Lyft. (n.d.-c). British Columbia Insurance Policy. help.lyft.com/hc/en-ca/all/articles/360034937073-British-Columbia-Insurance-Policy
- Lyft. (2019). Find high demand with personal power zones. [lyft.com/hub/posts/personal-power-zones](https://www.lyft.com/hub/posts/personal-power-zones)
- Meyer, C. (n.d.). Ridehailing on the verge of pricing perfection. cars.stanford.edu/blog/ridehailing-verge-pricing-perfection-0
- Mojtehdzadeh, S. (2022). Pizza Hut faces \$150 million class action over alleged misclassification of delivery drivers. [thestar.com/news/gta/2022/01/26/pizza-hut-faces-150-million-class-action-over-alleged-misclassification-of-delivery-drivers.html](https://www.thestar.com/news/gta/2022/01/26/pizza-hut-faces-150-million-class-action-over-alleged-misclassification-of-delivery-drivers.html)
- Paul, K., (2021). Uber and Lyft drivers join day-long strike over working conditions. [theguardian.com/technology/2021/jul/21/uber-lyft-drivers-strike-app-based-work-gig-economy](https://www.theguardian.com/technology/2021/jul/21/uber-lyft-drivers-strike-app-based-work-gig-economy)
- Payments Canada. (2021). Canada's gig economy has been fuelled by the pandemic – but workers and businesses are challenged by payments mismatch. [payments.ca/about-us/news/canada%E2%80%99s-gig-economy-has-been-fuelled-pandemic-%E2%80%93-workers-and-businesses-are-challenged](https://www.payments.ca/about-us/news/canada%E2%80%99s-gig-economy-has-been-fuelled-pandemic-%E2%80%93-workers-and-businesses-are-challenged)
- Proposition 22. (n.d.). [vig.cdn.sos.ca.gov/2020/general/pdf/top1-prop22.pdf](https://www.vig.cdn.sos.ca.gov/2020/general/pdf/top1-prop22.pdf)
- Rhinehart, L., McNicholas, C., Poydock, M., & Mangundayao, I. (2021-a, b, c). Misclassification, the ABC test, and employee status. [epi.org/publication/misclassification-the-abc-test-and-employee-status-the-california-experience-and-its-relevance-to-current-policy-debates/#:~:text=AB5%20establishes%20that%20the%20ABC,laws%2C%20with%20certain%20limited%20exceptions](https://www.epi.org/publication/misclassification-the-abc-test-and-employee-status-the-california-experience-and-its-relevance-to-current-policy-debates/#:~:text=AB5%20establishes%20that%20the%20ABC,laws%2C%20with%20certain%20limited%20exceptions)
- Rodino-Colocino, M. (2019). Uber drivers report 80-plus hour workweeks and a lot of waiting. [theconversation.com/uber-drivers-report-80-plus-hour-workweeks-and-a-lot-of-waiting-115782](https://www.theconversation.com/uber-drivers-report-80-plus-hour-workweeks-and-a-lot-of-waiting-115782)
- Samfiru Tumarkin, LLP. (2021). Uber class action lawsuit. [stlawyers.ca/blog-news/uber-class-action-lawsuit/](https://www.stlawyers.ca/blog-news/uber-class-action-lawsuit/)

- SkipTheDishes. (n.d.-a). Thermal bags. courier-help.skipthedishes.com/hc/en-ca/articles/360060024153-Thermal-Bags
- SkipTheDishes. (n.d.-b). Providing proof of insurance. courier-help.skipthedishes.com/hc/en-ca/articles/360060023433-Providing-Proof-of-Insurance
- Strauss, K., Ivanova, I. (forthcoming) Precarity in British Columbia. Canadian Centre for Policy Alternatives BC Office and the SFU Morgan Centre for Labour Research.
- Sun, Z., Xu, Q., & Shi, B. (2020). Dynamic pricing of ride-hailing platforms considering service quality and supply capacity under demand fluctuation. hindawi.com/journals/mpe/2020/5620834/
- TaskRabbit. (n.d.-a). What supplies will my tasker have? support.taskrabbit.com/hc/en-ca/articles/360049548472-What-Supplies-Will-My-Tasker-Have-
- TaskRabbit. (n.d.-b). What supplies should I have as a tasker? support.taskrabbit.com/hc/en-ca/articles/360052684512-What-Supplies-Should-I-Have-as-a-Tasker-
- TaskRabbit. (n.d.-c). What kind of insurance does TaskRabbit offer? support.taskrabbit.com/hc/en-ca/articles/204409470-What-kind-of-insurance-does-TaskRabbit-offer-
- TaskRabbit. (n.d.-d, e). The TaskRabbit happiness pledge terms (Canada). taskrabbit.ca/ca/en/pledge
- TaskRabbit employee reviews. (n.d.). ca.indeed.com/cmp/Taskrabbit/reviews#:~:text=Overall%2C%20fun%20and%20enjoyable.,can%20prove%20to%20ve%20challenging.
- Uber BV and others (Appellants) v Aslam and others (Respondents), 2021 UKSC 5. supremecourt.uk/cases/docs/uksc-2019-0029-judgment.pdf
- Uber Technologies Inc. v. Heller, 2020 SCC 16. decisions.scc-csc.ca/scc-csc/scc-csc/en/item/18406/index.do
- Uber. (2021). A modern approach to app-based work in Canada. uber.com/en-CA/newsroom/a-modern-approach-to-app-based-work-in-canada/
- Uber. (n.d.-a). Drive. uber.com/ca/en/drive/
- Uber. (n.d.-b). How surge pricing works. uber.com/ca/en/drive/driver-app/how-surge-works/
- Uber. (n.d.-c). Sign up now and receive up to \$1,000 extra cash bonus. uber-driver-reward.com/
- Uber. (n.d.-d, h). Together, we can reinvent app-based work. uber.com/ca/en/u/reinvent-work-together/
- Uber. (n.d.-e). Need a car to earn? uber.com/ca/en/drive/vehicle-solutions/
- Uber. (n.d.-f). Vehicle requirements. uber.com/ca/en/drive/vancouver/vehicle-requirements/
- Uber. (n.d.-g) Drive. uber.com/ca/en/drive/vehicle-solutions/#:~:text=How%20does%20Uber's%20program%20with,car%20at%20a%20low%20commitment
- Uber. (n.d.-i). Every trip is insured. uber.com/ca/en/drive/insurance/?utm_campaign=yourdrive&utm_medium=display-programmatic&utm_source=dbm
- van der Noordt, M., IJzelenberg, H., Droomers, M., Proper, K. (2013). Health effects of employment: a systematic review of prospective studies. pubmed.ncbi.nlm.nih.gov/24556535/
- White, R., (2020). How the Ontario Labour Board ruled Foodora workers are “employees” and not independent contractors. lawofwork.ca/how-the-ontario-labour-board-ruled-foodora-workers-are-employees/

PRECARIOUS WORK GLOSSARY

ABC test

The ABC test is now the gold standard for determining who is an employee. We recommend this test is used for coverage under the *Employment Standards Act* and *Workers Compensation Act*.

The person doing the work will be considered an employee unless the employer shows:

- A: The worker is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact;
- B: The worker performs work that is outside the usual course of the hiring entity's business; and
- C: The worker is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed.

App-based employment

Employment that operates through a software application, such as Uber or SkipTheDishes.

Common law test

This test focuses on how two key aspects function in an employment relationship: control and dependency. "Who is responsible for determining working conditions and financial benefits and to what extent does a worker have an influential say in those determinations?"^a

Dependent contractor

On a scale of employment relationship, this is an intermediate category in relation to the key factors of control and dependency. "A dependent contractor might set their own hours and hire their own employees but derive most of their income from a contract with one business, and thus be fairly dependent on that business to earn their living."^b Currently, the employment rights of dependent

a McCormick v. Fasken Martineau DuMoulin LLP, 2014 SCC 39 (CanLII), [2014] 2 SCR 108, canlii.org/en/ca/scc/doc/2014/2014scc39/2014scc39.html

b Law Students' Legal Advice Manual, Law Foundation of British Columbia, 2021, Chapter 9, p. 14, lslap.bc.ca/uploads/2/9/3/5/29358111/9_-_employment_law__2021_.pdf

contractors are limited to the right to unionize and the right to reasonable notice of termination.^c Dependent contractors may be covered by workers compensation if they meet the definition of a worker under the *Workers Compensation Act*.

Employee

Under the *Employment Standards Act*, an “employee” includes:

- (a) a person, including a deceased person, receiving or entitled to wages for work performed for another,
- (b) a person an employer allows, directly or indirectly, to perform work normally performed by an employee,
- (c) a person being trained by an employer for the employer’s business,
- (d) a person on leave from an employer, and
- (e) a person who has a right of recall.^d

Employer

Under the *Employment Standards Act*, an “employer” includes a person:

- (a) who has or had control or direction of an employee, or
- (b) who is or was responsible, directly or indirectly, for the employment of an employee.^e

Gig work

A form of non-standard work where a worker is defined as an independent or dependent contractor (or freelancer). Some workers choose this classification but, more often than not, workers are told by a company that they do not qualify or cannot accept work as an employee. Historically, gig work has included work in the construction trades, visual effects, graphic design, high technology, taxi industry, domestic work, hair styling, and personal care. Currently, app-based technologies are emerging as a significant sector of gig work. A gig company is a business that profits through this type of work.

c Cavalluzzo, *Employees, Dependent Contractors and Independent Contractors: What’s the Difference? What misclassification can mean to you*, 2019, cavalluzzo.com/resources/blog/post/item/employees-dependent-contractors-and-independent-contractors-what-s-the-difference

d *Employment Standards Act*, Definitions, current to July 13, 2022, bclaws.gov.bc.ca/civix/document/id/complete/statreg/00_96113_01#section1

e Ibid.

Independent contractor

A person who is self-employed, running their own business. “When deciding if a worker is an employee or an independent contractor, one of the main questions to ask is ‘whose business is it?’”^f

Misclassification

When employers incorrectly classify workers as independent contractors instead of employees. Misclassification deprives workers of employment standards protections including paid sick leave, minimum wage provisions, termination and severance requirements, and more.

Platform company

A business that operates through a software platform, such as Uber or SkipTheDishes.

Worker for the purposes of workers compensation

Under the *Workers Compensation Act*, a “worker” includes the following:

- (a) a person who has entered into or works under a contract of service or apprenticeship, whether the contract is written or oral, express or implied, and whether by way of manual labour or otherwise.^g

f Employment Standards Branch Factsheet, July 2016, gov.bc.ca/assets/gov/employment-business-and-economic-development/employment-standards-workplace-safety/employment-standards/factsheets-pdfs/pdfs/employee_or_contractor.pdf

g *Workers Compensation Act*, Definitions, current to July 13, 2022, bclaws.gov.bc.ca/civix/document/id/complete/statreg/19001_01#section1



Submission to the BC Ministry of Labour

Submission with respect to the
Discussion Paper “Proposing
Employment Standards and Other
Protections for App-Based Ride-Hail
and Food-Delivery Workers in
British Columbia

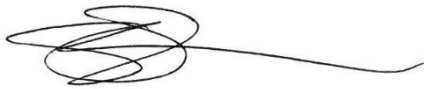
September 2023



Authority

The BC Federation of Labour (“Federation,” “BCFED”) and our affiliated unions are pleased to participate in the consultation on the BC Ministry of Labour’s Discussion Paper, “Proposing Employment Standards and Other Protections for App-Based Ride-Hail and Food-Delivery Workers in British Columbia.”


The BCFED represents more than 500,000 members of our affiliated unions, from more than 1,100 locals working in every aspect of the BC economy.



Sussanne Skidmore
President



Hermender Singh Kailley
Secretary-Treasurer

1000_23_sub_ss_gig_work_consultation_response_sept.docx/km^{move}

Introduction

We are pleased to see the BC government propose laws and regulations to better protect workers. You are joining governments across the globe that have already taken action to improve working conditions for ride-hail and food delivery workers.

Ride-hail and food delivery services are widely used in our province. These services themselves are in no way new -- companies have been moving goods and passengers for hundreds of years. All that is new is the use of smartphone-based applications, which have, to a significant degree, replaced traditional dispatch systems.

However, this app-dispatched gig work has been allowed to grow in BC outside of traditional employment standards, health and safety protections and labour laws. This has had harmful consequences for workers and for our province's programs and services.

The exclusion of these workers from basic protections is unacceptable and inconsistent with how we treat other sectors.

Workers in these jobs report a multitude of issues including low wages, long hours, exposure to harassment and violence, unfair suspensions and terminations, tip theft and more. These workers are organizing themselves into networks and raising their voices on social and traditional media, standing up and demanding change.

There is growing evidence that the majority of app-based work is being done by newcomers and racialized workers¹ and their exclusion from the rights and protections afforded to other workers is a systemic issue. Many of our previous and existing exclusions and exemptions to the *Employment Standards Act* ("ESA") also predominantly affect racialized workers — for instance, farmworkers. Allowing these app-based workers to continue to have substandard employment conditions is inconsistent with the *Human Rights Code* and the provincial government's commitment to address systemic racism.

¹ From the BCFED's recent survey of gig drivers, approximately three-quarters (74%) were immigrants and 83% were non-white.

Making exceptions for employers simply because they're app-based sets a terrible precedent. Employers in other sectors are very likely to demand similar (or worse) exemptions, turning employment standards in British Columbia into a patchwork — and dramatically increasing the extent of precarious employment and poor working conditions. The expansion of these practices could set employment protections back a century.

The better path is clear. Workers have delivered two strong messages – they are tired of being treated worse than other workers in our province, and they feel powerless in their dealings with huge multi-national platform companies.

In response to the government's options paper, we have therefore focused on two main themes:

- Ensuring workers have access, at a minimum, to all the basic employment rights and protections other workers receive through the ESA and *Workers Compensation Act*; and
- Providing workers with a pathway to unionization so they can have a voice in their pay and working conditions in negotiations with app companies.

Minimum wage = A living wage

Workers have told us emphatically that they are being underpaid for their work² They want minimum hourly rate protections, so they know that they are guaranteed a fair wage for all the time they work.

We believe the minimum wage rate for app-based ride-hail and food-delivery workers should be equivalent to BC's highest living wage for a metro area. For 2023, that is \$24.49 per hour.

The wage rate must be paid for ALL time worked and be calculated AFTER expenses. We define work as all

"I began doing food delivery during the pandemic. Back then, there was a lot more demand. I earned pretty good money. But now, I am only getting forced to make choices that the app gives me whether to accept the assignment or not. If I don't accept, that affects my acceptance rate which impacts the next chance of getting assignments. If I accept, I may have to work longer shifts that barely leaves me with less than a minimum wage. I realize that I am forced to make these choices that eventually only benefit the platform, not me as a worker. I am not getting fair compensation for the time that I work." worker K.

² The quotes featured in this submission are taken from the BCFED's focus groups with gig drivers during Summer 2023. We have kept them anonymous to allow them to speak without fear of retaliation.

the time a worker spends on the app performing various duties -- not just the time they are transporting customers or goods.

Their minimum pay should be calculated on a daily basis. We do not believe this amount should be averaged like the taxi industry over a month³ as suggested in the paper.

Pay rate

All workers in BC should be guaranteed a fair wage. Every year, the Living Wage for Families campaign calculates this rate based on the actual cost of living in our communities; it best reflects workers' actual economic needs. We believe the living wage should be the minimum wage standard for all workers in BC.

But many workers report to us that after expenses and excluding tips, they are earning far below not only the living wage but even the current minimum wage (\$16.75/hr). We believe as a matter of principle that companies in BC should not be permitted to pay poverty-level wages.

Workers report that their wages have consistently declined since the introduction of transportation network services ("TNS") while their expenses have increased sharply. To address these low wages, workers report they are having to work more and more hours to make ends meet. Many workers tell us they are working more than 10 hours in a day and more than 60 hours in a week. Many work at least six days a week.⁴

"If I don't work all seven days now, I cannot make my ends meet. That means 15h or 16h per day." – worker T.

The lack of regulation of earnings leaves workers with no predictability or security around the minimum they are guaranteed to earn for the same amount of work on different days.

Pay for all time worked:

Studies have shown that on average 40% of a workers' time is spent outside of what companies define as engaged hours. Even with legislative measures in place to increase usage rates, publicly available data collected in New York⁵ – a market much larger than Vancouver -- shows that ride-hail

³ We also support requiring the taxi industry to move to a daily standard.

⁴ From the BCFED's recent survey of gig drivers, almost one quarter are working over 60 hours per week.

⁵ <https://toddschneider.com/dashboards/nyc-taxi-ridehailing-uber-lyft-data/>

vehicles average one-point-eight (1.8) trips per hour with an average duration of 20 minutes per trip. That means an average of 36 minutes out of every hour are spent with a rider in the vehicle, representing only 60% of the driver's time.⁶

Time between assignments is not “free time” -- it is work. Workers are not free to engage in activities of their choosing because, due to the time-sensitive nature of the work, they must be immediately available at any moment. Companies control workers' choices during these “in between” times, for example with punitive consequences for workers who do not accept assignments. These consequences may include being blocked from prime pickup areas such as the airport or losing access to critical information about their work, like pay and destination information.

Not paying workers for all of their work time can also exclude them from other benefits they should be entitled to. If a worker is injured between customers while repositioning or immediately after delivering an order, for example, they may be ineligible to make a workers' compensation claim. Not paying workers for all hours of their work hours may also mean they lack the hours for EI eligibility and its associated funding programs.

The dangers of “engaged time”

We believe the government should reject a payment system based only on the made-up construct of “engaged time.” This is an extremely dangerous and regressive concept.

The work of providing ride-hail and food delivery services extends beyond transporting customers or products. It includes many other duties including repositioning, waiting for restaurants and customers, cleaning, refueling, searching for assignments, communicating with the company and more. These duties are essential to the services provided by the company, as without them, the transportation of goods and customers could not occur.

The government must also consider the precedent and impact on other sectors and workers. Our employment and labour laws have moved away from compensating workers based on a per job or piece rate — and for good reason. Piece rates raise stress, promote overwork, lower safety

⁶ In our survey, drivers estimated only 30% of their time was spent transporting a customer or package.

“I feel pushed and pressured to work more and more. I am more than 60 now. I push myself to work more too and it's something that's against human right. That's against labor right. That's against even the public safety.” – worker A1.

standards, create unhealthy competition, and can lead to an oversaturation of the labour pool that results in all workers receiving poverty wages. They are profoundly unfair and should not be used. The Federation has long campaigned for the remaining piece rates for hand harvesters (farmworkers) to be eliminated.

Work-related expenses

Workers must be compensated for work-related expenses and must not be required to pay the company's business costs.

“We don't even make minimum wage after the gas, insurance and other expenses” – Survey respondent

The Ministry must consider the significant impact of expenses on workers' take-home pay. Workers report that their earnings drop below the minimum wage due to the out-of-pocket expenses they must cover. Yet in their estimates of take-home pay, companies fail to account for many of the real costs workers must pay out.

Additionally, workers must not be required to pay to use the app to access work.

Workers using vehicles

An appropriate reimbursement rate should include compensation at the CRA mileage rate for vehicle use. The CRA mileage rate should be paid for all kilometres driven while on the app, including repositioning after a drop off. Workers frequently are asked to drop off customers or orders in areas where they will not be immediately able to access a next assignment.

“For maintenance, I think I put 4 to \$5000 a year. I just bought new winter tires. I had to buy new summer tires. I had to get my transmission replaced. I had to get a new 2 new front brakes, new set of rear brakes plus the headlights, my seat's coming apart, my keys are actually falling apart because of so many times that I'm getting back in the car and turning it on and off. And those keys, turns out, are \$170 a piece.

On top of this amount, workers should be compensated for other expenses including but not limited to: cleaning; safety equipment such as

cameras and roadside safety kits; cell phone and data usage; parking; and any additional licensing fees or inspections that are required.

Workers using e-bikes and e-scooters⁷

For workers who use e-bikes and e-scooters for delivery, a per-kilometre rate should be established for vehicle use. This should cover charging, repairs and maintenance, depreciation of equipment including batteries, insurance and attached special equipment like lights, racks and baskets. This rate should be paid for all kilometres travelled on the app.⁸

On top of that rate, workers should be reimbursed for other expenses including but not limited to cell phone and data usage, special equipment including thermal bags, and safety equipment such as gloves, rain gear, high-visibility vests and helmets.

Expenses should not unnecessarily pass through workers or be billed back

Other business costs like city or airport fees, levies and GST should be handled directly by the companies and should not be funneled through workers.

Workers report they are currently being charged for many business-related expenses such as airport fees, booking fees, GST on fees, city fees and split-fare fees. Companies must not be permitted to make deductions from workers' pay to cover these types of business expenses.

As well, companies must not be permitted to bill workers for any benefits that the company must provide them. For example, the company must be prevented from billing workers for employer compensation contributions or for the employer's share of payroll taxes.

Prohibit unauthorized deductions

As set out in the ESA, companies must be prohibited from making unauthorized deductions from a worker's pay. We have received several reports of deductions and "overpayment" reimbursements where workers have not consented to the charge or negotiated a repayment plan. A recent

⁷ We have not observed many workers still using traditional bicycles for this purpose.

⁸ Electric bike rental companies may provide an effective comparator in determining this rate. For example, Evo car share charges \$.35 per minute for an e-bike rental.

example is a company making deductions for criminal record checks when numerous workers report they have already paid for them at the police station.

When unauthorized deductions are made, workers are faced with a poor communication system in order to challenge the charge. Some workers may not see the deduction or be afraid to make a complaint because of fear of suspension or deactivation.

Tip protection

Workers should have access to the tip protection provided in the ESA. Tips are not wages, and the Ministry must ensure that workers' base wages are calculated separately from tips.

Tips are highly variable and at the discretion of customers. How much a worker receives can be impacted by racism, sexism and discrimination based on other prohibited grounds.

We see no need to develop and administer a different set of rules for this industry. There should be one clear standard for how tips are treated across industries, as universal protections are more likely to be adhered to and are easier to enforce.

Pay and destination transparency

Pay and destination transparency is a significant issue for workers. They have expressed frustration that assignments are offered with very little to no information.

“Because I am in a group community, we often talk about this algorithmic wage differences. And unless I talk to other drivers and actually compare our apps together, I will never know that we are offered different pays for the exact same assignment. And this has happened to me many times already which is one of the reasons why I am going to stop working this job soon.” – worker K.

Workers should receive both an estimate of pay and destination information at the time an assignment is offered. Companies currently offer pay and destination information to some workers (often as a perk), so we do not see any legal or administrative barrier to providing this information.

Workers should also be informed of the tips they have received for each assignment. When providing this information, companies should also disclose any fare

multipliers or bonusing that applies to the assignment that alters the base rate of pay.

In addition, workers should receive wage statements (pay stubs) for each pay period that clearly indicate the time worked, the rate of pay including any incentive or bonuses, allowances and/or expense reimbursements, vacation and statutory holiday pay, tips and the statutory or other deductions that were made. They should also receive their remaining paid sick leave entitlement. Section 27 of the ESA outlines the appropriate information workers should receive. The wage statement should also include an accounting of tips and expense reimbursements.

Suspensions and terminations (deactivation)

The majority of workers we've spoken with say they've been suspended from working for ride-hail and food delivery companies at least once in the time they've been working. Many are unaware of the reason for the suspension and report poor communication with the company when trying to rectify the situation. In many cases, the workers were reinstated. However, they report a significant loss in income and are not made whole even when it is found they were not at fault.

Further, workers report that they have been threatened with suspension and/or deactivation for raising concerns about issues with their pay, tips and safety.

Many workers whose accounts were deactivated say they had few avenues to challenge the deactivations. This resulted in unemployment and a significant loss of income. Since most of these workers have not paid into the Employment Insurance ("EI") system, they were ineligible for EI benefits.

"Uber deactivates the account without listening the driver. If the passenger calls for whatever reason, Uber first deactivates your account. Then they may review what happened, but they don't care. They are not going to give any compensation for the time they kept you deactivated." Worker A

Ride-hail and food delivery workers would like to see protections that extend beyond those provided in the ESA in the event of a suspension or termination. We believe these protections should be available to all workers in BC.

The suspension and termination provisions in the ESA should be strengthened for all workers as follows.

Suspensions

Workers should not be suspended without prior warning and without just cause. When discipline is warranted, it must be progressive and appropriate to the infraction. Suspensions are a serious form of discipline and not an initial step except in the case of the most egregious violations. Should a suspension be made in error, or should a worker be found not to have engaged in misconduct, they should be made whole including the repayment of their average daily wages for any time loss.

Terminations

Workers should not be terminated without cause.

Notice and compensation for length of service

Ride-hail and food delivery workers should be eligible to receive notice or compensation for length of service in the case of a layoff, as per the ESA.

Access to Employment Insurance

Workers should have access to EI in the event of layoff through both their own contributions and contributions made on their behalf by app companies through payroll deductions.

Complaints

Complaints should be handled through a fully-funded and effective Employment Standards Branch, with the resources to conduct timely investigations and adjudications. Workers accessing the services of the Branch have the right to representation. The Ministry should consider developing an expedited complaints process to deal with unfair terminations for all workers. When a worker's livelihood is jeopardized, they should be able to get an immediate adjudication.

Workers should also have access to unionization and be able to file complaints through their union representative using the grievance procedure.

Workers' compensation coverage

The safety of these workers is at risk every day. Within the past year there have been several high-profile incidents involving ride-hail and food delivery workers. These incidents include a stabbing, a physical and verbal assault and the death of a worker in a motor vehicle accident.

“On my last shift or my last delivery of the night in the winter last year, I dropped the order off at the customer's door and then, as I was walking back to my vehicle. I missed a step on their pathway. And my foot turned. It was very badly sprained, and I fractured it in 3 places. But I yelled out help because I mean, I felt my foot go. And yeah, the customer picked up their order. I don't know if they just saw me or didn't see me and didn't choose to see me, I have no idea. So I had to drive myself to the emergency room. and the and the injury was on my right foot. Unfortunately, I was just too desperate to start making or needing money that I didn't fully go through their contract in the beginning and we're all independent contractors. We are responsible for our own personal insurance. We have absolutely no rights and no coverage under SkipTheDishes.” – worker J.

Companies are not following the health and safety laws designed to prevent injuries and deaths. They are not implementing violence prevention plans, addressing bullying and harassment or providing safety equipment.

Currently most workers employed in ride-hailing and food delivery have no workers' compensation protection in the case of an injury or occupational disease. The few that may be eligible (mostly food delivery workers using bikes or on foot) likely don't even know they could file a claim. In general, companies are not contributing to our workers' compensation system.

Prevention and compensation

In addition, to ensuring that workers can access compensation in the case of an injury, ride-hail and food delivery workers must be protected by all of our health and safety laws. Employers should be required to establish health and safety committees and create safe work policies to prevent injury and illness. Premiums should be paid by the companies and not downloaded onto workers.

Protection for all work

It is essential that workers are protected for all of their work time because they continue to be vulnerable to injury between transporting passengers or orders. If a worker completes a delivery but is injured exiting a

building, or if a ride-hail driver is assaulted while waiting outside a concert for an assignment, they should be covered. Workers should not be forced to prove the injury arose “out of employment”

and have to face legal challenges from deep-pocketed app companies. If they are active on the app, they must be covered.

Manitoba provides workers' compensation coverage to ride-hail and food delivery workers with only narrow, strict exclusions.⁹

Paid sick leave

During the COVID-19 pandemic, we saw the critical importance of having access to paid sick leave as a way of preventing the transmission of communicable diseases. Providing workers access to paid sick leave keeps our economy functioning and our communities safe. Ride-hail and food delivery workers fulfilled essential tasks when British Columbians were required to isolate or unable to take public transportation.

The BCFED and other worker advocacy groups fought to ensure that paid sick leave was available to casual and part-time workers, and the government agreed. These workers, whether they work casually, part-time or full time, are just as deserving of access to the five days of paid sick leave as other workers in our province.

Other employment protections

Ride-hail and food delivery workers deserve access to all the other protections provided to workers in BC. This includes but is not limited to meal breaks, vacation and statutory holiday pay, and domestic and sexual violence leave.

Workers should be protected from retaliation by a company for raising an employment, health and safety or human rights issue.

Flexibility

We want to stress that there is nothing in the ESA that prevents employers from providing flexibility to workers over when and where to work. For example, in many school districts, teachers on call are able to choose from half- to full-day assignments and can even choose what grade level

⁹ <https://wcb.mb.ca/wcb-coverage-for-app-based-workers>

or neighborhood they would like to work in. While there may be a minimum number of assignments they must take in a school year, the district doesn't dictate on which days they must occur. Flexibility is purely a function of how the employer chooses to manage its workforce.

It is also important to note that despite many companies touting worker flexibility, in actual practice, workers have little control. Workers report that of the three main food delivery companies operating in the Lower Mainland, only one is accepting new workers. Several food delivery companies are requiring workers to sign up for shifts and limiting the number of shifts that are available. Workers have reported that they'd like to work but that a shift is unavailable.

Ride-hailing companies restrict where workers can pick up assignments. Workers can be prohibited from pick ups in certain areas due to having low acceptance rates or customer ratings.

This is clear evidence that it is not classification that determines the flexibility of the work, but rather how management exercises its discretion.

Access to unionization

One of the strongest themes we've heard from workers is the sense of powerlessness they feel in their relationship with app companies. The companies unilaterally set the customers' rates and workers' pay, and control ratings, privileges and in some cases when and where drivers can work. As individuals, these workers have no power over the terms and conditions of their employment. They need the ability to negotiate collectively.¹⁰

Workers also want to have influence over terms that extend beyond basic employment standards. Though the government may choose to intervene in some areas in the short term – like pay and destination transparency as discussed earlier -- companies often make changes to their services based on changes in consumer behavior and the algorithmic data they collect. It is nearly impossible for the government to respond to potential changes in a timely manner.

Every worker in Canada must have access to their Charter-protected right to unionize. As it stands, ride-hail and food delivery workers do not have a clear path to unionization. There are significant

¹⁰ According to the BCFED survey, 87% of workers would join a union if they had the option.

legal and practical hurdles to unionization that would need to be overcome.

We see the pathway to unionization as a two-step process.

First, ride-hail and food delivery workers must be covered by the *Labour Relations Code*. This should happen through inclusion in the ESA as employees. As we see companies make more significant interventions into the management of the workforce – requiring workers to accept shifts, punishment for rejecting offers of work, promoting and demoting workers based on performance -- it is likely that these workers would meet the current legal test as an employee.

Though there is a pathway to unionization as dependent contractors, workers would not be guaranteed the basic standards provided by the ESA. In practical terms it means rather than starting to negotiate from \$16.75/hr, workers would start from \$0.00/hr, and there would be no requirement for the final agreement to meet or exceed the ESA. And as discussed earlier, excluding a workforce that is predominantly made up of newcomers and racialized workers from the entitlements of the ESA is systemic racism and goes against the grain of the government's agenda to address structural and systemic racism.

The second step is to implement a sectoral bargaining model. It makes sense for ride-hail and food delivery to be the pilot area for expanded sectoral bargaining in BC. There are significant challenges in identifying and agreeing on the eligible list of workers: the work is low pay, the workforce has high turnover, there is no central dispatch location, workers can be spread out over a large geographic area and the use of algorithms and AI significantly interfere in the allocation and management of work. And this is what companies say they want; they have publicly asked for sector-wide labour standards in order to ensure a level playing field between companies.

Conclusion

The writing is on the wall. Ride-hail and food delivery (and, we argue, all gig workers) need employment, health and safety and labour rights. Governments across the globe are taking action and BC is being left behind. Our province is uniquely positioned to get this right, by taking the most logical and simplest path forward: providing workers with the same basic protections afforded to other workers in our province. Let's apply the proven BC model to this form of work, and not create a new, unnecessary approach. This works because we have already built up a network of intersecting rights and protections to ensure that workers don't fall through the cracks. From wage protections to sick leave, from EI to Canada Pension Plan, from violence prevention strategies to compensation for injuries on the job, the legislation is already written and it works.

For more information on working conditions for ride-hail and food delivery workers, you can also read our previous submission to the Ministry on this topic at <https://bcfed.ca/precariouswork>.

**SUPPORT
PRECARIOUS
WORKERS'
RIGHT
TO
UNIONIZE**

AN INTRODUCTION TO
BROADER-BASED AND
SECTORAL BARGAINING

TABLE OF CONTENTS

1. THE CASE FOR BROADER-BASED AND SECTORAL BARGAINING
1

2. HISTORIC OVERVIEW
8

3. EXISTING MODELS
11

4. NEXT STEPS
15

5. DECISION POINTS CHARTS
18

6. FURTHER READING
28

CREDITS
29

1. THE CASE FOR BROADER-BASED AND SECTORAL BARGAINING

The Current Labour Code Leaves Out Many Workers

Existing legislation on unionizing the private sector is skewed against people in the most precarious industries.

Currently, the labour code for the private sector is oriented towards what's called **enterprise bargaining**. A single union represents a bargaining unit, which is made up of people in a single workplace who work for the same employer. People who hold the same position but work for different employers are barred from belonging to the same bargaining unit and being covered by the same collective agreement.

This model works great in a factory or a mine, where one employer oversees a large number of workers in a single work site. When hundreds or thousands of workers come together to form a union and negotiate together, they have a lot of leverage over their employer. If the employer doesn't negotiate fairly, all those unionized workers could withhold their labour at great cost to the employer.

Today, more and more workers are making a living outside the traditional workplace model that enterprise bargaining is based on. The existing labour code makes unionization very difficult for small workplaces, franchises, single locations within multinational corporations, and subcontracted industries. This means workers in retail, fast food, domestic work, ride hailing, dentistry, and many other sectors are rarely able to unionize, even though many of them want to.

Let's consider a few cases to illustrate the challenges faced by precarious workers.

CERTIFIED DENTAL ASSISTANTS

Certified Dental Assistants (CDAs) help dentists with procedures like fillings, surgeries, sterilization, and preventative procedures. Most dental offices have under ten employees, including just a few CDAs—sometimes an office only has one CDA. CDAs work in close proximity with the dentist, their employer.

Due to the small size of their workplace, an individual CDA who wants to unionize faces a far greater risk for retaliation from the employer than a union supporter in a workplace with hundreds of other workers. This is especially true in a close-knit industry like dentistry, where word travels and workers who advocate for themselves risk being blacklisted across the province. Organizing dental offices is very challenging.

Even if a CDA unionization drive were to succeed against great odds, the unionized workers would need to negotiate a collective agreement that only covered a handful of people. Organizing and bargaining shop-by-shop would be extremely laborious.

Since 2021, CDA Movement has been working on a campaign to remove the barriers to unionization faced by CDAs and other dental workers.

Check out CDA Movement: cdamovement.org

DOMESTIC WORKERS

Domestic workers assist their employers with personal care and housekeeping. They usually work alone in their employers' home, where they often also live. The working conditions of domestic work restrict the impact of withholding labour as a form of bargaining power during negotiation. A single worker going on strike has no leverage over the employer, who can easily find a replacement. Since the 1990s, the Vancouver Committee for Domestic Workers' and Caregivers' Rights has been advocating for shifts in the labour code to extend collective bargaining to domestic workers.

Check out Vancouver Committee for Domestic Workers' and Caregivers' Rights to support domestic workers: cdwcr.org

RETAIL AND FAST FOOD WORKERS

Retail and fast food workers are often employed at franchises. In a franchise model, a central office establishes brand rules and runs a few stores, but most of a franchise's locations are operated by independent owners. The central corporation controls costs and many workplace policy directives, which makes collective bargaining very challenging. Unionized workers must negotiate with their direct employer, the franchise owner, who does not actually control many of the working conditions.

Even retail and fast-food outlets that are not franchises — for example, most Starbucks locations around the world are company-owned — face barriers to unionizing under the existing bargaining model. Often, workers are “diffused,” meaning they circulate between multiple locations, which makes organizing coworkers very challenging. Further, even upon certification, a single unionized outlet has little leverage against the powerful and moneyed central office. A single location going on strike has little impact on the company's overall bottom line, so the corporate office has no incentive to fairly negotiate with a unionized outlet.

The workers in these case studies have two points of commonality:

- 1) The very structure of their workplaces limits their access to unionization
- 2) Even if they do manage to unionize, against massive barriers, they have limited bargaining power to negotiate a strong contract

In order to meaningfully access their right to unionize, workers in precarious industries require an alternative approach to collective bargaining.

Broader-Based and Sectoral Bargaining

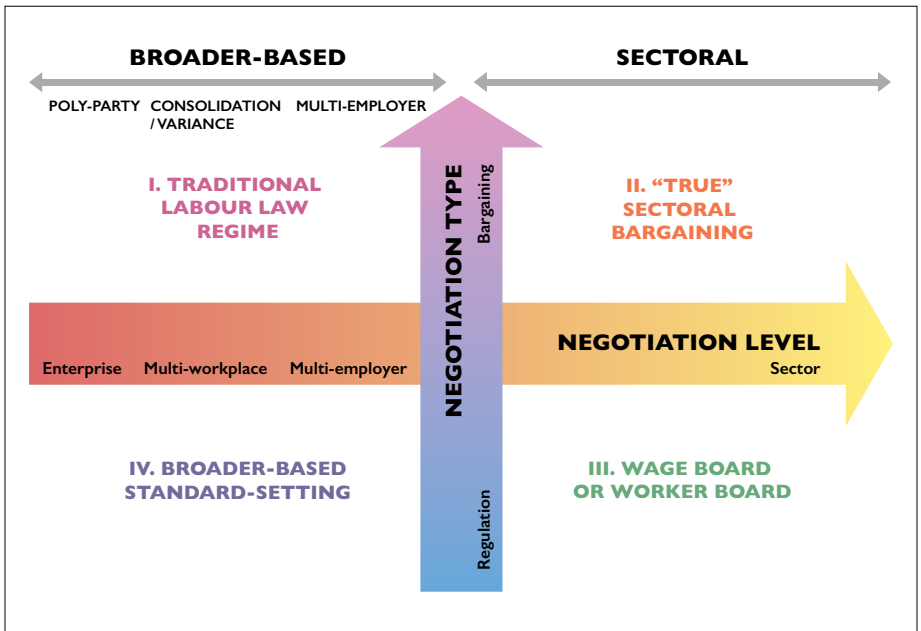
Increasingly, advocates for precarious workers in the private sector have looked to broader-based and sectoral bargaining to address the two limitations of enterprise bargaining.

Broader-based and sectoral bargaining are both approaches that expand on enterprise bargaining in some way. Instead of a single union representing a bargaining unit composed of workers in a single workplace under a single employer, broader-based and sectoral bargaining could include multiple unions, bargaining units, workplaces, or employers — or some combination of those.

While enterprise bargaining dominates labour relations in Canada, models of broader-based and sectoral bargaining have existed in this country throughout history and in certain industries or jurisdictions today. This approach is well established in many European countries and has been gaining ground elsewhere — New Zealand recently passed a highly publicized version of sectoral bargaining legislation.

A variety of models, more or less appropriate for different circumstances, fall under the umbrella of broader-based and sectoral bargaining.

Sara Slinn, Associate Professor at Osgoode Hall Law School, has devised a conceptual framework explaining different approaches to broader-based and sectoral bargaining, shown in the diagram below.



Broader-based and sectoral bargaining conceptual overview ©Sara Slinn, 2023

In the diagram, the horizontal axis, **Negotiation Level**, refers to the scope of the parties engaged in bargaining, generally referred to as the *level of bargaining*.

This ranges from enterprise-level bargaining (single-union, single-unit, single-workplace, single-employer) to negotiation involving all the workers of a sector within a defined geographic area (for example, “all

fast food outlets in North Vancouver” or “all Certified Dental Assistants in British Columbia”). *Sectoral* models, on the right side of the diagram, involve an entire sector while *broader-based* systems are broader than strictly enterprise bargaining without applying to a whole sector (e.g. multi-workplace or multi-employer).

A jurisdiction dominated by enterprise bargaining experiences a high degree of fragmentation: there is a multitude of collective agreements, each with unique terms and applying only to a small portion of the entire workforce within a sector. In contrast, full sectoral bargaining represents the most centralized and concentrated level of negotiation: a single agreement covers all workplaces within a geographically defined sector.

The vertical axis, **Negotiation Type**, refers to the way that negotiation takes place. This ranges from collective bargaining, which happens freely between representatives of workers and employers, to regulation, which often involves government with varying input from workers and employers. Often, government has final say on whether to accept, reject, or unilaterally amend regulations.

Different negotiation types produce different outcomes. Collective bargaining determines working conditions in absolute terms, while regulation sets a floor of minimum standards.

The diagram is divided into four **quadrants**, each representing a different approach to bargaining at different ends of the axes.

I. Traditional Labour Law Regime

The top-left quadrant is where our existing labour relations system generally resides. Negotiation does not extend to an entire sector and involves free bargaining, leading to a collective agreement that sets absolute terms rather than minimum standards.

Even under the current labour relations code, however, some options exist for bargaining approaches that are broader than strictly enterprise bargaining. These include poly-party bargaining (establishing a single collective agreement between an employer and multiple unions), consolidation / variance (where unions apply to consolidate existing bargaining units or vary certification to extend a bargaining unit), and multi-employer bargaining (bargaining with an association of multiple employers).

Some well-known proposals for broader-based bargaining reside in this quadrant. These proposals would adapt the traditional labour law regime to facilitate bargaining beyond the enterprise level. One example of this is the Baigent-Ready Model, which emerged from a

1992 labour code review in British Columbia. The next section of this document includes a brief overview of the history of this model.

As modifications of the traditional labour law regime, broader-based bargaining proposals in this quadrant are most appropriate to sectors that already have some union density, even if they are traditionally underrepresented by unions. This is because workers need to continue navigating the traditional certification or variance process. Further, this approach works most effectively for sectors that are relatively homogenous and discrete.

II. “True” Sectoral Bargaining

The top-right quadrant contains true sectoral bargaining. Here, negotiation occurs across an entire sector defined along geographic and occupational or industrial dimensions. This approach typically includes some form of recognition or certification test, which could be more flexible than the mandatory vote certification model in traditional labour law regimes. An example of this flexibility is the *Status of the Artist Act* sectoral bargaining system in the federal jurisdiction, where representation and bargaining rights are not established through card-based certification. Rather, an artists’ association has to prove that it is the most representative association in the sector it seeks to represent.

Bargaining often occurs on the basis of councils, usually between a labour council and an employers’ council. Sectoral bargaining involves free bargaining, producing to a collective agreement that sets absolute terms rather than minimum standards regulation.

Sectoral bargaining can apply to a sector that doesn’t have much union density, though it is important that some unions already be active in the sector. It is less crucial, under this approach, that sectors be relatively homogenous or discrete, although those qualities are helpful. Sectoral bargaining could incorporate a large geographic sector, like a significantly sized region or an entire province.

Sectoral bargaining exists in many areas of the public sector, like education and healthcare, as well as certain private industries like construction.

III. Wage Board or Worker Board

The bottom-right quadrant covers an approach often known as wage board or worker board. This refers to regulation that sets minimum standards across an entire sector, with varying degrees of input by worker and employer representatives. Government is often involved

in these negotiations and could have a final say in the implemented regulation. There may be no threshold test or representation by unions. Sectors that are more well-defined, discrete, and homogenous could see a greater scope of matters included in their minimum-standards regulations.

This approach is most appropriate to occupations, industries, or groups of workers that are extremely difficult or impossible to organize, with effectively no union density. This typically covers low-wage, low-power occupational sectors.

IV. Broader-Based Standard Setting

The bottom-left quadrant, broader-based standard setting, occurs at a subsectoral level. It does not involve free collective bargaining but rather minimum standards regulation that applies across multiple workplaces or a subsectoral region. This could look like very specific regulations in the employment standards regulation

There is no contemporary proposal for broader-based bargaining reflecting this fourth quadrant. It is unlikely to be useful for promoting collective representation or collective bargaining among workers. The first three quadrants are more relevant to proposals for amending the existing labour code to include broader-based or sectoral bargaining reforms.

2. HISTORIC OVERVIEW

In Canada, the 1992 labour law review in British Columbia and the 2015 *Change Workplaces Review* in Ontario were two unsuccessful attempts to incorporate broader-based or sectoral bargaining into the labour code. They provide lessons for challenges that proponents for broader-based bargaining must overcome.

Baigent-Ready Model of Broader-Based Bargaining

In 1992, the NDP government in British Columbia commissioned a panel of special advisors to review the labour code. The panel included John Baigent, a union-side labour lawyer, Vince Ready, a well-known arbitrator, and Tom Ropert, an employer-side lawyer.

Two of the special advisors, Baigent and Ready, were interested in broader-based and sectoral bargaining as a mechanism for addressing the changing nature of work. At the time, a number of unions were supportive of broader-based bargaining, in particular resource-based unions, which had extensive histories with the approach. Some of them bargained through industry-wide bargaining councils while others organized across occupations, industries, establishments, and resource towns. Those unions were familiar with the advantages of less fragmented, non-enterprise basis structures for bargaining, and they also experienced negative consequences as resource industries shifted towards enterprise-level bargaining in the 1980s. Thus, by the 1990s, resource-based unions were interested in revitalizing broader bargaining structures in their industries.

Another group of unions supportive of broader-based and sectoral options were healthcare unions, which at the time saw sectoral bargaining as an organizing and growth strategy. They also thought sectoral bargaining could slow the expansion of precarious work in healthcare, especially in the home-care sector, which was rapidly becoming deprofessionalized into contract-service work.

Baigent and Ready consulted with representatives from the labour movement but did not receive a great deal of input for concrete proposals. Baigent and Ready ended up working mostly on their own to formulate a broader-based organizing and bargaining approach that especially targeted small workplaces and underrepresented sectors. Their proposal is known as the Baigent-Ready model, which you can learn more about on page 22.

The employer member of the 1992 special advisory panel, Tom Ropert, was opposed to the Baigent-Ready Model. The NDP government was only willing to adopt one non-consensus proposal from the advisory group, and labour had to choose to consolidate support between the Baigent-Ready Model and a non-consensus proposal on replacement-worker provision. The replacement-worker provision won by a narrow margin, which was adopted.

Notably, the NDP government did implement recommendations from a separate 1992 review, the Korbin Commission, to reorganize the public sector into a highly centralized, broader-based structure that incorporated multi-party or multi-tier bargaining.

Changing Workplaces Review

In Ontario, an extensive labour and employment law review occurred from 2015 to 2017. The special advisors involved explicitly sought input on whether broader-based bargaining was feasible and recommended, either generally or for certain industries.

The advisors faced the same problem as the advisory panel in British Columbia, receiving few submissions to their request. The advisors set out nine options that they devised for potential broader-based or sectoral bargaining amendments to the legislation but were unable to produce consensus among unions.

The absence of consensus and specific proposals led the special advisors to make only a modest recommendation in their report for a broader-based model, which would be solely applicable to franchisees of a single franchisor. It was not adopted into the legislation.

Opposition to Broader-Based and Sectoral Bargaining

In both British Columbia and Ontario, broader-based and sectoral bargaining proposals faced strong employer resistance. Apart from opposition to increased access to unionization, employers also cited concerns about

potential loss of flexibility that could result from negotiations occurring at a level beyond the workplace. Smaller employers, in particular, objected to the possibility of losing the ability to compete by lowering wages.

While a number of unions supported broader-based and sectoral bargaining, many others expressed misapprehensions or a lack of understanding. Some unions were worried about whether broader-based or sectoral structures could threaten their existing representation rights. The prospect of a council of unions — present in some broader-based or sectoral bargaining models — also raised question about whether the voices of individual unions would be diluted and possible jurisdictional conflicts arising from new representation structures.

The concern about diluting the voice of individual unions was especially active in the 2015-2017 Ontario *Changing Workplaces Review*. In the years before the review, the government restructured the public sector to impose a multi-tier, centralized bargaining structure on unions. In that case, sectoral bargaining was implemented to undermine the uneven bargaining power that unions wielded, including the ability to engage in militant tactics like significant whipsawing.

The power structure is very different in private sector industries currently featured in discussions about broader-based or sectoral bargaining. Changes to the current bargaining structure would focus on workplaces, occupations, and industries that are very difficult to organize, where workers have no systemic bargaining-power advantage.

3. EXISTING MODELS

Despite the dominance of enterprise bargaining in Canada, broader-based and sectoral bargaining have been implemented in specific industries or jurisdictions across the country for over a century. Recently, broader-based and sectoral bargaining reforms have started gaining momentum, with legislation passing in New Zealand and California¹. This section offers a basic introduction to three real-world examples of broader-based or sectoral bargaining models that currently exist.

New Zealand *Fair Pay Agreement*

In 2022, New Zealand implemented the *Fair Pay Agreement* (*FPA*). The *FPA* falls under the Wage Board or Worker Board quadrant on the conceptual framework diagram in Chapter 1, which means that it sets minimum standards across an entire sector and is designed to specifically target industries or occupations that are difficult, if not impossible, to organize. Compared to many other Wage Board or Worker Board models, the standards established by the *FPA* negotiation process are subject to free bargaining between the worker and employer councils, with interference from government only if the negotiated outcome is contrary to another legislation.

Organizing within the *FPA* involves two phases. In the initiation phase, a union or workers organization applies to government for the right to start the bargaining process for a fair pay agreement within a particular sector. In order to do this, they must pass two tests.

First, the initiating union or organization needs to pass a “public interest test” showing that the employees they want to represent receive low pay and one of the following conditions: they have little bargaining power or lack of pay progression or are not paid well enough considering factors like long hours, night shifts, weekends, or employment uncertainty.

¹ California’s *FAST Recovery Act*, which sets minimum standards for the state’s fast food industry, has recently been held by a judge in response to a legal challenge brought forward by a petition from employers, leading the legislation to move to a public referendum. No comparable legal challenge framework exists in British Columbia.

Passing the public interest test enables the union or organization to bypass the traditional card-check certification process in favour of a “representation test.” The representation test is the mechanism for the initiating union or workers organization to demonstrate that it has sufficient support among workers within the sector in consideration. In the *FPA*, sufficient support is defined as at least either 1000 or 10% of all employees in a sector.

After the union or organization passes the representation test, it can move onto the bargaining phase. In bargaining, all affected people and representatives involved in the sector under consideration come together to form two councils, each representing workers or employers. The workers’ council could include a combination of unions, worker representatives, and government officials, while the employers’ council includes all employers that have a presence in the sector. A system of weighted voting exists within these councils, and the government provides financial and professional support for the negotiation process.

Bargaining takes place between the two high level councils to establish minimum standards within certain categories like pay, working hours, and health and safety. Importantly, the *FPA* cannot undercut the standards of existing legislation. The *FPA* also does not preclude further organizing. Unions could continue producing collective agreements with better conditions through the traditional certification process.

On the right is a screenshot from the campaign from a union, E tū, to pass the representation test in order to begin negotiation for a fair trade agreement in security, cleaning, and hospitality sectors. The union is targeting their own membership and non-union workers in those sectors.



Sign on for a Fair Pay Agreement!

E tū is collecting signatures to initiate the very first Fair Pay Agreements in security and cleaning. Click the buttons below to go to our sign up forms!

- Security Fair Pay Agreement (existing E tū members)
- Cleaning Fair Pay Agreement (existing E tū members)
- Hospitality Fair Pay Agreement (existing E tū members)
- Security Fair Pay Agreement (not yet E tū members)
- Cleaning Fair Pay Agreement (not yet E tū members)
- Hospitality Fair Pay Agreement (not yet E tū members)

Screenshot from etu.nz/signfpa/

Quebec Decree System

The Quebec labour code includes a very unique system that was implemented nearly a century ago, in 1935. This system allows for the extension — or “decree” — of certain provisions from an existing collective agreement to other workers, both unionized and non-unionized, within the same sector and geographic area.

A decree is considered the legal extension of a collective agreement. Not all negotiated terms within a collective agreement form a decree, which tend to focus on financial conditions. The decree system is mainly in place to minimize unfair competition from employers who are not subject to collective agreements and ensure that employers do not resort to wage suppression and poor working conditions as their primary mechanisms for competition.

Decrees are issued by the Quebec provincial government upon being approached by a group of workers or a union. Once a decree is in place, it is administered and enforced by a Parity Committee made up of combinations of workers, unions, and employers working collaboratively.

The Quebec decree system exists as a combination of Traditional Labour Law Regime, the first quadrant of the conceptual framework, and Wage Board or Worker Board, the third quadrant. This model involves organizing a bargaining unit through a traditional enterprise-level certification process, freely bargaining on the enterprise level to produce a collective agreement with absolute terms, then extending that collective agreement into a sector-wide minimum-standards regulation overseen by government and the Parity Committee.

British Columbia Health Authorities Act

As discussed in Chapter 2, the 1992 Korbin Commission centralized public-sector bargaining in British Columbia into broader-based structures. One example of this is the *Health Authorities Act*, a two-tier system in the British Columbia healthcare sector. Tier One concerns collective bargaining while Tier Two considers the administration of collective agreements.

Tier One includes six multi-union associations, each representing workers within a healthcare subsector, and one multi-employer bargaining agent called Health Employer Associations of BC (HEABC). The six subsectors named in the statute are Ambulance Paramedics and Ambulance Dispatchers, Community, Facilities, Health Sciences Professionals, Nurses, and Resident Doctors.

Unions representing healthcare workers within British Columbia must join one of the six subsectoral associations. Each association has its own rules and conventions, dictating issues like how unions are represented within the association, how they communicate and negotiate, and so on. Each association bargains separately with HEABC to produce a master collective agreement for the entire subsector across the province.

While bargaining happens at the subsectoral level, the day-to-day administration of a master collective agreement takes place at a more local scale. Individual unions engage with the employer responsible for a particular worksite to represent members at that location.

The British Columbia *Health Authorities Act* is situated in the top-right quadrant of the conceptual framework diagram, “True” Sectoral Bargaining, where many public sectors reside. Like other models in the quadrant, it applies to entire (sub)sectors within a large geographic region and produces freely bargained collective agreements that set working conditions in absolute terms.

4. NEXT STEPS

Government Opportunities

This year presents a window of opportunity to campaign for changes to bargaining structures in British Columbia. The provincial *Labour Relations Code* requires no more than five years between government reviews of the code. The last review took place in 2018, so this year should see another one where reforms for broader-based and sectoral bargaining could be introduced.

Last December, the Office of the Premier released mandate letters outlining the objectives and priorities for the Ministry of Labour over the next two years. The letters to Minister of Labour Harry Bains and Parliamentary Secretary of Labour Janet Routledge both include sections that are compatible with reforms for broader-based and sectoral bargaining, as seen below.

As you continue to make progress on items in your previous mandate letter, over the remaining period of this mandate I expect you to prioritize making progress on the following:

- Work to improve the timeliness of employment standards dispute resolution.
- Continue engaging with affected parties on implementation of the recommendations of the Industrial Inquiry Commission regarding Forest Industry Successorship.
- Work with WorkSafeBC to ensure meaningful programs are in place to support the return of injured workers to their workplaces.
- Support WorkSafeBC, with involvement of the Minister of Health and the Minister of Mental Health and Addictions, to develop better options for chronic work-related pain, including improving pain management practices for injured workers and providing treatment on demand to those with chronic pain as a result of workplace injuries.
- **Ensure our labour law is keeping up with modern workplaces through the upcoming review of the Labour Code, providing stable labour relations and supporting the exercise of collective bargaining rights.**

Excerpt from mandate letter to Minister Bains (relevant section is highlighted)

You will work with your Minister to help advance these shared responsibilities:

- Support development and maintenance of relationships with organized labour to ensure their feedback is considered in policy development.
- Continue work to develop a precarious work strategy that reflects the diverse needs and unique situations of today's workers and workplaces.
- Propose employment standards and other protections relevant to app-based ride hail and food delivery drivers.
- Investigate the feasibility of a government-backed collective benefit fund and access to a voluntary pooled-capital pension plan for workers who do not otherwise have coverage.
- Review labour policy innovations in other jurisdictions related to the emerging economy and precarious work to identify trends that may inform the development of labour policy in British Columbia.

5. DECISION POINTS

SCOPE OF REPRESENTATION

Includes only unionized workers

Includes all workers, union and non-union, within a sector

SECTORS INCLUDED

All sectors

Sectors named in regulation or legislation (e.g. fast food sector)

Sectors that meet particular criteria (e.g. low union density)

SIZE OF ELIGIBLE WORKPLACE

Any workplace within a defined sector

Workplaces under a maximum threshold within a defined sector (e.g. under 50)

Workplaces over a minimum threshold within a defined sector (e.g. over 5)

DEFINITION OF SCOPE

Defined by government in an act (e.g. BC's *Health Authorities Act*)

Through application by union(s) to represent workers in a region or industry within a region

FURTHER BREAKDOWN BY SECTOR/SCOPE/REGION

A particular employer or franchises (e.g. Starbucks franchises in BC)

By occupation (e.g. Certified Dental Assistants in BC)

A sector and a region (e.g. fast food in Vancouver)

UNION DRIVE

Ongoing certification campaigns with worksite add-ons to bargaining unit

One certification campaign per sector to establish floor/standard/master collective agreement

Decision points for unions to determine and agree upon before proposing a broader-based / sectoral bargaining model for the upcoming labour code review.

CERTIFICATION PROCESS

Two-step verification (e.g. if 45-55% of required cards are signed)	One-step card check (e.g. if over 55% of required cards are signed)
---	---

UNION NEGOTIATION MODEL

Individual unions, each with its own multi-worksite collective agreement with specific employer	Most representative union within a sector	A centralized council of all unions who have certification within a sector
---	---	--

EMPLOYER NEGOTIATION MODEL

Individual employers whose worksites are unionized under a sectoral certification	A centralized council of employers
---	------------------------------------

NEGOTIATION OUTCOME

Multiple collective agreements, each negotiated by a different union with a different set of employers whose worksites have been certified	A master agreement across the entire province, which all unions and employers within a sector are bound to	A master minimum standards regulation that establishes baseline rights and allows for locally negotiated terms in specific areas
--	--	--

DISPUTE RESOLUTION MODELS

Strike/lockout	Binding arbitration	Final offer arbitration
----------------	---------------------	-------------------------

IMPLEMENTATION TIMELINE

Phased in	Immediate
-----------	-----------

FAIR PAY AGREEMENT

SCOPE OF REPRESENTATION

Includes only unionized workers

Includes all workers, union and non-union, within a sector

SECTORS INCLUDED

All sectors

Sectors named in regulation or legislation (e.g. fast food sector)

Sectors that meet particular criteria (e.g. low union density)

SIZE OF ELIGIBLE WORKPLACE

Any workplace within a defined sector

Workplaces under a maximum threshold within a defined sector (e.g. under 50)

Workplaces over a minimum threshold within a defined sector (e.g. over 5)

DEFINITION OF SCOPE

Defined by government in an act (e.g. BC's *Health Authorities Act*)

Through application by union(s) to represent workers in a region or industry within a region

FURTHER BREAKDOWN BY SECTOR/SCOPE/REGION

A particular employer or franchises (e.g. Starbucks franchises in BC)

By occupation (e.g. Certified Dental Assistants in BC)

A sector and a region (a specific industry in a region)

UNION DRIVE

Ongoing certification campaigns with worksite add-ons to bargaining unit

One certification campaign per sector to establish floor/standard/master collective agreement

Implemented in 2022 in New Zealand, the Fair Pay Agreement “brings together unions and employer associations to bargain for minimum employment terms for all covered employees in an industry or occupation.”

CERTIFICATION PROCESS

Two-step verification (e.g. if 45-55% of required cards are signed)

One-step card check (1000 or 10% of employees in a sector in a region)

UNION NEGOTIATION MODEL

Individual unions, each with its own multi-worksite collective agreement with specific employer

Most representative union within a sector

A centralized council of all unions who have certification within a sector

EMPLOYER NEGOTIATION MODEL

Individual employers whose worksites are unionized under a sectoral certification

A centralized council of employers

NEGOTIATION OUTCOME

Multiple collective agreements, each negotiated by a different union with a different set of employers whose worksites have been certified

A master agreement across the entire province, which all unions and employers within a sector are bound to

A master minimum standards regulation that establishes baseline rights and allows for locally negotiated terms in specific areas

DISPUTE RESOLUTION MODELS

Strike/lockout

Binding arbitration

Final offer arbitration

IMPLEMENTATION TIMELINE

Phased in

Immediate

BAIGENT-READY MODEL

SCOPE OF REPRESENTATION

Includes only unionized workers

Includes all workers, union and non-union, within a sector

SECTORS INCLUDED

All sectors

Sectors named in regulation or legislation (e.g. fast food sector)

Sectors that meet particular criteria (e.g. low union density)

SIZE OF ELIGIBLE WORKPLACE

Any workplace within a defined sector

Workplaces under a maximum threshold within a defined sector (under 50)

Workplaces over a minimum threshold within a defined sector (e.g. over 5)

DEFINITION OF SCOPE

Defined by government in an act (e.g. BC's *Health Authorities Act*)

Through application by union(s) to represent workers in a region or industry within a region

FURTHER BREAKDOWN BY SECTOR/SCOPE/REGION

A particular employer or franchises (e.g. Starbucks franchises in BC)

By occupation (e.g. Certified Dental Assistants in BC)

A sector and a region (workers performing "similar tasks" in a geographic region)

UNION DRIVE

Ongoing certification campaigns with worksite add-ons to bargaining unit

One certification campaign per sector to establish floor/standard/master collective agreement

A broader-based bargaining proposal that emerged from a 1992 report from a labour reform subcommittee commissioned by the the BC NDP. The proposal was not implemented.

CERTIFICATION PROCESS

Two-step verification (e.g. if 45-55% of required cards are signed)

One-step card check (e.g. if over 55% of required cards are signed)

UNION NEGOTIATION MODEL

Individual unions, each with its own multi-worksite collective agreement with specific employer

Most representative union within a sector

A centralized council of all unions who have certification within a sector

EMPLOYER NEGOTIATION MODEL

Individual employers whose worksites are unionized under a sectoral certification

A centralized council of employers

NEGOTIATION OUTCOME

Multiple collective agreements, each negotiated by a different union with a different set of employers whose worksites have been certified

A master agreement across the entire province, which all unions and employers within a sector are bound to

A master minimum standards regulation that establishes baseline rights and allows for locally negotiated terms in specific areas

DISPUTE RESOLUTION MODELS

Strike/lockout

Binding arbitration

Final offer arbitration

IMPLEMENTATION TIMELINE

Phased in

Immediate

CONSTRUCTION INDUSTRY

SCOPE OF REPRESENTATION

Includes only unionized workers

Includes all workers, union and non-union, within a sector

SECTORS INCLUDED

All sectors

Sectors named in legislation (Industrial, Commercial, Institutional sector)

Sectors that meet particular criteria (e.g. low union density)

SIZE OF ELIGIBLE WORKPLACE

Any workplace within a defined sector

Workplaces under a maximum threshold within a defined sector (e.g. under 50)

Workplaces over a minimum threshold within a defined sector (e.g. over 5)

DEFINITION OF SCOPE

Defined by government in an act (*Ontario Labour Relations Act*)

Through application by union(s) to represent workers in a region or industry within a region

FURTHER BREAKDOWN BY SECTOR/SCOPE/REGION

A particular employer or franchises (e.g. Starbucks franchises in BC)

By occupation (ICI sector)

A sector and a region (e.g. fast food in Vancouver)

UNION DRIVE

Ongoing certification campaigns with worksite add-ons to bargaining unit

One certification campaign per sector to establish floor/standard/master collective agreement

Sectoral bargaining model for Ontario's construction industry, first implemented in the 1970s and compulsory for the Industrial, Commercial, and Institutional (ICI) sector since 1977.

CERTIFICATION PROCESS

Two-step verification (card check and vote by sector)

One-step card check (option to opt for one-step starting in 2005)

UNION NEGOTIATION MODEL

Individual unions, each with its own multi-worksite collective agreement with specific employer

Most representative union within a sector

A centralized council of all unions who have certification within a sector

EMPLOYER NEGOTIATION MODEL

Individual employers whose worksites are unionized under a sectoral certification

A centralized council of employers

NEGOTIATION OUTCOME

Multiple collective agreements, each negotiated by a different union with a different set of employers whose worksites have been certified

A master agreement across the entire province, which all unions and employers within a sector are bound to

A master minimum standards regulation that establishes baseline rights and allows for locally negotiated terms in specific areas

DISPUTE RESOLUTION MODELS

Strike/lockout

Binding arbitration

Final offer arbitration

IMPLEMENTATION TIMELINE

Phased in

Immediate

BC HEALTH SECTOR

SCOPE OF REPRESENTATION

Includes only unionized workers

Includes all workers, union and non-union, within a sector

SECTORS INCLUDED

All sectors

Subsectors named in legislation (Community, Facilities, Health Sciences Professionals, Nurses, Residents, Ambulance)

Sectors that meet particular criteria (e.g. low union density)

SIZE OF ELIGIBLE WORKPLACE

Any workplace within a defined subsector

Workplaces under a maximum threshold within a defined sector (e.g. under 50)

Workplaces over a minimum threshold within a defined sector (e.g. over 5)

DEFINITION OF SCOPE

Defined by government in an act (*Health Authorities Act*)

Through application by union(s) to represent workers in a region or industry within a region

FURTHER BREAKDOWN BY SECTOR/SCOPE/REGION

A particular employer or franchises (e.g. Starbucks franchises in BC)

By occupation (Health Sciences Professionals, Nurses, Residents subsectors)

By occupation and setting (Community, Facilities, Ambulance subsectors)

UNION DRIVE

Ongoing certification campaigns with worksite add-ons to consolidated subsector certification

One certification campaign per sector to establish floor/standard/master collective agreement

Established in 1995, sectoral bargaining in BC’s health sector is defined by six multi-union associations. Each association represents a subsector and bargains its own collective agreement with the Health Employers Association of BC, the sole employer bargaining agent.

CERTIFICATION PROCESS

Two-step verification (e.g. if 45-55% of required cards are signed)	One-step card check (if over 55% of required cards are signed)
---	--

UNION NEGOTIATION MODEL

Individual unions, each with its own multi-worksite collective agreement with specific employer	Most representative union within a sector	Six centralized council of all unions who have certification within a subsector
---	---	---

EMPLOYER NEGOTIATION MODEL

Individual employers whose worksites are unionized under a sectoral certification	A centralized council of employers (Health Employers Association of BC)
---	---

NEGOTIATION OUTCOME

Multiple collective agreements, each negotiated by a different union with a different set of employers whose worksites have been certified	A master agreement across the entire province, which all unions and employers within a sector are bound to	A master minimum standards regulation that establishes baseline rights and allows for locally negotiated terms in specific areas
--	--	--

DISPUTE RESOLUTION MODELS

Strike/lockout	Binding arbitration	Final offer arbitration
----------------	---------------------	-------------------------

IMPLEMENTATION TIMELINE

Phased in	Immediate
-----------	-----------

6. FURTHER READING

Andrias, Kate. “A Seat at the Table: Sectoral Bargaining for the Common Good.” *Dissent Magazine*, May 1, 2019.

dissentmagazine.org/article/a-seat-at-the-table-sectoral-bargaining-for-the-common-good

Doorey, David. “The Model of Sectoral Collective Bargaining Everyone Is Whispering About.” *The Law of Work*, May 6, 2016.

lawofwork.ca/the-model-of-sectoral-collective-bargaining-everyone-is-whispering-about/

King, Adam D.K. “New Zealand Is Introducing Sectoral Bargaining. Canada Should Do the Same.” *Passage*, May 27, 2021.

readpassage.com/p/new-zealand-is-introducing-sectoral-bargaining-canada-should-do-the-same/

Madland, David. “The Re-Emergence of Sectoral Bargaining in the US, Britain, Australia and Canada.” *OnLabor*, April 22, 2021.

onlabor.org/the-re-emergence-of-sectoral-bargaining-in-the-us-britain-australia-and-canada/

Slinn, Sara J. “Broader-Based and Sectoral Bargaining in Collective-Bargaining Law Reform: A Historical Review.” *Labour / Le Travail* 85, no. 1 (2020): 13–51.

doi.org/10.1353/llt.2020.0002 and
digitalcommons.osgoode.yorku.ca/all_papers/324/

Walker, Liz and Shanice Regis-Wilkins. “What Is Sectoral Bargaining and How Can It Help Canada’s Working Class?” *PressProgress*, July 30, 2021.

pressprogress.ca/what-is-sectoral-bargaining-and-how-can-it-help-canadas-working-class/

CREDITS

Adapted from the British Columbia Federation of Labour Precarious Work
Working Group Virtual Panel on January 11, 2023:
[youtube.com/watch?v=B00TPdhm_84](https://www.youtube.com/watch?v=B00TPdhm_84)

Chapter 1 is based on research and presentation from Sara Slinn, and
presentations from Kriss Li, Megan Ballantyne, Judy Dalubutan, and
Alexandra Sorrentino

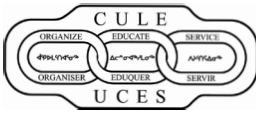
Chapter 2 is based on presentation from Sara Slinn

Chapter 3 is based on presentation from Alicia Massie

Chapter 4 is based on presentation from Denise Moffatt

Chapter 5 is designed by Kriss Li with input from Sara Slinn and Andrew
Longhurst

Compiled and designed by Kriss Li





ILWU Canada Longshore Strike 2023: Strategies and Lessons from the Digital Picket Line

Genevieve Lorenzo
Organizing and Education
ILWU Canada

SUMMARY

When contract negotiations came to a standstill earlier this year, ILWU Canada's longshore workers served strike notice to the employer. Two of the Union's Locals (500 and 517) had members who were asked by their employer to work remotely during the strike. A digital picket line was required to stop this from happening. The digital picket was held through social media, concurrent to the physical picket lines, and employed a positive, entertaining, and highly visible campaign that gained traction among the broader membership. The digital picket was successful in preventing remote work from being performed, as affected members notified their bosses that they would be unable to work from home due to the digital picket line. This effort was the first of its kind in British Columbia, so this report includes recommendations for future digital picket lines.

OVERVIEW

How does a union, whose very existence and structure is founded upon the physical spaces its workers inhabit, fight a virtual threat? The International Longshore and Warehouse Union formed in response to waterfront bosses who used their places on the docks to bribe, divide, and weaken longshore workers. The equitable distribution of work from the Union's dispatch hall formed the beating heart of the ILWU, and that tradition is maintained today as an integral part of its governance and structure. In response to an increasingly online environment, the Union has stepped up to accommodate these changes, and organized workers whose jobs focus on digital technology, such as IT technicians. It is no surprise then, that in response to a threat of virtual scab labour via remote work, ILWU quickly adapted its concept of place to include the online spaces that its membership is active in, and to use those spaces to protect the integrity of its strike.

On July 1, 2023, ILWU Canada struck a digital picket line for the first time. No stranger to making history, ILWU Canada's strike also marked the first time a digital picket was used in the longshore industry, and among unions in British Columbia.

The concept of a digital picket line is not new, but it is still relatively uncommon in practice. Writing and journalism are industries that were affected early by digitization, with employers exploiting the convenience of freelance work and online spaces to drive down the cost of labour and the need for expensive physical spaces to host their workforces. Workers soon found themselves fighting against a race to the bottom in wages and working conditions. Arguably the earliest digital picket line occurred during the 2007-2008 Writers Guild of America strike¹. The WGA struck over the threat that digital distribution and streaming posed to workers' job security, increasing workload, and wage stagnation in the face of record profits for their employer, and they were on strike again in 2023 for many of the same issues. In 2016, the Halifax Typographical Union set up a digital picket line against the *Chronicle Herald*² in response to the boss employing scab labour and asked the public to stop reading and subscribing to the publication.

¹ Miranda J. Banks (2010) The Picket Line Online: Creative Labor, Digital Activism, and the 2007–2008 Writers Guild of America Strike, *Popular Communication*, 8:1, 20-33, DOI: 10.1080/15405700903502387

² <https://ourtimes.ca/article/crossing-a-digital-picket-line>

By 2018 when Uber UK workers put up a digital picket line against the app that platformed their work³, the digital economy's impact on the nature of labour around the world was profound and permanent. For gig workers like those at Uber, the request was straightforward: log out and do not use the app. For workers at universities, such as the UK's University and College Union (UCU), the 2019 digital picket encompassed day-to-day labour performed digitally, such as planning lectures, teaching online courses, electronic marking, writing or publicising papers including research or grant applications, and work applications⁴. In 2022 and 2023, Insider Union, who represents the workers at Insider publications, asked people to "not cross the clicket line"⁵ by engaging with the company's websites and news, in an unfair labour practice dispute with their employer. And in a recent case, the New York Orchestra Musicians have asked the public to support them by participating in their digital picket line on social media through sharing and signal boosting.⁶

The methods of a digital picket line may vary depending on the labour being struck, but the means are consistent with traditional picket lines held in physical spaces: Draw the boundaries, form a line, hold fast, and stay united. Do not relent. This is how ILWU Canada succeeded in its first digital picket line.



Example of a meme shared by a digital picket team member.

³ <https://www.theguardian.com/technology/2018/oct/09/uber-uk-strike-users-urged-not-to-cross-digital-picket-line>

⁴ <https://www.ucu.org.uk/article/12469/FAQs>

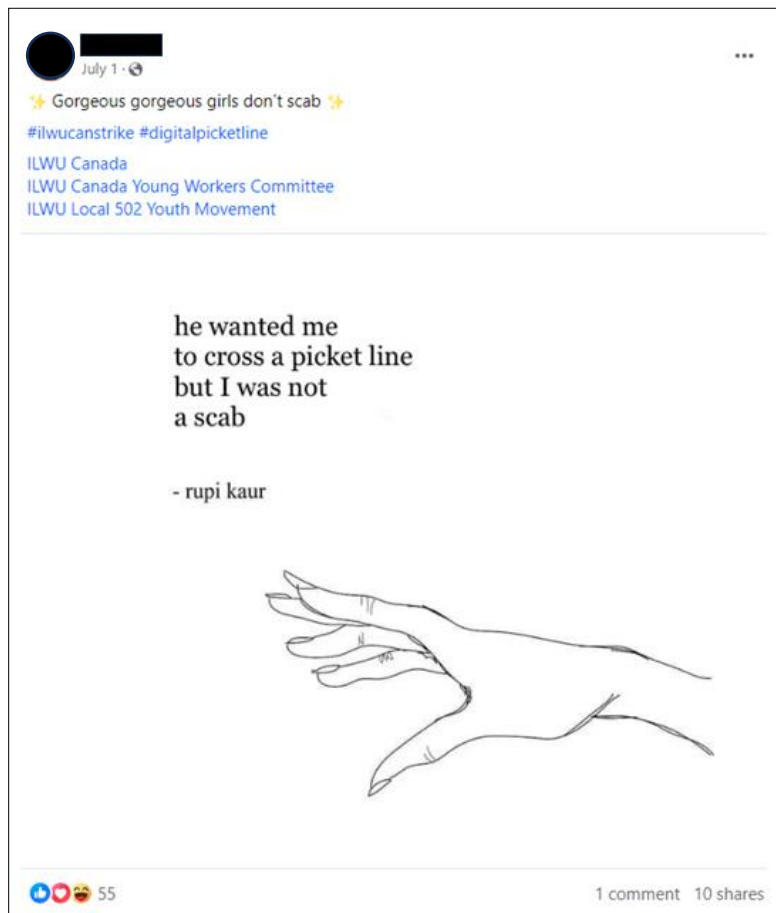
⁵ <https://www.insiderunion.org/business-outsider/insider-union-strike-best-picket-signs-how-to-help>

⁶ <https://www.instagram.com/p/CqjJvLehexS/>

COORDINATING THE DIGITAL PICKET

We recruited a team of 9 ILWU Canada longshore members from different locals. We looked for workers who were familiar with and comfortable using social media and had accounts on different platforms. We set up a WhatsApp group to act as our central communications hub, because this app is accessible and allows image and file sharing.

Since there had never been a digital picket in British Columbia before, our legal counsel at Victory Square Law Office (VSLO) provided us with a guide to follow. This guide included the standard legal requirements of any picket, with ground rules similar to those at physical picket lines (e.g., respectful communications, no defamatory statements), but also a helpfully thorough list of example captions that our team members could use on their posts along with memes, and social media accounts to tag. VSLO also provided us with an infographic that we could share to help explain to the broader public what a digital picket line was and how to support it (see Appendix 1). This guide and accompanying images were uploaded into a shared Google Drive that would be accessible to all team members. We used the Digital Picket Guide to train each of our team members. We spoke to each member individually and went through the guide with them, ensuring they were clear on the instructions and ground rules. Each post about the digital picket needed to have both the #digitalpicketline and #ilwucanstrike tags.



A post by a digital picket team member.

We set the picket line shifts at the same time as the business hours that our remote workers followed, which was 8am to 4pm. There were 2 shifts a day (8am to 12pm; 12pm to 4pm) with a minimum of 1 post per hour. We monitored the entirety of the digital picket line, checking in with the team members, providing updates to ILWU Canada leadership, logging each post into a spreadsheet, and relaying news when our digital picket line had been successful in preventing remote work from being performed. There were some workers who preferred to post on a continuous basis at regular intervals, while others followed their shifts as planned.

The team quickly settled into a rhythm, creating their own memes to use, which were first posted in the WhatsApp group for approval by the digital strike captains. The team also began posting photos of the physical picket lines they walked. The creative energy they fostered in this group chat was a means of encouragement and morale as the strike continued into its second week, which is when we saw an increase in posting fatigue.

We anticipated a degree of burnout and accommodated the members when they needed to take a break and step back for a time by arranging shifts to ensure coverage with the remaining team. We recruited additional team members by the second week to cover empty shifts. This ebb-and-flow structure allowed our team to maintain the energy of the digital picket to match that of the physical lines without the fear that a member taking a break would weaken our line.



A member poses in front of his painted mural on a picket line in Prince Rupert.

SUCCESS ON THE DIGITAL PICKET LINE

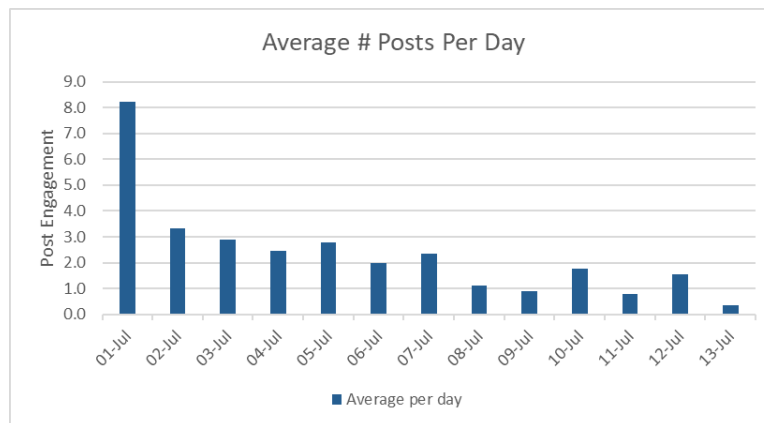
We measured our success in two ways. The first is whether any members of Local 500 or 517 performed work remotely, which we are proud to report that they did not. We learned from both Locals that members had notified their employers that they could not work remotely due to the digital picket line. We also heard that these employers were angry and threatened the Union with unfair labour practices, but these were idle threats and no complaints were ever filed.

Our second measure was the amount of engagement on the digital picket team’s social media posts, using the #digitalpicketline tag as an indication of visibility. The data available to us shows that the efforts of each team member did indeed work to increase the level of engagement by the broader membership, notably during the second week of the strike.

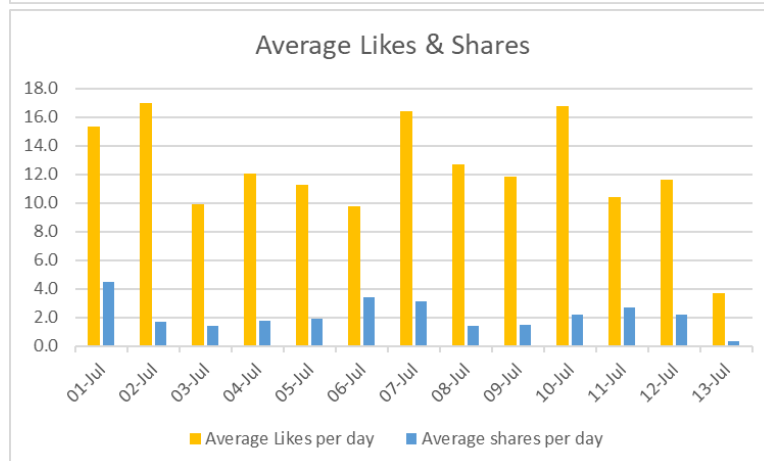
Our team made a total of 276 posts during the 13-day strike. These posts received a total of 3,279 likes and 694 shares. The first day of the strike, July 1, saw the highest engagement with 1,153 likes and 335 shares on that day alone. The last day of the strike saw the least amount of engagement, but this was expected. Interestingly, the total posts and post engagement saw a dramatic and unexplained decline on July 8, but engagement increased after July 9, likely due to the massive solidarity rally held July 9 at Jack Poole Plaza in Vancouver.

The overall trend of our team posts had a very strong start on the first week, then declined during the second as fatigue and burnout set in (graph 1). However, by the second week, the news of our digital picket had spread to enough people that there was no overall decline in the number of likes and shares that our posts received (graph 2). The collective energy of the membership buoyed the team members beyond what they could sustain on their own and we maintained a steady level of engagement.

Graph 1.



Graph 2.



DATA COLLECTION

The data were collected from the Facebook posts of the 9 digital picket team members over the course of the strike, between July 1 and July 13. The likes and shares on each post that used both the #digitalpicketline and #ilwucanstrike tags were tallied, but any likes and shares on a given post from fellow team members were subtracted from this total to more accurately represent engagement. Finally, only original posts by a team member were included, while reshares were excluded. Data was collected manually.

Team member posts were made to 3 social media platforms (Facebook, Instagram, Twitter), but only data from Facebook was included. This was due to several factors:

1. Facebook is the primary platform used by the majority of ILWU Canada's membership, where Twitter is not and Instagram skews to a younger demographic.
2. The Union frequently provides updates and information on its Facebook page and functions as a source of online information supplementary to its website, where Twitter and Instagram do not serve this purpose.
3. Engagement on Facebook posts is obvious as the likes and shares of a post are immediately visible, where Instagram shares and stories are not, and Twitter usage by members was too infrequent to provide useful data.

WHAT WE LEARNED

Posting on Facebook profiles was effective when post settings were "public", as this allowed a greater degree of visibility to the broader populace. Posting on a central business page and having team members share from this page may produce more accurate measures of reach. However, members of the team raised concerns during the second week over an apparent algorithmic decrease in post visibility, but there was no observable decrease in the overall engagement data. It is within Meta's algorithms to suppress repeated, similar content in their News Feeds⁷, and something to consider for future campaigns.

Creating and sharing memes was more work for the team but it was also an enjoyable experience, and posts with memes were more likely to be shared by others. Posting photos from the line with a caption about the #digitalpicketline generally produced more likes but fewer shares.

Organic engagement among the general membership increased during the second week, as well as within the broader labour ally community.

There is a definite benefit to signal boosting using profiles or pages with a high degree of engagement or visibility. For example, a member at large posted photos of a ILWU mural he painted with the caption: "A little Art Attack ! #ilwucanstrike #digitalpicketline #FairDeal #ilwucanada #ilwulocal505". His post on its own received 125 likes and 15 shares. When the ILWU Canada Facebook page shared his post, it received 247 likes and an additional 6 shares.

ILWU Canada's official Facebook page provided the ability to view individual post data in great detail, including the number of times it appeared in someone's Facebook News Feed ("reach"), and

⁷ <https://transparency.fb.com/features/explaining-ranking/>

engagement, defined as “the number of times people engaged with your post through reactions, comments, shares, views and clicks”. There were 2 posts from the ILWU Canada Facebook page with the hashtag #digitalpicketline:

Post 1: Announcement from President Rob Ashton that the strike had begun.



Caption: “The ILWU Canada Longshore Division is now on strike!

We have been working around the clock at Federal Mediation and Conciliation Services since 8am on June 30th to avert a strike.

The ILWU Canada Longshore Division has not taken this decision lightly, but for the future of our workforce we had to take this step. We are still hopeful a settlement will be reached through FREE Collective Bargaining!

The Longshore Bargaining Committee has been willing to bargain with the BCMEA since February. Unfortunately the BCMEA did not want to bargain a fair and balanced Collective Agreement!

The ILWU Canada Longshore Bargaining Committee is ready willing and able to meet to secure a Collective Agreement for the rights of Working Class!

On Behalf of The Longshore Bargaining Committee,

Rob Ashton, President, ILWU Canada

#ilwucanstrike #digitalpicketline #ilwu #ilwucanada #canpoli #bcpoli”

Results: 139 likes, 142 shares, 10,675 post reach, 535 total post engagement

Post 2: Pictures of Deltaport picket line.



Caption: “Picket line photos from ILWU Local 502 at Deltaport 0100 and 0800! Stay strong friends! Support your bargaining committee! NEGOTIATE DO NOT LEGISLATE! #ilwucanstrike #digitalpicketline #longshorevictory #ilwu #ilwucanada #canpoli #bcpoli @CBC Vancouver”

Results: 89 likes, 6 shares, 1,412 post reach, 379 total post engagement

LIMITATIONS OF DATA COLLECTION

Analytical inferences from the data collected are limited:





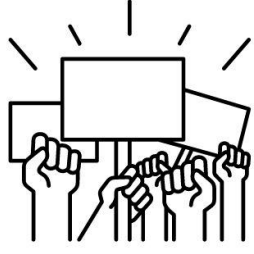
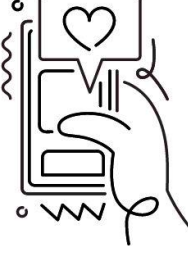
- The data comprises only original Facebook posts by team members using the #digitalpicketline and #ilwucanstrike tags, and therefore shows only first degree engagement. Given Facebook’s privacy settings, it is not possible for someone to view the posts or shares of a person unless they are on that person’s friend list or the post settings are public.
- The data presented here does not demonstrate the true reach of any single post, only the total likes and shares on the original post.

FINAL THOUGHTS

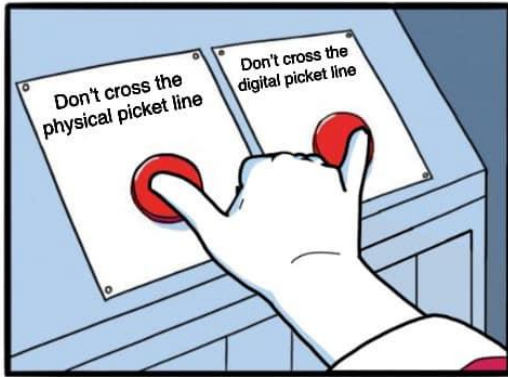
A digital picket line wrests control of online spaces away from the boss and back into the hands of the workers. It is an effective and accessible way for workers to build solidarity with each other and their communities and allows for the same creativity and joy of resistance that we see on physical picket lines. In a post-pandemic world in which remote work is commonplace, and gig labour is increasingly globalized and decentralized, digital pickets enable a greater proportion of the working class to participate in a strike.

As employers hone their strategies to better capitalize on weaknesses in the labour market, they will seek to control and silence digital spaces through litigation and legislation, making it a necessity for unions to understand how to respond without losing momentum or power. Turning the taps off at the means of production not only includes traditional profit streams, but also redirecting intangible assets that bosses normally rely on to exploit and divide the workers, such as time, expertise, and public narrative. Withheld or weaponized against the boss, these are the aspects of a strike that become particularly effective in the flattened hierarchy of digital spaces. ILWU Canada is just one example of the ability of workers to adapt and innovate resistance, be it through dispatch halls – or sharing memes online.

Appendix 1: Infographic

	<h2>DIGITAL PICKET LINE ILWU STRIKE</h2>
<p>1 What is a digital picket line?</p> <p>A digital picket line works much like a physical picket line, except it is online! The aim of the digital picket line is to communicate that we are on strike.</p>	
	<p>2 How does a digital picket line work?</p> <p>Picket online by posting messages to inform others of the strike action and our demands and ask the public and other workers not to cross our digital picket line.</p>
<p>3 Don't Cross the Picket Line!</p> <p>Crossing the digital picket line includes performing work for the employer from home that would normally happen behind the physical picket line.</p>	
	<p>4 Digital Picket Line Shift</p> <p>Check in at the start of your shift with your digital picket captain by tagging them in your posts. Begin posting and post minimum 1x/hour.</p>
<p>5 Use these hashtags</p> <p>Always use these two hashtags whenever you post: #ilwucanstrike #digitalpicketline</p>	
<p>ILWU An Injury To One Is An Injury To All</p>	

Appendix 2: Examples of Digital Picket Memes



@petircp
imgflip.com

+ JAKE-CLARK.TUMBLR



imgflip.com



imgflip.com



imgflip.com

With special thanks to our digital picket crew, and the team at Victory Square Law Office for their advice and work in producing the Digital Picket Guide and infographic.

NOTES

THE CYBERPICKET: A NEW FRONTIER FOR LABOR LAW

Down, but not out; bruised, but not beaten: U.S. labor law, though tired, can still put up the gloves. New strategies, born of the digital age and modern-day labor struggles, are reinvigorating the century-old legislative bases.¹ One innovation, the cyberpicket, promises to revive an aging doctrine and equip employees of online businesses with a powerful new tool to galvanize public support for their strikes and protests. For now, it's just a concept. But that could soon change, for the right to cyberpicket fits comfortably within labor law's current regime.

Admittedly, labor law doesn't ooze novelty. Most worker protections today still percolate from the National Labor Relations Act² (NLRA), a New Deal statute last updated by Congress during the Nixon Administration.³ Some labor activists hope for bold amendments;⁴ others seek reinvention of the current order.⁵ Yet given the current political gridlock,⁶ it's worth trying to breathe new life into old law.

Make no mistake, however: the NLRA isn't mummified. It's still a seminal statute with far-reaching effects, guaranteeing workers' right to organize and act collectively in their own interests.⁷ Situating the Act in historical context explains its staying power. Many of the same labor injustices that beset Depression-era workers afflict their great-grandchildren today. And just as the NLRA provided cover for the Greatest Generation, so too does it keep watch over the twenty-first-century labor force. Issues in the modern workplace that resemble the abuses that motivated the NLRA's authors have equal claim to the Act's remedial scheme. Nowhere is this clearer than in the realm of picketing.

As part of its package of protections, the NLRA permits employees to engage in peaceful picketing against their employers.⁸ It's a familiar form of protest, calling to mind workers, signs and pamphlets in hand, lining the entrance of a brick-and-mortar. Picketing pairs strong messaging with striking visuals: from suffragettes marching outside the

¹ See, e.g., *Motor City Pawn Brokers Inc.*, 369 N.L.R.B. No. 132, at 7 (July 24, 2020) (recognizing social media as a protected medium through which employees can discuss unionization).

² 29 U.S.C. §§ 151–169.

³ See *infra* notes 23–26 and accompanying text.

⁴ See, e.g., Protecting the Right to Organize Act of 2021, H.R. 842, 117th Cong. § 107 (2021).

⁵ See Kate Andrias, *The New Labor Law*, 126 YALE L.J. 2, 8–11 (2016).

⁶ Cf. Carl Hulse, *Republicans Prepare New Rules, But Fixing Congress Isn't So Easy*, N.Y. TIMES (Jan. 8, 2023), <https://www.nytimes.com/2023/01/08/us/politics/house-republicans-rules.html> [<https://perma.cc/QK2B-3LR2>] (describing the current congressional stalemate).

⁷ See *The Right to Unionize*, LAB. LAB., https://www.laborlab.us/the_right_to_unionize [<https://perma.cc/CY63-UYWC>].

⁸ See *infra* notes 62–69 and accompanying text.

White House⁹ to steelworkers patrolling their plants,¹⁰ these gripping scenes have long captured the public's attention and sympathies.

Consumer picketing¹¹ — this Note's focus — serves three main purposes: it informs the public about a labor dispute, dissuades customers from patronizing the business, and puts would-be shoppers to a symbolic choice — stand with workers, or cross against them. When successful in disrupting an employer's operations, picketing puts pressure on management to accede to the employees' demands, whether that means a return to the negotiating table, an agreement to comply with an existing contract, or a plan to improve workplace conditions.¹²

But having entered the digital age, many businesses now operate online. In the absence of a brick-and-mortar storefront, employees have nowhere to picket. This development jeopardizes labor law's delicate balance between employer interests and worker rights.

Luckily, there's a potential solution — first proposed by Professors Sharon Block and Benjamin Sachs — that doesn't require new legislation: the cyberpicket.¹³ Much like its in-person counterpart, a cyberpicket would alert potential customers to a labor dispute and put them to the choice of whether to continue transacting with the business. Instead of encountering rows of workers outfitted with signs and

⁹ See Matthew Costello, *Picketing the White House: The Suffragist Movement During the Great War*, WHITE HOUSE HIST. ASS'N (Apr. 14, 2017), <https://www.whitehousehistory.org/picketing-the-white-house> [<https://perma.cc/C5XF-UQ6T>].

¹⁰ See generally, e.g., Tom Juravich & Kate Bronfenbrenner, *Steelworkers' Victory at Ravenswood: Picket Line Around the World*, 3 WORKING USA 53 (1999).

¹¹ Some pickets target not consumers but coworkers, to dissuade them from strike-breaking. To avoid complication, any future mention of "picketing" refers to consumer picketing.

¹² A picket's objective can determine whether it's protected under law. The NLRA forbids, with few exceptions, nonunionized workers from picketing to "forc[e] or requir[e] an employer to recognize or bargain with a labor organization as the[ir] representative." 29 U.S.C. § 158(b)(7). This is called "recognitional" picketing. *What's the Law?*, NAT'L LAB. RELS. BD., <https://www.nlr.gov/about-nlr/rights-we-protect/whats-law/unions> [<https://perma.cc/ZS78-9LP4>]. But these same workers *can* picket to "truthfully advis[e] the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization." 29 U.S.C. § 158(b)(7)(C). This is known as "informational" picketing. *What's the Law?*, *supra*. It applies equally to workers who are already unionized and want to, for example, draw attention to an impasse in contract negotiations. See *Cap. Med. Ctr.*, 364 N.L.R.B. 887, 887, 899, 905 (2016), *enforced*, 909 F.3d 427 (D.C. Cir. 2018). When this Note mentions picketing, it means to invoke the informational, rather than the recognitional, variety — and specifically informational picketing against employers with whom workers have a *primary* (that is, direct) dispute. Cf. 29 U.S.C. § 158(b)(4)(i)(B) (prohibiting secondary pickets against neutral employers).

¹³ See SHARON BLOCK & BENJAMIN SACHS, CLEAN SLATE FOR WORKER POWER: BUILDING A JUST ECONOMY AND DEMOCRACY 64 (2020); see also Sharon Block, Benjamin Sachs & Tascha Shahriari-Parsa, *A Path Forward for Amazon Workers: Digital Picketing*, ONLABOR (Nov. 16, 2022), <https://onlabor.org/a-path-forward-for-amazon-workers-digital-picketing> [<https://perma.cc/Q3Y9-9HPA>]. Block and Sachs use the term "digital picket" to describe their innovation. Because that's also what the New York Times Guild called their recent social media campaign, see *infra* note 56 and accompanying text, this Note prefers the term "cyberpicket" as a way of differentiating the two concepts.

pamphlets, however, e-shoppers would come across a notification that materializes at a site's landing page — the business's "entrance."

The technology needed to implement a cyberpicket breaks no new ground. In fact, it's already widely utilized by online businesses for compliance with the European Union's (EU) "Cookie Law," which requires that websites give visitors the right to refuse data tracking.¹⁴ So-called "consent banners" — now familiar fixtures for netizens across the pond¹⁵ — present a tried-and-true template for the cyberpicket.

Not only is the cyberpicket a viable alternative to its in-person counterpart, it's a right owed to employees of online businesses. This Note sharpens the concept of a cyberpicket by expanding on its legal justification, expected benefits, and possible challenges. Part I outlines the NLRA's framework and argues that, though constructed long ago, it inherently extends to modern-day labor struggles. Part II supplies a doctrinal foundation, combing through case law to locate the right to cyberpicket. The focus here is on statutory precedents, temporarily setting aside constitutional considerations. Part III builds out the cyberpicket's mechanics, with inspiration from the EU's Cookie Law. It then offers next steps for interested workers. Part IV confronts the obstacles posed by the First and Fifth Amendments. Although the bleeding edge of constitutional law looks ominous, there's reason to test its boundaries.

This Note's goal isn't to engage in abstract statutory analysis but rather to inspire workers to test the limits of what's possible under the NLRA and thereby hold employers to their legal obligations. Labor law yearns for a spark; the cyberpicket promises to ignite one.

I. LABOR LAW'S INFRASTRUCTURE: SCAFFOLDING FOR THE CYBERPICKET

The NLRA, the nation's foundational labor statute, was forged from the industrial unrest and political agitation of a past era. Today, it's up to the modern National Labor Relations Board (NLRB) — more specifically, the agency's five-member committee that oversees implementation of the Act (the Board) — to recognize that the NLRA's heirloom protections still have purchase in the digital economy.

A. *A Framework Revisited*

Close to a century ago, the NLRA rewrote the rules of engagement in the battle for workers' rights. The result of labor unrest during the Great Depression, it dramatically altered the common law employment

¹⁴ See Council Directive 2002/58/EC, 2002 O.J. (L 201) 25 [hereinafter *ePrivacy Directive*], last amended by Council Directive 2009/136/EC, 2009 O.J. (L 337).

¹⁵ Many Americans will recognize consent banners, too: "As of October 2022, 45% of Fortune 500 websites were utilizing [them]." David A. Zetony, *How Many Websites Now Have Cookie Banners?*, NAT'L L. REV. (Dec. 7, 2022), <https://www.natlawreview.com/article/how-many-websites-now-have-cookie-banners> [<https://perma.cc/BRP5-RZMS>].

relationship and set a national policy in favor of collective bargaining and industrial democracy.¹⁶ Congress tasked the NLRB — an independent regulatory agency — with enforcing the new regime.¹⁷ These reforms catalyzed rapid labor mobilization and sharp union growth.¹⁸

The great NLRA experiment quickly felt the hand of correction. Responding to corporate interests and union abuses, Congress enacted the Taft-Hartley Act¹⁹ in the wake of World War II.²⁰ It reconfigured the labor-capital balance of power.²¹ Union arsenals shrunk; managements' strength grew.²² And labor law's landscape once again looked different.

Taft-Hartley not only dealt a blow to the labor movement but also marked one of Congress's last updates to the NLRA. Legislators addressed union corruption in 1959²³ and expanded the Act's coverage to nonprofit hospital workers in 1974,²⁴ but neither amendment worked a major shift in the labor-capital relationship.²⁵ Nor has any new legislation otherwise "modernized" labor law.²⁶ As a result, workers today must rely on a statute from a bygone era for their organizational rights. The workplace has changed, and labor law hasn't kept pace.

B. *The NLRA Today*

Still, the NLRA is far from a dead letter. Many workers (and employers) continue to seek refuge in its protections.²⁷ While the rate of unionization declined last year, the total number of union members grew,²⁸ as did workers' willingness to engage in collective action against

¹⁶ Andrias, *supra* note 5, at 13–14, 16.

¹⁷ 29 U.S.C. § 153.

¹⁸ See Andrias, *supra* note 5, at 16. The gains realized by workers were not evenly distributed. See, e.g., IRA KATZNELSON, WHEN AFFIRMATIVE ACTION WAS WHITE 53–79 (2005) (exposing the racist exclusion of agricultural and domestic workers from the statute's coverage).

¹⁹ Labor Management Relations (Taft-Hartley) Act of 1947, Pub. L. No. 80-101, 61 Stat. 136 (codified as amended at 29 U.S.C. §§ 141–187) (amending the NLRA).

²⁰ See HARRY A. MILLIS & EMILY CLARK BROWN, FROM THE WAGNER ACT TO TAFT-HARTLEY 272–81 (1950) (detailing the history of the Taft-Hartley Act).

²¹ See Andrias, *supra* note 5, at 18.

²² *Id.* at 18–19.

²³ Labor-Management Reporting and Disclosure (Landrum-Griffin) Act of 1959, Pub. L. No. 86-257, 73 Stat. 519 (codified as amended in scattered sections of 29 U.S.C.).

²⁴ Act of July 26, 1974, Pub. L. No. 93-360, 88 Stat. 395 (codified as amended in scattered sections of 29 U.S.C.).

²⁵ See Andrias, *supra* note 5, at 27 & n.127 (noting that the Landrum-Griffin Act "tinker[ed] with" the NLRA); Ira M. Shepard, *Health Care Institution Amendments to the National Labor Relations Act: An Analysis*, 1 AM. J.L. & MED. 41, 53 (1975) (lamenting that the health care amendments, while "ambitious," ultimately "fall[] short" of providing "essential" safeguards).

²⁶ See Andrias, *supra* note 5, at 27–28.

²⁷ See *Unfair Labor Practice Charges Filed Each Year*, NAT'L LAB. RELS. BD., <https://www.nlr.gov/reports/nlr-case-activity-reports/unfair-labor-practice-cases/intake/unfair-labor-practice-charges> [<https://perma.cc/QFK3-V64Q>] (recording that individuals, unions, and employers collectively filed 17,998 unfair labor practice charges with the NLRB in 2022).

²⁸ News Release, Bureau of Lab. Stat., U.S. Dep't of Lab., Union Members — 2022 (Jan. 19, 2023), <https://www.bls.gov/news.release/pdf/union2.pdf> [<https://perma.cc/6C2Q-7QAS>].

uncooperative employers.²⁹ Tens of thousands — from graduate students to baristas — exercised their statutory right to strike in 2022.³⁰ Unions are also winning more elections, despite forceful company-led countercampaigns.³¹ Clearly, then, the rank-and-file still rely on the NLRA to justify and effect their self-empowerment.

And they currently have a powerful ally in NLRB General Counsel Jennifer Abruzzo, who bears responsibility for prosecuting unfair labor practices.³² Early in her tenure, Abruzzo vowed to challenge questionable Board precedents that hamstringing workers' statutory entitlements, including their picketing rights.³³ So far, she has kept her promise.³⁴

Yet Abruzzo's efforts have yielded little from the Board, despite its enjoying a Democratic majority that many hoped would revitalize labor law's doctrinal landscape.³⁵ Decisions under "Biden's NLRB" have been slow to emerge, with crucial cases seemingly left on the back burner.³⁶ A flurry of labor-friendly activity at the close of last year offers hope for a more active 2023.³⁷ But the outlook for workers remains hazy: even with its recent bump in funding, the Board still faces budgetary constraints and an ever-expanding backlog of cases.³⁸

Separate from these practical limitations lies an issue that can't be fixed with an appropriations bill or efficiency gains: the Board's politicization. Members are appointed by the President, with Senate consent,

²⁹ See Rani Molla, *How Unions Are Winning Again, In 4 Charts*, VOX (Aug. 30, 2022, 6:00 AM), <https://www.vox.com/recode/2022/8/30/23326654/2022-union-charts-elections-wins-strikes> [https://perma.cc/P5K4-UJNH].

³⁰ Marick Masters, *Worker Strikes and Union Elections Surged in 2022 — Could It Mark a Turning Point for Organized Labor?*, THE CONVERSATION (Jan. 5, 2023, 8:25 AM), <https://theconversation.com/worker-strikes-and-union-elections-surged-in-2022-could-it-mark-a-turning-point-for-organized-labor-195995> [https://perma.cc/5NKW-MSGK].

³¹ See Molla, *supra* note 29; Andrea Hsu & Alina Selyukh, *Union Wins Made Big News This Year. Here Are 5 Reasons Why It's Not the Full Story*, NPR (Dec. 27, 2022, 10:01 AM), <https://www.npr.org/2022/12/27/1145090566/labor-unions-organizing-elections-worker-rights-wages> [https://perma.cc/P7G8-EM8K]. Unions aren't just popular among their members; they enjoy high approval ratings from Americans generally. See Justin McCarthy, *U.S. Approval of Labor Unions at Highest Point Since 1965*, GALLUP (Aug. 30, 2022), <https://news.gallup.com/poll/398303/approval-labor-unions-highest-point-1965.aspx> [https://perma.cc/G2TV-CC55] (reporting that "[s]eventy-one percent of Americans now approve of labor unions").

³² 29 U.S.C. § 153(d).

³³ See Memorandum from Jennifer A. Abruzzo, Gen. Couns., Office of the Gen. Couns., Nat'l Lab. Rels. Bd., to All Reg'l Dirs., Officers-in-Charge & Resident Officers 1, 7–8 (Aug. 12, 2021).

³⁴ See, e.g., Brief in Support of General Counsel's Exceptions to the Administrative Law Judge's Decision at 20–62, CEMEX Constr. Materials Pac., LLC, No. 28-CA-230115 (N.L.R.B. Div. of Judges Dec. 16, 2021) (seeking to overrule decades of probusiness precedents).

³⁵ See David Dayen, *Coalition Asks: Where Is Biden's NLRB?*, AM. PROSPECT (Dec. 8, 2022), <https://prospect.org/labor/coalition-asks-where-is-bidens-nlr> [https://perma.cc/4QZB-P9YM].

³⁶ *Id.*

³⁷ See Paul King Jr., *Landmark NLRB Decision Expands Labor Violations*, NAT'L L. REV. (Jan. 17, 2023), <https://www.natlawreview.com/article/landmark-nlr-b-decision-expands-labor-violations> [https://perma.cc/5M5J-QJ7A].

³⁸ See Press Release, Nat'l Lab. Rels. Bd., Off. of Pub. Affs., Statement on NLRB Funding in the 2023 Omnibus Bill (Dec. 29, 2022), <https://www.nlr.gov/news-outreach/news-story/statement-on-nlr-b-funding-in-the-2023-omnibus-bill> [https://perma.cc/MYR8-L2J5].

to five-year staggered terms, meaning each administration can effectively reconstitute the Board.³⁹ The legislators who dreamt up the quasi-judicial body imagined that its constituents would be “nonpartisan and neutral.”⁴⁰ After only two decades, however, politically motivated appointments began to splinter the Board.⁴¹ Today, shifting majorities create doctrinal whiplash, as probusiness Republicans blow one way, while prolabor Democrats sweep the other.⁴² Even if labor secures a victory in the picketing context, the rights might not stick.

Setting a precedent still carries weight, however. The Board must later justify a departure in a reasoned decision.⁴³ In the meantime, labor enjoys stronger protections and generates a proven template for future cases. It’s therefore crucial that workers continue to assert their statutory rights, striking while the iron is perhaps lukewarm, but hopefully heating up, under the Biden Board.⁴⁴ Depending on the results of the next presidential election, it may soon turn stone-cold.

C. Digital Dilemma, Cyber Solution

One of labor law’s new frontiers, the internet, challenges the NLRA to prove its continued vitality. For most of the Act’s lifespan, Americans shopped in brick-and-mortar stores.⁴⁵ Take the once-prominent department chain Sears.⁴⁶ If, during the retailer’s mid-twentieth-century heyday,⁴⁷ its employees were to picket, Sears’s customers would ipso facto learn about the underlying labor dispute. Shoppers would then have to make an informed decision about whether to keep spending there, a symbolic act that expresses a lack of solidarity with the workers.⁴⁸

³⁹ See 29 U.S.C. § 153(a).

⁴⁰ James J. Brudney, *Isolated and Politicized: The NLRB’s Uncertain Future*, 26 COMPAR. LAB. L. & POL’Y J. 221, 243 (2005).

⁴¹ See Joan Flynn, *A Quiet Revolution at the Labor Board: The Transformation of the NLRB, 1935–2000*, 61 OHIO ST. L.J. 1361, 1365 (2000).

⁴² See Dayen, *supra* note 35. Political approximations for Members’ tendencies to support decisions seen as prolabor or probusiness aren’t perfect, but they roughly align with what Presidents look for in appointees and thus capture general trends. See Brudney, *supra* note 40, at 248–50.

⁴³ See *Shaw’s Supermarket v. NLRB*, 844 F.2d 34, 35 (1st Cir. 1989).

⁴⁴ See *supra* notes 35–36 and accompanying text.

⁴⁵ The first known sale of an item over the internet took place in 1994. See Shahed Nasser, *The History of Ecommerce: 1979 to 2023*, MEDUSA (Mar. 9, 2023), <https://medusajs.com/blog/ecommerce-history> [<https://perma.cc/HVF4-9CH6>].

⁴⁶ See Vicki Howard, Essay, *How Sears Industrialized, Suburbanized, and Fractured the American Economy*, ZÓCALO PUB. SQUARE (July 20, 2017), <https://www.zocalopublicsquare.org/2017/07/20/sears-industrialized-suburbanized-fractured-american-economy/chronicles/who-we-were> [<https://perma.cc/K7E9-L4SK>].

⁴⁷ See *id.*

⁴⁸ See Kim Kelly, Opinion, *Crossing the Picket Line: What You Need to Know About Strikes*, TEEN VOGUE (Sept. 1, 2020), <https://www.teenvogue.com/story/strikes-and-picket-lines-explained> [<https://perma.cc/F3AB-8AEZ>].

But what if there's no physical storefront? E-commerce as an industry, which earned over a trillion dollars in the United States in 2022,⁴⁹ threatens workers' ability to picket. Consider Amazon's business model. Although the company now operates several brick-and-mortar outlets,⁵⁰ the plurality of its retail sales come from its online marketplace.⁵¹

Last year, Amazon's Staten Island warehouse successfully unionized following a historic election.⁵² Despite this, the e-commerce giant has refused to engage in contract negotiations, no doubt violating its statutory duty to bargain in good faith.⁵³ The legal remedies available to the union are "too weak to offer . . . much hope of forcing Amazon to come to the table . . . any time soon."⁵⁴ Suppose the Staten Island workers, instead of taking to the courts, wish to exercise their right to picket. Sure, they can line the entrances of a local Amazon grocery outlet, if there's one nearby. But customers can continue to shop on the company's website, blissfully unaware of any labor dispute. These patrons don't have to make the difficult choice of whether to cross the picket line because there's none in sight: no patrolling, chanting, or signs.

Workers can try to publicize labor disputes to online audiences through other means, such as social media, but that's no substitute for traditional picketing.⁵⁵ Members of the New York Times Guild recently initiated what they called a "digital picket," taking to sites like Twitter to urge consumers not to engage any of the newspaper's platforms until

⁴⁹ See CENSUS BUREAU, U.S. DEP'T OF COM., CB23-22, QUARTERLY RETAIL E-COMMERCE SALES 4TH QUARTER 2022 (2023), https://www.census.gov/retail/mrts/www/data/pdf/ec_current.pdf [<https://perma.cc/P8GG-DCP6>].

⁵⁰ See, e.g., Veronika Bondarenko, *Amazon's New Brick-and-Mortar Store Concept Is Now Open for Business*, THE STREET (May 25, 2022, 1:15 PM), <https://www.thestreet.com/investing/amazon-first-retail-fashion-store> [<https://perma.cc/PXK8-YUAH>].

⁵¹ See Amazon.com, Inc., Annual Report (Form 10-K), at 67 (Feb. 3, 2023).

⁵² See Karen Weise & Noam Scheiber, *Amazon Workers on Staten Island Vote to Unionize in Landmark Win for Labor*, N.Y. TIMES (Apr. 1, 2022), <https://www.nytimes.com/2022/04/01/technology/amazon-union-staten-island.html> [<https://perma.cc/5VDX-GKLG>]. "Amazon's fulfillment centers are the engine of the company — massive warehouses where workers track, pack, sort, and shuffle each order before sending it on its way to the buyer's door." Colin Lecher, *How Amazon Automatically Tracks and Fires Warehouse Workers for "Productivity"*, THE VERGE (Apr. 25, 2019, 12:06 PM), <https://www.theverge.com/2019/4/25/18516004/amazon-warehouse-fulfillment-centers-productivity-firing-terminations> [<https://perma.cc/HDP7-YPEE>]. Each location boasts thousands of employees, who do their best to meet Amazon's tall demand. See *Our Facilities*, AMAZON, <https://www.aboutamazon.com/workplace/facilities> [<https://perma.cc/7YZJ-KZEP>].

⁵³ See 29 U.S.C. § 158(d); Ananya Bhattacharya, *Amazon Refuses to Make Peace with Unions Even After They've Won the Right to Organize*, QUARTZ (Dec. 1, 2022), <https://qz.com/amazon-refuses-to-make-peace-with-unions-even-after-the-1849839810> [<https://perma.cc/AB3J-92EQ>].

⁵⁴ Block, Sachs & Shahriari-Parsa, *supra* note 13.

⁵⁵ Because social media companies are privately held, they can arbitrarily limit the reach of union-led campaigns by suppressing or rejecting posts. Cf. Sofia Grafanaki, *Platforms, The First Amendment and Online Speech: Regulating the Filters*, 39 PACE L. REV. 111, 133–34 (2018). This threat alone counsels against relying on such platforms to supply workers' picketing rights.

it reached an agreement with the union.⁵⁶ The call-to-action went viral, garnering much interest (and some criticism) from the public.⁵⁷ Yet it could easily have gone unheeded by those without an active online presence. Social media word-of-mouth can serve as a powerful adjunct to traditional forms of economic pressure, but it looks more like a sign above a freeway than a banner beside a building's entrance — those who *walk* to the store miss the message.

More importantly, labor law doesn't end where the World Wide Web begins; employers can't escape the NLRA's reach by doing business online. The Act's broad language, as interpreted by the Board, naturally supports the right to cyberpicket.⁵⁸ The basic idea, first sketched elsewhere,⁵⁹ is simple enough. Each time someone navigates to a cyberpicketed business's landing page, a banner will appear on screen. It will describe the labor dispute and encourage the visitor not to transact with the company until the workers' demands have been met. To continue to the site, customers must click a box indicating that they agree to cross the picket line. Nothing on the landing page itself will change; once past the cyberpicket, the visitor will encounter a shopping experience that's identical to the one they're familiar with.

So conceived, cyberpickets aim to achieve the same goals as their in-person counterparts: educating visitors about ongoing labor disputes, discouraging customers from doing business with the employer, and forcing patrons into the same tough decision that confronted the mid-twentieth-century Sears shopper.⁶⁰ And ultimately, employees seek a similar outcome: applying enough economic pressure through reduced sales and bad press to push the employer into meeting their demands.

The right to cyberpicket, then, not only fits naturally into the NLRA's scheme but also signals that the Act will stand as a bulwark against novel encroachments on established labor protections and keep online businesses accountable. The Board should take note, for the rise of e-commerce is precisely the kind of "changing industrial practice[]" meant to factor into its "adapt[ive]" interpretations of the Act.⁶¹

⁵⁶ Nicholas Clairmont, Opinion, *Tweeters of the World, Unite Around the New York Times and Its "Digital Picket Line,"* NEWSWEEK (Dec. 9, 2022, 2:11 PM), <https://www.newsweek.com/tweeters-world-unite-around-new-york-times-its-digital-picket-line-opinion-1766052> [<https://perma.cc/PZS8-BCF4>].

⁵⁷ See *id.* (critiquing the class-based dimension to the digital picket).

⁵⁸ When this Note speaks of "online businesses," it refers not only to fully virtual e-commerce sites but also to brick-and-mortars that sell in-person services on the internet. For instance, most people book travel online. See *Online Travel Booking Statistics 2020–2021*, CONDOR FERRIES, <https://www.condorferries.co.uk/online-travel-booking-statistics> [<https://perma.cc/233T-SHAA>]. A hotel that offers getaways for purchase on its site can be cyberpicketed. (Indirect booking through travel agencies presents a different question, but one best suited for future research.)

⁵⁹ See sources cited *supra* note 13.

⁶⁰ See *supra* notes 11–12 and accompanying text.

⁶¹ See *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 266 (1975).

II. FROM PAVEMENT TO PIXELS: PICKETING RIGHTS IN THE DIGITAL AGE

The Board has constructed a comprehensive scheme of picketing rights from the NLRA's text. Putting constitutional objections aside for the moment, the right to cyberpicket fits neatly within the case law.

A. *Statutory Regime*

Peaceful picketing holds special significance in labor law jurisprudence, both constitutionally and statutorily. When it occurs on *public* property like parks and sidewalks, the First and Fourteenth Amendments grant participants broad protections.⁶² Even some *private* property — namely, company towns — must conform to the constitutional guarantee of free expression.⁶³ In most cases, however, picketing on an employer's premises is governed exclusively by the NLRA.⁶⁴

Section 7 of the Act supplies picketing its statutory anchor. It states that employees “have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, *and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.*”⁶⁵ These protections embrace the right “to criticize or complain about [one's] employer or [one's] conditions of employment, and to enlist the assistance of others in addressing employment matters.”⁶⁶ Further still, workers may “solicit[] support not only from fellow employees but also from nonemployees such as customers and the general public,”⁶⁷ including through primary picketing.⁶⁸ Employers, in turn, “commit an ‘unfair labor practice’ in violation of the Act when they ‘interfere with, restrain, or coerce employees in the exercise of’ their Section 7 rights.”⁶⁹

Sometimes Section 7 rights run up against employer property interests. When that happens, the Board must “seek a proper accommodation between the two,”⁷⁰ meaning with “as little destruction of one as is consistent with the maintenance of the other.”⁷¹ Over time, the Board has developed certain presumptions to aid in its task. One, first

⁶² See *Amalgamated Food Emps. Union Loc. 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308, 315 (1968), *overruled on other grounds by* *Hudgens v. NLRB*, 424 U.S. 507 (1976).

⁶³ See *Marsh v. Alabama*, 326 U.S. 501, 508–09 (1946).

⁶⁴ See *Hudgens*, 424 U.S. at 513, 521.

⁶⁵ 29 U.S.C. § 157 (emphasis added).

⁶⁶ *Quicken Loans, Inc. v. NLRB*, 830 F.3d 542, 545 (D.C. Cir. 2016) (citing *Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 491 (1978); *Stanford Hosp. & Clinics v. NLRB*, 325 F.3d 334, 343 (D.C. Cir. 2003); *Tradesmen Int'l, Inc. v. NLRB*, 275 F.3d 1137, 1141 (D.C. Cir. 2002)).

⁶⁷ *Cap. Med. Ctr. v. NLRB*, 909 F.3d 427, 430 (D.C. Cir. 2018) (citing *Stanford Hosp. & Clinics*, 325 F.3d at 343).

⁶⁸ *Cf.* 29 U.S.C. § 158(b)(4)(i)(B) (“[N]othing contained in this clause . . . shall be construed to make unlawful, where not otherwise unlawful, any . . . primary picketing.”).

⁶⁹ *Cap. Med. Ctr.*, 909 F.3d at 430–31 (quoting 29 U.S.C. § 158(a)(1)).

⁷⁰ *Cent. Hardware Co. v. NLRB*, 407 U.S. 539, 543 (1972).

⁷¹ *Id.* at 544 (quoting *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1956)).

developed in the context of workplace organizing but later applied to picketing cases, made its way to the Supreme Court. In *Republic Aviation Corp. v. NLRB*,⁷² the Justices confronted an employer's rule that prohibited solicitation of any kind — union-related or not — at its plant.⁷³ Agreeing with the Board's reasoning below, the Court approved a presumption that blanket no-solicitation rules unreasonably impede employees' Section 7 right to self-organize unless necessary for discipline or production.⁷⁴ Hence, employers can't prohibit off-the-clock workers from passing out pro-union pamphlets on company property, whether during rest periods, on lunch break, or after hours.⁷⁵ This holding rested on a simple truth: to effectively exercise their right to self-organization, employees must have an opportunity to communicate about unionization, and the job site is uniquely conducive to such interactions.⁷⁶

The Board has extended the *Republic Aviation* presumption to certain restrictions on worker picketing. It once found that a business committed an unfair labor practice by “calling the police” and “causing the arrest” of off-duty employees who were picketing in front of a store's entrance.⁷⁷ A similar result obtained when a hospital tried to ban like activity outside its front lobby doorway.⁷⁸ These cases establish that off-duty employees have a statutory right to picket on nonworking areas of company property, in turn saddling employers with the heavy responsibility of showing business necessity for any imposed constraints.⁷⁹

The NLRA's protections go further still, underscoring Section 7's breadth. Employees of, say, a Walmart in Atlanta are legally entitled to picket not only at their assigned store but also at the nearby Decatur branch.⁸⁰ In this scenario, Walmart's corporate structure serves as the unifying entity — the individual locations need not maintain a close relationship, support each other's inventories, or sell the same products:

⁷² 324 U.S. 793 (1945).

⁷³ See *id.* at 794–95.

⁷⁴ *Id.* at 803 & n.10.

⁷⁵ See *id.* at 803 n.10 (quoting *Peyton Packing Co.*, 49 N.L.R.B. 828, 843 (1943), *enforced*, 142 F.2d 1009 (5th Cir. 1944)); *cf.* *Eastex, Inc. v. NLRB*, 437 U.S. 556, 572–74, 574 n.23 (1978) (applying *Republic Aviation* presumption to restrictions on at-work distribution of union newsletter that not only discussed purely organizational matters but also other protected Section 7 activity).

⁷⁶ See *Republic Aviation Corp.*, 324 U.S. at 801 n.6 (quoting *Republic Aviation Corp.*, 51 N.L.R.B. 1186, 1195 (1943)).

⁷⁷ See *Cap. Med. Ctr.*, 364 N.L.R.B. 887, 889 (2016) (citing *Town & Country Supermarkets*, 340 N.L.R.B. 1410, 1413–14 (2004)), *enforced*, 909 F.3d 427 (D.C. Cir. 2018).

⁷⁸ See *id.* at 887–88, 891.

⁷⁹ See *id.* at 888–90. True, “Section 7 does not itself speak of access rights.” *ITT Indus., Inc. v. NLRB*, 251 F.3d 995, 1000 (D.C. Cir. 2001). But “the Board's reasonable interpretation[s] of ambiguous NLRA provisions” call for deference from federal courts. *Cap. Med. Ctr.*, 909 F.3d at 433 (citing *ITT Indus., Inc.*, 251 F.3d at 999–1000; *Chevron U.S.A. Inc. v. Nat. Res. Def. Council*, 467 U.S. 837, 842–43 (1984)).

⁸⁰ See *ITT Indus., Inc.*, 341 N.L.R.B. 937, 941 (2004), *enforced*, 413 F.3d 64 (D.C. Cir. 2005); *Hillhaven Highland House*, 336 N.L.R.B. 646, 648–49 (2001), *enforced sub nom.* *First Healthcare Corp. v. NLRB*, 344 F.3d 523 (6th Cir. 2003).

“[I]f [an employer] is essentially a single enterprise, in its operations, its employees have the right to picket geographically separated parts of its operation in support of a primary dispute in one part, without proving that there is a direct relationship between the parts at the local level.”⁸¹

Off-site employees aren’t relegated to picketing on a distant public sidewalk; they too have a right to engage in Section 7 activity *on company property*.⁸² Part of this holding’s significance lies in the fact that it was never inevitable. Off-site employees could’ve been treated like nonemployee union organizers, who enjoy *very* limited access rights.⁸³ Indeed, if store employees are reasonably accessible off the property, a business may treat nonemployee organizers as trespassers and bar or evict them from the premises.⁸⁴ Critically, any access privileges nonemployee organizers enjoy “deriv[e]” from the workers’ right “to exercise their organization rights effectively.”⁸⁵ That’s not true of off-site employees, so concluded the Board.⁸⁶ Their access rights spring directly from Section 7 as part of protected “concerted action,” for the employees ultimately aim “to increase the power of the[ir] union” and “improve the working conditions for the onsite and offsite worker alike.”⁸⁷

Other strands of NLRB case law strike a different, less worker-friendly balance between employees’ Section 7 rights and employers’ private property interests, yet none map as cleanly onto the cyberpicketing context as, well, the Board’s picketing precedents. One decision in particular — *Caesars Entertainment*⁸⁸ — might have the look of a management trump card, but the analogy folds under scrutiny. There, the Board interpreted *Republic Aviation* narrowly to hold that employees, in most cases, aren’t entitled to use their company’s email system to communicate about Section 7 activity.⁸⁹ Today’s workers, the Board

⁸¹ Teamsters, Loc. Union No. 560, 248 N.L.R.B. 1212, 1214 (1980) (citing Int’l Bhd. of Teamsters, 128 N.L.R.B. 916, 919 (1960); Retail Clerks Int’l Ass’n, 122 N.L.R.B. 1264, 1270 (1960); Madden v. Steel, Metals, Alloys & Hardware Fabricators, 22 F. Supp. 635, 638 (N.D. Ill. 1963)).

⁸² See, e.g., *Hillhaven*, 336 N.L.R.B. at 648–49. The Board has modified slightly the *Republic Aviation* framework to account for the fact that employers “may well have heightened private property-right concerns when offsite (as opposed to onsite) employees seek access to its property to exercise their Section 7 rights.” *Id.* at 648.

⁸³ See *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 538 (1992).

⁸⁴ See *id.* at 539 (quoting *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 113 (1956)) (citing *NLRB v. Lake Superior Lumber Corp.*, 167 F.2d 147 (6th Cir. 1948)) (permitting access in limited contexts, such as logging camps).

⁸⁵ *Sears, Roebuck & Co. v. San Diego Cnty. Dist. Council of Carpenters*, 436 U.S. 180, 206 n.42 (1978).

⁸⁶ See, e.g., *Hillhaven*, 336 N.L.R.B. at 648.

⁸⁷ *First Healthcare Corp. v. NLRB*, 344 F.3d 523, 533 (6th Cir. 2003) (citing *Hillhaven*, 336 N.L.R.B. at 648). Another “critical distinction” for the Board “is that employees are not strangers to the employer’s property, but are already rightfully on the employer’s property pursuant to their employment relationship, thus implicating the employer’s management interests rather than its property interest.” *Town & Country Supermarkets*, 340 N.L.R.B. 1410, 1414 (2004) (citing *Hudgens v. NLRB*, 424 U.S. 507, 521 n.10 (1976); *Eastex, Inc. v. NLRB*, 437 U.S. 556, 571–73 (1978)).

⁸⁸ 368 N.L.R.B. No. 143 (2019).

⁸⁹ See *id.* at 7–8.

submitted, can usually discuss union-related matters either face-to-face or through digital mediums like social media; thus, a company could prohibit nonbusiness use of its IT resources without unreasonably impeding the exercise of its employees' self-organizational rights.⁹⁰

The Board's decision in *Caesars* doesn't spell doom for cyberpicketing. For one, a landing page isn't akin to an email system — it's the functional equivalent of a storefront. In this sense, temporarily occupying business property for a cyberpicket is more like standing outside a retail outlet to engage with would-be shoppers (protected) than typing to coworkers on internal company servers (not protected). And even if employees of online businesses can meet in a break room or connect on LinkedIn to discuss Section 7 activity, these same avenues aren't available (and certainly aren't adequate) for communicating with potential customers or the public at large about a labor dispute. Hence, *Caesars* neither applies of its own force nor succeeds by analogy. The Board's picketing cases supply a much sturdier foundation on which to rest a decision about the right to cyberpicket.

B. Closing the Click-and-Mortar Gap

The NLRA's broad regime of picketing rights has not yet made its way online, choking off an important stream of worker power at the source. Nothing in the Board's decisions recognizing the right of employees to access nonworking areas of company property — such as parking lots, gates, and storefronts⁹¹ — for Section 7 activity suggests a carveout for online businesses. Nor does the text of the NLRA, which broadly permits "concerted activities" for "mutual aid or protection."⁹² Traditional conceptions of picketing, however, deprive e-commerce workers of a valuable tool for applying economic pressure against their employers, who gain an unfair advantage just by operating on the web. Settling for a watered-down version of the NLRA would leave Amazon's Staten Island warehouse employees to either picket one of the company's relatively inconsequential brick-and-mortars or shout into the void of social media.⁹³ But there's a better path forward.

Employees of online businesses have a statutory right to cyberpicket, the functional analog of an in-person picket. The Board's precedents, fairly read, make that clear. To illustrate why, it will help to first revisit

⁹⁰ *Id.* at 8.

⁹¹ See *Tri-County Med. Ctr.*, 222 N.L.R.B. 1089, 1089 (1976).

⁹² 29 U.S.C. § 157.

⁹³ See *supra* notes 49–51 and accompanying text. Conceivably, the workers could picket their own warehouse, but because customers don't shop there, the message wouldn't reach its intended audience. The NLRA doesn't relegate workers to such an enfeebled form of picketing. *Cf. Teamsters, Local Union No. 560*, 248 N.L.R.B. 1212, 1214 (1980) (upholding workers' right to picket "geographically separated parts" of a "single enterprise"); *Scott Hudgens*, 230 N.L.R.B. 414, 415–18 (1977) (protecting right of striking warehouse employees to picket adjacent to employer's retail outlet in shopping mall).

the Walmart hypothetical — typecast here as a chain of brick-and-mortars — before comparing it with Amazon’s e-commerce business. Assume Walmart has refused to bargain in good faith with the Atlanta workers’ union. Under Board precedents, not only do those employees have the right to picket at the entrance of their “home” store, but they can also line the gates of the nearby Decatur location — or the Miami Walmart, for that matter.⁹⁴ Every potential customer to these outlets must witness the picket and decide whether to proceed inside anyway.

Now consider Amazon’s online marketplace. Despite its intangibility, it too is a bona fide store.⁹⁵ The shop’s entrance is not a revolving door but rather the landing page. From there, customers can peruse products, put items in their carts, and even ask for help from a “live agent.” Indeed, scrolling through goods on one’s phone closely resembles thumbing through a grocery outlet’s selection of produce. Amazon’s web banner might look different from Walmart’s bright-blue storefront lettering, but the activity inside is the same: retail shopping.

Although Amazon’s online marketplace operates much like Walmart’s physical stores,⁹⁶ employees of the e-commerce giant miss out on a crucial Section 7 right due to the lack of effective picketing options. The cyberpicket promises to fill the gap. Its contours may still seem blurry, but for now think of it as a banner-like notification that materializes when a webpage is loaded. Conceiving of the cyberpicket in broad strokes at this early stage can help illustrate how it fits into the NLRA’s scheme without getting bogged down in nitty-gritty mechanics.

Employers may argue that recognizing a right to cyberpicket will swing the pendulum too far in the direction of workers, upsetting the NLRA’s fragile balance. For Atlanta Walmart employees to picket the entrances of a Los Angeles store, they’d need to buy plane tickets for a multihour flight. All told, that could cost thousands of dollars, take up valuable time, and exhaust participants, weakening resolve. Granted, nationwide pickets aren’t uncommon — off-duty pilots recently instituted

⁹⁴ See *supra* notes 80–81 and accompanying text.

⁹⁵ This analogy is more than intuitive — it’s making its way into other areas of law, as well. Several courts of appeals have determined that websites can be places of public accommodation. See Randy Pavlicko, Note, *The Future of the Americans with Disabilities Act: Website Accessibility Litigation After COVID-19*, 69 CLEV. ST. L. REV. 953, 962–63 (2021).

⁹⁶ Although Amazon consolidates its marketplace into one online site available to shoppers nationwide instead of operating region-specific domains, the analysis remains the same. Walmart couldn’t escape pickets by maintaining a single “superstore” in California, to which customers from around the country flocked for ultradiscounted goods. East Coast employees who manage and ship the inventory would retain their Section 7 rights. The same goes for Amazon’s Staten Island warehouse workers: they can stage a cyberpicket visible to customers beyond New York, even without a direct connection to their purchases. Cf. *Teamsters*, 248 N.L.R.B. at 1214.

one,⁹⁷ as did Starbucks workers.⁹⁸ But these protests involve immense coordination with local employees, who typically do not travel to new locations but rather man the entrances of their own stores.⁹⁹ Cyberpicketers — armed with nothing but a keyboard — could theoretically engage in a potent form of collective action from thousands of miles away, at home, fast asleep. They need not carry signs, patrol, or chant. This ability arguably gives employees a powerful *new* weapon against employers, instead of restoring to them an old one.

But making the exercise of Section 7 rights too easy doesn't trigger the same concerns as a complete forfeiture. Nothing in the NLRA forbids employees from devising ways to make their picketing more efficient or less burdensome. And there's no requirement that says workers must endure arduous conditions — they may picket in sunny Los Angeles or snowy Boston.¹⁰⁰ Even if the Board disagrees, all hope isn't lost. It's possible to “geofence” the cyberpicket, such that only customers shopping within a defined area see it.¹⁰¹ Reasonable time limits might also be appropriate.¹⁰² It will be up to the Board to set parameters, if it so chooses.¹⁰³ Even if subject to limitations, the cyberpicket should remain a viable option for interested workers.

III. CONSTRUCTING THE CYBERPICKET: MECHANICS AND IMPLEMENTATION

While cyberpicketing promises to shake up labor law, its proposed mechanics are unremarkable. Many websites — particularly

⁹⁷ *Pilots Nationwide Picketing for Change After Summer of Airline Woes*, CBS (Sept. 1, 2022, 8:09 PM), <https://www.cbsnews.com/newyork/news/pilots-nationwide-picketing-for-change-after-summer-of-airline-woes> [https://perma.cc/6F3D-ZGY7].

⁹⁸ Matt Bloom, *Starbucks Workers in Colorado Join Nationwide Strike as Union's Contract Negotiations Stall*, CPR NEWS (Nov. 17, 2022, 11:35 AM), <https://www.cpr.org/2022/11/17/starbucks-workers-in-colorado-join-nationwide-strike-as-unions-contract-negotiations-stall> [https://perma.cc/B4GJ-V6MY].

⁹⁹ See, e.g., *id.* (reporting on local logistics of nationwide Starbucks picket).

¹⁰⁰ The picket is one of workers' most valuable economic weapons, but employers have equally powerful arms at their disposal. For example, they can stop furnishing work to employees, known as a lockout, which diminishes unions' perceived power. See 29 U.S.C. § 158(d)(4); Ellen Dannin & Ann C. Hodges, *The Supreme Court Empowers Employers to Lock Out Workers*, TRUTHOUT (May 23, 2013), <https://truthout.org/articles/the-supreme-court-empowers-employers-to-lock-out-workers> [https://perma.cc/4RPQ-5D6M].

¹⁰¹ Geofencing is a “location-based service” that uses GPS and other data “to trigger a pre-programmed action” when a device “enters or exits a virtual boundary set up around a geographical location.” Sarah K. White, *What Is Geofencing? Putting Location to Work*, CIO (Nov. 1, 2017), <https://www.cio.com/article/288810/geofencing-explained.html> [https://perma.cc/7YAH-PJBL]. It's a popular marketing tool: for instance, “[i]f you download a grocery [store] app, chances are it will register when you drive by to prompt an alert, trying to get you to stop in.” *Id.*

¹⁰² Cf. 29 U.S.C. § 158(b)(7)(C) (requiring workers who initiate recognitional picketing to file an election petition within thirty days).

¹⁰³ See *Hudgens v. NLRB*, 424 U.S. 507, 521 (1976) (“[T]he task of the Board . . . is to resolve conflicts between § 7 rights and private property rights . . .”).

those available to users in Europe — already include a similar feature. This model provides the jumping-off point for the cyberpicket.

A. *The Blueprint*

The cyberpicket need not reinvent the wheel; there's a template from which it can draw inspiration. The EU's ePrivacy Directive sets ground rules for data protection in the digital age.¹⁰⁴ It's not self-executing, so each member state devises its own means for implementation, but the end goal is common to all.¹⁰⁵ One of its provisions, the so-called Cookie Law, requires that websites give visitors the opportunity to refuse certain data tracking and collection.¹⁰⁶ To remain in compliance, online businesses that wish to reach EU audiences have designed "consent banners" that ask for permission to use the visitor's cookies.¹⁰⁷ These banners, overlaid across the main webpage, vary in shape, size, and functionality. Sites can freely customize them so long as they are compliant with the law.¹⁰⁸ The banners most relevant to cyberpicketing are known as "modal dialogs," which are effectively pop-ups that prevent users from accessing a webpage's content until they've either "accepted or declined the cookie collection."¹⁰⁹ That is, users can't ignore the banner and go on using the site — they must first interact with it.

Cyberpickets should look similar to consent banners and function like modal dialogs. To access the landing pages' contents and shop as desired, visitors must decide whether to "cross" the cyberpicket line. That means featuring a binary choice.¹¹⁰ For example — as suggested by Block and Sachs — an introductory prompt might read, "There is a strike occurring at this [business]; do you still want to proceed?"¹¹¹ Clicking "yes" would close out the dialog box and give the customer

¹⁰⁴ See generally *ePrivacy Directive*, *supra* note 14. The closest U.S. analog is the California Consumer Privacy Act (CCPA), CAL. CIV. CODE §§ 1798.100–199 (West 2022), which applies to businesses that serve the state's residents. See *id.* § 1798.140(d)(1)–(4), (i). Unlike the ePrivacy Directive, the CCPA doesn't require that companies obtain affirmative consent from e-visitors before collecting their data, but sites must include opt-out mechanisms and privacy notices. See Phillip Walters, *A Cookie Banner Isn't Enough for CCPA Compliance*, TRUEVAULT: BLOG (Oct. 27, 2022), <https://www.truevault.com/blog/a-cookie-banner-isnt-enough> [<https://perma.cc/MRX8-FHVS>]. So, mandated digital disclosures aren't foreign to U.S. law, businesses, or consumers.

¹⁰⁵ See *Types of Legislation*, EUR. UNION, https://european-union.europa.eu/institutions-law-budget/law/types-legislation_en [<https://perma.cc/KP5J-TK3K>].

¹⁰⁶ See *ePrivacy Directive*, *supra* note 14, at 25. Cookies are "small text files that websites place on your device as you are browsing," which "can store a wealth of [personally identifiable] data." Richie Koch, *Cookies, The GDPR, and the ePrivacy Directive*, GDPR.EU, <https://gdpr.eu/cookies> [<https://perma.cc/S2FG-Q23B>].

¹⁰⁷ See Cristiana Santos et al., *Are Cookie Banners Indeed Compliant with the Law?*, 2 TECH. & REG. 91, 91 (2020).

¹⁰⁸ See *id.*

¹⁰⁹ See Sheri Byrne-Haber, *Cookie Banners and Accessibility*, MEDIUM: UX COLLECTIVE (Aug. 25, 2020), <https://uxdesign.cc/cookie-banners-and-accessibility-d476bf9ee4fc> [<https://perma.cc/Q3TZ-D3DS>].

¹¹⁰ See BLOCK & SACHS, *supra* note 13, at 64.

¹¹¹ *Id.*

immediate access to the site’s contents; clicking “no” would return the customer “to the last page they visited.”¹¹² This mechanism would put online customers on equal footing with the twentieth-century Sears patron, who had to make an informed decision about whether to advance past the protesting workers and into the store.

B. *The Specifications*

Online businesses ought to have flexibility to determine a banner’s configuration, meaning its dimensions, positioning, and appearance.¹¹³ This suggestion will likely trigger objections from both sides, but it’s a sensible approach.¹¹⁴ Employers may protest that they must not only host the cyberpickets but create them too. Generally, workers can’t expect their employer to finance Section 7 activity.¹¹⁵ If they want pro-union signs, they have to bring their own. The company must lend only its premises; it need not open its pocket book. This argument sounds not only in the NLRA but also in the Constitution — a topic addressed in Part IV. Suffice to say here, employees must pay for their cyberpickets, including hosting fees and labor costs, but preliminary estimates suggest that these expenses won’t be prohibitively high.¹¹⁶ This allocation of financial responsibility should allay employers’ concerns.

¹¹² Block, Sachs & Shahriari-Parsa, *supra* note 13. Admittedly, in-person patrons need not *announce* their intention to cross the picket line; they can quietly duck their heads and scurry past. But even that requires an affirmative choice to disregard the workers in front of them. It would needlessly corrode the cyberpicket’s function, then, to allow employers to insist on non-modals, by which “[u]sers can still interact with the background content” without engaging with the overlay. See Ryan Neufeld, *Modal vs Page: A Decision Making Framework*, MEDIUM: UX PLANET (Mar. 2, 2020), <https://uxplanet.org/modal-vs-page-a-decision-making-framework-34453e911129> [<https://perma.cc/3F7L-HWUL>]. Some workers may favor this less confrontational method to reduce the risk of alienating visitors from the union, but that’s a preference, not a requirement.

¹¹³ Sachs has proposed a different mechanism for effecting a cyberpicket that doesn’t engage employers at all, but his suggestion falls short of what’s required by the NLRA and ultimately proves ineffective. He submits that “the Department of Labor [could] collect[] data on labor disputes” and then “mak[e] a browser extension available to consumers” that would trigger a DOL-designed notification when visiting a picketed site. Interview by Gizmodo with Benjamin Sachs, Cofounder, Clean Slate for Worker Power Project, *transcribed in* Whitney Kimball, *The Case for Virtual Picket Lines*, GIZMODO (Apr. 12, 2021), <https://gizmodo.com/the-case-for-virtual-picket-lines-1846654139> [<https://perma.cc/3RQL-X6QU>]. While creative, the browser-extension approach requires an affirmative opt-in from users. It thus resembles the New York Times Guild social media campaign, reaching primarily those who wish to engage. See *supra* notes 55–57 and accompanying text. The NLRA empowers workers to engage in picketing that’s far more robust and impactful.

¹¹⁴ Consider the alternative. Workers *could* configure the banner, but they’d likely need access to sensitive source code, and the design may not mesh well with the webpage’s layout. A reasonable compromise might involve contracting with a third-party vendor. See *infra* note 116.

¹¹⁵ While the NLRA prohibits employers from “interfer[ing] with . . . employees in the exercise of” their Section 7 rights, 29 U.S.C. § 158(a)(1), nothing in the Act’s text speaks to mandatory funding or reimbursement. Cf. BLOCK & SACHS, *supra* note 13, at 83 (“Historically, labor unions in the U.S. have relied on dues and fees paid by employees to finance their operations.”).

¹¹⁶ Costs per cyberpicket will vary by website — depending on visitor traffic, design elements, and security features — but a survey of third-party vendors that create and implement consent

Workers might prefer more control over the banners' specifications, but they too must yield. Consider a dialog box that occupies the customer's entire screen, eclipsing any part of the main webpage. That's arguably the most worker-friendly formulation of the cyberpicket, but it would raise several issues. For one, it's not analogous to what the twentieth-century Sears shopper would've seen when arriving at a picketed store. The protest might have wrapped around the building, but the company's name, blazoned near the top of its concrete structure, would've remained visible, lifted high above the workers' heads.

Apart from a broken analogy, there would be practical issues too. Potential customers must be able to tell that they're in the right place and didn't accidentally navigate to the wrong URL. To be sure, "[i]nconvenience, or even some dislocation of property rights, may be necessary in order to safeguard [Section 7 rights]."¹¹⁷ But the Board must seek a proper balance between worker and employer interests,¹¹⁸ which seems best achieved by permitting businesses to retain agency in their web design while also enabling the use of cyberpickets. Of course, employers will have an incentive to minimize the banner's dimensions, so the Board must be proactive. On top of ordering corrective measures on a case-by-case basis, it should issue regulations that establish minimum specifications and other mandatory guidelines for banners.¹¹⁹

C. *The Contents*

Even if employers were to supply the vessels, workers would retain control over the contents.¹²⁰ In-person pickets often include a mix of patrolling, chanting, and handbilling. Cyberpicketers could leverage analogous features to craft their message. For example, a banner could inform potential customers of a labor dispute through text, graphics, or both, standing in for the signs held by in-person picketers. A banner could also contain a link to an external website, managed by the

banners for businesses reveals modest pricing schemes. For only \$40 per month, one company will generate custom geotargeted consent banners, assertedly compliant with EU law, that can meet the needs of "large business[es] with high traffic." *Pricing & Plans*, COOKIEYES, <https://www.cookieyes.com/pricing/#pricing-comparison> [<https://perma.cc/88LT-Q485>].

¹¹⁷ *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 802 n.8 (1945) (quoting *LeTourneau Co. of Ga.*, 54 N.L.R.B. 1253, 1259 (1944)).

¹¹⁸ *See Cent. Hardware Co. v. NLRB*, 407 U.S. 539, 543 (1972).

¹¹⁹ *See* 29 U.S.C. § 156 (giving the Board rulemaking authority). The Board doesn't often promulgate regulations, but it's not an unprecedented practice. *See* Charlotte Garden, *Toward Politically Stable NLRB Lawmaking: Rulemaking vs. Adjudication*, 64 EMORY L.J. (SPECIAL ISSUE) 1469, 1471 (2015); *see also* Press Release, Nat'l Lab. Rels. Bd., Off. of Pub. Affs., NLRB Issues Notice of Proposed Rulemaking on Fair Choice and Employee Voice (Nov. 3, 2022), <https://www.nlr.gov/news-outreach/news-story/nlr-issues-notice-of-proposed-rulemaking-on-fair-choice-and-employee> [<https://perma.cc/5SUV-ACFC>].

¹²⁰ In the "extremely unlikely event" that two distinct groups of (unionized) workers employed by the same company wanted to implement a cyberpicket and couldn't agree on a unified message, the ensuing banner may need to be partitioned and its space shared. Zoom Interview with Benjamin Sach, Cofounder, Clean Slate for Worker Power Project (Mar. 6, 2023).

picketing employees, that would offer more information about the protest to those interested.¹²¹ This URL would be equivalent to talking to passersby and distributing pamphlets to those willing to take them.

There's great potential for creativity with the more granular elements. These include wording, font, and level of detail.¹²² Images too: just as brick-and-mortars can't limit protesters to text-only leaflets, online businesses couldn't insist on text-only banners. In-person pickets are as visually striking as they are informative. The sight of bundled-up Cleveland Heights teachers braving snow to contest their district's contract offer injected pathos into their appeals.¹²³ Cyberpicketers might not face the same physical obstacles, but that doesn't mean they couldn't build sympathy through their visual depictions. There's power in putting a face to a labor dispute, particularly one where in-person protest is futile or impossible. Online businesses must allow for reasonable customization of the banner's contents to avoid the cyberpicket becoming an empty formality. Giving employers control over the banners' specifications doesn't smuggle in the authority to mute the picket's distinctive features or otherwise control its message.¹²⁴

D. The Placement

Although this Note has presented a business's landing page as the most appropriate place for a cyberpicket, some employees may seek a more impactful location. Imagine adding an item to your virtual Amazon cart, only to be met by a notification that the company is embroiled in a labor dispute. You might rethink that purchase decision. Or as you're about to "checkout," suppose you encounter an image of striking workers. The urge to click "place order" may quickly dissipate.

While enticing, these options likely won't pass muster under the NLRA. In-person picketers can't follow customers around while shopping or stand with them at the cash register. Employers can generally bar off-duty employees from engaging in Section 7 activity in *working*

¹²¹ Relatedly, the banner could give visitors the option to make a donation to the picketing workers. This approach might appeal to a wider audience, including those who may choose to cross the picket line but still want to support the employees in some way.

¹²² Just as in-person picketers march with union-made signs, cyberpicketers can opt for a union-made banner, if they so wish.

¹²³ See Tony Bifulco, *Cleveland Heights Teachers Strike in the Snow, Beating Austerity with Solidarity*, LAB. NOTES (Dec. 11, 2020), <https://labornotes.org/2020/12/cleveland-heights-teachers-strike-snow-beating-austerity-solidarity> [<https://perma.cc/7QGC-TFQF>].

¹²⁴ Text and images are one thing; video is quite another. Consider a fifteen-second clip of employees staging an in-person picket at an online business's warehouse. Embedding it into the cyberpicket banner and programming it to auto-play wouldn't be an issue in itself. In-person pickets aren't just striking for their still frames; the chanting and patrolling influence patrons too. But to force customers to watch the entire video before accessing the site would be problematic. In-person picketers can't physically block customers from entering the store. See, e.g., Dist. 65, Retail, Wholesale & Dep't Store Union, 141 N.L.R.B. 991, 1001 (1963). Similarly, cyberpicketers would need to ensure that e-shoppers have the option to proceed quickly through the dialog box.

areas,¹²⁵ like grocery aisles and checkouts. The digital marketplace is no different. That's why the landing page, as the store's "entrance," readily lends itself to hosting the cyberpicket banner.

E. The Execution

The right to cyberpicket isn't self-executing; it requires recognition by the Board. Workers should start by creating a design and then contacting their employers to request implementation, providing clear steps for doing so. Predictably, the company will deny the request, as most are loathe to fulfill even clearly established legal obligations.¹²⁶ Once that happens, the workers should file a charge with the NLRB, alleging that the employer has violated their Section 7 rights by refusing to permit protected activity on company property and petitioning for injunctive relief under Section 10(j).¹²⁷ If the Board faithfully applies its precedents, it should order implementation of the cyberpicket.

IV. THE SUPREME COURT CONUNDRUM

Even if the NLRB swings in the workers' favor on statutory grounds, the game isn't over. The Supreme Court could step into the batter's box next, ready to make contact with two constitutional curveballs: the First Amendment's "compelled speech" doctrine and the Fifth Amendment's Takings Clause. Workers face disquieting odds, but balking guarantees that picketing won't ever make its way online.

A. Compelled Speech Doctrine

By far the most menacing obstacle, the compelled speech doctrine threatens the right to cyberpicket on multiple fronts. The First Amendment prohibits laws that abridge the "freedom of speech," a term that "necessarily compris[es] the decision of both what to say and what *not* to say."¹²⁸ Simple in theory, but complex in fact. It's difficult to make sense of the doctrinal morass in the Court's compelled speech case law, whose broad principles and internal tensions defy easy categorization.¹²⁹

Here's the upshot: the right to cyberpicket lies at the intersection of several threads of compelled speech. Framed most favorably to employers, it seemingly requires online businesses to host and subsidize third-

¹²⁵ See *Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 493 (1978) (working area); cf. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 803 n.10 (1945) (quoting *Peyton Packing Co.*, 49 N.L.R.B. 828, 843 (1943)) (working time).

¹²⁶ See, e.g., Alana Semuels, *Some Companies Will Do Just About Anything to Stop Workers from Unionizing*, TIME (Oct. 13, 2022, 10:12 AM), <https://time.com/6221176/worker-strikes-employers-unions> [<https://perma.cc/99ZM-E8SU>].

¹²⁷ See 29 U.S.C. § 160(j).

¹²⁸ *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 796–97 (1988).

¹²⁹ See Eugene Volokh, *The Law of Compelled Speech*, 97 TEX. L. REV. 355, 356–57 (2018).

party speech on private forums. So understood, this statutory right resembles content-based speech regulation and thus awaits an inevitable showdown with the oft-fatal test of strict scrutiny.¹³⁰ But that's not the end of the road. Workers must contest the employer-friendly characterization of the speech interests at stake and, as a backup, make a case for satisfying strict scrutiny.

Compelling an online business to compromise its own messaging in favor of someone else's is a surefire way to raise the Supreme Court's suspicions. The Justices are especially wary of government laws that "alte[r] the content of [one's] speech."¹³¹ Websites certainly *look* like speech products. Much like parade organizers¹³² and newspaper editors,¹³³ online businesses exercise control and judgment in curating their landing pages. Forcing them to include worker-made messages could be seen as intruding on their editorial prerogatives.

But in-person picketers don't trammel on a brick-and-mortar's free speech rights by visually disrupting company messaging on the building's exterior with their marching and signs. Neither do cyberpicketers inflict constitutional damage through their virtual protest at the threshold of an online marketplace. Unless the Court is willing to recognize a speech interest in a physical store's outer design, which could be partially obscured by shoulder-to-shoulder employees, it shouldn't extend comparable protections to the gateway for entering Amazon's marketplace. Cyberpicketers don't seek integration or commingling with a website's substantive content; they request a digital overlay, leaving what lies beneath untouched.¹³⁴

Without a speech interest in the threshold to their landing pages, online businesses will lay down a different First Amendment trump card: compelled subsidy. A brick-and-mortar doesn't pay for in-person pickets; nor does it incur ongoing costs (apart from lost business) by virtue of the workers' presence. Websites, though, have server fees. And creating a cyberpicket occupies IT resources. The Court hasn't taken kindly to coerced payments for labor-related causes.¹³⁵ As long

¹³⁰ *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226–27 (2015) (citing *R.A.V. v. St. Paul*, 505 U.S. 377, 395 (1992); *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 115, 118 (1991)).

¹³¹ *Nat'l Inst. Fam. & Life Advocs. v. Becerra*, 138 S. Ct. 2361, 2371 (2018) (first alteration in original) (quoting *Riley*, 487 U.S. at 795).

¹³² *See Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc.*, 515 U.S. 557, 568–70 (1995).

¹³³ *See Mia. Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974).

¹³⁴ Online businesses may try to frame cyberpicket banners as occupying otherwise fillable space on customer screens — specifically on the “second layer,” where dialog boxes sit — arguably amounting to a speech restriction. But a brick-and-mortar can't expel protesting workers from the property simply because it wishes to keep open the possibility of erecting a statue where they stand. And, again, a banner wouldn't interfere with any underlying content, over which the business would retain full control.

¹³⁵ *See Janus v. AFSCME, Council 31*, 138 S. Ct. 2448, 2486 (2018) (prohibiting mandatory agency fees).

as workers pay the attendant costs, however, there's little to protest.¹³⁶ True, the business must dispatch staff to coordinate with the picketing employees and implement their request (unless the job is outsourced). But labor law is no stranger to these small asks. Consider employers' responsibilities with regard to representation elections. They must print out election notices, take time and resources to post them, and supply eligible-voters lists.¹³⁷ Neither the Board nor the union is expected to reimburse employers for these minimal costs.

Rounding out the employer's First Amendment laundry list is the charge of compelled hosting, as the cyberpicket requires some accommodation of worker speech. This doctrinal thread remains elusive,¹³⁸ though it's clear that the statutory right to cyberpicket doesn't stir up the same anxieties as other laws found impermissible by the Court. There's little risk, for example, that visitors to a website will mistake a cyberpicket — whose character is one of conflict, not synergy — for the owner's speech.¹³⁹ Businesses could make that even clearer with a co-terminous disclaimer. It's also difficult to imagine how the Court could cabin an employer-friendly decision to the cyberpicketing context. Unless willing to put all access rights on the chopping block, the Justices should approach the compelled-hosting argument with caution.

Even if strong-armed into strict scrutiny — which demands that content-based regulations be narrowly tailored to serve compelling government interests¹⁴⁰ — the statutory right to cyberpicket could survive. The federal government arguably has a compelling interest in ensuring that employees of online businesses can exercise effectively their Section 7 rights. And assuming employers have substantial control over the positioning and dimensions of banners, there's an argument for narrow tailoring too. Admittedly, this last-ditch effort faces tough odds, as few laws emerge victorious from the gauntlet of strict scrutiny.¹⁴¹ But the constellation of statutory and constitutional arguments available to workers provides enough of a foundation to press ahead.

¹³⁶ For a discussion of expected costs, see *supra* note 116.

¹³⁷ See 29 C.F.R. §§ 102.63(a)(2), 102.67(l).

¹³⁸ See Volokh, *supra* note 129, at 371–75.

¹³⁹ Cf. *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc.*, 515 U.S. 557, 576–77 (1995) (citing *Pruneyard Shopping Ctr. v. Robbins*, 447 U.S. 74, 87 (1980)) (worrying about message confusion with uninvited participants in parade).

¹⁴⁰ *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015) (citing *R.A.V. v. St. Paul*, 505 U.S. 377, 395 (1992); *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 115, 118 (1991)).

¹⁴¹ See Note, *Two Models of the Right to Not Speak*, 133 HARV. L. REV. 2359, 2367 (2020). *But cf.* 303 *Creative LLC v. Elenis*, 6 F.4th 1160, 1178–82 (10th Cir. 2021) (finding that a law compelling speech survives strict scrutiny), *cert. granted in part*, 142 S. Ct. 1106 (2022).

B. *The Takings Clause*

Another potential issue — this one involving the Fifth Amendment’s Takings Clause¹⁴² — threatens not just cyberpicketing, but picketing rights generally. In *Cedar Point Nursery v. Hassid*,¹⁴³ the Court ruled that a California regulation granting nonemployee union organizers limited access rights to farm property interferes with the employers’ right to exclude and therefore constitutes a per se physical taking requiring just compensation.¹⁴⁴ Of course, the picketing rights discussed in this Note accrue to employees, not union organizers. Under a narrow reading of *Cedar Point*, employees merit an entirely different analysis, reflecting their (limited) license to be on the employer’s property.¹⁴⁵ Yet the Court’s opinion didn’t dwell on the defendants’ nonemployee status. Read expansively, it arguably requires just compensation to employers whose property is co-opted for picketing — or presumably any Section 7 purposes. That conclusion would mark a significant departure from the American labor law tradition, counseling restraint.¹⁴⁶

CONCLUSION

Workers’ broad picketing rights under the NLRA don’t disappear when a business moves online. Amazon can’t hide behind the World Wide Web for insulation from its legal obligations. E-commerce sites might have revolutionized retail, but they aren’t so different from brick-and-mortars as to evade the strictures of current law. These online marketplaces have entrances, aisles of products sorted by category, shopping carts, and even customer-service assistants. They operate like traditional retail outlets but don’t have to contend with worker pickets — a protected activity under the NLRA. Cyberpicketing promises to restore to employees of online businesses a long-held tool of economic persuasion, resetting the careful balance of power between labor and capital. It’s high time for these workers to reclaim what’s rightfully theirs.

¹⁴² U.S. CONST. amend. V (“[N]or shall private property be taken for public use, without just compensation.”).

¹⁴³ 141 S. Ct. 2063 (2021).

¹⁴⁴ *Id.* at 2072, 2074.

¹⁴⁵ See Benjamin I. Sachs, *Safety, Health, and Union Access in Cedar Point Nursery*, 2021 SUP. CT. REV. 99, 101–02, 102 n.24 (2022).

¹⁴⁶ Look no further than the World War II-era case *Republic Aviation*, discussed *supra* notes 72–76 and accompanying text. Admittedly, however, the current Court sees no difficulty overturning longstanding precedent. See, e.g., *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2242 (2022).

Complete Chapter [HTML](#) [PDF](#) | [RCW Dispositions](#)

Chapter 49.46 RCW

MINIMUM WAGE REQUIREMENTS AND LABOR STANDARDS

(Formerly: Minimum wage act)

Sections

HTML	PDF	49.46.005	Declaration of necessity and police power—Conformity to modern fair labor standards.
HTML	PDF	49.46.010	Definitions.
HTML	PDF	49.46.020	Minimum hourly wage—Paid sick leave.
HTML	PDF	49.46.040	Investigation—Services of federal agencies—Employer's records—Industrial homework.
HTML	PDF	49.46.060	Exceptions for learners, apprentices, messengers, persons with disabilities.
HTML	PDF	49.46.065	Individual volunteering labor to state or local governmental agency—Amount reimbursed for expenses or received as nominal compensation not deemed salary for rendering services or affecting public retirement rights.
HTML	PDF	49.46.070	Records of employer—Contents—Inspection—Sworn statement.
HTML	PDF	49.46.080	New or modified regulations—Judicial review—Stay.
HTML	PDF	49.46.090	Payment of amounts less than chapter requirements—Employer's liability—Assignment of claim.
HTML	PDF	49.46.100	Prohibited acts of employer—Penalty.
HTML	PDF	49.46.110	Collective bargaining not impaired.
HTML	PDF	49.46.120	Chapter establishes minimum standards and is supplementary to other laws—More favorable standards unaffected.
HTML	PDF	49.46.130	Minimum rate of compensation for employment in excess of forty hour workweek—Exceptions.
HTML	PDF	49.46.140	Notification of employers.
HTML	PDF	49.46.160	Automatic service charges.

HTML	PDF	49.46.170	Employment of individuals with disabilities at less than the minimum wage—State agencies prohibited.
HTML	PDF	49.46.180	Paid sick leave—Construction workers covered by a collective bargaining agreement excluded.
HTML	PDF	49.46.200	Paid sick leave.
HTML	PDF	49.46.210	Paid sick leave—Authorized purposes—Limitations.
HTML	PDF	49.46.300	Transportation network companies—Definitions—Driver compensation—Notice of rights—Electronic receipts—Weekly notice, trip information—Trip fee—Driver resource center—Rules.
HTML	PDF	49.46.310	Transportation network companies—Driver resource center fund—Selection of driver resource center—Intent.
HTML	PDF	49.46.320	Transportation network companies—Department investigation of compensation-related complaints—Penalties—Appeals—Orders—Private right of action.
HTML	PDF	49.46.330	Transportation network companies—Department investigation of noncompensation requirements—Penalties—Appeals—Orders.
HTML	PDF	49.46.340	Transportation network companies—Unlawful practices—Retaliation—Penalties—Request for reconsideration—Appeals.
HTML	PDF	49.46.350	Transportation network companies—Paid sick time—Department investigation—Notice of assessment—Rules.
HTML	PDF	49.46.800	Rights and remedies—Long-term care individual providers covered under this chapter.
HTML	PDF	49.46.810	Adoption, implementation of rules.
HTML	PDF	49.46.820	Chapter 2, Laws of 2017 to be liberally construed—Local jurisdictions may adopt more favorable labor standards.
HTML	PDF	49.46.830	Chapter 2, Laws of 2017 subject to investigation and recordkeeping provisions.
HTML	PDF	49.46.910	Short title.
HTML	PDF	49.46.920	Effective date—1975 1st ex.s. c 289.

NOTES:

*Enforcement of wage claims: RCW **49.48.040**.*

Site Contents

Selected content listed in alphabetical order under each group

Let Your Voice Be Heard
[Contact Your Legislators](#)

About the Legislature
[Committees](#)

[Comment on a Bill](#)

[Participate in Committee Hearings](#)

Find

[Bills](#)

[Committee Meeting Schedules & Agendas](#)

[District & Legislators](#)

[Laws & Rules](#)

[Member Information / Rosters](#)

[Video & Audio on TVW](#)

Additional Information

[Accessibility Information](#)

[Civic Education](#)

[Comments about this site](#)

[Contact Us](#)

[Disclaimer](#)

[Employment Opportunities](#)

[Gift Center](#)

[Glossary of Terms](#)

[Help](#)

[History of the State Legislature](#)

[Privacy Notice](#)

[Reports to the Legislature](#)

[Search](#)

[House of Representatives](#)

[Legislative Agencies](#)

[Legislative Information Center](#)

[Legislature Home](#)

[Senate](#)

Track Legislation

[Bills](#)

[Email Updates \(GovDelivery\)](#)

[RSS Feeds](#)

[Web Services](#)

Outside the Legislature

[Contact Congress - the Other Washington](#)

[Governor's Website](#)

[OFM Fiscal Note Website](#)

[Washington Courts](#)

Translate



The Office of Labor Standards reception area is open to the public weekdays 9:00am-4:00pm.

We are still available to serve you by phone at [\(206\) 256-5297](tel:(206)256-5297), by TTY by dialing 7-1-1, online at www.seattle.gov/laborstandards and [email laborstandards@seattle.gov](mailto:laborstandards@seattle.gov).

Office of Labor Standards

[Home](#)

TNC Driver Resolution Center (DRC) Funding

The [Transportation Network Company \(TNC\) Driver Deactivation Rights Ordinance \(DRO\)](#) protects TNC drivers, such as Uber and Lyft drivers, from unwarranted deactivation, an action that blocks drivers' access to the online platform that allows the driver to provide rides to customers. The law provides a venue for drivers to challenge those deactivations before a neutral arbitrator and creates supports for drivers to assert their rights.

Through a competitive Request for Proposal ("RFP"), announced in March under the Office of Labor Standards, [Drivers Union](#) was selected to deliver the first-in-the-nation Driver Resolution Center (DRC) services at no cost to TNC drivers and consistent with the requirements of [SMC 14.32](#). Specifically, the organization will provide:

- Consultation and support services to drivers facing deactivation;
- Direct legal representation to drivers in deactivation arbitration proceedings;
- Outreach, education, and support to drivers about their rights; and
- Culturally and language-specific services to drivers in the primary languages that drivers speak.

Drivers Union will work with [Teamsters Local 117](#) as a contracted partner.

For information, please contact us at labor.standards@seattle.gov or call us at [\(206\) 256-5297](tel:(206)256-5297). If you prefer to communicate in a language other than English please tell us: your name, preferred language, and contact

number. Our office will then call you back with an interpreter from Language Line on the line.

2021 - 2022 Recipient

*18-month contract period from July 1, 2021 to December 31, 2022. The amount of project funding is contingent upon the certification of the availability of sufficient revenue by the City Budget Office and upon sufficient appropriation by **City Council in 2021 and the 2022 adopted budgets**. The length of contract, and funding amount may be subject to change.

	Amount Funded	Partner Information	Community of Focus
Drivers Union	\$5,025,000*	Teamsters Local 117	Eligible TNC drivers

Annual Reports

[o Drivers Union DRC 2021 Narrative Report](#)

[o Drivers Union DRC 2021 Demographic Report](#)

Community Resources:

More Information about legal protections

For more information about the TNC Driver Deactivation Rights Ordinance and the Deactivation Appeals Panel process, please visit our page by clicking [here](#).

Help for Drivers

If you are a TNC driver and are looking for information about your rights or if you have been deactivated and are looking for help about your options/next steps, the Driver Resolution Center may be able to assist. The City of Seattle has contracted with Driver's Union to provide support and services to drivers, including free consultation and representation in deactivation disputes and outreach and education about Seattle labor standards.

Driver Resolution Center c/o Driver's Union

Email: support@driversunionwa.org

Phone: [\(206\) 812-0829](tel:(206)812-0829)

Website: <https://www.driversunionwa.org/deactivation>

About Us

[Our Mission](#)

[Our Services](#)

[Careers](#)

[City Boundaries](#)

Labor Standards

Steven Marchese, Director

Address: [810 3rd Avenue, Suite 375, Seattle, WA, 98104-1627](#)

Phone: [\(206\) 256-5297](tel:(206)256-5297)

Email: laborstandards@seattle.gov

Newsletter Updates

[Subscribe](#)

Sign up for the latest updates from Labor Standards

Citywide Information

[Elected Officials](#)

[Open Data Portal](#)

[Public Records](#)

[City Holidays and Closures](#)

[City News Feed](#)

Popular Pages

1. [Paid Sick and Safe Time](#)

2. [Secure Scheduling](#)

3. [Resources](#)

4. [Language Resources](#)

5. [File a Complaint](#)

[City Event Calendar](#)

[All City Newsletters](#)
[View the Departments & Agencies List](#)

The Office of Labor Standards enforces Seattle's labor standards ordinances to protect workers and educate employers on their responsibilities.



[About Our Digital Properties](#) | [Privacy Policy](#) | [ADA Notice](#) | [Sitemap](#)

Submission to the
BC Labour Relations Code

Review Panel

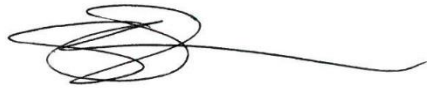
BCFED response to
Presentations and submissions
made to the Panel

May 2024



Authority

This document 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 members across the province of British Columbia.



Sussanne Skidmore (she/her)
President



Hermender Singh Kailley (he/him)
Secretary-Treasurer



BC Federation of Labour | 110-4259 Canada Way | Burnaby BC V5G 1H1
tel: 604 430 1421 | email: president@bcfed.ca www.bcfed.ca

The BC Federation of Labour is located on unceded xʷməθkʷəy̓əm (Musqueam), sə́lilwətaʔt (Tsleil-Waututh), Skwxwú7mesh (Squamish) territories.

1000_24sub_bcfed_response_presentations_to_lrc_review_panel/km^{move}UP

BCFED's reply submission to Labour Relations Code Review Panel

The BC Federation of Labour (“BCFED”) submits the following additional information in response to the presentations and submissions made to the Labour Relations Code Review Panel (“Panel”).

Economic outlook

We strongly disagree with assertions that the 2018 changes to the *Labour Relations Code* (“Code”) and additional improvements will negatively impact BC’s economic outlook. We encourage you to review the submissions and presentations made by the Centre for Future of Work and the CCPA BC office which demonstrate that strong and effective labour laws are the foundation of a successful economy and instrumental in reducing income inequality and systemic discrimination.

Fairness

Several presenters argued that a balance in labour-relations has been achieved, and, in fact, tipped too far towards workers.

From where workers stand, that statement has little to do with reality. It’s a measure of how spectacularly the scales were tilted against working people that modest steps to improve fairness are described that way.

Low-wage workers, precarious workers and gig workers still struggle to access their right to fair working conditions, to unionize and collectively bargain. Sectors with high numbers of Indigenous, Black, racialized workers, gender diverse workers and workers living with disabilities continue to see markedly lower pay, worse working conditions and fewer employment benefits.

A balanced economy and labour market shouldn’t leave large numbers of people behind.

We encourage the Panel to look beyond scorecards and instead focus on what needs to change to ensure that every worker has access to meaningful collective bargaining.

Equity, Diversity and Inclusion

The BCFED calls on the Panel to make recommendations that will further reduce barriers to unionization for workers who are marginalized and to strengthen protections so that workers who have existing bargaining rights don't lose them.

Workers experience marginalization based on race, Indigeneity, ability, and sexual and gender orientation and identity, among other grounds prohibited in the *BC Human Rights Code*. One of the most effective ways to bring equality to workers' wages, their hours of work, their working conditions and benefits is through a union and a collective agreement.

Marginalized groups continue to be overrepresented in low-wage and precarious work. Upcoming research from the CCPA BC using Statistics Canada data will demonstrate that women and racialized workers in BC are much more likely to earn less than the living wage. Specifically, one-in-two racialized women in the Lower Mainland earns less than the living wage. Statistics Canada data shows that in Canada, Indigenous women and women who are recent immigrants continue to experience a wage gap of more than 20%.¹

Accessing collective bargaining is a concrete way for workers to address systemic discrimination and economic inequity. Wage inequities can be narrowed through wage grids and classification processes. Bias in hiring can be addressed through clear post-and-fill provisions. Workers who face marginalization are protected by clear procedures to address bullying and harassment. And workers with disabilities benefit from representation in duty to accommodate processes and access to extended health benefits and sick leave provisions to support their full participation in the workplace. Collective agreements include a host of other provisions to promote equity including but not limited to leave for gender affirming care, cultural and ceremonial leave for Indigenous workers, recognition of days of observance for various faith-based communities and equitable hiring practices.

While those who have access to collective bargaining experience these benefits, too many workers who face marginalization continue to experience significant barriers to unionization.

¹ <https://canadianwomen.org/the-facts/the-gender-pay-gap/>

These barriers are especially well documented for migrant workers, new immigrants and those who speak languages other than English. We see this reflected in low union density in sectors with a high number of migrant workers and racialized workers like farm work, live-in care work, food delivery, hospitality, cleaning, security and residential construction.

Sectoral bargaining

The BC Federation of Labour recommends establishing a tripartite, single-issue commission to consult stakeholders over a period of six-to-nine months on how to implement sectoral bargaining.

The BCFED has been working with migrant farm workers, ride-hail and food delivery workers who face significant structural challenges when trying to join a union. These sectors have high numbers of migrant workers, new immigrants, and racialized workers who contend with systemic discrimination, such as reduced minimum employment standards. Failing to address their needs increases their experiences of precarity, drives down working conditions and entrenches the systemic discrimination they already face. This leaves workers even more vulnerable and at higher risk of un-ending economic insecurity.

The panel heard from organizations representing domestic care workers about the challenges and power imbalances they face. The panel also heard from our affiliates about the experiences of workers in the food and beverage sector struggling to attain bargaining rights with deep-pocketed, multi-national corporations.

Significantly, our affiliates have come together to recommend implementing sectoral bargaining to expand access to collective bargaining and improve working conditions and economic security for precarious and low-wage workers. Broader-based and sectoral bargaining is also supported by several community organizations. Some of them have been calling for it – for decades.

This is not a new idea for BC. We have extensive experience with sectoral and broader-based bargaining in both the private and public sectors. Film and Television, Construction, Forestry,

Health Care, K-12 Education and Community and Social Services currently or previously engaged in broader-based or sectoral bargaining.

We believe implementation will have the biggest chance of success if it is built on the feedback of stakeholders and is customized to our province's needs. To achieve this, the commission should consult on a specific model or models of sectoral bargaining. While we have our own views on what should be implemented, consulting on a proposal or proposals will garner the most helpful feedback by making it easier to identify opportunities and challenges. Feedback received through the consultation should be used to customize the proposal to meet the diverse needs of BC workers.

There are a number of existing proposals that could form the basis of the consultation, including but not limited to the Baigent Ready proposal from the 1992 Review and Sara Slinn and Mark Rowlinson's adaptation of the NZ Fair Pay agreement. While the models are based on different foundations – one uses a more traditional collective agreement structure and the other creates a negotiated employment standard – they offer many concepts worthy of consideration.

For additional background, we suggest reviewing the following articles.

Sectoral Certification: A Case Study of British Columbia, Diane MacDonald:

https://www.canlii.org/en/commentary/doc/1997CanLIIDocs104#!fragment/zoupio-Tocpdf_bk_16/BQCwhgziBcwMYgK4DsDWszlQewE4BUBTADwBdoAvbRABwEtsBaAfX2zhoBM_AzZgl1TMAjADYAIABpk2UoQgBFRIVwBPaAHJ1EiITC4Ei5Ws3bd+kAGU8pAEJqASgFEAMo4BqAQ_QByAYUcTSMD5oUnYxMSA.

Sara Slinn's review of broader-based and sectoral bargaining Proposals:

[Broader-based and Sectoral Bargaining Proposals in Collective Bargaining Law Reform: A Historical Review \(yorku.ca\)](#).

The Centre for Future Work's website also brings together a number of useful resources:

Online platform work

We recommend that the panel review the definition of employee and propose amendments to provide online platform workers clear access to the right to organize and collectively bargain. This could be as simple as adding online platform workers to the definition of employee.

As discussed, online platform work is growing rapidly in BC and across Canada. While most people are familiar with ride-hail and food delivery apps – platform workers perform various types of work including home care, grocery shopping, household chores with new areas emerging all the time.

We are calling for an affirmation that online platform workers are covered by the definition of employee in the Code and have the right to organize.

Inclusion in the *Employment Standards Act* (“ESA”) and the *Workers Compensation Act* (“WCA”) should be sufficient to prove coverage under the Code, but the large multi-national companies who employ these workers have deep pockets and a history of leveraging their political and legal power to limit workers’ rights. Organizing thousands of workers will be challenging in and of itself. We do not believe these workers should then have to litigate whether they even have the right to bargain collectively.

Further, while ride-hail and food delivery workers will be offered some basic employment protections through the ESA, the government has indicated they will receive only partial coverage. Workers will not have access to many core rights including paid sick leave and overtime pay. It would be unjust to limit their rights under the ESA and then slam the door on their ability to collectively bargain something better.

Acquisition of bargaining rights

We oppose changes to eliminate single-step certification and extend the timelines for representation votes.

Single-step certification removes barriers for workers and supports BC’s most vulnerable workers in their efforts to form a union and improve their working conditions through collective bargaining. It reduces employer interference and improves safety and security for workers who face marginalization in their workplace and our broader communities.

We have not heard any compelling argument supporting a return to representation votes for all certifications. To the contrary, the evidence shows that single-step certification is working very effectively. More workers have been able to join a union and few, if any, problems have been identified. In 2023, on average, certifications were granted with 76% membership support. Of the 1,920 cards that were audited, only one card was questioned and following investigation, there was sufficient explanation, and no issue was found with the veracity of the application or membership evidence².

Further, we do not agree with lengthening the voting period for representation votes for applications demonstrating at least 45% but less than 55% membership. The current five-day timeline is consistent with other jurisdictions and helps to prevent “improper interference” as noted in the Panel’s 2018 report. We did not hear any concrete explanations for how employers would use the additional time.

Access to employee lists

Where a union has made an application with the support of at least 20% of the workers in a proposed unit, the list of employees should be provided.

Fair organizing practices rely on the ability to communicate with other workers. Workers must be provided with access to their colleagues if they are going to have any meaningful ability to freely associate and have a union in their workplace.

Workplaces are changing. Many workers do not have a central work location. In online platform work, a single company may have 10,000 plus workers with no central dispatch location or office. More and more workers work from home and may not be located in the same community. Workplaces that traditionally relied on centralized operations are turning to

² <https://www.lrb.bc.ca/media/21808/download?inline>

remote work. USW reported that up to 50% of call centre agents for Telus now work from home. IBEW 213's submission notes that their technicians employed by Rogers receive assignments and complete reports remotely and rarely attend a central dispatch location anymore.

Other structures in traditional brick and mortar workplaces are changing. Just-in-time scheduling uses AI and algorithms' ability to track demand trends and respond instantly to order levels to replace the role of managers in making decisions around labour needs. Workers are no longer assigned regular shifts and receive little advance notice of when they will work. For workers there is no predictability around shifts and often last-minute call outs or shift cancellations³. This is being implemented not only in retail and hospitality, but also being used in industries like manufacturing⁴. All of these changes are structured in a manner that makes it nearly impossible for workers to get to know their colleagues and connect with each other.

We echo the recommendation of the 2016 Ontario Changing Workplaces Review – where a union has made an application with the support of at least 20% of the workers in a proposed unit, the list of employees should be provided. This recommendation was implemented by the Ontario government in Bill 148 in 2017 but has since been repealed by the Ford government.

The Panel also asked about privacy considerations. We have included the text of Bill 148 at the end of this submission for your reference as it provides guidance on privacy matters through defined parameters on what information must be provided and how it is to be handled.

Section 54 and restructuring

USW has made additional recommendations around Section 54 of the Code, including recommending the appointment of an economic commissioner to review and make recommendations on the community impacts of business restructuring. We support this recommendation.

³ <https://www.deseret.com/indepth/2020/9/5/21417148/just-in-time-scheduling-fair-work-week-shift-project-brookings-institution-cloping-child-care/>

⁴ <https://appliedsmartfactory.com/pharmaceutical-blog/pharma-4-0/jit-scheduling/>

Remote work

Ensure that all workers regardless of the structure of their workplace (remote, hybrid, central) can picket and that virtual or cyber pickets have the same standing as physical pickets.

As more workers are employed remotely and businesses operate through on-line websites and platforms, we believe updates are needed to ensure that workers can exercise their right to strike through meaningful picketing including by establishing “virtual” picket lines.

Striking workers have the right to use pickets to persuade anyone “not to enter the employer’s place of business, operations or employment; deal in or handle the employer’s product; or do business with that person.” All workers must have a meaningful way to strike.

The definition of a picket in the Code refers to “attending at or near a person’s place of business, operations or employment” but not all workers report to a place of business outside of their home.

This is an issue that Labour Boards across the country are having to grapple with. There is a recent case from Alberta, *Bioware ULC v United Food and Commercial Workers Canada Union, Local No. 401*, where the arbitrator found that remote workers were entitled to establish physical pickets at the place of business of their primary contract holder. While this decision provides some clarity on where remote workers can picket when there is a connection to a physical worksite, there are other scenarios the decision does not address.

Many companies operating in the tech industry and e-retail have no brick-and-mortar stores or offices leaving workers no ability to signal to customers and contract holders that there is a strike. Workers who perform on-line platform work don’t have a central work location to report to and the companies they work for often don’t even have offices in the province. Where could they lawfully picket?

There are other challenges – workers at a brick-and-mortar location must have the means to signal their job action to those who work remotely. Their employers may argue that remote workers can’t honour the physical picket lines of their colleagues because they don’t report to

the physical location and have not encountered the picket line. Or employers may attempt to circumvent physical picket lines by directing workers to work remotely during a strike.

While the scenarios may seem a bit complicated, the issue is quite simple: Workers must have the ability to establish virtual or cyber pickets to achieve the same aims as a physical picket.

There are various forms where virtual picketing could take place including but not limited to; the use of social media, push notifications, auto responders, status updates in inter-office programs and group chats, voicemail messages, and pop-up banners on websites.

We encourage the panel to review and recommend any necessary amendments to the definition of picketing in Section 1(1) and Sections 65 and 66 to ensure workers can establish, communicate about and honour virtual pickets the same way as physical picket lines.

Bill 9 and picketing

Maintain the picketing improvements established in Bill 9 that permit provincial workers to honour federal and other provincial picket lines.

The affiliates of the BCFED strongly hold the view that protecting the right to honour picket lines regardless of the jurisdiction is a fundamental expression of worker solidarity and ultimately shortens disputes. Forcing workers to cross picket lines causes significant confusion, frustration and disappointment amongst union members. It also creates worker-to-employer and worker-to-worker tension and resentment that can build during difficult job actions. These tensions can take years to resolve.

Bill 9 addresses a problem that is real, not hypothetical. As you have heard from others, workers were forced to cross picket lines at their places of work due to their jurisdiction.

We support Bill 9 and its goal of ensuring provincially-regulated workers can honour federal and other provincial pickets.

With respect to employers' concerns related to common site relief, employers would have the ability to seek relief through the courts.

BCGEU's reply submission provides additional background on this matter.

Section 104, Expedited arbitration

Do not limit the ability of unions to access the expedited arbitration provisions of the Code.

We do not support proposals that seek to restrict the application of Section 104 of the Code. We do not support creating limits on the number of applications that can be filed or limiting the precedential value of a decision without both parties' agreement. We do not support proposals that call for expedited arbitration language in a collective agreement to supersede the Code and eliminate the ability of the parties to file under Section 104. We see no reason to close off a resolution option that may assist the parties to find a timely resolution to their disputes.

Common and true employer test

We do not support the four-part test proposed by the Canadian Franchise Association or any other changes that would make it more difficult to succeed on a common or true employer application. Businesses should have fewer, not more, avenues to divide their interests and avoid their obligations to workers.

Particulars in discipline arbitrations

We support BCGEU and CUPE BC's submissions in response to the Canadian Association of Counsel to Employers' proposal on requiring union particulars in discipline arbitrations.

Broadening the definition of a trade union

We do not agree with broadening the definition of a trade union or creating a new subset of organizations that can operate like a trade union. We are strongly opposed to including management in bargaining units. We believe moving ahead with these requests would create a dangerous precedent. Workers who are properly classified as employees under the Code have existing avenues to access the benefits of a trade union should they choose to do so.

Remedial certifications

We disagree that there is a substantial increase in remedial certifications and that the Labour Relations Board (“Board”) is using its power to grant remedial certifications capriciously. Remedial certifications continue to be a rarity despite revised legislation. Since 2019, fewer than 15% of applications for remedial certification have been granted. While 2022 appears to be an outlier with five remedial certifications granted, no remedial certifications were issued in 2021, and of the 19 requests made in 2023, only one was granted.⁵

Funding

We note that there is widespread agreement between employers and unions that the Board needs more funding.

⁵ <https://www.lrb.bc.ca/media/21808/download?inline>

Appendix: Bill 148, Fair Workplaces, Better Jobs Act, 2017

Application for employee list

6.1 (1) Where no trade union has been certified as bargaining agent of the employees of an employer in a unit that a trade union claims to be appropriate for collective bargaining and the employees are not bound by a collective agreement, a trade union may apply to the Board for an order directing the employer to provide to the trade union a list of employees of the employer.

Notice to employer

(2) The trade union shall deliver a copy of the application under subsection (1) to the employer by such time as is required under the rules made by the Board and, if there is no rule, not later than the day on which the application is filed with the Board.

Content of application

(3) An application under subsection (1) must include,

(a) a written description of the proposed bargaining unit, including an estimate of the number of individuals in the unit; and

(b) a list of the names of the union members in the proposed bargaining unit and evidence of union membership, but the trade union shall not give this information to the employer.

Notice of disagreement

(4) If the employer disagrees with the description of the proposed bargaining unit or with the estimate of the number of individuals in the unit included in the application under subsection (1), the employer may give the Board notice of the disagreement and shall do so within two days (excluding Saturdays, Sundays and holidays) after the day the employer receives the application.

Content of notice

(5) A notice under subsection (4) must include,

(a) a statement that,

(i) the employer agrees with the description of the bargaining unit included in the application under subsection (1) but not with the estimate of the number of individuals in the unit, or

(ii) explains why the employer believes the description of the bargaining unit included in the application could not be appropriate for collective bargaining; and

(b) a statutory declaration setting out the number of individuals in the bargaining unit described in the application under subsection (1), if the employer disagrees with the trade union's estimate.

Board determinations, etc., no notice of disagreement

(6) The following rules apply if the Board does not receive a notice under subsection (4):

1. If the Board determines that 20 per cent or more of the individuals in the bargaining unit proposed in the application under subsection (1) appear to be members of the union at the time the application was filed, the Board shall direct the employer to provide the list to the trade union.

2. If the Board determines that fewer than 20 per cent of the individuals in the bargaining unit proposed in the application under subsection (1) appear to be members of the union at the time the application was filed, the Board shall dismiss the application.

Same, notice of disagreement

(7) The following rules apply if the Board receives a notice under subsection (4):

- 1. The Board shall determine whether the description of the bargaining unit included in the application under subsection (1) could be appropriate for collective bargaining. The determination shall be based only on that description and the notice under subsection (4).*
- 2. If the Board determines that the description of the bargaining unit included in the application under subsection (1) could not be appropriate for collective bargaining, the Board shall dismiss the application. 31*
- 3. If the Board determines that the description of the bargaining unit included in the application under subsection (1) could be appropriate for collective bargaining, the Board shall determine an estimated number of individuals in the unit as described in the application.*
- 4. After the Board determines the estimated number of individuals in the unit, the Board shall determine the percentage of the individuals in the bargaining unit who appear to be members of the union at the time the application under subsection (1) was filed.*
- 5. If the percentage determined under paragraph 4 is fewer than 20 per cent, the Board shall dismiss the application.*
- 6. If the percentage determined under paragraph 4 is 20 per cent or more, the Board shall direct the employer to provide a list of employees of the employer to the trade union.*

No hearing or consultation required

(8) The Board is not required to hold a hearing or to consult with the parties when making a determination under subsection (7) and may make a determination under paragraphs 3 or 4 of subsection (7) based only on the information provided in the application under subsection (1) and the notice under subsection (4).

Mandatory content of employee list

(9) If the Board directs an employer to provide a list of employees of the employer to the trade union under subsection (6) or (7), the list must include,

(a) the name of each employee in the proposed bargaining unit; and

(b) a phone number and personal email for each employee in the proposed bargaining unit, if the employee has provided that information to the employer.

Discretionary content of employee list

(10) If, in the opinion of the Board, it is equitable to do so in the circumstances, the Board may order that the list also include,

(a) other information relating to the employee, including the employee's job title and business address; and

(b) any other means of contact that the employee has provided to the employer, other than a home address.

Security and confidentiality of employee list

(11) If the Board directs an employer to provide a list of employees of the employer to a trade union under subsection (6) or (7), the employer shall ensure that all reasonable steps are taken to protect the security and confidentiality of the list, including protecting its security and confidentiality during its creation, compilation, storage, handling, transportation, transfer and transmission.

Restriction on use of listed information

(12) If a list of employees of an employer is provided to a trade union in compliance with a direction made by the Board under subsection (6) or (7), the use of that list is subject to the following conditions and limits:

- 1. The list must only be used by the trade union for the purpose of a campaign to establish bargaining rights.*
- 2. The list must be kept confidential and must not be disclosed to anyone other than the appropriate officials of the trade union.*

3. The trade union shall ensure that all reasonable steps are taken to protect the security and confidentiality of the list and to prevent unauthorized access to the list.

4. If the trade union makes an application for certification in respect of the employer and employees on the list and the application for certification is dismissed less than one year after the Board's direction to provide the list, the list must be destroyed on or before the day the application is dismissed.

5. If the list is not destroyed in accordance with paragraph 4, it must be destroyed on or before the day that is one year after the Board's direction to provide the list was made.

Destruction of list

(13) For the purposes of paragraphs 4 and 5 of subsection (12), a list must be destroyed in such a way that it cannot be reconstructed or retrieved.

Deemed compliance FOI Acts

(14) Any disclosure of personal information made by an employer in compliance with a direction made by the Board under subsection (6) or (7) shall be deemed to be in compliance with clause 42 (1) (e) of the Freedom of Information and Protection of Privacy Act and clause 32 (e) of the Municipal Freedom of Information and Protection of Privacy Act.

Subsequent certification application

(15) Where a list of employees is provided to a trade union by an employer in compliance with a direction made by the Board under subsection (6) or (7), and, within one year after the Board's direction to provide the list, the trade union makes an application for certification in respect of that employer and employees on the list, if that application is dismissed, the Board shall not consider another application under subsection (1) from any trade union in respect of a proposed bargaining unit that is the same or substantially similar to the one that was described in the original application under subsection (1) until one year after the application for certification is dismissed.

Effect of determination

(16) A determination made by the Board under this section does not limit the Board's ability to consider or determine matters under section 7, 8, 8.1, 9 or 10.

Non-application to construction industry

(17) This section does not apply with respect to an employer as defined in subsection 126 (1).



May 17, 2024

VIA Email: lrcreview@gov.bc.ca

Panel Members:

Lindsie M. Thomson

Michael Fleming

Sandra Banister, KC

Dear Panel Members:

Re: B.C. Labour Relations Code Review

In January 2024, 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*.

Over the course of March, April and May 2024, the Panel received written submissions and heard oral submissions at public hearings throughout British Columbia. The Panel has posted the written submissions it has received and invited reply submissions.

The BCGEU stands by its March 21, 2024 written submissions, as well as the further submissions made at the May 7, 2024 public hearing held in Vancouver, B.C. We also continue to support and stand by the written and oral submissions made by the B.C. Federation of Labour.

That said, the BCGEU has identified two topics in the employers’ submissions that we submit lack crucial perspective and demand a reply. These are:

1. Bill 9 and Federal/Provincial picketing; and
2. Union particulars in discipline grievances.

Bill 9 and Federal/Provincial Picketing

Several employer submissions take issue with the provincial government’s introduction to the legislature in March 2024 of *Bill 9, Miscellaneous Statutes Amendment Act, 2024* (“Bill 9”).

Among other things, Bill 9 would amend the definition of “strike” in the *Code* to clarify that it does not include “picketing conducted by employees in respect of whom collective bargaining is regulated by the laws of Canada or another province who are locked out or on strike.” In other words, provincial workers who refused to cross a federal picket line would not be engaged in an illegal strike.

The employer submissions take issue with, first, the government’s perceived lack of consultation before introducing Bill 9, and second, concerns that the Labour Relations Board will be powerless to regulate the effects of federal labour disputes on provincial employers, who are, in the view of the employer submissions, “innocent third parties.”

We submit that both concerns fail to recognize the full context of the proposed amendment and are without merit.

The BCGEU agrees that, generally, it is very important that the government engage in broad consultation with the labour relations community when contemplating changes to the *Code*. However, the legislature also has a duty to act to amend legislation when judicial or administrative decisions unexpectedly change a longstanding practice or understanding in the community.

This is precisely what occurred prior to the introduction of Bill 9. In *Vancouver Shipyards Co*, 2022 BCLRB 146, the Board interpreted the *Code*’s definition of strike in a manner that it acknowledged would upset the “widely held understanding in the labour relations community in British Columbia that honouring a picket line does not, in and of itself, constitute a strike.”

The Board acknowledged that this understanding dates back to a 1976 policy decision of the Board under former Chair Paul Weiler and that its decision would therefore upset a decades-long understanding.

It is also important to note that, in addition to these policy concerns inherent in the interpretation the Board ultimately upheld, the Board also identified policy concerns that would have been present if it had chosen the unions’ interpretation. Namely, according to the Board, the unions’ interpretation would have made the Board powerless to regulate any picketing by provincial employees unrelated to a provincial labour dispute, including not just federal picket lines but picket lines related to political protests, for example.

In the context of these policy concerns raised by both possible interpretations of the current definition of strike, it was entirely reasonable for the legislature to act to amend that definition in a manner that addresses the concerns on both sides. That is, the amendment excludes not crossing a federal picket line from the definition, but still gives the Board the ability to regulate other forms of picketing unrelated to provincial labour disputes, such as picketing in relation to political protests.

The concerns raised by the employer submissions around lack of Board ability to regulate the effects of federal labour disputes on allegedly innocent provincially regulated third parties are similarly not a valid reason for the legislature not to amend the *Code* in response to the Board's decision in *Vancouver Shipyards*.

Provincially regulated employers who are concerned about the effects on them of picketing related to a federal labour dispute will still have an avenue to seek relief: the courts. While this may not be their preference, it is important to note that the regulation of picketing in most other provinces is exclusively through the courts.

The requirement to go to court rather than to the Board does not militate against the need for the legislature to act in the face of a Board decision that upsets a decades-long understanding about crossing picket lines – one of the most important principles of solidarity for unions in B.C. and globally. We submit the Panel should defer to the action the legislature has already taken on this issue.

Union particulars in discipline cases

One of the employer submissions invites the Panel to recommend amendments to the *Code* to require unions to provide particulars in the arbitration process for discipline grievances. This submission is in response to an arbitral decision in which the BCGEU successfully argued that the lack of particulars from the union in this circumstance does not deny an employer a fair hearing: *British Columbia (Ministry of Public Safety and Solicitor General) v. BCGEU*, 2019 BCCAAA No 136. The arbitrator's award was upheld by Board: 2020 BCLRB 28.

The employer submission is incorrect in its portrayal of the *British Columbia* decision and its practical effect.

The employer submission characterizes the decision as frustrating the policy of the *Code* and impeding the grievance procedure. These claims must be put in context.

The employer in *British Columbia* was seeking to avoid its obligation to provide pre-hearing disclosure of documents and information it relied on in coming to its decision to terminate the grievor's employment, by arguing the union was required to provide particulars first. The arbitrator disagreed, relying on the longstanding and accepted principles that an employer bears the onus of establishing just cause for discipline and that a union is entitled to remain silent until the employer has made its case. These well-established arbitral principles in fact give life to *Code* principles – particularly the just cause principle found in Section 84 – rather than frustrating them.

The employer submission alleges that the decision will result in frequent adjournments because unexpected defenses will arise at hearing. However, the arbitrator specifically held that particulars of certain defenses may need to be provided by a union in advance of a hearing.

The employer submission also alleges, without providing examples or evidence, that: “A failure to provide particulars means that there is virtually no prospect that any dispute over discipline and discharge will be resolved under the terms of the collective agreement prior to an arbitration hearing.”

This framing is overly legalistic and frankly out of touch with the realities of cooperative labour relations on the ground. Unions and employers who have cooperative and productive relationships routinely resolve discipline and discharge cases regardless of whether there is a strict arbitral requirement for the union to provide particulars.

The BCGEU pulled data regarding its discipline grievances since 2020, when the Board’s decision was issued. Since 2020 to the present, over 90 per cent of discipline grievances were resolved prior to arbitration.

The decision in *British Columbia* did not represent a dramatic change but rather a reinforcement of longstanding principles, and it has not had a discernible practical effect on the ability to resolve discipline grievances. We submit the Panel should decline to make any recommendation regarding this issue.

We thank the Panel for allowing the BCGEU to make this reply submission. The BCGEU would be happy to provide elaboration or clarification on our submission at the Panel’s convenience.

Yours sincerely,



Stephanie Smith
President

WHERE LEADERS MEET TO UNLOCK BC'S FULL POTENTIAL



Business Council of
British Columbia
Est. 1966

Business Council of British Columbia

Supplemental submission to

Section 3 *Labour Relations Code* Review Panel

May 17, 2024

*Prepared with the assistance of
Roper Greyell LLP*

TABLE OF CONTENTS

INTRODUCTION	1
RECENT AND CURRENT ECONOMIC CONTEXT	1
Economic Growth	2
Per Capita Economic Growth	4
B.C.'s Job Creation: Unbalanced and Unusually Weak	5
PROPOSED CHANGES AND ISSUES UNDER CONSIDERATION	8
Virtual Picketing	8
Production of Employee Lists	9
Successorship	10
Sectoral Bargaining	10
Definition of Strike	10
CONCLUSION	11

INTRODUCTION

We appreciate the opportunity to provide a responsive submission to the Panel. In it we discuss:

1. The economic context in which B.C. businesses are currently operating as it pertains to the Panel's s.3 review and the impact of changes proposed by labour groups within that context.
2. Comments on changes proposed by labour groups:
 - recognition of so-called "virtual picketing";
 - mandatory production of employee lists to unions establishing only 20% threshold support;
 - expanded application of legislated "deemed" successorship in the context of competitive service contract retendering; and
 - sectoral bargaining.
3. Comments on the recent amendments to the definition of "strike" (Bill 9) that has occurred without the benefit of review by the Panel.

RECENT AND CURRENT ECONOMIC CONTEXT

In this section we examine the recent and current macro economic backdrop essential to understanding the "context of our modern economic realities" and the *Code* s. 2 considerations that include fostering employment in "economically viable businesses."

The B.C. economy has grown more quickly than Canada's over the past five years. But it is important to recognize what drove this growth. B.C.'s underlying economic circumstances have deteriorated over the past five years and the outlook is somewhat sobering.

- Supercharged population growth, owing to the federal government's changes to immigration policy, has superficially boosted topline economic growth in recent years. But looking through the veneer of population growth, per capita real GDP growth has in fact slowed from the previous five-year period and is projected to fall in both 2023 and 2024. In 2028, provincial real GDP per capita is projected to be lower than in 2022, according to the 2024 B.C. Budget (2024 B.C. Budget, p100). Per capita GDP growth offers a better reflection of what is happening to living standards in B.C. and Canada than topline GDP growth.

- Several “mega” engineering construction projects provided an extraordinary, one-off economic lift to B.C. over the 2016-2023 period. We estimate B.C. economic growth from constructing the Site C dam, the Transmountain pipeline, the LNG Canada facility, and the Coastal Gaslink pipeline lifted average GDP growth by 0.5 percentage points between 2018-2023. These projects have been completed or are now winding down, raising questions as to what will drive provincial prosperity in the coming years.
- The COVID-19 pandemic occurred during the period under consideration and the impact on employment was unprecedented. Just as the positive economic “shock” from construction of mega projects is necessary context, understanding the negative impact and aftermath of the pandemic on the job market is also essential. Tracking B.C.’s private sector job growth relative to other provinces through and after the pandemic shows B.C.’s private sector employment growth has been unusually weak over the past five years.

Economic Growth

B.C.’s real economic growth averaged 2.5% over the 2018-2023 period. Canada’s 1.5% over the same period. Government communications frequently reference B.C.’s comparatively strong growth (on average 0.9 percentage points higher than Canada’s) and point to this top line number as evidence that all is well in B.C.

Additional important context includes the fact that:

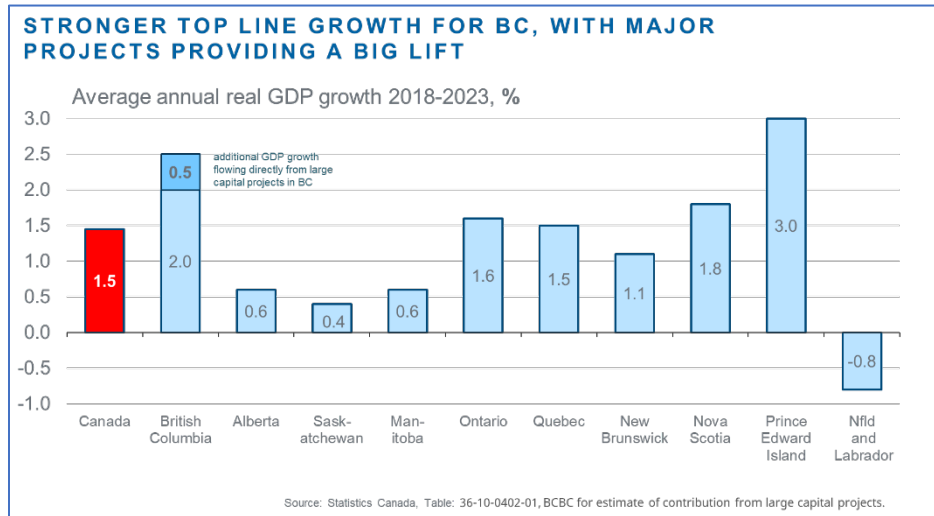
- B.C.’s real GDP growth slowed from the average 3.3% pace in 2013-2018; average growth in the most recent period was also below B.C.’s long-term average growth rate.
- The average growth rates over the periods in **Table 1** show B.C.’s economic growth is normally higher than Canada’s, with B.C. outpacing Canada by the widest margin in the 2013-2018 period.

Given B.C.’s track record, it should not be surprising that B.C.’s economy grew more quickly than Canada’s over the 2018-2023 period. What is perhaps surprising is that B.C.’s average economic growth exceeded Canada’s by only nine-tenths of a percentage point at a time when several mega energy/infrastructure projects totaling more than \$100+ billion in investment were all at peak levels of construction activity. If ever there was a period when B.C.’s economy should have outperformed Canada, it was the past five years.

Table 1: Real GDP, average annual growth, %						
	2018-2023		2013-2018		2003-2013	
Provinces	Avg. annual growth%	Rank among provinces 1=fastest	Avg. annual growth%	Rank among provinces 1=fastest	Avg. annual growth%	Rank among provinces 1=fastest
British Columbia	2.5	2	3.3	4	2.5	4
Alberta	0.7	7	1.0	1	3.6	1
Saskatchewan	0.4	9	0.9	2	2.8	2
Manitoba	0.6	8	2.0	3	2.5	3
Ontario	1.6	4	2.7	8	1.4	8
Quebec	1.5	5	2.1	6	1.5	6
New Brunswick	1.2	6	1.1	10	0.6	10
Nova Scotia	1.9	3	1.4	9	0.7	9
Prince Edward Island	3.1	1	2.0	5	1.6	5
Newfoundland and Labrador	-0.8	10	-0.4	7	1.4	7
British Columbia excl. large energy projects	2.0	2 (BC ranking the same)	3.1	1	n/a	n/a
Canada	1.5		2.1		2.0	

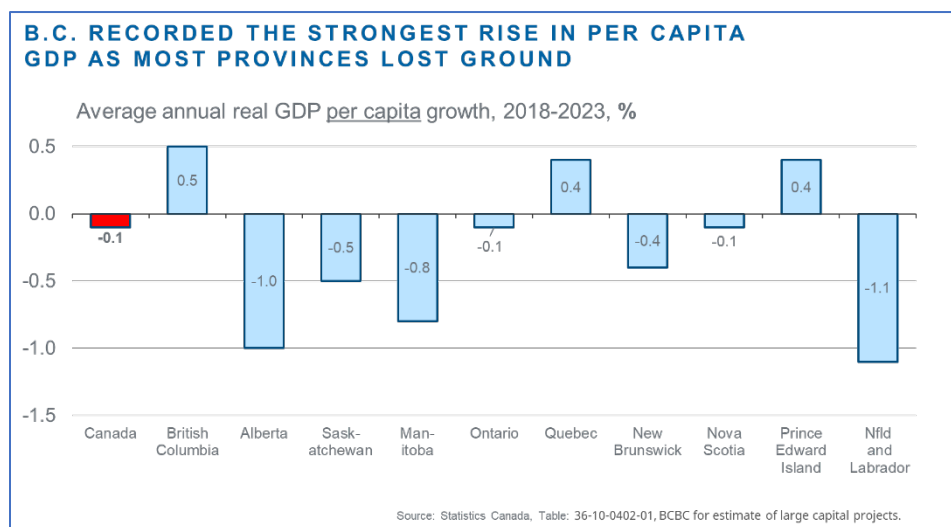
Sources: Statistic Canada, Tables: 36-10-0402-01 and 17-10-0005-01. BCBC for estimates of direct economic impact from large capital projects.

The additional activity flowing from the mega projects represents a one-time huge positive economic shock to the B.C. economy. We estimate construction of these projects lifted economic growth by upwards of 0.1 percentage point each year since 2016 and during peak years more than 0.2 percentage points and accounted for as much as 10% of B.C.'s economic growth in some years. Absent these projects we estimate B.C.'s economic growth would have averaged 2.0% in 2018-2-23, rather than 2.4% and 3.1% in 2013-2018 rather than 3.3%.



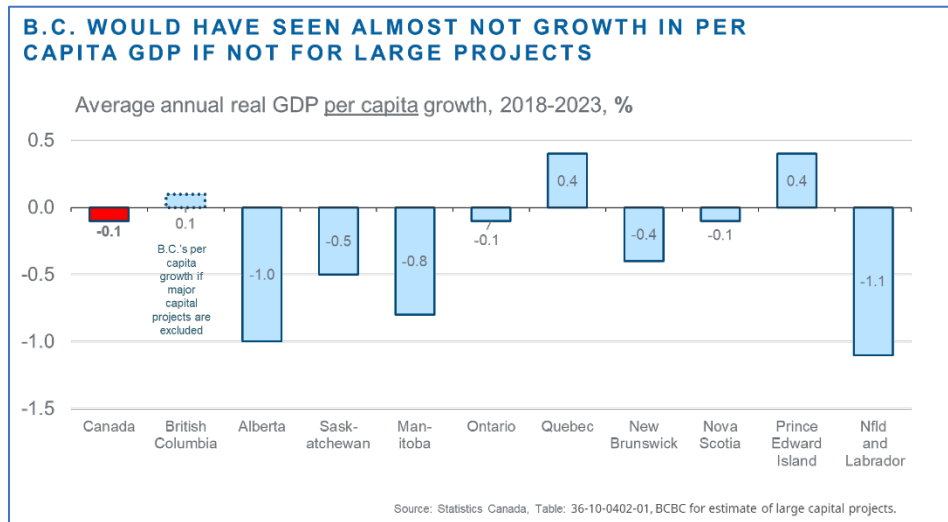
Per Capita Economic Growth

The most recent five-year period also featured strong in-migration with B.C.'s population rising by an average of 1.9% in 2018-2023 compared to 1.6% in 2013-2018. Because average economic growth downshifted in 2018-2023 even as population growth picked up, per capita GDP growth (a key metric of living standards) slowed significantly in 2013-2018. Strikingly, during the period when mega projects provided an unprecedented economic lift (2018-2023), real GDP per capita growth was less than one-third the average 1.6% rate of the previous five-year period when these projects were in their early stages.



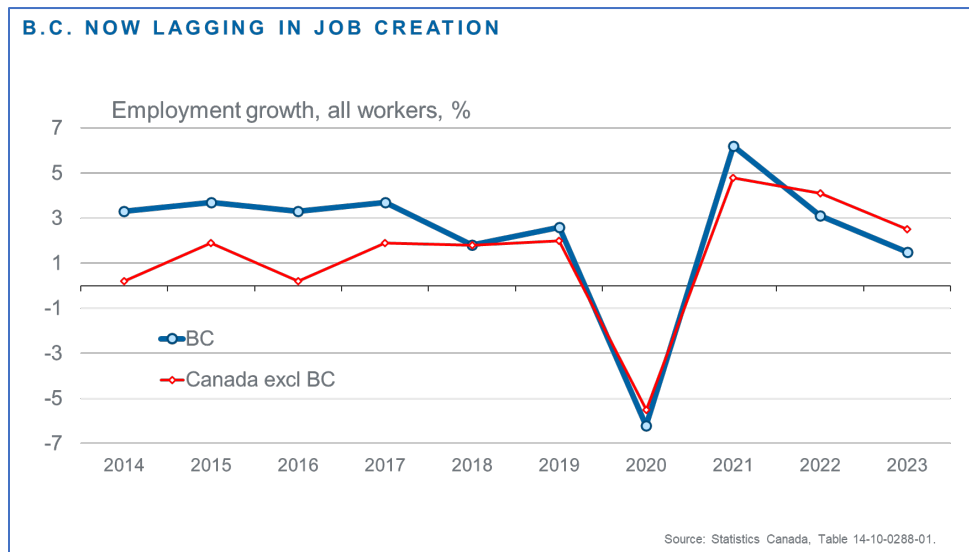
While weak in historic context, B.C.'s 0.5% real per capita GDP growth is well above Canada's and the strongest of any province. But it is important to recognize it was the large capital projects that delivered the additional economic activity and per capita GDP growth that has differentiated

B.C. from the other provinces. **If not for the mega projects, B.C.'s per capita GDP growth would have barely inched ahead (0.1% annually) and would have been essentially aligned with Canada's dismal performance.**



B.C.'s Job Creation: Unbalanced and Unusually Weak

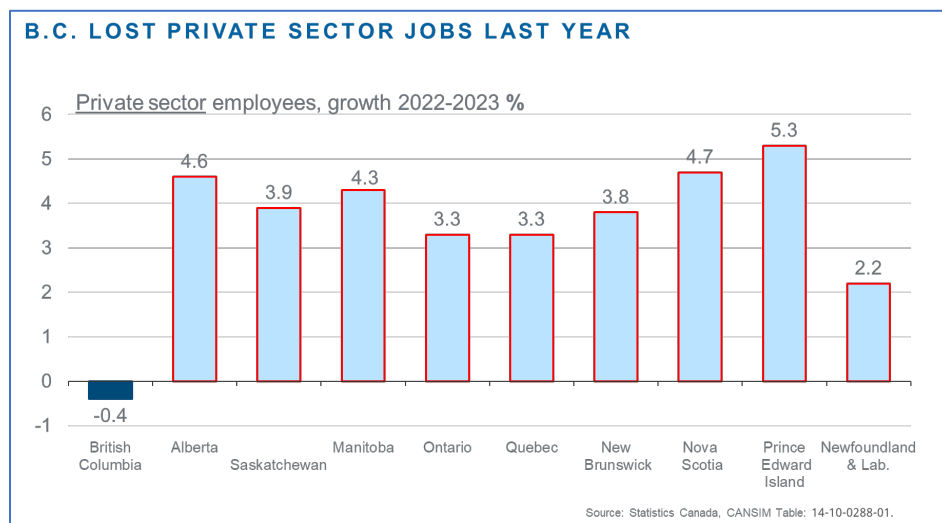
The total number of people working in B.C. grew by an average of 1.5% annually over the 2018-2023 period, slightly below the 1.6% pace recorded in the rest of Canada. Over the past decade or so total employment growth in B.C. has gone from well above, to being in line, and now to well below the employment growth in the rest of Canada.



The downshift in total employment growth compared to earlier years, and also in relation to other parts of Canada, reflects softer labour market conditions in B.C. but masks much more concerning trends in private sector job growth. **Critical to the Panel’s current work and understanding of B.C.’s current economic circumstances is the fact that almost all new jobs in B.C. have come in the public sector with only incremental gains in private sector employment. B.C. stands alone among the provinces in this regard.**

The number of employees in B.C.’s private sector grew by an average annual rate of 0.8% over 2018-2023, less than half of the 1.8% pace in the rest of Canada. The modest gain for B.C. came mostly before the pandemic (as the mega projects ramped up). Looking thorough the impact of the pandemic shutdowns and comparing employment levels at the beginning of 2019 to levels at the beginning of 2024, shows private sector employment in B.C. is up just 1.6% over the five-year span. **Public sector employment has charted a rather different path, rising an astonishing 35% over the same period. In absolute numbers, private sector payrolls have risen by a feeble 30,000 net positions in the last five years while public sector payrolls swelled by 160,000.**

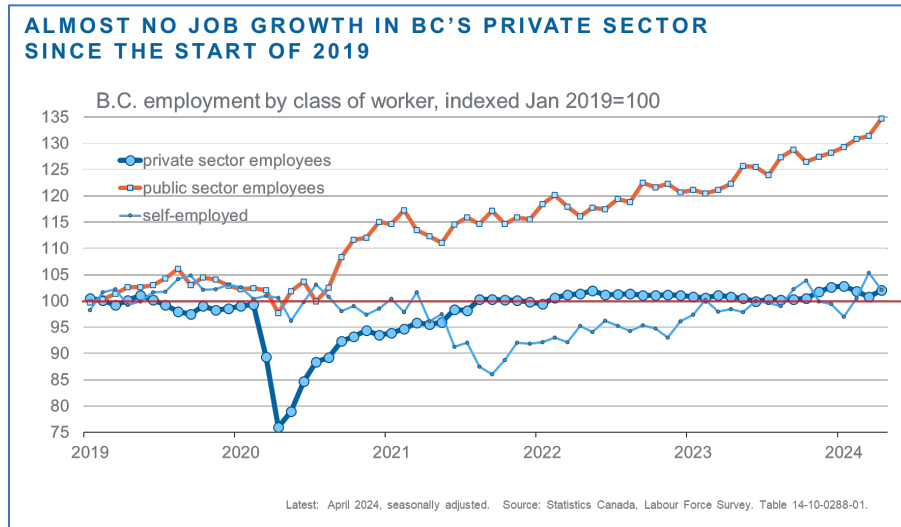
Elsewhere in Canada, public sector employment has also been climbing, but at only half of B.C.’s head-spinning pace. Public sector hiring has also driven overall job creation more than usual at the national level, but at least in the rest of Canada proportionately more jobs have been created in the private sector. We note that in 2023 the number of private sector employees in B.C. dropped 0.4% while all other provinces registered very strong growth in private sector payrolls.



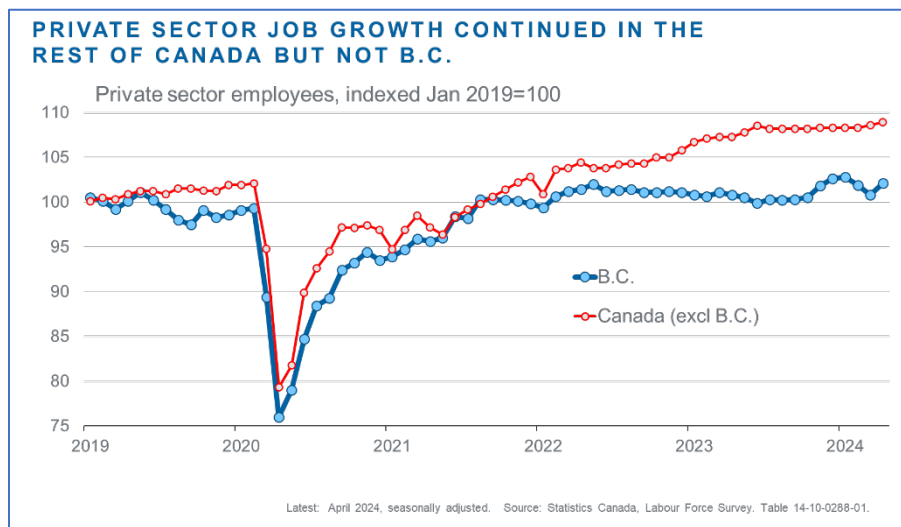
The unprecedented and concerning differences between B.C.’s labour market and the rest of Canada’s is reflected in the following summary metrics:

- **In the other nine provinces, on average, for every new private sector job since 2019 there have been “just” 0.6 new public sector positions created.**

- In B.C., for every new private sector job, there have been 5.5 new public sector jobs created.



This remarkably unbalanced public versus private sector hiring ratio is not sustainable. The winding down of a handful of major capital projects has weighed on job growth in some segments, but this factor does not explain the protracted period of little to no private sector employment growth. We urge Panel members to reflect carefully on B.C.'s recent job creation track record prior to making any amendments to the Code that might further tilt its balance away from the interests of employers and broader job creation objectives.



PROPOSED CHANGES AND ISSUES UNDER CONSIDERATION

As outlined in our earlier submission from a coalition of B.C. business groups, the Business Council reiterates the importance for the Panel to make recommendations that preserve the balance in the *Labour Relations Code* rather than broad swings reflecting the alliances of the party in power in Victoria, especially considering the sustained lack of private sector job growth. The submissions of labour groups seek changes aligned with broad swings that the Business Council believes the Panel should advise against. Almost all requests for change in the filed submissions come from labour groups and most of those requests do not document or even point to problems or issues the changes purport to address. Rather they are changes that will simply enhance the rights, power and influence of organized labour, and upset the balance necessary for stable labour relations.

The Business Council again urges the Panel to make recommendations that will preserve and protect balance with incremental change only when necessary to address actual issues or problems.

Virtual Picketing

The rules regarding the time and place for lawful picketing during a labour dispute form a critical pillar of the careful balance within the *Code*. Several labour groups request amendments to create the concept of “virtual picketing” that would permit a union to declare that a virtual picket line exists without the physical presence of pickets. We understand that this change is intended to address the circumstances of remote workers.

This requested change is unnecessary and risks expansion of established picketing rights. While it may be necessary to clarify the permissible location of pickets for remote workers (e.g., permissible picketing at the location from which they are supervised), labour groups offer no reason why remote workers cannot be physically present to picket.

Picketing is defined and understood as expressive conduct in the form of a physical presence at an employer’s location to persuade others not to do business with the employer. The place of permissible picketing is carefully regulated under the *Code* so that picketing affects only the struck employer at the place of the strike or lockout. A “virtual” picket line that is simply declared to exist without any physical presence will fall well outside of that scheme and will more closely resemble a “hot declaration” used to persuade others not to handle the products of a struck employer. Hot declarations are regulated in an entirely different manner. The Board has the discretion to issue a declaratory opinion to void or limit the operation of a hot declaration based on the effect of the declaration (s. 70). The creation of a new form of picketing that is akin to a hot declaration will create confusion in this regulatory scheme and risk the expansion of picketing beyond that intended in the *Code*.

In summary, introducing the concept of virtual picketing is unnecessary and will introduce unnecessary confusion and risk within the carefully crafted regulation of picketing and hot declarations in the *Code*. Such a change would constitute a swing away from balance in a manner without precedent in the rest of Canada.

Production of Employee Lists

Several labour groups seek *Code* amendments that will require employers to produce employee lists and contact information to unions that can demonstrate only 20% threshold membership support – less than half of the support necessary for consideration of a certification application.

In the coalition of business association's initial submission to the Panel, the group urged a return to balance in respect of certification rules by a return to secret ballot votes or, in the alternative, a return to card-check rules in line with the rest of the country that do not include the 2019 amendments intended for a secret ballot vote context. This new proposed amendment would constitute a significant swing away from balance by handing unions an organizing treatment unprecedented in Canada. Moreover, such an amendment would tread on employees' privacy rights at a time when such rights are receiving more, not less, legislative protection – and for good reason.

The reason for this requested amendment is not clear from the submissions other than reference to remote workers, multiple worksites, high turnover, and those working through apps. None of these issues are new and they are certainly not unique to B.C.

We note that the *Code* already allows unions to request access orders for workers whom they cannot reasonably access (s. 7(2)) and notably does not require employers to produce employee lists in such cases. Further, Board jurisprudence already allows for relaxation of rules with respect to the certification of appropriate bargaining units in industries that are difficult to organize such as those to which this new remedy appears to be targeted.

Certification activity has increased substantially following the return to card-based certification and there is no evidence that existing rules and structures impede reasonable access to collective bargaining in any sector. Our coalition notes that this request is particularly anomalous given unions' current access to social medial platforms to connect with potential members that did not previously exist.

Finally, a requirement that employers produce employee lists upon demonstration of only 20% membership support would make B.C. an outlier in Canada and should be rejected.

Successorship

Several labour group submissions seek an expansion of the 2019 amendments that deem a successorship to occur due to competitive contract retendering in certain sectors.

The 2018 panel recommended those amendments based on “anecdotal” stories, primarily from the health sector, about the impact of so-called “contract flipping”. The 2018 panel recommended a “measured” and “incremental” approach reflected in the 2019 amendments that were extensive but limited to the sectors in which there was at least anecdotal evidence of a problem to resolve.

Basing legislative amendments on anecdotal stories is not ideal, but the current submissions from labour groups seek expansion of these amendments without data or even new anecdotes about contract flipping in other sectors that would now be included. These submissions simply seek to bolster the position of organized labour by deeming certification rights attached to a contract – an extraordinary remedy – in all industries even absent evidence of contract flipping.

Expanding these deemed successorship provisions as proposed will simply further tip the balance in favour of organized labour in a manner that would again make B.C. an outlier in Canada.

Sectoral Bargaining

Our first submission included comments concerning anticipated submissions from labour groups for amendments to allow for sectoral bargaining and we will not repeat those submissions here. BCBC simply observes in reply that the submissions received demonstrate the novelty of this concept, further confirming that such measures cannot be seriously considered without much more extensive study and consultation.

Definition of Strike

The Business Council must communicate its deep concern about the government’s commitment to this process considering enactment of one of the most significant *Code* amendments since 1992, buried in Bill 9, *Miscellaneous Statutes Amendment Act, 2024*, during this Panel’s important work. The amendment to the definition of “strike” to give provincially regulated employees a “free pass” to engage in mid-contract strikes in response to federal pickets that the Board cannot regulate will significantly worsen the impacts of often far-reaching federal strikes in this province. While the federal government has recently appointed a panel to examine and address labour disputes in the federally regulated longshore industry,

the provincial government has taken steps to ensure that such disputes could have potentially devastating disruptive effects on our economy.

Provincially regulated employees in B.C. now have much more significant rights to honour federal pickets than do federally regulated employees. The absence of a “free pass” in the *Canada Labour Code* for mid-contract strikes by federal employees faced with picket lines was upheld despite a *Charter* challenge before the CIRB (decision upheld by the Federal Court of Appeal with leave to appeal to the Supreme Court of Canada denied - *Grain Workers' Union, Local 333 v. B.C. Terminal Elevator Operations' Association*, 2009 FCA 201 leave to appeal dismissed [2009] S.C.C.A. No 352). There was clearly no legal reason to make these amendments that further empower organized labour in the province while putting the economy at risk.

Despite this legislation having now been passed, this matter is squarely within the Panel’s jurisdiction to comment upon, and our coalition urges the Panel to recommend that the amendment be reversed. Further, the Panel must take account of this pre-emptive swing in the direction of organized labour when it considers other amendment requests, including those addressed above.

CONCLUSION

The Business Council, and the business community at large, are concerned about calls from organized labour to move the Code further away from balance. The government’s recent change to the definition of a strike (Bill 9), without consultation with industry, and pre-empting the Panel’s review, only adds to our concern.

Looking through the extraordinary impact of four mega capital projects – Trans Mountain, Site C, LNG Canada, and Coastal Gas Link – the province’s GDP growth performance has been lacklustre. Looking through the impact of supercharged immigration and population growth, provincial real GDP per capita – a key metric of living standards – is expected to fall in both 2023 and 2024 and be lower in 2028 than in 2022, according to figures from the latest provincial budget. Also, there has been very little growth in private sector employment in B.C. since 2019. In contrast, public sector hiring has been ebullient: 5.5 times the rate of private sector jobs growth. However, this cannot be sustained given the province’s deteriorating fiscal situation and credit ratings outlook.

In other words, even with the temporary lift from one-off mega engineering construction projects, the province is seeing the makings of a lost decade for living standards and prosperity. The province can ill afford a period of disruptive labour relations due to an unbalanced Code. We urge the Panel to consider these factors in their deliberations.



The Canadian Animation Guild

IATSE Local 938

Via Email

May 15, 2024

Email:

Seniorsteward@cag938.ca

Ministry of Labour

LRCReview@gov.bc.ca

Dear Sirs/Mesdames:

I am writing on behalf of The Canadian Animation Guild, IATSE Local 938, to provide our Local's reply to submissions made to the Panel as part of the BC Labour Relations Code Review process. We would like to address some issues that we saw discussed often in submissions made by other individuals and groups. There were many important topics discussed that impact our local, and we feel that we could contribute useful information on. As a newer local, our executive board is still composed of members that are at work in our industry. Our union formed very recently, we're actively organizing across the entire province, we are still deeply affected by the ebb and flow of work being available to us. This closeness to working on the ground is something that we hope will also help to ground our replies in a lived reality. We hope that these replies will be useful for the Panel in their review.

1. Economic Status of British Columbia

It was very interesting to hear from business and employer representatives about how difficult the current economic situation is for them and how many aspects of the Labour Relations Code would lead to our province's economic downfall. It came across as a naïve sentiment at best, and at worst a deliberate misrepresentation of what forces have led to our current economic situation. In light of this, we would like to share our local's first hand experience with Titmouse Animation Inc, our first employer under contract. Their experience with our union and the LRC has not gutted them financially, and in fact they have done fairly well despite the current climate.

The Animation industry has not been spared from the current economic pain and uncertainty that grips much of our province. Many of our peers are out of work, and contending with the rising cost of living alongside employers. Interestingly enough, Titmouse Animation Inc where our union represents workers at– the only unionized studio with a collective agreement in BC– has arguably fared the best economically compared to its competitors through the past year of upheaval. Titmouse is a medium sized animation company, and tends to service slightly more boutique clients. They continued to hire workers as their competitors laid workers off and have been securing new projects despite an industry-wide contraction. Throughout all of this, our union represented our workers, fielded labour relations issues with this employer and ensured that our members had their rights respected. It would appear that the BC Labour Relations Code, respect for workers rights and successful businesses are not antithetical to one another.

Certainly, the Panel is also very aware of what overarching issues are actually creating the economic uncertainty we find ourselves in, and how the stability that comes from labour peace and robust worker's rights in turn contributes to the stability of an economy. Our Local urges the Panel to be skeptical of appeals that insist that a Code that fairly balances the rights of workers is impossible for our economy– struggling or healthy– to shoulder.

2. Card Check

We noted that many employer submissions to the BC LRC Review urged the Panel to walk back the 2022 amendment to the Code that allows workers to form unions with single-step or “card check” certification. Some employers even went so far as to request that the panel

not only return to the previous two-step certification process but also to extend the timeline for the required secret ballot vote certification vote. The Employer representatives claim that the card check system unfairly biases the certification process in favour of the workers seeking to form a union. We feel incredibly strongly that card check in fact balances the system according to the realities of the flow of power in a workplace and that the repeal of card check would be a terrible disservice to the protection of worker's rights.

As workers that organized our union, we see card check as a removal of an arbitrary barrier that granted employers a week-long opportunity to mount an anti-union campaign to a captive audience during work hours. The period between the submission of union representation cards and the secret ballot vote is an incredibly vulnerable time for a union campaign. Worker-organizers must not campaign for the union during work hours, while the employer is free to dedicate as many working hours as they see fit to messaging and meeting with workers, or hiring law firms or consultancies to do that in their stead. A clever employer will rely on these consultancies to intimidate or coerce their workers in this captive setting without treading into the territory of inducements that can be brought up in an unfair labour practice filing. While the two-step certification process may appear to be balanced on paper, the reality is that the secret ballot vote, and the waiting time that leads up to it, creates a deeply unfair system.

Two-Step Certification creates a significant burden on the shoulders of worker-organizers. Decisions regarding which workers will be on the voter list, making sure that ballots are accessible to workers, performing technical support in a limited window of time for voters and re-campaigning to make sure all card-signers remember to vote is a massive amount of work and coordination that must be done in a short period of time. (all during off hours as well.) Even then, as animation workers organizing during the height of the pandemic, our worker-organizers had the ability to see this process through while working remotely and were able to conduct our vote online. Other workers would have to do all that we did and more, while under the eyes of their managers. Card check protects workers from these tensions and pain points and allows them to organize their workplaces more safely.

Since the introduction of Card Check to the BC LRC, our Local has successfully organized Wildbrain, a workplace that is- at its leanest- roughly three times the size of Titmouse. Wildbrain, at the time of its certification, had almost 600 workers. A headcount that would have required a massive amount of labour and coordination to manage a voting campaign for. Card check allowed organizers to collect the equivalent of votes through signed cards,

over a period of time that allowed organizers to properly speak to, educate and inform their colleagues of the union drive at a pace that protected their anonymity in the workplace until they chose to make their campaign public. While we firmly believe that Wildbrain workers would have still successfully certified their workplace no matter the circumstances, Card Check allowed for the certification process to proceed in a more equitable and safe manner for the workers involved.

Card Check has been an incredible boon for animation workers across our province. The Canadian Animation Guild firmly contests any argument that single step-certification unfairly benefits workers over employers. Card Check creates a safe and equitable mechanism for the certification of unions. We encourage the Panel to maintain the current certification process as it stands in the BC Labour Relations Code.

3. Bill 9 - Miscellaneous Statutes Amendment Act 2024, Amendments to the Definitions of Strike and Person

Our Local has reviewed the submissions made regarding the amendments to the BC Labour Relations Code as part of Bill 9. We understand that this decision was one that came from a reasoned evaluation of many events in which provincial and federal labour codes were at odds with one another. In order to address these conflicts, we understand that the BC government passed the following legislation as part of Bill 9:

Section 1 of the Labour Relations Code, R.S.B.C. 1996, c. 244, is amended

(a) in subsection (1) by repealing the definition of "person" and substituting the following:

"person" includes an employee, employer, employers' organization, trade union and council of trade unions, but does not include, except for the purposes set out in subsection (3), a person in respect of whom collective bargaining is regulated by the *Canada Labour Code*;

(b) in subsection (1) by repealing paragraph (b) of the definition of "strike" and substituting the following:

(b) a cessation, refusal, omission or act of an employee that occurs as a direct result of, and for no other reason than,
(i) picketing permitted under this Code, or
(ii) picketing conducted by employees in respect of whom collective bargaining is regulated by the laws of Canada or another province who are locked out or on strike, and

(c) by adding the following subsection:

(3) For the purposes of paragraph (b) (ii) of the definition of "strike" in subsection (1), the definitions in subsection (1) are to be read as though the

definition of "person" did not exclude a person in respect of whom collective bargaining is regulated by the *Canada Labour Code*.

We understand that Bill 9 received royal assent on April 25 2024. We wanted to still take the time however to inform the Panel of our support for the intent of this amendment as it ensures that federal picketing may be respected by workers governed by our provincial legislation.

4. Virtual Picket Lines

Our Local also would like to echo the BC Federation of Labour's call for the Labour Relations Code to be updated in order to better outline a worker's rights on a virtual picket line. The animation industry as it exists currently is one where many of our workers are working from home, and from the review of many other submissions, it appears that we are not alone in our experience. Virtual workspaces are ubiquitous across industries in BC and they will likely remain an aspect of work to some extent permanently. The BC Labour Relations Code's language may currently be interpreted to require some manner of physical presence for a picket line to be considered valid and protected. This physical space is no longer the only reality in which job action occurs. It is time to update the code to properly codify what a virtual picket line is, and ensure the protection of workers engaged in such an activity.

Codifying the right to engage in a virtual picket line is also essential to protect worker's ability to represent their work as struck work to the public. A further wrinkle to the virtual picket line issue for Animation workers centers around our industry's relationship with its clients and how it manifests in the non-disclosure agreements that workers sign. The majority of the animation industry in BC is service-based work for international producers. Through this relationship, employers negotiate non-disclosure agreements with clients that are passed on to workers to sign and they are largely non-negotiable. Certain clients do not want the workers that are producing their product to publicly state at all that they perform the work that they perform. If a worker that was working on a production with a client like this were to state that "Production A is struck work, do not cross the picket line and accept work on Production A." They may be subject to disciplinary action for breaking their NDA if their statement was not protected as part of a picket. Making clear what messaging is permissible on a virtual picket line, will help to make the practice safer.

When people report to work virtually, socialize virtually, deliver products to clients virtually and organize virtually, it necessarily follows that they must also perform a strike action virtually as well. (Not to mention, that should an employer lock out their workers, it would be done virtually as well.) An update to the BC Labour Relations Code that reflects the new reality of how people engage in their work is essential to maintaining labour peace in a changing landscape.

5. Conclusion

The Canadian Animation Guild hopes that our contributions on the above topics are helpful to the panel's review of the BC Labour Relations Code. We are thankful to have the opportunity to submit our reply to the panel, and for the opportunity to participate in this consultation process.

Respectfully submitted on behalf of IATSE Local 938.

Sincerely,

A handwritten signature in black ink, appearing to read "Emily Gossmann", with a long horizontal flourish extending to the right.

Emily Gossmann, Senior Steward

The Canadian Animation Guild

TO Labour Relations Review Panel May 15, 2024
FROM Submission of Canadian Association of Counsel for Employers (CACE)

We write pursuant to the Labour Relations Code Review Panel ("Panel") invitation to submit written replies to any of the submissions posted on the Panel's website. The deadline for our submission is Friday, May 17, 2024.

The primary purpose of our Reply submission is to ensure that the Panel is aware of CACE's fundamental concerns relating to the numerous submissions from trade unions and trade union organizations espousing the benefits of "Sectoral Bargaining". Many of those submissions focus on the assertion that new broader based bargaining structures (which would include sectoral bargaining structures) would constitute an enhancement of the fundamental freedom of association set out in section 2 (d) of the *Canadian Charter of Rights and Freedoms* ("Charter"). However, respectfully, the submissions endorsing these types of bargaining structures are antithetical to the concept of freedom of association as identified in the *International Labour Organization Convention 87- Freedom of Association and Protection of the Right to Organize, 1948* ("Convention 87") (**Tab 1**). This convention was adopted by Canada in March of 1972 (**Tab 2**). It has been relied upon by the Supreme Court of Canada in its decision outlining the scope of freedom of association under the *Charter*. The following elements of *Convention 87* are apposite:

Article 3

1. Workers and employers organizations shall have the right to draw up their constitutions and rules, to elect their representatives in full freedom, to organize their administration and activities and to formulate their programs.
2. The public authorities shall refrain from any interference which would restrict this right or impede the lawful exercise thereof.

....

Article 8

1. In exercising the rights provided for in this *Convention* workers and employers and their respective organizations, like other persons or organized collectivities, shall respect the law of the land.



2. The law of the land shall not be such as to impair, nor shall it be so applied as to impair, the guarantee provided for in this Convention.

Article 11

3. The Committee on Freedom of Association - The Committee on Freedom of Association Committee is a tripartite body set up in 1951 by the governing body of the International Labor Organization (“ILO”).
4. Each member of the International Labor Organization for which this Convention is enforced undertakes to take all necessary and appropriate measures to ensure that workers and employers may exercise freely the right to organize.

The Committee examines alleged infringements of the principles of freedom of association and the effective recognition of the right to collective bargaining enshrined in the Constitution of the ILO. In furtherance of its role, the Committee issues reports regarding complaints of governmental actions which have been referred to them for determination of whether they are compliant with Convention 87. Upon completion of their investigation, the Committee issues a decision. The most recent collection of those decisions is found in the 6th addition of the “Compilation of Decisions of the Committee on Freedom of Association” (**Tab 3**).

The Committee has, on a number of occasions, been called upon to consider the imposition of broader based mandatory bargaining structures by governmental actors and has issued a number of reports with regard to such actions emphasizing that they are not consistent with the requirements of Convention 87. The compilation of reports is set out in numbered paragraphs which include the comments related to the specific cases digested from year to year. For the purposes of this submission, we will confine our references to the summaries contained in the relevant numbered paragraphs and the interested reader can then review the digested items set out under each of the numbered paragraphs.

The Committee’s reports include:

474. The Committee has emphasized the importance that it attaches to the fact that workers and employers should, in practice, be able to establish and join organizations of their own choosing in full freedom.

....



478. The provisions contained in a national constitution concerning the prohibition of creating more than one trade union for a given occupational or economic category, regardless of the level of organization, in a given territorial area which in no case may be smaller than a municipality, are not compatible with principles of freedom of association.

....

486. While it is generally to the advantage of workers and employers to avoid the proliferation of competing organizations, a monopoly situation imposed by law is at variance with the principle of free choice of workers and employers organizations.

....

487. Unity within the trade union movement should not be imposed by the State through legislation because this would be contrary to the principles of association.

....

490. A situation in which an individual is denied any possibility of choice between different organizations, by reason of the fact that legislation permits the existence of only one organization in the area in which the individual carries on his or her occupation, is incompatible with the principles embodied in *Convention 87*, in fact, such provisions established, by legislation, a trade union monopoly which must be distinguished both from union security clauses and practices and from situations in which the workers voluntarily form a single organization.

It is clear that the imposition of legislated broad-based bargaining structures such as sectoral bargaining, which deprive both workers and employers the recognition of their fundamental rights and freedom of association as found in *Convention 87*, would breach Canada's international obligations. It would also be inconsistent with the role that *Convention 87* has played in the development of freedom of association under section 2(2) of the *Charter*. Such legislated mandatory structures would be a "law of the land" which impairs the guarantees provided for in *Convention 87*.

A Final Comment

The submission filed on behalf of the British Columbia Federation of Labour ("BCFED") is one of several which recommended sectoral bargaining structures. The BCFED's recommendation treats the imposition as a forgone conclusion: a matter already decided. Its recommendation speaks only to processes related to "the implementation of sectoral bargaining." We do not attribute this sense of pre-ordainment to your Panel's examination of the issue but are concerned that submissions on the



issue may be futile as it appears the BCFED is confident that new legislation will contain such provision, regardless of the submissions filed. The source of that confidence is not disclosed.

The submission filed by the BCFED also has attached to it an Appendix comparing, among other things, the author's perception of the effectiveness of collective bargaining in countries with centralized and coordinated collective bargaining systems against workplace-based collective bargaining systems in Canada (among other countries). Respectfully, this comparison is not apt. The existence of the centralized bargaining structures which are, for the most part voluntary, in many European states, is a response to the post World War II economic reconstruction of those countries' economies which were virtually obliterated because of the ravages of the war. In such circumstances, the citizenry of those countries (including employers, workers, and workers organizations) concluded that working together to voluntarily chart a path forward for the rejuvenation of their economies was needed. It is not clear from the Appendix whether, or which of, those centralized bargaining structures are statutorily mandated or whether participants in those structures are free to withdraw from them at their own choice. We have not had the time to review the laws of each of those countries to provide a definitive answer to that issue. However, given the adherence of those countries to *Convention 87*, the most logical conclusion is that there is no such statutory compulsion.

We would be happy to discuss these issues with you at your convenience.

Kind regards,



Nicole Skuggedal, CACE President



CFIB response to 2024 Labour Relations Code review submissions

May 17, 2024

Panel members,

As you know, the Canadian Federation of Independent Business (CFIB) is a non-profit, non-partisan business association with 97,000 members across Canada and 9,700 in British Columbia. We are Canada's largest organization exclusively representing the interests of small and medium-sized businesses from a variety of industries. We appreciate the opportunity to respond to other submissions for the 2024 Labour Relations Code ("the Code") review and address recommendations that would negatively impact BC small businesses.

Sectoral bargaining

As expected, numerous labour organizations have called for amendments to the Code to allow sectoral bargaining in specific sectors. While these proposals are well-intentioned, the implementation of sectoral bargaining would have significant and detrimental consequences for BC small businesses, their employees, and the provincial economy.

The BC Federation of Labour's submission, for example, states that the current enterprise bargaining model *"is effective for mid-size to large workplaces where workers convene at a single worksite. But more and more, this doesn't represent the structure of our modern workplaces. Workers in small (and very small) workplaces, franchises, contracted work, or dispersed workplaces have little ability to effectively unionize and use their collective power."*

To be clear, the current bargaining model does not inherently prevent unionization in small or dispersed workplaces. Low unionization rates in these businesses are often due to the close-knit, personal relationships between employers and employees. This dynamic allows for open communication and quick resolution of issues. Introducing sectoral bargaining can disrupt this harmony, creating a more adversarial atmosphere and bringing in a third party that may complicate the collaborative environment that characterizes the relationship between small business owners and their employees.

While we acknowledge that the unique structures of small and micro businesses do present distinct challenges, the introduction of sectoral bargaining would only exacerbate them. Agreements to standardize conditions such as working hours or overtime rates would limit small businesses' ability to adapt quickly to changing market conditions. Operational flexibility is foundational to small businesses and the rigidity introduced by sectoral bargaining could stifle innovation and responsiveness, which are

critical for small businesses to remain competitive with larger businesses that have more flexibility to adapt.

Sectoral bargaining also restricts the ability for businesses to tailor wages and working conditions to their specific circumstances, potentially jeopardizing the flexible employment arrangements that many small businesses and their employees rely on. For example, many small businesses depend on the ability to offer varied hours or unique compensation packages that align with both their business needs and employee preferences. Sectoral bargaining's one-size-fits-all approach forces small businesses and their employees to adhere to guidelines that may not suit their business models or individual circumstances, leading to inefficiencies and dissatisfaction from employees.

Moreover, imposing uniform standards across an entire sector leads to increased operational costs, which are especially difficult for small businesses to absorb. This financial strain could result in reduced hiring, cutbacks in employee benefits, or even business closures, thereby harming the very workers this amendment aims to protect. On top of the harm caused to existing businesses, increasingly rigid labour standards will deter entrepreneurs and investors from starting new businesses in BC.

Several submissions from other stakeholders highlighted agriculture and construction as industries where sectoral bargaining is deemed necessary. However, adopting sectoral bargaining in these industries could exacerbate existing affordability challenges. Both sectors are essential for maintaining an operational and functional supply chain and addressing housing needs, respectively. As mentioned before, introducing sectoral bargaining could lead to standardized wages and working conditions that may increase operational costs significantly. In agriculture, this might translate to higher food prices, worsening food security issues for British Columbians. In construction, the increased costs could be passed on to homebuyers, exacerbating the already critical housing affordability crisis. By driving up costs in these key industries, sectoral bargaining risks making essential goods and services more expensive for everyone, hindering economic growth, and disproportionately affecting low-income families.

Another industry that was mentioned was franchises. Franchises, often small businesses operating under larger brand umbrellas, faced severe financial strain due to lockdowns, reduced consumer spending, and increased health and safety costs in the last four years. Implementing sectoral bargaining in this already vulnerable sector would impose additional administrative and financial burdens on these businesses, further jeopardizing their survival.

Secondary picketing

The BC Federation of Labour's submission states that the introduction of secondary picketing would *"allow employers to mitigate the economic impact of a strike by redistributing their goods and services to other substantially similar worksites."*

From a small business perspective, the idea that employers can mitigate the economic impact of a strike by redistributing goods and services to other similar worksites is impractical and flawed. Small businesses operate with limited resources and personnel, lacking the logistical infrastructure needed for efficient redistribution. Any attempt to manage such a process would likely be inefficient and costly, further straining their already limited resources. More importantly, unlike larger corporations, most small businesses do not have multiple worksites. This means that a strike can completely halt operations, making it impossible to shift production or services elsewhere.

In addition, secondary picketing clearly increases the economic impacts of strikes, particularly for small businesses that rely heavily on the goods and services of other businesses. When a supplier is being picketed, it can drastically disrupt supply chains, leading to significant delays, shortages, and higher costs for these small businesses. These disruptions ultimately translate to higher costs for consumers, exacerbating the economic strain on the broader community.

Furthermore, small businesses often rely heavily on local customer relationships and their presence in the community. Many small businesses offer specialized or customized products and services that cannot be easily transferred to other sites, as their operations are tailored to specific local markets. Attempting to redistribute in response to a strike can lead to increased operational disruptions, logistical challenges, higher costs, and deteriorating quality and customer service, ultimately exacerbating the economic impact rather than mitigating it.

The BCFED also asserts, *“There is no suggestion that allowing secondary picketing has caused any difficulty for industry or led to widespread labour unrest. Unfair restrictions on secondary picketing relieve economic pressure on employers and may very well result in longer disputes.”*

This logic is counterintuitive, as the practice of secondary picketing can indeed strain or damage the relationship between the primary employer and the affected third-party business being picketed. Such actions can prolong striking activities and fracture relationships with customers, suppliers, investors, and other stakeholders, potentially leading to long-term damage to business relations and trust.

Also, lifting secondary picketing restrictions does not guarantee a swifter resolution. In fact, it can introduce complexities and escalate tensions, potentially prolonging the dispute. The ability to picket secondary sites may broaden the scope of the strike, leading to increased resistance from employers and further entrenchment of opposing positions. Additionally, secondary picketing may disrupt operations at uninvolved businesses, prompting legal challenges or public backlash that divert attention from resolving the core issues of the dispute.

This collateral damage unfairly penalizes employers uninvolved in the labour dispute, potentially resulting in job losses and community harm. Moreover, the economic pressure on small employers, which often operate on thin margins, can be overwhelming. They lack the resources to absorb the costs and disruptions caused by secondary picketing, risking closures, layoffs, and diminished market competitiveness.

We want to re-emphasize the notion that allowing secondary picketing would place significant economic pressure on small employers. These businesses often operate on thin margins and lack the resources to absorb the additional costs and operational disruptions caused by secondary picketing. Navigating the complexities of such labour actions can divert resources away from core business activities and create an environment of instability, which is detrimental to the day-to-day operations of small firms.

Secret ballot and card check certification

The removal of mandatory secret ballot votes in favour of card-based certification, contrary to the 2018 Labour Code Review Panel report's recommendation that secret ballot be retained, has reduced the transparency and equity of unionization negotiations between employers and employees. Due to the lack of confidentiality with this system, some employees, when asked to sign a membership card, may feel obliged to do so. Since only a portion of bargaining unit members are required to vote, this process excludes important perspectives and undermines the general public's confidence in the certification process.

We wish to highlight ICBA's submission which states "Given the lack of evidence that the enhanced measures have failed to address any concerns about employer interference, we submit that the current Panel should re-confirm its 2018 recommendation that the secret ballot be maintained (in present circumstances, restored), and that this fundamental democratic right should be reinstated to ensure that neither side in a certification drive is able to use intimidation or exert undue influence over the outcome."

In summary, CFIB strongly recommends that the Panel refrains from recommending the implementation of sectoral bargaining and the lifting of picketing restrictions. Small businesses would like to see the Panel take a balanced approach to employment relations given that implementing these *Code* amendments would undoubtedly swing the pendulum too far in favour of organized labour. In addition, we encourage the Panel to recommend re-introducing the secret ballot vote to protect our democracy and worker's employment freedoms.

We appreciate the opportunity to express our concerns regarding statements made in other stakeholder submissions.

Sincerely,



Jairo Yunis
Director, British Columbia
and Western Economic Policy



Emily Boston
Senior Policy Analyst,
British Columbia

May 17th, 2024

VIA EMAIL
lrcreview@gov.bc.ca

BC Labour Relations Code Review Panel

Dear Panel Members,

Re: Labour Relations Code Review – Reply Submission – REVISED

The Canadian Union of Public Employees British Columbia welcomes the opportunity to submit the following additional information in response to the presentations and submissions made to the Panel.

Pre-hearing Disclosure in Discipline Cases

The submission of Canadian Association of Counsel to Employers (“CACE”) with respect to pre-hearing disclosure advocates a change that is inconsistent with the *Labour Relations Code* and arbitral law and principles on discipline grievances. CACE seeks a requirement that the *Code* oblige arbitrators to provide employers with pre-hearing disclosure in discipline cases. CACE claims that the Board’s recent decision in *British Columbia (Ministry of Public Safety and Solicitor General)* [2020] BCLRBD 28 (“*Solicitor General*”) endorsing the arbitrator’s decision not to order pre-hearing disclosure of particulars to an employer in a discipline case, is inconsistent with the *Code*. Not only is *Solicitor General* consistent with the *Code*, it is also consistent with British Columbia’s arbitral jurisprudence.

CACE’s submission overlooks the fact that the *Code* does not require arbitrators to order pre-hearing disclosure. No party has an inherent right to pre-hearing disclosure. The change advocated by CACE would be inconsistent with section 92 of the *Code* which specifically states that an arbitration board is empowered to determine its own procedure and “determine prehearing matters and issue prehearing orders”. While arbitrators typically order pre-hearing disclosure, the *Code* does not entitle any party to pre-hearing disclosure.

CACE seeks a change that is inconsistent with the principles of a fair hearing which require that the employer establish just cause for discipline. Given that employers have full information supporting their decision to discipline workers, unions should not have to provide pre-hearing disclosure which may provide additional information that the employer

Page | 1

was not aware of and, therefore, could not have relied on. Employers typically seek pre-hearing disclosure in discipline cases to bolster their reasons for imposing discipline. Arbitrators in British Columbia have long acknowledged that the only pre-hearing particulars and documents a union need provide to an employer to ensure a fair hearing are with respect to defenses such as alibi, condonation and discriminatory discipline and have ordered particulars accordingly. The established law and practice have not hindered the parties in settling discipline cases and contribute to a fair hearing. The change sought by CACE would tilt the balance in favour of employers by helping them build a case post discipline.

Section 104 – Expedited Arbitration Criticisms are Unfounded

Several submissions included criticisms of the Section 104 process and how parties are using it, and suggested changes. The criticisms included the following:

- a) Parties using Section 104 “in an effort to duplicate arbitration processes”.
- b) Parties applying for arbitration under Section 104 without having completed all steps of the grievance procedure.
- c) The abbreviated Section 104 process does not provide a full exploration of the facts and case law commensurate with important decisions such as in interpretation cases.

The submissions also include proposed changes to address the perceived problems with Section 104:

- a) Allowing parties to contract out of Section 104 if they have a comparable expedited hearing process in their collective agreement.
- b) Make Section 104 decisions non-precedential such as requiring decisions issued under Section 104 to include a disclaimer that the decision shall not be used as a precedent for deciding other disputes.
- c) Designate that only certain types of cases can be heard using Section 104.
- d) Allow the LRB to decide whether a matter can be heard using Section 104.
- e) Provide for mandatory or opt-out mediation.
- f) Provide the LRB with a case-management function.
- g) Provide the LRB with a gate-keeping function.

Our Response to these Criticisms and Proposed Changes

Given that employer grievances are rare, it is unions that bring the vast majority of Section 104 applications. Hence, changes to Section 104 will have a significant impact on unions and workers. The criticisms outlined above ignore the fact that Section 104 does not dictate how arbitration hearings are conducted; its main function is to ensure that a hearing concludes within 90 days of an arbitrator being appointed, in line with the truism that justice delayed is justice denied.

Many of the changes advocated in the submissions would undermine the main purpose of Section 104. The proposal that parties who have an expedited dispute resolution process included in their collective agreement should be allowed to contract out of Section 104, ignores the practical point that an adjudicator would have to first determine whether the collective agreement language offered the same protections as Section 104, thus delaying the hearing of the grievance. In our experience, expedited dispute resolution clauses, while useful, are not comparable to the protections under Section 104. They don't always include language that limits the time for concluding an arbitration following referral to hearing - the most important feature of Section 104. They often require both parties' consent to use the expedited process, and employers frequently withhold consent. They rarely, if ever, include a mediation option such as the settlement officer services under Section 104. They don't always name agreed upon arbitrators. They frequently restrict the form of evidence that parties may introduce as well as the number of legal authorities and they often ban the use of outside lawyers. Arbitrators appointed under Section 104 or Board Vice-Chairs would have to allow the parties to make submissions on the issue of whether the collective agreement language was sufficiently similar to the provisions of Section 104, thus delaying the hearing process and potentially creating more work for already over-burdened Vice-Chairs.

The 2018 Section 3 Review Panel was well aware that some parties have expedited arbitration language in their collective agreements as noted in the section of their report recommending changes to Section 104 and chose not to allow contracting out of Section 104 for parties with expedited language. That Panel also rejected the call to limit the availability of the Section 104 process to certain types of issues and to make Section 104 decisions non-precedential noting that such an approach "would limit the utility of Section 104 by excluding a wide range of grievances" while acknowledging that some disputes are not well-suited to the expedited process. The 2018 Review Panel noted that the vast majority of matters referred under Section 104 are resolved without a hearing.

The Board's records confirm that approximately 75% of all Section 104 applications are resolved without the need for arbitration. Many favourable comments were made about the assistance provided by the Board settlement officers under Sections 104. Some stated this is the main reason they file Section 104 applications.

The criticism that the Section 104 process does not provide for a full exploration of the facts and case law is unfounded. There is nothing about the Section 104 process that prevents the parties from bringing forward all the facts and case law. Granted, the parties will have less preparation time before the hearing, but parties typically gather facts during the grievance procedure and arbitrators appointed under Section 104 are required to engage in case management including ordering the exchange of particulars and documents. The fact that Section 104 sets out some of the ways in which an arbitrator can streamline a hearing does not prevent a full exploration of the facts.

The request for an LRB gate-keeping function overlooks the fact that it already exists. LRB staff already perform a gate-keeping function with respect to Section 104 applications as required under Section 104(2) and (3). At a minimum, Board staff will reject Section 104 applications that are not filed within the narrow time window required under the *Code*, thus preventing a party from duplicating referrals to arbitration. In addition, Board staff reject applications including more than one grievance. Hence, there is no need to add additional gate-keeping functions.

The suggestion that Section 104 be changed to add a case management function by the Board is unnecessary and would violate Section 92(1) of the *Code* which states that an arbitration board may determine its own procedure. Section 104(7) requires case management by the arbitrator. It would be highly problematic to require over-burdened Board staff, presumably Vice-Chairs, to case manage matters that will be adjudicated by an arbitrator, particularly given that an arbitrator is master of their own procedure, a right that continues under Section 104(8).

The *Code* should not be amended to recognize employee associations comprised partly or wholly of managers as trade unions.

The exclusion of managers from a union’s bargaining unit to avoid a potential conflict of interest between a manager’s duties to the employer and their membership in the union is a fundamental principle in labour law. The *Code* amendments sought in the submissions by the Association of Administrative and Professional Staff (APSA) at Simon Fraser University and the Association of Administrative and Professional Staff of the University of British Columbia (AAPS) to effectively recognize associations comprised partly of managers as a “trade union” under the *Code* undermine this fundamental principle. We urge this Panel not to adopt these amendments.

Neither APSA nor AAPS are subject to their existing non-unionized labour relations scheme by way of legislation. APSA and AAPS have both failed to meet the definition of a “trade union” under the *Code* in front of the Board because both associations voluntarily represent managers along with employees. Contrary to their submissions, APSA and AAPS are not prohibited from inclusion under the *Code* due to their representation of highly qualified, skilled and educated individuals employed by “large” employers. CUPE Locals, Faculty Associations, alongside many other unions, also represent highly qualified, skilled and educated members employed by the same university employers as APSA and AAPS. CUPE Locals have historically and continuously disputed the exclusion of positions out of a CUPE bargaining unit and into non-management and management positions represented by APSA or AAPS.

AAPS has benefited from exclusion under the *Code* in successfully defending itself against Section 12 complaints by their members. In *Sumit Sidhu*, BCLRB No. B93/2017, both AAPS and UBC took the position that AAPS is not and cannot meet the definition of a “trade union” under the *Code* because AAPS represents individuals who “perform functions of a manager” and thus are specifically excluded from the definition of “employee” under the *Code*. UBC further stated their relationship with AAPS was inconsistent with a relationship governed by the *Code* because of the agreements negotiated between the parties, which include two primary agreements called the “Framework Agreement” and the “Agreement on Conditions and Terms of Employment”. UBC also relied on the BC Court of Appeal’s finding in *Ferrari v University of British Columbia*, 2014 BCCA 18, that AAPS was a non-union organization that was subject to a common law duty of fair representation rather than obligations under Section 12 of the *Code*.

In AAPS' submissions, it described itself as “the legal bargaining agent for the [Management and Professional] Staff group and represents its nearly 6,500 members in collective bargaining and dispute resolution with” UBC. APSA similarly identified itself in their submission as an association “recognized by [SFU] as the sole bargaining agent for its members, is incorporated under the Societies Act of B.C., has a constitution, an elected Board, a professional staff, policies and a basic agreement that must be negotiated between the parties (effective amounting to a collective agreement) and processes grievances via mediation and arbitration.”

In their submissions, APSA asserted the definitions of “employee”, “trade union” and “unit” under Section 1 of the *Code* are likely not compliant with the Charter rights to collective bargaining and to strike as affirmed in a number of decisions by the Supreme Court of Canada. These assertions are inaccurate especially in light of the recent SCC decision, *Société des casinos du Québec inc. v. Association des cadres de la Société des casinos du Québec*, 2024 SCC 13. In *Société des casinos*, the SCC held the legislative exclusion of all levels of managers under the Quebec Labour *Code* did not violate the constitutional right of freedom of association under Section 2(d) of the Charter because the purpose of the legislative exclusion of managers was not to interfere with the managers' rights to associate. Rather, the Court held the purpose of legislative managerial exclusion “were to distinguish between management and operations in organizational hierarchies; to avoid placing managers in a situation of conflict of interest between their role as employees in collective bargaining and their role as representatives of the employer in their employment responsibilities; and to give employers confidence that managers would represent their interests, while protecting the distinctive common interests of employees” (at para 51). Based on their own submissions, despite their exclusion from the labour regime under the *Code*, AAPS and APSA have demonstrated their abilities to associate, collectively bargain and administer agreements on behalf of their memberships. Applying the reasoning in *Société des casinos*, it will be unlikely for the legislative exclusion of AAPS and APSA from the *Code* to be found unconstitutional.

We agree with and refer this Panel to the reply submission submitted by CUPE Local 3338, Polyparty (representing UBCJA Local 1907, IBEW Local 213, IUOE Local 882, IUPAT Local 138, UA Local 170, IAM Lodge 692, Teamster Local 213 and CSWU Local 1611), TSSU and SFUFA in response to the submissions by APSA.

The Definition of “Employee” Should Continue to Include Student Workers

The Research Universities’ Council of British Columbia (RUCBC) submitted that there should be no change to the definition of employee that would treat students as employees under the *Code*. Since 1976, the Board has recognized that students who perform work which forms part of their education can be employees (see for example *St. Paul’s Hospital*, [1976] 2 Can LRBR 161). There should be no change to the definition of employee which would limit students from being classified as “employees.”

In RUCBC’s constituent institutions, many students engage in research work which substantially benefits their respective university. This work might advance their own educational goals but in many cases, this work also advances the interests of the research university and specific faculty members. The work product of student workers at British Columbia’s research universities assists faculty members to make scientific breakthroughs and create research publications, it helps them to advance their own career progression, and it supports them in obtaining grant funding. The work performed by student employees furthers the central goal of their university employers: to produce novel research which contributes to scientific understanding and to the world-class reputation of British Columbia’s research universities.

The definition of “employee” should remain broadly drafted to include students who perform work which benefits their university.

Funding Increase for the Labour Relations Board

Many submissions called for increased funding for the Labour Relations Board. We add CUPE’s voice to that call and ask panel members to pay careful attention to the submission filed by Board employee Tammy Nystrom. Ms. Nystrom explains how expediting certain Board processes through the 2019 amendments to the *Code* has put additional pressure on Board staff and adjudicators who were already working to full capacity and with outdated technology before those changes.

Additionally, in introducing the Board’s 2023 Report, Chair Jennifer Glougie notes that the 323 certification applications filed with the Board in 2023 exceeded the Board’s 25-year average for the first time since 2001. While the number of certification applications alone has increased since 2001, the Board complement has decreased by almost half.

The significant increase in certification applications and the size of the bargaining units sought has taxed the Board's staff and appointees. In addition to the Board's Executive, the Board complement in 2001 was 14 Vice Chairs, 44 Members, and 58 staff members. In 2023, it was six Vice Chairs and 35 staff members (p.2, Annual Report 2023).

Parties on both sides have experienced frustration with Board decisions exceeding the 180-day guidelines. Given the resources available to the Board, it is only through the dedication and diligence of Board staff and Vice-Chairs that any decisions are issued within 180 days. It is ironic that because of chronic government underfunding, the very people we rely on to provide workplace justice are required to work under extremely stressful conditions. The long-term underfunding of the Board must be remedied.

Finally, we thank the panel for your work engaging with the public and the labour relations community about our *Labour Relations Code*. It is important that the *Code* remain attuned to the changing conditions of our workplaces and economy. Thank you for bringing your years of knowledge and experience to this task.

Respectfully submitted,



Karen Ranalletta
President
CUPE BC

moveup

COPE491*DF/sk



**Additional Information on B.C.'s Recent Economic Performance:
Supplement to Presentation to B.C. Labour Relations Code Review
Dr. Jim Stanford, Economist and Director, Centre for Future Work**

June 14, 2024

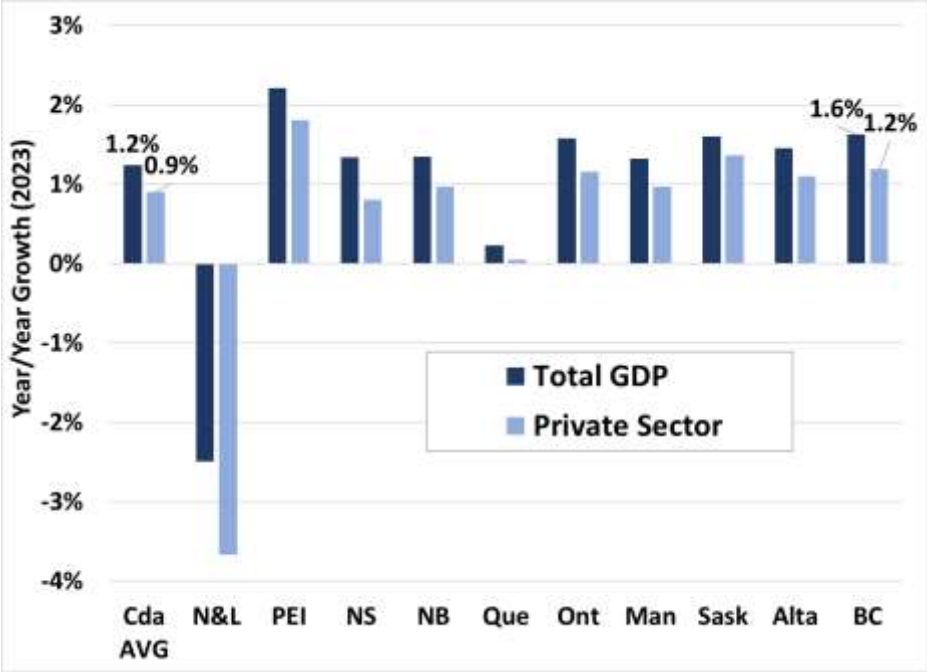
On May 6, 2024 I appeared before the commissioners conducting the five-year review of B.C. Labour Relations Code at their public hearing in Surrey. My presentation concentrated on measures of B.C.'s recent economic performance, including extensive empirical data on GDP growth, labour market conditions, productivity, and wages. My presentation concluded that B.C.'s economy consistently has performed amongst the strongest in Canada (and according to many indicators the strongest) over the last five years. I argued that this strong performance was reinforced by measures taken in B.C. over that similar time, to strengthen wages, workers' collective representation, and a more equitable distribution of income. This evidence contrasts with the claims of some representatives of the employer community who have argued B.C.'s labour laws have damaged the provincial economy by making it a less hospitable location for investment, job-creation and growth. The empirical evidence is certainly not consistent with the claim that B.C.'s economy is weak – nor that such purported weakness could be attributed to its labour policy and industrial relations regime.

At the hearing I was asked whether this general finding of superior economic performance (largely described in my submission with data extending over a five-year period) still holds within a more recent time frame. Apparently a concern is that with the conclusion of major investment projects (such as the Kitimat LNG and Peace River dam projects), a deeper underlying weakness in B.C.'s economy would now become more visible. I took that question on notice, and can now provide some additional information.

I have reviewed the data sources I consulted in the original presentation to see if there is any significant difference in the ranking of B.C. according to the various criteria provided, if we use a more recent period (say, two years) instead of a longer period (the five year framework utilized in my submission). In almost no cases is B.C.'s relative position significantly changed as a result of shortening the time frame of analysis. Economic performance across Canada has been hampered in the last two years as a result of high interest rates implemented by the Bank of Canada in a deliberate effort to reduce economic growth and slow inflation – and B.C. has not been immune to those headwinds. Other uncertainties in national and global economic conditions (such as continued fluctuations in global energy prices) also have held back recent growth and job-creation. But B.C.'s relative position compared to other provinces remains very strong. Hence the claim that B.C. is being held back by province-specific policies (including labour policies) is not supported.

For example, Figure 1 shows the most recent data on real GDP growth in B.C. for 2023. The five-year growth record indicated in Figure 1 of my May 6 submission showed B.C. ranked second among Canadian provinces for total GDP growth. That second-place ranking held true in 2023, as well, with the province recording GDP growth of 1.6% – one-third faster than the Canada-wide average. In the private sector, B.C.’s growth was also one-third faster than the Canadian average, and third among all provinces.

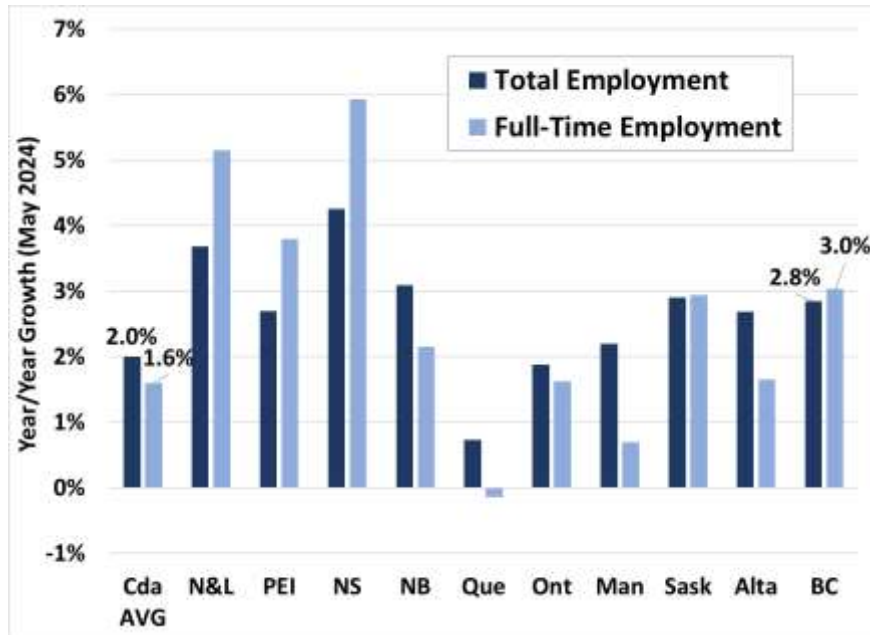
Figure 1. Total and Private Sector GDP Growth, 2023



Source: Statistics Canada Catalogues 36-10-0402-01 and 36-10-0434-03.

Recent labour market performance in B.C. has remained strong, as well. Figure 2 illustrates employment growth over the latest 12-month period (concluding in May 2024, the most recent Statistics Canada data available). Total employment in B.C. rose 2.8% in the last 12 months, despite the contractionary impacts of high interest rates. Full-time employment increased even faster, by 3.0% over the same period. Employment growth in B.C. was considerably faster than the Canadian average – almost twice as fast in the case of full-time employment growth. And B.C.’s increase in full-time employment in the last year was faster than any province outside the Atlantic region.

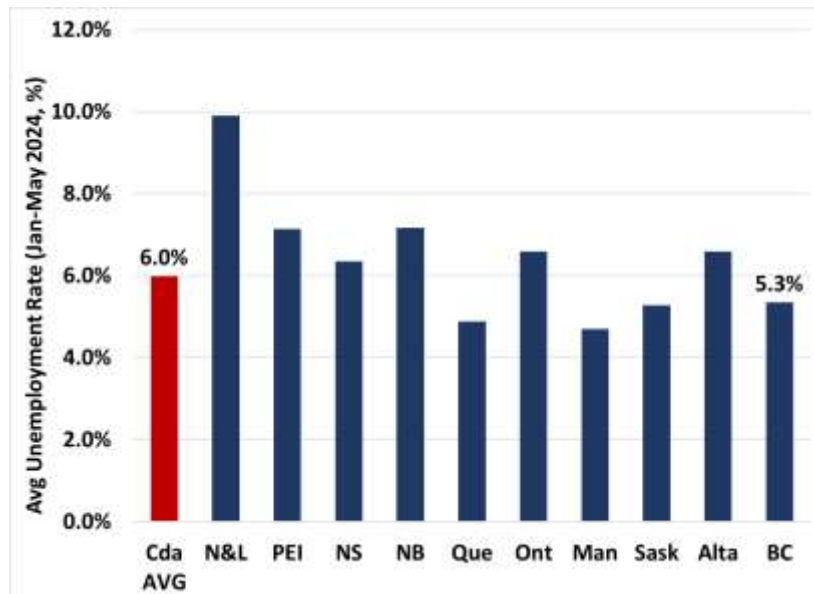
Figure 2. Employment Growth, Year/Year to May 2024



Source: Statistics Canada Catalogue 14-10-0287-01.

Thanks to strong employment growth, B.C.'s unemployment rate has continued to outperform Canadian averages, consistent with the longer-term perspective provided in my original submission. Over the first five months of 2024, the provincial unemployment rate has averaged 5.3% (as shown in Figure 3). That is 0.7 percentage points lower than the Canada-wide average, and tied with Saskatchewan for third lowest in Canada.

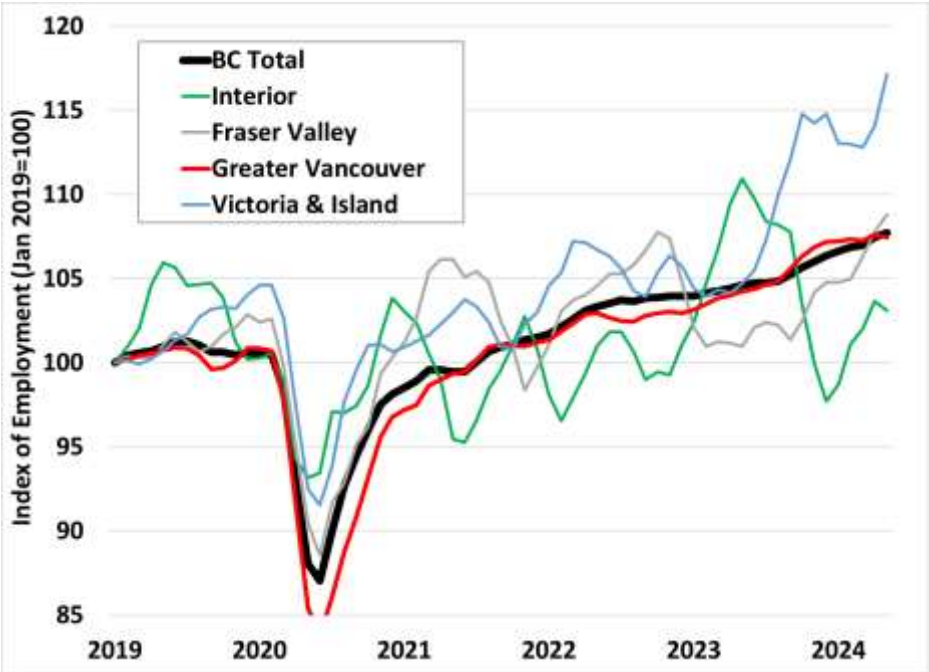
Figure 3. Average Unemployment Rate, Year-to-Date 2024 (January to May)



Source: Statistics Canada Catalogue 14-10-0287-01.

The claim that B.C.'s strong employment and economic performance was due solely to the (temporary) impact of major northern construction projects is also not supported by the empirical evidence. Figure 4 plots the growth of employment in B.C. since 2019 (before the COVID pandemic) across the major regional areas tracked by Statistics Canada's disaggregated employment data. The level of employment in the Greater Vancouver region almost perfectly tracks the province-wide average. That is not surprising, given Vancouver's large share of total population and employment. But it certainly debunks the view that strong employment numbers are due to northern construction projects. Employment in the Fraser Valley region has also broadly tracked the province-wide trend (with some additional volatility). The strongest employment record was recorded in Victoria and Vancouver Island. Employment in the Interior region has been slower than the provincial average. This regional breakdown confirms that the strength in B.C.'s labour market is broadly based.

Figure 4. Employment Growth by Region, 2019-2024



Source: Statistics Canada Catalogue 14-10-0380-01.

By other metrics, the more recent data on B.C.'s economic and labour market performance also confirms the province's relatively strong standing among Canadian provinces – including wage growth, profits, productivity, and exports. The one notable exception to this finding is business capital spending. Following the wind-down of major northern projects, business non-residential capital spending in B.C. is expected to decline in 2024 by 5% (according to Statistics Canada's investment intentions survey, Catalogue 34-10-0035-01). This is due to the imminent completion of some of those projects. The decline in investment is concentrated in non-residential structures; business spending on machinery and equipment is expected to grow 6% this year (reflecting strong investment across the broader set of business sectors in B.C., which are less oriented around construction of structures). And even with the decline in capital spending on non-residential structures this year, business capital spending remains far higher than before the COVID pandemic. Statistics Canada's investment intentions survey projects non-

residential capital spending in the province in 2024 will still be 38% higher than in 2019 (compared to a 29% rise in Canada as a whole over the same period).

Residential construction activity has also slowed down in B.C., as in the rest of Canada, due to high interest rates and the broader economic slowdown. However, there are signs of a rebound in residential investment, as interest rates plateaued and (more recently) have begun to decline. Residential investment in B.C. in March was up 6% compared to year-earlier levels, matching the 6% improvement in Canada as a whole (Statistics Canada Catalogue 34-10-0286-01).

In sum, B.C.'s economy and labour market continue to demonstrate a broadly based and strong momentum. Over the past five years (a period which also covers B.C.'s recent and positive labour market reforms, including single-step union certification, higher minimum wages, and the in-sourcing of previously outsourced public sector roles), the provincial economy has outperformed most other provinces across an impressive range of indicators. That strong performance was not a temporary effect of particular major investment projects; it reflects diversified growth across a wide range of industries and regions. B.C., like other provinces, has confronted macroeconomic challenges in the past two years, but even through this period B.C.'s performance has been relatively strong. I would argue that B.C.'s commitment to a more inclusive vision of economic and social progress, including positive measures taken in labour policy and industrial relations, have reinforced that superior performance – not detracted from it.

Growth with Inclusion:

An Overview of B.C.'s Recent Economic and Labour Market Performance

By Jim Stanford

Economist and Director, Centre for Future Work

Notes for Presentation to B.C. Labour Relations Code Review

Surrey, May 6 2024

Introduction and Summary

Broader macroeconomic and labour market conditions provide important context for consideration of optimal labour policy settings. Policy-makers want to be sure that labour laws and regulations are consistent with strong, sustainable economic performance in all sectors of the economy. They also want to ensure labour policies promote an equitable distribution of the gains from ongoing economic growth. These goals are highly relevant in the context of the current five-year review of B.C.'s Labour Relations Code.

B.C.'s economy has performed very strongly in recent years, in relation both to past history and to the performance of other provinces. In per capita terms, economic growth has been stronger over the past five years than any other province. This strong growth has resulted from a diversified set of drivers: including the strongest business investment in Canada, the strongest innovation record in Canada, strong export growth, and steady expansion of public sector activity and public services. This strong growth has underpinned encouraging progress in labour markets, including strong employment outcomes and healthy progress in wages.

An argument has been made by some business critics that labour policy settings are too favourable to unions, and too restrictive for business, hence undermining business investment, growth, and employment. The empirical evidence presented here, from official Statistics Canada sources, shows the opposite: B.C.'s economic performance has been solid, superior to other provinces by most metrics. B.C. has also recorded the strongest wage growth of any province, measured in real terms. This achievement reflects both the strength of the provincial economy, and the positive impact of recent labour policy reforms – many of which (including a higher minimum wage, reforms to encourage and facilitate collective bargaining, and fair bargaining settlements in public sector negotiations) have supported workers in accessing better jobs and compensation.

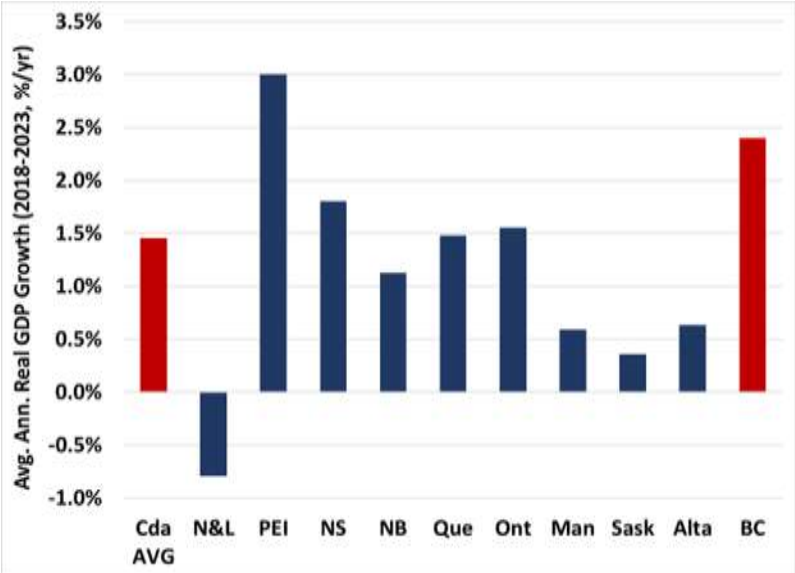
Strong wage growth, in turn, underpins household financial well-being and broader growth in aggregate demand (after all, consumer spending accounts for about one-half of provincial GDP, more than any other component). The combination of strong investment (both private and public), innovation, a diverse industrial structure, and deliberate efforts to ensure that growing incomes are shared throughout society, constitutes a virtuous and self-reinforcing model of economic and social development. Far from interfering with private business activity and investment, B.C.’s approach to labour relations in recent years has clearly reinforced the province’s economic momentum, and this has clearly benefited business.

Ongoing efforts to strengthen and modernize labour laws and regulations, to ensure that workers in all occupations and industries are able to produce to their fullest potential, and share fairly in the dividends of economic growth, are appropriate. One timely opportunity in that regard is the proposal from the B.C. Federation of Labour for a process to expand systems of multi-employer or sectoral collective bargaining. This proposal would strengthen B.C.’s labour standards and collective bargaining system, which despite recent reforms continues to deny meaningful access to collective representation and bargaining opportunities for many workers.

Economic Growth

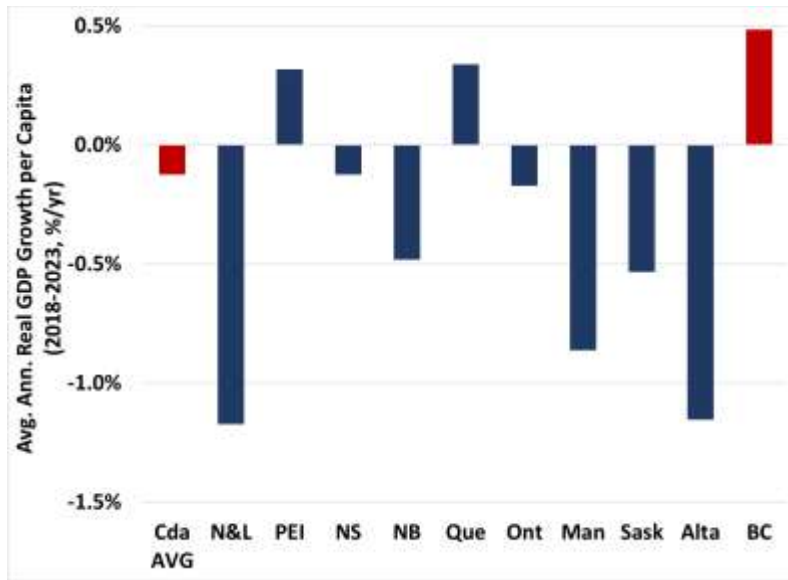
Through the turmoil of the COVID-19 pandemic and its aftermath, B.C. has recorded the second strongest economic growth of any province (Figure 1) – surpassed only by P.E.I. (which has experienced a large population influx since the pandemic, boosting provincial GDP and employment). B.C.’s GDP (measured in real terms at basic prices) grew at an average rate of almost 2.5% per year over the past five years, two-fifths faster than the Canadian average. In per capita terms, B.C.’s growth was the strongest of any province: growing by 0.5% per year through that period, compared to a small decline in per capita GDP for Canada as a whole (Figure 2).

Figure 1. Average Annual Real GDP Growth, 2018-2023



Source: Calculations from Statistics Canada Table 36-10-0402-01, basic prices.

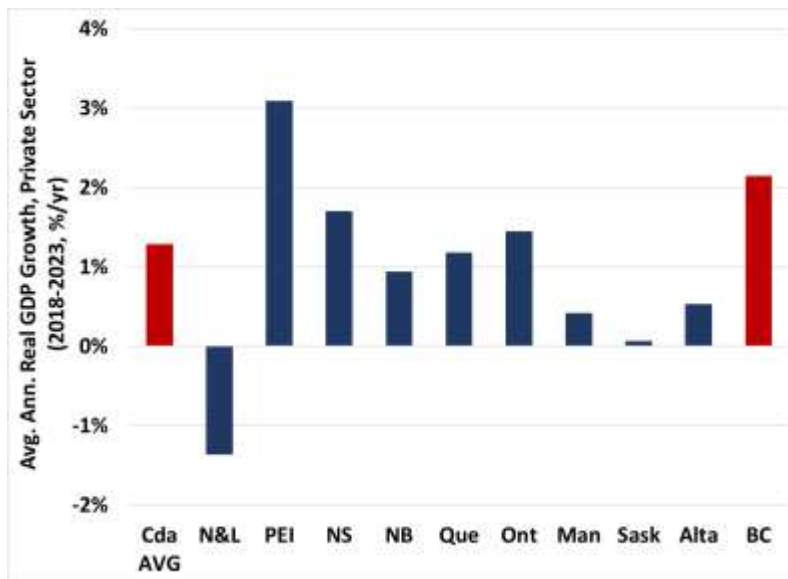
Figure 2. Average Annual Real GDP per Capita Growth, 2018-2023



Source: Calculations from Statistics Canada Tables 17-10-0005-01 and 36-10-0402-01, basic prices.

Some critics complain that B.C.'s strong economic and employment performance has been driven solely by government spending (for services such as health care, education, and others). However, the empirical data confirm that private sector economic activity has also expanded strongly in B.C. The province recorded the second-fastest growth in private sector GDP (about 2.1% per year on average, Figure 3), again exceeded only by P.E.I. B.C.'s private sector boasts a strongly diversified set of industries that have powered continued expansion; growth was spread across most major private-sector industries, including mining and petroleum, construction, trade, information and communications services, and finance. The professional and scientific sector saw a 36% increase in real GDP over the past five years.

Figure 3. Average Annual Real GDP Growth, Private Sector, 2018-2023

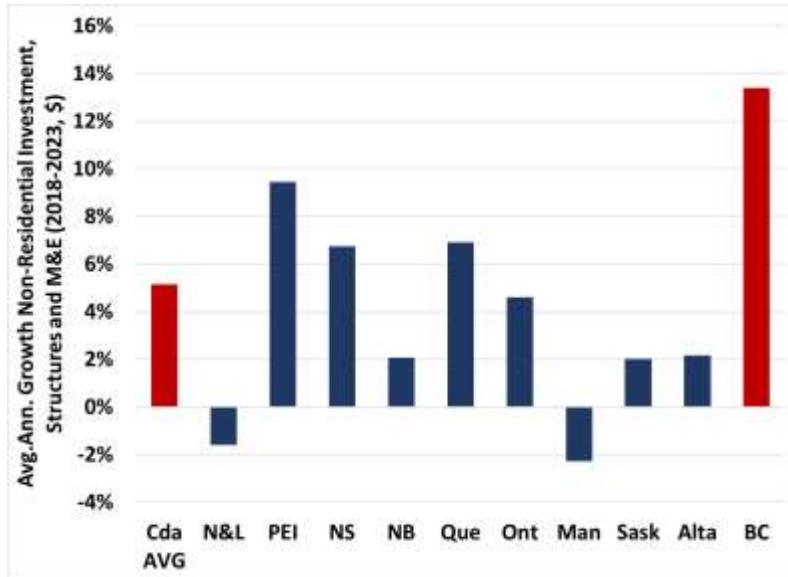


Source: Calculations from Statistics Canada Table 36-10-0402-01, basic prices.

Components of Growth

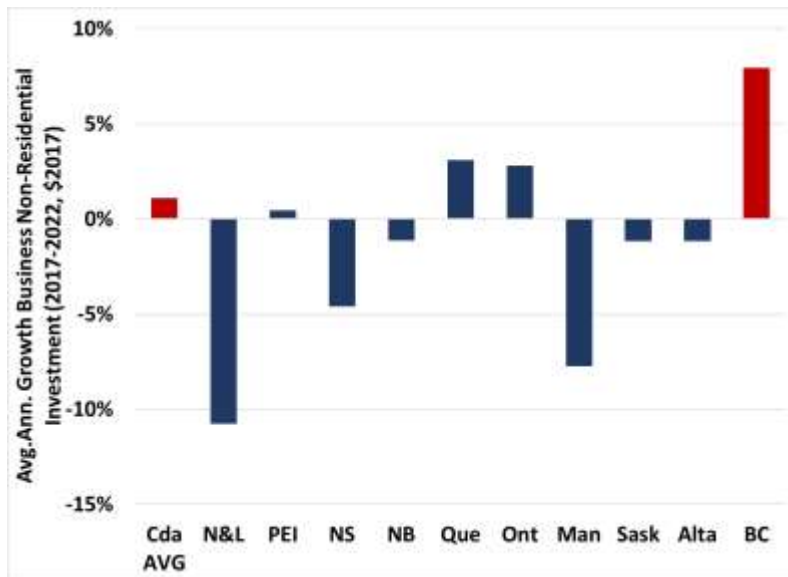
Strong fiscal support for public services (including health care and education) have certainly contributed to B.C.'s superior economic performance in recent years. But the major components of private sector expenditure have also expanded strongly, confirming the province's multi-dimensional momentum. Statistics Canada data shows that non-residential capital investment (both private and public) grew far more quickly in B.C. than any other province over the past five years, rising at an average rate of over 13% per year – more than twice the Canadian average (Figure 4).

Figure 4. Non-Residential Capital Spending by Province, 2018-23



Calculations from Statistics Canada Table 34-10-0035-01.

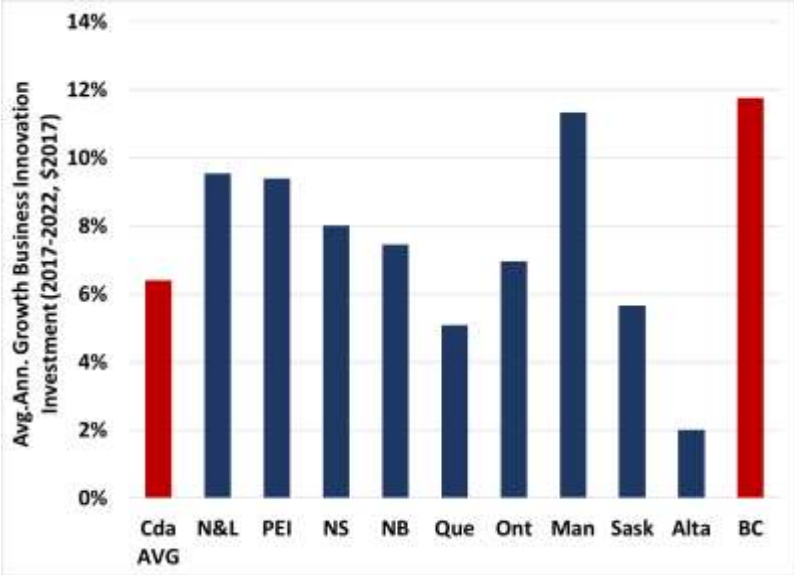
Figure 5. Real Business Capital Spending (Structures, Machinery & Equipment), 2017-2022



Source: Calculations from Statistics Canada Table 36-10-0222-01.

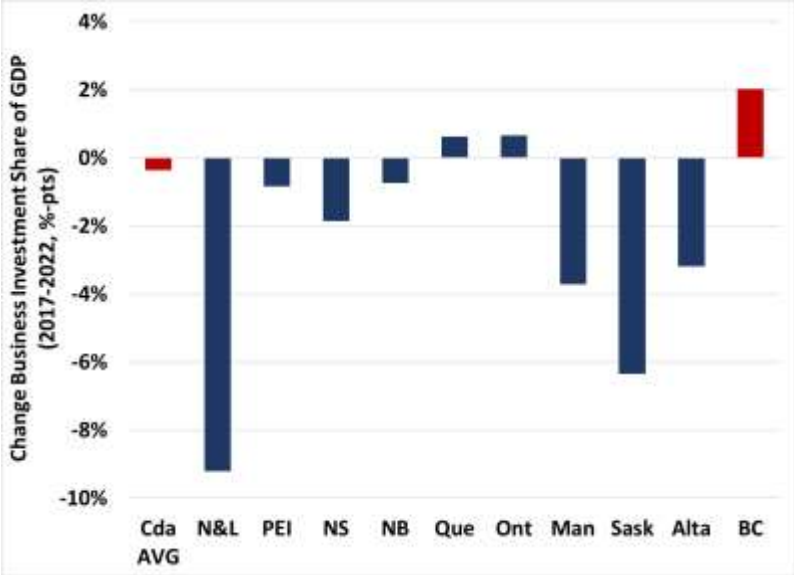
Adjusted for inflation, and considering only private sector non-residential investment, B.C. also stands head and shoulders above other provinces. Real spending in this category grew by an average of almost 8% per year over the most recent five years of data (Figure 5).¹ B.C.'s rapidly-growing technology sector has also led strong expansion in real business spending on innovation and intellectual property, which grew at an annual rate of almost 12% per year since 2017 (again, twice the Canadian average, Figure 6).

Figure 6. Real Business Innovation Investment, 2017-2022



Source: Calculations from Statistics Canada Table 36-10-0222-01.

Figure 7. Change in Business Non-Residential Investment as Share GDP, 2017-2022

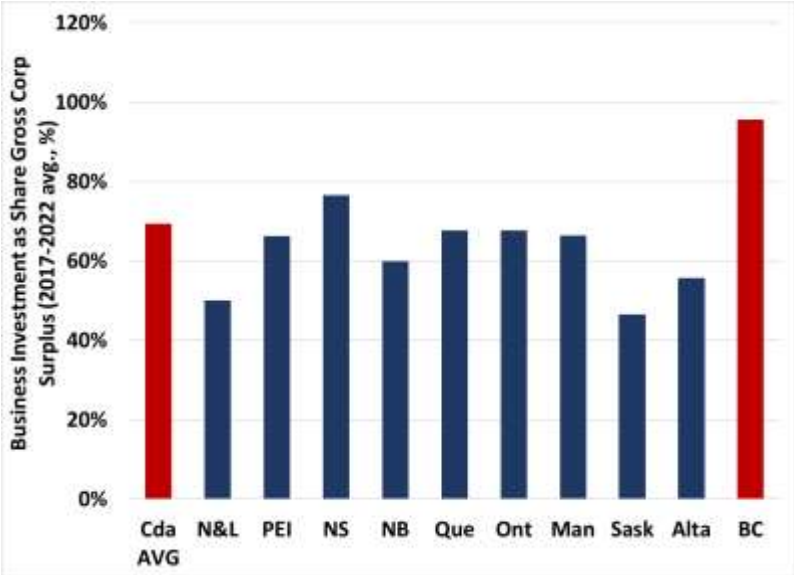


Source: Calculations from Statistics Canada Table 36-10-0222-01.

¹ Data for provincial GDP by income and expenditure have not yet been published for 2023, so comparisons using this data cover the five-year period 2017-2022.

Indeed, business investment in B.C. has been so strong in recent years, that it has increased as a share of total provincial GDP (Figure 7). The investment share of GDP rose by 2 percentage points since 2017, contrasting with a slight decline for Canada as a whole; again, by that measure, business investment was the strongest of any province. Another measure of the vibrancy of business investment is provided by the strong reinvestment of corporate profits in the province. Gross corporate surpluses grew almost 50% over the last five years. On average, B.C. corporations re-invested 96% of those surpluses in new capital projects in the province (Figure 8) – a higher re-investment rate than any other province. Clearly, the private sector sees ample opportunity to capitalize on B.C.’s growing, diversified economy, and this strong business investment which in turn generates faster growth and even more opportunity.

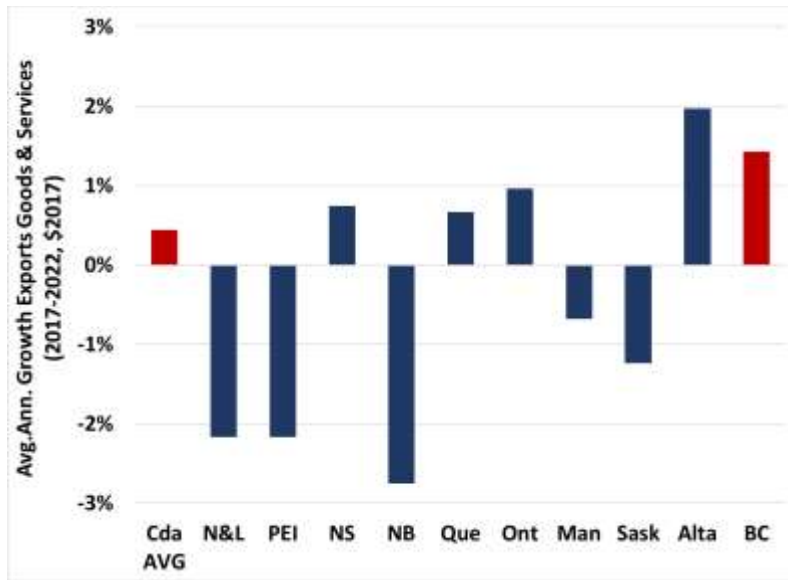
Figure 8. Business Profit Re-Investment Rate, 2017-2022



Source: Calculations from Statistics Canada Tables 36-10-0222-01 and 36-10-0221-01.

Exports of goods and services have been another strong feature of B.C.’s economic expansion in recent years. B.C. exports (in real terms) grew by 1.5% per year from 2017 through 2022 (Figure 9). That was the second strongest of any province (after Alberta), and more than three times the Canadian average. Exports of services from B.C. were especially strong: growing 2.8% per year in real terms, more evidence of the importance of the growing technology and business services industries. B.C.s interprovincial exports were also particularly strong, growing 3.1% per year in real terms.

Figure 9. Real Export Growth by Province, 2017-2022



Source: Calculations from Statistics Canada Table 36-10-0222-01.

Labour Market Performance

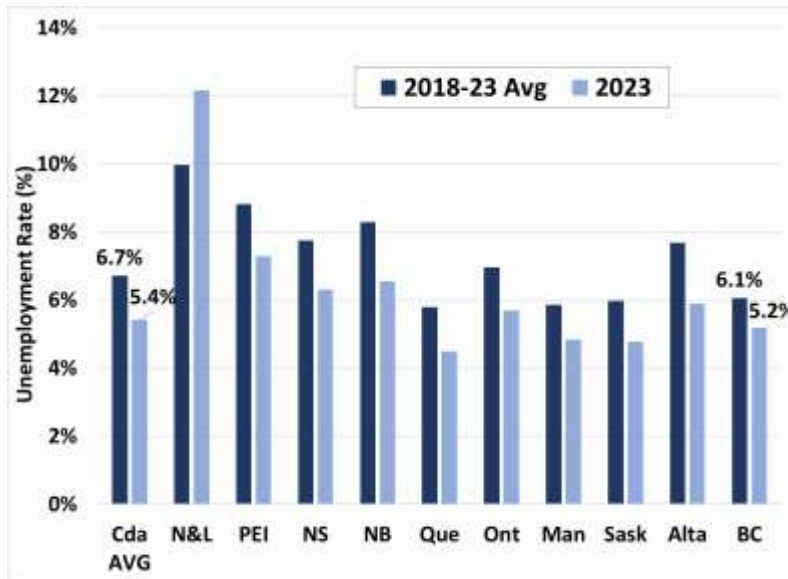
This strong and diversified economic expansion has provided a foundation for strong labour market conditions. Of course, B.C.’s labour market, like other provinces, was hit hard by the COVID-19 pandemic and health restrictions on economic activity. But the province’s relatively strong public health response, and underlying economic momentum, contributed to a quick recovery. B.C. was the second province in Canada (after Nova Scotia) to regain its pre-pandemic peak level of employment – reaching that benchmark by August 2021 (Table 1).

Table 1	
Month Provinces Regained Pre-COVID Peak Employment	
Nova Scotia	Feb. 2021
B.C.	Aug. 2021
Ontario	Sept. 2021
CANADA	SEPT. 2021
N.&L.	Nov. 2021
P.E.I.	Nov. 2021
Quebec	Nov. 2021
Manitoba	Nov. 2021
Alberta	Nov. 2021
Saskatchewan	Feb. 2022
N.B.	Mar. 2022

Source: Calculations from Statistics Canada Table 14-10-0287-01.

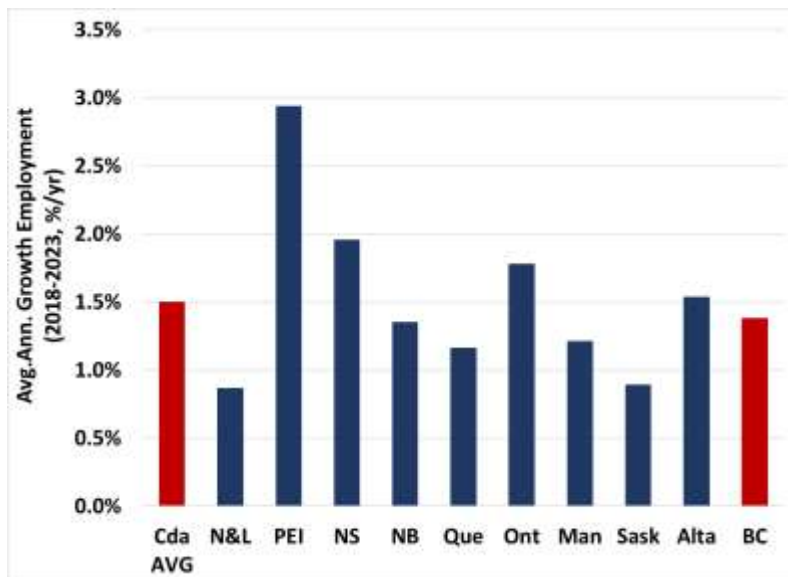
B.C. maintained positive labour market momentum as the recovery from the pandemic continued. On average over the last five years, B.C.'s unemployment rate was over one-half percentage point lower than the Canadian average (Figure 10). In 2023, B.C. had the fourth-lowest unemployment rate of any province, remaining below the Canadian average. The pace of new job-creation has broadly matched Canada-wide trends, with employment growing 1.4% per year on average over the past five years (Figure 11).

Figure 10. Unemployment Rate by Province



Source: Calculations from Statistics Canada Table 14-10-0393-01.

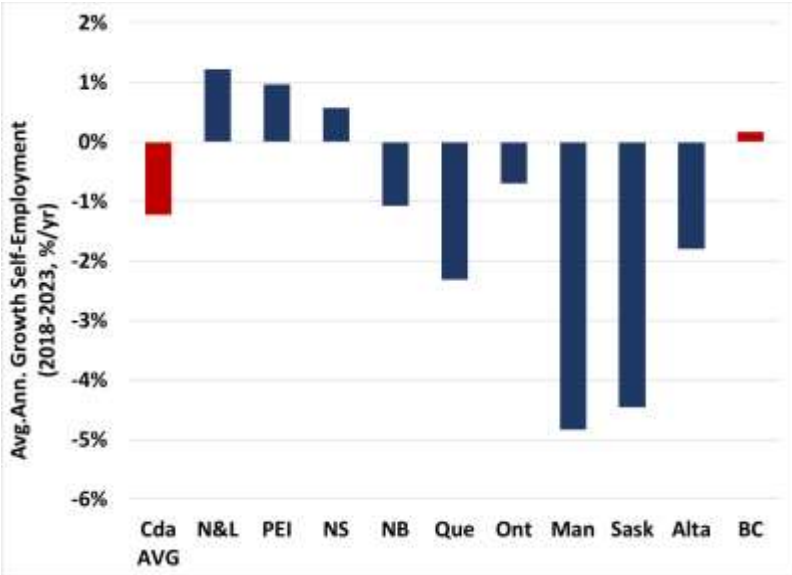
Figure 11. Annual Job-Creation by Province



Source: Calculations from Statistics Canada Table 14-10-0393-01.

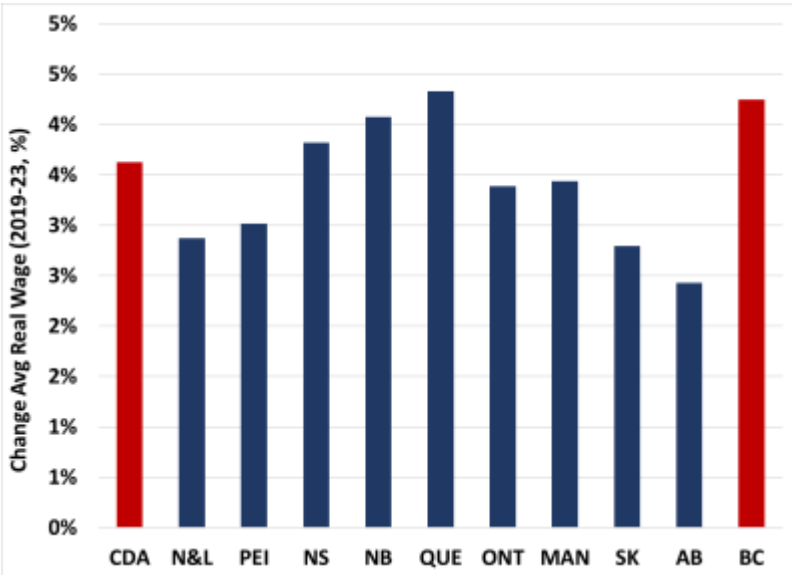
Small business in Canada has faced many challenges during and after the pandemic. This partly reflects specific after-effects of the pandemic (including lockdowns, labour supply shocks, and high interest rates). It also reflects the strong conditions in the market for paid employment, which has led to migration by many workers from self-employment to employee status (lured by low unemployment and rising wages there). Despite these challenges, self-employment in B.C. grew slightly over the past five years (Figure 12), a sharp contrast with most of the rest of Canada. The claim that B.C.'s government regulations, labour laws, taxes, and red tape undermine small business is not supported by this evidence.

Figure 12. Self-Employment Growth by Province



Source: Calculations from Statistics Canada Table 14-10-0393-01.

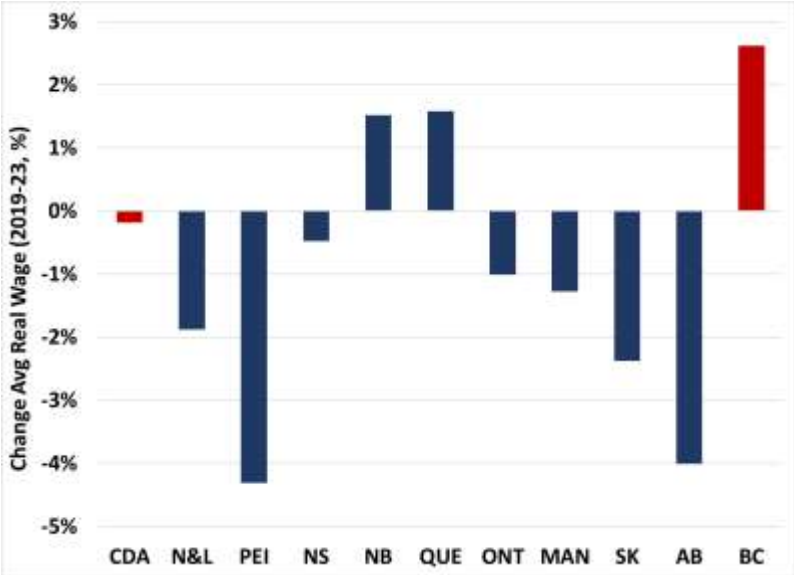
Figure 13. Average Annual Growth Nominal Wages, 2018-2023



Source: Calculations from Statistics Canada Table 14-10-0206-01, employees.

Thanks to vibrant economic growth, strong labour market conditions, and worker-friendly policies (including higher minimum wages, and support for collective bargaining), wages for B.C. workers grew faster through the pandemic years than in any other province but Quebec (Figure 13). And since B.C. had slightly slower inflation during this period than Quebec, real wage growth in B.C. was the best in Canada (Figure 14). In contrast to stagnation in real wages since 2019 for Canada as a whole, B.C. workers have managed (on average) to win wage increases that slightly exceeded inflation. Slow, steady growth in real wages is an expected outcome of a well-functioning labour market (underpinned by ongoing productivity growth, discussed further below). B.C.’s strong labour policies and institutions ensure that workers are able to share in the benefits of economic and productivity growth.

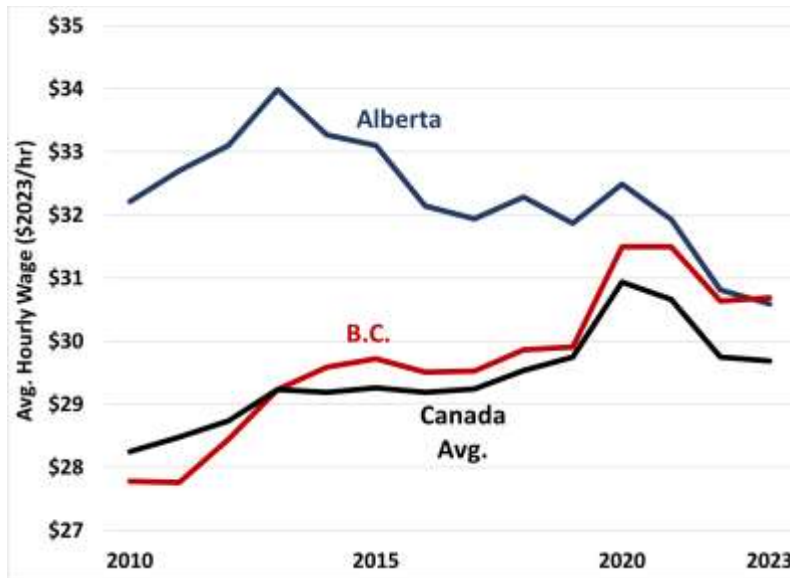
Figure 14. Cumulative Growth Real Wages, 2019-2023



Source: Calculations from Statistics Canada Tables 14-10-0206-01 and 18-10-0005-01, employees.

The fact that average wages for B.C. workers matched and slightly exceeded inflation through the pandemic years has reinforced household consumer spending and financial well-being. Indeed, as a result of steady wage growth in B.C., combined with a historic decline in real wages in neighbouring Alberta (where the minimum wage has been frozen in nominal terms for six years, and provincial policies have suppressed normal collective bargaining in the public sector, and discouraged it in the private sector), B.C. now demonstrates the highest average wages for paid employees of any province (Figure 15). Some employer representatives may bemoan this achievement as a sign of “excessive labour costs.” But as documented in this presentation, since B.C.’s superior wage performance has been accompanied by strong business investment in capital, superior innovation, and strong productivity growth, B.C.’s strong wage trends are clearly ratified by the continued progress of the overall economy – and are a cause for celebration, not complaint.

Figure 15. B.C. is Now Canada's Wage Leader

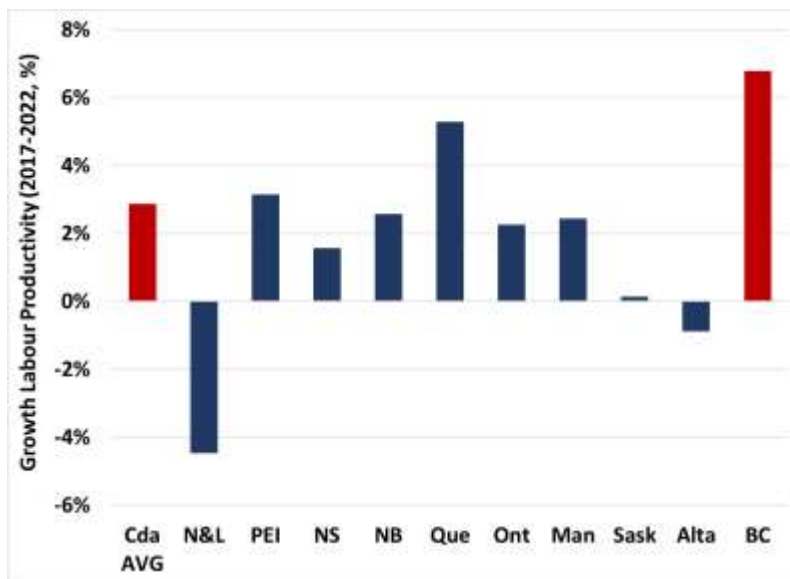


Source: Calculations from Statistics Canada Tables 14-10-0206-01 and 18-10-0005-01, employees.

Productivity

Productivity is another key economic variable that has been shocked as a result of the COVID-19 pandemic and its aftermath. Initially, recorded productivity surged during COVID lockdowns – because a disproportionate share of the jobs lost in the lockdowns were lower-wage positions in less technology-intensive private services sectors (such as retail, hospitality, and personal services). As a result, average productivity in the jobs that remained was higher. Then productivity began to slip, as the lockdowns ended, workers returned to those jobs, and the labour market experienced other adjustments (including a rapid increase in immigration).

Figure 16. Average Annual Growth Labour Productivity, 2017-2022

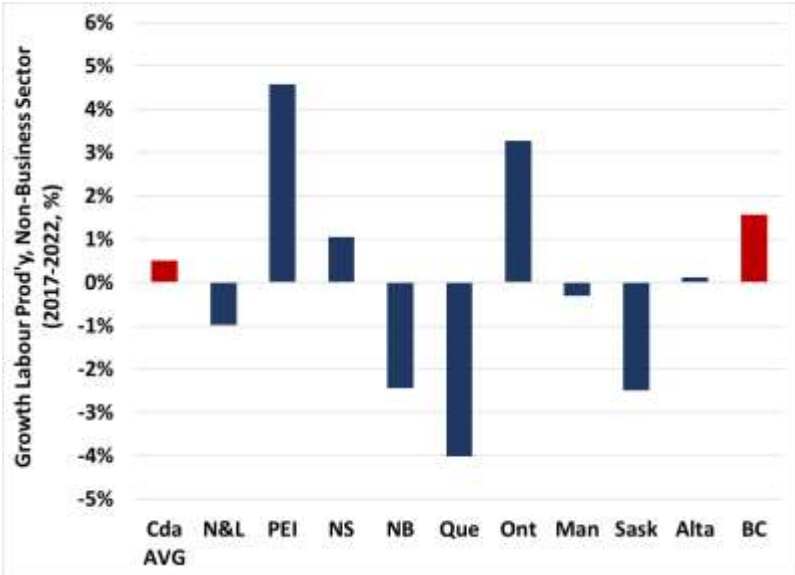


Source: Calculations from Statistics Canada Table 36-10-0480-01, all industries.

Through all of these developments, however, B.C. has emerged as a Canadian leader in productivity. Hourly labour productivity across all industries in B.C. was 6.8% higher in 2022 than in 2017² – more than twice as strong as the growth in labour productivity in the Canadian economy as a whole (Figure 15), and faster than any other province. Productivity grew in the business sector even faster, by 7.5% in total in those five years. That was the second-fastest of any province, surpassed only by Quebec.

Again, much has been made of the expansion of services and employment in public services in B.C. (such as health care and education), which for some critics implies a drain on productivity and efficiency in the overall economy. Measurement of productivity in non-marketed public service industries is difficult, since the value of output in those industries is evaluated differently than for private (marketed) output. Nevertheless, even with those measurement limitations, labour productivity in B.C.’s non-business industries (including public services) has been superior to most other provinces (ranking third of ten over the same five-year period). This attests both to efficient management of B.C.’s public services, and to the value of the work that is performed there. Far from dragging down B.C.’s economic efficiency, public services have improved it.

Figure 16. Average Annual Growth Labour Productivity, Non-Business Sector, 2017-2022



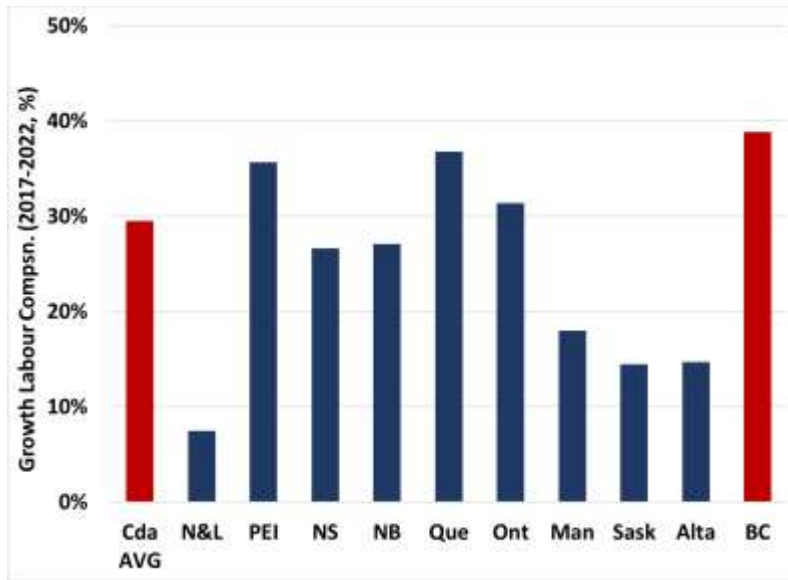
Source: Calculations from Statistics Canada Table 36-10-0480-01.

Distribution of Economic Gains

It is not enough to simply ‘grow’ the economy: using more natural, financial and human resources, applied more productively, to expand total output. It is equally important to ensure that economic gains are shared widely across society, in order to facilitate high living standards and economic security. As was noted above, B.C. experienced the strongest real wage performance of any province through the tumultuous years of the pandemic. And there are several other indicators that the province is achieving a comparatively fair and inclusive distribution of the gains of economic growth.

² Provincial productivity data has not yet been reported for 2023.

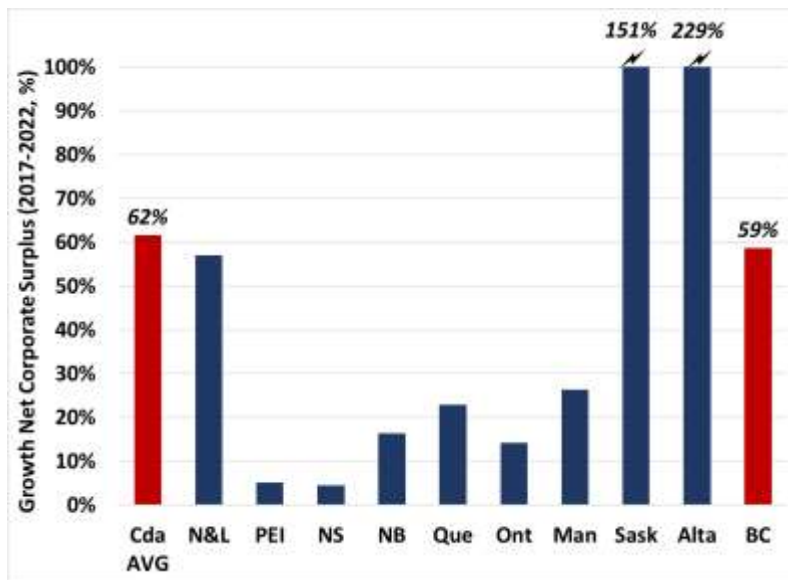
Figure 17. Labour Compensation Growth, 2017-2022



Source: Calculations from Statistics Canada Table 36-10-0221-01.

Thanks both to strong job creation and to healthy wage growth, total labour compensation (including pensions and other supplementary compensation) grew faster in B.C. than in any other province, according to the latest five years of data: up 39% in five years (Figure 17). That confirms that workers were directly receiving a strong share of the benefits of economic growth. However, lest it be argued that these wage gains were excessive and undermined business viability, note that net corporate profits in B.C. grew much faster: up 59% over the same period.

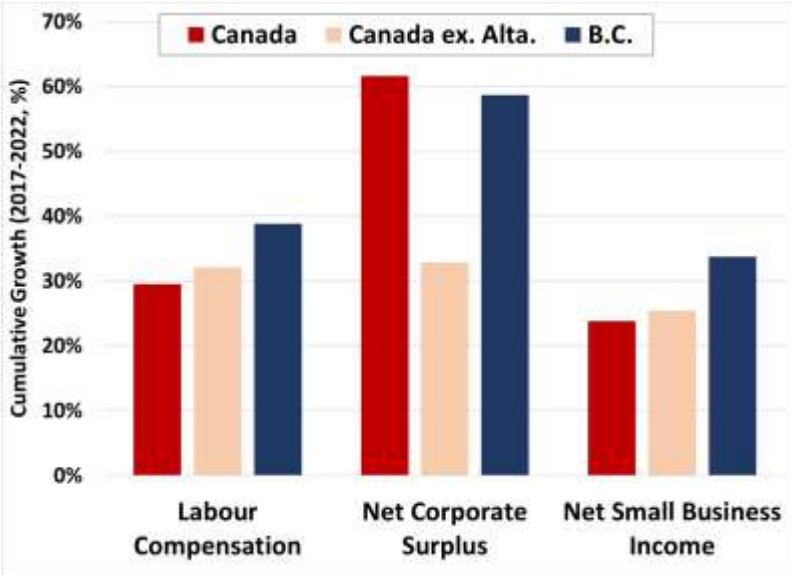
Figure 18. Net Corporate Surplus Growth, 2017-2022



Source: Calculations from Statistics Canada Table 36-10-0221-01.

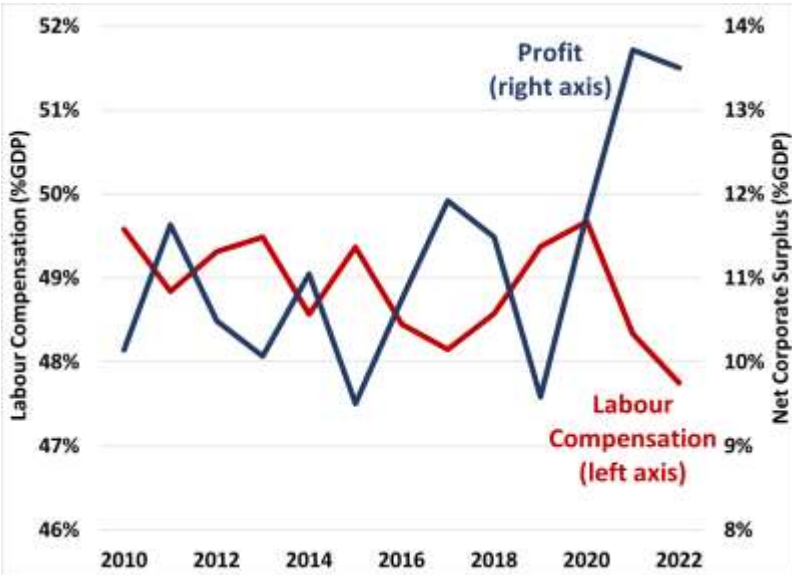
Total labour compensation in B.C. grew faster than for Canada as a whole, yet corporate net profits grew almost as fast as for Canada as a whole – so those wage trends did not interfere with business success. Moreover, if Alberta is excluded (where corporate profits more than doubled since 2017), then B.C.’s profit performance appears even stronger. Excluding Alberta, profits across Canada grew 33% from 2017 through 2022, much less than in B.C. Small business income was also strong in B.C.: up 34% over the last five years, compared to 25% growth in Canada as a whole. Clearly, while B.C. workers have done relatively well in recent years compared to other provinces, so have B.C. businesses.

Figure 19. How Economic Gains Were Shared, 2017-2022



Source: Calculations from Statistics Canada Table 36-10-0221-01.

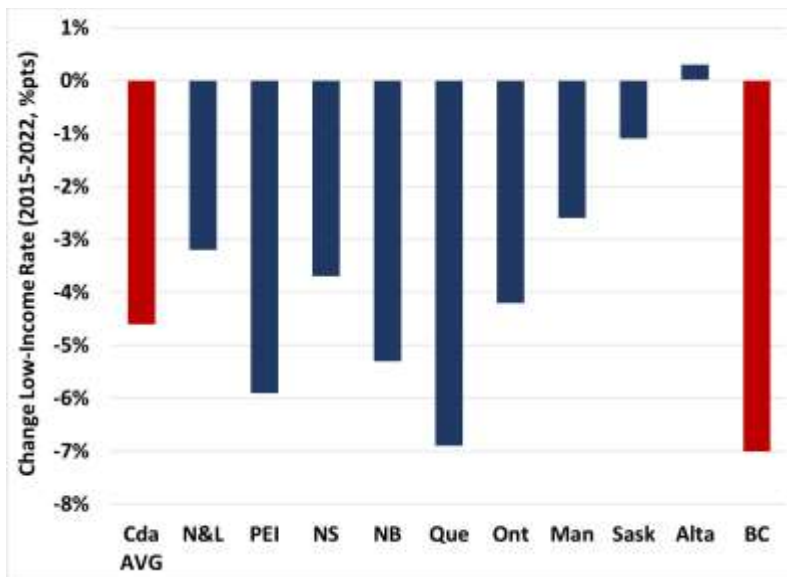
Figure 20. Changing Income Shares in B.C., 2010-2022



Source: Calculations from Statistics Canada Table 36-10-0221-01.

In fact, relative to overall GDP, corporate profits have increased as a share of GDP in B.C., compared to pre-pandemic norms. Net corporate operating surpluses equaled 13.5% of B.C. GDP in 2021 and 2022, about three percentage points higher than the ten-year pre-pandemic average (Figure 20). But labour compensation actually declined in the same period, falling by about 2 percentage points of GDP. So despite business complaints about B.C.'s regulations, taxes, and labour laws, the reality is that businesses (especially corporations) have expanded their share of the overall economic pie – an economic pie which, moreover, grew faster than almost anywhere else in Canada.

Figure 21. Change in Low-Income Rate, 2015-2022



Source: Calculations from Statistics Canada Table 11-10-0093-01.

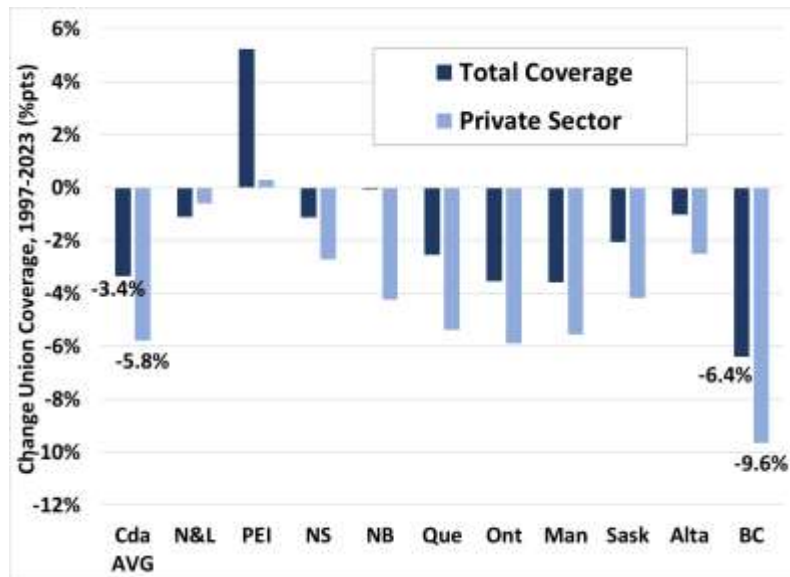
Two final indicators complete our review of the distributional dimensions of B.C.'s recent economic performance. Thanks again to a combination of strong labour market and wage conditions, and positive provincial income and social supports, B.C. has recorded the largest decline in low-income of any province. The share of provincial residents falling below Statistics Canada's market basket low-income measure declined by 7 percentage points between 2015 and 2022. Poverty has fallen significantly in most provinces (Alberta being the only exception) in this period, thanks in part to federal child benefits and other policy reforms. But B.C. has experienced the largest decline in poverty of any province – and this partly reflects the province's strong effort to direct the benefits of economic expansion further down the income ladder (through measures such as higher minimum wages, the in-sourcing of some public sector services, support for collective bargaining, and more). Poverty in B.C. is still too high: 11.6% of residents lived below the low-income cut-off, compared to 9.9% across Canada. But the province is heading in the right direction, and more forcefully than other provinces.

A more worrisome sign, however, is that the share of B.C. workers covered by a collective agreement has also declined faster than in any other province in Canada. The union coverage³ rate for B.C. workers was 30.1% in 2023: slightly below the Canadian average, but more than 6 full percentage points lower than in

³ Union coverage refers to workers whose wages and other terms of employment are determined by a union-negotiated collective agreement; it includes a small share of employees (about 2% of all employees) who are covered by such agreements but do not belong to a union. The unionization rate is thus slightly lower.

1997 (when Statistics Canada began collecting this data). The deunionization of work has been concentrated in the province’s private sector, where union coverage declined by almost 10 percentage points in the same time – also further than in any other province.

Figure 22. Deunionization by Province, 1997-2023



Source: Calculations from Statistics Canada Table 14-10-0070-01.

Once again, then, claims that B.C. has become too “union-friendly” are at odds with the empirical evidence. Union coverage in both the economy as a whole, and in the private sector, are below Canadian averages, and have fallen more steeply than in any other province. Despite recent reforms aimed at supporting more collective bargaining and union coverage in B.C., private sector union coverage shows no sign yet of recovering from those steep losses. This reinforces the conclusion that changes in the broader economy (including the shift to smaller workplaces, the rise of precarious employment, and the advent of digital platform work), as well as more strident and sophisticated union avoidance efforts on the part of private sector employers, are preventing most B.C. workers from accessing the benefits of collective representation and bargaining.

In this light, therefore, while B.C. has much to be proud of in its economic and labour market record, which demonstrates the virtuous effects of simultaneously promoting growth and ensuring that its benefits are widely shared, it is equally clear that more needs to be done. To that end, this review of the B.C. Labour Relations Code should reject arguments that B.C.’s existing labour policy settings have somehow undermined investment, profits, innovation, and productivity. We have presented ample evidence here to the contrary. And far from being too supportive of workers, wages, and benefits, it is clear that the province’s labour policies need to be strengthened to allow a larger share of the workforce to share in the benefits of good work and a strong economy.

May 16, 2024

Labour Relations Code Review Panel

Ministry of Labour

Panel Members:

Lindsie Thomson

Michael Fleming

Sandra Banister, KC

Email: LRCReview@gov.bc.ca

Re. Submission in response to recommendations to the Special Committee to Review the *Labour Relations Code*

We make this submission on behalf of the Confederation of University Faculty Associations of British Columbia (CUFA BC). CUFA BC is a provincial organization that represents 5,500 faculty members through their unionized faculty associations at BC's research universities, including the University of British Columbia, Simon Fraser University, University of Victoria, University of Northern British Columbia, and Royal Roads University. For more than fifty years, we have promoted the value of high-quality post-secondary education; academic freedom; university governance; academic labour relations; and research and teaching to the provincial government and wider public.

CUFA BC was invited to make written submission to this committee but we did not make recommendations for change since the unionized faculty associations at BC's research universities were largely satisfied with the existing *Labour Relations Code* ("the *Code*"). In the wake of submissions received by other stakeholders, specifically from the employer organizations and non-unionized associations in the post-secondary sector, we would like to respond with our own recommendations.

CUFA BC cautions against substantive changes to the *Code* and prioritizes overall stability in our sector. The *Code* as it exists today is sufficiently balanced for the parties of a collective agreement. The *Code* provides reasonable recourse for the parties to navigate complex labour relations disputes on BC's campuses.

The following comments respond to specific recommendations in the submissions from employer organizations, including the Research Universities Council of British Columbia (RUCBC) and the Post-Secondary Employers' Association (PSEA), as well as non-unionized professional staff associations, including the Administrative and Professional Staff Association (APSA) at SFU and the Association of Administrative and Professional Staff (AAPS) at UBC.



Maintain Current Definition of Employee

The current definition of employee under the *Code* must be maintained. *Employee* is defined in a clear, concise manner and in alignment with the *Code* and the spirit of section 2(d) of the Charter of Rights and Freedoms. Any expansion to include those who would be managers and supervisors would undermine the very definition of a trade union and the definition of “employee.” For associations like APSA and AAPS, they represent many who are categorized as managers, as much as 30% of APSA’s membership comprises managers. We must maintain separation between employees and managers who hold competing interests. There would be wide and long-term consequences for allowing access to people who are not deemed employees. Any change to the definition of employee will contribute to escalated labour unrest. These changes would unnecessarily burden the labour board, unions, employers, and workers with costly and time-consuming disputes as the parties seek to operationalize a novel understanding of “employee” in the local context. These definitions aren’t gatekeeping so much as they are essential guidelines that help trade unions, workers, and employers navigate their workplace relationships. As always, certification is the mechanism through which well-respected associations like APSA and AAPS can access the *Code* to achieve their labour relations goals.

Maintain Limit on Essential Services

We strongly recommend against expanding essential services to include faculty. Faculty must have the right to strike. The vast majority of academic staff are not essential service providers at BC’s research universities. Striking faculty would rarely pose a threat to the health, safety, or welfare of the community members on campus or residents of BC. Changes in this definition would categorically shift the balance of power in favour of employers while undermining workers’ rights to collectively bargain or withhold their labour.

Maintain Limits on Replacement Workers

We recommend maintaining existing limits on replacement workers during strike or lockout. We reject the recommendation to change the replacement worker provision in Section 68(1)(a) advanced by the employer association RUCBC. Their rationale focuses on a shortage of workers at the manager level and retention challenges over the course of collective bargaining. The recommendation would see a shift to the freeze on hiring replacement staff during strike or lockout. This freeze normally starts at the moment notice to collective bargain is issued but the employer suggests this is not tenable and unfairly advantages the union. We disagree with this rationale and further disagree that the employer’s challenges with hiring and retaining managers ought to require a qualitative change to the *Code*. The notice to commence bargaining can be issued by either party to



the collective agreement and involves a whole suite of provisions that bridge between the expired agreement and the time when a new collective agreement comes into force. The provision for hiring replacement workers aligns with the existing practice of anchoring timelines to the notice to commence bargaining.

Maintain Access to Expedited Grievance

We recommend maintaining access to the expedited grievance process. Faculty unions and employers are historically judicious in selecting appropriate mechanisms for dispute resolution. We respond to RUCBC and PSEA suggestions to curtail access to expedited grievance with our own counter that expedited grievances are rarely invoked under Division 4 of the *Code*, it is a necessary process that is only used in limited circumstances.

Affirm Union Independence & Autonomy

We recommend against consolidating multi-bargaining unit structures. Post-secondary institutions are complex organizations and the employee structure proportionately and fairly reflects this complexity. The RUCBC and PSEA employer organizations have suggested that having multiple bargaining units is no longer appropriate, claiming blurred lines between different employee groups as a result of technological advancements and other changes to the workforce. We understand no such blurring of employee groups, which each have unique and significant community of interests that are well established over decades. The strength of labour relations in universities is borne from the clearly articulated collective agreements on behalf of the parties. Having multiple unions on campus also entails multiple focused collective agreements tailored to specific bargaining unit work. We don't believe there is value in expanding to omnibus-style collective agreements with behemoth memberships or that it would contribute to harmonious labour relations.

We believe these recommendations will uphold the spirit and intent of the BC *Labour Relations Code* in contributing to strong labour relations at BC's public universities. Should you have any questions, please reach out to our office via Executive Director Annabree Fairweather at executive.director@cufa.bc.ca or at 604-646-4677 ext.100.

Thank you for your time and consideration of our input.

Sincerely,

Dr. Ken Christie
President



BC CONSTRUCTION
EMPLOYERS
BUILDING
RELATIONSHIPS

CONSTRUCTION LABOUR RELATIONS ASSOCIATION OF BC

May 16, 2024

By Email

Labour Relations Code Review Panel

Attention: Sandra Banister, KC
Michael Fleming
Lindsie Thomson

Dear Panel Members:

We write in response to submissions provided to the Panel by the Bargaining Council of British Building Trade Unions (“BCBCBTU”) and its member unions including, but not limited to: the United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States and Canada, Local 170 (“UA Local 170”); the International Brotherhood of Electrical Workers, Local 213, International Association of Heat and Frost Insulators and Allied Workers Union, Local 118 (the “Insulators”); International Union of Operating Engineers, Local 115 (the “Operating Engineers”); Construction Maintenance and Allied Workers Canada; and LiUNA Local 1611 (the “Building Trades Submissions”).

The Building Trades Submissions make numerous proposals for changes to the *Labour Relations Code*, some of which go to the fundamental nature of collective bargaining in the construction industry. For example, the Insulators are asking the Panel “to recommend the immediate removal of Section 41.1 of the *Code*”. Similarly, the Operating Engineers propose “that Part 4.1 of the *Code* as it was before the *Skills Development and Labour Statutes Act, 2001*, be revived” or, in the alternative, “that Section 41.1 of the *Code* be removed from the *Code*.” These are not trivial asks.

With all due respect to the Panel, this review is not the appropriate forum in which to undertake the comprehensive examination of the diverse needs, wants, and interests of all interested parties that is necessary before any such changes can be proposed. Such a detailed review – one which has the time to consider the potential consequences, both intended and unintended, of such changes – should be undertaken by a panel appointed to conduct an inquiry specific to the construction industry.

To be clear, CLR does not agree with many of the statements, found in the Building Trades Submissions, regarding the state of labour relations in the building trades sector of the construction industry. Notably, in 2023, CLR and BCBCBTU were, once again, able to negotiate over 40 collective agreements without any labour dispute. Accordingly, we do not agree that any of the sweeping changes advocated for in the Building Trades Submissions are necessary. If, however, amendments of this nature are to be considered, we believe that those considerations should be undertaken as a part of a building trades-specific panel review as the UA Local 170 has proposed.

A handwritten signature in blue ink, appearing to read 'Ken McCormack', is written over a horizontal line.

Ken McCormack
President and CEO

May 6, 2024

SUBMISSION TO:

2024 BC Labour Relations Code Review

By email: lrcreview@gov.bc.ca

Introduction/ Context

The Interior Forest Labour Relations Association ([IFLRA](#)) and the Council on Northern Interior Forest Employment Relations ([CONIFER](#)) have previously made a joint submission to the 2024 BC Labour Code Review Panel reflecting input from BC forest companies that operate in the Interior of the province. This additional submission, from the BC Council of Forest Industries ([COFI](#)), is intended to support that submission and amplify issues of concern to forest companies on the BC Coast.

About COFI

The BC Council of Forest Industries (COFI) represents forest companies in BC that produce wood for construction, pulp and paper, and residual biomaterials for energy and other renewable products. COFI advocates for the interests of its members and works with government, First Nations, communities, labour, and other stakeholders to promote a healthy, diversified, and sustainable forest industry that benefits people and families across BC. COFI's members range from some of the largest publicly traded forest companies in Canada to mid-sized companies, family-owned companies, and smaller specialized operators. COFI has expertise on forest and economy policy issues and provides services to members on overseas market development and quality control.

2024 BC Labour Code Review

The IFLRA and CONIFER submission documented the extremely strong economic headwinds being faced right now by all forest companies in BC. These include the factors outlined below and summarized in the attached data points.

- Reduced market demand and prices for BC forest products due to rising interest rates.
- Uncertainty stemming from implementation of a number of new and overlapping provincial policy changes.
- Since 2018, harvest levels on public land in BC have fallen by close to 40% due to a combination of market conditions, policy changes, and a changing natural resource base in the wake of insect infestations, fire, and other natural disturbances.
- The BC coast is the highest cost lumber-producing region in the world.
- Since 2020, the BC forest industry has experienced approximately fifty closure and curtailment announcements.
- Since 2018, the BC forest sector has lost over nine thousand direct jobs.

Two very recent indicators of the impact that these and other factors are having on the BC forest sector include: (1) the April 26, 2024, application by Teal Jones for bankruptcy protection (under the Companies' Creditors Arrangement Act); and (2) the May 1, 2024, US Department of Commerce redetermination on anti-dumping which will result in a further increase in trade barriers, in the form of duties, on Canadian lumber exports to the US.

Under these circumstances, changes to the Labour Code that add costs will exacerbate current operational and competitiveness challenges in the BC forest sector. Proposals for sectoral bargaining and automatic successorship could have significant cost impacts while also potentially impacting economic participation by First Nations. A key focus in the sector right now is on increasing First Nations' participation in governance, stewardship, and economic activity. This priority reflects company commitments to economic reconciliation with First Nations as well as implementation of the BC's Declaration on the Rights of Indigenous Peoples Act (DRIPA).

Changes to the Labour Code should avoid creating a situation where new sector entrants from the Indigenous community would be compelled to enter into existing labour agreements. The latter would be subject to the argument that it is not consistent with the spirit of BC's DRIPA, as well as Section 35 of the Constitution Act dealing with the rights of Indigenous Peoples. At a minimum, it would attract legal challenges that would lead to more uncertainty. For the reasons noted above, many forest companies and contractors in BC are already facing a shortage of economic fibre supply. Further court action – that could take years to resolve – will only add to current delays in the approval of harvesting plans and increase the risk of disruption or displacement for everyone in the sector, including unionized workers.

Another example of a change that could have a disproportionate economic impact on forest companies would be a requirement that companies pay for benefits if a union decides to go on strike. The Labour Relations Code already ensures that benefits continue to be provided during a strike, subject to the union paying for them in advance. Shifting this responsibility to employers only could result in the need for large outlays of cash at a time when companies – including small contractors and Indigenous-owned or led entities – can least afford them.

The Labour Code Review is intended to continue a balanced approach to labour relations in BC. Employers in the forest industry are concerned that some of the proposals being considered could alter that balance by increasing costs to companies at a time when the economic sustainability of the sector is at stake. A strong and healthy company and contractor community in the BC forest sector benefits the government (through stumpage and other government revenue), employees (through jobs with high wages), communities (through taxes and indirect economic benefits), as well as unions (through memberships and dues). Changes to the Labour Code should avoid shifting this balance, especially now that the forest industry in BC is in a major period of transition and is struggling to respond to new challenges on several different fronts.

Sincerely,

A handwritten signature in blue ink that reads "Linda Coady". The signature is written in a cursive, flowing style.

Linda Coady
President and Chief Executive Officer

Attachment: BC Forest Sector Data Points, COFI, May 2024

Cc: Jeff Roos, President, IFRLA jroos@ifra.com
Mike Bryce, Executive Director, CONIFER mike@conifer.ca

BC Forest Sector Data Points

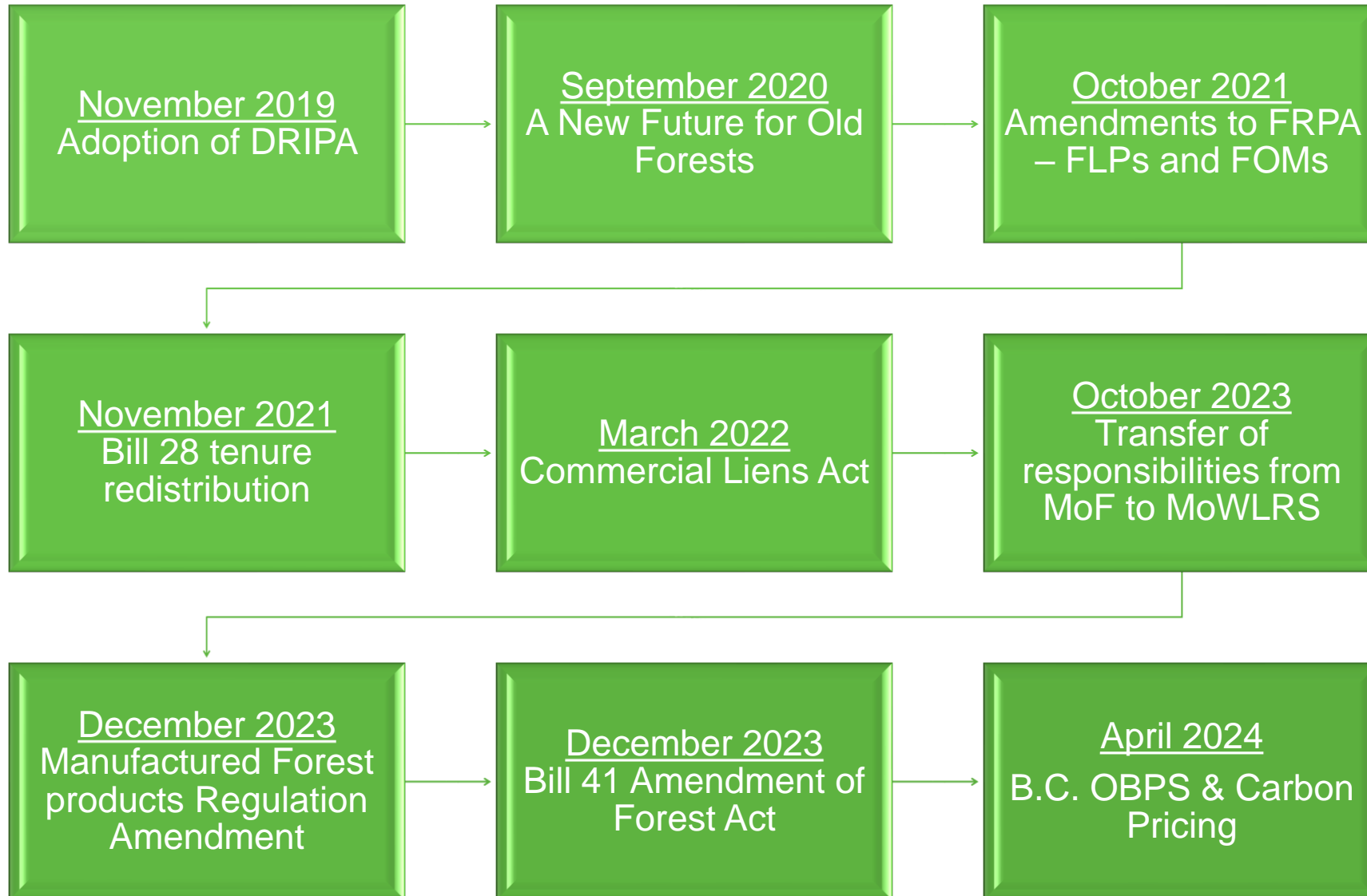
May 2024



FORESTRY FOR THE PLANET.
FOREST PRODUCTS FOR THE WORLD.

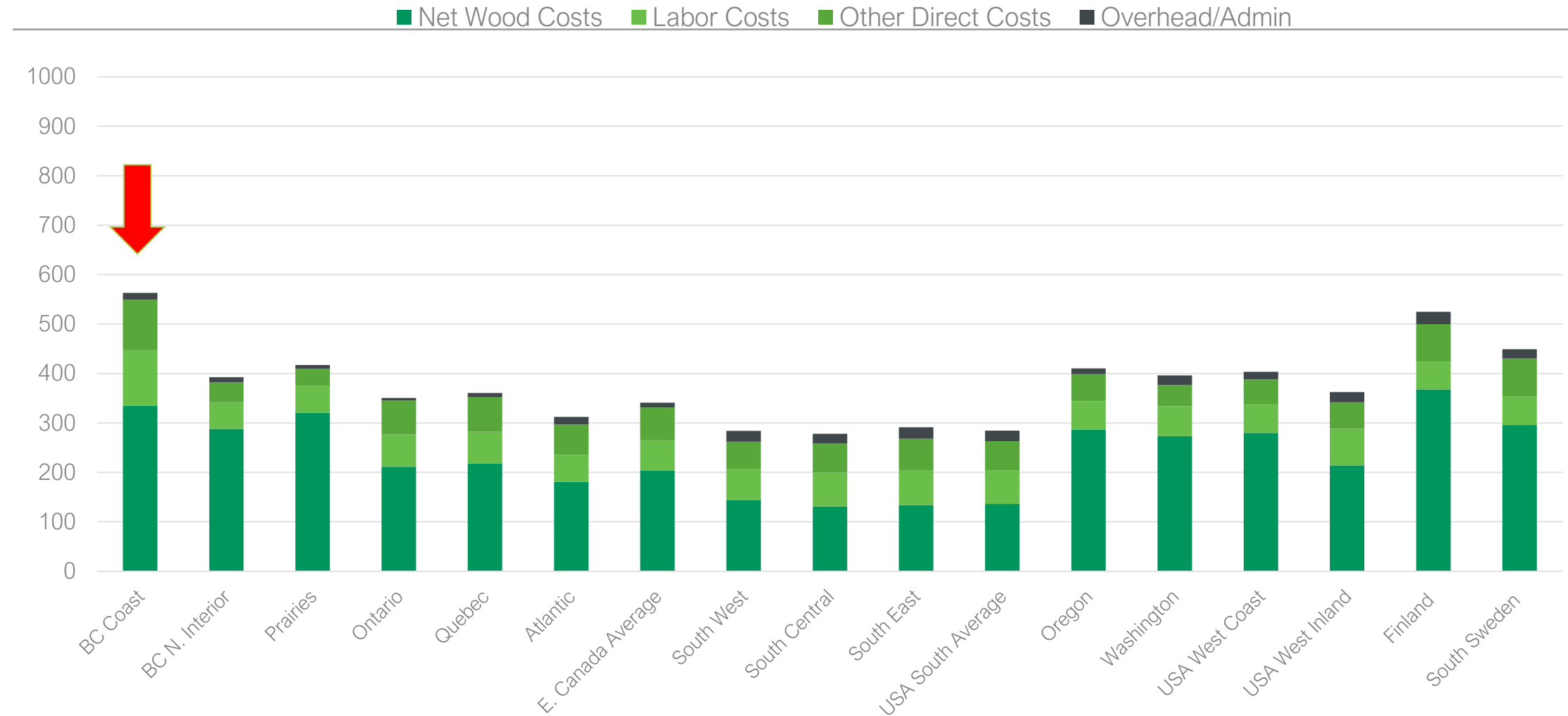
[COFI.ORG](https://cofi.org)

Policy changes have impacted the sector



BC Coast is the highest cost region

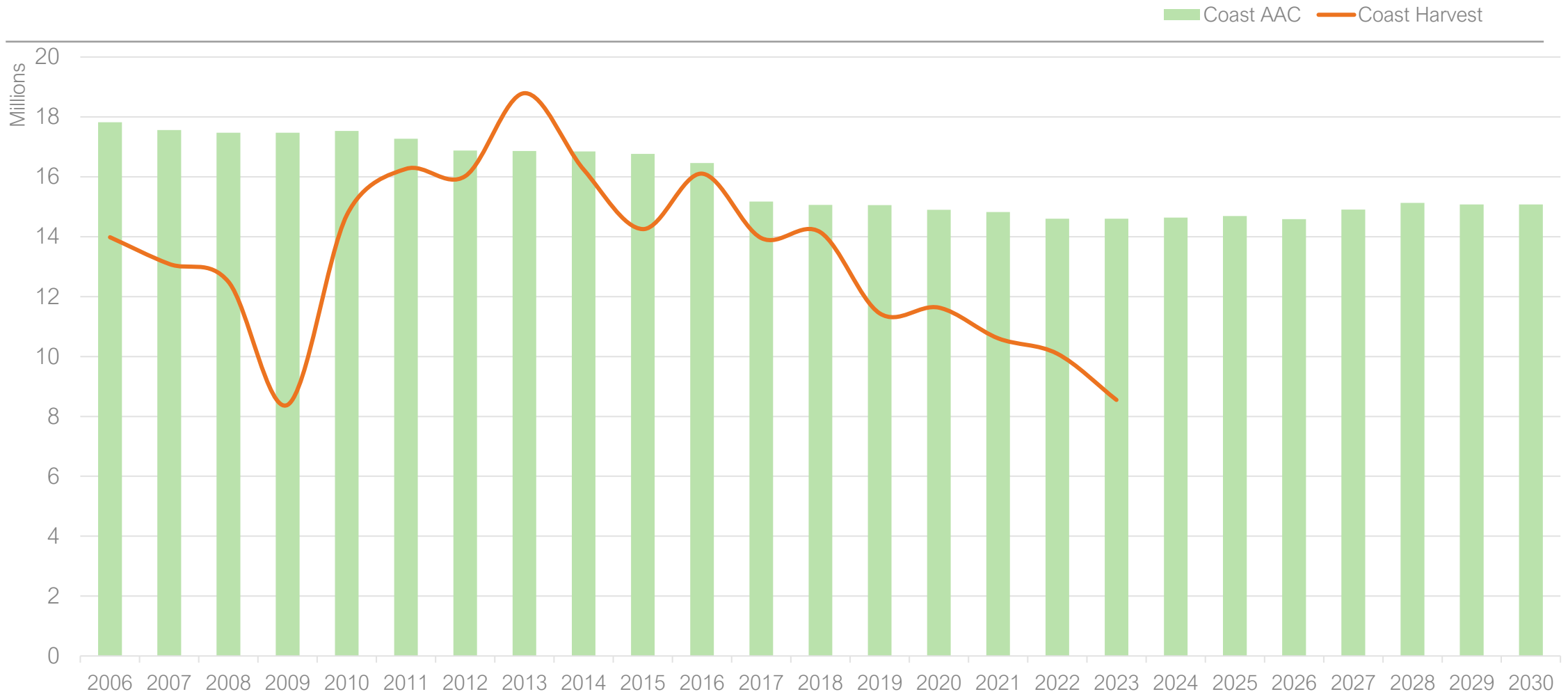
Based on Softwood Lumber Average Variable Costs [USD/MFBM]



Source - Forest Economic Advisors (FEA)

BC Coastal Harvest in Decline

Millions of Cubic Meters (M3)



Source: MoF Forest Inventory and analysis branch, Harvest Billing System

Closures, Curtailments & Shift Reductions

BC has been battered with 50+ announcements of closures, curtailments & shift reductions since 2020

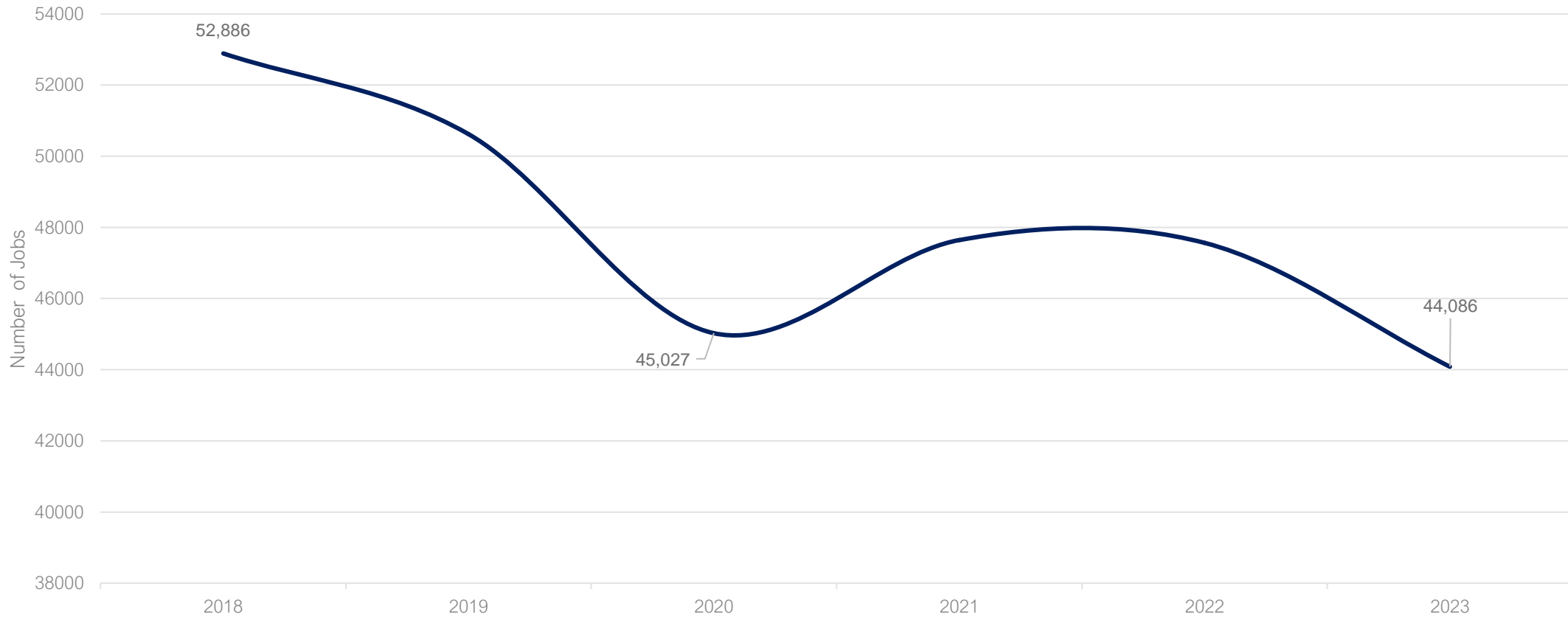
Fibre supply, market conditions, transportation and natural disturbances cited as the main causes

Company	Location	Date Ann	Facility	Reason(s)	Jobs	Curtailment Status (Permanent Cl)	Source of Info
Paper Excellence	Crofton	2020-02-14	Pulp/Paper	Fibre Access	450	Temporary Curtailment	https://vancoverjournal.com/business/local-business/b-c-pulp-and-paper-mill-faces-30-day-closure-due-to-lack-of-wood/
Carrier	Prince George	2020-03-27	Lumber		120	Temporary Curtailment	https://www.woodbusiness.ca/carrier-lumber-temporarily-closing-big-river-mill-labor-planer/can't-find-NP/
Atco Wood Products	Fruitvale	Ongoing/Inter	Veneer	Market Conditions		Temporary Curtailment	https://www.grandforksgazette.ca/news/veest-kootenay-mills-weathering-perfect-storm-in-industry/
Louisiana Pacific	Fort St John	2021-02-16	OSB		190	Temporary Curtailment	https://investor.lpcorp.com/news-releases/news-release-details/lp-building-solutions-reports-fourth-quarter-and-full-year-2020
Canfor	Western Canada	2021-07-20	Lumber	Forest fires		Temporary Curtailment	https://www.canfor.com/docs/default-source/news-2021/2021-07-20-canfor-announces-production-curtailment-in-canada.pdf?sfvrsn=298e091_2
Interfor	Chase, Castlegar, and Grand F	2021-07-29	Lumber	Forest fires		Temporary Curtailment	https://interfor.com/wp-content/uploads/2021/07/2021-07-29-Interfor-Announces-Production-Impacts-in-British-Columbia-Due-to-Log-Supply-Constraints.pdf
Conifex	Mackenzie	2021-08-24	Lumber	Market conditions		Temporary Curtailment	https://conifex.com/wp-content/uploads/2021/08/Conifex-NR-Temporary-Curtailment.pdf
Canfor	BC sawmills (exception of w/n	2021-08-24	Lumber	Market conditions		20% reduction of production capacity	https://www.canfor.com/investor-relations/investor-news-press-releases/news-detail/2021/08/25/canfor-announces-reduced-operating-schedules-at-bc-sawmills
Paper Excellence Canada	Catalyst Crofton	2021-10-26	Pulp/Paper	Logistics challenges and maintenance of		Temporary curtailment/Temporary Shift Reduc	Email (link to come)
Paper Excellence Canada	Catalyst Tiskwat	2021-12-01	Pulp/Paper	Market conditions	206	Indefinite Curtailment	https://paperexcellence.com/paper-excellence-announces-indefinite-curtailment-of-catalyst-paper-tiskwat-mill-in-powell-river-bc/
Canfor Pulp	Northwood Pulp	2021-12-02	Pulp	Supply Chain Challenges		Temporary curtailment	https://www.canfor.com/docs/default-source/news-2021/2021-12-02-canfor-pulp-announces-production-curtailments.pdf?sfvrsn=27d1e091_2
Canfor Pulp	Taylor Pulp	2021-12-02	Pulp	Supply Chain Challenges		Temporary curtailment	https://www.canfor.com/docs/default-source/news-2021/2021-12-02-canfor-pulp-announces-production-curtailments.pdf?sfvrsn=27d1e091_2
Western Forest Products	Cheminus Sawmill	2022-02-02	Lumber	Log supply		Temporary curtailment	https://www.vancouverislandfreedaily.com/news/length-of-cheminus-sawmill-production-curtailment-unknown/
Canfor	Plateau Sawmill	2022-02-16	Lumber	Log supply		Permanent curtailment	https://www.newswire.ca/news-releases/canfor-announces-capacity-reduction-at-plateau-sawmill-811544176.html
Canfor Pulp	Taylor Pulp	2022-02-16	Pulp	Transportation challenges		Temporary curtailment	https://www.canfor.com/investor-relations/investor-news-press-releases/news-detail/2022/02/17/canfor-pulp-announces-production-curtailment-at-taylor-pulp
West Fraser	BC Lumber mills	2022-03-01	Lumber	Transportation and inventor	740	Shift reduction (three-day operation schedule)	https://www.castlegarnews.com/news/west-fraser-temporarily-adopts-three-day-work-week-at-b-c-lumber-mills/
Western Forest Products	Cheminus Sawmill	2022-03-22	Lumber	Log supply		Temporary curtailment	https://www.ladysmithchronicle.com/news/another-production-curtailment-at-the-cheminus-sawmill-this-week/
Canfor Pulp	Taylor Pulp	2022-03-29	Pulp	Transportation challenges		Temporary curtailment	https://www.canfor.com/investor-relations/investor-news-press-releases/news-detail/2022/03/23/canfor-pulp-announces-extension-of-production-curtailment-at-taylor-pulp
Sinclair Group	Vanderhoof/Fort St. James/Pr	2022-04-19	Lumber	Supply Chain Challenges		Temporary curtailment	https://sinclair.com/wp-content/uploads/2022/04/SGFP-Press-Release-14-04-22.pdf
West Fraser	Fraser Lake/Williams Lake/Qu	2022-08-09	Lumber	Access to timber and transp	147	Permanent curtailment	https://www.westfraser.com/sites/default/files/August%202022%20News%20Release%20regarding%20BC%20Operating%20Strategy.pdf
Conifex	Mackenzie	2022-08-22	Lumber	Supply Chain Challenges		Temporary curtailment	Email
Canfor	BC Lumber mills	2022-09-19	Lumber	Market Conditions		Temporary curtailment	https://www.canfor.com/docs/default-source/news-2022/2022-09-19_canfor-reducing-production-capacity-in-british-columbia-through-end-of-2022.pdf?sfvrsn=b63ce191_2
Paper Excellence Canada	Crofton	2022-10-06	Pulp/Paper	High cost and Market Condi	150	Temporary curtailment	https://biv.com/article/2022/10/06/crofton-paper-mill-be-indefinitely-curtail
Conifex	Mackenzie	2022-10-10	Lumber	High Cost & Market Conditions		Temporary curtailment	https://www.nipimpressions.com/conifex-timber-temporarily-curtails-production-at-mackenzie-sawmill-in-british-columbia-cms-14417
Canfor	Prince George (Intercontinent	2022-10-17	Pulp/Paper	Fibre shortage		Extension of Temporary Curtailment	https://biv.com/article/2022/10/17/canfor-extends-prince-george-pulp-mill-curtailment
Interfor	Across NA Operations	2022-10-20	Lumber	Market Conditions		Temporary curtailment	https://interfor.com/wp-content/uploads/2022/10/Interfor-Announces-Temporary-Production-Curtailments-in-Q422.pdf
Western Forest Products	Port Alberni Sawmill	2022-10-15	Lumber	Market Conditions & Log SL	90	Permanent closure	https://www.cheknews.ca/operations-temporarily-curtailed-at-port-alberni-sawmill-impacting-90-employees-110867/
Western Forest Products	Across BC Operations	2022-11-30	Lumber	Market Conditions & Log Supply		Temporary Curtailment	https://www.westernforest.com/wp-content/uploads/2022/11/30-Temp-Production-Curtailment.pdf
Canfor	Across BC and AB operations	2022-12-05	Lumber	Market conditions		Temporary Curtailment	https://www.canfor.com/docs/default-source/news-2022/2022-12-05-canfor-temporarily-curtailing-canadian-production-capacity-final.pdf?sfvrsn=7bfe191_2
Canfor	Prince George (Intercontinent	2022-12-19	Pulp	Fibre shortage due to sawmill curtailmen		Temporary Curtailment	https://www.canfor.com/docs/default-source/news-2022/intercon-curtailment.pdf?sfvrsn=c4b5e191_2
Tolko Industries	Soda Creek/Armstrong	2022-12-28	Lumber	Market Conditions & Log SL	350	Temporary Curtailment	https://tolko.com/tolko-copt_news/ian2023-downtime-sc-armstrong/
Vaagen Fibre	Midway	2022-12-06	Lumber	Market conditions and fibre	86	Indefinite Curtailment	https://www.pentictonwesternnews.com/news/vaagen-fibre-canada-indefinitely-shuts-down-midway-mill-operation/
Skeena Sawmills	Terrace	2022-01-06	Lumber	Market Conditions		Temporary Curtailment	https://www.woodbusiness.ca/skeena-sawmills-shuts-down-log-deliveries-temporarily/
Canfor	Prince George	2023-01-11	Pulp	Reduction of AAC and chall	300	Permanent closure	Email (link to come)
Interfor	Outside of Interfor's US South	2023-01-11	Lumber	Market Conditions & Log Supply		Temporary curtailment	https://interfor.com/wp-content/uploads/2023/01/Interfor-Announces-Temporary-Production-Curtailments-in-Q123.pdf
Mercer International	Castlegar	2023-01-18	Pulp/Paper	Lack of Residual Fibre for Pulp		Temporary Curtailment	https://www.pulpandpaper.ca/canada/merc-international-to-curtail-celgar-mill-in-b-c/
Sinclair Group	PG, Vanderhoof, Fort St. Jame	2023-01-23	Lumber	Market Conditions & Log Supply		Temporary curtailment	Email
Canfor	Chetwynd	2023-01-25	Lumber & p	Market Conditions & Log SL	157	Permanent Closure	https://www.canfor.com/investor-relations/investor-news-press-releases/news-detail/2023/01/26/canfor-restructuring-b-c-operations-to-create-a-more-sustainable-footprint
Mercer/West Fraser	Quesnel	2023-02-07	Pulp/Paper	Lack of fibre		Temporary curtailment	https://mercerint.com/news/2023/mercer-international-inc-announces-downtime-at-its-cariboo-mill-for-eight-weeks/
Conifex	Mackenzie	2023-02-22	Lumber	Unsustainable inventory levels due to rai		Temporary curtailment	https://www.woodbusiness.ca/conifex-temporarily-shuts-mackenzie-sawmill-in-b-c/
Skeena Sawmills	Terrace	2023-02-06	Lumber + Bi	high operating costs and fibre	170	Temporary curtailment	https://www.terracestandard.com/news/skeena-sawmills-in-terrace-announces-temporary-closure/
Sinclair Group	Prince George, Fort St. James	2023-05-01	Lumber	High cost of fibre, poor market conditior		Temporary curtailment	https://www.mprincegeorgenow.com/171717/news/sinclair-curtailments-another-tough-pill-for-northern-lumber-industry-to-swallow/
Tolko Industries	Vernon	2023-05-15	Lumber	Significantly high log costs ir	50	Temporary curtailment	https://tolko.com/tolko-copt_news/lakeview-downtime-may-2023/
Conifex	Mackenzie	2023-05-19	Lumber	Low water levels in Williston Reservoir, n		Temporary curtailment	https://okpgojay.ca/2023/05/19/conifex-announces-mackenzie-lumber-production-will-take-unscheduled-downtime/
Brink (Pleasant Valley Remanufacturing)	Houston	2023-05-29	Lumber	Canfor, the provider of the rough inv	75 Direct +	Temporary curtailment	https://getea.com/mill-capacity-changes/brink-man-forest-products-to-temporarily-close-pleasant-valley-remanufacturing
Paper Excellence Canada	Crofton	2023-05-30	Pulp/Paper	Global demand for paper has	100	Curtailment	https://www.timescolonist.com/business/crofton-mill-to-be-idled-for-30-days-port-alberni-for-two-weeks-7063901
Paper Excellence Canada	Port Alberni	2023-05-30	Pulp/Paper	Global demand for paper has	174	Curtailment	https://www.timescolonist.com/business/crofton-mill-to-be-idled-for-30-days-port-alberni-for-two-weeks-7063901
Western Forest Products	Across BC Operations	2023-06-12	Lumber	'Weak Market Conditions		Temporary curtailment	https://financialpost.com/globe-news/western-forest-products-inc-announces-temporary-production-curtailments-in-british-columbia-2
Sinclair Group	Vanderhoof/Mechako	2023-08-03	Lumber	Lack of economic fibre		Permanent Shift Reduction	https://pacificnews.ca/index.php/2023/08/03/sinclair-group-forest-products-reducing-operations-at-mechako-lumber-in-vanderhoof/
West Fraser	Fraser Lake, BC	2024-01-22	Lumber	Lack of economic fibre	175	Permanent closure	https://getea.com/mill-capacity-changes/west-fraser-timber-co-ltd-announces-permanent-closing-of-fraser-lake-b-c-sawmill/
Paper Excellence Canada	Crofton	2024-01-25	Paper	Markets, lack of domestic fi	75	Indefinite curtailment	https://www.paperadvance.com/news/industry-news/paper-excellence-canada-to-indefinitely-curtail-paper-operations-at-catalyst-crofton-mill.html
Dunkley	Prince George, BC	2024-02-02	Lumber	Unknown		Shift Reduction (one shift only)	Hamid Patel - Trade sources also reported that, in a rare move, Dunkley Lumber has reportedly only been running one shift at its Prince George, BC sawmill (~485 mmfbm/y) since Monday, tem
Tolko Industries	Williams Lake (Lakeview Mills)	2024-02-05	Lumber	Cost of operations in BC an	80	Temporary layoff reducing from 2 shifts to one	https://www.pentictonwesternnews.com/news/shift-idled-at-williams-lake-mill-as-rough-run-continues-for-bc-forestry-731358
Interfor	BC Operations	2024-02-16	Lumber	'Weak market condition, low log inventor		Indefinite Curtailment	https://getea.com/mill-capacity-changes/interfor-announces-indefinite-curtailment-at-its-pilomath-or-sawmill-and-reduced-production-at-bc-operations

Close to 9 thousand direct jobs losses since 2018

BC Forest Sector Employment has declined dramatically and continues its downtrend.

Overall employment continues to trend down from ~53k pre-pandemic to 44k most recently



Source - Statistics Canada Table: 14-10-0201-01 from SEPH (Averaged)

May 15, 2024

Via email: lrcreview@gov.bc.ca

Labour Relations Code Review Panel

Panel Members:

Sandra Banister, K.C.

Michael Fleming

Lindsie Thomson

Re: Reply Submission to the Labour Relations Code Review Panel

The Health Employers Association of British Columbia (“**HEABC**”) is the statutory accredited bargaining agent for most publicly funded health employers in the province and is constituted pursuant to Section 6 of the *Public Sector Employers Act*, RSBC 1996, c. 384. HEABC’s statutory role involves coordinating human resources matters within the publicly funded health sector, including negotiating six provincial collective agreements that govern the terms and conditions of employment of approximately 170,000 unionized health sector employees within the province.

HEABC writes further to the Review Panel’s invitation for written replies to submissions provided to the Review Panel and posted to its website. HEABC thanks the Review Panel for the opportunity to provide reply. In this letter, HEABC will reply to certain submissions provided by the Hospital Employees’ Union (“**HEU**”) requesting additional amendments to Section 35 of the *Labour Relations Code*, RSBC 1996, c 244 (the “**Code**”).

REPLY SUBMISSIONS

1. HEABC writes in reply to submissions provided by the HEU to the Review Panel requesting amendments to Section 35 of the *Code*, which the HEU writes are intended to expand the successorship provisions of the *Code* to apply to scenarios in which health sector employers initially contract out work, or recapture work that was previously contracted out. These submissions are set out in Section III(a) of HEU’s submission.
2. The specific example of the current legal approach provided by the HEU as necessitating its request for such an expansion to Section 35 of the *Code* is a decision of the Labour Relations Board indexed as: *Health Employers Association of British Columbia on Behalf of Provincial Health Services Authority v Sodexo Canada Ltd.*, 2023 BCLRB 20 (“*Red Fish*”).
3. HEABC encourages the Review Panel to carefully consider the scenario in *Red Fish*, which differs considerably from the stories of the effects of contract re-tendering in health care heard by the 2018 panel leading to the measured approach recommended by that panel to address certain types of

contract re-tendering. In HEABC's submission, the *Red Fish* scenario reflects a consistent application of well-settled Board law and policy and does not support further amendments to Section 35 now requested by the HEU.

4. By way of summary, the Provincial Health Services Authority ("PHSA") opened the Red Fish Healing Centre for Mental Health and Addiction ("Red Fish") in 2021 to replace the Burnaby Centre for Mental Health and Addiction ("BCMHA"). PHSA applied existing health sector certifications held by health sector unions at BCMHA to Red Fish. Specifically, at Red Fish, the BC General Employees' Union ("BCGEU") continued to represent workers in the community subsector bargaining unit, the BC Nurses' Union continued to represent workers in the nurses' bargaining unit, and the Health Sciences Association of BC continued to represent workers in the paramedical professional bargaining unit.
5. PHSA chose to directly employ food services and housekeeping staff at Red Fish. These services had previously been contracted out at BCMHA, most recently to Sodexo Canada Ltd. United Steelworkers, Local 2009 had represented the food service and housekeeping staff employed by Sodexo to work at BCMHA. At Red Fish, food service and housekeeping staff employed by PHSA were covered by the BCGEU's community subsector certification, along with all other community staff working at Red Fish. The *Red Fish* decision reflects that PHSA offered employment to all then current food service and housekeeping employees who previously worked at BCMHA under the terms of a without prejudice transition agreement between PHSA and the BCGEU.¹
6. On these facts, Local 2009 applied under Section 35 of the *Code* to have PHSA declared the successor employer to Sodexo. The result sought by Local 2009 was to maintain its representation of staff in food service and housekeeping previously employed by Sodexo, rather than to have those employees represented by the BCGEU along with all other employees in the community subsector bargaining unit employed by PHSA at Red Fish. HEABC and the BCGEU opposed the application on the basis that the circumstances of the case fell squarely within the Board's well-settled law and policy that the recapture of work that has been previously contracted out does not trigger a successorship under Section 35 of the *Code*.
7. The Board agreed with the position of the BCGEU and HEABC and applied the Board's long-settled law and policy regarding the repatriation of previously contracted out work (at para 25):

Consequently, I see no reason to depart from that well-established law and policy. I accept and adopt the proposition established by those cases that returning contracted out work in-house does not trigger a successorship under Section 35(1) of the *Code*. Employers and unions have operated under this understanding for decades. There is no basis to deviate from it now.

8. The Board further confirmed that its law and policy in this area should not be altered by the introduction of Section 35(2.2) of the *Code*, which was drafted to address contract flipping (para 26):

¹ *Red Fish*, p. 4

I do not agree that the law and policy in this area should be altered because of the introduction of Section 35(2.2) of the *Code*. That new *Code* section was drafted in such a way as to address what is commonly referred to as contract flipping. It was designed to prevent the deleterious impact on employees and unions when customers in certain industries, cancel contracts with unionized service suppliers. The language used in that section has no application to a situation where contracted work is being brought in-house by the customer of previously contracted services.

9. As a result of the *Red Fish* decision, food service and housekeeping staff employed by PHSA at Red Fish are represented by the BCGEU along with all other community subsector staff at the facility, and the terms and conditions of their employment are governed by the provincial collective agreement negotiated between HEABC and the Community Bargaining Association (of which the BCGEU is the lead member).
10. Had Local 2009's position prevailed such that a successorship was declared, the result may have been for Local 2009 to displace the BCGEU with respect to representation of the food services and housekeeping staff employed by PHSA at Red Fish, while all other community subsector staff continued to be represented by the BCGEU under its existing certification. Moreover, a successorship in these circumstances may have resulted in a proliferation of bargaining agents administering the same collective agreement at the same location, which is also directly contrary to well-established Board policy due to the industrial instability that presumptively results.²
11. The *Red Fish* scenario is generally representative of the experience of repatriating services in the legislated health sector. Health authorities are largely organized by well-established health sector unions, who belong to broader bargaining associations corresponding to each statutory bargaining unit.³ When a health authority recaptures work that has previously been contracted out, often an existing health sector union will already hold a certification that can be applied to the recaptured service. Workers employed under these health sector certifications are then governed under the terms and conditions of the applicable provincial collective agreement negotiated between HEABC and the bargaining association. The implementation of the collective agreement terms to these workers can be agreed upon between the employer and union, as was the case in *Red Fish*.
12. In HEABC's submission, the Review Panel should not recommend an amendment to Section 35 of the *Code* that would effectively reverse the Board's reasoning in *Red Fish* and depart from well-established law and policy under Section 35 that employers and unions have operated under for decades, particularly in the absence of any compelling factual basis for doing so.
13. Finally, while much of the focus of the HEU's submission and this reply is the recapture of previously contracted out services, rather than an initial contracting out, HEABC notes that a prospective contracting out of services would be subject to negotiated collective agreement language contained

² See for example: *Health Employers Association of British Columbia on behalf of Portland Hotel Society (PHS Community Services Society) -and- Canadian Union of Public Employees, Local 1004 (Vancouver Civic Employees Union) -and- British Columbia Nurses' Union, 2021 BCLRB 64 ("PHS")* at paras. 45 to 48

³ See *Health Authorities Act, RSBC 1996, c 180, ss. 19.4 and 19.9*

within the health sector provincial collective agreements. While collective agreement language concerning contracting out was previously impacted by the *Health and Social Services Delivery Improvement Act*, SBC 2002, c 2 (Bill 29), Bill 29 has now been repealed by the passage of the *Health Sector Statutes Repeal Act* (Bill 47).

All of which is respectfully submitted.

Yours truly,



Andrew Nathan
Senior Legal Counsel
Legal Services, Negotiations & Labour Relations
HEABC



Labour Relations Code Review

REPLY

May 2024

HOSPITAL EMPLOYEES' UNION

The Hospital Employees' Union ("HEU") thanks the Panel for its invitation to provide a written reply to the submissions of other stakeholders.

HEU's reply will proceed thematically, focusing in turn on the following:

1. Automatic certification
2. Timing of certification hearings
3. Successorship
4. Sectoral certification
5. Expedited arbitration under s. 104
6. Picketing

1. Automatic certification

Numerous employer-side stakeholders have taken issue with recent Code amendments permitting automatic certification (or "card check") when the Board is satisfied that at least 55% of the employees in a bargaining unit are members in good standing of the applicant trade union (s. 23).

These stakeholders submit, among other things, that the reintroduction of automatic certification undermines worker freedom and autonomy and opens the door to coercion and misinformation.¹

In HEU's view, such assertions fail to account for a fundamental reality: while coworkers may exert social or peer pressure, it is only an employer who can impose – or threaten to impose, expressly or implicitly – real workplace and economic consequences, including, for example, re-assignment, re-scheduling, reduction of hours, increased monitoring, trumped-up discipline, lay-off, and termination.

In other words, an employer can control nearly every facet of an employee's work life and indeed their very livelihood – a fact acutely pronounced in non-unionized environments where, as in the long-term care sector, employees may be especially vulnerable due to socioeconomic and demographic reasons of the sort highlighted in our initial submission.²

This inherent structural reality gives employers outsize influence on employee decision-making. In the context of an organizing drive, such influence is most likely to be exerted – sometimes overtly but often subtly, even unintentionally – between the filing of a certification application and the holding of a vote.

Amendments to the Code in 2019 that reduced the time between application and vote and expanded the availability of remedial certification have provided a modicum of insulation and deterrence where a vote is still required.

¹ See, e.g., Canadian Federation of Independent Business submission at p. 6.

² As we noted (at p. 12), care aides and support staff in the long-term care sector are an overwhelmingly female and racialized cohort. Looking at HEU's membership as a whole, 78 percent are women, nearly a third are racialized, and 10 percent have a disability. A substantial portion are first-generation Canadians; over a third speak a language other than English at home; some are international students with work permits; and others are temporary foreign workers, who often reside on-site in employer-provided lodgings.

But in those cases where a substantial majority of employees in a proposed bargaining unit have formalized their support for an applicant trade union, signed membership cards are, on balance, more likely than a secret-ballot vote to provide an accurate and unadulterated gauge of employees' true preference.

For similar reasons, it is untenable for certain employer-side stakeholders to suggest that automatic certification, if maintained, must be mirrored by automatic decertification.

While such symmetry might at first blush appear superficially satisfying, it again fails to acknowledge the immense influence that employers are able to exert on their staff. Simply put, a card campaign backed by a few peers with the support of outside union organizers is profoundly different from one backed – or even plausibly perceived to be backed, however subtly – by an employer.

In HEU's submission, the maintenance of the secret-ballot vote for decertification affords employees a degree of protection against such undue influence while still allowing the true will of bargaining-unit members to be expressed at the ballot box.

Thus, despite fulminations about “bias in BC against the rights of ... working people”,³ and despite hopelessly misleading comparisons to provincial or municipal elections,⁴ the current regime strikes a fair and appropriate balance between the interests of employees and employers, fostering conditions in which the genuine will of employees – to unionize or not, to decertify or not – can be reliably ascertained.

While some have suggested that the uptick in certification applications since the reintroduction of card check should give pause,⁵ in HEU's view it simply indicates that access to the rights and protections of the Code has become more readily accessible in workplaces where a substantial majority of employees favour unionization – hardly a concerning development.

In short, card check promotes the free choice of workers while enhancing the efficiency of the certification process, saving resources for parties and the Board. There is simply no compelling reason to turn back the clock nor, as some have advocated,⁶ to deprive those in smaller workplaces of access to the full suite of certification-related rights under the Code.

2. Timing of certification hearings

Several employer-side stakeholders have expressed the view that the five-business-day timeline for conducting a certification vote under s. 24 of the Code is too short, especially insofar as it necessitates that a certification hearing be held within a few days of the filing of an application. This fact, they say, “hampers the ability of employers to participate, communicate or comply with Board

³ Canadian LabourWatch Association submission at p. 2.

⁴ Ibid.

⁵ See, e.g., Independent Contractors and Businesses Association submission at p. 5: “At the very least, the current Panel should take this very significant change into account when considering the ‘pendulum swing’ that has occurred and whether the pendulum should be swung further.”

⁶ See, e.g., Retail Council of Canada submission at p. 1; Greater Vancouver Board of Trade submission at p. 4.

rules or orders”;⁷ renders it “unrealistic” to “compel employers to produce lists of all employees in a proposed bargaining unit ... on such a truncated timeline”;⁸ and generally leaves employers with “little to no time to respond to certification applications”.⁹ Some have therefore urged that the previous ten-day timeline be reinstated, with at least one organization advocating a 20-day timeline.¹⁰

In HEU’s submission, these professed concerns are overstated. Summary legal advice of the sort that might be sought immediately after the filing of a certification application can generally be obtained on very short notice.

Relatedly, while the current timeline does necessitate that a certification hearing be held within days of an application, with a vote to follow quickly when required, the procedural reality is that where an employer raises objections at this initial certification hearing, the employer is then afforded ample time – in our experience, typically two weeks -- to develop and present more comprehensive submissions.

With respect to employee lists and payroll data, such information is squarely within an employer’s control and can certainly be generated or retrieved on an expedited basis when prioritized.

So, while HEU acknowledges that the current timeline is tight, we must emphasize that it is tight for a reason: to minimize the prospect of undue influence and ensure that the true will of affected employees is expressed. With this goal in mind, a ten-day timeline would be unwarranted; a 20-day timeline would be egregious.

3. Successorship

In our initial submission, we noted the devastating consequences of Bills 29 and 94, which in the early 2000s effectively eliminated successorship protections for unionized employees in the health sector when their jobs were contracted out. We praised legislative developments that restored these protections and disincentivized the invidious practice of “contract flipping”, but we also noted that, even as amended, Section 35 of the Code does not currently extend – as in our view it should – to situations where work is initially contracted out, or where it is “repatriated” or “recaptured” (i.e., brought back in-house).

In contrast, one employer-side stakeholder, namely Harris & Company LLP (“Harris”), impugns the 2019 Code amendments that targeted contract flipping, arguing that they “provide[d] certain trade unions and employees with a form of tenure”.¹¹

To prop up this assertion, Harris points to two extremely vague “scenarios” which it says are supported by “anecdotal evidence from [its] clients”.¹²

⁷ Greater Langley Chamber of Commerce submission at p. 2.

⁸ Ibid.

⁹ Coalition of Business Associations submission at p. 9.

¹⁰ Greater Vancouver Board of Trade submission at p. 4.

¹¹ Harris submission at p. 5.

¹² Ibid.

Yet curiously, despite numerous references to “anecdotal evidence”, Harris does not in fact provide a single anecdote for consideration.¹³ It is therefore impossible to glean what industries or specific experiences Harris might be alluding to. Nevertheless, we offer – to the extent we are able – the following response.

Harris’s first “scenario” posits that contractors and their employees are “acting complicitly” in negotiating “wages far beyond the wage levels the job functions would merit in a free market”, safe in the knowledge that “the client is likely to agree to increase the net value of the contract because they know that, even if they re-tender the contract, that cost structure willingly given up by the [c]ontractor cannot be interfered with.”¹⁴

To the extent Harris may be referring to the health sector (which again is entirely unclear), this has certainly not been HEU’s experience. Contractors in the health sector continue to negotiate tenaciously – often quite sharply – to suppress employee compensation to the greatest degree possible.

Harris’s second “scenario” posits that protections against contract-flipping preserve “the ability of inefficient [c]ontractors to remain in business” because “an inefficient [c]ontractor knows that there is a diminished prospect of being replaced given that their workforce, along with their collective agreement, will simply continue to bind the contracting party”.¹⁵

This assertion, like the first, does not withstand scrutiny. A contractor who cynically negotiates disadvantageous agreements to the ultimate prejudice of a client will not stay a contractor for long. Dissatisfied clients will simply bring in another contractor or repatriate the work before subsequent

¹³ With its repeated invocation of the phrase, it would appear that Harris is attempting to frame its “scenarios” as being on an evidentiary par with the relatively particularized accounts of contract-related mischief considered by the 2018 panel. In HEU’s 2018 submission, for example, we provided the following (at p. 12):

...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.

...

From time to time, ... 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. ...

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.

...

In one seniors’ care facility, the owner or operator engaged six (6) contractors in the period 2003 to 2015.

¹⁴ Harris submission at p. 5.

¹⁵ Ibid.

rounds of bargaining saddle them with increasingly unfavourable deals. And, of course, the commercial contract between client and contractor is more than capable of imposing market-based constraints on both sides.

In sum, no persuasive reason – let alone any actual evidence, anecdotal or otherwise – has been advanced for why contract-flipping should be re-incentivized; Harris’s “scenarios” deserve to be dismissed out of hand.

Finally, it must be noted that while the 2019 amendments to Section 35 have drastically minimized the frequency and harms of contract flipping for thousands of relatively vulnerable low-income workers, HEU continues to observe regular re-tendering of contracts in the private health sector -- this due perhaps to the very nature of contracted service-provision. If, as Harris advocates, an “intent” component were imported into Section 35 – i.e., if a successorship declaration were available only “when the employer contracts out in order to defeat or undermine collective bargaining rights or avoid collective agreement obligations”¹⁶ – several deleterious effects would follow. First, insofar as “intent” of this kind is often easy to recognize but always difficult to prove, Harris’s proposed modification would effectively neuter protections against contract-flipping altogether, returning countless frontline workers to a state of indefensible precarity. (Indeed, given that contracting-out for the purpose of undermining collective bargaining rights was already a prohibited unfair labour practice long before the 2019 amendments,¹⁷ the substance of Harris’s proposed modification amounts to nothing less than a wholesale repeal of those amendments – a return to the *status quo ante* in which contracting-related mischief was free to flourish except in those rare instances where sufficient evidence of anti-union animus could be obtained.)

Second, even assuming (naively) that nefarious contract-flipping would remain suppressed, those workers impacted by truly “innocent” re-tendering would find themselves relatively disadvantaged for no principled reason.

And third, Harris’s proposed amendment would of course invite a flood of litigation over the true motivation behind any re-tendering decision, needlessly taxing the resources of unions, employers and the Board.

4. Sectoral certification

In HEU’s initial submission, we recommended that a single-issue commission be struck to examine possible Code amendments that might provide for broader-based bargaining through sectoral certification or some other means.

We note that numerous stakeholders have also offered detailed and occasionally impassioned submissions on the topic of sectoral certification, both in favour and against. While we do not intend to engage with the substance of those submissions in this reply, we suggest that their quantity and character speak to the importance of the topic and underscore the need for a dedicated review.

¹⁶ Ibid.

¹⁷ See, e.g., *Nanaimo Seniors Village Partnership and Well-Being Seniors Services Ltd., Re*, B221/2005 (BC LRB), at paras 131-134 (leave for reconsideration refused, B297/2005).

We also note that during oral presentations on April 5, 2024, the Panel raised the issue of whether broader-based bargaining might be achieved through amendments to the *Health Authorities Act*, RSBC 1996, c 180 (the “HAA”). As described in our initial submission, the HAA enables a form of sectoral certification in the health sector. Unfortunately, this scheme extends only to hospitals and certain other designated employers,¹⁸ the employees of whom must be included in one of the six statutory bargaining units provided for in Part 3 of the HAA. Although in principle this scheme could certainly be expanded to capture the entirety of the unionized workforce providing direct care and support services in British Columbia, in practice successive provincial governments have declined to do so. As a result, unionized health employees of many direct employers and contractors remain outside the sectoral certification regime, covered by a multitude of inferior and inefficient stand-alone collective agreements. Assuming (without agreeing) that these employees, for whatever reason, would not appropriately be included in one of the HAA’s six statutory bargaining units, they should still have access to some form of broader-based bargaining – something that could likely be best achieved through amendments to the Code.

5. Expedited arbitration under Section 104

Several stakeholders have criticized the Code’s expedited arbitration provision, claiming, among other things, that it is an inappropriate vehicle for generating precedential decisions;¹⁹ that it should be inaccessible to parties whose collective agreements already contain “dispute resolution processes akin to Section 104”;²⁰ and that it can be used for strategic purposes “rather than as a bona fide methodology for the quick and efficient resolution of outstanding matters in the workplace.”²¹

HEU disagrees. In our assessment and experience, access to binding, precedential rulings on an expedited basis is unquestionably a net good, allowing parties to conclusively resolve contentious workplace issues with minimal delay and uncertainty.

While the expedited processes found in many collective agreements in British Columbia (including numerous to which HEU is a party) are eminently useful, they are often quite limited in scope – this both by design and by agreement. We can see no compelling logic in the suggestion that the existence of such negotiated processes should deprive parties of access to Section 104, a qualitatively different process in numerous key respects, including, for example, the scope of matters that can be addressed and the availability of a settlement officer.

In HEU’s view, there is a real danger that predicating access to Section 104 on the elimination of negotiated processes will incentivize just that.

Stifling access to Section 104 to tamp down on alleged misuse would be similarly counterproductive and unwarranted. The benefits of quick and conclusive resolutions are so widely acknowledged as

¹⁸ These designated employers are identified in the Health Care Employers Regulation, BC Reg 427/94.

¹⁹ Community Social Services Employers’ Association of BC submission at p. 2.

²⁰ Ibid.

²¹ Harris submission at p. 5.

to be axiomatic; indeed the Code itself expressly implores the promotion of “conditions favourable to the orderly, constructive and expeditious settlement of disputes.”²²

Finally, we would note that the volume of referrals under Section 104 has been generally steady over the years and if anything is trending slightly downward, with a six-percent decline in 2023 compared to the average of the previous five years.²³

6. Picketing

On the topic of secondary picketing and the Code’s definition of a “strike”, HEU fully endorses the submissions of both the BC Federation of Labour and the BC General Employees’ Union.

Without duplicating those, we would simply emphasize the deleterious effect of ss. 65(3) and (8) of the Code in the private long-term care sector, where, as described in our initial submission, complex corporate structuring presently allows large multi-site employers to insulate their broader operations from labour action at a single location. This current reality is both unjustified and, in our view, unconstitutional.

All of which is respectfully submitted.

Yours truly,

A handwritten signature in black ink, appearing to read "Bueckert", with a stylized flourish at the end.

Lynn Bueckert
Interim Secretary-Business Manager

²² Code at s. 2(e).

²³ BC Labour Relations Board Annual Report, 2023, at p. 54.

Supplementary Submission to the Labour Code Review Panel

Sandra Banister, K.C.

Michael Fleming

Lindsie Thomson

Via Email: lrcreview@gov.bc.ca

Independent Contractors and Businesses Association



May 17, 2024

Supplementary Submission to the Labour Code Review Panel

Independent Contractors and Businesses Association (“ICBA”)

ICBA appreciates the opportunity to provide this supplementary submission to the Labour Code Review Panel (“Panel”). The main purpose of this supplementary submission is to respond to several points raised by the BC Federation of Labour and other union-affiliated groups in their previous submissions to the Panel. This supplementary submission also includes an Appendix that provides additional economic background material that may be relevant to the Panel’s deliberations.

Various unions and groups affiliated with organized labour have filed extensive submissions with the Panel. In the time available to review these, we have chosen to consider and present the information and arguments advanced herein. We have focused this Supplementary Submission on a few key areas where the BC Federation of Labour and certain other union-affiliated groups are seeking to have this Panel recommend measures that will further unbalance and distort labour relations in BC, at a fragile point in time for the province’s economy.

Many of the union-backed submissions make broad (and often hyperbolic) claims about changes to workplaces in the short period since the Panel’s last review (2018). However, they consistently fail to explain how the supposed changes in BC workplaces support the sweeping modifications to the *Labour Relations Code* they are seeking.

For example, the BC Federation of Labour (the “BC Fed”) makes the general statement that, “In the five years since the previous review of the *Labour Relations Code*, our world and workplaces have changed significantly.” The BC Fed explains what it means by referencing the rise of on-line food delivery services and ride-hailing, increased use of remote work, and some early developments in artificial intelligence. Yet the structure of the province’s economy and the composition of the overall labour market have changed little since 2018. Based on Statistics Canada’s latest data¹, the share of GDP accounted for by various industry sectors in British Columbia is similar to what it was a half-decade or so ago, apart from the continued shrinkage of the forest products industry; nor is the distribution of employment across BC industries much different, except for the fact that public sector jobs have been growing 4-5 times faster than private sector employment since 2019.²

The BC Fed submission then segues into a call for sectoral bargaining models, without providing any compelling or substantive link to the “significant workplace changes” it has identified. This is but an example of the tenuous logic being used by organized labour to justify further upsetting the balance in labour relations.

¹ Statistics Canada, “Gross Domestic Product at basic prices, by industry, provinces and territories, by percentage share” Table 36-10-0400-01, released May 1, 2024.

² B.C. Economic Review and Outlook, Business Council of B.C., February 15, 2024.

Losing Sight of Employee Rights

A review of the union-affiliated submissions also reveals a profound gap in organized labour's rationale for seeking the changes being suggested. Time and again, these proposed changes not only ignore the need to protect employee choice -- in some cases, the unions' recommendations also seek to prevent employees from being able to exercise any choice about whether they wish to be represented by a union.

Many of the proposals advanced by the union movement conflate "employee" or "worker" rights with trade union rights. These are not the same. The BC Fed's proposals claim to be addressing "worker" rights, but then argue in favour of removing worker choice in various ways. Rather than advocate for workers' rights, they seek to control the choices of workers. When one follows many of these union-related submissions to their logical conclusion, essentially what the proponents are saying is that employees do not know what is best for them -- and union leaders do. We urge the Panel to reject this paternalistic approach to labour policy and employee rights. There is a reason why the current Section 2 duties in the *Code* expressly distinguish between employee and trade union rights. We submit that the Panel should continue to respect this distinction.

Sectoral Bargaining and Certification

Many union-backed submissions have urged this Panel to recommend the implementation of sectoral bargaining and certification, in some cases after a body is established to consider the best ways of doing so. We respectfully submit -- as we did in our earlier submission -- that the Panel should reject such a path and carefully consider the far-reaching consequences of any such policy change.

The broad imposition of sectoral bargaining and certification would have a profound and potentially destabilizing impact on labour relations in British Columbia. There are reasons why these models have not been adopted in *Wagner* Act jurisdictions, many of which were outlined in our prior submission to the Panel.

Some of the arguments that organized labour is now making seek to address the fact that, as noted by the Panel in its 2018 Report, British Columbia would be an outlier in North America should it adopt sectoral certification. The arguments advanced fall short of providing a convincing justification for such a significant change to labour relations.

Some have argued, as the BC Fed has done, that "enterprise bargaining has left many workers behind, unable to exercise their Charter bargaining rights".

There is no evidence of this.

Rather, these submissions simply suggest that a lack of union representation at an enterprise is *ipso facto* evidence that there must be some barrier to employees wishing and arranging to have a union represent them. There is, of course, no foundation to such an assertion, and it speaks

once again to the vein of paternalism that infuses many of the BC Fed's recommendations. There is a consistent unwillingness to recognize the possibility that, in certain workplaces and work settings, employees may have no interest in ceding their workplace autonomy to a third party. When this lack of interest among employees is conceded, the view appears to be that it is misguided to the extent that the ability to even make such a choice must be removed from them.

The BC Fed has supported its submission on sectoral bargaining with a lengthy appendix entitled "*Economic Benefits of Sectoral and Broader-Based Bargaining*" (the "BC Fed Appendix"). A review of the BC Fed Appendix reveals that it rests in large part on the premise that expanded collective agreement coverage is inherently and wholly beneficial, and thus that anything that achieves this is presumptively to be viewed as good policy, regardless of any other policy or employee choice issues that might arise.

The BC Fed Appendix sets out submissions that fall within three general categories. These are (1) a comparison to other jurisdictions; (2) a general assertion that extended bargaining coverage is good; and (3) some purported specific advantages resulting from sectoral bargaining.

While lengthy, these submissions provide no actual policy foundation for a consideration of sectoral bargaining in British Columbia.

The jurisdictional comparison is of little assistance. As can be readily seen from page 7 of the BC Fed Appendix, true sectoral bargaining and certification exists only in certain European countries, with "some sectoral bargaining" in Japan. The BC Fed Appendix provides no examples of *Wagner Act* jurisdictions that have adopted sectoral bargaining as found in a handful for European countries.

The BC Fed Appendix then avers that, "One very strong conclusion from this international comparison of bargaining systems is that multi-employer bargaining systems of all kinds are associated with notably higher collective bargaining coverage." While this may be true, it is not itself a reason to impose sectoral bargaining. Consideration must also be given to the economic context and competitive landscape that defines British Columbia as a small, sub-national economy – one that is extensively and very closely integrated with the larger North American marketplace.³

The other conclusion that the study cited by the BC Fed makes clear, however, is that sectoral certification and bargaining are not consistent with the *Wagner Act* model of labour relations. Indeed, this model would either have to be significantly changed or abandoned altogether in favour of a European model of labour relations. The BC Fed Appendix, at page 4, appears to recognize this when it states, "However, the capacity of conventional *Wagner Act*-style collective

³ British Columbia accounts for less than 1% of the combined GDP of the U.S., Canada and Mexico. Adding together exports and imports of goods and services, and taking account of both international and interprovincial transactions, more than 80% of British Columbia's "external trade" takes place with other North American jurisdictions.

bargaining regimes to fulfil this potential [widespread collective bargaining] is being undermined by economic, technological, and political changes.”

We respectfully submit that this Panel should understand that the BC Fed is not just suggesting (as sweeping as it is) the imposition of sectoral bargaining, it is seeking to fundamentally alter the current BC labour relations regime. We further submit that it is not within the mandate of this Panel to recommend that the province’s existing labour relations model be replaced. Rather, the Panel’s mandate is to review the existing *Labour Relations Code* and make any necessary recommendations for its amendment.

The second category of submissions in the BC Fed Appendix is really just a summary of what it claims are the benefits of extending collective agreement coverage. Whatever one might think of the arguments made on this matter, they do not provide any specific basis for the imposition of sectoral certification.

Finally, the BC Fed Appendix includes a few pages that seek to justify the imposition of sectoral or broader-based bargaining systems.

More focused, coordinated bargaining and Level Playing Field

The BC Fed Appendix attempts to create a weakness out of a strength of the current BC labour relations model when it says that it would be a good thing to force different employers, with different workforces, structures, financial capacities, and other competitive realities, into a unified “one-size fits all” construct.

In reality, taking such a dramatic step would artificially create winners and losers and threaten the viability of many enterprises that employ vast numbers of British Columbians, particularly in smaller and mid-sized firms that often are unable to compete with organizations that can more easily absorb the costs related to sectorally-mandated terms and conditions of employment.

The strength of BC’s current labour relations model is that employers and employees can negotiate terms that make sense for their specific circumstances, thus ensuring both the viability of the employer and continued employment for the employees. The current model also ensures that workers at an enterprise have a meaningful say in the terms of employment that will govern their working lives.

At page 17, the BC Fed Appendix asserts that sectoral bargaining would channel “competitive pressures between firms into more useful and productive directions: instead of competing with each other to find new ways of driving down labour costs (in a “race to the bottom”), firms are steered toward more genuine improvements in efficiency, technology and innovation, to the benefit of employers, workers and consumers.” Leaving aside the lack of understanding of the marketplace that this statement evinces, what is left unsaid is that firms that have little or no available capital compared to their competitors are left to perish, along with the jobs of their employees. Nor is evidence provided that wages and salaries have been falling, generally, in BC, still less that this has been caused by the existence of non-union employers. In fact, wages and

salaries have risen steadily across most sectors of our economy, in some cases growing faster than labour productivity as measured by real GDP per hour.⁴ It is also worth noting that within Canada, Alberta has the highest average wages yet also reports the lowest overall “union density” rate of any province.

Training and Qualifications

The BC Fed Appendix asserts that sectoral regimes can facilitate stronger training programs and structures. However, it provides no evidence to support this assertion. In fact, according to Skilled Trades BC data, in British Columbia the largest and most successful sponsor of apprenticeships is ICBA. ICBA is also a leader in diversity, sponsoring more female and Indigenous apprentices than any other company, union or organization. In fact, open shop contractors in BC sponsor approximately 82% of all trades apprentices in the province. These apprentices have chosen to be affiliated with ICBA and non-Building Trades employers in order to exercise their right to be paid according to the quality of their work, receive top-notch benefits and bonuses, and to obtain the flexibility that union-mandated rules often take away.

Boost to Innovation and Productivity

The BC Fed Appendix also suggest that another strength of a regime of government-imposed sectoral bargaining is that it would lead to higher levels of business productivity and greater innovation. There is little or no evidence within North America that supports such a claim. In Canada, business sector productivity is highest in Alberta,⁵ where – as noted above – union density is comparatively low.

In business and economic circles, more has been written about productivity in the past few two years than on nearly any other topic. As we point out in our summary of economic trends in the Appendix to this supplementary submission, the Bank of Canada’s deputy governor made a remarkable statement – “You know those signs that say, ‘In an emergency, break the glass?’ Well, it's time to break the glass.” Why does productivity matter? Because the more Canadian firms innovate, the more they spend on upskilling their people and on adopting new technology, the more profitable they are and the more they can increase the size of paycheques for workers.

By every measure of well-being and competitiveness, Canada is coming up short among its global peers. So, what is going on in Canada? Last year, the C.D. Howe Institute reported that for every dollar that an American business spends on training, technology and capital—the essential ingredients for innovation—a Canadian company invests 58 cents.

Further, according to the OECD, on business investment from 2015 to 2023 Canada ranked 44th out of 47 advanced economies.

⁴ David Williams, “Which Industries Pay the Bills for British Columbia? An Update, Business Council of B.C., October 21, 2021.

⁵ Statistics Canada, Table 36-10-0480-01.

However, there is no link whatsoever between business innovation and productivity, on the one hand, and sectoral bargaining. The Panel may wish to consider that in the United States, private sector union density hovers in the range of 6-7%, compared to 17-21% in most Canadian jurisdictions; yet US business sector productivity, as proxied by the value of output per hour using purchasing power parity exchange rates, is roughly 25% higher than in Canada. The relatively weak presence of unions within the US business sector has not prevented America from becoming a top-performing country on measures of both productivity and innovation.

Application to Non-Standard Employment

Much is made of non-standard or “precarious” employment arrangements. However, it does not follow that the imposition of sectoral agreements is necessary to address some of the issues that may arise in these circumstances. Other steps are being taken by BC policymakers with the *Employment Standards Act* that can more appropriately target these emerging issues. If there are specific amendments to the *Code* that need to be considered regarding “precarious” work, then this can be done. The wholesale imposition of sectoral agreements on varied work and contractual arrangements is not a sensible answer. Sectoral arrangements, in our view, would reduce employment options and opportunities by rendering many small and mid-sized firms non-competitive and at risk of going out of business.

Macroeconomic Outcomes

The BC Fed Appendix refers to and cites for support the OECD study, which once again is focused on Europe and the “co-ordinated systems” that are primarily found in those countries. The alleged better economic outcomes are specific to those countries with those labour models. We do not believe the tentative and contestable findings of the OECD’s paper are relevant or at all persuasive in the British Columbia context. For one thing, BC’s primary trading partners and main competitors for business investment, business growth, market share, and skilled labour are other Canadian provinces, the United States, and a handful of East Asian countries, not countries in Europe. Scholars have long recognized that the details and characteristics of geographic location matter to the economic growth and prosperity of small jurisdictions like BC.⁶

Perhaps even more noteworthy is that this same OECD study referenced by BC Fed found that collective bargaining coverage declined in many OECD countries between 1975 and 2018, but “was relatively stable in Canada”. (OECD 2019, p. 15). This, of course, undermines the purported rationale for imposing sectoral bargaining in our own jurisdiction.

Secondary Picketing

In 2018 the Panel concluded:

The restrictions on both secondary picketing and the use of replacement workers during a labour dispute were proposed by the 1992 Report which recommended the

⁶ The classic statement is Paul Krugman, *Geography and Trade*, 1991.

Code should restrict the picketing of a secondary location provided the ability to use replacement workers was also restricted. Those corresponding restrictions were intended to provide balance and enhance industrial stability. We agree that is an appropriate balance.

There has been a significant decline in person days lost due to labour disputes in B.C. since the mid -1990s. Employers maintain the Code has been an important factor in this decline. While additional factors play a role, we agree that Sections 65 and 68 have contributed to this decline. The restrictions on secondary picketing and the use of replacement workers were intended to be a package. In our view, the countervailing restrictions on secondary picketing and use of replacement workers during a labour dispute have worked well and should be maintained.

We have set out this conclusion again because the union-related submissions have mounted a direct challenge to this clear connection and balance.

It is also worth remembering that BC already has the most restrictive replacement worker provisions in Canada. As noted and understood by the Panel just a few years ago, this was quite expressly part of the policy rationale for the restrictions on secondary picketing.

Some submissions, like the one from the BC Fed, entirely ignore the balance between Sections 65 and 68. The BC Fed submission asserts that the majority of other jurisdictions in Canada do not restrict picketing in the same manner as BC, but carefully avoids any mention of this province's highly restrictive replacement worker provisions.

Other submissions at least acknowledge the well-established connection between Sections 65 and 68, but nevertheless urge the Panel to sever this link, without any evidence or meaningful policy rationale to support this very significant change to the *Code*.

The union-related submissions have provided no evidence to suggest that these countervailing restrictions have not worked well, or that anything important has changed since the Panel's unambiguous findings in 2018. To accept these submissions would render irrelevant the duties in s. 2(a), (b), and in particular (f), as these changes would allow a union to expand the dispute beyond the affected workplace and threaten the livelihoods of employees that are not involved in the dispute and that have no control over it.

Common Employers in the Construction Sector

The BC Fed and BC Building Trades submissions, among others, have recommended that the *Code* be amended to "remove the discretionary nature of common employer applications in construction."

This is both an astonishing and a revealing proposal.

As the Panel is aware, the Board's policy, when considering whether to make a common employer declaration under Section 38, is to ask whether:

- there is more than one entity carrying on a business
- they are under common control or direction
- they are involved in associated or related activities or businesses and
- there is a labour relations purpose served by declaring that the entities are a common employer

The union-related submissions, in seeking to remove the Board's discretion, are directly targeting the final question. In other words, the BC Fed and BC Building Trades are suggesting that the Board should be required to issue a common employer declaration *even when there is no labour relations purpose to do so*.

The union submissions provide no rationale for such a dramatic change, other than to say that it is sometimes difficult to convince the Board that bargaining rights have been undermined.⁷

These submissions are quickly revealed for what they are – an attempt to provide unions with an advantage over employers in collective bargaining, and to expand bargaining rights. The Board's and the *Code's* clear policy since the establishment of the modern labour relations regime in the 1970's has been that these are not goals that are consistent with Section 38 or sound labour relations policy. It has also been clear that the Board's discretion with respect to common employer remedies is central to their effective and appropriate use.⁸

We respectfully submit that this Panel should summarily reject these unions' recommendation to require that common employer declarations be ordered under the *Code* without any labour relations purpose for such an order.

Construction Raid Window

The BC Building Trades has recommended that the construction raid window should be expanded by 50%, from two to three months, by including September in addition to July and August. This would increase the annual raid period from one sixth of the year to a full quarter.

The BC Building Trades' rationale is simply that this will make it easier for them to sign construction workers up.⁹ Respectfully, this is far from sufficient foundation for such a significant change.

The raid period in British Columbia has long been a two-month window. This allows a sufficient amount of time for employees to consider whether they wish to change their union representation, balanced against the disruption in the workplace that is inherent in these types of campaigns. The BC Building Trades has provided no evidence to suggest the long-established

⁷ BC Building Trades submission, at page 5; and BC Federation of Labour Submission, at page 14

⁸ See, for example, *Baywood Enterprises*, BCLRB No. 161/74

⁹ BC Building Trades submission, at page 6

two-month raid period that applies in all sectors somehow presents a barrier to employees wishing to seek alternative union representation.

We respectfully submit that no basis has been provided for this Panel to make such a recommendation in the face of the additional disruption it would undoubtedly cause in construction workplaces.



**Supplementary Economic
Material for the B.C. Labour
Code Review Panel**

**Chris Gardner
CEO and President - ICBA**

May 17, 2024

Construction's Contribution to BC's Economy



12X

More than film and television



11X

More than clean technology



6X

More than agriculture

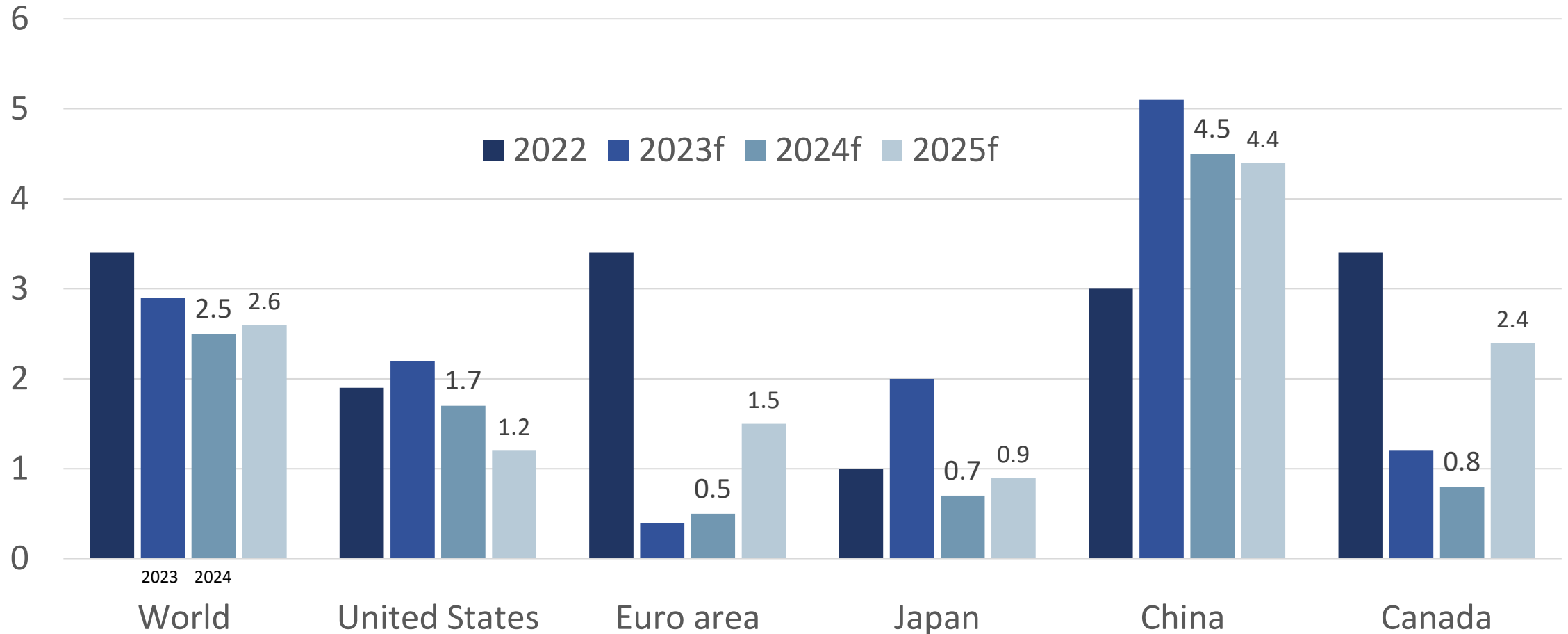


2X

More than tourism

Sluggish Global Economic Outlook

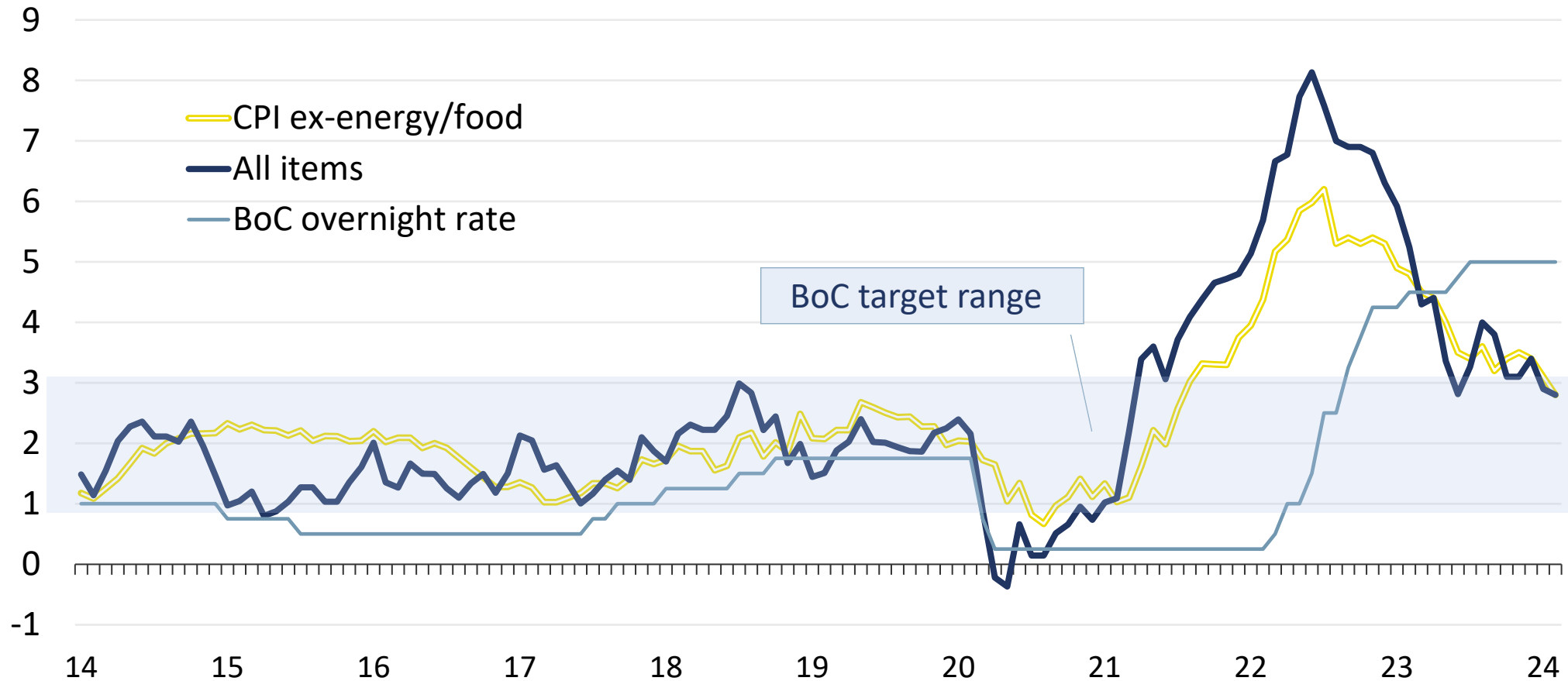
Outlook for real GDP growth, annual %



Source: Bank of Canada

Inflation in Canada Still Above Target Zone

Canada consumer price index, Y/Y % change

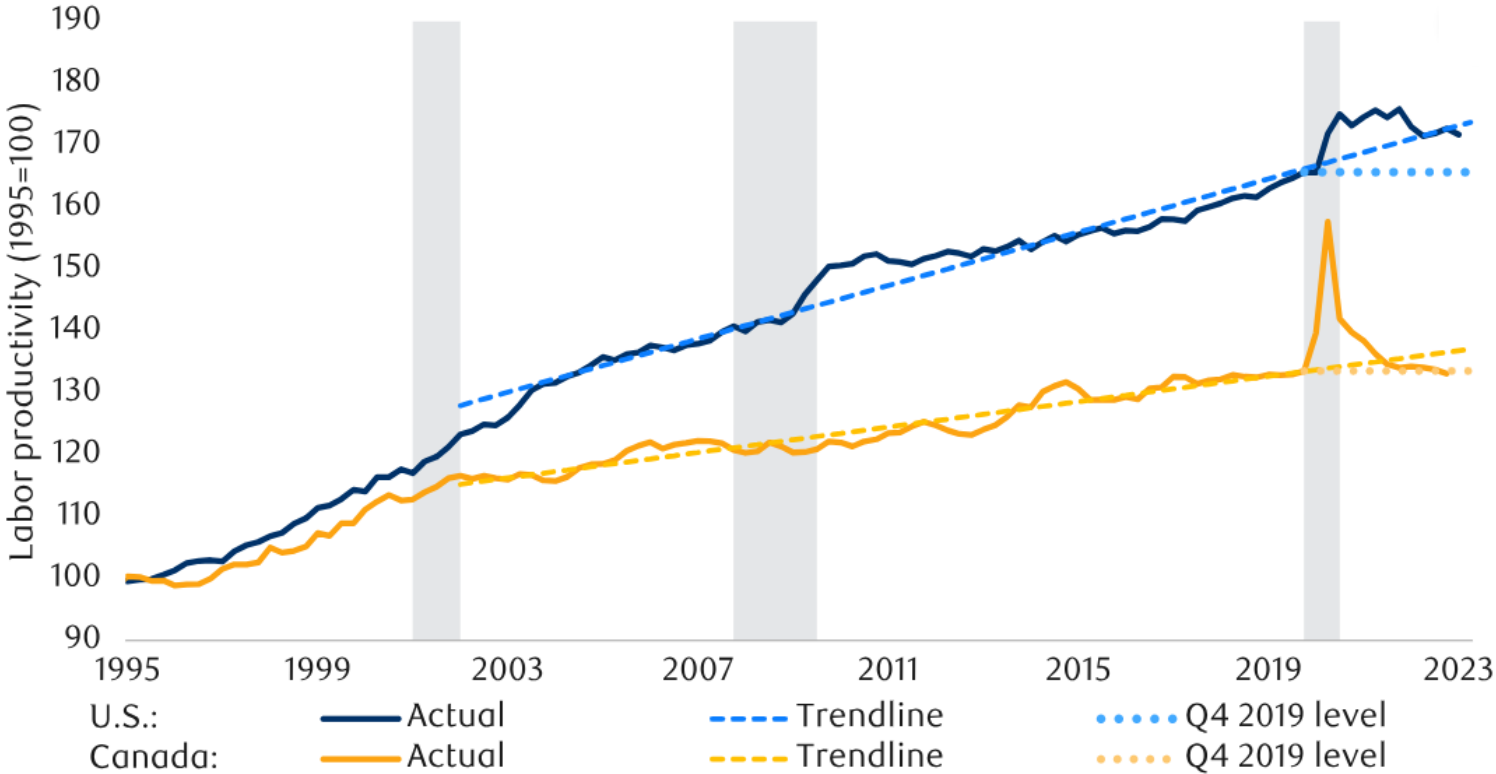


Source: Statistics Canada, Table 18-10-0004-01, Bank of Canada.



Labour Productivity

Labour productivity growth has downshifted in both U.S. and Canada– but more so here



U.S. as of Q1 2023. Canada as of Q4 2022. Productivity measured as business sector/total economy real output per hour of all persons. Trendline based on growth rate from 2002 to 2019. Shaded area represents U.S. recession. Source: Macrobond, RBC GAM



A Challenging B.C. Business Environment

- ▶ **Economic growth in B.C. slumped in 2023 and will drop again in 2024**
 - per capita GDP is *falling*....in 2024, it will roughly match the level in 2017
- ▶ **Private sector employment growth has been unusually weak...recently, but also since 2019**
- ▶ **B.C. economic growth drivers**
 - population
 - rapidly expanding public sector
 - bits and pieces of the export base, positive terms of trade, potential upside for international exports including tourism, LNG production
- ▶ **Four major energy-related capital projects are winding down (~\$100 billion of combined cap-ex since 2017)...and there isn't much to take their place**
- ▶ **Increased financial fragility in the B.C. business sector**
 - rising bankruptcies, insolvencies, 'business exits'
 - very muted overall private sector job creation and weak capital investment



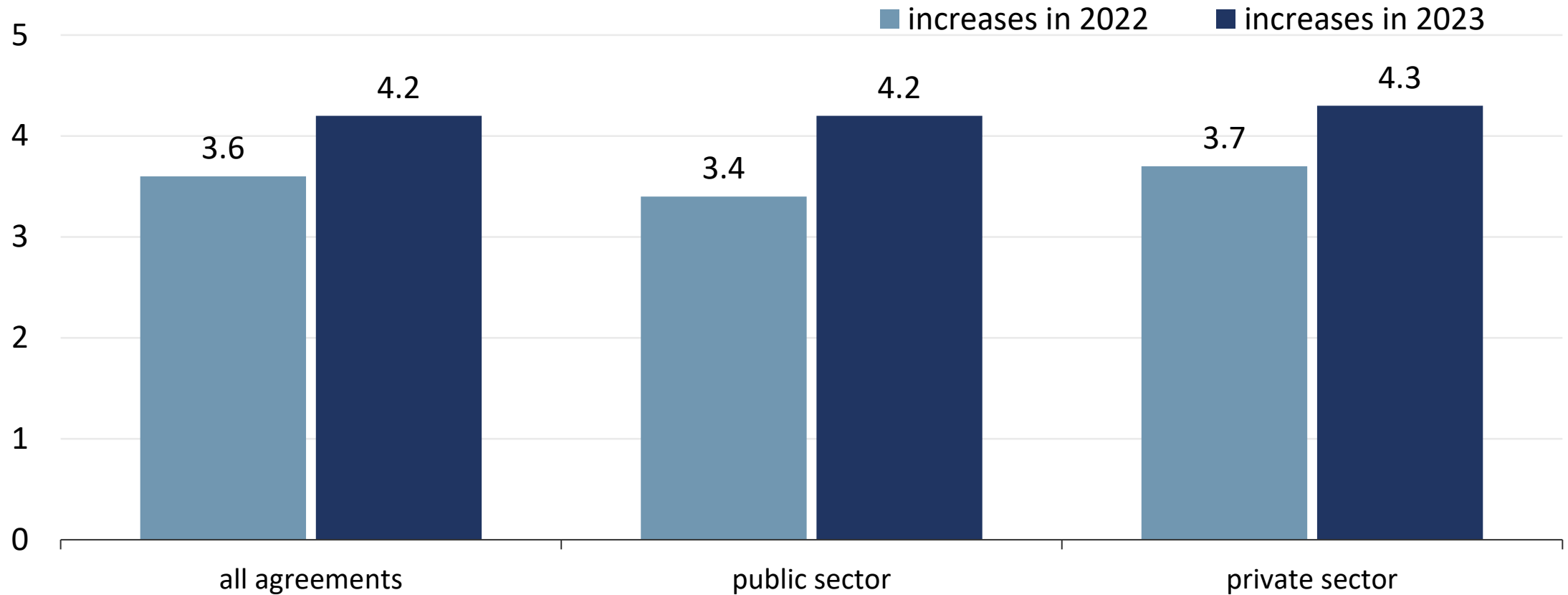
Rising Cost of Doing Business in B.C.

- ▶ Wage settlements running >4% last year
- ▶ Greater Vancouver Board of Trade estimates that from 2022 to 2024, B.C. businesses will pay a cumulative \$6.5 billion in additional direct 'government-imposed costs'. This estimate includes a handful of government measures to lower business costs. It does not include the impact of policy and regulatory changes since 2017 that have raised costs for business and industry
- ▶ Rates of new business formation have fallen in B.C....
- ▶ Important to recognize the composition of the B.C. business community – 98% of all firms have 0-49 employees. Only 2% (8,600 firms) have 50 or more employees. The 'typical' firm in B.C. with paid staff has fewer than 10 employees; most have fewer than 5



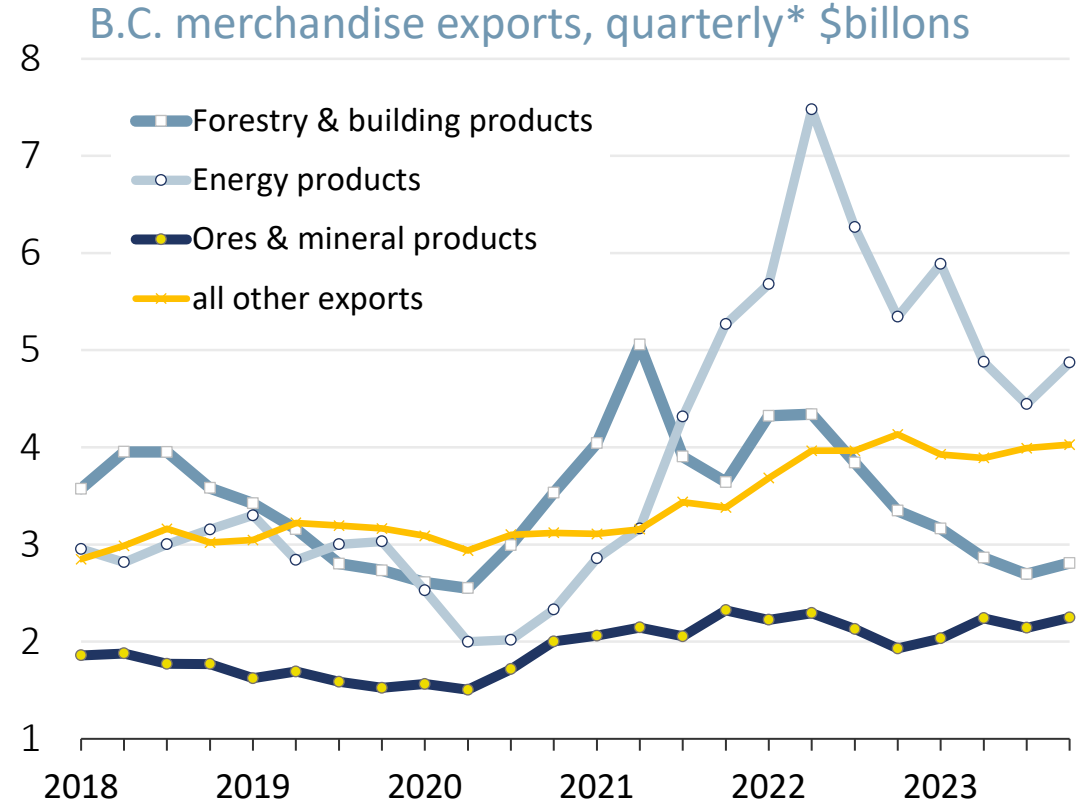
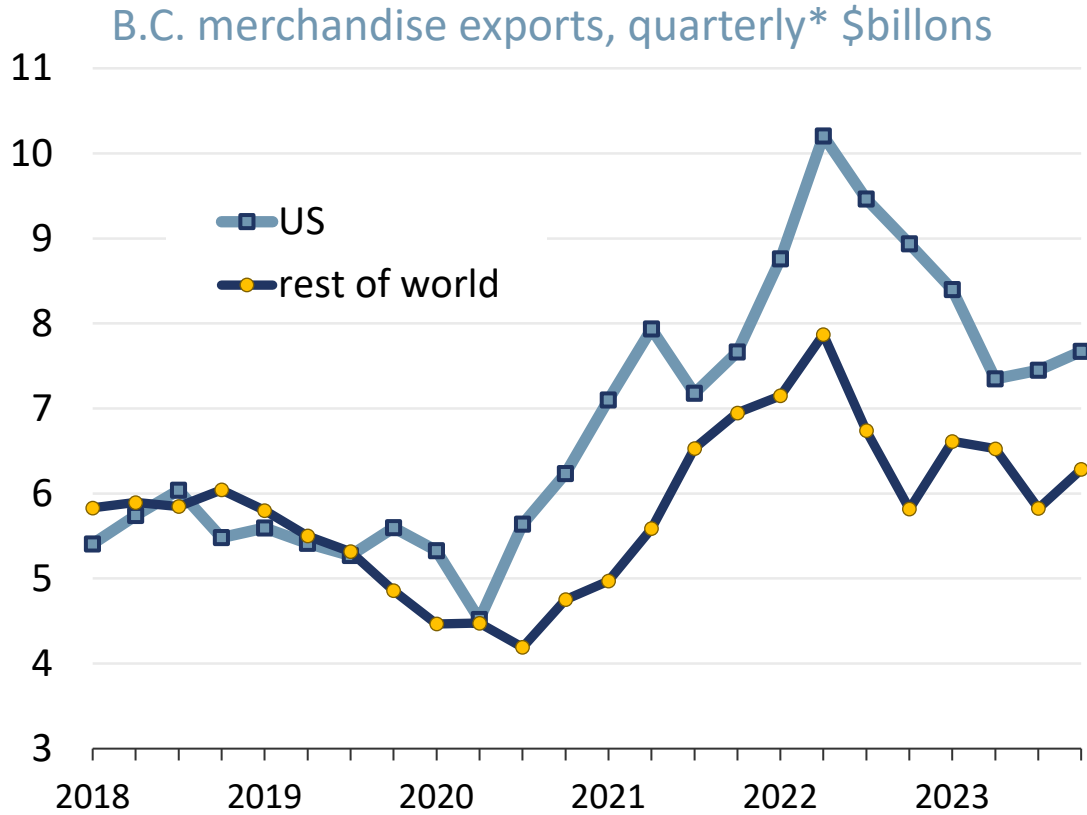
Contract Settlements Above 4%

B.C. average wage increases settled contracts, %



*Contracts settled January-September 2023.

B.C. Exports Retreat from Record Highs



* seasonally adjusted.

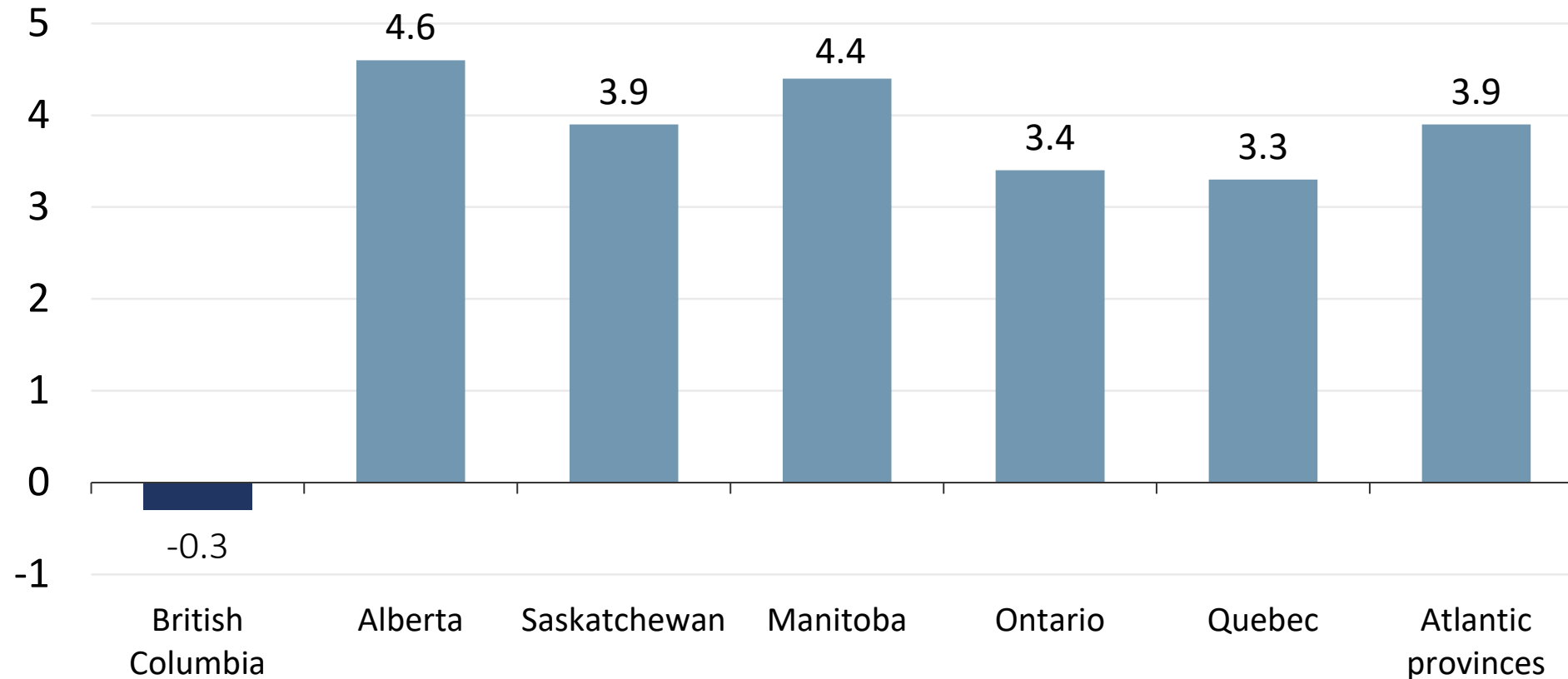
Source: B.C. Stats. Q4 2023 estimated based on Sept-Nov data.



Private Sector Shed Jobs in 2023

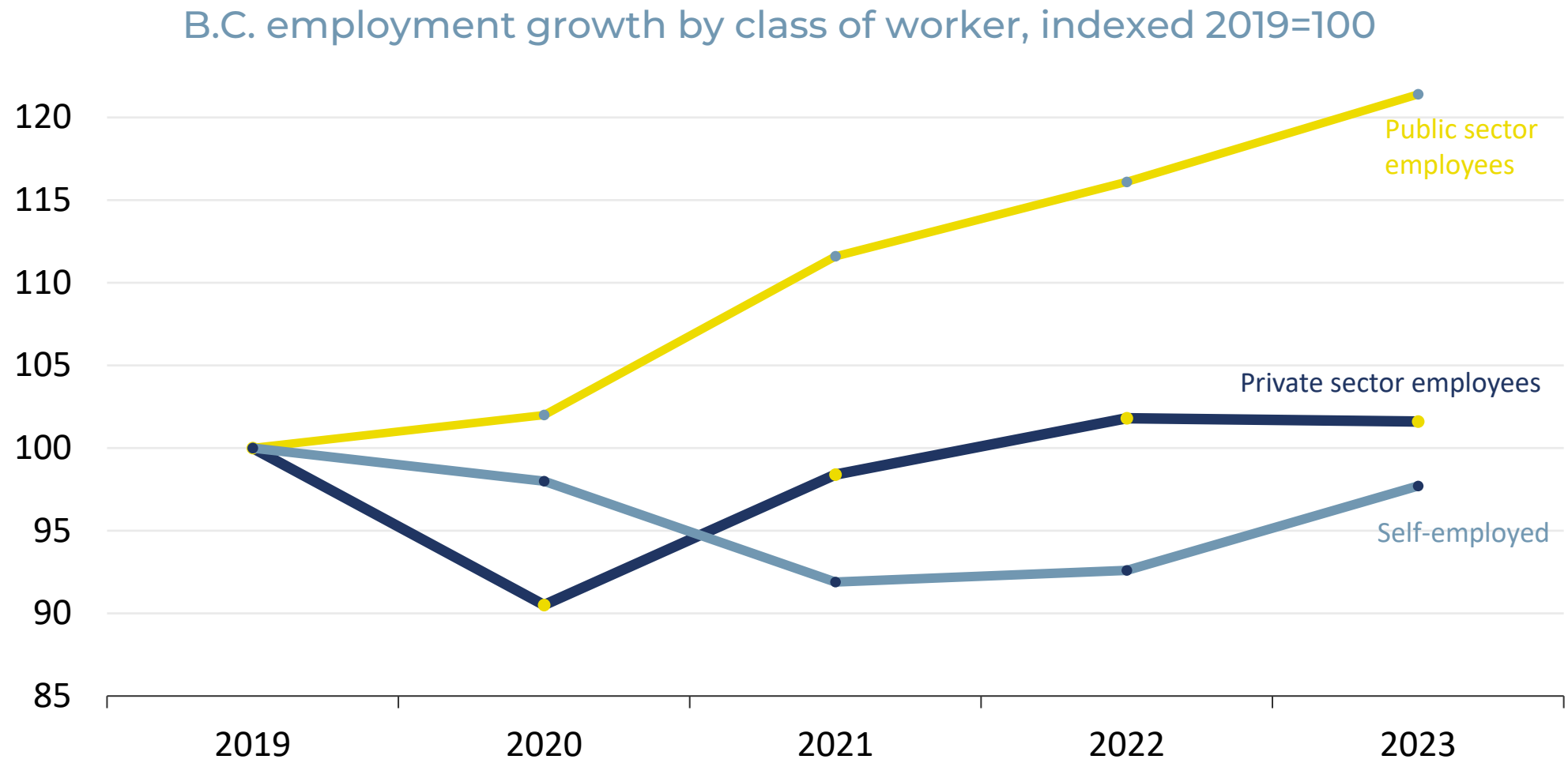
Private sector employment down in B.C. while all other provinces record strong gains

Private sector employees, growth 2022-2023 %



Source: Statistics Canada, CANSIM Table: 14-10-0288-01.

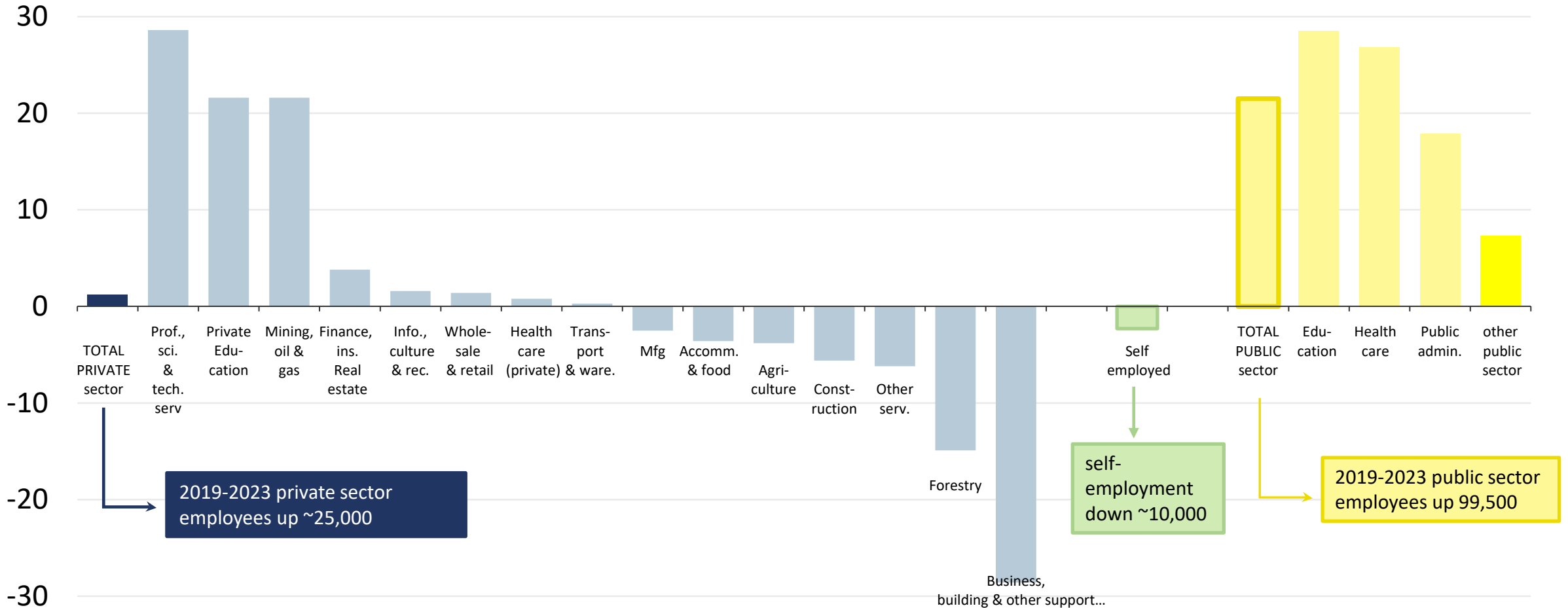
Little Job Growth in Private Sector Since 2019



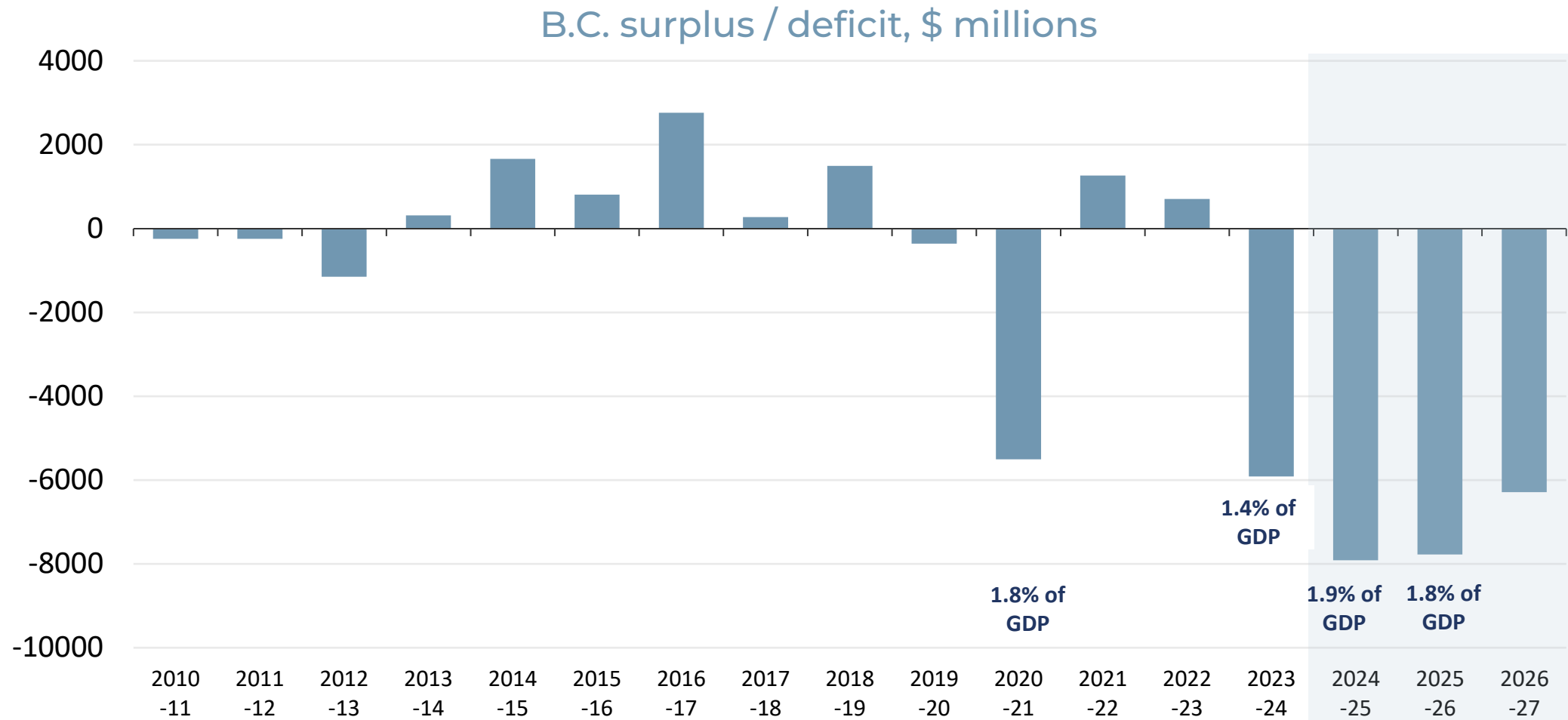
Source: Statistics Canada, Labour Force Survey. Table 14-10-0288-01.

B.C. Private Sector

Only a few B.C. industries have seen private sector payrolls increase since 2019



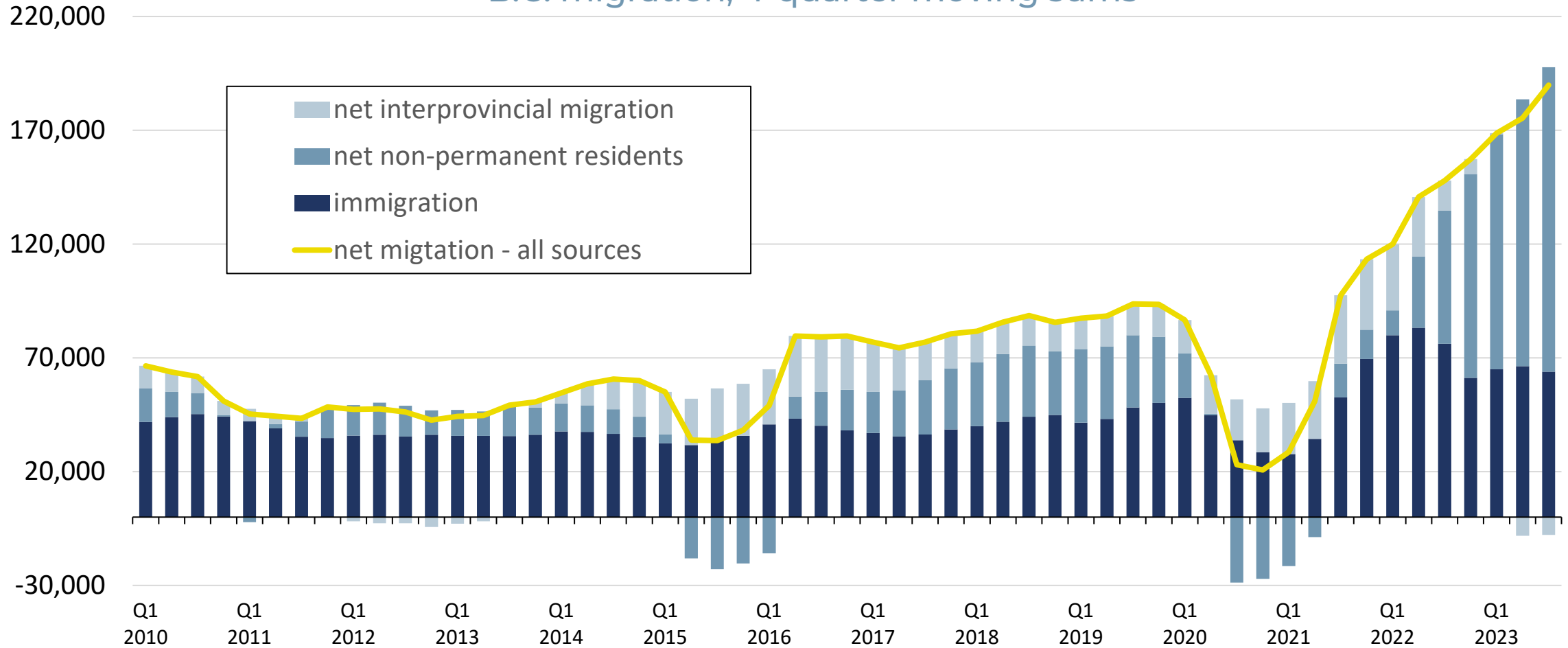
B.C. Government Planning for Record Deficits



Source: BC 2022 Financial and Economic Review and 2024 BC Budget.

Record High in Migration

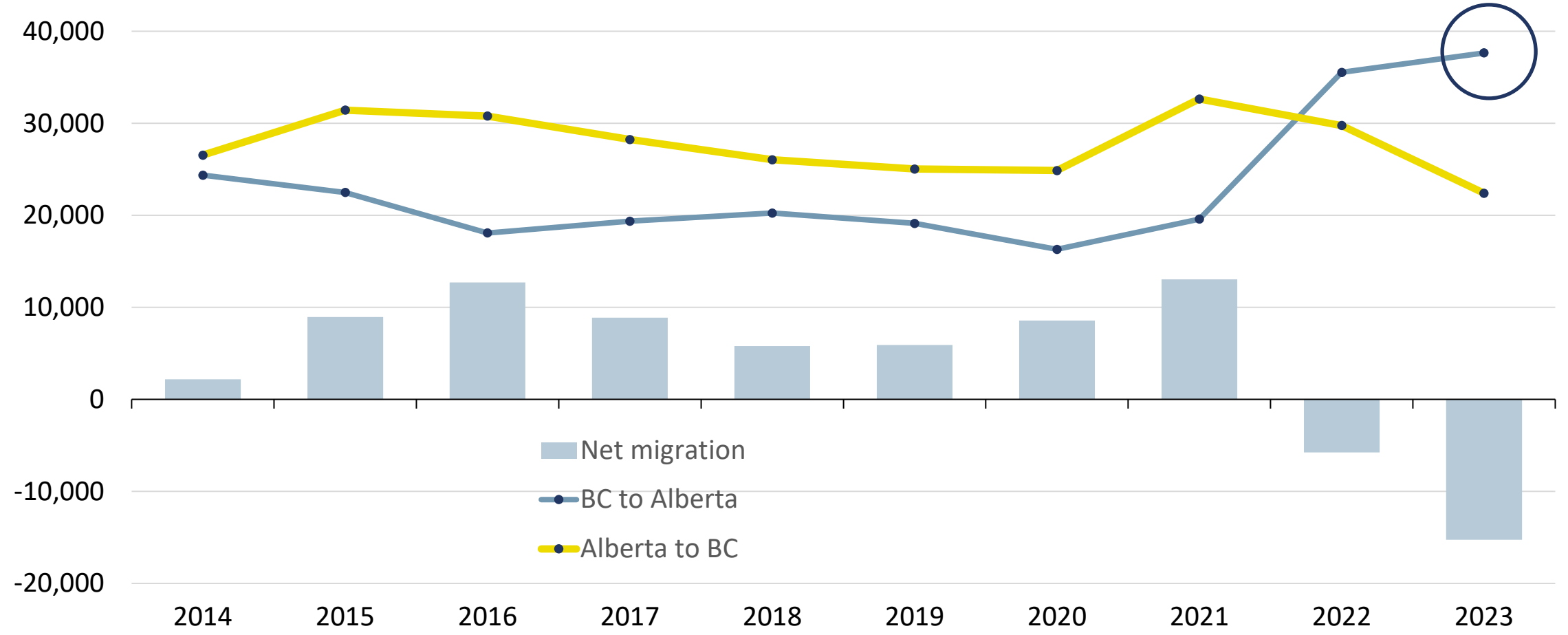
B.C. migration, 4-quarter moving sums



Source: Statistics Canada, Table 17-10-0040-01 and 17-10-0009-01 and 17-10-0020-01.

British Columbians Moving to AB in Record Numbers

Interprovincial migration between B.C. and Alberta, persons



Source: Statistics Canada, Table 17-10-0020-01.



B.C. Economic Outlook

Annual % change unless otherwise indicated

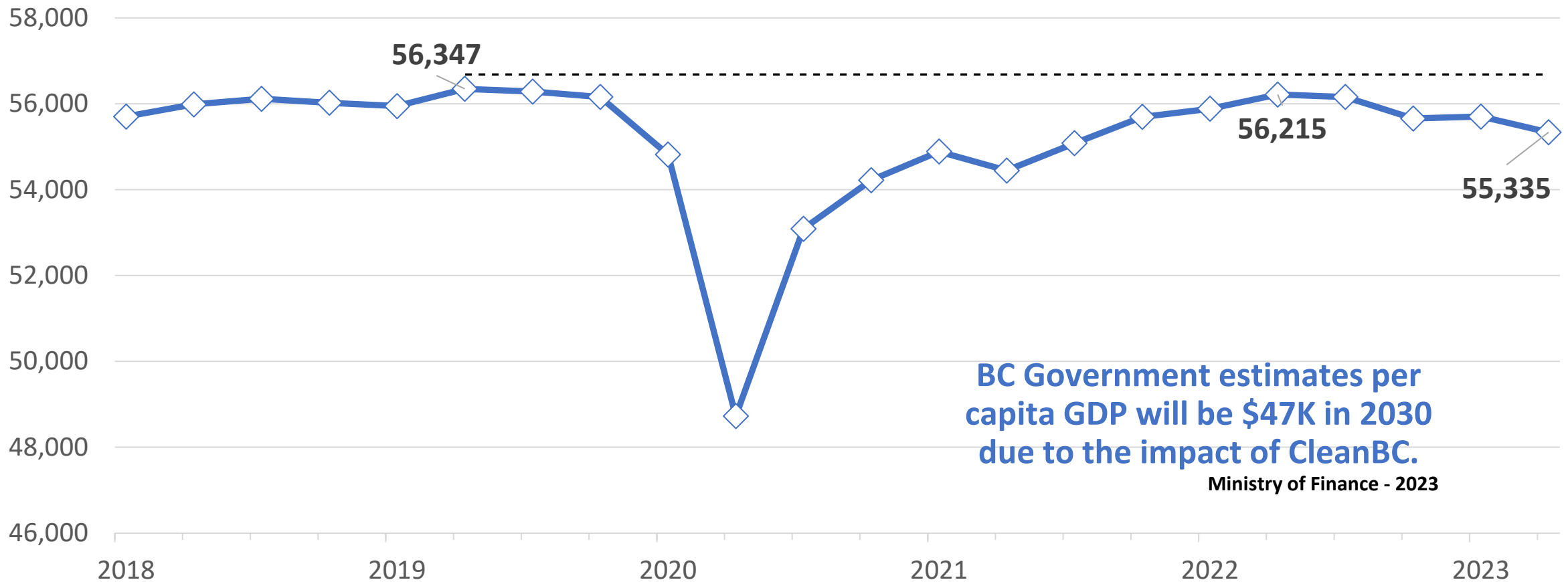
	2022	2023	2024f	2025f
Real GDP (2017 chained \$)	3.8	0.9e	0.7	1.6
Real GDP per capita (2017 chained \$)	1.5	-1.8	-1.8	-0.7
Employment	3.1	1.6	1.2	1.4
Private sector employees	3.4	-0.2	0.3	0.7
Public sector employees	4.1	4.6	3.2	2.8
Self-employed	0.8	5.5	2.5	2.2
Unemployment rate (%)	4.6	5.2	5.6	5.8
Housing starts (000 units)	46.7	50.5	46.5	46.0
Retail sales	3.1	0.9e	3.0	3.0
B.C. CPI	6.9	4.0	3.7	2.3
Population	2.2	2.8	2.5	2.3

f – forecast e – estimate

Source: Statistics Canada and BC Stats; Business Council for forecasts.

B.C.'s Per Capita GDP has Flat-lined

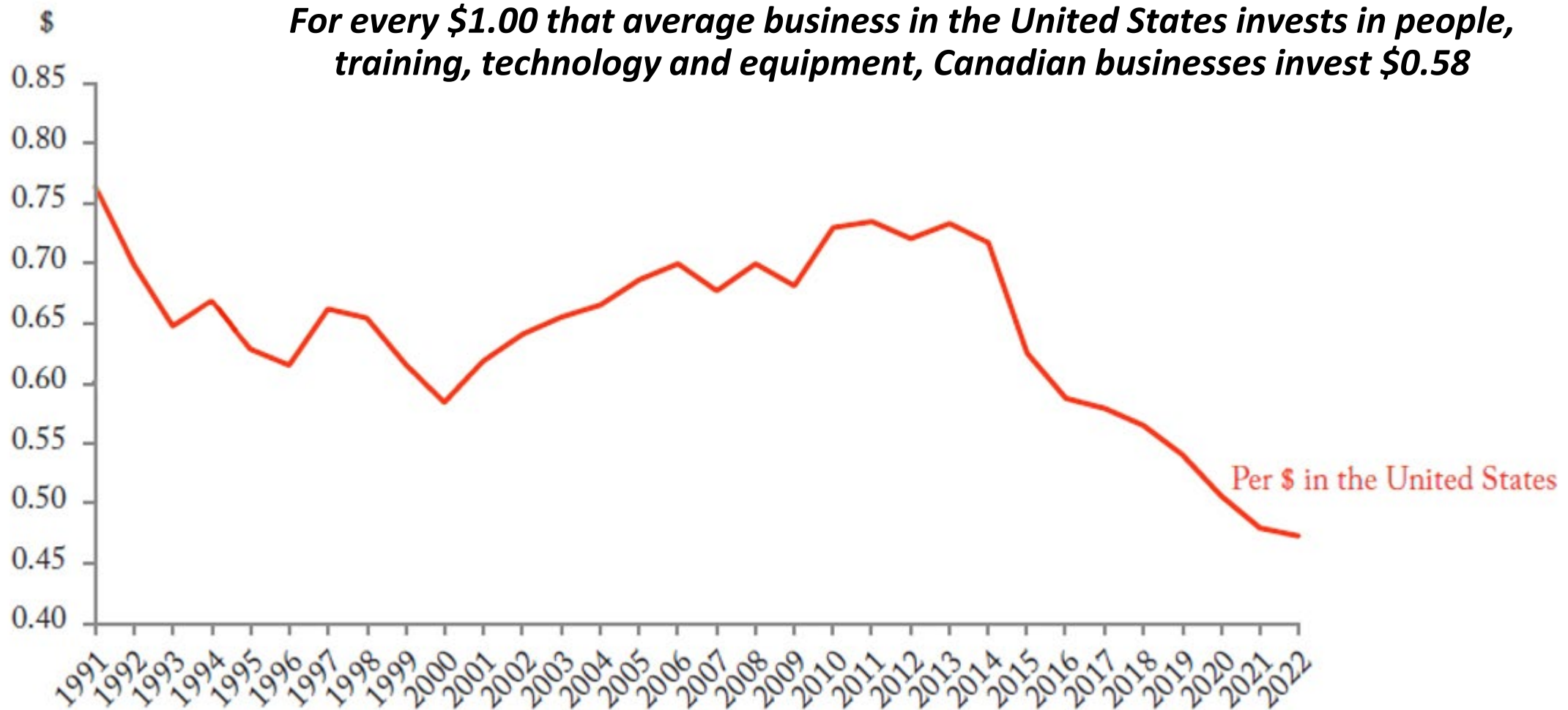
At \$55,300, it's lower than it was in 2019 before the global COVID-19 pandemic.



BC Government estimates per capita GDP will be \$47K in 2030 due to the impact of CleanBC.

Ministry of Finance - 2023

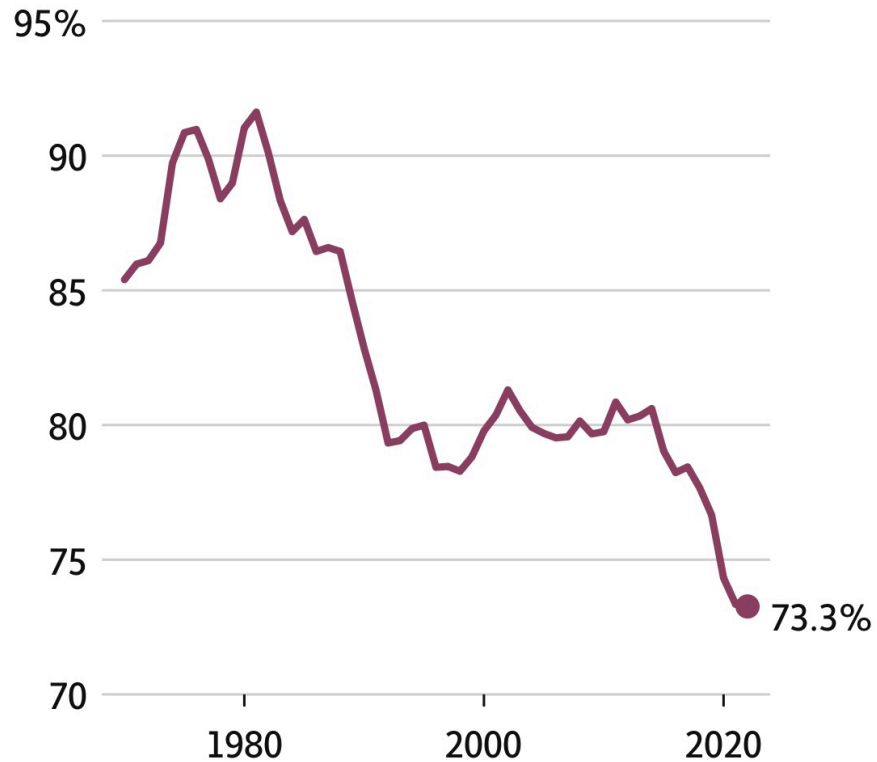
Canada Has an Investment Problem



A Tale of Two Countries – Canada’s Failing Grade

GDP per capita, Canada as a percentage of U.S.

Constant 2015 U.S. dollars, converted at 2015 purchasing power parity

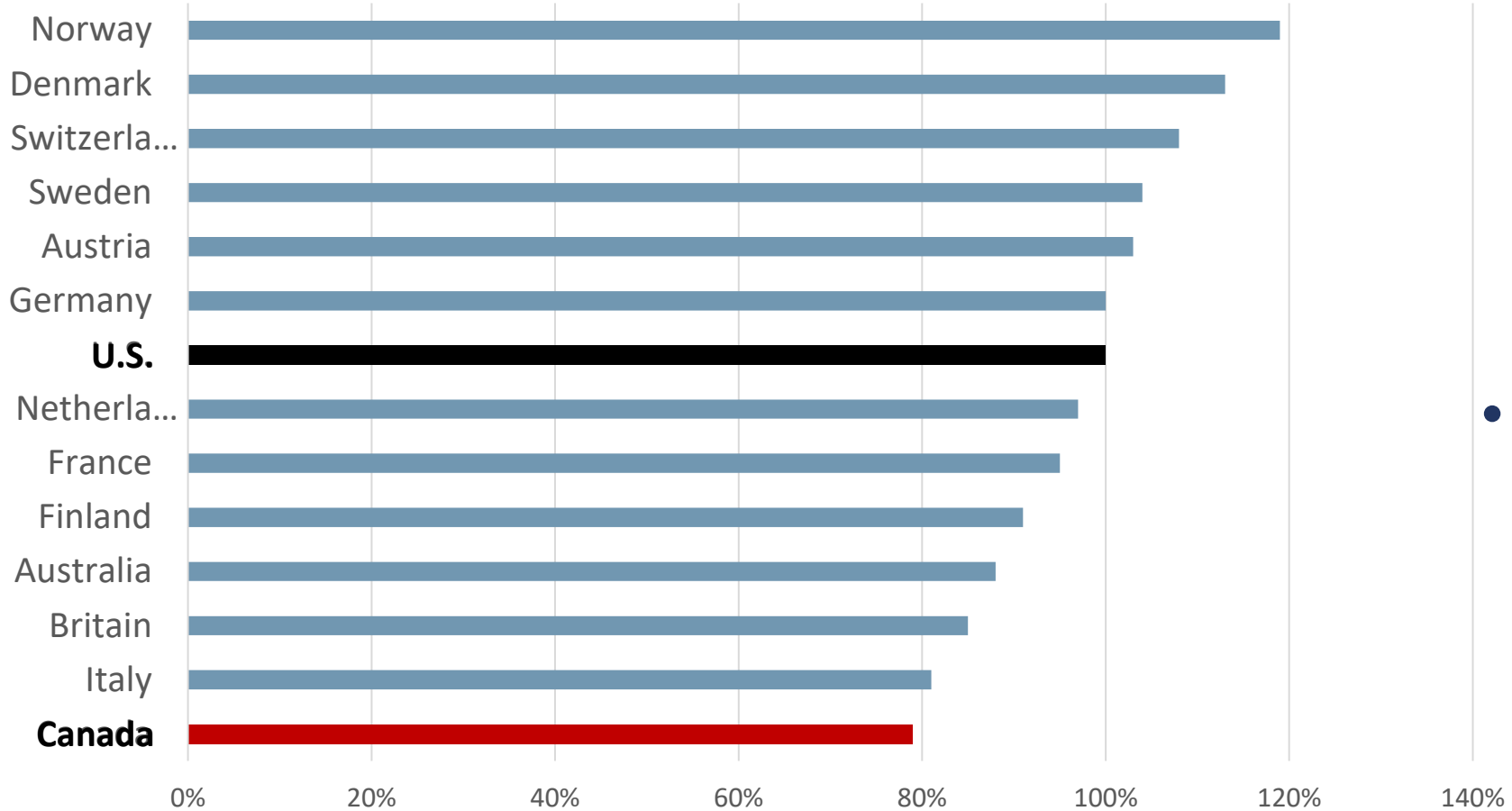


THE GLOBE AND MAIL, SOURCE: OECD

- On a per-hour basis, an average Canadian worker produced around 71% of the output of a U.S. worker in 2022 - down from 88 per cent in 1984. (BoC Deputy Governor Carolyn Rogers, March 26, 2024)
- Bank of Canada Deputy Governor Carolyn Rogers: “You’ve seen those signs that say, ‘in emergency, break glass.’ Well, it’s time to break the glass!” (March 26, 2024)
- Lagging business investment and innovation means Canadians are losing opportunities and seeing their pay cheques shrink.

Canada's Poor Productivity Performance

GDP per hour worked in 2023 as % of U.S.



Conference Board of Canada / OECD

- Where Canada's productivity ranks among 38 advanced economies:

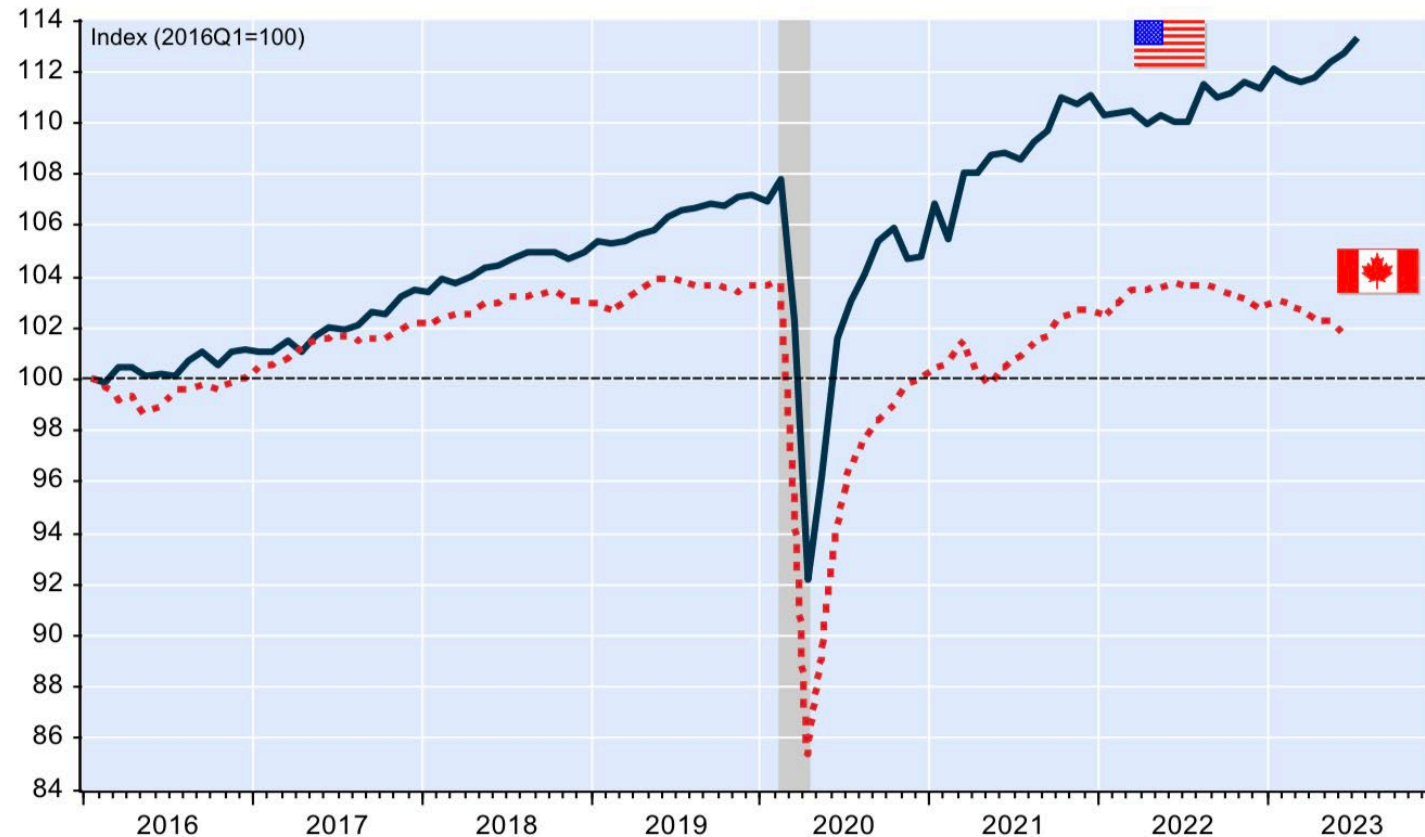
29

- In the time it takes a Canadian to produce \$1.00 of goods and services, an American produces \$1.30

Canada's Standard of Living Declining vs USA

Canada: Standard of living at a standstill

Real GDP per capita

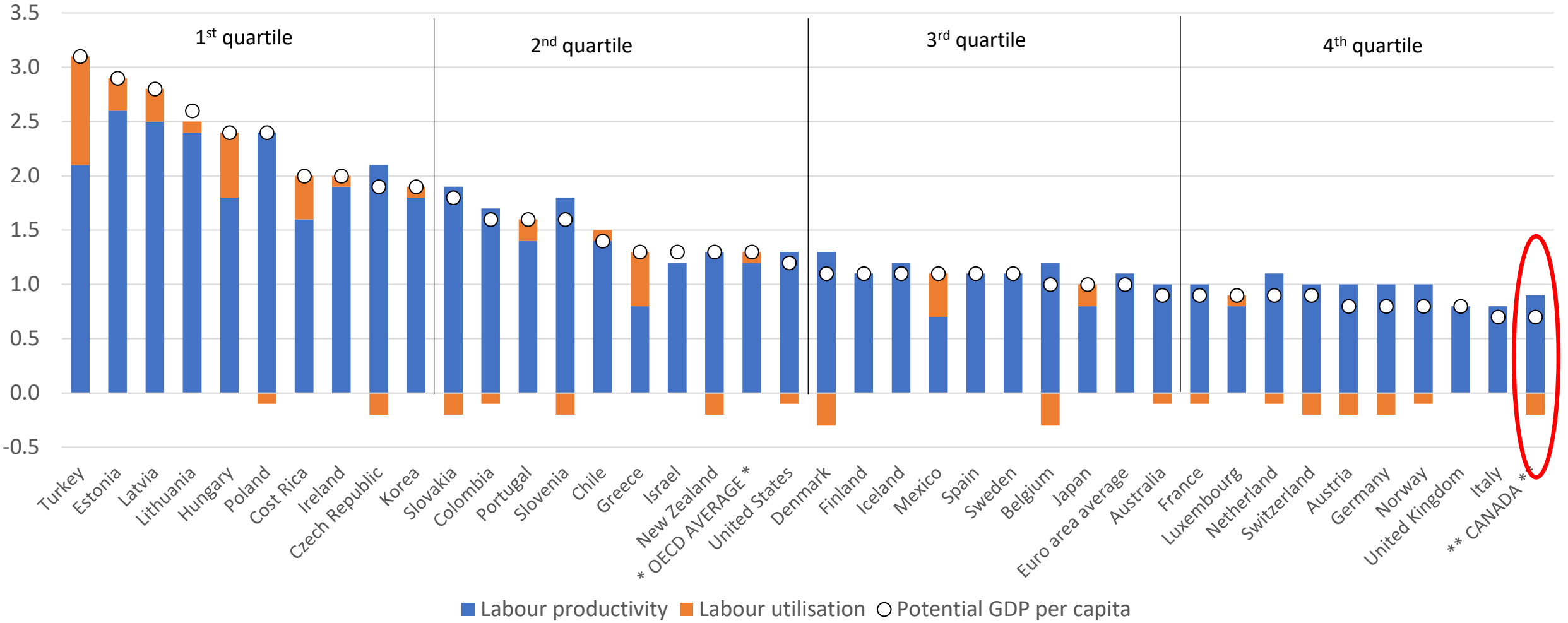


Since 2015 disposable income per person has increased by only 0.2% a year in Canada

OECD: Canada Dead Last in Economic Growth to 2030

Growth per annum (%)

Projected real GDP per capita growth - OECD countries from 2020-2030



Losing Our Competitive Edge



THE WORLD BANK



OECD



Approving Projects:
Canada Ranks #64

Business investment in
Canada from 2015-2023
44 / 47

Not Struggling to Grow: Government



- From 2020 to mid-2023: 114,000 new jobs were created in B.C.
- 94% were public sector jobs
- B.C.'s debt downgraded by two agencies – S&P stated:

“B.C.’s fiscal performance will materially deteriorate over the next 2 years”

S&P - April 8, 2024



May 14, 2024

Via Email: lrcreview@gov.bc.ca

Attention: Labour Relations Code Review Panel

Dear Ms. Bannister, K.C., Mr. Fleming and Ms. Thomson:

RE: 2024 – Labour Relations Code Review

1. Please accept this letter as a joint reply submission made on behalf of the Interior Forest Labour Relations Association (IFLRA) and the Council on Northern Interior Forest Employment Relations (CONIFER). We write in response to the April 5, 2024 reply submissions invitation regarding the review of the *Labour Relations Code* (the “Code”). We also continue to rely on our March 18, 2024 joint submission.
2. The IFLRA was formed in 1959 to represent forest companies in the southern interior of BC in collective bargaining with what was then the International Woodworkers of America, now the United Steelworkers Union (USW).
3. There are currently 10 member companies and 15 operating divisions, whose manufacturing employees (approximately 2,100) are represented by USW, Local 1-417 in the Kamloops region, Local 1-423 in the Okanagan region and Local 1-405 in the Kootenays.
4. CONIFER was formed in 1973 to represent forest companies in the northern interior of BC. in collective bargaining with what was then the International Woodworkers of America, now the USW.
5. There are currently 13 member companies and 18 operating divisions, whose manufacturing employees (approximately 2,300) are represented by USW, Local 1-2017.
6. A review of the union submissions in the April 8, 2024 eBinder demonstrates ideas and proposals that would push the *Code* to an extreme swing, past the balanced model, past union protection, and towards union advocacy and promotion.

-
7. The bulk of the unions' submissions lack objective evidence of alleged problems requiring additional provisions in favour of unions. Rather, the unions' ideas and proposals are primarily designed to make it easier for unions to operate. Further, the unions' ideas and proposals fail to consider the lack of balance and consequences on employers and "economically viable businesses", *Code* section 2(b).
 8. Unions propose a section 54 amendment to allow for adjustment plan terms to be "imposed" by a third party. Such an amendment would create an opportunity for unions to obtain results they were unable to achieve at collective bargaining, via the section 54 process.
 9. That is inconsistent with the section 2(c) duty, "encourages the practice and procedures of collective bargaining...", as unions would have a "second kick at the can" for terms they did not get (or did not seek) at collective bargaining. That is also inconsistent with the section 2(e) duty, "promotes conditions favourable to the orderly, constructive and expeditious settlement of disputes", as litigation around section 54 imposed terms would be almost inevitable and dramatically deplete the resources of the Board. Finally, there is no balance in the *Code* for employers to impose concessions from unions outside of collective bargaining.
 10. Section 62 was raised in USW Local-1937's submissions, proposing it be mandatory for employers to continue benefits during a strike or lock out where the union commits employees to repay those benefit costs. Effectively, the union's proposal is that employers become loan agencies for the employees, while the employees are on strike or locked out.
 11. It is obvious that losing access to benefits is a serious concern for many. That is why section 62 was added to the *Code*, to give unions the option to continue benefits for their members by paying the cost of the benefits. Cost is at the core of the "economic warfare" inherent in labour disputes. To buffer that cost in favour of the unions unduly tips the scales and potentially increases and extends the duration of labour disputes.
 12. Further, for employees and unions who do not or cannot repay the benefit costs, employers would need to commence grievances and/or litigation to try to recover the "loans". Rather, a more practical solution already available is for unions to save up funds to cover the benefit costs and/or be the loan agencies for their members. Employers cannot and should not be forced to pay the benefits costs while their workforce is not working due to a labour dispute and while the employers are also exposed to financial hardships associated with a labour dispute.
 13. Regarding union ideas and proposals for sectoral bargaining, including USW District 3, it is clear that such a system is complex, cumbersome and does not further the duties under the

Code. Specifically, it would disrupt the balance necessary for stable labour relations and economic growth.

14. The fact that sectoral bargaining has not been adopted generally in any Canadian jurisdiction, aside from Quebec’s system, is a strong message sectoral bargaining tips the scales too far in favour of unions. Of note, *Code* duty section 2(c) “encourages the practice and procedures of collective bargaining between employers and trade unions as the freely chosen representatives of employees”. It is implicit in this duty that individual employers are free to decide their collective bargaining strategies, which may include the decision to join an employer association. Under the sectoral bargaining model, those free decisions would be removed from individual employers who would have their voice watered-down regarding collective bargaining strategies and have a one-size-fits-all collective agreement imposed on them.
15. Since our original March 18, 2024 joint submission, Bill 9 received royal assent resulting in the change to the definition of a “strike” to permit BC unions to respect picket lines of non-BC unions “...regulated by the laws of Canada or another province who are locked out or on strike”.
16. As previously noted, this is a major change favouring unions, creating significant advantages to non-BC pickets, which the *Code* and Board do not have jurisdictional powers to resolve. Currently, the *Code* applies to BC employees, BC employers and BC unions. The *Code* permits BC unions to strike after meeting the requisite preconditions and picket at certain reasonable locations. The *Code* permits BC unions to respect those lawful BC pickets. The *Code* has common site powers to restrict the picketing of the BC union on strike.
17. The *Code* has **no** authority to regulate strikes or picketing of non-BC unions “...regulated by the laws of Canada or another province...”. Specifically, the *Code* does **not** have jurisdiction over a federal union to restrict picketing for common site purposes, meaning a common site BC employer has **no** recourse under the *Code*.
18. This a serious distress for our members, who have operations connected to federal railways and transportation. **After canvassing our Member Companies, we can advise that over 90% of our operating facilities, have or are adjacent to Federally Regulated rail lines or marine operations.** Those federal unionized employees would have an ability to set up pickets at or near our members worksites, and prevent USW employees from attending work. Moreover, in the case of pickets under the *Canada Labour Code*, there is **no** restriction on where they can go, meaning pickets could impact workplaces completely unconnected to the underling strike or lockout. Further, the Board does not have jurisdiction

to even determine if the non-BC union is properly on strike or locked out and the non-BC employer may not seek a decision from the applicable Labour Board to answer that question.

19. This is inconsistent with the section 2(f) duty, “minimizes the effects of labour disputes on persons who are not involved in those disputes”, by expanding the scope of extra-provincial unions who can now lawfully prevent BC unionized employees from attending work.
20. The timing of Bill 9, while Panel’s review process is underway, suggests the BC Government is not interested in hearing from the labour relations community or the recommendations of this Panel regarding “stable labour relations”.
21. This Panel is well positioned to detail the above serious concerns and provide a recommendation to reverse the Bill 9 amendment. Doing so will allow the *Code* and Board to fully oversee and address labour disruptions within BC’s jurisdictional scope, and avoid significant labour disruptions caused by non-BC union pickets.
22. We submit that the current *Code* is already tilted in favour of unions and no additional pro-union recommendations and amendments are warranted. Rather, recommendations and amendments towards a more balanced *Code* require reversing Bill 9 and balancing the certification process as set out in paragraphs 19 to 22 of our original submission.

Sincerely,



Jeff Roos
President
IFLRA



Mike Bryce
Executive Director
CONIFER



INTERNATIONAL LONGSHORE & WAREHOUSE UNION CANADA

180 - 111 Victoria Drive, Vancouver, BC V5L 4C4. (604) 254-8141 Fax (604) 254-8183 E-Mail: officers@ilwu.ca

ILWU Canada
#180 – 111 Victoria Drive
Vancouver, BC, V5L 4C4
President@ilwu.ca

Canada Labour Code Review Digital Picketing



**Submission By
International Longshore and Warehouse Union – Canada
(ILWU Canada) – May 17, 2024**

Reply Submission to the Labour Relations Code Review Panel

LABOUR RELATIONS CODE REVIEW PANEL

Panel Members: Sandra Banister, K.C. Michael Fleming Lindsie Thomson

By Email: lrcreview@gov.bc.ca

Introduction

1. This submission is made by ILWU Canada in response to the Review Panel’s invitation to stakeholders to provide further feedback on other submissions.
2. The submissions of stakeholders representing both employer and unions repeatedly raised the need for this Panel to consider technological changes, and in particular the issues of remote work, gig work, and digital picketing. This is unsurprising given the prevalence of remote and virtual work in BC’s economy, the proliferation of gig work and app-based employment, and the boom in BC’s tech industry.
3. This Panel has the mandate of ensuring that the *Labour Relations Code* is “keeping up with modern workplaces (...) and supporting the exercise of collective bargaining rights”.¹ Unquestionably, this requires the Panel to be responsive to technological changes impacting work, labour relations, and freedom of expression.
4. ILWU Canada shares the views of the BC Federation of Labour and the numerous other union-affiliated stakeholders urging this Panel to recommend changes to the *Code* to protect the right of workers to engage in digital picketing. Doing so is a necessary step in ensuring that BC’s labour laws guarantee *all* workers the right to exercise their *Charter* protected freedoms.
5. ILWU Canada is able to provide insight on the issue of digital picketing given its experience conducting digital picketing during the waterfront strike in the summer of 2023. This experience is described in “ILWU Canada Longshore Strike 2023: Strategies and Lessons from the Digital Picket Line”, a report prepared by Genevieve Lorenzo. A copy of this report is attached to this submission for the Panel’s review.

Recommendation

6. ILWU Canada encourages the Panel to recommend that the definition of “picketing” in sections 1(1), 65, and 66 of *Code* be amended to recognize digital picketing.
7. Adapting the *Code*’s picketing provisions to account for today’s technological realities is necessary to protect workers’ right to establish, communicate, and honour both physical and digital picket lines.
8. Specifically, ILWU Canada suggests that the definition of picketing in section 1(1) of the *Code* be amended as follows:

“picket” or “picketing” means attending at or near a person's place of business, operations or employment for the purpose of persuading or attempting to persuade anyone not to

¹ December 2022 Mandate Letter to the Labour Relations Code Review Panel

- (a) enter that place of business, operations or employment,
- (b) deal in or handle that person's product or services, or
- (c) do business with that person

and a similar act at such a place or a similar communication made in such a manner that has an equivalent purpose, but does not include lawful consumer leafletting or messaging that does not unduly restrict access to or egress from that place of business, operations or employment or prevent employees from working at or from that place of employment;

9. These proposed amendments provide recognition that electronic communications may create the “strong and automatic signal” that defines a picket line, while also maintaining the necessary distinction between digital picketing and consumer leafletting.²
10. In the context of these proposed amendments, electronic communications would constitute digital picketing only where the necessary “signal” component is present.³ This signal effect is achieved through electronic communications conveying the digital picket line directly to employees of the struck employers. For example:
 - (a) Picketing: an email from the union personally sent to a non-striking employee alerting them to the striking union’s digital picket line and asking them to respect the picket line.
 - (b) Not picketing: a sponsored advertisement on a digital platform such as Instagram, Facebook, TikTok, or Twitter, criticizing the struck employer.

Insight From ILWU Canada’s Digital Picket in the Summer 2023

11. The circumstances surrounding ILWU Canada’s digital picket line in the summer of 2023 clearly illustrate the need for clear and explicit legislative protection of digital picketing in an economy with an ever-increasing reliance on technology and remote work.
12. When contract negotiations came to standstill between the BC Maritime Employers Association (BCMEA) and ILWU Canada in June 2023, ILWU Canada issued strike notice. After this strike notice was issued, members of ILWU Local 500 and ILWU Local 517 working for BCMEA employers were asked by their employers to work remotely during the strike. In order to prevent employers from exploiting remote work arrangements to bypass picket lines, ILWU enacted a digital picket line. This digital picket line was held through social media and held concurrent to physical picket lines. The physical picket line was successful in preventing remote work from being performed, with affected members notifying their bosses that would be unable to work from home due to the digital picket line.

² *U.F.C.W., Local 1518 v. KMart Canada Ltd.*, [1999] 2 S.C.R. 1083 (“*Kmart*”) at paras 40. See also paras 41-43.

³ *KMart* at para 42

The Submissions of Employer-Aligned Organizations Highlight the Need for the *Code* to Recognize Digital Picketing

13. The BC Labour Relations Board has not yet ruled on the issue of digital picketing. Accordingly, this Panel must not give weight to unfounded suggestions from employer interest organizations that the “*Code*’s current provisions are sufficient” for attending to digital picketing and that the Board is “already dealing with this issue through its jurisprudence”.⁴ This is simply not true.
14. The submissions of organizations representing employers’ interests clearly highlight the need to amend the definition of picketing in section 1(1) to recognize digital picketing. For instance, the submissions of Harris & Company LLP illustrate how the *Code*’s current picketing language leaves space for employers to argue that picketing requires a “physical presence”. This interpretation is incorrect and misguided, but it does provide insight into how employers may exploit the *Code*’s current picketing language to restrict the ability of remote, hybrid and gig workers to picket.
15. It is unrealistic for employers to suggest that “without the act of physical attendance at a location, picketing is bereft of expression and ought not to be permitted”.⁵ Physical presence has no bearing on the quality or legitimacy of expression.
16. By this logic, videos on YouTube, photos on Instagram, and posts on Facebook are “bereft” of expression based on their existence in the digital realm. This is clearly irrational. This assertion must be dismissed by the Panel as it has no basis in law and represents a misunderstanding of the *Charter*’s protection of freedom of expression.
17. It is similarly absurd for employer-aligned stakeholders to suggest that “permitting a “virtual” picket line, which does not require the physical presence of the employees exercising their freedom of expression is contrary to the values that picketing is intended to protect in a labour relations context”.⁶
18. Freedom of expression, which has been recognized as “one of the highest constitutional values”,⁷ is the core value that picketing promotes in a labour relations context. Labour speech, including picketing “is fundamental not only to the identity and self-worth of individual workers and the strength of their collective effort, but also to the functioning of a democratic society”.⁸
19. As a *Charter* protected freedom that plays a foundational role in democratic society, the labour speech of workers and unions must not be unduly limited or restricted. However, this is precisely what the Panel is being urged to do by employer-aligned stakeholders. It is contrary to the *Charter* to amend the *Code*, as employers urge, to

⁴ Submissions of the Research Universities’ Council of BC.

⁵ Submissions of Harris & Company LLP.

⁶ Submissions of Harris & Company LLP.

⁷ R.W.D.S.U., *Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd.*, 2002 SCC 8 (“*Pepsi-Cola*”) at para 32

⁸ *Pepsi-Cola* at para 69

include more restrictive and rigid language requiring “physical presence of employees for the purposes of exercising their freedom of expression”.

CONCLUSION

20. As set out above, the *Code*'s current picketing language fails to account for the impact of technological change on modern workplaces. ILWU Canada urges the Panel to make the amendments necessary to bring the *Code*'s picketing provisions into the 21st Century.

ALL OF WHICH IS RESPECTFULLY SUBMITTED,



Rob Ashton
President of ILWU Canada
President@ilwu.ca



**ILWU Canada Longshore Strike 2023:
Strategies and Lessons from the Digital Picket Line**

Genevieve Lorenzo
Organizing and Education
ILWU Canada

SUMMARY

When contract negotiations came to a standstill earlier this year, ILWU Canada's longshore workers served strike notice to the employer. Two of the Union's Locals (500 and 517) had members who were asked by their employer to work remotely during the strike. A digital picket line was required to stop this from happening. The digital picket was held through social media, concurrent to the physical picket lines, and employed a positive, entertaining, and highly visible campaign that gained traction among the broader membership. The digital picket was successful in preventing remote work from being performed, as affected members notified their bosses that they would be unable to work from home due to the digital picket line. This effort was the first of its kind in British Columbia, so this report includes recommendations for future digital picket lines.

OVERVIEW

How does a union, whose very existence and structure is founded upon the physical spaces its workers inhabit, fight a virtual threat? The International Longshore and Warehouse Union formed in response to waterfront bosses who used their places on the docks to bribe, divide, and weaken longshore workers. The equitable distribution of work from the Union's dispatch hall formed the beating heart of the ILWU, and that tradition is maintained today as an integral part of its governance and structure. In response to an increasingly online environment, the Union has stepped up to accommodate these changes, and organized workers whose jobs focus on digital technology, such as IT technicians. It is no surprise then, that in response to a threat of virtual scab labour via remote work, ILWU quickly adapted its concept of place to include the online spaces that its membership is active in, and to use those spaces to protect the integrity of its strike.

On July 1, 2023, ILWU Canada struck a digital picket line for the first time. No stranger to making history, ILWU Canada's strike also marked the first time a digital picket was used in the longshore industry, and among unions in British Columbia.

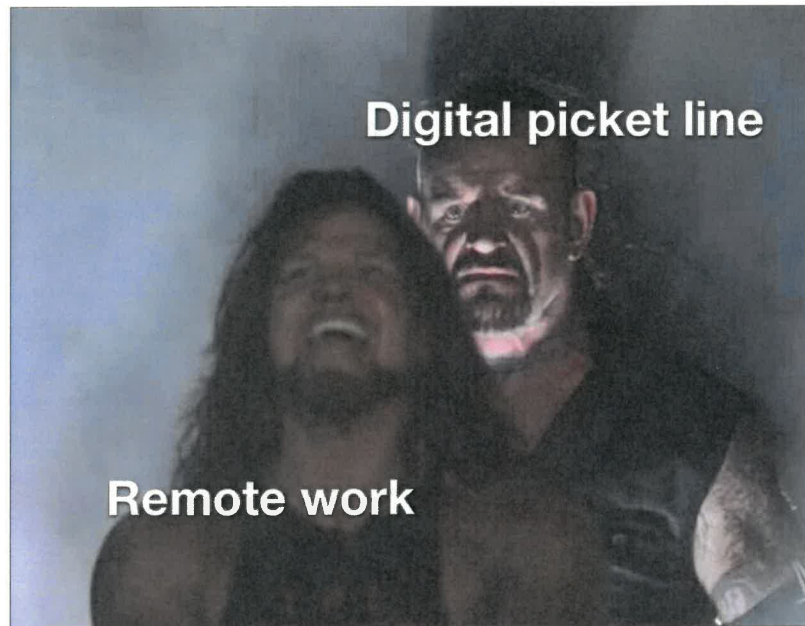
The concept of a digital picket line is not new, but it is still relatively uncommon in practice. Writing and journalism are industries that were affected early by digitization, with employers exploiting the convenience of freelance work and online spaces to drive down the cost of labour and the need for expensive physical spaces to host their workforces. Workers soon found themselves fighting against a race to the bottom in wages and working conditions. Arguably the earliest digital picket line occurred during the 2007-2008 Writers Guild of America strike¹. The WGA struck over the threat that digital distribution and streaming posed to workers' job security, increasing workload, and wage stagnation in the face of record profits for their employer, and they were on strike again in 2023 for many of the same issues. In 2016, the Halifax Typographical Union set up a digital picket line against the *Chronicle Herald*² in response to the boss employing scab labour and asked the public to stop reading and subscribing to the publication.

¹ Miranda J. Banks (2010) The Picket Line Online: Creative Labor, Digital Activism, and the 2007–2008 Writers Guild of America Strike, *Popular Communication*, 8:1, 20-33, DOI: 10.1080/15405700903502387

² <https://ourtimes.ca/article/crossing-a-digital-picket-line>

By 2018 when Uber UK workers put up a digital picket line against the app that platformed their work³, the digital economy's impact on the nature of labour around the world was profound and permanent. For gig workers like those at Uber, the request was straightforward: log out and do not use the app. For workers at universities, such as the UK's University and College Union (UCU), the 2019 digital picket encompassed day-to-day labour performed digitally, such as planning lectures, teaching online courses, electronic marking, writing or publicising papers including research or grant applications, and work applications⁴. In 2022 and 2023, Insider Union, who represents the workers at Insider publications, asked people to "not cross the clicket line"⁵ by engaging with the company's websites and news, in an unfair labour practice dispute with their employer. And in a recent case, the New York Orchestra Musicians have asked the public to support them by participating in their digital picket line on social media through sharing and signal boosting.⁶

The methods of a digital picket line may vary depending on the labour being struck, but the means are consistent with traditional picket lines held in physical spaces: Draw the boundaries, form a line, hold fast, and stay united. Do not relent. This is how ILWU Canada succeeded in its first digital picket line.



Example of a meme shared by a digital picket team member.

³ <https://www.theguardian.com/technology/2018/oct/09/uber-uk-strike-users-urged-not-to-cross-digital-picket-line>

⁴ <https://www.ucu.org.uk/article/12469/FAQs>

⁵ <https://www.insiderunion.org/business-outsider/insider-union-strike-best-picket-signs-how-to-help>

⁶ <https://www.instagram.com/p/CqjJvLehexS/>

COORDINATING THE DIGITAL PICKET

We recruited a team of 9 ILWU Canada longshore members from different locals. We looked for workers who were familiar with and comfortable using social media and had accounts on different platforms. We set up a WhatsApp group to act as our central communications hub, because this app is accessible and allows image and file sharing.

Since there had never been a digital picket in British Columbia before, our legal counsel at Victory Square Law Office (VSLO) provided us with a guide to follow. This guide included the standard legal requirements of any picket, with ground rules similar to those at physical picket lines (e.g., respectful communications, no defamatory statements), but also a helpfully thorough list of example captions that our team members could use on their posts along with memes, and social media accounts to tag. VSLO also provided us with an infographic that we could share to help explain to the broader public what a digital picket line was and how to support it (see Appendix 1). This guide and accompanying images were uploaded into a shared Google Drive that would be accessible to all team members. We used the Digital Picket Guide to train each of our team members. We spoke to each member individually and went through the guide with them, ensuring they were clear on the instructions and ground rules. Each post about the digital picket needed to have both the #digitalpicketline and #ilwucanstrike tags.

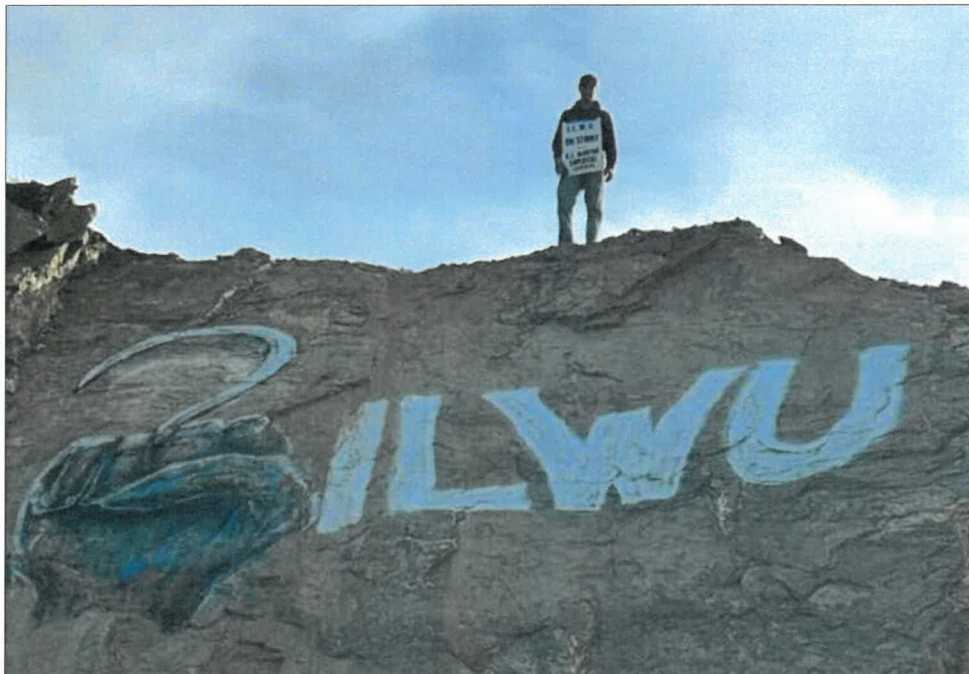


A post by a digital picket team member.

We set the picket line shifts at the same time as the business hours that our remote workers followed, which was 8am to 4pm. There were 2 shifts a day (8am to 12pm; 12pm to 4pm) with a minimum of 1 post per hour. We monitored the entirety of the digital picket line, checking in with the team members, providing updates to ILWU Canada leadership, logging each post into a spreadsheet, and relaying news when our digital picket line had been successful in preventing remote work from being performed. There were some workers who preferred to post on a continuous basis at regular intervals, while others followed their shifts as planned.

The team quickly settled into a rhythm, creating their own memes to use, which were first posted in the WhatsApp group for approval by the digital strike captains. The team also began posting photos of the physical picket lines they walked. The creative energy they fostered in this group chat was a means of encouragement and morale as the strike continued into its second week, which is when we saw an increase in posting fatigue.

We anticipated a degree of burnout and accommodated the members when they needed to take a break and step back for a time by arranging shifts to ensure coverage with the remaining team. We recruited additional team members by the second week to cover empty shifts. This ebb-and-flow structure allowed our team to maintain the energy of the digital picket to match that of the physical lines without the fear that a member taking a break would weaken our line.



A member poses in front of his painted mural on a picket line in Prince Rupert.

SUCCESS ON THE DIGITAL PICKET LINE

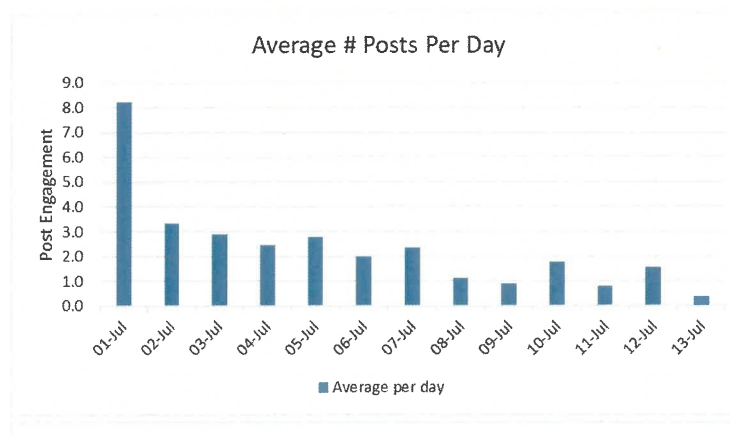
We measured our success in two ways. The first is whether any members of Local 500 or 517 performed work remotely, which we are proud to report that they did not. We learned from both Locals that members had notified their employers that they could not work remotely due to the digital picket line. We also heard that these employers were angry and threatened the Union with unfair labour practices, but these were idle threats and no complaints were ever filed.

Our second measure was the amount of engagement on the digital picket team’s social media posts, using the #digitalpicketline tag as an indication of visibility. The data available to us shows that the efforts of each team member did indeed work to increase the level of engagement by the broader membership, notably during the second week of the strike.

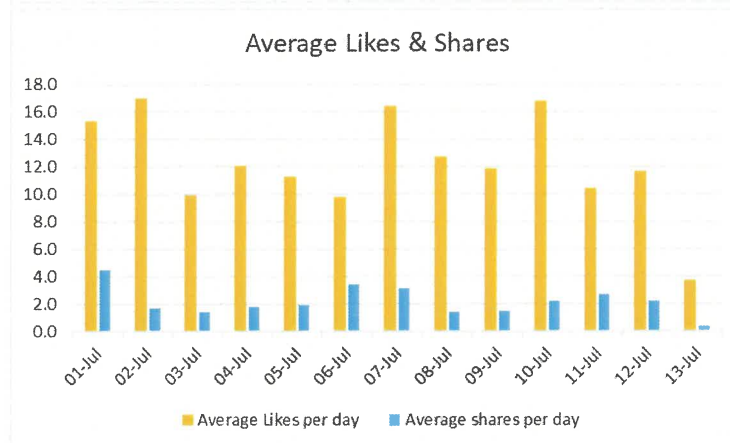
Our team made a total of 276 posts during the 13-day strike. These posts received a total of 3,279 likes and 694 shares. The first day of the strike, July 1, saw the highest engagement with 1,153 likes and 335 shares on that day alone. The last day of the strike saw the least amount of engagement, but this was expected. Interestingly, the total posts and post engagement saw a dramatic and unexplained decline on July 8, but engagement increased after July 9, likely due to the massive solidarity rally held July 9 at Jack Poole Plaza in Vancouver.

The overall trend of our team posts had a very strong start on the first week, then declined during the second as fatigue and burnout set in (graph 1). However, by the second week, the news of our digital picket had spread to enough people that there was no overall decline in the number of likes and shares that our posts received (graph 2). The collective energy of the membership buoyed the team members beyond what they could sustain on their own and we maintained a steady level of engagement.

Graph 1.



Graph 2.



DATA COLLECTION

The data were collected from the Facebook posts of the 9 digital picket team members over the course of the strike, between July 1 and July 13. The likes and shares on each post that used both the #digitalpicketline and #ilwucanstrike tags were tallied, but any likes and shares on a given post from fellow team members were subtracted from this total to more accurately represent engagement. Finally, only original posts by a team member were included, while reshares were excluded. Data was collected manually.

Team member posts were made to 3 social media platforms (Facebook, Instagram, Twitter), but only data from Facebook was included. This was due to several factors:

1. Facebook is the primary platform used by the majority of ILWU Canada's membership, where Twitter is not and Instagram skews to a younger demographic.
2. The Union frequently provides updates and information on its Facebook page and functions as a source of online information supplementary to its website, where Twitter and Instagram do not serve this purpose.
3. Engagement on Facebook posts is obvious as the likes and shares of a post are immediately visible, where Instagram shares and stories are not, and Twitter usage by members was too infrequent to provide useful data.

WHAT WE LEARNED

Posting on Facebook profiles was effective when post settings were "public", as this allowed a greater degree of visibility to the broader populace. Posting on a central business page and having team members share from this page may produce more accurate measures of reach. However, members of the team raised concerns during the second week over an apparent algorithmic decrease in post visibility, but there was no observable decrease in the overall engagement data. It is within Meta's algorithms to suppress repeated, similar content in their News Feeds⁷, and something to consider for future campaigns.

Creating and sharing memes was more work for the team but it was also an enjoyable experience, and posts with memes were more likely to be shared by others. Posting photos from the line with a caption about the #digitalpicketline generally produced more likes but fewer shares.

Organic engagement among the general membership increased during the second week, as well as within the broader labour ally community.

There is a definite benefit to signal boosting using profiles or pages with a high degree of engagement or visibility. For example, a member at large posted photos of a ILWU mural he painted with the caption: "A little Art Attack ! #ilwucanstrike #digitalpicketline #FairDeal #ilwucanada #ilwulocal505". His post on its own received 125 likes and 15 shares. When the ILWU Canada Facebook page shared his post, it received 247 likes and an additional 6 shares.

ILWU Canada's official Facebook page provided the ability to view individual post data in great detail, including the number of times it appeared in someone's Facebook News Feed ("reach"), and

⁷ <https://transparency.fb.com/features/explaining-ranking/>

engagement, defined as “the number of times people engaged with your post through reactions, comments, shares, views and clicks”. There were 2 posts from the ILWU Canada Facebook page with the hashtag #digitalpicketline:

Post 1: Announcement from President Rob Ashton that the strike had begun.



Caption: “*The ILWU Canada Longshore Division is now on strike!*

We have been working around the clock at Federal Mediation and Conciliation Services since 8am on June 30th to avert a strike.

The ILWU Canada Longshore Division has not taken this decision lightly, but for the future of our workforce we had to take this step. We are still hopeful a settlement will be reached through FREE Collective Bargaining!

The Longshore Bargaining Committee has been willing to bargain with the BCMEA since February. Unfortunately the BCMEA did not want to bargain a fair and balanced Collective Agreement!

The ILWU Canada Longshore Bargaining Committee is ready willing and able to meet to secure a Collective Agreement for the rights of Working Class!

On Behalf of The Longshore Bargaining Committee,

Rob Ashton, President, ILWU Canada

#ilwucanastrike #digitalpicketline #ilwu #ilwucanada #canpoli #bcpoli”

Results: 139 likes, 142 shares, 10,675 post reach, 535 total post engagement

Post 2: Pictures of Deltaport picket line.



Caption: “Picket line photos from ILWU Local 502 at Deltaport 0100 and 0800! Stay strong friends! Support your bargaining committee! NEGOTIATE DO NOT LEGISLATE! #ilwucanstrike #digitalpicketline #longshorevictory #ilwu #ilwucanada #canpoli #bcpoli @CBC Vancouver”

Results: 89 likes, 6 shares, 1,412 post reach, 379 total post engagement

LIMITATIONS OF DATA COLLECTION

Analytical inferences from the data collected are limited:





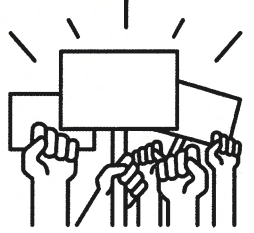
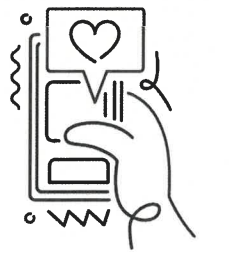
- The data comprises only original Facebook posts by team members using the #digitalpicketline and #ilwucanstrike tags, and therefore shows only first degree engagement. Given Facebook’s privacy settings, it is not possible for someone to view the posts or shares of a person unless they are on that person’s friend list or the post settings are public.
- The data presented here does not demonstrate the true reach of any single post, only the total likes and shares on the original post.

FINAL THOUGHTS

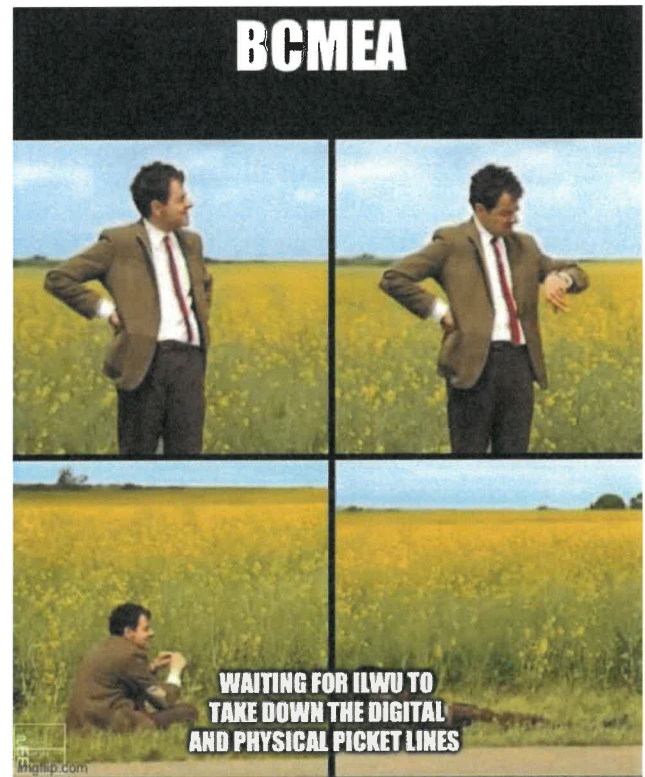
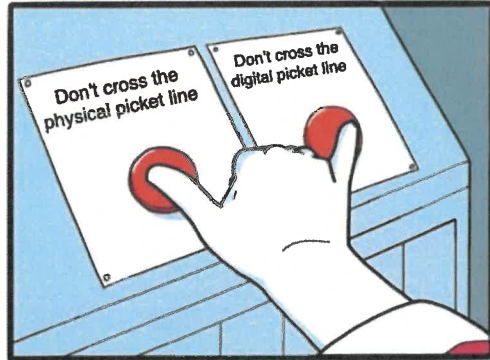
A digital picket line wrests control of online spaces away from the boss and back into the hands of the workers. It is an effective and accessible way for workers to build solidarity with each other and their communities and allows for the same creativity and joy of resistance that we see on physical picket lines. In a post-pandemic world in which remote work is commonplace, and gig labour is increasingly globalized and decentralized, digital pickets enable a greater proportion of the working class to participate in a strike.

As employers hone their strategies to better capitalize on weaknesses in the labour market, they will seek to control and silence digital spaces through litigation and legislation, making it a necessity for unions to understand how to respond without losing momentum or power. Turning the taps off at the means of production not only includes traditional profit streams, but also redirecting intangible assets that bosses normally rely on to exploit and divide the workers, such as time, expertise, and public narrative. Withheld or weaponized against the boss, these are the aspects of a strike that become particularly effective in the flattened hierarchy of digital spaces. ILWU Canada is just one example of the ability of workers to adapt and innovate resistance, be it through dispatch halls – or sharing memes online.

Appendix 1: Infographic

	<h2>DIGITAL PICKET LINE ILWU STRIKE</h2>
<p>1 What is a digital picket line?</p> <p>A digital picket line works much like a physical picket line, except it is online! The aim of the digital picket line is to communicate that we are on strike.</p>	
	<p>2 How does a digital picket line work?</p> <p>Picket online by posting messages to inform others of the strike action and our demands and ask the public and other workers not to cross our digital picket line.</p>
<p>3 Don't Cross the Picket Line!</p> <p>Crossing the digital picket line includes performing work for the employer from home that would normally happen behind the physical picket line.</p>	
	<p>4 Digital Picket Line Shift</p> <p>Check in at the start of your shift with your digital picket captain by tagging them in your posts. Begin posting and post minimum 1x/hour.</p>
<p>5 Use these hashtags</p> <p>Always use these two hashtags whenever you post: #ilwucanstrike #digitalpicketline</p>	
<p>ILWU An Injury To One Is An Injury To All</p>	

Appendix 2: Examples of Digital Picket Memes



With special thanks to our digital picket crew, and the team at Victory Square Law Office for their advice and work in producing the Digital Picket Guide and infographic.



May 17, 2024

To: Labour Relations Code Review Panel 2024

Re: *Feedback on behalf of the Post Secondary Employers' Association*

We write in response to the Review Panel's invitation for written replies to submissions provided to date. We appreciate the opportunity to provide additional submissions.

The Post Secondary Employers' Association is the employer bargaining agent for all public colleges, special-purpose teaching universities, and institutes in British Columbia. These nineteen institutions¹ are governed by the College and Institute Act and the University Act, respectively.

We would like to reiterate that a successful labour relations framework is based on predictability and minimal adjustment to the Labour Relations Code (the "Code"). We continue to support the work of this Review Panel in examining areas of the Code which create conflict, while maintaining the successful well-established elements.

In their submissions, the British Columbia Federation of Labour, the British Columbia General Employee's Union, the Canadian Union of Public Employees British Columbia, the Hospital Employee's Union and Unifor have asked the Review Panel to amend the effective and well-established picketing provisions at Section 65 of the Code relating to secondary picketing. We respectfully disagree with their submissions.

The unions argue the current provisions require change, as the legislation is contrary to Section 2(d) of the Charter of Rights and Freedoms, based, in part, on the Supreme Court of Canada decision *R.W.D.S.U., Local 558 v. Pepsi-Cola Beverages (West) Ltd.*, 2002 SCC 8, [2002] 1 SCR 156 ("Pepsi-Cola").

We do not agree that the current provisions are contrary to the Charter of Rights and Freedoms and/or are unconstitutional in any way. We note that *Pepsi-Cola* was concerned with the common law of picketing under the Canadian Labour Code, not the balance struck in the British Columbia Labour Relations Code. Comments about the balance struck under the common law of picketing are not relevant to inform the balance struck by the Legislature under the Code in British Columbia. There are several features of the Code in British Columbia which are radically different from Canada Labour Code.

Under the Canada Labour Code, picketing is not regulated and the common law has developed, in *Pepsi-Cola*, to regulate picketing based on the "wrongful action" approach. Essentially, picketing is constrained by tortious activity alone and as a result the right to picket under the common law is more extensive.

¹ British Columbia Institute of Technology, Camosun College, Capilano University, Coast Mountain College, College of New Caledonia, College of the Rockies, Douglas College, Emily Carr University of Art & Design, Justice Institute of British Columbia, Kwantlen Polytechnic University, Langara College, Nicola Valley Institute of Technology, North Island College, Northern Lights College, Okanagan College, Selkirk College, University of the Fraser Valley, Vancouver Community College and Vancouver Island University



Further, the Canada Labour Code contains practically no restriction on replacement workers which gives employers more tools with which to resist a strike.

In contrast, the British Columbia Code regulates picketing through the provisions in Section 65 on the basis that picketing is permitted at the primary struck location, not secondary locations – unless an ally assists the employer to resist the dispute. In exchange for this limited form of picketing, unions enjoy protection from torts under section 66 which normally limit picketing under the common law. On the employer side, employers are prevented from using replacement workers by Section 68 except in narrow circumstances. So while picketing is restricted under Section 65, there is a countervailing restriction on the employer's power through Section 68. When viewed as a whole, it is clear that the Code represents a careful and deliberate balancing of the interests of both parties to a labour dispute.

When viewed as a whole, it is also clear that the Code is constitutional and compliant with the right to freedom of association under the Charter of Rights and Freedoms. The Supreme Court of Canada in *Saskatchewan Federation of Labour v. Saskatchewan* 2015 SCC 4 noted:

To determine whether there has been an infringement of s. 2(d) of the Charter, the test is whether the legislative interference with the right to strike in a particular case amounts to a substantial interference with a meaningful process of collective bargaining.

The current language allows employees to strike, to picket their employer's location where they work or an ally of their employer, and to leaflet. Employees continue to have the meaningful ability to withdraw their services through collective action as part of the bargaining process and to express their views and position in a labour dispute to the public.

The unions are further advocating for "minimal" changes to secondary picketing which, practically, expand picketing to a much broader range of operations. This expansion was specifically excluded by the Legislature in 1987 and 1992 and the majority of opinions from subsequent Code review panels. When looking at the current picketing provisions and the balance in the Code, we think it is important to understand the historical context which gave rise to the existing language and balance.

In 1979, the first common site picketing language was included in the Code, at Section 86, and provided the Board with discretion to "give directions respecting the picketing to reasonably restrict and confine the picketing to the persons causing the lockout, or whose employees are on strike".

In 1984, the Code was amended to state that, where picketing is common site picketing, "the board shall by order reasonably restrict the picketing to the employer causing the lockout, or whose employees are on strike, or to an ally of that employer".

In 1987, the language was amended again to state where the picketing is common site picketing "the council shall 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".



There was considerable legislative debate when the 1987 language was proposed. The mandatory language in 65(7) along with the addition of s. 65(8) – deeming separate and distinct divisions of the same corporation to be separate employers for the purposes of common site picketing – underscored that the Legislature’s intent was to limit picketing to the struck or locking out employer only – regardless of whether it shares a worksite with an affiliated entity – even an entity with shared ownership and same or similar products or services.

In 1992, the language was again amended after a review and report of the Sub-Committee of Special Advisors (the “1992 Report”). The Special Advisors did not agree on the proposed picketing amendments and each provided a rationale for their position in Appendix 4 of the 1992 Report. Vince Ready commented on the existing [1987] wording and stated: “Currently, the Act would require the Board to eliminate picketing in a common site picketing situation where there was no way to confine the pickets to the operation of the struck employer without affecting the uninvolved party. I believe that the Board should have discretion in such circumstances. I propose a section which would place primary emphasis on the protection of uninvolved parties unless the only restriction possible would result in a prohibition of picketing which is otherwise lawful. In that circumstance, I believe that the Board should have the ability to regulate the picketing in such a manner as it deems appropriate.” Mr. Ready’s language formulation was adopted by the Legislature and remains in force today.

The unions’ proposals to amend the scope of where picketing can occur in respect to common employers or alternative businesses of the same employer would upset the well-established and predictable balancing of rights. The current language protects employees’ right to strike and impact their employer while communicating their collective intent to the public. We are not aware of any new or compelling reason to modify the existing balance. In 1987, 1992, and when this language was reviewed again by the 2018 review panel, employers with multiple locations existed. Buildings with multiple employers existed. There is no new or compelling reason for the change proposed.

Finally, in our view, the most appropriate forum to challenge the constitutionality of the current legislative framework is through litigation, so that an adjudicator can consider the issues in factual context and with equal weight and time for submissions by all parties involved. The fact that the constitutionality of the legislation has not been directly challenged through to a decision in the 30+ years since it was adopted is telling.

All of which is respectfully submitted,

A handwritten signature in black ink, appearing to read "Rebecca Maurer", with a small horizontal line at the end.

Rebecca Maurer
Chief Executive Officer

May 31, 2024

BC Labour Code Review Panel
Sent by email: lrcreview@gov.bc.ca

Dear Panel Members,

Re: British Columbia Labour Relations Code Review – Supplemental Submission

The Progressive Contractors Association of Canada (“PCA”) would like to thank the Panel for the opportunity to present our comments and recommendations in-person on May 2 with respect to the British Columbia *Labour Relations Code* (the “**Code**”) review.

The initial call for submissions and the in-person meetings are important steps in the review process. It is equally important, however, that stakeholders can review and respond to each other’s submissions. This allows for the Panel to hear from the labour relations community on policy areas they might not otherwise have covered in their original submissions. This added layer of engagement allows stakeholders to make further detailed submissions to aid the Panel when considering their recommendations.

Introduction

As part of our initial written submission and during our in-person presentation, PCA hopes the Panel agrees that our contributions are aligned with the Minister’s mandate to “ensure our labour law is keeping up with modern workplaces.” Modern workplaces should reflect the objectives of balance, choice, and flexibility in BC’s labour landscape.

To remind the Panel, PCA works diligently to ensure fair access to work opportunities for all contractors and workers by advocating for legislation and industry practices that provides a level playing field for all construction industry participants. PCA firmly believes that fairness for workers and business is best derived from a collaborative relationship between employees and employers, rather than the more zero-sum, confrontational model that we see all too often.

As the Panel moves into its final deliberations, PCA would like to remind the Panel about the need to ensure the Code remains in balance. The Code reflects our past compromises that were hard-fought for over the years. These compromises helped establish a lasting peace in our province’s labour relations history, something we weren’t known for before the 1992 review and legislative changes.

Therefore, building on PCA’s initial submission, this supplemental submission will again focus on the concepts of collaboration, cooperation, and balance while discouraging proposals that undermine these principles that are necessary to BC’s long-term economic success for all British Columbians.

Further Considerations

PCA provides comments on the following issues:

Wall-to-Wall Organizing in Construction Industry

The Panel has received several submissions from several union stakeholders seeking what can be viewed as quite a fundamental shift of construction labour relations in the province. The summary of their position is that BC would be best served by only a craft-based, or jurisdictional, construction organizing model. While most of these unions don't call for an outright ban of wall-to-wall construction bargaining units, their proposals to grant the Labour Relations Board some kind of power to "receive complaints, conduct investigations and audit internal processes," is meant to hinder, impede and ultimately frustrate the operation of wall-to-wall construction unions.

As the employer association representing companies that are signatory to alternative, wall-to-wall bargaining units, PCA can say with confidence that any measure that restricts, limits or bans wall-to-wall organizing in construction would cause significant disruption to our industry. Before making such a monumental change, the Panel should be presented with clear, overwhelming evidence that restricting the construction industry to a craft-based/jurisdictional labour model would offer meaningful benefits to the construction workforce. We do not believe that such a case could be made, as all-employee or wall-to-wall bargaining units are the norm in Canada (and the USA) in all sectors. The construction industry in prior times was afforded craft-based/jurisdictional delineations to reflect the function of the building trades unions, which previously — but in no ways currently — occupied the bulk of the unionized construction sector.

The Panel should also be cautious regarding this recommendation as the right to freedom of association is a long-protected principle within our jurisprudence. It is likely that any legislative changes that would restrict or ban wall-to-wall organizing models would face a charter challenge. Given the Code represents all workers, PCA would suggest any amendments to limit worker choice of representation should be avoided in our democratic society.

Supplemental recommendation #1: reject any call to restrict wall-to-wall organizing in the construction industry.

Secondary Picketing

Secondary picketing is another issue that has been raised by many stakeholders as part of their written submissions. While secondary picketing hasn't been a primary issue for PCA, we feel it's important to share our perspective with the Panel.

Similar to the 2018 review, this Panel has heard from some union stakeholders that the picketing provisions in the Code are too restrictive. At the same time, it's important to remember that the replacement worker provisions in the Code are considered the most restrictive in all of Canada. This is a significant part of the compromise formed in 1992 that has allowed for the relative labour peace that BC has enjoyed over the years. Restrictions on replacement workers were counter-balanced with restrictions on secondary picketing.

To maintain the balance, the Panel should again reject any change in the secondary picketing provisions. As a reminder, the 2018 Panel agreed that an appropriate balance had been struck by the current Code provisions. PCA quotes the 2018 panel position:

"The restrictions on both secondary picketing and the use of replacement workers during a labour dispute were proposed by the 1992 Report which recommended the Code should restrict the picketing of a secondary location provided the ability to use replacement workers was also restricted. Those corresponding restrictions were intended to provide balance and enhance industrial stability. We agree that is an appropriate balance."

As the Panel considers this matter, PCA would like the Panel members to remember that a change to secondary picketing would negatively disrupt the balance of labour relations in BC. And should this change be made, then it should be done with some kind of change in the replacement worker provisions to maintain BC in some kind of equilibrium.

Supplemental recommendation #2: reject any recommendation that upends the balance between the restriction on secondary picketing and the replacement worker provisions.

Access to Employee Lists

The final issue we want to comment on is access to employee lists that came up in several union stakeholder submissions. It has been recommended that companies be compelled to provide employee lists with contact information to organizers during a certification process once a trade union has signed cards from at least 20% of the eligible workers.

Looking at this recommendation through the lens of balance and fairness, this change to the Code would further shift the pendulum in favour of trade unions. To grant access to employee lists with only 20% of cards signed doesn't necessarily reflect the will of the workers and thus precipitate the sharing of personal information. In an extreme example, a company of 10 employees being compelled to share personal information with a trade union when only 2 workers sign a card doesn't seem to be a fair, adequate level to divulge such sensitive details.

This should also raise a more fundamental concern for the Panel given the digital age we live in and the number of cyber attacks we have seen related to personal information. The employers' responsibility for protecting their employees' private information has been evolving recently through legislative and regulatory development, legal rulings, and case law. These changes are generally shifting toward increased privacy rights for employees. We believe that any government that directs employers to provide their employees private, personal information/data to third parties is treading on thin ice. Such provisions could cause employers to violate privacy laws and would likely conflict with the government's own privacy laws and regulations.

The Panel should exercise caution when it comes to allowing this kind of access to personal employee information. To place this kind of provision in the Code creates a whole new level of risk that personal data can be compromised.

PCA recommendation #3: reject the recommendations that expand access to employee lists.

Conclusion

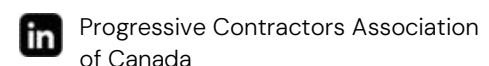
PCA appreciates the opportunity to make this further submission on the issues above. PCA feels the supplemental recommendations we put forward respect worker choice and freedom, promote competition, foster stability, enhance efficiency and generate investment and economic growth.

Thank you again for allowing us to share our thoughts. Please do let us know if you need any further information.

Respectfully yours,



Dan Baxter
Regional Director, BC
Progressive Contractors Association of Canada (PCA)



cc. Paul de Jong, President and CEO, PCA
Darrel Reid, VP Public Affairs, PCA



2 Pemberton Avenue

(604) 988-3111

North Vancouver, BC V7P 2R2

www.seaspan.com

Canada

**Seaspan Shipyards' Reply Submission to the Section 3 Panel
Reviewing the British Columbia Labour Relations Code**

May 2024

On behalf of:

Vancouver Shipyards Co. Ltd.

Vancouver Drydock Co. Ltd.

Victoria Shipyards Co. Ltd.

We write this reply submission further to this Panel's invitation dated April 5, 2024.

Since filing our initial submission to this Panel on March 22, 2024, Bill 9 received Royal Assent on April 25, 2024, and an amendment to the definition of "strike" is now in force. Therefore, it is now law in British Columbia that employees who are faced with a federal (or extra provincial) picket line will not be found to be engaging in an illegal strike should they decide not to cross it.

Despite this amendment to the BC *Labour Relations Code*, this Panel should still review the submissions received regarding the definition of strike and provide recommendations to the Minister as to the relevance of the change and its impact.

As the Honorable Minister Bains mentioned on April 8, 2024 during the sitting of the Legislative Assembly, this Panel is tasked with broader consultation of the community on this amendment to the Code that complements the initial review of Government. It was clear from the Minister's comment that the Ministry is "looking forward to the labour code review panel's recommendation on this." It is this Panel's responsibility to follow Minister's direction and listen to the submissions, analyze the issue and make specific recommendations on the issue at hand, with full guidance from the submissions both in writing and during public hearings.

Without repeating the content of our previous submission on this matter, there seems to be a common misunderstanding regarding the extent of workers' rights when it comes to honouring picket lines. It appears that the belief is that provincially regulated employees have benefited from such a right since 1970, at the inception of the Code, however this assertion has been made without objective evidence, and is in fact false.

Federally regulated employees have consistently and regularly been ordered to cross picket lines as the *Canada Labour Code* does not permit any form of mid-contract withdrawal of services whether as a result of a picket line or any other reason. Orders from the Canada Industrial Relations Board have applied to employees employed in BC on many occasions.

In addition, the BC Labour Relations Board has regularly and consistently provided common site relief, which requires unionized employees to continue to work despite the presence of a picket line at or near the property of their employer. The BC Code has been applied in such contexts in accordance with Section 2 to "minimize the impact of labour disputes on persons who are not involved in those disputes". So to assert that employees in BC have believed for 50 years that they can refuse to work just because of a picket line is false.

A general theme throughout the Union submission to this Panel that have addressed this issue, as well as comments from the Labour Minister during the debate on Bill 9, is a misapprehension of the law and fundamental principles of labour law and policy.

The Union submissions appear to suggest that the honouring of a picket line is a fundamental right of workers in British Columbia. While trade unions and their members may believe the honouring of picket lines to be a fundamental tenet of showing union solidarity, such is not the equivalent of there being a right recognized in law as being a fundamental right to honour a picket line.

Labour laws are meant to balance the power between the union and management (by allowing employees to bargain together rather than as individuals), to provide for a mechanism (including strikes and lockouts) to solve impasses in collective bargaining, and to provide labour peace for both sides while the collective agreement is in operation. Employers rely on this to properly attract and retain customers and business. Employees rely on this to pay their expenses and provide for themselves and their families. Disrupting this balance can only lead to harm for both sides. Employees engaging in mid-contract withdrawals of their services will lose money, and security for themselves and their families. The reputation of employers subject to such unplanned and unexpected work stoppages, outside of their control, will be adversely impacted, resulting in losses to the employers, their employees, and the economy as a whole.

We strongly encourage the Panel to recommend that the Government return the definition of strike in the *Code* to what it was prior to the passing of Bill 9.

Seaspan Shipyards

Per:



Brent Hale
Chief Administrative Officer

**Advancing Centralized Bargaining in the Commercial Cleaning Industry:
SEIU Local 2 and the Justice for Janitors Campaign**

Supplemental Documentation for BC Labour Code Review 2024

May 13, 2024

Executive Summary:

Service Employees International Union Local 2 (SEIU Local 2) has organized a highly effective model of centralized bargaining in the commercial cleaning industry, specifically demonstrated through the Justice for Janitors recent city-wide agreement in Vancouver. This model, while advantageous, is heavily reliant on characteristics unique to the commercial cleaning industry and the broader real estate sector, indicating a pressing need for a legislative framework to broaden its application and enforce standards that foster positive competition and increased productivity across various industries.

Key Features of the Commercial Cleaning Industry

The commercial cleaning industry is characterized by its hierarchical ownership and management structures, dominated by a small number of institutional investors and large property managers. This concentrated ownership, often involving public or union-linked pension funds, is crucial because it aligns the industry with broader public and ethical investment standards. The industry's reliance on labour-intensive practices and its competitive bidding environment are further shaped by these significant institutional investments, which exert considerable influence over labour practices and contracting standards. While the industry has shown a tendency to exploit workers, particularly new immigrants, by leveraging the vulnerabilities associated with their employment status, the presence of institutional investors provides a strategic point of leverage for enforcing fair labour practices and resisting the race to the bottom in labour standards.

Centralized Bargaining Process in Ottawa, Toronto, and Vancouver:

Pressure Campaign: SEIU Local 2 targets specific urban sites to address common labour violations. Using the labour board or other regulatory systems, the union files complaints to leverage against non-compliant employers. Employers are offered a settlement that includes a peace agreement and a pathway toward city-wide union recognition and participation in centralized bargaining. This process, though voluntary, results from substantial union pressure.

Union Density Achievement: As market union density reaches sufficient levels, pressured employers allow union organizers onto their sites. This expansion is crucial for wider union influence and broader negotiations.

Collective Bargaining Agreements: These engagements lead to city-wide collective agreements that standardize wages and conditions across employers, reducing the incentive to undercut labor costs. Companies then refocus competition on service quality and innovation.

Public and Legal Support: Negotiations are supported by aligning with public investors and union-linked pension funds owning significant real estate properties. This alignment utilizes their risk aversion to reputational damage to enhance compliance and support fair labor practices industry wide.

Need for Legislative Support

In Ottawa, Toronto, and Vancouver, SEIU Local 2 has successfully initiated centralized bargaining by initially securing non-targeting agreements with major commercial cleaning contractors, contingent upon achieving sufficient market union density. This strategic approach has led to city-wide collective agreements that standardized wages and working conditions, significantly alleviating competitive pressures to undercut labour costs. This process was supported by leveraging the reputational concerns of public investors and union-linked pension funds, who prioritize ethical labour practices.

The effectiveness of this model is limited by its reliance on specific industry conditions, highlighting the need for comprehensive legislative frameworks. Legislation facilitating sectoral bargaining would ensure fair contracting and labour standards across industries, thus extending the benefits of organized labour to all workers, particularly those in precarious employment situations.

Organizing in the Canada: Justice for Janitors and City-Wide Campaigning

In the United States, the Building Services Employees International Union (BSEIU), which later became the Service Employees International Union (SEIU), was chartered in 1921.¹ The innovative strategy of the BSEIU was that throughout their history they negotiated collective bargaining agreements with a group of employers at a citywide level, rather than with just one employer. This approach emerged in a context where industry-wide bargaining was not prevalent.

By the 1950s, the landscape of commercial real estate in both the United States and Canada began to shift towards ownership by national and international investors, leading to a preference for outsourcing cleaning services to specialized vendors.² In the United States, for SEIU, this advent of commercial cleaning contracting did initially have an adverse effect on union membership. While this development initially disrupted SEIU's membership in the U.S., with union membership in the janitorial sector declining significantly by 1985, it also presented new organizing challenges and opportunities.³

In contrast, the organization of building services in Canada was more sporadic and less coordinated. Historically, where janitors were unionized in Canada, negotiations occurred on a building-by-building basis, managed by various unions. This fragmented approach meant that while janitors employed directly by large buildings or government entities, such as the Royal Ontario Museum, earned decent wages, those employed by commercial cleaning contractors often received salaries barely above the minimum wage.

Unlike other sectors such as construction and security, where industry councils facilitated market-level contract negotiations (as seen with province-wide agreements for security guards in Ontario and Québec), commercial cleaning services lacked such cohesive organization until the launch of the Justice for Janitors campaign in Toronto in 2006. This initiative marked a significant shift towards organizing commercial cleaning contractors at a company-wide level, mirroring earlier strategies employed by the SEIU in the United States.

Features of the Commercial Cleaning Industry: Structural Conditions and Wage Pressures

The Justice for Janitors campaign in Canada is primarily focused on the subsector of commercial office and multi-unit retail cleaning—for ease of discussion, we refer to this as

¹ History of 32BJ. <http://www.seiu32bj.org/au/history.asp>

² Waldinger, Roger et al. “Helots No More: A Case Study of the Justice for Janitors Campaign in Los Angeles” in *Organizing to Win: New Research on Union Strategies*.

³ Ibid

the commercial cleaning industry. This industry is characterized by unique structural conditions that perpetuate downward wage pressure, a challenge that has persisted over decades. A comprehensive case study by Roger Waldinger et al., detailed in *Organizing to Win* (1999), highlights the dual factors that have historically led to membership decline among janitors in Los Angeles, and these factors remain relevant in the Canadian context today:

Firstly, the local unions' efforts to improve conditions and compensation for janitors have inadvertently prompted commercial cleaning contractors to seek non-union alternatives. The commercial cleaning industry is notably labour-intensive, with direct labour costs constituting the largest expense for companies. This economic structure places significant cost pressures on unionized firms, particularly the larger, more heavily capitalized ones. These firms experience discontinuous economies of scale; beyond a certain size or asset threshold—necessary to manage extensive payroll and insurance costs—there are minimal economies of scale, especially in terms of labour. This limitation makes it challenging for these companies to absorb wage increases without passing the costs onto building owners, thereby intensifying competitive pressures within the industry.

Secondly, the shift away from building owner management has led to increasingly precarious relationships between building owners, managers, and commercial cleaning contractors. Contracts often allow for short notice of termination, putting unionized workers at risk of abrupt job loss if a building owner switches to a non-union service provider. This volatile environment underscores the vulnerability of union members, who may find their employment terminated almost overnight.

These dynamics are mirrored in today's Canadian markets, where commercial cleaning contractors—predominantly labour-only operations—struggle with the same discontinuous economies of scale. They face significant challenges in passing wage increases onto building owners, maintaining fragile relationships that can easily lead to contract terminations in favor of non-union services. Consequently, workers often find that even when they successfully organize and secure higher wages, their employers are at risk of losing contracts. This precarious situation highlights the necessity for legislative protections, such as successorship rights, to safeguard against these industry-specific challenges.

A Reliance on New Immigrants to Lower Labour Costs

As explored by Waldinger et al., another significant aspect of the intense competition in the commercial cleaning industry is the increased reliance on new immigrants. This strategy

displaces marginally better-paid workers with industry tenure, exploiting the vulnerabilities of new arrivals to lower labour costs.

Historically, the commercial cleaning sector has often been the first job for many immigrants in Canada.⁴ From the 1950s to the 1970s, the emerging commercial cleaning industry in Eastern Canada was largely populated by Irish and Portuguese cleaners, while Punjabi and South Asian immigrants dominated in Vancouver. Over the decades, the industry has evolved, with today's large national commercial cleaning companies often managed by individuals from these established immigrant communities, while the workforce is now predominantly composed of newer immigrants from South and Central America and Asia.

The structural dynamics of the commercial cleaning industry have fostered exploitative relationships between employers and workers. The sector's competitive nature encourages new firms to enter the market by undercutting existing labour costs. Over time, the number of janitorial firms has fluctuated significantly, reflecting both market consolidation and the proliferation of small, often nominally independent companies used by larger firms to outsource labour cheaply. For instance, in 1991, Canada had 9,571 registered janitorial firms, and by 2008, Ontario alone had 6,330.⁵ As of 2024, the broader category of "services to buildings and dwellings" includes 65,898 establishments.⁶ Despite this apparent growth, the cleaning of most office and industrial spaces is managed by a few large, professionalized companies.⁵

These smaller companies often exist because larger firms use subcontracting and intermediaries to manage payroll, effectively shifting the costs of business onto individuals misclassified as independent contractors. Practices such as "double breasting," where a company operates both unionized and non-union arms, and subcontracting to smaller firms are strategies employed to maintain low labour costs.

This "race to the bottom" in the commercial cleaning industry creates adverse incentives for employers to circumvent employment standards to keep labour costs as low as possible. Unfortunately, this structure disadvantages those employers who wish to improve working conditions, pay higher wages, and adhere to employment standards. This systemic undermining of labour standards poses significant challenges for those attempting to enhance working conditions and pay fair wages. It creates an environment

⁴Aguiar, Luis. "Doing Cleaning Work Scientifically: The reorganization of work in the contract cleaning industry" *Economic and Industrial Democracy*, Vol 22: pp 239-269

⁵Garland Bill. "Policies to Temper a Harsh Business Climate: Unscrupulous Labour Practices Undermine Operational Efficiency", *Canadian Property Management* February/March, 2008

where legal protection and legislative standards are essential to protect worker rights and regulate the industry.

A demonstrative case that highlights these systemic issues is *Service Employees International Union Local 2, Brewery, General and Professional Workers' Union v. Alco Janitorial Services*.⁶ In this instance, SEIU Local 2 contended with the exploitative practice of "spousal teams," where employers hire one person, often classified as a "contractor," but expect the work of two. This arrangement frequently involves one spouse who may be undocumented or otherwise legally unable to work, performing labour that is compensated through a single person's wages, thus exploiting both individuals. The case of Alco Janitorial Services, alongside such cases as *Modern Cleaning Concept Inc. v. Comité paritaire de l'entretien d'édifices publics de la région de Québec*⁷, exemplifies how such a practice is a common approach within the industry that results in the exploitation of vulnerable workers. This model maximizes profit at the expense of legal and ethical employment standards, often leaving workers, especially immigrants or those in precarious situations, without recourse or visibility.

SEIU Local 2 has pursued and settled multiple cases involving employee misclassification, immigrant visa issues, and violations of employment standards, although specific details often remain confidential due to settlement agreements. However, the Alco case, not restricted by such clauses, serves as a public example of the union's efforts to challenge these exploitative practices and advocate for the rights of underrepresented workers within the janitorial sector.

Institutional Investors and Targeted Pressure in the Commercial Cleaning Industry

The commercial cleaning industry is embedded within the broader real estate sector and is influenced by specific hierarchical relationships as outlined in Figure 1. At the top of this hierarchy, institutional investors typically purchase real estate portfolios through ownership companies. These ownership entities then delegate the maintenance and management of their properties to professional property managers, who in turn outsource various maintenance functions to commercial cleaning contractors. These contractors may further subcontract certain tasks to both legitimate and nominal subcontractors to reduce labour costs.

⁶ Statistics Canada, Canadian Business Patterns, June 2008

⁷ *Modern Cleaning Concept Inc. v. Comité paritaire de l'entretien d'édifices publics de la région de Québec*, 2019 SCC 28 (CanLII), [2019] 2 SCR 406, <<https://canlii.ca/t/j0362>>



Figure 1: Hierarchical Relationships in Commercial Cleaning Industry

Within this framework, a relatively small number of players control significant market shares at each level of the relationship map. A limited group of institutional investors owns a large portion of Class A and Class B properties in major Canadian markets. Similarly, a small pool of property managers oversees these properties, and approximately a dozen commercial cleaning contractors are responsible for cleaning around 30% of Class A and Class B office spaces across the eight major markets nationwide.

In Canada, the concentration of institutional investors often includes a significant presence of publicly owned or union-linked pension funds, which adds another layer to the industry dynamics. For instance, Oxford Properties, a prominent real estate investor, developer, and manager, is owned by OMERS, a defined benefit pension plan for public service employees in Ontario. Oxford Properties boasts a diverse portfolio spanning over 23 million square feet across Canada, the USA, the UK, and Europe.⁸

The concentrated structure of ownership and management in the real estate sector is inherently sensitive to reputational risks due to its intense competition and significant public exposure. This sensitivity is particularly acute when property owners or managers are linked to union-pension funds or public investors with explicit commitments to

⁸ See www.oxfordproperties.com

responsible contracting and collective bargaining rights. These entities are under heightened scrutiny to adhere to ethical labour practices and fair contracting policies, making them highly adverse to any actions that could threaten operational stability or breach the ethical standards expected by their stakeholders.

Publicizing issues such as illegal subcontracting schemes or employment standard violations serves as an effective strategy for unions to exert pressure on commercial cleaning contractors through the hierarchical real estate owner-management chain. Even a hint of reputational damage can have amplified consequences, especially when it risks undermining the public or quasi-public nature of the investment entities involved. This alignment with unions and collective bargaining ideals thus creates a powerful incentive for property owners to ensure compliance with labour laws and fair practices across their operations. By leveraging this relationship, unions can use public exposure of unethical practices as a potent tool to enforce industry standards and enhance working conditions for cleaners.

City-Wide Bargaining in Toronto, Vancouver, and Ottawa

Since Justice for Janitor's Canadian beginnings in 2006, SEIU Local 2 has heavily invested in creating a voluntary city-wide bargaining framework for janitors across Ottawa, Toronto, and Vancouver. This approach has proven to be highly effective, yet it remains a unique and somewhat fragile arrangement.

The commercial cleaning industry's distinctive characteristics, coupled with SEIU's intensive commitment to field organizing and the advancement of successorship rights, have enabled the establishment of centralized bargaining for janitors. The industry is marked by fierce competition in bidding, which, when combined with the involvement of institutional investors and pension funds, creates unique opportunities not found in other sectors.

Our strategic approach begins through engagement with specific worksites within the intensely competitive urban markets. We focus on employers who violate employment standards, engage in illegal subcontracting, misuse worker classifications, or engage in exploitative visa schemes. Leveraging our in-depth understanding of these common infractions, SEIU Local 2 identifies and files appropriate labour code or employment standard complaints against noncompliant employers. These actions are strategically employed as leverage points.

In this environment marked by heightened accountability, we propose to employers a strategically beneficial settlement: a peace agreement that forms part of a comprehensive

path toward city-wide recognition and engagement in centralized bargaining. It is crucial to note that while these agreements are ultimately entered into voluntarily, initial employer participation is not readily forthcoming. Instead, it is the result of substantial pressure stemming from ongoing legal challenges and the potential public exposure of their labour practices. This process, though seemingly cooperative, is driven by rigorous enforcement and strategic pressures, highlighting the essential role of persistent union follow-through and the use of legal tools and regulatory systems.

These preliminary agreements are designed to safeguard companies from any immediate competitive disadvantages that could arise from individual worksite certifications. As previously discussed, when a specific worksite or employer is compelled to offer higher wages, it could face the loss of contracts or bids under the intense pressure to minimize labour costs, especially in the absence of successorship legislation.

Through centralized bargaining, competing companies are enabled to remove wage costs and benefits from their competitive equation. By establishing a new industry standard, akin to the Employment Standards Act, commercial cleaning companies are encouraged to refocus their competitive efforts on enhancing service quality, fostering research and development, and other operational improvements. This ensures that providing fair wages and benefits no longer places any single employer at a disadvantage, fostering a more equitable industry environment.

Ottawa is now more than a decade into central multi-employer bargaining and has 33 contractors signed onto the city-wide agreement. The heavy presence of government operations within the Ottawa commercial real estate sector facilitates more transparent contract bidding and the central bargaining process encompasses a diverse array of contractors, ranging from small family-owned businesses and sole proprietorships to large, publicly traded companies.

A mature centralized bargaining process, like those in Ottawa and Toronto, has resulted in significant improvements to the industry, helping to raise workers out of poverty and limit employment standards violations. See Table 1 for a simplified demonstration of what centralized bargaining can achieve.

Contract Term	# of Employers	Themes	Achievements
2011-2015	12	Stabilization Period: -Root out misclassification -Enforce <i>Employment Standards</i> , -Begin raising standards above statutory minimums	-Increase minimum rate to \$1 above minimum wage (\$11.25); premiums for midnight work -personal days, more vacation, days off for immigration related hearings -introduction of seniority based rights
2015-2019	14	Higher Wages, Health Benefits	-increasing the gap between minimum wage and union rates -Health and Dental Insurance -Sick days
2019-2022	23	Retirement Security	-Introduction of a DB pension plan -Improvements to Health and Dental Benefits -Higher Wages
2022-2025	24+	Keeping up with Inflation, Consolidating and Protecting Gains	-16% wage increase over the course of 3 years -Pension and Dental Plan improvements -Protections from subcontracting

Table 1: Simplified Ottawa Janitorial Centralized Bargaining Progress

In late 2023, more than 2,500 janitors in Vancouver successfully secured their first city-wide Collective Agreement through central bargaining. This agreement involved eight competing contractors and applies to commercial properties within Metro Vancouver that exceed 75,000 square feet. The scope of the agreement was determined using classifications and square footage calculations established by the Building Owners and Managers Association of British Columbia (BOMA BC).

Conclusion: The Potential and Limitations of Central Bargaining in the Janitorial Sector

The establishment of city-wide central bargaining for janitors through the Justice for Janitors campaign over the past decade underscores both the unique opportunities and significant challenges within the commercial cleaning industry. This campaign has capitalized on the highly competitive bidding environment and the influential role of institutional investors, conditions that are distinctly advantageous for union organizing but not commonly found in other sectors.

Our efforts across North America have led to the successful implementation of central bargaining models in both the janitorial and security sectors, driven by these specific industry conditions. However, attempts to replicate this model in other sectors have frequently encountered major obstacles. We believe that without the unique factors of the commercial cleaning industry, the strategy's applicability is limited.

In major urban centers like Ottawa, Toronto, and Vancouver, where there is a high concentration of property ownership and institutional investment, the centralized bargaining model has proven effective. This model has not only stabilized wages and enhanced service quality, but also introduced significant advancements such as health benefits and retirement security in markets like Ottawa and Toronto—developments that are unprecedented in these sectors. Nevertheless, the model's current structure is voluntary, partial, and primarily applicable to large-scale commercial properties, leaving many workers, especially those in isolated or small-site conditions, without the benefits of collective bargaining.

The majority of janitors, particularly those in the most vulnerable employment situations, remain outside the scope of this bargaining model. Without a comprehensive legislative framework supporting sectoral bargaining, these workers are unlikely to see improvements in wages or working conditions. Such a framework is essential not only for extending the reach of bargaining benefits but also for ensuring a more equitable distribution of these gains across the entire sector.

In conclusion, while central bargaining has demonstrated considerable potential within the janitorial industry, the limitations of our current voluntary model underscore the urgent need for legislative action. Establishing a robust legislative framework for sectoral bargaining would provide the necessary foundation to expand these benefits to all workers within the sector, fostering a more equitable and productive industry.

May 7th, 2024

Ms. Sandra Banister, K.C.
Mr. Michael Fleming
Ms. Lindsie Thomson

Dear Ms. Banister, Mr. Fleming, and Ms. Thomson,

We write as the unionized organizations representing staff and faculty at Simon Fraser University, with reference to a submission made to the Board regarding the current Labour Code review. In its submissions, the Administrative and Professional Staff Association of SFU (APSA) has advocated for changes to the Code which would allow non-unionized organizations to access the benefits and protections offered under the Code. We, the campus unions at SFU (CUPE 3338, Polyparty (representing UBCJA Local 1907, IBEW local 213, IUOE local 882, IUPAT local 138, UA Local 170, IAM Lodge 692, Teamsters Local 213, and CSWU Local 1611), TSSU, and SFUFA) strongly oppose such an expansion, which we believe undermines the very definition of a trade union and the definition of “employee” which is foundational to the Code.

APSA and other organizations of its kind play a role in representing some people properly defined as employees under the Code; they also, however, represent many who are properly categorized as managers. In APSA’s case, during a Spring 2023 variance application brought by the Faculty Association (which was ultimately successful), Simon Fraser University noted that some 30% of APSA’s membership would likely be deemed management, submission that was not disputed by APSA. There is, then, broad recognition that the professional association covers a significant number of people and positions that do not and should not meet the definition of employee under the Code. Historically, many jobs that had been done by CUPE workers were reclassified out of CUPE into APSA; there is already a community of interest for that work in a union on campus should those workers decide to unionize.

To extend the rights of unions to such an organization would have significant long-term consequences to the Code, to the guiding framework of the Board, and to the foundation of our system of labour law, which is, throughout, premised on a clear distinction between management personnel and employees.

That there are likely competing interests between management personnel and employees is core to the Labour Relations Code. Those competing interests are visible, too, in the internal relationships of SFU’s employee groups. For example:

- In 2003, APSA sought certification at the Board. At that time, its application was denied at least in part because, as Vice-Chair Saunders explained, “APSA must establish a rational and defensible line around the proposed unit.” APSA continues to be unable to draw this line as it has become the *de facto* home of any and all

positions SFU would like to create that are not explicitly covered by the existing campus unions and is evident in that some 30% of its members are not considered employees under the Code;

- In 2021, APSA explicitly sought expansion of its bargaining rights in a grievance brought before arbitrator James Dorsey; in the decision rendered November 10th, 2021, Mr. Dorsey had indicated APSA's option to seek expanded bargaining rights existed through the certification process and was not appropriate outside of that process;
- In Fall, 2022, as SFU's employee organizations worked to draft a joint letter to the employer regarding common labour relations issues, APSA's then-President indicated that the association would not be prepared to take a position that placed them in such opposition to the employer;
- In 2023, in opposition to a group of its-then-members' application to unionize with the Faculty Association, APSA took the position that its current structure and status offered its members adequate rights and protections, and unionization was neither necessary nor appropriate for this group of workers;
- In 2024, during and after a strike by the Teaching Support Staff Union, APSA repeatedly took the position that its members were loyal to the employer and ought to be thanked by the employer for their decision to cross the picket line;

These are just a few examples of the ways that APSA's status as an organization that represents significant numbers of management personnel has impacted its internal relationships at SFU. These, we believe, are illustrative of much deeper conflicts and contradictions that would emerge should there be an attempt to expand the Code to include such organizations.

To be clear: we do not dispute in any way that some portion of the APSA membership ought to be eligible for the protections afforded by the Labour Code. But there is a clear path to achieving those protections – certification as a trade union, either through APSA's own decision to relinquish its management component, or through certification of eligible members with one or other existing unions, subject of course to the existence of an appropriate community of interest.

Sincerely,

CUPE 3338, Polyparty, TSSU, and SFUFA

Code Review Panel

May 17, 2024

c/o Labour Relations Board

Suite 600 – 1066 West Hastings Street

Vancouver B.C. V6E 3X1

This is the reply submission of UBCP/ACTRA, the trade union representing performers in the film industry in British Columbia, to the Code Review Panel, (“the Review Panel”), which is seeking submissions from interested groups regarding potential amendments to the Labour Relations Code (the “Code”).

Recommendations for Amendments to the Labour Relations Code

In the event that the Panel declines to recommend that a single issue Artificial Intelligence (“AI”) panel be established but instead decides to make specific recommendations for changes to the Code, UBCP/ACTRA supports and adopts the recommendations made in the submission of the Canadian Animation Guild (IATSE Local 938) at pages 11 and 12:

- Require all employers that intend to introduce AI to their unionized workplace to consult with a union and come to an agreement on how AI may be implemented.
- Require all employers that intend to introduce AI to their unionized workplace to conduct risk assessments and share those assessments with workers and unions.
- Forbid the use of AI systems that monitor workers, evaluate worker performance and evaluate applications for hiring or advancement.
- Ensure that all employer policies concerning AI be written in plain language to ensure transparency and informed consent.

- Ensure that workers have the right to opt out of AI usage and data collection wherever possible and forbid employers from requiring workers to engage with AI that could lead to the automation of their work as a condition of employment.
- Protect workers from AI technology being used to fully automate their work.
- Ensure that workers are compensated and credited appropriately when their work or data is used to train AI.

UBCP/ACTRA also supports and adopts the recommendations on this issue made by IATSE International at pages 6 – 9 of their submission.

Placement in the Code

One issue that has been raised is into what Part of the Code would it be appropriate for provisions related to AI to be inserted. UBCP/ACTRA submits that it would be appropriate for those provisions to be placed in Part 4, Division 2 of the Code, perhaps after Section 54. Sections 53 and 54 are similar in nature to the potential AI provisions. They contemplate and require joint consultation, cooperation and if necessary, mediation to address events which may not have been foreseen and which will have a significant impact on the workplace. The potential AI provisions in the Code would address the same type of situation, although with a wider scope for negative impacts to the workforce than those existing provisions.

Proposals limited to the Labour Relations Code

Another issue that has been raised is whether the impact of AI in the workplace is so potentially large that it cannot be dealt with only by amending the Code but could require changes to the Employment Standards Act, the Human Rights Code and also other non-employment related

statutes. Those other changes may become necessary in the near future but UBCP/ACTRA submits that the Panel's jurisdiction is limited to considering potential changes to the Labour Relations Code.

Sectoral Bargaining

UBCP/ACTRA supports the submission on sectoral bargaining made by the U.S.W at pages 7 – 11 of their submission. In particular, UBCP/ACTRA supports their specific recommendations found at page 10 – 11 and their recommendation that sectoral bargaining should not be limited to workplaces of less than 50 people.

If the Review Panel recommends the establishment of a form of sectoral bargaining, UBCP/ACTRA calls for that structure to be applied to the commercial production industry.

Regards,



Keith Martin Gordey

President

UBCP/ACTRA



ARSENAULT AARON

LAWYERS

April 23, 2024

VIA EMAIL: lrcreview@gov.bc.ca

Labour Relations Code Review Panel
c/o Michael Fleming, Chair
4055 Pender Street, Suite 15
Burnaby, BC V5C 2L9

Dear Sirs / Mesdames:

Re: Labour Relations Code Review - 2024

Please consider this supplementary/reply submission to the Labour Relations Code Review Panel ("the Panel") on behalf of our client, the United Association of Journeyman and Apprentices of the Plumbing & Pipefitting Industry of the United States and Canada, Local 170 ("the Union").

Our client made a March 22, 2024, submission to the Panel by which Local 170 proposed the establishment of a fresh section 41 review of the structure of the Bargaining Council of British Columbia Building Trades Unions ("the Bargaining Council"). In the course of those submissions, Local 170 pointed to carpenters havoc as evidence that there are some cracks in the foundation of the current legislated bargaining structure.

Some of those cracks have started to manifest into greater fissures, as described in our enclosed April 19, 2024, application to the Labour Relations Board ("the Board Application") regarding the recent dissolution of the BCRCC and the issue of how to address the resulting vacancy in the shared carpentry seat at the Bargaining Council's Executive Committee - as per the Board's decisions in BCLRB No. B277/2007 and BCLRB No. B167/2009.

At our scheduled April 26, 2024, appearance before the Panel, we intend to refer to the Board Application and argue that the issues that it raises supports our client's March 22, 2024, submissions requesting a fresh section 41 review of the structure of the Bargaining Council.

All of which is respectfully submitted.

ARSENAULT AARON

DAVID M. AARON

david@legalmind.ca

Encl.

cc: Carpenters' Regional Council c/o Kurt Kashuba, CRC Regional Manager - by email: KKashuba@ubcja.ca

cc: CMAW c/o legal counsel, Sebastian Anderson by email: S.Anderson@labourrightslaw.com

cc: BCBCBTU c/o legal counsel, Michael Shapiro by email: ms@hllo.ca

cc: client

Associated law corporations

302 - 543 Granville Street, Vancouver, B.C. V6C 1X8

Tel: 604.669.4447 Fax: 604.669.4737



ARSENAULT AARON

LAWYERS

April 19, 2024

VIA EMAIL

Labour Relations Board
#600 – 1066 West Hastings Street
Vancouver, B.C.
V6E 3X1

Attention: Registrar

Dear Sirs and Mesdames:

**Re: Bargaining Council of British Columbia Building Trades Unions
- Labour Relations Code Sections 41(5), 133(2), 139(b) and 143**

We are legal counsel for the United Association of Journeyman and Apprentices of the Plumbing & Pipefitting Industry of the United States and Canada, Local 170, and are authorized to bring, on its behalf, the instant application pertaining to the representation of the craft of carpentry on the Bargaining Council of British Columbia Building Trades Unions ("the Bargaining Council").

This application is brought pursuant to the Labour Relations Board's retained jurisdiction under BCLRB No. B277/2007 and BCLRB No. B167/2009, as well as the Board's authority under section 41 of the *Labour Relations Code* [RSBC 1996] ch. 244 ("the Code").

I. DEFINITIONS

UBCJA	United Brotherhood of Carpenters and Joiners of America
BCRCC	B.C. Regional Council of Carpenters
CRC	Carpenters' Regional Council
CMAW	Construction, Maintenance and Allied Workers Bargaining Council
BCPC	B.C. Provincial Council of Carpenters

Associated law corporations

302 - 543 Granville Street, Vancouver, B.C. V6C 1X8
Tel: 604.669.4447 Fax: 604.669.4737

II. RELIEF SOUGHT

1. Local 170 hereby requests that the Board, pursuant to section 41(5) of the Code, issue directions as to:
 - a. the appropriate union(s) to represent the craft of carpentry on the Bargaining Council in the aftermath of the dissolution of the BCRCC; and
 - b. how the seats/votes (formerly shared as between CMAW and BCRCC) will be filled/exercised at the Bargaining Councils' Executive, Policy and Negotiating Committees.
2. Furthermore, Local 170 requests that the Board issue declarations, pursuant to sections 139(b) and 143 of the Code, that:
 - a) the CRC is not a trade union and is not the successor to the BCRCC on the Bargaining Council; and
 - b) the CRC appointment of the Director of the Piledrivers Local 2404 as a carpenters' representative on the Bargaining Council Executive Committee is void and of no force and effect.
3. Finally, we request such further and other relief as counsel may request or the Board may deem necessary and appropriate.

III. FACTS

1. The craft of carpentry has historically been represented on the Bargaining Council through the BCPC.
2. As a result of a contentious relationship with its international parent, the UBCJA, the BCPC went through some changes. In November 2003, CMAW was formed - establishing itself as a council of trade unions including various BCPC locals and the Communications Energy and Paper Workers Union, Local 470.
3. Thereafter, the UBCJA created the BCRCC out of those carpenter locals that remained loyal to the UBCJA. Because of the transition of the BCPC to the BCRCC, the relevant 2007 - 2009 jurisprudence refers to the BCPC and the BCRCC with some interchangeability.
4. Ultimately, CMAW and BCRCC (sometimes anachronistically referred to as BCPC) emerged as rival representatives of the craft of carpentry in British Columbia.
5. In 2007, the Board allowed CMAW and BCRCC to share the representation of the craft of carpentry: BCLRB No. B277/2007. This was a marked departure from the established framework for building trades collective bargaining. Accordingly, the Board made this

allowance on the basis of conditions. One condition was that the Board retain the jurisdiction to address concerns related to ongoing rivalry/instability and any issues that arise between CMAW and BCRCC as a result of sharing those representational rights.

6. Rivalry between CMAW and organizations affiliated with the UBCJA remains a contemporary fact. As recently as February 2024, a UBCJA affiliated union, United Workforce Group (UWG), successfully raided a CMAW all-employee unit. CMAW's objection to UWG's trade union status failed. [*Aarc-West Scaffolding Inc.* 2024 BCLRB 30]
7. In BCLRB No. B167/2009, the Board issued an interim order allowing CMAW and BCRCC (referred to in that decision as the BCPC) to represent the craft of carpentry in industry negotiations between CLR and the Bargaining Council. That order included the following terms:
 1. BCPC will be replaced by both CMAW and BCPC in the Bargaining Council.
 2. CMAW and BCPC will comply with the Bargaining Council Constitution and will not act in a manner that is inconsistent with the interests of the Bargaining Council as an entity made up of craft unions.
 3. Raids on a craft basis between members of the Bargaining Council will not be permitted.
 4. Bargaining Council Executive Committee: Currently, under the Bargaining Council Constitution each member of the Bargaining Council is entitled to one delegate. That will be varied (for the life of this interim order) to allow each union a right to two delegates on the Executive Committee. CMAW and BCPC will each be entitled to one delegate.
 5. Bargaining Council Policy Committee: Currently, under the Bargaining Council Constitution each member of the Bargaining Council is entitled to four delegates. CMAW and BCPC will each be entitled to two delegates.
 6. Bargaining Council Negotiating Committee: Currently, under the Bargaining Council Constitution each member of the Bargaining Council is entitled to two delegates. BCPC and CMAW will each be entitled to one delegate.
8. As a result, CMAW and BCRCC both became constituent members of the Bargaining Council and came to share representation rights in respect of the craft of carpentry, subject to Board-imposed conditions including the requirement that CMAW and BCRCC comply with the Bargaining Council Constitution and refrain from acting “in a manner that is inconsistent with the interests of the Bargaining Council as an entity made up of craft unions”.

9. As described in submissions below, recent rogue conduct by UBCJA Locals 1370 and 1907 raises serious questions as to whether that requirement has been complied with. Furthermore, the prohibition against raiding (condition #3) has clearly been violated through UWG at *Aarc-West Scaffolding Inc.*
10. Effective November 29, 2022, the BCRCC and several other UBCJA regional carpenter councils were dissolved. A new UBCJA regional council called the CRC now purports to exercise the BCRCC's rights, however the CRC's status is impugned by the instant application.
11. According to its Instagram profile, the CRC is composed of 31 affiliated Local Unions of the UBCJA across Ontario, Manitoba, Saskatchewan, Alberta, British Columbia, and Yukon. It is ostensibly administered through an office in Ontario.
12. The CRC is not locally controlled and is not constituted so as to place authority for collective bargaining functions in the hands of officials within the Province of British Columbia.
13. The CRC has purported to appoint the Director of the Piledrivers Local 2404 as a carpenters' representative on the Bargaining Council Executive Committee ("the Impugned Appointment").
14. The Piledrivers Local 2404 is not an affiliate member union of the BCBCBTU. It is not signatory to any collective agreement negotiated under the BCBCBTU /CLRA s.41.1 statutory bargaining structure. It is plain and obvious that Local 2404 is not an appropriate union to be involved in the governance of the Bargaining Council or its activities as the bargaining agent for its member unions, in any respect. Local 2404 is a stranger to the collective bargaining relationship between the BCBCBTU/CLRA and its member unions established by the s.41.1 statutory bargaining structure and the representational relationship between the BCBCBTU member unions and their members.

IV. CRAFT SHARING IN BRITISH COLUMBIA

15. Craft certifications normally grant exclusive bargaining rights in respect of a craft to **one** union. The sharing of the craft between CMAW and BCRCC is anomalous, and exists by permission of the Board.
16. CMAW and BCRCC are longstanding rivals. The sharing of the craft of carpentry meant both CMAW and BCRCC could continue to represent the craft. However, the introduction of two rival unions within a single craft upset the traditional model for the construction industry, whereby a signatory contractor would access work and skilled workers through a single union under its standard collective agreement. The Board has consistently identified this rivalry and the potential for instability in the construction industry arising from the sharing of the craft as reasons for concern. Under the craft sharing model, the Board manages instability concerns and exercises a retained jurisdiction in that regard: B135/2015.

17. The overarching concern of the Board in this context is the stability of the sector and the impact of the labour relations structure created by the Board under Section 41 on the competitive position of the sector.

V. CRC AS IMPOSTOR

18. The November 2022 dissolution of the BCRCC raises questions about Bargaining Council constituency and voting in relation to the craft of carpentry as shared between CMAW and the varying purported iterations of UBCJA affiliates in BC.
19. The CRC has no representational rights in British Columbia and there is no legal basis for the CRC to exercise any successorship arising from the craft sharing arrangements established by the Board in BCLRB No. B277/2007 and BCLRB No. B167/2009.
20. The CRC is not even a local organization with local union status under the Code [*Myco Services Ltd.* (2007) B.C.L.R.B.D. No. 264].
21. Local 170 objects to the Impugned Appointment on the basis that, under the Labour Relations Code, the CRC has no legal standing or trade union status, and therefore cannot assume the role of a successor union to the BCRCC. The CRC therefore has no statutory authority to represent the craft of carpentry under the shared craft representation model established by the Board.

VI. CRITICAL BARGAINING COUNCIL GOVERNANCE

22. The Executive Committee (on which the CRC aspires to sit) has been recognized as the key governing body of the Bargaining Council. The CRC's attempt to take a representational role on that body is not merely an administrative matter - particularly since the CRC cannot meet the definition of trade union under the Code; and furthermore, has no legal basis to act as successor to the craft sharing arrangement established by the Board in BCLRB No. B277/2007 and BCLRB No. B167/2009.
23. It is notable that the CRC has sought to infiltrate the Executive Committee without having initiated any Board process or retained jurisdiction. It has been left to Local 170, as a major stakeholder in the integrity of the section 41.1 representational structure, to bring this matter before the Board for oversight and preservation of industrial stability.

VII. LRB RETAINED JURISDICTION

24. The seat at the Executive Committee, as shared amongst the craft of carpentry, was created by the Board - and therefore must not be modified in the absence of the engagement of the Board's continued jurisdiction.
25. Pursuant to BCLRB No. B277/2007 and BCLRB No. B167/2009, the Board has retained jurisdiction to address concerns related to ongoing rivalry/instability and any issues

arising a result of the sharing of representational rights pertaining to the craft of carpentry (“the Retained Jurisdiction”).

26. Given the recent rogue conduct by UBCJA Locals 1370 and 1907 (as discussed below), the representational questions arising from the dissolution of the BCRCC (and attempted infiltration of the CRC) should engage the Board’s Retained Jurisdiction. This is particularly so given the recent raid by a UBCJA affiliate (UWG) on CMAW’s representational rights at Arc-West Scaffolding Inc. This raid constitutes a blatant violation of condition #3 of BCLRB No. B167/2009.
27. This is an opportunity for the Board, pursuant to its Retained Jurisdiction, to revisit the sharing relationship pertaining to the craft of carpentry at the Bargaining Council and consider submissions with respect to reform or restructuring for the sake of industrial stability.
28. Pursuant to section 133(2) of the Code, we request that the Board exercise its jurisdiction and issue relief on a discretionary basis in a manner it considers to be in furtherance of the purposes set out in section 2 of the Code.

VIII. SECTION 12

29. Section 12 considerations arise from the CRC’s attempt to play a representational role in Bargaining Council governance.
30. Through the majoritarian processes that drive the administration of its Executive, Policy and Negotiating Committees, the Bargaining Council has a statutory mandate to act as a single bargaining agent with a degree of efficacy in accordance with section 12 of the Code. Having established, at those committees, a split seat for the shared craft of carpentry, it is incumbent on the Board to exercise oversight with respect to the craft sharing arrangement and, in particular, with respect to the impact of that arrangement on the Bargaining Council’s fulfillment of its section 12 duties.
31. Local 170 challenges the legitimacy of a Local 2404 official purporting to represent the craft of carpentry at the Executive Committee and any other Bargaining Council committee. The Bargaining Council is a single union exercising exclusive bargaining agency over its constituents. As long as an alleged alien purports to discharge a role in the representation of that union, there remain serious questions as to the council’s capacity to govern itself and discharge its section 12 duties.
32. Furthermore, the member craft unions that constitute the Bargaining Council cannot properly fulfill their individual section 12 duties to their respective members if the CRC-appointed representative is permitted to influence and vote on the decisions of the Executive Committee.
33. Local 170 and the other member unions of the Bargaining Council are locked into the s.41.1 bargaining structure by statute. It is through that collective bargaining structure

that they are compelled to represent their members in collective bargaining. Were a stranger to sit on the Executive Committee, it would impair the ability of the Bargaining Council and its members to act as a cohesive organization of craft unions charged with the legal authority to represent all of the employees working under the terms of the collective agreements negotiated between the Bargaining Council and CLRA.

34. The record before the Board shows that the Bargaining Council has inherent vulnerabilities, the particulars of which are beyond the scope of this submission. For present purposes, it is sufficient for Local 170 to implore the Board to take a proactive approach to the exercise of its jurisdiction to support the functionality of the Bargaining Council so that instability does not take root.

IX. CARPENTERS GONE ROGUE

35. The shared craft model is premised on a *proviso* that the parties refrain from acting in a manner that “is inconsistent with the interests of the Bargaining Council as an entity made up of craft unions”. That *proviso* has been breached as a result of the recent rogue conduct of UBCJA locals in British Columbia as described below.
36. The Carpenters’ long history of conflict over representational issues within their own craft is set out in *Construction, Maintenance and Allied Workers Bargaining Council v. Construction Labour Relations Assn. of British Columbia* [2016] B.C.J. No. 805. This pattern of industrial unrest has already taken a tremendous toll on British Columbia’s construction industry.
37. History is repeating itself as, once again, a new iteration of havoc from the Carpenters’ union threatens to undermine the jurisdictional truce that has been a contemporary measure of functional cohesion amongst the building trades. Over the last year, two UBCJA locals have engaged in conduct that is inimical to the craft model of representation and the Carpenters’ membership in BCBCBTU.
38. Present day construction labour relations is premised on a territorial equilibrium that was engendered through decades of Board certification of “standard craft bargaining unit” descriptions; and has been self-governed through the BC Building Trades administration of the Jurisdictional Assignment Plan. Most import, for current purposes, is that each of these standard unit descriptions corresponds to the craft union “pertaining to the craft” [section 21(1)].
39. The Carpenters have always been one such union. As a result of UBCJA initiatives, the Carpenters in British Columbia are now abdicating from that role in an attempt to hack the Code and exploit the Codes representational regime to laterally encroach along craft lines. This defection constitutes a tectonic shift in the landscape upon which has rested an industrial stability that is not to be taken for granted.
40. The first iteration of the Carpenters’ breach is described in *Altrad Services Ltd.*, 2023 BCLRB 142 (Leave for Reconsideration of 2023 BCLRB 118) where the UBCJA 1370,

represented by Peter A. Gall, K.C., unsuccessfully attempted to certify an “all-remaining employees” unit where the employer was already subject to a craft certification.

41. Thereafter, it came to light that UBCJA Local 1907 had entered into an “all employee” voluntary recognition agreement with respect to a bargaining unit of painters and glaziers employed by a glazing specialty contractor, Tailored Glass Ltd. (“the VRA”) An application for declaratory relief against the VRA has been brought by IUPAT Local 1527; and the BC Building Trades has brought a standing application in support of Local 1527 - all of which remains pending with the Board.
42. The VRA awkwardly positions the UBCJA Local 1907, a carpentry craft union, as the representative of a bargaining unit that is, in reality, constituted entirely of employees performing the craft work of glazing. The employer is incontrovertibly a glazing specialty contractor.
43. The VRA resulted in the UBCJA Local 1907 asserting representational rights that are inimical to the Board’s long-standing recognition of Local 1527 as the appropriate representative of the craft of glazing in British Columbia.
44. To the shock of its fellow constituents on the Bargaining Council, the Carpenters Local 1907 have sought to expand into the established craft work jurisdiction of the Glaziers Local 1527 and disrupt the jurisdictional equilibrium and industrial stability which has developed through an evolution in craft governance in British Columbia, including the current section 41.1 structure.
45. The BC Building Trades, by internal motion of September 8, 2023, brought forward an ultimatum forcing the UBCJA to either cease its predatory conduct or withdraw from the BC Building Trades. Having refused to cease and desist, the Carpenters have acceded to their expulsion from the BC Building Trades and have revealed themselves to be a predatory craft union that has openly declared that it will not respect the standard, established jurisdictional boundaries of the building trades.
46. This conduct by a member of the Bargaining Council constituted a complete rupture in the fabric of cohesive and unitary functionality that underlies the section 41.1 structure. The building trades are now effectively mandated into bargaining as an involuntary association, a constituent of which is eating “the union” from within.
47. The Carpenters conduct is inimical to the section 41.1 structure of the BCBCBTU. At the same time as being mandated into the Bargaining Council, the building trades stand vulnerable to jurisdictional encroachments by their fellow affiliates, under the pretense of an all-employee certification regime sanctioned under the Code. These attacks by a BCBCBTU member against its fellow affiliates constitutes a new and dangerous development that stands to undermine industrial stability and re-engage the Board’s retained jurisdiction to police the shared craft of carpentry at the Bargaining Council.

X. REMEDY

48. Local 170 hereby requests that the Board, pursuant to section 41(5) of the Code, issue directions as to:
- a) the appropriate union(s) to represent the craft of carpentry on the Bargaining Council in the aftermath of the dissolution of the BCRCC; and
 - b) how the seats/votes (formerly shared as between CMAW and BCRCC) will be filled/exercised at the Bargaining Councils' Executive, Policy and Negotiating Committees.
49. Furthermore, Local 170 requests that the Board issue declarations, pursuant so section 139(b) of the Code, that:
- a) the CRC is not a trade union and is not the successor to the BCRCC on the Bargaining Council; and
 - b) the CRC appointment of the Director of the Piledrivers Local 2404 as a carpenters' representative on the Bargaining Council Executive Committee is void and of no force and effect.
50. Finally, we request such further and other relief as counsel may request or the Board may deem necessary and appropriate.

XI. HEARING REQUESTED

51. We request that the Board convene an expedited hearing of this application to be scheduled over a duration of two days.

All of which is respectfully submitted.

ARSENAULT AARON



DAVID M. AARON

david@legalmind.ca

cc: client

cc: Carpenters' Regional Council c/o Kurt Kashuba, CRC Regional Manager - Alberta and British Columbia by email: KKashuba@ubcja.ca

cc: CMAW c/o legal counsel, Sherry Shir by email S.Shir@labourrightslaw.com

cc: BCBCBTU c/o legal counsel, Michael Shapiro by email: ms@hlllo.ca

May 17, 2024

This is the submission of British Columbia Locals 2404, 2736, 1370, 1907, 1541, 1598, and 527 of the United Brotherhood of Carpenters and Joiners of America (the "Carpenters Union") to the Labour Relations Code Review Panel.

1. This submission by the Carpenters Union is limited to the provisions of the *Labour Relations Code* (the "Code") affecting the construction industry in particular.
2. The Carpenters Union submits that the present structure of the *Code* has properly allowed labour relations in the construction industry to evolve to meet the changing needs and circumstances over the past decades of both workers and employers, and thus there is no valid labour relations reason to amend the *Code* in this regard.
3. In particular, the *Code* has enabled construction workers to be able to freely choose between craft trade union representation on the one hand, and the more industrial style, all employee trade union representation on the other hand, according to their wishes and their own judgments about the type of union representation that best meets their interests. This freedom of choice has enabled the unionized sector of the construction industry to be better able to compete for work against the non-union sector, which can effectively carry out its work without being bound by strict craft lines.
4. The reality of today's construction industry is that there are no major general contractors who operate on the craft model, and the craft unions have a very small percentage of the overall construction work in the province. By providing construction workers with both modes of trade union representation, the Carpenters Union is simply reflecting that reality, as permitted under the *Code*.
5. The IRC in its reconsideration decision in the Cicuto & Sons case (BCLRB No. B52/97) described the spread of the industrial collective bargaining structure within the construction industry as an evolutionary process, which enables construction workers to choose the representation model that best suits their individual interests in today's construction industry.

Craft units are appropriate but they are not the only appropriate structure. We are satisfied that all employee bargaining units can also be appropriate in the construction setting. While limited for sound labour relations reasons, the scope for such units is not as narrowly circumscribed as the Applicants have argued. To repeat, we view the spread of the industrial collective bargaining structure within the construction industry as an evolutionary process. It is hardly surprising given the hard times which befell this industry in recent years,

with the attendant high unemployment within the ranks of the traditional craft workers, that the workers themselves would be driven to reconsider their own choices about bargaining agents and structures. We take notice of the fact that many craft union members have sought and obtained non-union employment, not as much as an alternative to craft union membership but more as an alternative to unemployment. This appears to have been merely the first step along the road of evolution in response to changing realities.

The next evolutionary step was the attraction for construction workers in being represented within an all employee unit. Perhaps as a measure of their dissatisfaction with having no representation on non-union projects, some former craft union members chose to opt for collective representation using a different model. It is understandable that an all employee unit might be viewed as offering some of the benefits of union representation but with the prospect of more continuity of employment through seniority rights and assignments of work across craft lines; employment characteristics which are foreign to the craft unit model.

6. Some craft unions, namely CMAW and the UA Local 170 have made submissions to this Panel that are critical of this initiative of the Carpenters Union to provide industrial style trade union representation in the construction industry as well as craft representation.
7. This initiative of the Carpenters Union – which, it should be noted, has also been pursued by other craft construction unions – is, of course, consistent with a fundamental purpose of the *Code* which is to provide employees with the protected right to choose the trade union representation they believe best serves their interests.
8. CMAW describes unions that provide industrial style trade union representation as “accommodational organizations,” which “stand opposed to almost everything that the labour movement values.”
9. First of all, many industrial unions going back much farther than CMAW’s existence, as examples, those in forestry and mining, would no doubt be perplexed by that statement. See Duke Point Development Ltd BCLRB No. 58/79 and the 1998 Report of the Construction Industry Review Panel, for a description of the IWA’s historical representation of construction workers.
10. But additionally, and with respect, that statement reflects a mindset that the Carpenters Union absolutely rejects. For the labour movement to remain relevant to workers, it has to provide trade union representation that today’s workers need and want in our economy.
11. Unions that do not recognize this economic reality are not going to be able to successfully represent workers. Trying to force employees into a trade union model that doesn’t work for them is not in the best interests of workers or the economic future of

the province – and most importantly, it is inconsistent with the fundamental principle of the *Code*, namely, employee free choice about trade union representation.

12. If workers want the craft style of representation, all well and good. But if they want the alternative of the more industrial style representation, that too is well and good.
13. The Carpenters Union submits that this fundamental principle of free choice must be kept foremost in mind in this *Labour Code* review, which means that construction workers must continue to have the right to choose either craft or industrial style trade union representation.
14. Also, in response to the submission of Local 170 regarding the Building Trades bargaining structure, while this is not a matter that comes within the mandate of the Review Panel, the Carpenters Union does think there is a question about whether, given the significant changes in the construction industry since this structure was created, the Bargaining Council imposed under s. 41 continues to serve a useful labour relations purpose. However, this is a matter for the Minister of Labour to consider and not the Review Panel.

All of which is respectfully submitted for the panel's consideration.

Yours very truly,

A handwritten signature in blue ink, appearing to read 'L - WB', with a stylized flourish at the end.

Laura K. Weston
Legal Counsel (West)

**UFAWU Submission
to the
BC Labour Relations Code
Review**

**Regarding amendments to the Fishing
Collective Bargaining Act**



May 6, 2024

Contact: Emily Orr
250 247 7271
BAgent@ufawu.org

Joy Thorkelson
250 600 4814
ufawupr@citywest.ca

UFAWU-Unifor Submission to the BC Labour Relations Code Review 2024

The United Fishermen and Allied Workers' Union-Unifor (UFAWU-Unifor) is a local of Unifor. We represent the organized fishermen, tendermen and shoreworkers in British Columbia in the commercial fishing industry. The Unifor submission covers the concerns of our wage workers, tendermen and shoreworkers, but fishermen are covered for the purposes of collective bargaining rights under an additional Act, the Fishing Collective Bargaining Act (FCBA).

This submission concerns amendments to the FCBA.

The application of the BC Labour Relations Code (BCLRC) and the Fishing Collective Bargaining Act (FCBA) to BC fishermen and their employers.

The **BC Labour Relations Code (BCLRC)** is modified by the **Fishing Collective Bargaining Act (FCBA)** which “*applies to persons engaged in the catching or harvesting of fish and to persons purchasing fish*”

The FCBA says (Section 3) *The Code and the regulations under it apply in respect of the matters to which this Act applies, but if there is a conflict or inconsistency between this Act and the Code, this Act applies.*

The Act defines a "**collective agreement**" to mean “*a written agreement between an employer or an employers' organization authorized by the employer, and a trade Union providing for minimum prices or prices of fish, share arrangements between vessel owners and crew members on fishing vessels, hours of work or other conditions of employment and includes any such agreement that was entered into before June 30, 1994 and that is still in force;*”

Section 14 of the FCBA gives the Board “*exclusive jurisdiction to decide a question arising under this Act, including jurisdiction to decide*
(a) that a person may be an employee for some purposes and an employer for other purposes, and
(b) that the relationship between a person engaged in commercial fishing and a purchaser of fish constitutes an employment relationship.

The FCBA describes a number of alternatives for employer-employee relationships.

"employee" means a person engaged in commercial fishing and includes a person who agrees to accept as remuneration a share or portion of the proceeds of a fishing venture;

"employer" means a person who employs one or more employees and includes

- (a) a person who purchases fish from a commercial fisher,*
- (b) a person who provides as remuneration a share or portion of the proceeds of a fishing venture, and*
- (c) an employers' organization;*

Helpful information:

Fishermen are normally paid on a price per pound of fish caught and sold to a fish buyer (or employer under the Act). Some types of fishing vessels are fished by one fisherman (the employee). In this case, that sole fisherman would retain all the revenue of the catch and would be the beneficiary of price negotiations.

In the case of larger vessels fished by multiple people, the revenue of the catch is shared between the owner of the vessel and the crew of the vessel. The people fishing - the crew members - receive a portion or share of the value of the catch. This is called the crew share. The beneficiary of the price negotiations is therefore both the crew and the owner of the vessel. The share paid to the crew is as much as a determinant of a crew member's income as is the negotiated price. In this case, the Act provides that the employer can be both the fish buyer and the owner of the vessel. In both cases the crewman is the employee.

Negotiating a share agreement with a fish buyer.

There has been one **Decision (BCLRB No. B81/2019)** regarding Certification and this Decision has shown that the **Act is deficient in providing for collective bargaining for share based fisheries.**

Amendments are needed to: permit collective bargaining with fish buyers in order to define the share or portion of the income from the catch for all fishermen delivering to the employer , so that all share fishermen selling their fish to the buyer (and covered by the Union's certification) will receive the same benefits from the negotiations.

Background-

The FCBA has only been tested once in the certification process. The first application for certification was of the UFAWU-Unifor with Canadian Fishing Company for a bargaining unit of salmon seine fishermen in 2018.

The Decision (BCLRB No. B81/2019) found the unit was an appropriate unit for collective bargaining.

The Union applied for a bargaining unit under which they would negotiate prices and a share agreement with the fish buyer that would cover all salmon seine fishermen delivering to the buyer. The Board found that the Union could negotiate prices for all salmon seine fishermen. However, the Decision also found that the Union could only bargain for shares for crew on vessels that were wholly owned by the employer, and not for crew on vessels wholly or partially owned by another party.

The Vice-chair interpreted the FCBA definition of 'collective agreement' combined with the definitions of 'employee' and 'employer' to mean that there were two types of collective agreements – “price agreements”, which would set the prices the buyer would pay for fish and “share agreements” which could only be negotiated between crew of a vessel and the owner of the vessel.

In this case, the employer (buyer) owned some vessels and so the Decision said that the Union could negotiate a share agreement with them, but that share agreement would not apply to the crew on the vessels that were not wholly owned by the buyer even though the fish was being sold to that buyer.

Sole Certification:

The **UNITED FISHERMEN AND ALLIED WORKERS' UNION - Unifor** holds the sole certification under this Act and under the BC Labour Relations Code. In 2019, the UFAWU-Unifor was certified by the Board for: *“all salmon seine boat crew members employed by Canadian Fishing Company including captains/skippers, engineers, mates, cooks, deckhands, and crew members who own the seine boat, and crew members who share ownership of the boat, in the Province of British Columbia”*.

Issues highlighted by the Decision on Certification:

The Board's interpretation of the FCBA resulted in a number of unresolvable conundrums.

1. The Union is certified to bargain for the price of salmon, and on an employer owned vessel, the Union can also negotiate the crew members share or portion, so that the crew knows what their income will be. On a non-employer wholly owned vessel, the Union can only negotiate the price, the share is determined by whoever owns the vessel and the crew is often unaware of their income until paid.

The income of a crew member on a share based vessel is dependent on the price of salmon multiplied by the pounds caught by the vessel subtracting operating costs of fuel, food and the like) divided by the portion shared to that member. (Income =(price X pounds caught – operating costs) / share to the crew member) For example, if the Union bargains for a price of \$2.00 per pound, the vessel catches 10,000 pounds, the total vessel revenue is \$20,000. After operating costs (eg \$5,000) the share to be divided is \$15,000. On an employer owned vessel (after expenses) the crew receives 7/11 (64%) of the revenue. On a non-employer owned vessel, the total revenue would also be \$20,000 but the crew does not know what their income will be.

2. The result of restricting the Union to bargaining shares for those crew only on employer owned vessels is that the Union bargains prices that are paid to crew on employer owned vessels and to owners on non-employer owned vessels. The crew on those non-employer owned vessels may or may not receive the benefits of the collective bargaining. The employer (buyer) pays the company who owns the vessel; that owner benefits from Union negotiated prices, but does not have to share the benefits of the negotiated price with their crew.

3. The ridiculousness of this is that the Union is certified to represent all crew when bargaining for price; if a strike is called, all crew on all vessels delivering to the employer are covered by the strike for prices no matter who owns the vessel. However, if the crew on a non-employer owned vessel do not know what their share is, what exactly are they striking for? The benefits of the negotiation would be paid to the owner of their vessel, not to the crew member. The crew member may have struck only for the benefit of the vessel owner of the boat the member is working on.

So the Union certification for salmon price negotiations could be meaningless for those selling their fish to the employer (and therefore covered by the certification, bargaining and the collective agreement) who are fishing on a non-employer vessel as they may not benefit from the negotiations. The Decision has created two classes of employees: those who benefit from negotiations because they know the price and their share and those who only know the price that will be paid to the owner of their boat and may not benefit, depending on that vessel owner.

4. The employer owns many vessels and benefits from the share by virtue of having a portion of the catch guaranteed to them. A standard share agreement has a portion going to the crew and the balance going to the vessel owner. If the employer (the fish buyer who owns a vessel for whom the Union has negotiated a share) wishes to change their share arrangement and acquire a larger share, they do not have to negotiate this with the Union, according to the LRB Decision they merely have to sell a portion of the ownership of the vessel to someone else. Then the employer can set their own share without negotiating with the Union because the vessel is no longer 'wholly owned' by the buyer and is no longer in the Union's jurisdiction for share negotiations. This sale of vessels to 'partial owners' is common; the share negotiated covering that crew on that same vessel becomes no longer in force.

5. Further constricting the Union's ability to protect its members from the sale of a vessel impacting their rights as crew members, is that under Section 6 of the FCBA, "**Successor rights:** *Section 35 of the Code does not apply with respect to the sale of a fishing vessel.*", thereby guaranteeing the employer the ability to nullify a share agreement by simple partial sale of their vessel.

Under Section 6 of the FCBA, the collective agreement does not follow the vessel when it changes ownership; under the BCLRC, other employees who face a sale of their company have protections to ensure the collective agreement applies to the new owner. Not fishermen.

For example, the employer the UFAWU-Unifor is certified for bargaining is Canadian Fishing Company. Canadian Fishing Company regularly sells part ownership in the vessel, and/or in the license to fish attached to the vessel, nullifying any share agreement attached to that vessel. The crew still delivers its catch to CFC. However the vessel owner (CFC+?) still receive the benefits of the price negotiations, but the crew may not.

A small change in ownership and the vessel is no longer bound by a collective agreement because the FCBA prohibits successorship.

So there are 2 hurdles to overcome: the Decision that says that the Union cannot negotiate a share agreement with the buyer that covers non-wholly buyer owned boats so if there is even a partial sale in ownership, there is no longer a share agreement for that vessel. And Section 6 of the FCBA prohibits successorship.

6. If the Union is to be prevented from negotiating one share agreement that applies to all crew members fishing for that buyer, along with one price that applies to all crew members, then the alternative is to certify each and every vessel independently and negotiate a separate share collective agreement with each vessel.

A Union certification to negotiate for prices is with one buyer. That buyer can have multiple vessels fishing for it, some they own and some they don't, and each year the buyer can change which vessels it engages. The Union negotiates the price based on the buyer, not on the vessel.

For example: There are between 20-80 salmon seine vessels fishing for and delivering to Canadian Fishing Company, depending on the expected volume of salmon. Each vessel has between 4-5 crew members. The Union has no control over which vessels fish for the employer. The employer can have different vessels fishing for it every year, some privately (non-CFC wholly owned) and some wholly owned by CFC. If the Union is required to negotiate a share agreement with every non-employer wholly owned vessel fishing for the employer, then every year it would have to hold a certification campaign for the vessels it does not have a share agreement with. And if the vessel is sold or partially sold, there is no successorship. An unworkable situation. If the Union is forced to certify all non-buyer owned vessels fishing for the buyer (employer) every year, it will be an impossibility.

Fair meaning of collective bargaining:

The UFAWU-Unifor cannot believe that the Fishing Collective Bargaining Act was meant to allow crew members fishing for the same employer (buyer) to be treated so differently and to unfairly create a set of 'secondary citizens'.

We cannot think of any other situation where a Union bargains and wins a wage increase that is negotiated to be paid to all workers - but where the responsible Act or Code allow a third party to the negotiations to totally remove the benefits of the negotiations from certain employees and retain it for themselves.

Under the Act, the Union has no ability to guarantee that all those covered by the collective agreement, and are part of negotiations, will receive the benefits of the collective bargaining for a better price.

Resolution:

The Fishing Collective Bargaining Act needs to be amended so that it requires that the benefits of collective bargaining go to the workers (fishermen) covered by the negotiations and the Collective Agreement, and not to a third party.

The FCBA should to be changed so that the formula “price x share” can be negotiated with the buyer and will set the price paid to the crew on all vessels selling to that buyer. The crew on private vessels need to know what they are earning under their collective agreement from the delivery and sale of their fish. If the person or corporation who owns the private vessel does not like the terms (price and share) set out in the collective agreement they can choose to sell to another buyer.

Suggestions for amendment:

1) Present FCBA

"collective agreement" means a written agreement between an employer or an employers' organization authorized by the employer, and a trade Union providing for minimum prices or prices of fish, share arrangements between vessel owners and crew members on fishing vessels, hours of work or other conditions of employment

Suggested FCBA amendment:

*"collective agreement" means a written agreement between an employer or an employers' organization authorized by the employer, and a trade Union providing for minimum prices or prices of fish, share arrangements ~~between vessel owners and crew members~~ on fishing vessels, **quota fees, benefits**, hours of work or other conditions of employment.*

[The Union has added quota fees and benefits to the list of things that may be negotiated.]

2) Present FCBA

"employer" means a person who employs one or more employees and includes

- (a) a person who purchases fish from a commercial fisher,*
- (b) a person who provides as remuneration a share or portion of the proceeds of a fishing venture, and*
- (c) an employers' organization;*

Suggested FCBA amendment:

"employer" means a person who employs one or more employees and includes

- (a) a person who purchases fish from a commercial fisher, **and/or***
- (b) a person who provides as remuneration a share or portion of the proceeds of a fishing venture, and*
- (c) an employers' organization;*

There is nothing in this definition that restricts collective bargaining for minimum prices or prices of fish, share arrangements on fishing vessels, quota fees, benefits, hours of work or other conditions of employment with any employer, including a person who purchases fish from a commercial fisher.

3) Present FCBA

Effect of certification

12 It is not inconsistent with section 27 (1) (a) or section 48 of the Code for an employer to pay bonuses or make other payments to employees above the minimum price in a collective agreement.

Suggested FCBA amendment: Add new section [renumber present section 12 to 12a and add 12b]

Effect of certification

12(a) It is not inconsistent with section 27 (1) (a) or section 48 of the Code for an employer to pay bonuses or make other payments to employees above the minimum price in a collective agreement.

12(b) A Union can be certified to bargain a share agreement with a buyer that covers all vessels who are fishing and delivering to that buyer.

4) Present FCBA

Jurisdiction of Labour Relations Board

14. The board has exclusive jurisdiction to decide a question arising under this Act, including jurisdiction to decide

(a) that a person may be an employee for some purposes and an employer for other purposes, and

(b) that the relationship between a person engaged in commercial fishing and a purchaser of fish constitutes an employment relationship.

Suggested FCBA amendment:

Jurisdiction of Labour Relations Board

14. The board has exclusive jurisdiction to decide a question arising under this Act, including jurisdiction to decide

(a) that a person may be an employee for some purposes and an employer for other purposes, and

(b) that the relationship between a person engaged in commercial fishing and a purchaser of fish constitutes an employment relationship.

(c) that a purchaser of fish may, according to the terms of a collective agreement, bind a person who owns a vessel whose crew are also employees of the fish purchaser, to the terms of the collective agreement, including the division of shares.

5) Present FCBA

Successor rights

6. Section 35 of the Code does not apply with respect to the sale of a fishing vessel.

Suggested FCBA amendment:

Remove FCBA Section 6 to allow successor rights as per the BCLRC Section 35.

Discussion:

The UFAWU-Unifor is not proposing the above language (in red) as the only or even the best solution. However, it needs to be clarified that under the Act, a fish buyer (employer) can bargain a share arrangement that will bind a vessel that they do not own but who is delivering (fishing) for the buyer to a common share agreement.

1. The employer (fish buyer) may argue that they cannot enforce how a separate business (vessel owner) manages its employees and its payroll. In fact, the FCBA *Dismissal provision in collective agreements section 8 states that Section 84 (1) and (3) of the Code does not apply (b) to an employment relationship where the employer maintains no control over the discipline or dismissal of the employee.* The Union does not dispute that for non-monetary issues regarding hiring, discipline and termination of a crew member on a privately owned (non-employer owned) vessel, that the relationship is between the vessel owner and the crew member that they have engaged to fish on their vessel. However on monetary issues that are properly bargained with an employer in a normal sense (remuneration for work, benefits, pensions), the Union submits that these properly lay at the feet of the buyer with whom the Union is negotiating such matters. The share the crew receive is part of determining remuneration for work. All employees of the buyer should benefit equally from the collective bargaining with the buyer.

If a vessel owner does not want to pay their crew according the share agreement negotiated with the buyer, they can sell their fish to a different buyer. They may not benefit from a union negotiated price, but they would not have to pay their crew according to the share arrangement with the buyer.

In the Decision (BCLRB No. B81/2019) at paragraph 171 page 30, the Vice Chair writes:

171. I acknowledge that Section 8 of the FCBA states certain dismissal provisions in the Code do not apply to "an employment relationship where the employer maintains no control over the discipline or dismissal of the employee". This could support the Union's argument that the FCBA allows for vessel owners to become bound as employers to terms and conditions of employment negotiated between the Union and a different employer. **However, I find such an intention would need to be more clearly expressed in the legislation than through what is contained in this provision.** [UFAWU emphasis]

The Vice-Chair did not speculate what legislation might be required.

2. In the UFAWU-CFC instance, the employer (buyer) has also been using the relationship between the vessel owners and themselves to frustrate the payment of Union dues. For crew members fishing on vessels not owned by CFC, this employer denies an ability to pay dues directly to the Union based on a sliding scale or percentage of earnings because they maintain they are not in control of the crew members' earnings and don't know what they would be. A common share arrangement would solve this problem as the buyer would know the crew's income.

3. An alternative to negotiating a common share agreement that applies to all vessels that deliver fish to the buyer is that the Act could be amended to say that a partial share can be negotiated with an employer who purchases fish so that the crew members get such a percentage and the vessel owner gets a certain percentage, both to be paid up front and directly to the crew and vessel owner involved. This would require the vessel owner to charge to the crew, after the crew is paid by the buyer, various operating expenses that the crew would owe the vessel owner. This solution would respect the buyer's obligation to their employees (for the purpose of remuneration for the proceeds of the catch) and the vessel owner, but would complicate things for the vessel owner as they would have to chase after their crew members to be reimbursed for operating expenses. Certainly it would be simpler to apply a full share arrangement (including up front deduction of expenses) at the buyer level.

4. A third alternate could be that the province, by legislation, (perhaps through the Employment Standards Act) set a share agreement that applies to all vessels fishing in BC. This could be done by gear and species fished. This would be the most beneficial for all fisheries but not what we are asking for.

What we do ask is for legislative clarity that

a) a Union can be certified to bargain a share agreement with a buyer that covers all vessels who are fishing and delivering to that buyer.

b) a fish buyer, due to terms in a collective agreement, can require all vessel owners to pay a crew share based on a share agreement that is common to all fishing vessels selling fish to the buyer.

Conclusion:

The purpose of a Union is to represent their members in the bargaining unit at the negotiating table with the employer. The FCBA is deficient because it does not allow a Union to bargain so that all its members benefit from the negotiations with the buyer it is certified to bargain with. The Union should not be forced under the Act to bargain for one set of crew members and for another set of employers (vessel owners) who may or may not share the proceeds of the negotiations with their crew. The Union is bargaining for a price that should apply equally to crew fishing on buyer owned vessels and on vessels which are not wholly or partially owned by the buyer.

The FCBA should not shield employers from properly reimbursing those who are doing the work on the vessels to catch the fish. The Act should not be used to frustrate the meaning of Collective Bargaining.

The Union also submits that the following excerpt from the **Department of Justice's Charterpedia**

i) Protection for trade Union activities, including collective bargaining and striking (Government of Canada <https://www.justice.gc.ca/eng/csj-sjc/rfc-dlc/ccrf-ccd1/check/art2d.html>) should be taken into account when considering the FCBA:

In determining whether the right to a process of collective bargaining has been infringed, the courts assess whether the measure disrupts the balance of power between employees and employer necessary to ensure the meaningful pursuit of workplace goals so as to “substantially interfere” with meaningful collective bargaining. Such disruption can occur in many ways: restriction on the subjects that may be discussed, the imposition of arbitrary outcomes, banning recourse to collective action without countervailing protection, making employee workplace goals impossible to achieve or establishing a process which employees cannot effectively control or influence. Substantial interference with collective bargaining negates the employees’ right to meaningful freedom of association by rendering their collective efforts pointless, which encourages the view that future associational activity would be similarly futile.

The UFAWU argues that the crew members overwhelming voted to be represented by the UFAWU-Unifor for the purposes of collective bargaining with the fish buyer in order to make a better living. Half or more are now frustrated because they do not see the benefits of the negotiations because the Act does **not** make it clear that the employer who benefits from the purchase of what their labour has provided (fish that they caught) must ensure that they are the beneficiaries of the bargained prices. The reason for the Fishing Collective Bargaining Act was to ensure that fishermen were able to collectively bargain in BC for better prices and benefits and conditions. The Act is now frustrating those fishermen who are on share based non-wholly buyer owned vessels to collectively bargain for a better income. Some of those fishermen are wondering why they are bothering with collective bargaining, as the owner of the vessel is benefiting from their bargaining, not them.

Respectfully Submitted

May 6, 2024

United Fishermen and Allied Workers’ Union – Unifor
UFAWU-Unifor



May 17, 2024

Submitted via email: lrcreview@gov.bc.ca

Labour Relations Code Review Panel
Sandra Banister, K.C.
Michael Fleming
Lindsie Thomson

Dear Panel Members:

Re: Reply to Labour Relations Code Review Submissions

We write in response to the Panel's April 5, 2024 update to the community inviting written replies to the submissions posted on the Review Panel's website. Please accept this letter as the reply of the United Steelworkers.

Our reply focuses on three issues:

- a) The employer community's claim that the Code must be "balanced";
- b) Proposals for amendments to the certification provisions of the Code; and
- c) The proposal from the Canadian Association of Counsel to Employers (CACE) with respect to pre-hearing disclosure of particulars in grievance arbitration cases involving discipline.

A. The fallacy of "balance"

A call for "balance" is one of the predominant themes running throughout the submissions of employer-side members of the labour community. Employers argue that the last Review Panel process resulted in union-friendly changes to the Code, which created a lack of balance that must be corrected, or at the very least, not expanded upon. This argument underpins the employers' criticism of the present certification process and is the foundation of its resistance to the idea of broader-based or sectoral bargaining.

It is also a false argument.

The idea that the Labour Relations Code should be "balanced" is fundamentally cynical, invites instability, and ultimately undermines the policy objectives of the Code. The purposes of the Code, as reflected in section 2, are not neutral. While section 2 recognizes the rights and obligations of both unions (and employees) and employers, the Code also quite explicitly sets out to "encourage the practice and procedures of collective bargaining between employers and trade unions as the freely chosen representatives of employees." Thus, the Code's objective is to facilitate access to collective bargaining, not to discourage it. It is not neutral, nor should it be.

As this Panel knows, the right to form a trade union and bargain collectively is a Charter right. The Code, therefore, should be viewed through the same lens through which we approach Constitutional, quasi-constitutional, or similar legislation that has as its aim the protection and preservation of basic rights. A balancing of interests approach does have its place in such legislation: the Charter is subject to “reasonable limits” (section 1); the Human Rights Code does not require accommodation where it would result in “undue hardship.” Importantly, those limitations are secondary to the legislation’s primary purpose of protecting and preserving fundamental rights.

Likewise, one of the primary purposes of the Code is to provide workers with a means to exercise their right to bargain collectively. The Code’s recognition of the rights of employers and uninvolved third parties place certain limits on the activities of workers and trade unions, but in no way supersedes the fundamental right to join a union and engage in collective bargaining.

If employers were to argue that Charter rights should be curtailed because they pose an impediment to business activity, that would be met with skepticism. If employers were to lobby for a dilution of human rights protections because the Human Rights Code makes doing business more expensive (which it can), that too would be poorly received. The suggestion that the Labour Relations Code’s protection of employees’ access to collective bargaining should also be restrained because it is “bad for business” is, we submit, similarly offensive. It also ignores the plain purposes of the Code.

While the need for “balance” is a repeated refrain in the employer community’s submissions, none of those submissions identify what “balance” actually looks like, let alone articulate any principled reason why “balance” should be a goal *per se*. That is because there is no principled reason why “balance” should be elevated over sound labour relations policy. It is a classic example of *argumentum ad temperantiam*, or the fallacy that the truth (or common good) lies in the middle of two opposites. It is the labour relations equivalent of journalism’s “both-sidesism”.

But the “balance” argument is not just empty rhetoric – it makes for poor public policy and is ultimately bad for both business and labour. The problem with approaching the Labour Relations Code review process as a purely political exercise is that it treats the Code as a scorecard, as opposed to an expression of sound labour relations policy. The resulting wild swings of the pendulum only create unpredictability and instability, which surely undermines the Code’s other goal of “foster[ing] the employment of workers in economically viable businesses.”

There is a time and a place for broader discussions about how to foster economically viable businesses. As a predominantly private-sector union, we too would like to promote economic viability. However, economic development – particularly in a province whose economy is dominated by resource extraction – is driven by factors that fall under the purview of multiple ministries and all levels of government, including First Nations. To reduce the “investment climate” to the contents of the Labour Relations Code is simplistic at best.

In short, we invite the Review Panel to reject calls for “balance” for the sake of balance. What we need is a modern Labour Relations Code that “encourages . . . collective bargaining” in a manner that reflects the modern workplace and economy.

B. Amendments to the certification timelines in the Code

This leads us to our response to the employers' proposals that the certification process be amended to lengthen the period between the date of application and the date of vote (if there is one). Proposals from employers included:

- Returning to the 10 calendar days that pre-existed the most recent changes to the Code;
- Moving to 10 business days; and
- Extending the timeline to a minimum of 20 days.

We submit that these proposals should be flatly rejected.

The employer community primarily seeks a return to a two-step certification process that requires a vote in all cases. The proposed extension of the timelines is posited as an alternative. However, there is little or no rationale offered in support of an extended time frame. Rather, the extended timeline is offered as a way to restore “balance” to the system in the wake of single-step certification. Indeed, when questioned by the Panel during public consultation meetings, employer representatives candidly admitted that the proposed extended timelines were an attempt at compensation for the fact that unions were “given” card-based certification. For all of the reasons outlined above, we invite the Board to reject this “tit for tat” approach to labour relations policy in favour of a principled approach.

In fairness, a handful of employers asserted that a move to “business days” is warranted because of alleged difficulties in collating employee lists and other information or accessing legal advice over the weekends. They claim that counting weekends as part of the timeline leads to an unfair advantage to the union applicant.

We do not understand how asking respondent employers to work weekends is problematic or unfair. The sort of information sought by the Board in response to an application for certification is straightforward and should be readily accessible. Employers know their businesses; surely, they can identify their employees. It is equally reasonable to ask employers (who expect productivity and flexibility of their employees) to work on the weekend where necessary. Lastly, the suggestion that legal advice is not available over the weekend is not borne out by our experience.

In sum, we say that there is no rational basis to extend the timelines that govern the certification process. Lengthening the time it takes to process a certification application generates unnecessary delay and, worse, creates the opportunity for mischief and undue interference in the expression of employee wishes.

C. Pre-hearing disclosure of particulars in discipline arbitrations

Lastly, we wish to respond to the submissions of the Canadian Association of Counsel to Employers (CACE) with respect to the pre-hearing disclosure of particulars.

CACE asks that the Panel recommend changes to section 88.1(a) of the Code (and consequential changes to the Rules) to “require pre-hearing disclosure at arbitration in the same manner as the disclosure required in Board proceedings under Rule 2”.

We oppose this recommendation. While we agree that pre-hearing disclosure is generally to be encouraged, mandated disclosure in all cases is a “one size fits all” approach that deprives arbitrators of the discretion to determine if, when, and to what extent disclosure is appropriate and necessary to ensure a fair hearing.

With respect, CACE’s recommendations to this Panel amount to an attempt to relitigate *British Columbia (Ministry of Public Safety and Solicitor General) and BCGEU, Local 105, 2020 BCLRB 28 (“Solicitor General”)*, in which the Board rejected the employer’s application under s. 99 of the Code for a review of an arbitration award in which the arbitrator had refused to order that the union provide particulars of its position respecting a discipline grievance. The Board reasoned [at para. 22], in part, as follows:

. . . the difficulty with the Employer's position in the present case is that the arbitral case law does not recognize an inherent right to pre-hearing disclosure of particulars: *Douglas College and Douglas College Faculty Assn., Re [1989 CarswellBC 1958 (B.C. Arb.)]*, Award No. A-268/89 (Hall), para. 3; *West Fraser Timber Co. v. I.W.A., Local 1-425 [1982 CarswellBC 2614 (B.C. Arb.)]*, Award No. A-15/82 (Vickers), para. 7. While arbitrators have recognized that, in some cases, the right to a fair hearing will make the exchange of particulars necessary, they have generally not accepted that discipline cases fall within that category. Rather, because an employer bears the onus of establishing the facts on which it relied to impose discipline, arbitrators have recognized that a union is entitled to stay silent until the employer has made its case: *Overwaitea Food Group v. U.F.C.W., Local 1518 (1994)*, 42 L.A.C. (4th) 19 (B.C. Arb.) (Taylor) (“Overwaitea”), para. 14; *Riverside Forest Products Ltd. v. IWA-Canada, Local 1-423 [2000 CarswellBC 4552 (B.C. Arb.)]*, Award No. A-020/00(a) (Hall) (“Riverside Forest Products”), para. 14; *Community Social Service Employers' Assn. v. H.S.A.B.C. [2002 CarswellBC 3401 (B.C. Arb.)]*, Award No. A-133/02 (Lanyon) (“CSSEA”), para. 105; *U.A., Local 170 v. National Energy Equipment Inc. [2012 CarswellBC 2077 (B.C. Arb.)]*, Award No. A-079/12 (Dorsey) (“National Energy”); *Rippel (2009) Enterprises Ltd. and UNITE-HERE, Local 40, Re [2016 CarswellBC 2426 (B.C. Arb.)]*, Award No. A-077/16 (Saunders) (“Rippel”).

The Board determined that the employer had not been denied a fair hearing and dismissed the application.

The employer’s loss in this single case (*Solicitor General*) does not warrant a statutory amendment that would effectively mandate pre-hearing disclosure of particulars by unions in all discipline arbitrations. Arbitrators can be entrusted to determine the appropriateness of pre-hearing disclosure on a case-by-case basis in the context of the specific facts before them.

CACE argues that the effect of *Solicitor General* has been to “frustrate the proper operation of the grievance procedures contemplated by the Code,” asserting that a “failure to provide particulars means that there is virtually no prospect that any dispute over discipline and discharge will be resolved under the terms of the collective agreement prior to an arbitration hearing”.

This is, with respect, hyperbole. It is also wholly inconsistent with our experience, which is that the grievance arbitration system continues to work as well as it had before *Solicitor General*. In light of

CACE’s submissions, we canvassed all of our British Columbia staff representatives to ask whether their ability to settle discipline grievances prior to hearing has changed since 2020 (when the Board issued its decision in *Solicitor General*). The answer was a unanimous “no”. The sky has not fallen. In most cases, the union continues to voluntarily share particulars prior to hearing where it makes sense to do so, and it continues to be the case that most grievances – including discipline grievances – settle before arbitration. In the rare case where natural justice requires pre-hearing disclosure of the union’s particulars in a discipline matter, arbitrators are empowered to make such orders. There is nothing here to be fixed.

We thank the Review Panel for the opportunity to provide these response submissions.

A handwritten signature in black ink, appearing to read "Lunny", with a horizontal line extending to the right and a small dot at the end.

Scott Lunny
Director
United Steelworkers District 3



VANCOUVER and DISTRICT LABOUR COUNCIL



May 6, 2024

Labour Code Review Panel
c/o Michelle Webster
Harris & Company LLP
VIA EMAIL: mwebster@harrisco.com

Greetings,

Per my email on the morning of May 6th, 2024, I am unable to attend my scheduled presentation at 11:15am on May 7th due to illness. I was scheduled to speak on behalf of the Vancouver & District Labour Council, which represented over 90 affiliated local unions, and approximately 60,000 unionized workers in the Metro Vancouver region. It is my hope that this summary of the comments I wished to share will be accepted. I will be happy to answer any questions.

As noted in my earlier written submission, our Labour Council endorses the BC Federation of Labour (BCFED) Response to the Labour Code Review, which was issued in March of this year.

There are a couple of areas in that document which I had hoped to emphasize in my verbal submission.

First, I would like to strongly support Recommendation 2: Recognize the success of single-step certification. The June 2022 decision of this provincial government to reinstate single-step certification was a tremendous and crucial step in ensuring that working people can access their charter right to join a union.

As noted in the BCFED submission, the Board approved 195 applications for certification in 2023, a 36% increase on the previous year. At the Labour Council, we work closely with our affiliated unions and have an opportunity to receive reports from them monthly at our regular meetings. In those meetings I have heard about the workers who, thanks to the reinstatement of single-step certification, were able to exercise their rights without undue hindrance.

The workers in question have ranged from animators to baristas, retail workers, janitors, healthcare workers, and beyond. They include many youth, racialized workers, women, and gender-diverse workers. They've sought to be part of a union to achieve greater balance in their workplace and ensure respect and fairness for themselves and their coworkers.

Pg. 2/...

The implementation of single-step certification has clarified and simplified the process, making for better access to exercise this right. As has been noted by many, one is not required to undergo a waiting period and then sign a second time for a mortgage, to become an organ donor, to be married, or buy a car. One should not be required to do so to exercise a fundamental charter right.

Another area that I'd like to draw attention to is Recommendation 4: Expand successorship protection. This is an area that has been raised as a concern by many of our affiliates in sectors which are prone to contracting and sub-contracting.

The addition of successorship protections in following the 2018 review provided protections to many workers in building cleaning, security, bus transportation, food services, and non-clinical health sector. However, many workers remain without these protections.

All workers should be able to rely on their jobs, wages and benefits following them when a contract changes hands. This is a matter of fundamental fairness, and an important affordability measure. As noted in the BCFED submission, it is also an equity issue, since workers in many of the affected industries are disproportionately racialized, immigrant, or newcomer workers.

Finally, I'd like to highlight Recommendation 5: Ensure provincially regulated workers can honour the picket lines of workers who are regulated by the federal government or another provincial government.

This is an area which has been the subject of substantial discussion at the labour council and is a serious concern for our affiliates. We second the BCFED's support for the amendments contained in Bill 9. Addressing this issue is critical and urgent.

I highlight these three areas purely because they are the ones that I believe we have heard about most consistently at our Labour Council. However, we heartily endorsed the BCFED submission, and consider all of its recommendations deeply important to providing a fairer, more just labour relations atmosphere in the province of British Columbia.

Thank you for your time, and my apologies once again for being unable to appear in person on this occasion.

Best regards,



Stephen von Sychowski
President, Vancouver & District Labour Council

svs/eb

moveUP

Issue 1:	Significant lack of racial/ethnic diversity amongst labour arbitrators
Information:	<p>Allowing labour unions and employers to select who is going to arbitrate their dispute actively discourages diversity. What results is some labour arbitrators have significant amounts of business, and others cannot sustain a book of business and thus do not continue offering services... yet in some cases, individual employees are waiting longer than it would take to secure a court date had the court had jurisdiction.</p> <p>Naturally, humans gravitate to what is familiar and what is comfortable. That can mean seeking out those that have similar ethnic/racial backgrounds, genders, values, work experience, etc. From there, a strategic analysis is done to determine the likelihood of the respective arbitrator ruling in their favour.</p> <p>The public is not permitted to select the judge assigned to their case, and with the deference given to labour arbitration decisions, it does not seem ethical that unions and employers be permitted to choose their arbitrator.</p>
Supporting Evidence:	<ul style="list-style-type: none"> • Sarah Rudolph Cole, “Arbitrator Diversity: Can It Be Achieved?” (2020) Wash. U. L. Rev. 98 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3744139#> • Ontario Bar Association (OCBA), “Neutral Diversity in Ontario” (2022) https://www.oba.org/CMSPages/GetFile.aspx?guid=feddadcd-980f-4e83-86c9-ff8ecbfba32d • Verlyn Francis, “Ethics in Arbitration: Bias, Diversity, and Inclusion”, 51 Cumberland Law Review 419 (2020-2021) https://heinonline.org/HOL/LandingPage?handle=hein.journals/cumlr51&div=18&id=&page=
Recommendation:	Require that all labour arbitration appointments be done through the Collective Agreement Arbitration Bureau. This can support alleviate some of the financial pressures faced by the BCLRB, ensure that labour arbitrators are given standardized training on best practices annually, allows for arbitrators to enhance their knowledge on a variety of files and work collaboratively with one another in a formalized mentor/mentee relationship, and supports building diversity within the labour arbitration profession.

<p>Issue 2:</p>	<p>Individual employees are waiting an excessively long time for the resolution of termination grievances while their mental health and finances suffer.</p>
<p>Information:</p>	<p><i>Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia</i>, [2007] 2 S.C.R. 391, 2007 SCC 27 at para 60 stated the following:</p> <p>P.C. 1003 was a compromise adopted to promote peaceful labour relations. On the one hand, it granted major protections to workers to organize without fear of unfair interference from the employers and guaranteed workers the right to bargain collectively in good faith with their employers without having to rely on strikes and other economic weapons. On the other hand, it provided employers with a measure of stability in their relations with their organized workers, without the spectre of intensive state intervention in the economy (Fudge and Glasbeek, at p. 370). These elements of P.C. 1003 continue to guide our system of labour relations to this day (Adams, at pp. 2-98 et seq.).</p> <p><i>Dayco (Canada) Ltd. v. CAW-Canada</i>, [1993] 2 S.C.R. 230 states the following:</p> <p><i>Unresolved disputes fester and spread the infection of discontent. They cry out for resolution. Disputes in the field of labour relations are particularly sensitive. Work is an essential ingredient in the lives of most Canadians. Labour disputes deal with a wide variety of work related problems. They pertain to wages and benefits, to working conditions, hours of work, overtime, job classification and seniority. Many of the issues are emotional and volatile. If these disputes are not resolved quickly and finally they can lead to frustration, hostility and violence. Both the members of the work force and management have every right to expect that their differences will be, as they should, settled expeditiously. Further, the provision of goods and services in our complex society can be seriously disrupted by long running labour disputes and strikes. Thus society as a whole, as well as the parties, has an interest in their prompt resolution.</i></p> <p>Arguably, jurisdiction over labour issues was removed from the court and granted to arbitrators to support timely access to justice. Timely access to justice is not happening. Strategic arbitration appointments are made resulting and there is also intentional delay tactics engaged by both unions and employers. It is not just the union or employer that suffer (if they suffer at all depending on the issue being disputed), it is the individual employee whose life is on hold that suffers the consequences of such unethical behaviour.</p> <p>In 2021, of all termination grievances decisions that were published on CanLii that were not related to lay-off, the median timeframe to resolution was 248 days from the date of termination to the date of award. The longest was 707 days, and the shortest 77 days.</p> <p>This is absolutely egregious and if you were the court, I think it would be fair to say that you could take judicial notice of the impact of delay on a grievor’s mental health and financial stability.</p>

	<p>These timelines are absolutely unacceptable and need to be addressed. The current system is not working as intended and additional arbitrator availability will not resolve this issue. This needs to have a targeted solution.</p>
<p>Supporting Evidence:</p>	<ul style="list-style-type: none"> • Ronald A. Pink, Q.C. and David C. Wallbridge, “The Future of Labour Arbitration”, Canadian Bar Association, 2010
<p>Recommendation:</p>	<ul style="list-style-type: none"> • Require that all non-layoff related terminations be registered with the BCLRB in some way that affords the individual employee some anonymity (eg. registration with an employee number or other non-SIN related identifier). • Amend legislation to require all grievance steps be complete within 45 days for termination grievances <ul style="list-style-type: none"> ○ If an employer has followed all of the expected steps prior to termination as established by years of labour precedent, this timeline is not unreasonable ○ Consent to extend this timeline should be at the discretion of the employee. It is their lives that are impacted and on hold ○ Legislate disclosure requirements for the grievance process... there are some employers who only disclose information once the issue has reached the stage of arbitration, which is unacceptable, or the union only requests information after the steps of the grievance are complete. <ul style="list-style-type: none"> ▪ An amendment like should will hopefully increase the quality of representation by unions and require employers to organize documents as they prepare for termination • At the end of 45 days, if the termination grievance has not been resolved or consent for an extension has not been granted by the employee, the Collective Arbitration Bureau needs to assign an arbitrator who will hear the matter within 45 days.

Issue 3:	The BC Labour Relations Board is systemically biased against individual grievors who file Duty of Fair Representation Complaints
Information:	<p>Canadian labour law has long established that unions are the exclusive bargaining agent for members of a bargaining unit and have considerable latitude when deciding to move forward with an employee’s grievance. They control the unionized employee’s access to justice and are required to exercise their discretion fairly.</p> <p>If unionized employees feel their union has represented them unfairly, they can file a Section 12 Duty of Fair Representation complaint [DFR] with the BCLRB, which will adjudicate their claim. Their ability to access justice depends on their success in the DFR complaint.</p> <p>Since the 1973 introduction of the BC Labour Code, an employee’s DFR complaint is decided by a vice-chair appointed to the board either as an employer or union representative. Of the 3,967 DFR complaints noted in the BCLRB’s annual reports between 1991 and 2023, 2.46% have been successful. In most years, the success rate of a DFR complaint has been less than 2.12%.</p> <p>Canada’s Labour Law system was mostly developed based on recommendations made in the 1968 <i>Woods Report</i>. The Report suggested that the Canadian Labour Congress and similar organizations set up Public Review Boards with members outside the labour movement to address internal union complaints.</p> <p>The Report stated that when labour boards made decisions, they weren’t doing so based on a legally enforceable right but rather what they “<i>consider[ed] to be a fair reconciliation of conflicting interests and claims.</i>” While this would bring some “<i>comfort to the claimant to know that a friendly point of view may be found on the board,</i>” he didn’t find that this benefit outweighed its disadvantages in a new labour relations system that would have labour relations boards exercise a more expansive power. The expanded jurisdiction of labour boards would mean enforcing more than interests. They would be tasked with enforcing rights and duties, and he didn’t think that these quasi-judicial powers should be executed by a tribunal by which its structure lends itself to compromise.</p> <p>After the Woods Report was released, there was an explosion of labour law reform across the country. Parliament and the ten provinces would amend their labour relations legislation in response. While BC did transfer power away from the court and to the BCLRB, it chose not to implement the most significant recommendations that would have the greatest impact on individuals claiming unfair representation by their union – the reconstitution of labour relations boards with members from outside of the labour movement and public review boards.</p> <p>British Columbia didn’t view a labour board comprised of members of the labour community exercising quasi-judicial powers as problematic. Instead, the BCLRB</p>

continued to be constituted with equal representation of employers and trade unions. This model continues today.

While the 1973 Labour Code didn't include public review boards as recommended by the Woods Report, it added a new role of the Labour Ombudsman. The Labour Ombudsman would have the authority to examine and consider decisions and make recommendations. Unfortunately for individual complainants, this part of the legislation was not enacted, and the role of the Labour Ombudsperson never existed. Paul Weiler, who all members of the panel will be familiar, is a widely published and respected labour law scholar and former chair of the BC Labour Relations Board. In his book *Reconcilable Differences*, Weiler referred to the adjudication of DFR complaints by those internal to the labour relations community as a "gaping hole in the integrity of what was supposed to be a comprehensive labour code"

Vice-Chairs have an indirect pecuniary interest in ruling against individual claimants.

Most often, when an appointment to the BCLRB is not renewed (whether by choice or they didn't receive an offer), Vice-Chairs return to legal practice as employer or union representatives or become arbitrators. For those who return to traditional legal practice, demonstrating support for individual rights is not likely to curry favour with employer or union clients. For those who become arbitrators, clients want to understand their views before a consensual appointment.

As noted by Richard Charney, in Ontario, it's no secret that members of the labour relations community who wish to erase perceptions of bias have applied to become Vice-Chairs of the Ontario Labour Relations Board [ONLRB].

Of the thirty-three labour arbitrators who decided the 146 BC labour arbitration decisions published on CanLii in 2022, 39.4% were former BCLRB Vice-Chairs, and 12.1% had held an equivalent role federally, in another province or the United States. 21.2%

had experience being appointed by the Province of BC to another administrative tribunal. Only 27.3% of the Arbitrators identified had no prior experience acting as an adjudicator for an administrative tribunal. Presumably, similar motivations for joining the ONLRB in Ontario exist for those joining the BCLRB in British Columbia.

British Columbia doesn't have a labour law system where all labour disputes are heard by an arbitrator assigned by a neutral bureaucrat.

As written in *C.U.P.E. v. Ontario (Minister of Labour)*, [2003] 1 S.C.R. 539, 2003 SCC 29 at para 191 "*The independence and impartiality of arbitrators is guaranteed not by their remoteness, security of tenure, financial security or administrative security but by training, experience and mutual acceptability.*" Therefore, there is a strong incentive to write decisions that are palatable to the labour community. In Richard Charney's

analysis of Ontario arbitration decisions between 1977 and 2003, there is some evidence indicating arbitrators seek to split results. It isn't a stretch to infer that BCLRB vice-chairs will also consider the impact of their decisions on their post-LRB income.

Further to this, BC's labour relations community and labour relations board have demonstrated their bias against individual employees.

In 1987, BC's legislature strengthened the DFR provision and expanded protections for individual grievors under s. 7 of the then Labour Relations Code.

Unfortunately, increased legislative and procedural protection for individual employees wouldn't last long. In 1992, as part of their Labour Code review, a committee of special advisors representative of the labour community just like yours called these enhancements "*unwarranted*." They recommended implementing a new procedure to adjudicate DFR complaints that obliged employees to make out a *prima facie* case before a hearing would be considered. Additionally, hearings would no longer be required, and the BCLRB could make decisions without submissions.

This new process was promoted as supporting the expeditious resolution of DFR complaints, but in reality, it limited procedural fairness available to employee complainants.

The recommendations regarding the DFR made by the 1992 Special Committee were adopted into the draft legislation put to the legislature. During the debate, it was identified that s. 13 was amended to reduce the workload of the BCLRB.

The Member of the Opposition, MLA Serwa rightly noted the difficulty that employees would have in making out a *prima facie* claim. The Minister of Labour at that time, Moe Sihota in trying to ward off criticism said that individual grievors would be and are assisted "*by an investigating officer appointed by the Board*." Then, he proceeded to criticize the opposition for failing to do their research when they pushed for more information about where to find this assistance in the legislation. Unfortunately for individual claimants, this assistance, like an Ombudsman in previous versions of the legislation, would never come to fruition. It was never existed or was implemented.

As cited in *C.U.P.E. v. Ontario (Minister of Labour)*, [2003] 1 S.C.R. 539, 2003 SCC 29 at para 99, "*courts generally infer that Parliament or the legislature intended the tribunal's process to comport with principles of natural justice*." The BC legislature's removal of procedural rights demonstrates that this isn't always true.

The [BC Court of Appeal](#) has decided that a reviewing court shouldn't concern itself with the application or compliance of the BCLRB with its own labour relations policies under the Code due to its considerable expertise and exclusive jurisdiction. Unfortunately, reviewing courts don't see the "*gaping hole in the integrity of what was supposed to be a comprehensive labour code*," as Paul Weiler identified when members of the labour

movement decide on individual claims. I think this gaping hole in the integrity of the Labour Relations Code is most often seen when the BCLRB blatantly ignores legislative intent without impunity.

In 1996, the s. 13 DFR complaint procedure in the Labour Relations Code was amended from requiring the board to determine whether the “complaint discloses a prima facie case that the contravention has occurred” to requiring the Board to determine whether the complaint discloses “a case that the contravention has apparently occurred.”

The 1998 Labour Code Review report identified that individual complainants were critical of the DFR prima facie requirement and thought the Board treated them unfairly. “The fact that the Board’s Vice-Chairs are drawn from either the union or the employer community compounds this problem.”

The 1998 Sub-Committee of Special Advisers didn’t recommend removing the prima facie requirement. It had already been removed from the *Code* when they completed their review. They did suggest that DFR complaints be heard by a body independent from the Board and that they be diverted to mediation. The Sub-Committee’s recommendations were not implemented.

On February 21, 2003, the BCLRB released its Judd decision – a decision that the BCLRB has used to deny thousands of DFR complaints by incorrectly applying the defunct *prima facie test* that was removed from the legislation.

In Judd, the BCLRB cites s. 133(4) instead of s. 13, writing that the Board can dismiss any application for failing to make out a prima facie case. What the BCLRB didn’t acknowledge is that s. 133(4) of the Labour Relations Code didn’t say prima facie then; it still doesn’t more than 20 years later in April 2024.

According to its [website](#), the BCLRB views Judd as a “leading decision on Section 12 [and] represents the law and policy of the Code.”

Perhaps a union-side advocate realized that the BCLRB made an error in Judd as the BC Federation of Labour’s desire to have the BCLRB engage the prima facie test at the intake stage of an employee complaint was identified during the 2003 Labour Code Review. Fortunately for individual employees, the legislature didn’t adopt their recommendation then, and the prima facie requirement hasn’t reappeared in the legislation since.

Unfortunately for individual complainants, the BCLRB continues to ignore legislative intent and uses Judd to justify the non-existent prima facie requirement to deny nearly all DFR complaints filed. Additionally, the BCLRB has reintroduced the prima facie requirement into its interpretation of s. 13 of the Code despite its absence in the legislation.

<p>Supporting Evidence:</p>	<ul style="list-style-type: none"> • S. 115 BC Labour Relations Code • BCLRB Annual reports • Canada, Privy Council Office, Canada Industrial Relations: The Report of the Task Force on Labour Relations, (31 December 1968) (Chair: Harry Douglas Woods), online: https://data2.archives.ca/copies/05-2023/oid-60629/e011781424.pdf [<i>Woods Report</i>] at pgs. 151, 175-186, 207 • Paul Weiler, <i>Reconcilable Differences: New Directions in Canadian Labour Law</i>, (Toronto, Carswell, 1980) at pgs. 149-150 • Richard J. Charney, <i>Arbitration: Grievance Resolution or Aggravation?</i> (November 2010), accessed online: https://www.cba.org/cba/cle/PDF/adm10_charney_paper.pdf at pg. 7 • Sub-committee of Special Advisers, British Columbia, Legislature, A Report to the Honourable Moe Sihota Minister of Labour: Recommendations for Labour Law Reform, (September 1992) at pg. 22 and Appendix 1: Draft Labour Relations Code at pgs. 14 – 15. • Legislative Assembly (BC), Hansard, 35th Leg., 1st Sess, (26 November 1992 afternoon sitting) at pgs. 4298-4299 • <i>British Columbia Ferry and Marine Workers' Union v. British Columbia Ferry Services Inc.</i>, 2013 BCCA 497 at para. 55, leave to appeal to SCC ref'd as cited in <i>Ferguson v. British Columbia</i> (Labour Relations Board), 2023 BCSC 2164 at para 48. • Labour Relations Code, 1992, c 82, s. 13 • Labour Relations Code, RS 1996, c 244 s. 13 • Sub-committee of Special Advisers, British Columbia, Legislature, Prepared for the Minister of Labour Government of British Columbia: Managing Change in Labour Relations – the Final Report (February 25, 1998) at pg. 22 and Appendix 1: Draft Labour Relations Code at pgs. 14 – 15. • Labour Relations Code Amendment Act, SBC 1998, c. 33 • Judd v. Communications, Energy and Paperworkers Union of Canada, Local 2000, 2003 CanLII 62912 (BC LRB) • Committee of Special Advisers, British Columbia, Legislature, Report of the B.C. Labour Relations Code Review Committee to the Minister of Labour, (April 11, 2003) at pg. 26 • In Killoran v Hospital Employees' Union, 2023 BCLRB 176, Vice-Chair Chesman indicates that the <i>prima facie</i> requirement is part of s. 13(1)(a) of the <i>BC Labour Relations Code</i>, and the same Vice-Chair does this again in Meyers v Canadian Union of Public Employees, Local 358, 2023 BCLRB 159 • Harry W. Arthurs, The Three Faces of Justice - Bias in the Tripartite Tribunal, Saskatchewan Bar Review. Volume 28, Issue 4 (1963), p. 147-156
<p>Recommendation:</p>	<ul style="list-style-type: none"> • Appoint a panel with members outside of the labour relations community to adjudicate employee duty of fair representation complaints • Amend legislation to re-strengthen the DFR provisions in the Labour Relations Code and enhance expectations of union conduct during the processing of employee grievances

<p>Issue 4:</p> <p>Information:</p>	<p>The Duty of Fair Representation is not adequate to ensure proper union conduct in termination grievances or cases involving harassment of any kind.</p> <p>For those with any familiarity with labour law, they will know that the Duty of Fair Representation as found in BC Labour Code and interpreted by the BC Labour Relations Board offers zero recourse for employees to have even a valid grievance heard.</p> <p>Karakatsanis J. in Northern Regional Health Authority v. Horrocks, 2021 SCC 42 wrote:</p> <p>[105] Given the mandate and provisions of the Code, including s. 22(1)'s use of "[a]ny person", I find it unacceptable that some unionized employees, whose unions refuse to grieve their members' discrimination claims without breaching the duty of fair representation, would be left without legal recourse. Nothing in the Code suggests that this result was intended; on the contrary, such a result might violate the responsibilities of the Commission under s. 4.</p> <p>[106] Although it is true that the duty of fair representation "acts as a check on the principle of exclusivity", it is not a sufficient check given the importance of the human rights involved (Mummé, at p. 237). Despite the tendency of labour arbitrators to interpret the duty in an expansive way where discrimination is involved, the content of the duty has not evolved since this Court's decision in <i>Gendron v. Supply and Services Union of the Public Service Alliance of Canada, Local 50057</i>, [1990] 1 S.C.R. 1298, which preceded <i>Parry Sound</i>:</p> <p>In a situation of conflicting employee interests, the union may pursue one set of interests to the detriment of another as long as its decision to do so is not actuated by any . . . improper motives . . . , and as long as it turns its mind to all the relevant considerations. . . . [I]t is the underlying motivation and method used to make this choice that may be objectionable. [pp. 1328-29]</p> <p>Thus, in cases involving discrimination against a unionized employee, unions can decide not to grieve without breaching their duty of fair representation, "so long as their decisions are reasoned, not arbitrary, in bad faith or discriminatory" (Mummé, at p. 238; see also <i>Mason v. Gen-Auto Shippers and Teamsters Local Union 938</i>, [1999] OLRB Rep. 242, at paras. 17 and 20; <i>Creed v. International Brotherhood of Electrical Workers, Local Union 339</i>, [1999] O.L.R.D. No. 3422 (QL)). They have the right to make errors, and they must also, at times, balance competing interests.</p> <p>At least one Supreme Court justice recognizes who useless the duty of fair representation process is for employees.</p>
---	---

Of the 3,967 DFR complaints noted in the BCLRB's annual reports between 1991 and 2023, 2.46% have been successful. In most years, the success rate of a DFR complaint has been less than 2.12%.

In Ms. C v. City and others, 2023 BCHRT 203, the BCHRT will be addressing Ms. C's complaint that view, Ms. C's complaint that the Union was unresponsive to Ms. C's concerns with respect to the City's duty to accommodate her regarding further encounters with a Municipal Councillor that sexually assaulted her.

If this was put to the BCLRB, there is a 98% chance Ms. C's claim would be dismissed before ever reaching a stage of a hearing.

During the [Workplace Sexual Harassment Grievances – When is the Labour Relations Board](#) an option for unionized employees webinar hosted by the Courthouse Libraries the BCLRB cited Sue Furlong, BCLRB No. B534/98 which states:

The issue is not whether the applicant has been subjected to harassment in their workplace, but whether the union represented the applicant in accordance with the duty of fair representation (i.e., not arbitrarily, discriminatorily, or in bad faith)

As pointed out by Karakatsanis J. in *Horrocks*, unions can choose not to grieve without breaching their duty of fair representation. This is even more concerning as during the webinar with the Courthouse Libraries, the BCLRB noted that they are adjudicating cases that could also be heard by the BCHRT because of the workload and delays experienced at the BCHRT. Whether adjudicated by the BCHRT or the BCLRB (or as recommended by a body appointed from outside of the labour community), individuals should be afforded equal protection.

In Quebec, unionized employees having been terminated or experienced harassment and believe that their union is not acting fairly are granted addition protection. S. 47.3 of Quebec's Labour Code provides for the following:

47.3. If an employee who has been dismissed or the subject of a disciplinary sanction or who believes he has been the victim of psychological harassment under sections 81.18 to 81.20 of the Act respecting labour standards (chapter N-1.1), believes that, in that respect, the certified association has contravened section 47.2, the employee must, if he wishes to rely on that section, file a complaint with and apply in writing to the Tribunal for an order directing that the employee's claim be referred to arbitration.

In [Centre hospitalier Régina Ltée v. Labour Court](#), [1990] 1 S.C.R. 1330

I agree. The legislator has clearly indicated his preference here by specifying in s. 47.3 L.C. those extreme cases in which arbitration of a grievance may survive its abandonment by the union: namely, cases of dismissal and disciplinary

sanctions. Collective labour relations are an area of socio-economic law where the legislator is continually making adjustments in an attempt to achieve a desirable balance between union, employee and employer.

This choice is consistent with the general recognition that it is important for an employee to retain his employment, in view of the potentially devastating effects on him. Jean-Denis Gagnon emphasizes this aspect in a passage preceding the one cited above (at p. 674):

[TRANSLATION] It is difficult to deal with the duty of representation incumbent on the union in implementing the collective agreement without making distinctions between the various grievances that can be filed by employees as a consequence of decisions made by the management of a business or department . . . For an employee whose employment comes to an end the challenge to the employer's decision is of considerable importance. His immediate future, his well-being and perhaps also that of his family are tied to his action and whether it succeeds. [Emphasis added.]

Professor Weiler is emphatically of the same opinion (op. cit., at p. 138):

The real reason for singling out discharge grievances for a special legal limitation to the unions' authority is simply that discharge is different. At several points on earlier pages, I have touched on the reasons why the protection against unjust dismissal is perhaps the critical job interest provided by the collective agreement. Especially in the case of the long service employee, being fired as a result of an immediate contretemps with his employer can have a devastating impact on his life. Not only is it difficult for older workers to find another job of any kind, but it is just about impossible to replace the benefits and amenities that are associated with lengthy seniority. [Emphasis added. Italics in original.]

The Quebec legislator's choice to distinguish the rights of an employee facing dismissal from other less serious situations is thus in accordance with a consistent line of scholarly and judicial authority.

BC citizens should be able to expect that they have access to justice for significant issues like termination grievances and harassment as is available to residents of Quebec.

As pointed out in [Horrocks](#):

[38] *Of course, there will be instances of a union declining to advance a grievance to arbitration without breaching its duty of fair representation or engaging in discrimination. And, in such cases, the employee will indeed be left without a forum for resolution. But this state of affairs —*

	<p><i>which, it bears restating, can be undone by clearly expressed legislative intent to the contrary — is a product of the union’s statutorily granted monopoly on representation (Bisaillon, at paras. 24-28; Noël v. Société d’énergie de la Baie James, 2001 SCC 39, [2001] 2 S.C.R. 207, at para. 41). In other words, it is a product of legislative choice, to which we are bound to give effect.</i></p>
<p>Supporting Evidence:</p>	<ul style="list-style-type: none"> • BCLRB Annual reports • S. 47.3 of the Quebec Labour Code
<p>Recommendation:</p>	<ul style="list-style-type: none"> • In addition to the recommendation above re: Appoint a panel with members outside of the labour relations community to adjudicate employee duty of fair representation complaints, higher expectations for union conduct in termination and harassment grievances needs to be codified • Enact the same or similar provision as seen in s. 47.3 of the Quebec Labour Code in BC

Issue 5:	The timelines for reconsideration of decisions under the BC Labour Relations Code are unreasonable and negatively impact mental health
Information:	<p>S. 141 of the BC Labour Relations Code grants 15 days for a reconsideration of a BCLRB decision.</p> <p>Reconsideration of Workers Compensation decisions must be filed within 30 or 90 days (dependent on the type).</p> <p>Reconsideration of Employment Standards decisions must be filed within 30 days.</p> <p>It is no secret to anyone who works within the legal community that members of the legal profession have atrocious mental health. The reconsideration timelines of the BC Labour Relations Code negatively impact the mental health of labour lawyers.</p> <p>Labour lawyers are needing to give their weekend and evening hours to getting a reconsideration filed if they have an arbitration booked, planned vacation, or another matter that is taking their time. These individuals are sacrificing relationships with their romantic partners, children, parents, or others who are important to them to meet the Labour Relations Code's timelines. These individuals especially suffer when they have responsibilities outside of their jobs that cannot be delegated.</p> <p>These Labour Relations Code's timelines are unreasonable for legal professionals and are even more unreasonable for the self-represented litigant who does not have familiarity with labour law and the law generally. The same mental health concerns are going to exist for the self-represented litigant if they are employed, have a disability or other responsibilities that take up their time.</p> <p>Regarding extensions, the BC Labour Relations Board website states:</p> <p style="padding-left: 40px;">“You must first ask the other parties if they agree to the extension. You must then write to the Registrar and request the extension, indicating how much more time you need, whether any of the other parties agree, and the reasons why you can't meet the deadline.</p> <p>What this has meant in practice is that if opposing counsel deny the extension, then submissions need to be made to justify why a deadline cannot be met. When asking the BCLRB about policy it uses to evaluate an extension request, the BCLRB staff stated:</p> <p style="padding-left: 40px;"><i>The Board does not have a list of cases or an internal policy document on extensions; however, the Board's decision Martina Steffin (sic) (particularly paragraphs 13-15) may be helpful.</i></p> <p>In Steffen, the applicant was unsuccessful in obtaining an extension. It is an incredible risk for a case to not be granted an extension, so instead of just focusing on original submissions, the applicant is also required to make submissions on the reasons for</p>

	<p>extension. This requires legal research, preparation of documents, and a supporting narrative.</p> <p>The BCLRB needs clear and cogent policy regarding extensions, and also have permission to grant extensions for reasons that may have been overlooked in the policy but seem reasonable.</p>
<p>Supporting Evidence:</p>	<ul style="list-style-type: none"> • Workers Compensation Act s. 293 https://www.bclaws.gov.bc.ca/civix/document/id/complete/statreg/19001_07#section293 • Employment Standards Act s. 116 https://www.bclaws.gov.bc.ca/civix/document/id/complete/statreg/00_96113_01#section116 • National Study on the Health and Wellness Determinants of Legal Professionals in Canada
<p>Recommendation:</p>	<ul style="list-style-type: none"> • Increase the timeline for reconsideration of Board decisions within the BC Labour Relations Code • Add a provision in the Code that allows for extensions to be granted with details laid out in policy

Issue 6:	Unions entering into Non-Disclosure Agreements without an Employees' Consent when Settling Grievances
Information:	<p>Unions are given considerable leeway when it comes to how an employee's grievance is to be handled.</p> <p>Unions have and will restrict an employee's choice to speak against injustices by entering into settlement agreements that include a non-disclosure agreement without their consent. Where the employer is considered government, unions are also restricting the member's right to freedom of expression under the Charter.</p> <p>This issue has been rarely litigated and there is only one known case that addresses the issue in a labour law context in Canada.</p> <p>In Myriam Michail v Ontario English Catholic Teachers' Association, 2017 CanLII 6507 (ON LRB), the ONLRB member wrote that “<i>confidentiality clauses and written releases are entirely normal features of a settlement</i>” and “<i>neither the School Board nor the union is duty bound to guarantee the applicant's Charter right to free expression.</i>” The ONLRB noted that anyone can ask another person to refrain from expressing themselves voluntarily, and this is what the school board was doing by offering a settlement to the applicant through the union. The union's pressure on the applicant to accept the settlement was a normal part of the settlement process.</p> <p>In contrast to Michail, in Aboucher, which is an employment law decision and has been widely cited throughout Ontario and BC, the following is stated:</p> <p style="text-align: center;"><i>The non-disclosure clause was not an implied condition of the settlement reached between the parties. A "complete and final" release does not entail the inclusion of a non-disclosure clause. If a party wishes to insert a non-disclosure clause, it must be negotiated. The parties in this case never discussed the potential need for a non-disclosure clause before the offer to settle was accepted by the plaintiff.</i></p> <p>Aboucher has repeatedly been cited throughout Ontario caselaw, accepted in BC and Alberta.</p> <p>Non-disclosure agreements have been receiving national attention due to tireless efforts of the founders of Can't Buy My Silence.</p> <p>Freedom of speech is considered essential to a just Canadian society. During the July 4, 1960 debate on the Bill of Rights, the Honourable Member for Iverness-Richmond, Mr. R. S. McLellan, referred to the freedom of expression as “the most important political freedom, and the only one which really counts.”</p> <p>The Bill of Rights informed the text of the Charter.</p>

	<p>Last year, I reviewed the Charter debates. There is no indication that the right to freedom of association was intended to override the right to Freedom of Expression.</p> <p>Allowing unions to enter into NDAs without the impacted member’s consent is unacceptable, particularly in cases that include discrimination and harassment. Further, a unionized employee should not be denied their right to access justice because they refuse to be silenced. If unionized employees had access to the courts, they could make their issues public.</p> <p>If an employer and a union want an NDA, they can work to resolve the issue to the impacted member’s satisfaction. NDAs should not be viewed as standard clause in settlement agreements.</p>
<p>Supporting Evidence:</p>	<ul style="list-style-type: none"> House of Commons Debates, 24th Parl, 3rd Sess, Vol 5 (4 July 1960) at 5667 https://parl.canadiana.ca/view/oop.debates_HOC2403_05/1
<p>Recommendation:</p>	<ul style="list-style-type: none"> Explicitly forbid unions from entering into non-disclosure agreements as part of a settlement agreement without an impacted employee’s consent

Issue 7:	Ethical Principles for BCLRB Vice-Chairs
Information:	<p>The Canadian Judicial Council's Ethical Principles for Judges states:</p> <p><i>5.C.7 Judges should be sensitive to the existence of relationships which, to a reasonable and informed person, would give rise to reasonable apprehension of lack of impartiality. In particular, judges will face this issue in relation to cases involving former clients, members of the judge's former law firm or lawyers from the government department or legal aid office in which the judge practiced before appointment. Each case is unique and the apprehension of bias should be assessed in light of all the circumstances. The following general guidelines may be helpful: (i) judges who were involved in private practice should not sit on any case in which the judge or, to their knowledge, the judge's former firm was directly involved in any capacity before the judge was appointed to office; (ii) judges who practised law in government service or legal aid should not sit on cases in which they had any involvement prior to their appointment; (iii) judges should not sit on a matter in which the judge's former law firm is involved until after a 'cooling off period', often established by local law or tradition, of between two and five years; and, (iv) judges should not sit on a matter in which the judge's former law firm is involved for at least as long as there continues to be a financial relationship between the judge and the law firm.</i></p> <p>While members of the BC Labour Relations Board are not judges, their decisions are given the same level of deference. Arguably more deference than any other administrative tribunal.</p> <p>While it would be unreasonable to expect the same level of ethical conduct and distancing from members of the BC Labour Relations Board given that they are recruited from the same small community that they are now adjudicating decisions for, it is not unreasonable to expect that there be some minimum ethical standards established for members of the Board.</p> <p>Members are adjudicating issues that were active while they were employed at their former firms, they are actively engaged in non-professional social media interactions with members of the same labour community that appear before them.</p> <p>On a file that engaged a Vice-Chair's former firm and was active while they were employed with the firm as partner, I reached out to the BCLRB about my concern regarding a reasonable apprehension of bias. The test for reasonable apprehension of bias as cited in Wewaykum Indian Band v. Canada, [2003] 2 S.C.R. 259, 2003 SCC 45 is:</p> <p><i>. . the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is "what would an informed person, viewing the matter realistically and practically — and having thought the matter through — conclude. Would he think that it is</i></p>

	<p><i>more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly.”</i></p> <p>The respective Vice-Chair in question responded:</p> <p><i>In your email of , you express concern about my being the adjudicator assigned to decide While it is not apparent that the matters you raise would justify recusal in the context of Board decision-making, the Board is prepared to re-assign to a different adjudicator. [Edited to protect anonymity]</i></p> <p>While I was grateful to have the application re-assigned, I was appalled that a Vice-Chair would not see any ethical issues with their deciding on a case that was active at their former firm during their tenure and being handled by someone who was likely their former subordinate.</p>
Recommendation:	<ul style="list-style-type: none"> • Develop ethical guidelines for members of the BC Labour Relations Board

Issue 8:	The BC Labour Relations Board does not have adequate expertise to decide on issues engaging Aboriginal and treaty rights
Information:	<p>In Paul v. British Columbia (Forest Appeals Commission), [2003] 2 S.C.R. 585, 2003 SCC 55, at para 39, the Supreme Court of Canada wrote that an admin tribunal has the ability to apply s. 35 of the <i>Constitution Act</i>, 1982 if the tribunal’s empowering legislation grants it permission to decide questions of law. The SCC decided that the court’s approach in permitting administrative tribunals to decide Charter issues should also be the approach taken when assessing whether an administrative tribunal is permitted to decide issues relating to s. 35 rights.</p> <p>There will be administrative tribunals that have the requisite knowledge to make decisions that engage Aboriginal rights and treaty rights, but the BC Labour Relations Board is most definitely not one of them.</p> <p>Unfortunately for Indigenous communities, s. 120 of BC Labour Relations Code grants the BC Labour Relations Board permission to decide on questions of law with no exception granted for deciding issues that engage the rights unique to Aboriginal peoples.</p> <p>In Newcrest Red Chris Mining Limited -and- United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, Local 1-1937, BCLRB 10 the BCLRB makes it clear that they are insensitive to the rights of Indigenous peoples by saying that the Tahltan did not have “<i>direct and material interest in the outcome of a proceeding to establish the content of a first collective agreement</i>” and their constitutional and statutory rights would be protected insofar as an “<i>arbitrator deems [them] relevant</i>”.</p> <p>As concerning as the BCLRB’s statement is on its own, it is absolutely absurd when read with Newcrest Red Chris Mining Limited v United Steel, Paper & Forestry, Rubber, Manufacturing, Energy, Allied Industrial And Service Workers International Union, Local 1-1937, 2023 CanLII 88238 (BC LA). In the latter decision, Arbitrator Saunders writes that the law and policy of the Code require that he give deference to a mediator’s recommended terms for a first collective agreement. Further to this, the Supreme Court of Canada has confirmed in McGavin Toastmaster Ltd. v. Ainscough, [1976] 1 S.C.R. 718 that repudiation does not apply to labour law.</p> <p>While the SCC confirmed in Canada (Minister of Citizenship and Immigration) v. Vavilov, 2019 SCC 65, [2019] 4 S.C.R. 653 that the standard of review for matters falling under s. 35 of the <i>Constitution Act, 1982</i> are to be decided on a correctness standard, this will cause issues in labour law where collective agreements aren’t to be repudiated.</p> <p>There are unions like the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, Local 1-1937 that do not support having the terms of an Impact Benefit Co-Management Agreement supersede the terms of a collective agreement. IBCAs are negotiated before a union is</p>

	<p>ever in place. If collective agreements can override the benefits an Indigenous community has negotiated for its members, there is no point of an Indigenous community ever entering into an IBCA that could be undermined until this issue is decided by a superior court.</p>
<p>Supporting Evidence:</p>	<ul style="list-style-type: none"> • USW Bargaining Committee, “USW Local 1-1937 Update – Bargaining Update #12” (13 May 2022), online (PDF): USW Local 1-1937 Red Chris Mine https://www.usw1-1937.ca/uploads/1/1/7/5/117524327/2022_newcrest_red_chris_mine_bargaining_update_12_may_13.pdf
<p>Recommendation:</p>	<ul style="list-style-type: none"> • Consult with Aboriginal organizations, Aboriginal communities, other interested Indigenous peoples, legal scholars, and the judiciary to determine whether it would be appropriate to set up an admin tribunal that specializes in Aboriginal rights issues that will hear Aboriginal rights claims. <ul style="list-style-type: none"> ○ Evaluate the feasibility of such a tribunal having hearings with panels that include the inclusion of at least one member from an admin tribunal that has subject matter expertise on the respective area of law (eg. one panel member borrowed from the BCLRB and 2 others specializing in Aboriginal law) • Engage in a targeted consultation with Aboriginal organizations, Aboriginal communities, and other interested Indigenous peoples to determine how the BC Labour Relations Code should be amended to fulfill the government’s commitments under UNDRIP.

From:
To:
Subject: Written Replies to Submissions for BC Labour Relations Code Review
Date: April 7, 2024 6:29:02 PM

Hi,

Further to the submissions I sent in, I would like to say I'm in full support of all of the submissions from United Steelworkers District 3 and the BC Federation of Labour.

Especially the following:

“C. Improving LRB processes:

1. Increase LRB funding
Provide a significant increase of at least \$5 million to the operating funding for the Labour Relations Board. Provide the necessary capital funding to accommodate additional staff and meet technology requirements.
2. Improve timely access to LRB services and decisions
Ensure that the Board has sufficient personnel and resources to meet the timelines established in the Code and to make procedures, services and decisions available within a reasonable timeframe.”

This will help out with our main issues where some companies choose to blatantly violate collective agreements and are then able to carry on violating for a year and a half or more while we wait for an arbitration hearing, and they then seem to not care having to pay a minimal award to the union anyways.

Which means that collective bargaining doesn't work and isn't fair at all if companies are able to do this type of thing, while if unions choose to strike or wobble they'd likely be penalized / fined potentially in the millions for any revenue not made for the company by the workers, thus creating a totally unbalanced and unfair system that does not mean anything and doesn't work if companies are able to violate at will and for lengthy periods of time and only have to pay a nominal penalty that they don't mind paying to be able to violate collective agreements.

So along with more arbitrators in place to have arbitrations heard in days to weeks at most instead of a year and a half or longer, there should also be far higher monetary penalties awarded to unions and locals when companies choose to violate agreed to articles in collective

agreements in hopes of deterring them from doing so and in hopes that they will simply choose to follow the collective agreements they said they would follow for the term of the agreement.

This will help make things more balanced and fair for workers.

Thank you,

Jason Arnold

Dear Madam or Sir,

I have some concerns about unions, the BC Labour Relations Code and the BC Labour Relations Board and how they operate in real life. The biggest concerns I have are that unionized workers have even less protections than non-unionized workers if their union does not take their grievances seriously, demographics and outcomes of grievances are not tracked, it is incredibly difficult and burdensome for workers to make a complaint against their union, and that it is effectively impossible for workers or workplaces to change unions. BIPOC workers in particular often need protection from discrimination from both employers and unions.

As it stands, the standards set out in collective agreements take precedence over the BC Employment Standards Act and other related legislation. This makes a few assumptions: that union representatives, such as shop stewards, are capable of understanding and interpreting collective agreements in a way that supports the safety, human rights and dignity of individual workers; that union representatives will represent workers in an unbiased and equitable manner; that union representatives will use all the resources at their disposal to fight for workers' rights; that union representatives are aware, and will inform workers, of alternatives to making a grievance through the union and be supportive of workers who go through WSBC or the BCHRT; that unions are capable of self-regulation; and that union representatives will be honest.

Unfortunately many unions behave in ways that do not support all workers. The same prejudices that are found in other parts of society are found in unions and this leads to vastly different treatment for BIPOC people and other marginalized workers. In Canada racism is most often encountered in the workplace but very little is done to counter it.¹ While unions offer anti-racism and other anti-discrimination training very little of it is effective²; there is no follow-up to see if it has done anything to improve discriminatory behavior. Biases and discriminatory behavior, on the part of union officials, is mostly unconscious but has very real and negative consequences for BIPOC workers³.

Research shows that exposure to micro-aggressive racism negatively affects both psychological and physical health and is a causative factor in cardiovascular diseases such as hypertension, heart attacks, and strokes, for mood disorders such as depression, anxiety, PTSD, etc, and overall health⁴. Being exposed to micro-aggressive racism can be likened to lead exposure; it is often not obvious, poisoning is slow and cumulative, negative health effects are variable but result in poorer quality of life, decreased life span, preventable injuries, and death. Unions have absolutely failed in protecting the health and safety Black and Indigenous workers from the dangers of workplace racism⁵.

Union officials often behave in unconsciously biased ways towards BIPOC workers. Complaints and grievances of BIPOC workers are not taken as seriously as those of white workers, and unions are loathe to even admit that racism and other forms of discrimination exist within their organization. Union officials often hold negative biases and stereotypes about the honesty, intelligence, knowledge, experience, education, criminality, mental stability etc. of BIPOC workers, and label normal behaviours

¹ Inclusion in the Workplace for Racialized Employees; IRCC Anti-Racism Employee Focus Groups Final report; Anti-Black Racism, Sexism & Systemic Discrimination in the Canadian Human Rights Commission

² Prejudice Reduction: What Works; Prejudice Reduction: Progress and Challenges

³ Nice Racism: How Progressive White People Perpetuate Racial Harm; Anti-Black Racism, Sexism & Systemic Discrimination in the Canadian Human Rights Commission; Inclusion in the Workplace for Racialized Employees; IRCC Anti-Racism Employee Focus Groups Final report

⁴ Microaggressions in Everyday Life

⁵ Chris Aylward, PSAC National President, Senate RIDR Committee testimony 2023

as pathological⁶. It is common for union officials to say that they ‘know’ what the worker has experienced, and dismiss and invalidate BIPOC workers’ lived experience and agency⁷. BIPOC workers are seen as less sympathetic and less deserving of resources and effort, and also as less harmed by accidents and abuse⁸. There are few substantial consequences for perpetrators if they are white and the target BIPOC, but not the reverse⁹. Significant pressure is placed on BIPOC workers not to make discrimination complaints or drop them if they do. Retaliation for making a complaint against a white or more favored minority person is common¹⁰.

Unionized BIPOC workers who want to make a complaint through the ESB, BCHRT or WSBC are told that they can’t because a collective agreement supersedes the ESA, and human rights in the workplace are covered under the Respectful Workplace and health and safety policies in the collective agreement; they must go through their unions’ grievance process. This is not strictly true, but if a worker goes to the BCHRT and/or WSBC those agencies will tend to defer to the processes and judgement of the union¹¹, and the worker is in for a long, traumatic, and expensive process. Consequently, if a BIPOC worker’s union does not support them, they often have less protection than they would under the ESA. To fight for their rights the worker must make a complaint about their union under the BCLRA at to the BCLRB, a very complicated and difficult to understand process. Systemic discrimination and unconscious bias also operates at the BCLRB. Unionized workers are also often hesitant to make complaints as union jobs usually pay better, and discrimination is the same no matter where you go.

The reality is that making a successful complaint about the discriminatory behavior of a union or union official through the BCLRB is very unlikely; there are no successful complaints made by a BIPOC person for non-blatant forms of racism or intersectional discrimination that I am aware of. Unions neither keep, nor will provide, any records which might show discriminatory behavior. Unions use union dues to pay for their lawyers and often have lawyers on retainer. Most employment lawyers will not touch that kind of case against a union, and definitely not on contingency, so an individual BIPOC worker has little chance of adequate representation even if they can afford it. Labour councils represent unions, not workers, and tend to be very ignorant about BIPOC issues¹². Complaining to higher levels of a union is equally useless¹³. Changing unions is not really possible as “unions will not raid sister unions for members”¹⁴. Starting a new union requires decertification of the current union in the workplace, then getting a new union certified.

All of this has resulted in a general view amongst BIPOC workers that unions are for white people. Historically this is true, early unions were often formed to explicitly exclude BIPOC workers from

⁶ Microaggressions in Everyday Life; White Fragility: Why It's So Hard for White People to Talk About Racism

⁷ IRCC Anti-Racism Employee Focus Groups Final report; Nice Racism: How Progressive White People Perpetuate Racial Harm, White Fragility: Why It's So Hard for White People to Talk About Racism

⁸ Race-based biases in psychological distress and treatment judgements; In Plain Sight; Understanding intersectional inequality in access to primary care providers using multilevel analysis of individual heterogeneity and discriminatory accuracy

⁹ IRCC Anti-Racism Employee Focus Groups Final report; Deputy Ministers’ Task Team on Values and Ethics Report to the Clerk of the Privy Council; 2021 WBI U.S. Workplace Bullying Survey

¹⁰ Racial discrimination within United Nations offices in Geneva: Results from an online survey; IRCC Anti-Racism Employee Focus Groups Final report; Inclusion in the Workplace for Racialized Employees,

¹¹ Communication from WSBC 2020

¹² Personal communication Victoria Labour Council, VLC executive did not know what ‘BIPOC’ meant, racism a “minority issue”.

¹³ CUPE National communication, “No enforcement of CUPE Locals” 2023

¹⁴ Communications with Victoria Labour Council, IBEW, PSAC 2020

competing with white workers for jobs. Unions fought for years to keep BIPOC people from being able to join but were eventually forced to accept BIPOC (and women) as members by changes in law. Systemic racism still exists in Canada and unions are very much a part of that system. Workplace issues that tend to affect white and BIPOC people equally, like remuneration and benefits, are fought for, but issues that largely only affect BIPOC workers are not¹⁵. Demographic data, grievance types, and outcomes need to be tracked to ensure that discrimination against BIPOC and other marginalized workers does not continue. Currently no one is ensuring that BIPOC and other marginalized workers are being treated equitably by unions.

There does not seem to be much oversight of unions in general as far as human rights and worker safety are concerned. I have been hearing a lot of complaints from all workers about workplace bullying, particularly in the healthcare, education, and gov't sectors, and also about the lack of workplace safety for lower level workers¹⁶. Worker mental and physical health is deteriorating, but rather than change the underlying workplace issues, workers are given classes on subjects like 'mindfulness' and nutrition to help them cope with workplace stress. Workers are also given classes on workplace safety and then pretty much forced to ignore what they were they were taught because of pressure to get things done quickly. Workers who don't feel better about their workplace situation are told they aren't trying hard enough, have a negative attitude, and aren't team players. They feel pressured to appear to be constantly positive no matter how they feel and, ironically, that causes increased psychological distress for many workers¹⁷. These types of worker 'supports' are a check-box approach that protects unions and workplaces from liability but do little to protect workers. Workers who complain are receiving little support from their unions and are often constructively dismissed, quit, or take health leave.¹⁸

Commonly expressed sentiments, especially amongst older workers, is that today's unions work more for management than workers, are there to keep things quiet, and function as another branch of "Inhuman Resources"¹⁹. Sadly a regional representative for a national union agreed with this assessment and said the main duty of the union was to fight for worker pay and benefits. When asked why they didn't change jobs white workers expressed similar reasons to BIPOC workers, union jobs paid better, but things were the same everywhere. They felt stuck too.

Unions need more gov't oversight than they currently have to ensure that they are enforcing health and safety, and human rights regulations, and are doing so in an equitable manner. Surprise inspections of all workplaces need to be done to make sure safety requirements are being followed and enforced. While employers are ultimately responsible for worker safety unions also bear some responsibility as they are supposed to make sure employers follow the rules on the behalf of union members. All union members should be given anonymous annual surveys, developed and administered by a reputable and truly independent agency, to measure how well unions are doing as far as health, safety, and equity are concerned, and to find out where there are problematic organizations, locals,

¹⁵ CUPE communications 2018-2023: ...(about racism) it is not in the interest of the majority of members for the union to take a stand on issues that only affect a few people; Grievances are not tracked.

¹⁶ CUPE 2081 bargaining units that have greater numbers of BIPOC members given lower quality PPE, unsafe working conditions particularly during Covid-19 pandemic

¹⁷ Employee well-being outcomes from individual-level mental health interventions: Cross-sectional evidence from the United Kingdom

¹⁸ 2021 WBI U.S. Workplace Bullying Survey

¹⁹ Personal communications with retired, and near retirement, union members and union organizers

bargaining units, and individuals. When problems are found corrective measures and penalties must be administered and followed up on to make sure that corrective measures were adequate.

All unions should provide the contact information for the presidents, VPs, and representatives of their various committees at every level on their websites. If someone is, for instance, experiencing a workplace safety issue, and their local is not responding to it, they should be able to easily contact the right person at a higher level. Currently this information is often not accessible to regular members and complaints to general contacts tend to be ignored or not treated seriously. Union management needs to take responsibility for the behaviour, actions, and inactions, of the regional and local levels of unions.

Union representatives should communicate clearly, honestly, and transparently with members. Union members should have access to all communications between union representatives and management in regards to their grievance. Union representatives should never use vague, evasive, or deceptive language, or any language that could be creatively interpreted that would undermine a member's rights and dignity, or work against the member's interests²⁰. Union representatives should defer to the judgement of the union member as to what is in the member's "best interest". Union representatives should not be permitted to sign settlement agreements without the express consent, or against the wishes, of the union member. No blanket consent should ever be allowed. NDAs that limit a member's ability to communicate about human rights, civil rights, or criminal abuses against themselves should never be permitted.

Unions that are not ensuring that employers follow health, safety, and human rights regulations should be sanctioned, with provisions for members to change to a different union, and/or decertification. Members who have been harmed by union inaction on health, safety and human rights, should have the previous 5 years of dues paid to the union returned to them, and additional damages, determined by the duration and severity of the injury, paid by the union. Union representatives that have been negligent in their duties to protect workers, or that have acted in a discriminatory manner, should be barred from holding office and be made to repay to the union any stipends and/or benefits they have received from the union for union duties for the previous 5 years. Where a union representative has failed in their duties the next level of union administration should receive mandatory training so they are better able to recognize when those under their supervision are having difficulty, or are not, carrying out their duties. If there is no higher level of the union administration, the persons in charge should be fired, and replaced with more diligent persons.

If a union member wishes to make a complaint about their union they should be provided with the funds necessary to retain their own lawyer by the union. It does not serve justice that a union may use resources that a union member's dues have paid for to fight a complaint made by that member against the union, while the union member does not have access to equal resources to fight for their rights.

Currently there is almost no incentive for unions and union representatives to do better by union members. Personal responsibility and penalties might smarten them up a little.

Sincerely,

Zelda Sun

²⁰ Playing the Bullshit Game: How Empty and Misleading Communication Takes Over Organizations; Nice Racism: How Progressive White People Perpetuate Racial Harm

Works Cited

- The Standing Senate Committee on Human Rights. (2023). *Anti-Black Racism, Sexism and Systemic Discrimination in the Canadian Human Rights Commission*. Ottawa: Gov't of Canada.
- African Arts and Cultural Community Contributor Society. (2022). *Black in BC Convener pilot project*. Victoria: African Arts and Cultural Community Contributor Society.
- Applebaum, B. (2019). Remediating Campus Climate: Implicit Bias Training is Not Enough. *Studies in Philosophy and Education*.
- Banaji, M. R., & Greenwald, A. G. (2013). *Blind Spot: Hidden Biases of Good People*. New York: Delacorte Press.
- Bonilla-Silva, E. (2022). *Racism without racists: Color-blind racism and the persistence of racial inequality in the United States 6th Ed.* Lanham, MD, USA: Rowman & Littlefield.
- Deputy Ministers' Task Team. (2023). *Values and Ethics Report to the Clerk of the Privy Council*. Ottawa: Gov't of Canada.
- DiAngelo, R. (2018). *White Fragility: Why It's So Hard for White People to Talk About Racism*. Beacon Press.
- DiAngelo, R. (2022). *Nice Racism: How Progressive White People Perpetuate Racial Harm*. Beacon Press.
- Dovidio, J. J., Gaertner, S. L., Penner, L. A., Pearson, A. R., & Norton, W. E. (2009). Aversive racism: How unconscious bias influences behavior: Implications for legal, employment, and healthcare contexts. In J. L. Chin (Ed.), *Diversity in mind and action* (Vol. 3, pp. 21-35). Santa Barbara, CA, USA: Praeger.
- Fleming, W. J. (2023). Employee well-being outcomes from individual-level mental health interventions: Cross-sectional evidence from the United Kingdom. *Industrial Relations Journal*.
- He, J., Terry, A., Lizotte, D., Bauer, G., & Ryan, B. (2024). Understanding intersectional inequality in access to primary care providers using multilevel analysis of individual heterogeneity and discriminatory accuracy. *PLoS ONE*.
- Immigration, Refugees and Citizenship Canada. (2021). *Anti-Racism Employee Focus Groups Research Report*. Ottawa: Gov't of Canada.
- Kenney, K., & Fotaki, M. (2023). The Costs and Labour of Whistleblowing: Bodily Vulnerability and Post-disclosure Survival. *Journal of Business Ethics*.
- Kunstman, J., Ogungbadero, T., Deska, J., Bernstein, M., Smith, A., & Hugenberg, K. (2023). Race-based biases in psychological distress and treatment judgement. *PLoS ONE*.
- Office of the Auditor General of Canada. (2023). *Inclusion in the Workplace for Racialized Employees*. Ottawa: Gov't of Canada.
- Paluck, E. L., & Green, D. P. (2009). Prejudice Reduction: What Works? A Review and Assessment of Research and Practice. *Annual Review of Psychology*.

- Paluck, E. L., Porat, R., Clark, C. S., & Green, D. P. (2021). Prejudice Reduction: Progress and Challenges. *Annual Review of Psychology*.
- Spicer, A. (2020). Playing the Bullshit Game: How Empty and Misleading Communication Takes Over Organizations. *Organization Theory*.
- Strohmeier, H., Musizvingoza, R., & Sajnani, N. (2024). Racial discrimination within United Nations offices in Geneva: Results from an online survey. *PLoS ONE*.
- Sue, D. W., & Spanierman, L. B. (2020). *Microaggressions in Everyday Life 2nd Ed.* Hoboken: John Wiley and Sons Inc.
- Sue, D. W., Lin, A. I., & Rivera, D. P. (2009). Racial microaggressions in the workplace: Manifestation and impact. In J. Chin (Ed.), *Diversity matters: Education and employment*. Westport, CT: Praeger.
- Sue, D. W., Torino, G. C., Capodilupo, C. M., Rivera, D. P., & Lin, A. I. (2009). How white faculty perceive and react to difficult dialogues on race: Implications for education and training. *Counseling Psychologist, 37*, 1090-1115.
- Turpel-Lafond, M. (2020). *In Plain Sight: Addressing Indigenous-specific Racism and Discrimination in B.C. Health Care*. Victoria: Gov't of British Columbia.
- Watson-Creed, G. (2022). Gaslighting in academic medicine: where anti-Black racism lives. *CMAJ*.
- Workplace Bullying Institute and Zogby Analytics. (2021). *2021 WBI U.S. Workplace Bullying Survey*. Workplace Bullying Institute.