A

REPORT TO

THE HONOURABLE

HARRY BAINS

MINISTER OF LABOUR

RECOMMENDATIONS FOR AMENDMENTS TO THE *LABOUR RELATIONS CODE*

Submitted by

the *Labour Relations Code* Review Panel

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Introduction

On February 2, 2024, the Minister of Labour appointed us as a panel of special advisors under Section 3 of the B.C. *Labour Relations Code* (the "*Code*") (the "Review Panel").

Our terms of reference include an excerpt from the Premier's December 2022 mandate to the Minister of Labour with the following direction:

> *Ensure our labour law is keeping up with modern workplaces through the upcoming review of the Labour (Relations) Code, providing stable labour relations and supporting the exercise of collective bargaining rights*

We were instructed to engage in consultations with and receive submissions from interested stakeholders, including the British Columbia Labour Relations Board (the "Board") and Indigenous parties, and provide a report to the Minister outlining our processes, observations analysis, findings and any recommendations for amendments to the *Code*. We were directed to have regard to section 2 of the *Code* and consider relevant developments in other Canadian jurisdictions.

We undertook a public consultation process inviting written submissions and participation in public hearings from stakeholders, including 204 First Nations. We received 126 written submissions and oral presentations from 63 groups at seven public hearings. As part of this public consultation, we met directly with participating stakeholder groups including the B.C. Federation of Labour, Business Council of British Columbia, Canadian Federation of Independent Businesses, Greater Vancouver Board of Trade, Arbitrator's Association of B.C. and the Board.

In 2019, the provincial government enacted the *Declaration on the Rights of Indigenous Peoples Act*, [SBC 2019], c.44 (the "*Declaration Act*") which, in part, mandates government to ensure the laws of B.C. are consistent with the United Nations Declaration on the Rights of Indigenous Peoples. To support the implementation of the *Declaration Act*, government established the Declaration Act Secretariat. Since our terms of reference do not include a delegation under the *Declaration Act,* we believe any application of the *Declaration Act* is beyond the scope of our present mandate.

Background

The most recent *Code* review occurred in 2018 (the "2018 *Code* Review"). Prior to that, it had been 16 years since a review of the *Code* had been undertaken. The 1998 Labour Relations *Code* Review Committee (the "1998 Committee") commented on the importance of the role of the section 3 process in moderating what could be otherwise dramatic swings in changes to the *Code* by taking an incremental and measured approach which we endorse: Final Report February 25, 1998.

The amendment enacted in 2019, which requires a *Code* review every five years, is designed to support an incremental approach to the development of labour law in B.C.

The 2018 *Code* Review Report (the "2018 Report") extensively reviewed the origins of the *Code*, the major amendments between 1973 and 2018 and significant legal developments,

including decisions of the Supreme Court of Canada which deal with the applicability of the *Canadian Charter of Rights and Freedoms* (the "*Charter*") to labour relations.

As noted in the 2018 Report, the 1973 Labour Relations *Code*, which forms the basis of the current *Code*, represented a new labour relations approach centered on the creation of the Board, an expert tribunal with exclusive jurisdiction to determine many issues previously decided by courts. The new paradigm emphasized a problem-solving approach through the extensive use of informal procedures and mediation.

The 2018 Review Panel recommendations reflected that panel's assessment of amendments required to respond to changes in the B.C. economy and workplaces and improve the functioning of the *Code.* The 2018 Review Panel noted:

> There have been a number of pendulum swings in important *Code* provisions over the past 30 years largely depending on the governing political party. This is not consistent with predictability, certainty or balance. Although not an easy task, it is essential to avoid pendulum swings by implementing balanced changes that are sustainable. Certainty and predictability are important considerations for investment decisions and the competitive position of B.C. in an increasingly globalized economy.

The 2019 amendments ("2019 Amendments") received the unanimous approval of all political parties in the B.C. Legislature, which substantially adopted the vast majority of the recommendations of the 2018 Report.

Two major changes to the *Code* were subsequently introduced; in 2022, single step certification was reintroduced and in 2024, the *Code* was amended to provide provincially regulated employees the right to refuse to cross picket lines of federally regulated employees and those from other provinces.

The reactions to these amendments are diametrically opposed; employers seek their repeal while unions strongly support them. Employers strongly oppose both of these amendments as indicative of a pendulum swing that ought to be avoided in order to provide the certainty and predictability critical for investment decisions. Unions welcome these changes stating the fundamental purpose of the *Code* is to facilitate access to collective bargaining, regardless of balance.

New Developments

The changes in the B.C. economy and workplaces reviewed in the 2018 Report included: demographic changes, the growth of non-standard work, the globalization and fissuring of the economy, technological change and the growth of the service sector. Those changes continue to evolve. Additional developments and concerns since 2018 also warrant review and comment.

Gig Work

Gig work is not new and has been historically present in a number of industries such as transportation, resource extraction, construction, film and television, and personal services: J. Stanford "*The Resurgence of Gig Work: Historical and Theoretical Perspectives"* Economic and Labour Relations Review 1-20.

Gig work involves individuals who perform short term tasks, projects or jobs who are paid per unit of work, may own their own tools and have no assurance of ongoing or steady employment. They must make specific efforts on their own to secure each task, project or job: *Handbook on Forms of Employment,* United Nations Economic Community for Europe (UNECE), 2022 p. 62.

A measure of the scope of gig work in Canada is reflected in the figures for the October to December 2022 period during which 871,000 Canadians had jobs with gig characteristics. About 1.5 million Canadians performed gig work at some point during the previous 12 months: V. Harvey, *"Defining and Measuring the Gig Economy"* Statistics Canada, March 4, 2024.

A newly emerging type of gig work is the use of digital platforms to organize and supervise work, deliver goods or services to a customer and facilitate payment: J. Stanford *supra* at p. 3. Digital platform work is "work carried out on, or through Internet platforms or apps which exercise control over the work process": Statistics Canada *supra* at p. 1.

The share of individuals performing work through digital platforms grew from 5.5% of the Canadian workforce in 2005 to approximately 10% in 2020. About 250,000 Canadians performed gig work through digital platforms in 2022: *"What we Heard: Developing Greater Labour Protections for Gig Workers"* Government of Canada, March 2023.

One study noted that gig workers are typically isolated independent workers who face irregular work schedules, in most cases provide some or all of the equipment used direction in their work and are paid on a piecework basis: A. Stewart and J. Stanford *"Regulating Work in the Gig Economy",* Economic and Labour Relations Review 28 (3), pp 382-401 (2017).

One of the recurring issues identified in respect to digital platform work is whether individuals performing that work are truly independent contractors.

Artificial Intelligence

Artificial intelligence ("AI"), and in particular generative AI, have experienced rapid growth in the last number of years with generative AI surging into the public consciousness in late 2022.

The Organization for Economic Cooperation and Development (OECD), of which Canada is a member, defines an AI system as "a machine-based system that, for explicit or implicit objectives, infers, from the input it receives, how to generate outputs such as predictions, content, recommendations, or decisions that can influence physical or virtual environments. Different AI systems vary in their levels of autonomy and adaptiveness after deployment." OECD AI policy overview, May 2024, https://oecd.ai>ai-principles.

Examples of the use of AI include facial recognition, process optimization (use of data to give more accurate solutions), digital assistants (chat or voice bots), healthcare (assist in patient diagnosis and treatment), fraud detection, data analysis and cybersecurity: "*Artificial Intelligence"* Canadian Centre for Cyber Security, Government of Canada, September 15, 2023 Artificial Intelligence - ITSAP.00.040 - Canadian Centre for Cyber Security

Generative AI has been characterized as "a subset of machine learning in which systems are trained on massive information sets – often including personal information – to generate content such as text, computer code, images, video or audio in response to a user prompt": *Principles*

for Responsible, Trustworthy and Privacy-Protective Generative AI (Artificial Intelligence) Technologies" Office of the Privacy Commissioner of Canada, December 7, 2023.

Whereas, more traditional AI systems recognize patterns or classify existing content, generative AI creates new content including texts, images, software code, etc. and has the ability to answer questions and compose paragraphs.

Authorities around the world recognize the potential risks associated with this technology: see for example the November 2023 G7 Leaders Statement, cited in the report by the Office of the Privacy Commissioner of Canada *supra.*

The G7 has issued a statement of guiding principles and a code of conduct for organizations developing AI systems which promote the responsible and safe development and use of artificial intelligence systems.

The European Union is in the process of enacting the *Artificial Intelligence Act* to regulate the use of generative AI, prohibit certain applications of technology and impose strict requirements on others. That legislation categorizes applications based on their perceived risks and establishes a regulatory frame-work for high-risk systems (such as those used in employment, law enforcement, critical infrastructure and education) and requires operators to undertake risk assessments and guarantee human oversight.

Several European countries require worker representatives, including unions, to be provided notice of any intention for AI to be introduced into a workplace and to be consulted in the development and implementation of AI programs.

Through the introduction of Bill C-27, the federal government has proposed to enact the *Artificial Intelligence and Data Act*, which is a voluntary code of conduct regarding the responsible development and management of generative AI systems.

In Canada, federal, provincial and territorial privacy commissioners have established principles for generative AI which address: legal authority and consent, appropriate purposes, necessity and proportionality, openness, accountability, individual access, limiting collection, use and disclosure, accuracy and safeguards.

In B.C., the government has undertaken a consultation with public servants in relation to the use of generative AI in public services. The B.C. Information and Privacy Commissioner, Ombudsperson and Human Rights Commission have called on government to expand that consultation to the public.

Covid-19 Pandemic

The most enduring impact of Covid-19 has been the increase in remote work. In 2016 only about 4% of the workforce worked remotely. By 2023, 13.5% of workers worked exclusively at home and a further 11.5% worked in hybrid arrangements: *Labour Force Survey* Statistics Canada, March 8, 2024.

Remote work is concentrated in sectors which do not require a physical presence. The highest levels are in the following sectors: professional, scientific and technical (60.6%); finance,

insurance, real estate and leasing (54.4%); and public administration (47.4%): *Labour Force Survey* supra.

The marked increase in remote work and the need for associated infrastructure considerably increased the use of digital tools.

B.C. Economy and the Need for Balance, Stability and Predictability

The 2018 Report aptly described the importance of predictability, certainty and balance to the health of the B.C. economy, on page 7. We adopt and endorse the following remarks in making our recommendations for changes to the *Code*:

> There have been a number of pendulum swings in important *Code* provisions over the past 30 years largely depending on the governing political party. This is not consistent with predictability, certainty or balance. Although not an easy task, it is essential to avoid pendulum swings by implementing balanced changes that are sustainable. Certainty and predictability are important considerations for investment decisions and the competitive position of B.C. in an increasingly globalized economy.
>
> In our view, the principles enunciated by the *Woods Task Force* and Professor Weiler in striking a balance between the interest of employers to operate their businesses and the right of employees to join unions remain important and relevant.
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> Collective bargaining and freedom of association are essential features of Canadian society and must be given meaningful effect. At the same time creating an environment supportive of business, particularly in the context of our rapidly changing economy, is also important.
>
> Labour relations in B.C. should not result in a binary mutually exclusive choice between the protection of fundamental workers' rights, productivity and business success. Economic growth can be achieved alongside flexible, innovative protections and practices under the *Code*.

In our consultations, economists from Centre for Future Work (endorsed by unions), the Business Council of B.C. and Independent Contractors Association of British Columbia agree policy makers need to ensure labour laws are consistent with strong sustainable economic performance in all sectors of the economy.

Employers, led by the Business Council of British Columbia, urge us to make recommendations for a fair and balanced *Code* supporting stable labour relations in order to attract capital investment to B.C. They say businesses with capital look for competitive and stable jurisdictions in which to locate and operate. Factors they consider include the availability of skilled labour and government policies and regulations touching on taxation, environmental standards and labour and employee relations. They point to s. 2 of the *Code* and our duty to conduct our review in a manner that, among other things, recognizes the rights and obligations of employees, employers and unions, fosters the employment of workers in economically viable businesses, and minimizes the impacts of labour disputes on persons not involved. Employers ask us to fully recognize the need for balance and the need to prevent pendulum-like swings in labour relations law and policy which could negatively impact business growth in B.C.

While employers recognize that the B.C. economy has performed well over the last five years compared to other provinces due in part to large infrastructure projects, they say those projects are coming to an end and the B.C. economy is at an inflection point. They assert the economy is shrinking and there is a planned structural deficit in the provincial Budget of $6 to 8 billion from 2024 to 2026.[1] Employers also assert that while total job growth is up, that trend is driven by public sector jobs (which have grown by 35% since 2018) and employers expressed a serious concern that private sector job growth in B.C. since 2018 is very weak compared to other provinces and is worsening.[2] Employers warn that if our report fails to achieve an appropriate balance it will have significant negative consequences for the B.C. economy, which will have a long term negative impact for employees, employers and unions.

The Centre for Future Work acknowledges that broader macroeconomic and labour market conditions provide important context for consideration of optimal labour policy settings: Growth with Inclusion, An Overview of B.C.'s Recent Economic and Labour Market Performance, May 6, 2024, Centre for Future Work, p. 1.

The Centre for Future Work submission dated May 6, 2024, provided data from 2017-2023 showing that B.C.'s economy has performed very strongly in recent years, and stated this "resulted from a diversified set of drivers: including the strongest business investment in Canada, the strongest innovation records in Canada, strong export growth, and steady expansion of public sector activity and public services."

The submission noted that strong growth in recent years has "underpinned encouraging progress in labour markets, including strong employment outcomes and healthy progress in wages". It went on to state B.C.'s solid economic performance, which has recorded the strongest wage growth of any province measured in real terms, denotes an "achievement which 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 contributes to the economy through consumer spending and therefore, it was asserted, "B.C.'s approach to labour relations in recent years has clearly reinforced the province's economic momentum, and this has clearly benefited business" (pp. 1-2).

In a supplemental submission dated June 14, 2024, p. 4, the Centre for Future Work noted by some metrics the B.C. economy enjoys a relatively strong standing among Canadian provinces – including in wage growth, profits, profitability and exports, with one notable exception being business capital spending which is expected to decline by 5% in 2024, due to the imminent completion of some large capital projects. Spending on machinery and equipment is expected to grow by 6% in 2024 which is said to reflect investment by non-construction businesses.

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[1] The real income per capita declined 2% in 2023 and is expected to decline by another 2% in 2024: the 2024 BC Budget forecasts the 2027 provincial real GDP per capita to be lower than in 2019; and net migration to Alberta has risen sharply: Coalition of Business Associations, Submission to S. 3 Labour Relations Code Review Panel, March 22, 2024, p. 6; Business Council of British Columbia, Labour Code Review Panel, April 5, 2024; Supplemental Submission to the Section 3 Labour Relations Code Review Panel, May 17, 2024, pp. 2-7

[2] In 2023 every other province registered strong job growth in the private sector (between 3.3% and 4.6%) while BC experienced a contraction of private sector jobs (–0.3%): Coalition of Business Associations, Submission to S. 3 Labour Relations Code Review Panel, March 22, 2024, p. 7; Business Council of British Columbia, Labour Code Review Panel, April 5, 2024

We recognize the importance of ensuring labour policy under the *Code* facilitates and encourages a strong and stable economy and believe our recommendations support that objective, as required by section 2 of the *Code*.

Labour Relations Board Resources

The Board plays a critical role in labour relations in B.C. and must be properly resourced to carry out its numerous functions under the *Code*. Timely decisions are necessary to provide certainty to unions, employers and workers.

Both union and employer groups expressed serious concerns about delay in the processing of a range of applications and the growing number of time limit extensions granted for Board decisions pursuant to the *Prescribed Time Periods for Decisions Regulation*, BC Reg. 49/2012

The reasons for the delays include a 40% reduction in the Board's funding in 2003 and the associated reductions in all levels of the Board's staff. There has not been an increase in staffing since that time.

Several recommendations of the 2018 Review Panel adopted by the legislature have imposed further demands on the Board's resources. One of those was the conclusion it was critical that certification votes, previously handled by Employment Standards Officers, be controlled by the Board. This increased workload was significantly exacerbated by the reintroduction of card check or single step certification in 2022. Consistent with historical patterns, this change resulted in a significant increase in applications for certification, with resulting increases in other applications such as unfair labour practice complaints and first collective agreement (section 55) applications. Consequently, the Board has developed a backlog of cases.

The current situation is not sustainable and will have an increasingly detrimental impact on the Board's ability to provide timely decisions and services and will exacerbate the serious recruitment and retention challenges the Board faces, particularly for vice chairs and mediators. Recruitment and retention of vice chairs is adversely impacted by the current remuneration levels which are established by a Treasury Board directive. The resulting maximum salary ranges are not attractive to experienced labour law practitioners. Mediators' salaries are also below industry standards.

Although, as a result of the 2018 Report, additional funding was provided to the Board to update its case management system, the system provided was not designed for the Board's operations and is inadequate. For example, it is unable to perform basic functions such as generating a copy of a certification or letters to parties and takes longer to accomplish some tasks than under the former dos system.

There is consensus in the labour relations community the Board should be provided increased operating funding to improve the functioning of the Board and minimize delays.

Recommendation No. 1

> A. Funding for the Board must be substantially increased to provide sufficient staffing levels necessary to reduce delays and to replace the case management system with a system compatible with the Board's operational needs.

B. There should also be a review of remuneration levels for vice chairs and mediators to ensure they are sufficiently attractive to support recruitment and retention.

Part 1 – Introductory Provisions

Definitions – Section 1

"Mediation"

The Arbitrator's Association of B.C. raised serious concerns regarding the implications of section 5.1-2.3 of the British Columbia Law Society's *Code of Professional Conduct* which states that, except as authorized by law, a lawyer is prohibited from communicating with a tribunal in the absence of the opposing party or their lawyer about any matter of substance unless the opposing party or their lawyer been made aware of the content of the communication.

Since 1973, the *Code* has relied extensively on mediation which, in the labour relations context, usually involves single party communications. Compliance with this rule would therefore render mediation ineffective and would be inconsistent with a principle of the *Code*: section 2(h).

In our view, an amendment to the *Code* is necessary to recognize the realities of mediation by expressly authorizing lawyers to engage in single party communications during mediation.

Recommendation No. 2

The following definition of "mediation" be added to Part 1, section 1(1):

> "Mediation means attempting to resolve issues in dispute between the parties including meeting separately with the parties and/or their representatives or legal counsel."

"**Employee**"

Online Platform Workers

Many unions advocated amending the definition of "employee" in the *Code* to expressly include online platform workers. They pointed to recent amendments to employment standards and workers compensation legislation which extended some coverages to online platform workers, such as ride hail or food delivery workers. They also noted American jurisdictions where efforts are being made to broaden the definition of "employee" beyond the traditional common law test.

In B.C., the definition of "employee" in section 1(1) of the *Code*, is already broader than the common law because it expressly includes "dependent contractor", also defined in the *Code*.

There are five jurisdictions in Canada (British Columbia, Alberta, Ontario, Newfoundland and Canada) which include dependent contractor in the definition of employee. Our research revealed no decisions in these jurisdictions concluding the definition is too narrow to encompass newly emerging gig work. In a relatively recent decision, the Ontario Labour Relations Board found a group of couriers providing food delivery services through a digital platform to be

dependent contractors and captured by the definition of employee under the Ontario legislation: *Foodora Inc. v Canadian Union of Postal Workers* 2020 CanLII 16750 (ON LRB).

The B.C. Board has established a test for determining if an individual is a dependent or independent contractor: *West Fraser Mills Ltd.* BCLRB No. B 97/93 and has found dependent contractor can accommodate a range of activities such as truck drivers, couriers, log haulers, taxi drivers, construction workers, symphony musicians and others.

Similarly, gig work covers a range of activities, only a part of which involves online platform workers. Therefore, amending the *Code* to expressly include online platform workers could have the effect of excluding other gig workers from employee status.

Depending on the particular facts, under the current *Code* provisions, individuals engaged in gig work could be found to be employees, dependent contractors or independent contractors. Consequently, we are not persuaded the existing definition of employee needs to be changed to include ride-hail or food delivery workers.

Manager

Two organizations advocated changes to the definition of "employee", "trade union" and "bargaining unit" in order to facilitate access to collective bargaining by individuals exercising management functions. They relied on Supreme Court of Canada decisions recognizing collective bargaining as a constitutionally protected right under section 2(d) of the *Canadian Charter of Rights and Freedoms* (the "*Charter*") to suggest a constitutional right to access to collective bargaining for currently excluded managers.

The definition of "employee", which has remained unchanged since 1975, expressly excludes managers and persons employed in a confidential capacity.

A fundamental premise of the *Wagner Act* model of labour relations is the recognition of the rights of employees to form unions and bargain collectively with their employer. While employers and unions have some shared interests they also have divergent interests. The underlying construct of the *Code* requires an arms-length relationship between employers, as represented by management, and unions, which represent employees in the bargaining unit. The Board has long recognized that while managers are also dependent on the enterprise for their livelihood, they wield substantial power over the working lives of employees they manage and therefore, like all other labour relations legislation in North America, managers must be assigned to the side of the employer.

The Board has carefully and narrowly applied the managerial exclusion, consistent with the purposes of the *Code*. To be excluded, an individual must exercise effective determination in respect to discipline, discharge, labour relations input, hiring, promotion and demotion. Those characteristics illustrate the conflict of interest and divided loyalty considerations underpinning the exclusion.

The proposed changes to the definition of "employee", "trade union" and "bargaining unit" to allow inclusion of managers are antithetical to the labour relations scheme of the *Code.*

Recommendation No. 3

Retain the existing definitions of “employee”, “trade union” and “bargaining unit” in section 1(1) of the *Code*.

“Strike”

Workers regulated by the B.C. *Code* have long been entitled to honour picket lines without that being considered an illegal strike. Initially, this was because the definition of strike required the work stoppage to have the subjective intention of persuading the employer to agree to terms and conditions of employment. When the definition of strike was amended in 1987 to remove the subjective element, the legislature added an express provision allowing employees to refuse to cross a picket line “permitted under this *Code*” (the “right to honor a picket line”).

In April of 2024, through the *Miscellaneous Statutes Amendment Act* (“Bill 9”) the government expanded this provision to permit employees to refuse to cross a picket line erected by employees who are regulated by the *Canada Labour Code* or by labour legislation in other provinces.

The fact the amendment to the definition of strike occurred without apparent consultation with the employer community in the middle of this consultative process compromised the integrity of this review process.

The impetus for Bill 9 was the Board’s reconsideration decision in *Vancouver Shipyards,* BCLRB No. B146/2022, which held the right to honour picket lines was limited to picketing by provincially regulated employees and did not extend to picketing by federally regulated employees. In that case, striking federally regulated employees of Seaspan ULC picketed a roadway to a common site between their employer and Vancouver Shipyards, a provincially regulated wholly owned subsidiary of the struck employer. Provincially regulated employees of Vancouver Shipyards honoured the picket line. The Board found those employees were on an illegal strike because the exemption for honouring a picket line under the definition of “strike” was limited to picketing permitted under the B.C. *Code* and did not include picketing permitted by other jurisdictions.

During our review, all unions strongly supported Bill 9 maintaining the right to honour a picket line is a fundamental expression of worker solidarity. Unions also suggested the change will reduce worker-employer and worker-worker tension and resentment that can arise if the right is limited, as it previously was.

Employer groups raised serious concerns regarding Bill 9. The first was that it occurred without input or consultation from the employer community and occurred in the middle of this consultative process. They say the amendment will permit federal picketers to shut down provincially regulated employers who will have no access to remedies that would otherwise be available to them under the *Code* for provincially regulated pickets. Employers also note many other Canadian jurisdictions, including the federal jurisdiction, provide broader rights to picket. However, workers in those jurisdictions who refuse to cross a picket line of another bargaining unit will be found to be engaging in an illegal strike, even where they have the right to do so under their collective agreement.

The Council of Northern Interior Forest Employment Relations ("CONIFER") and Interior Forest Labour Relations Association ("IFLRA") provided an example of the potential nature and scope of the problem created by Bill 9, noting that more than 90% of their members' operational facilities could be impacted by federally regulated picket lines because they have, or are adjacent to, federally regulated rail lines or marine operations.

A problem with Bill 9 flows from the disparate approaches to regulating picketing in the different jurisdictions. The B.C. *Code* restricts secondary and common site picketing, whereas other jurisdictions permit both. In the result, federally regulated employees have expansive rights to picket whereas B.C. regulated employees have limited picketing rights.

In addition, the Board regulates picketing by provincially regulated employees and has no jurisdiction with respect to picketing emanating from other jurisdictions. By contrast, the courts regulate picketing emanating from federally regulated labour disputes (and disputes in most other provinces) and only on the basis of tortious and criminal conduct.

The B.C. *Code* has historically recognized the importance of workers' ability to refuse to cross a lawful picket line by permitting them to do so. In other jurisdictions, for example under the *Canada Labour Code*, workers do not have the right to honour any other picket line, even when permitted by their collective agreement. Under Bill 9 there is no reciprocity; provincially regulated employees can now honour federal pickets whereas federally regulated workers do not have the reciprocal ability to honour the picket lines of B.C. workers.

We note that federally regulated businesses include airports, ports, telecommunication, grain elevators, marine shipping, postal services, radio and television, and interprovincial transportation. An example of the potential scope of this issue is illustrated in the B.C. Ferries case: *BC Ferry Corp. v. T.W.U*. 1981, 31 BCLR 247. In that case, the Telecommunications Workers Union ("TWU"), who were engaged in a labour dispute with B.C. Tel, erected pickets at B.C. Ferries and Fording Coal operations. Unionized employees refused to cross the TWU picket line, suspending the operations of B.C. Ferries and Fording Coal. If that were to happen today, their employees would have the right to honour the federal pickets, shutting down their operations without any recourse to the Board under the *Code*.

It is also a legitimate concern that the B.C. Board has no jurisdiction to regulate federal picketing even at common sites: *B.C. Ferry, supra; Tyco International,* BCLRB No. B272/94. This means a provincially regulated employer impacted by a federal picket line at a common site will be unable to seek common site relief from the Board under the *Code*.

Further, given the expansive right to picket at common law, federally regulated employees could potentially shutter completely uninvolved provincial employers who have no ability to impact the outcome of the labour dispute.

We have been unable to reach a consensus on a recommendation and therefore we provide the following options for your consideration.

Commentary and Recommendation of Michael Fleming

In my view, the amended definition of "strike" should be adjusted to provide a balance between limiting the impact of picketing in respect to an employer regulated by the laws of Canada or another province on uninvolved, unrelated employers regulated by the laws of B.C. while giving

effect to the *Code* right of B.C. workers to refuse to cross a lawful picket line. That balance reflects an application of the section 2(f) *Code* principle of minimizing the effects of labour disputes on persons not involved in those disputes.

I recommend the definition of "strike" recognize the right of employees regulated by the laws of B.C. to refuse to cross a picket line erected by employees of an employer regulated by the laws of Canada or another province where the employer regulated by the laws of B.C.:

> a) is a related company providing the same or substantially similar services or products on the same site as the struck employer (or who has locked out), regulated by the laws of Canada or another province; or
>
> b) where an employer regulated by the laws of B.C. assists or supplies goods or furnishes services for the benefit of the struck employer regulated by the laws of Canada or another province.

Commentary and Recommendation of Sandra Banister, K.C.

Honouring picket lines is a fundamental trade union principle which has long been recognized by the *Code*. My proposal recognizes the disparate picketing regimes and attempts to narrow the potential scope of the amendment in Bill 9 to those employers who may impact the outcome of the labour dispute. This is consistent with the duty under section 2(e) of the *Code*, "promoting conditions favourable to the expeditious settlement of disputes".

My proposal also respects agreements reached between employers and unions during collective bargaining which undoubtedly resulted from give and take on both sides.

I recommend:

> A. Section b(ii) of the definition of "strike" be amended as follows:
>
> > (ii) picketing conducted by employees **of the same employer or of a related or associated employer** in respect of whom collective bargaining is regulated by the laws of Canada or another province who are locked out or on strike; **or**
>
> B. Add section b(iii) to the definition of strike as follows:
>
> **(iii) respecting a clause in the collective agreement governing the employee's work which permits them to honour a picket line.**

Commentary and Recommendation of Lindsie Thomson

While the location of picketing is more restricted in B.C. than in other jurisdictions, lawful picket lines governed by the *Code* at secondary sites have a greater impact because the *Code* permits other employees to lawfully honour those picket lines. By contrast, while secondary picketing is generally permitted under the *Canada Labour Code* and in other jurisdictions, those pickets do not have the lawful right to shut down operations at secondary sites because other workers do not have the right to lawfully honour those picket lines. As a result, prior to Bill 9, as confirmed by the reconsideration decision in *Vancouver Shipyards, supra*, while a federally regulated union

(or a union regulated by another jurisdiction) could picket a provincially regulated employer in B.C. its employees would not have a lawful right to refuse to cross the picket line.

Bill 9 dramatically changes the landscape for secondary picketing of provincially regulated employers under the *Code* by permitting their employees to lawfully honour picket lines emanating from disputes in other jurisdictions. Under Bill 9, federally regulated disputes will now be able to shut down provincially regulated employers through secondary picketing and those employers will have no ability to seek relief from the Board under section 65.

Bill 9 significantly expands the impact of secondary picketing emanating from labour disputes regulated by other jurisdictions, including the *Canada Labour Code*. This expansion results in uncertainty for provincially regulated employers concerning when or whether their operation will be shut down by a labour dispute emanating from another jurisdiction. This is both a disincentive to the investment of capital in B.C. and contrary to section 2(f) "minimizing the effects of labour disputes on uninvolved persons", and section 2(g) "protecting the public interest during labour disputes" of the *Code*.

I recommend Bill 9 be repealed.

"Picketing"

Picketing is defined in section 1(1) of the *Code* as:

> "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
>
> a) enter that place of business, operations or employment,
> b) deal in or handle that person's product, or
> c) do business with that person …"

Section 66 of the *Code* provides protections to workers engaged in lawful picketing from tort claims.

A number of unions proposed the definition of picketing should be amended to ensure remote workers have the ability to establish virtual picket lines to signal that others should not do business with the employer involved in the labour dispute. They say the existing definition of picketing, which defines picketing as requiring a physical presence, unduly restricts the rights of remote workers to picket as they may have no physical place of employment. One union provided examples of what they referred to as virtual picketing which involved the use of social media to post images of striking workers, communicate with their members and remote workers of the same employer about the location of physical picket lines and provide strike updates.

Employer groups say the concept of a virtual picket line, without any physical presence, falls well outside the scheme of picketing under the *Code* and more closely resembles a "hot declaration" used to persuade others not to handle products of a struck employer. Hot declarations are dealt with under section 70 of the *Code* and it would create unnecessary confusion in the regulatory scheme if virtual picketing were to be included in the definition of picketing. Employers acknowledge while it may be necessary to clarify the permissible location of picketing for remote workers (for example the place where they are supervised), there is no

basis to conclude they would be denied the right to picket under the existing definition in the *Code.*

Based on our consultations it is apparent there is no common understanding of virtual picketing and, therefore, it is not surprising there were no proposals for either a definition of virtual picketing or how the existing definition of picketing might be amended.

Our research found a number of recent North American examples of the use of social media which were characterized by unions as virtual picketing. In all those cases, the activities were an adjunct to a physical picket line and were designed to involve workers (including remote workers) in a strike or encourage support for a physical picket line. Social media was used in a variety of ways, including to: post images of striking workers, communicate with workers to provide locations of physical picket lines, provide strike updates, facilitate the participation of remote workers in the strike and encourage support activities (such as on-line petitions, letter writing campaigns, on-line and in-person public education campaigns, and fund raising).

A recent Alberta Labour Relations Board decision, involving striking remote workers whose employer lacked a physical presence in Alberta, held those workers were entitled to picket at the site of a customer of the struck employer: *BioWare ULC v United Food and Commercial Workers' Union, Local 401,* 2023 ALRB 7 (CanLII). However, it is noteworthy the Alberta legislation allows picketing at "the employee's place of employment" whereas the B.C. *Code* allows picketing at "a site where the employees perform work under the control or direction of the employer if the work is an integral and substantial part of the employer's operation".

In our view, given the broad range of activities that are characterized as virtual picketing and the absence of a clear meaning of the term, to simply add virtual picketing to the definition of picketing in the *Code* would create confusion and result in litigation. Including this range of activities in the definition of picketing would result in their regulation as physical picketing, with the unintended consequence of restricting those communications in circumstances in which they might otherwise be permissible.

One of the legitimate concerns raised by unions relates to the situation where a struck employer which employs remote workers has no physical presence in B.C. Although it will be unusual for a business to have no physical presence in B.C., if that occurs, striking remote workers should not be without their constitutionally protected ability to exercise an expressive right in order to persuade persons not to do business with or handle goods of their employer.

Some of the expressive activities noted in the examples were designed to persuade persons not to do business with the struck employer and may be addressed under other sections of the *Code*, for example section 70 – Declaratory Opinion (hot declarations) and section 64 – Information.

The Board's approach to hot declarations is to consider whether the purpose and effect of the declaration is consistent with the principles of Part 5 of the *Code* and more particularly is consistent with the purpose and effect of picket lines directed against the struck operations: *Western Forest Products*, BCLRB No. B104/2019, para. 78. The focus for determining the validity of a hot declaration is on the nature of the pressure and impact rather than on its geography: *CIP Inc., Tahsis Pacific Region*, BCLRB No. 277/86 (Leave for Reconsideration denied, BCLRB No. 308/86), para. 18.

The Board has affirmed that a striking union can exert economic pressure in forms other than picketing on the struck employer, provided these pressures do not unnecessarily spill over to injure third parties or go beyond the bounds of that pressure which the union could place on the struck employer through picketing and strike activity: *Pacific Gillnetters Association et al.,* BCLRB No. 20/79, [1979] 1 Can LRBR 506, at p. 516. In our view, this principle must still apply even in the rare circumstance where an employer has no physical operations that would otherwise constitute a lawful site of primary picketing.

We believe in cases where there is no physical location for picketing permissible under section 65(3), the Board should have express discretion under section 70 to determine a hot declaration is valid and enforceable to ensure striking remote workers are able to effectively exercise their expressive rights.

Recommendation No. 4

A. Retain the existing definition of "picketing" in section 1(1).

B. Amend section 70 to add:

> **70(3)(c) Without limiting the Board's discretion under section 70(3)(b), where there is no physical site for a trade union, member or members to picket pursuant to section 65(3), the Board must exercise its discretion to ensure employees' expressive rights are given effect in a manner consistent with the intent and purpose of picketing under this Part.**

Duties under the *Code* – Section 2

The Board and others exercising powers under the *Code* must exercise their authority in a manner consistent with the duties set out in section 2.

As in 2018, a number of unions proposed eliminating section 2(b), which imposes a duty to foster "the employment of workers in economically viable businesses". Most unions say the *Code* should focus on encouraging access to and promoting collective bargaining, not the viability of businesses. In our opinion, it is not a binary choice and we reiterate the statement in the 2018 Report "….*Section 2(b) reflects the reality that employment, business viability, and collective bargaining are integrally connected and the inclusion of that duty contributes to the balance in the Code".*

Recommendation No. 5

Retain the existing language of section 2(b).

Part 2 – Rights, Duties and Unfair Labour Practices

Prohibitions Against Dismissals – Section 5(2) – Time Frames

Currently, a hearing for a complaint under section 5(2) must be commenced within three calendar days and a decision rendered within two calendar days after the completion of the hearing.

Some employer groups raised concerns regarding the extremely compressed time frames for section 5(2) complaints, which make it very difficult for an employer to retain counsel and prepare for a hearing. Employers note that section 5(2) complaints are often filed on a Friday which means they must retain counsel who must attempt to contact witnesses, obtain evidence and prepare for the hearing over a weekend, all of which creates a fundamental unfairness.

An additional concern is the current language requires a hearing to continue through weekends and statutory holidays which has a deleterious impact on all parties and requires the use of significant Board resources during those periods.

The current time frames for dealing with a section 5(2) complaint flow from the recommendations of the 1992 Subcommittee of Special Advisors (Vince Ready, John Baigent and Tom Roper) (the "1992 Review Panel" or "1992 Report", as applicable). In making its recommendations, the panel noted it is in the union's interest to have a section 5(2) complaint dealt with as quickly as possible so the potential effects of any improper conduct on an organizing drive can be minimized. They also noted it is in the employer's interest to have the air "cleared" as soon as possible if there is no basis for the complaint.

The Board advised us its practice is to not include Sunday for the purposes of calculating the time limits under section 5(2) and that the parties typically agree not to commence a hearing on a weekend.

The expeditious resolution of unfair labour practice complaints needs to be balanced against ensuring procedural fairness. In our view, it is appropriate to replace "calendar" days with "business" days in section 5(2)(a) and (c).

Recommendation No. 6

> Amend section 5(2) as follows:
>
> (2) If no collective agreement respecting a unit is in force and a complaint is filed with the board alleging that an employee in that unit has been discharged, suspended, transferred or laid off from employment or otherwise disciplined in contravention of this *Code*, the board must forthwith inquire into the matter and, if the complaint is not settled or withdrawn, the board must
>
> (a) commence a hearing on the complaint within 3 **business** days of its filing,
>
> (b) promptly proceed with the hearing without interruption, except for any necessary adjournments, and
>
> (c) render a decision on the complaint within 2 **business** days of the completion of the hearing.

Remedial Certification – Section 14(4.1)

Section 14(4.1) of the *Code*, which flowed from the 2018 Report, gives the Board the authority to order a remedial certification in response to unfair labour practices where the Board believes it is just and equitable. As noted in the 2018 Report, given the serious consequences of unfair labour practices, it is critical that remedies have both a restorative and deterrent effect.

Some employers sought repeal of that provision on the basis that it was part of a package of enhanced measures recommended in the 2018 Report to protect workers' freedom of association under a secret ballot vote. If a secret ballot vote is not reinstated, section 14(4.1) should be repealed and the language in section 14 should revert to what was in place prior to the 2019 Amendments.

The *Code* has always given the Board the discretion to impose a remedial certification. Notwithstanding the amendment, remedial certifications have continued to be very rare (five, since 2020). We believe the 2019 amendment, which gives the Board a somewhat wider discretion to assess the potential consequences of unlawful interference with employee choice and to ensure the Board has sufficient remedial authority to fully rectify its impact on the organizing drive, should remain in place.

Recommendation No. 7 of Michael Fleming and Sandra Banister, K.C.

Retain section 14(4.1).

Additional Commentary and Dissent of Lindsie Thomson

The recommendation in the 2018 Report to broaden the Board's discretion to order remedial certifications (and enact 14(4.1)) was part of a package of "enhanced measures" to protect employee free choice under a secret ballot vote system. The secret ballot vote was replaced with a card check system in 2022 and therefore the integrity of that package has not been maintained.

I recommend reverting to the language under section 14 in place prior to 2019. However, if my recommendation below to revert to a secret ballot vote is enacted, I recommend keeping section 14(4.1).

Part 3 – Acquisition and Termination of Bargaining Rights

Single Step Certification and Secret Ballot Votes – Section 23

Since 1984 one of the most contentious labour relations issues in B.C. has been whether certification should be determined by card check (single step) or secret ballot vote.

B.C. had a card check system from 1947 to 1984 when the secret ballot vote was first introduced. Since then, the system has alternated between card check and secret ballot depending largely on the political philosophy of the day: secret ballot 1984 to 1992; card check 1992 – 2001; secret ballot 2001 to 2022; and card check from 2022 to present.

B.C. and New Brunswick have card check for certification. Ontario has card check for construction. Manitoba has introduced legislation for a card check system which has not yet

been passed. In Quebec, Newfoundland, Prince Edward Island and under the *Canada Labour Code*, the board has discretion whether to order a representation vote if membership evidence exceeds a certain threshold. In Alberta, Ontario (except in construction) and Nova Scotia a secret ballot vote is always required.

There is general agreement employees must be able to freely choose whether or not to unionize. However, there are very divergent views regarding how to best give effect to that basic principle as reflected in the changes between card check and secret ballot systems.

Unions strongly endorse the current card check system while employers strongly favour a return the secret ballot vote.

Employers noted that the majority of the 2018 Review Panel preferred the secret ballot vote because it is the most consistent with our democratic norms, but noted employee free choice must be protected by meaningful and effective remedial authority. To that end, the majority recommended enhanced measures including: shortening the time-frame for votes, ensuring the expeditious and efficient processing of certification applications and unfair labour practice complaints, and the expansion of the Board's remedial authority. The majority stated if the enhanced measures were not effective, then there would be a compelling case for a card check system.

Employers say that if the card check system is to be maintained, at a minimum, those enhanced measures should revert back to what was in place during the last period of card check.

Commentary of Michael Fleming

As noted earlier, since 1984 the issue of whether certification should be determined by card check or a vote has been highly contentious. In my view, there are strengths and weaknesses associated with both legitimate options. The choice of the preferred option has largely been determined by the political philosophy of the government of the day.

I agree with the views set out in the 2017 Ontario Changing Workplace Review (the "2017 Ontario Panel" or the "2017 Ontario Report", as applicable), there is no single *correct* certification process. However, given the strongly held views regarding the card check and certification vote options, it is a significant challenge to find a path for achieving the measure of broadly perceived balance necessary to limit the incentive for pendulum swings.

The hope of the majority in the 2018 Report was that a balance could be achieved through the 2018 recommendations which would provide stability in labour relations policy. In 2022, the government determined that framework did not reflect the appropriate balance and made a clear policy decision to re-introduce the card check system. That development reinforces the importance of a measured and incremental approach in this review process.

Commentary of Sandra Banister, K.C.

As noted in my dissent in the 2018 Report, card check certification remains the single most effective mechanism to avoid unlawful employer interference and to ensure employee choice. The large number of certifications granted since single step certification was reintroduced in June 2022 confirms the efficacy of that system in ensuring access to collective bargaining, which is a fundamental duty of the *Code*.

Recommendation No. 8 of Michael Fleming and Sandra Banister K.C.

No change to section 23 of the *Code*.

Commentary and Dissent of Lindsie Thomson

Consistent with the majority recommendation of the 2018 Review Panel, I recommend reverting to the secret ballot vote system in place from 2001 to 2022 because it is more consistent with our democratic norms and protects employees' fundamental right of freedom of association enshrined in the *Charter* and reflected in section 2(c) of the *Code*. If this recommendation is accepted, I also recommend that section 14(4.1) of the *Code* be retained.

Certification Vote – Time Frame – Section 24(2)

The 2019 Amendments reduced the time frame for both certification and revocation votes from 10 calendar days to 5 business days.

The Board's practice is to schedule a certification hearing within 3 business days of an application for certification to ensure the vote can be conducted within the mandatory 5 business days. Prior to the certification hearing an Officer is required to complete an investigation and provide a report on various issues, including whether the union has met the required threshold of support. That process requires the Officer to compile an employee list from the employer's payroll data.

Prior to 1987, the timing of the certification vote was left to the discretion of the Board. The 1987 amendments introduced the requirement to hold the certification vote within 10 calendar days. That time frame remained until 2019, including between 1992 and 2001 when card check certification was in place.

The following Canadian jurisdictions have mandatory time limits for conducting certification votes:

- five (5) working days in Nova Scotia
- five (5) business days in Ontario
- seven (7) business days in Manitoba

Those jurisdictions provide their respective labour boards with discretion to extend those time frames in appropriate circumstances.

Canada, Alberta, Saskatchewan, Quebec, Prince Edward Island and New Brunswick do not specify a mandatory limit for certification votes but leave the timing of votes to the discretion of their respective labour boards.

Employers expressed serious concerns about the current 5 business day limitation for certification votes because it does not provide them sufficient time to compile all the necessary information for an Officer, retain counsel, obtain legal advice, and prepare for a hearing. Employers note certification applications are often filed on a Friday which means they are

required to accomplish all this over a weekend. That raises legitimate fair hearing issues regarding their ability to properly prepare for certification hearings. Employers rely on the unfairness of the short time-frame and the fact single step certification was reintroduced in 2022 to advocate reverting to conducting certification votes within 10 calendar days.

Unions support the current time limit. They assert employers have all necessary payroll and employee information, have sufficient time to retain counsel and obtain legal advice prior to a hearing and have managed to operate within the current time limit for 5 years. They emphasize the importance of conducting votes within 5 business days to minimize the prospect of an employer attempting to exert undue influence on employees prior to a certification vote. Votes continue to occur notwithstanding single step certification.

The current time frame for representation votes creates issues for both employers and the Board. It is nonetheless important that the vote be conducted expeditiously. Balancing these two considerations we recommend the *Code* be amended to require a representation vote be conducted within 6 business days of the date of application for certification.

Recommendation No. 9

> Amend section 24(2):
>
> A representation vote under subsection (1) must be conducted within **6** business days from the date the board receives the application for certification or, if the vote is to be conducted by mail, within a longer period the board orders.

Membership Evidence – Labour Relations Regulation – Section 3(b)

Since 1993, section 3 of the *Labour Relations Regulation,* BC Reg. 7/93 (the "Regulation") has mandated membership cards relied on in an application for certification contain the following statement:

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

Under single step certification, we believe the membership card should clearly indicate that signing the card is equivalent to voting in favour of unionization and the required wording should be amended accordingly.

This change will require every union to revise their membership cards. Given the longevity of the current wording and the fact cards are valid for 6 months, it is imperative there be an appropriate transition period to the new wording. Further, the Board must be proactive in making unions aware of this important change.

Recommendation No. 10

> A. Section 3 of the *Regulation* be amended to read:
>
> > *In applying for membership I understand that the union intends to apply to be certified as my exclusive bargaining agent and to represent me in*

collective bargaining. ***If the Labour Relations Board does not conduct a certification vote, I verify my signature on this membership card has the same effect as casting a vote in favour of the union being certified.***

B. The Regulation provide a transition period of 10 months following the effective date of the amendment to the Regulation during which time Board must accept membership cards bearing either the existing language in Regulation 3 or the amended language.

C. The Board must proactively inform unions that their membership cards must contain the revised language to qualify as membership evidence.

Employee Lists

Many unions support an amendment requiring an employer to disclose their employee list, with contact information, where a union establishes it has the support of at least 20% of employees in a proposed bargaining unit. The same proposal was advanced by unions during the 2018 Code Review.

The union rationale for this amendment was that due to technological advances, gig, remote and other workers without a central dispatch or place of work may not know who their coworkers are or how to contact them which creates a barrier to union organizing. They say the *Code* should adapt to these changes.

Employers generally oppose this change because requiring production of an employee list, with contact information, before the union provides threshold support for a certification vote would be a major change which would give unions a significant organizing advantage that exists nowhere else in Canada. They also note the current employee list provided to unions who meet the threshold for a certification application includes only employee names, not contact information, so this would unduly compromise employee privacy rights. They maintain the proposal is unnecessary due to the enhanced ability of unions to communicate with workers through new technological advances, such as social media. Employers also note the increased number of certifications since single step certification was reintroduced and there is no evidence that existing rules and structures impede reasonable access to collective bargaining in any sector.

Some employers note the *Code* provides discretion under section 7(2) to grant unions access to employees who reside on the employer's property where they cannot reasonably access employees during an organizing drive and note that employers are not required to produce employee lists in those cases. They also refer to the Board's policy which allows for the relaxation of certification rules around appropriate bargaining units in difficult to organize sectors, which could include those relied on by the unions to justify their proposal.

Between 1975 and 1977 the *Code* contained a provision requiring employers to produce a list of employee names, addresses and telephone numbers to the Board where it was satisfied the Union was actively engaged in an organizing drive for a bargaining unit which could be appropriate. Upon receipt of the union's application for a list the Board's practice was to have a notice of the application posted at the worksite so employees could object to the release of their name and contact information.

Since the repeal of that legislation, an employee list is not usually disclosed until the Officer has conducted an investigation of the employer's payroll and is satisfied the union has demonstrated the necessary threshold support: see for example *Spacan Manufacturing Ltd.* BCLRB No. B318/99.

In 2018 Ontario amended its *Code* to require production of an employee list if a union established 20% support of employees in a proposed unit. That provision also included extensive measures for the protection of employee confidential information. That amendment remained in effect for about 10 months until repealed following a change in government.

We have not been directed to any other Canadian jurisdiction which has ever had a similar provision.

For many years the *Code* has recognized there may be circumstances where a union's access to employees may be unduly hindered by circumstances outside the union's control. Section 7(2) gives the Board the discretion to make an order permitting a union access to employees who reside on their employer's property or property the employer or another person controls. In exercising that discretion, the Board determines whether barriers exist which create an inequality of opportunity for employees to access information about a union's organizing activities: *H.S. Rai Farms Ltd.* BCLRB No. B 11/82; *Thompson Creek Metals Inc.* BCLRB No. B 22/2020, para 13 ("Thompson Creek"). The Board's concern is to ensure workers in remote, inaccessible locations have the same opportunity to be informed about a union's organizing activities and messages as other workers: *Thompson Creek*, paras 3 & 13. In determining whether an access order should be granted, the Board does not examine the status of the union's organizing drive.

There may well be circumstances beyond those addressed in section 7(2) where workers' ability to be informed about a union's organizing activities may be inordinately hindered.

We are concerned that the unions proposal would necessarily require the Board to determine whether the threshold was met by considering the appropriateness of the bargaining unit, eligibility of voters and other issues. These issues would need to be adjudicated a second time following the application for certification which could result in considerable additional litigation. Secondly, it may be necessary for the list to be updated between the application for the list and any subsequent application for certification, which would result in additional litigation. Finally, employees may have privacy concerns with respect to the provision of their contact information which could require measures and processes as was the case in the Ontario legislation.

Recommendation No. 11

No amendment to the *Code*.

Commentary and Dissent of Sandra Banister K.C.

The right of employees to join a union and the facilitation of access to collective bargaining are fundamental tenets of the *Code*. We heard that right and the ability to organize have been impaired by the changing nature of work and workplaces, including: the prevalence of remote and platform work, the increase in part-time and casual work and the fragmentation and locations of worksites. While this must be addressed, it is apparent those challenges are not universal; this is confirmed by the significant increase in certification since the re-introduction of

single step certification. Consequently, a blanket entitlement to employee lists is not warranted at this time.

I am concerned that the 20% threshold proposed will result in significant litigation.

I propose an amendment targeted specifically at the problems identified:

> Where a trade union applies to the Board declaring it intends to attempt to persuade the employees of a unit to join a trade union and, in the Board's opinion, the circumstances or location of the work may impede employees accessing collective bargaining, the Board may order the employer deliver to the trade union a complete list of names, addresses and either the email addresses or telephone numbers of the employees in the intended unit.

Enhancing New Collective Bargaining Relationships – Section 27

Some unions recounted collective bargaining for a first collective agreement often requires significant amounts of time and resources to negotiate standard provisions required by the *Code*, such as grievance arbitration and joint labour-management provisions. That is said to flow from the fact newly certified employers, particularly small employers, have little or no experience with collective bargaining and limited resources for bargaining.

Employer groups agree that some form of assistance from the Board for newly certified employers could be helpful.

The initial phase of a collective bargaining relationship can be difficult, particularly for smaller employers with no experience with unions or collective bargaining, especially where the certification process was contentious.

In our opinion, the Board should assist the development of positive collective bargaining relationships by providing an information package to newly certified employers describing rights and obligations under the *Code* and model language related to mandatory collective agreement provisions, such as grievance arbitration and joint labour-management processes.

Recommendation No. 12

> Amend section 27(1) to add:
>
> **(d) The Board must provide an information package to the newly certified employer, with a copy to the trade union, describing rights and obligations under the *Code* and including model language related to collective agreement provisions required by the *Code*.**

Sectoral or Multi-Employer Certification and Bargaining

During our review, as in the 2018 *Code* Review, many stakeholders conflated the interconnected but distinct topics of multi-employer certification and collective bargaining.

Unions strongly support the creation of sectoral or broad based bargaining structures to address increasing fragmentation of work and to standardize terms and conditions of employment and labour costs across sectors of the provincial economy. Unions provided recent research relating to broad based bargaining models, largely from continental Europe, to illustrate the benefits of broad based bargaining for both unions and employers. Unions recognized the study and consultation necessary to evaluate broad based bargaining models and assess their applicability to B.C. was beyond the scope and time available in this review process. Consequently, they support the establishment of a single-issue commission for that purpose.

As part of this discussion, Unions maintain the current scheme of the *Code,* which is based on a single enterprise model of certification (the "*Wagner Act* model"), works well for mid to large sized employers but is highly inefficient or impractical for small workplaces, franchises, contracted work or dispersed workplaces. They say this results in denying access to bargaining for many precarious workers: domestic, agricultural, ride-hail, food delivery and franchise – the very groups most in need of access to collective bargaining. Unions advocate both multi-employer certification and sectoral bargaining to address these concerns and to standardize terms and conditions of employment across a sector. Unions noted the model proposed by the majority of the 1992 Review Panel (the "Baigent-Ready Model") was not implemented. In their view, sectoral certification will improve industrial stability.

Employers strongly oppose multi-employer certification and sectoral bargaining, noting sectoral certification does not exist in any *Wagner Act* jurisdiction. They say this would require a fundamental alteration of the labour relations regime because sectoral certification is inconsistent with the *Wagner Act* model. Employers say it would threaten the viability of many businesses, have a destabilizing impact on labour relations in B.C. and negatively impact the economy. In particular, they noted that despite being recommended by a majority of the 1992 Review Panel, no legislation has been enacted in B.C., or in any other Canadian jurisdiction. They say adopting sectoral certification or mandatory broad-based bargaining in the private sector would make B.C. an outlier and upset the balance of the *Code,* skewing it heavily in favour of unions.

Employers also oppose any mandatory broad based bargaining structures in the private sector largely because the resulting collective agreements would not reflect the substantive differences between workplaces and businesses across a sector, regardless of an employer's ability to sustain the costs. While acknowledging the prevalence of broad based bargaining in the public sector, employers note that where it exists in the private sector it has evolved on a voluntary basis. They maintain imposed sectoral bargaining structures in the private sector would create a very strong disincentive for investment in B.C.

Employers agree any examination of broad based bargaining is beyond the scope of this review. Without endorsing the concepts, some say any consideration of such measures cannot be seriously considered without much more extensive study and consultation.

Sectoral Certification

The *Wagner Act* model of labour relations, on which the B.C. *Code* is based, is foundational to all North American jurisdictions and unique in the world. Under this model, unions are certified to become the exclusive bargaining agent for an appropriate bargaining unit of employees in an

enterprise (i.e. single operation). Once certified, the union and employer must negotiate a collective agreement covering the employees in the bargaining unit.

The Board has developed policies to determine bargaining unit appropriateness, one of which is the building block approach. Under this approach the Board facilitates access to bargaining for workplaces it determines are difficult to organize by relaxing the test for an appropriate bargaining unit. Bargaining units can be expanded or consolidated, under section 142, to facilitate broader based bargaining structures: *Island Medical Laboratories* BCLRB No. B308/93; and *Sears Canada* BCLRB No. B389/89. Those considerations only apply to a single employer.

From 1973 to 1984, the *Code* allowed multi-employer certification where a majority of employees in a sector supported a union and a majority of employers consented. That provision was never utilized: 1992 Report, page 30.

Both the 1992 Report and 2017 Ontario Report noted there are practical challenges presented by the *Wagner Act* model because it requires unions to organize multiple small workplaces of different employers and then negotiate and administer collective separate agreements for each.

The 2017 Ontario Panel declined to recommend the Baigent-Ready Model and identified some practical concerns; for example, they questioned its viability in a sector with little collective bargaining experience where a diverse range of employers (often competitors) would be required to bargain together: May 10, 2017, Final Report, p. 355.

Sectoral certification is a very complex issue which should be approached with considerable caution. In proposing multi-employer certifications as a means for standardizing terms of employment and providing job protection for certain workers, unions referred to live-in-care workers employed by individual families within a particular geographic area. This example illustrates both the problems that need to be addressed in relation to working conditions and the challenges of attempting to address those issues under the structure of the *Code*. Consequently we do not recommend any changes to the *Code* relating to sectoral certification at this time.

However, certain groups of workers encounter significant employment issues that must be addressed. We believe the *Employment Standards Act*, [RSBC 1996], c. 113, is the appropriate mechanism to ensure sectoral standardized terms and conditions of employment, protections and improvements for the working lives of domestic, agricultural, food delivery and ride hail workers.

A number of U.S. cities and states have recently established advisory councils comprised of representatives of workers, employers and governments, to review terms and conditions of employment and make recommendations for legislated standards for domestic and agricultural workers, fast food workers, nursing and home care workers: A. Glass and D. Madland "Momentum for Worker Standards Boards Continues to Grow" September 7, 2023 https://www.americanprogress.org

Although we acknowledge this is beyond our mandate, given the legitimate concerns raised in many of the submissions and presentations, particularly from domestic worker organizations, we believe it is necessary to make a recommendation. Accordingly, we recommend the Ministry of Labour establish advisory councils under the *Employment Standards Act*, similar to those referenced above, for the types of workers identified (domestic, agricultural, food delivery and ride hail). These advisory councils should include representatives of workers, employers and

government and should be designed to focus on the challenges unique to those workers and implement effective enforcement mechanisms.

Recommendation No. 13

A. No change to the certification provisions of the *Code*.

B. The Minister of Labour should establish advisory councils for domestic, agricultural, food delivery and ride hail workers, under the *Employment Standards Act* or regulation, to make recommendations for the establishment and enforcement of standardized terms and conditions of employment designed to address the challenges unique to these workers.

Sectoral Bargaining

In recognition of the complexities associated with sectoral bargaining, the 2018 Review Panel recommended this issue be examined by industry councils under section 80 and, in appropriate circumstances, by an industrial inquiry commission.

The 2017 Ontario Report also considered this issue and noted it was not aware of any jurisdiction that had imposed a mandatory multi-employer collective bargaining regime in a sector without a history of substantive collective bargaining. That report concluded broad based bargaining schemes should only be considered if there is an established history of collective bargaining in a sector, p. 356.

In B.C., broad based bargaining exists in both the public and private sectors.

Broad based bargaining was established in the public sector in 1994 based on the recommendations of an independent commission (the Korbin Commission) to rationalize existing collective bargaining structures.

In the private sector broad based bargaining exists in several industries. In construction, industry bargaining existed for many years on a voluntary basis. In 1978, under section 41 of the *Code* the Board created the Bargaining Council of B.C. Building Trades Unions as a way of resolving significant instability issues. The Construction Labour Relations Association (“CLR”) was the accredited bargaining agent for most contractors with a collective bargaining relationship with building trades unions.

Broad based bargaining in the film and television industry was also established under section 41 of the *Code,* in 1995, in response to significant instability concerns. As part of that process a council of unions was created and U.S. and Canadian producers voluntarily agreed to an industry bargaining scheme. Various forms of industry wide bargaining have been in place in the forestry sector for many years. Those structures evolved on a voluntary basis. The hospitality, waterfront and, recently, the commercial cleaning sectors all have voluntarily developed broad based bargaining schemes.

Of the 38 members of the OECD (of which Canada is a member) broad based bargaining is only predominant in continental European countries. S. Cazes, “Negotiating our way up” Collective Bargaining in a Changing World of Work”, OECD Publishing, Paris. p. 24. In Europe, there is a broad spectrum of collective bargaining systems ranging from: decentralized bargaining at the company level (Western and Central-Eastern Europe); centralized bargaining where bargaining structures have evolved voluntarily (Nordic countries); highly centralized social partnership models (Central-Western Europe); and industry-wide bargaining with a strong role for the state (Southern Europe). There has been a move to decentralize bargaining and increase bargaining at the company level in recent years (Central-Western and Southern Europe). T. Muller “Collective Bargaining Systems in Europe: www.uni-europa.org 2021/04. All these jurisdictions have very different labour relations schemes from the *Wagner Act* model (enterprise based) which only exists in Canada and the U.S.

The *Code* provides some mechanisms for developing broader based bargaining. Although section 41 permits the Board to create councils of unions, there is no equivalent provision in respect to employers. Sections 43 and 44 permit the voluntary accreditation and de-accreditation of employer bargaining associations. The Board may add to or consolidate bargaining units under section 142.

The *Code* has always provided mechanisms to investigate systemic labour relations issues in particular industries. Under section 79 (formerly, section 122), the Minister may appoint, on application or the Minister’s own motion, an independent inquiry commission to investigate and report on a particular industry or dispute. Under section 80 (formerly, section 124) the Minister may direct the Board, on application or on the Minister’s own motion, to assist the parties to establish an industry council to examine labour-management relations and recommend measures to achieve more effective collective bargaining procedures. Our research indicates industry councils have never been utilized. While both these provisions may be useful in exploring sectoral bargaining, neither provide a clear mechanism under the *Code* to impose sectoral bargaining in a particular industry.

Sectoral or broad based bargaining is an extremely complex area and it is very difficult to assess the risks and impacts of mandatory sectoral bargaining in the abstract. Any consideration of amending the *Code* to provide a mechanism for determining the appropriateness of sectoral bargaining in a particular industry requires extensive research and consultation with stakeholders.

We are not persuaded a wide-ranging commission on the issue of sectoral bargaining in the abstract would be productive or useful. The factual matrix in each industry or sector will undoubtedly give rise to different perspectives on the viability or desirability of sectoral bargaining for an industry. Some of the facts that may impact the appropriateness or desirability of sectoral bargaining in a particular sector could include: bargaining history, number of unions, union density, number and size of employers and economic and competitive realities.

Since this consideration must be context dependent, we are recommending an Industrial Inquiry Commission be established, which should commence its inquiry by focusing on sections 79 and 80, consider whether any changes to the *Code* are required and make any necessary recommendations to amend the *Code*.

Recommendation No. 14

An Industrial Inquiry Commission be established to consult with stakeholders to consider:

a. whether sections 79 and 80 are broad enough to enable sectoral bargaining in appropriate circumstances for a particular industry; and if not,
b. whether those sections require amendment; and/or
c. whether other additions or amendments to the *Code* (such as a companion to 41 for mandatory employers' associations or changes to Division 6 Employers' Associations) are required to allow mandatory accreditation of an employer's organization in specific circumstances;

and make any appropriate recommendations.

Collective Bargaining and other issues in the Forestry Sector

The B.C. forest industry remains a significant contributor to B.C.'s economy and workforce. In 2022, the industry: contributed $20.1 billion in manufacturing sales; generated about $1.9 billion in provincial government revenue; directly employed more than 56,000 workers; and accounted for 26% of provincial manufacturing and 24% of B.C.'s export value: 2022 Economic State of the B.C. Forest Sector, Government of British Columbia, pp. 7-8.

However, the sector is facing significant challenges. Since 2018, harvest levels on public lands have fallen by close to 40% due to a combination of fibre supply challenges caused by old growth deferrals, insect infestation, fire and other natural disturbances, and government policy changes. Market conditions have a significant impact. Two employer groups report that since 2020, the B.C. forest industry has experienced approximately fifty closure and curtailment announcements, resulting in a loss of over 9,000-10,000 direct jobs: B.C. Council of Forest Industries, May 6, 2024, Labour *Code* Review Submission; Council on Northern Interior Forest Employment Relations and Interior Forest Labour Relations Association, March 18, 2024, Labour Code Review Submission.

Historically, bargaining in the forest industry was industry wide. Currently collective bargaining only occurs on an industry wide basis in the southern interior (between IFLRA and USW), and in the northern interior (between CONIFER and USW). One of those employer organizations noted in their presentation that voluntary broad based bargaining has worked well for them.

On the coast, commencing in the mid 2000's, major coastal licensees withdrew from Forest Industrial Relations, their accredited industry wide bargaining agent, and commenced negotiating individual collective agreements with the USW. Whereas, the coastal industry was historically characterized by large companies which controlled the entire production chain, the industry is now fractured with most logging now performed by individual contractors rather than forest license holders. Currently, the USW negotiates a collective agreement with the largest company, Western Forest Products then with several hundred small contractors which typically enter into "me too" agreements. This process has been further fragmented by WFP entering into limited partnerships with indigenous groups and transferring its tree farm licenses to those entities

The USW says the current bargaining structure is dysfunctional and needs to be rationalized by a return to some form of industry wide bargaining on the coast.

While there are labour relations matters, including bargaining structure, which need to be addressed, the issues facing the forestry sector go beyond the *Code*. Government decisions on a host of issues, including land use, reconciliation and conservation, have a significant impact on forestry. It is apparent there are serious challenges particularly relating to labour relations, job loss, tenure and volume transfer that must be addressed for the health of the industry and the B.C. economy. We recommend a Forestry Industry Commission, which must include government, unions and industry, to address the broad range of challenges facing the sector in a holistic manner.

Recommendation No. 15

> Government should establish a Forest Industry Commission, including representatives from government, unions and industry, with a broad mandate to address the critical issues facing the sector, including labour relations issues.

Successorship

Contract Re-tendering – Sections 35(0.1) and (2.2)

Prior to the 2019 Amendments, successorship under section 35 of the *Code* was limited to circumstances where a business, or part of it, was sold, leased or transferred or otherwise disposed of and did not extend to what is commonly referred to as contract re-tendering or the contracting out of work.

The 2018 Review Panel extensively reviewed contract re-tendering and its impacts on existing collective bargaining rights noting:

> When successorship legislation was originally enacted in B.C., contract re-tendering was not as prevalent as it is today. When contracts are re-tendered, often the same workforce continued to provide the same services to the same customers or clients, with the same working conditions at the same location, using the same equipment. The existing collective agreement ends, the employees are required to re-apply for their jobs, the union is required to organize the workforce and a new collective agreement must be negotiated.

During the 2018 *Code* Review process employers cautioned if any steps were to be taken they should be surgical. The 2018 Review Panel recommended a measured and incremental approach to address the issues. To that end, they recommended extending successorship protection for contract re-tendering in enumerated services.

The 2019 Amendments added section 35(0.1) and (2.2) which extend successorship protection to contract re-tendering of enumerated services: building cleaning services, security services, bus transportation services, food services and non-clinical services in the health sectors. The 2018 Review Panel also recommended an amendment to permit the expansion of the enumerated services by regulation. That was enacted through an amendment to section 159(2)(f) of the *Code*. To date, no additional services have been added.

The 2018 Review Panel also recommended a commission be established to consider successorship in the forest industry, discussed in further detail below.

Compared to other Canadian jurisdictions, the B.C. *Code* provides greater protection in the context of contract re-tendering. Although previously more expansive, the current Ontario legislation provides successorship protections only when contracts relate to "servicing the premises", including building cleaning services, food services and security services, are re-tendered. The term "servicing the premises" has been liberally interpreted to include, for example, bus shuttle services. The *Canada Labour Code* protects remuneration when contracts providing services at an airport and other services prescribed by regulation are re-tendered. Nova Scotia authorizes a successorship declaration if an employer contracts out or agrees to transfer bargaining unit work in order to defeat or undermine collective bargaining rights or avoid collective agreement obligations.

There have been 13 applications under section 35.2 in the five years since the *Code* was amended to include successorship for contract re-tendering, of which 12 were granted: nine were for cleaning services and one for each of bus transportation, security and food services.

Most unions advocate extending successorship to contract retendering in all sectors. They suggest there is no rational basis for limiting this protection. Since the impetus for extending successorship protection to contract re-tendering of particular services was to provide protection to precarious workers, several unions advised us the industries they represent, such as waste management and live theatre, are also precarious and deserve the same protection as those currently listed. The Hospital Employees Union also advocated the extension of successorship to the repatriation of previously contracted out work (see *Health Employer's Association of B.C.* BCLRB No. B20/2023 ("*Redfish*").

Employers oppose the expansion of section 35(2.2) saying unions have provided no real data or illustration of any problems or issues requiring legislative action. Instead, they are concerned any extension would further tip the balance in the *Code* even more in favour of unions. Employers note no other Canadian jurisdiction has the expansive successorship regime advocated by the unions. Employers did not provide evidence to this panel concerning negative impacts of the addition of section 35(2.2).

The Health Employers Association of British Columbia noted the facts in *Redfish* were unique and dealt not with successorship but with the Board's policy on proliferation of bargaining units. We agree and therefore will not be addressing repatriation of work in healthcare under our recommendations below.

While unions generally sought the expansion of section 35(2.2) to all contract re-tendering, IATSE, Local 118 and IUOE, Local 115 provided specific examples of the impact of contract re-tendering on their members.

IATSE, Local 118 pointed to the live event sector where work is project based with many employees working on a freelance or casual basis with only 10-20% of the workforce working full time. Local 118 provided an example from 2009 where the union was certified to represent employees of a contractor, the contract was subsequently re-tendered, employees lost their jobs and were rehired by the new contractor to provide the same services, to the same customers, at lower rates of pay and expressed concern this could be repeated in the future.

IUOE, Local 115 explained some of their members worked for a contractor, South Cariboo Sand and Gravel, which provided services for the Thompson Okanagan Regional District. When that contract was lost in a bid-tender process only approximately 60% of the workers were retained by the contractor and they lost seniority and their wages were reduced.

In our view, what has been characterized as the repatriation of previously contracted out work in healthcare as illustrated in the Redfish example is not captured by section 35(2.2) but rather by the Board's policy regarding the proliferation of bargaining units.

Successorship in the Forest Industry

The 2018 Report discussed in some detail the massive changes in the B.C. coastal forest industry due to provincial legislation and changes to the collective agreements which have significantly increased the contracting out of work. In light of those significant changes to the industry, the 2018 Review Panel recommended the appointment of an Industrial Inquiry Commission to examine the coastal forest industry, particularly in the context of the *Code*'s successorship provisions.

On November 9, 2021, the government acted on that recommendation by appointing Vince Ready and Amanda Rogers as an Industrial Inquiry Commission (the "Commission") to make recommendations. Their February 10, 2022 report made four recommendations:

- Successorship not apply when a forestry operator is not continued or resumed within a specified period;

- Successorship should be extended to forestry operations continued by new tenure holders but should allow for limited collective agreement negotiations with First Nations to address any inconsistencies with UNDRIP;

- Successorship should not be extended to work allocated to contractors through B.C. Timber Sales;

- Government should expand programs for compensation and re-training opportunities for employees displaced by government re-allocation of forest tenures.

The recommendations of the Commission represent an important step toward dealing with the serious challenges facing the coastal industry. The government has not acted on those recommendations except by providing funds to facilitate the early retirement of logging employees displaced by old growth cutting deferrals.

Commentary and Recommendation No. 16 of Michael Fleming and Lindsie Thomson

The 2018 Review Panel described the type of circumstances the proposed amendment to section 35(2.2) was intended to address situations where contracts re-tendered with the same workforce continuing to provide the same services to the same customers at the same location where they are required to reapply for their jobs, unions are required to reorganize their workforce and a new collective agreement be negotiated. It noted that the impacts were most pronounced in sectors with the greatest precarity.

We do not believe it would be appropriate to extend section 35(2.2) to cover all sectors. In keeping with a measured, incremental approach, parties seeking to have services added to the list in section 35(0.1) should provide sufficient information to demonstrate a clearly discernible distinct service (or sector) where circumstances analogous to those described above exist as a feature or characteristic of the service. We are not persuaded the information provided in respect to the live event services or waste management or waste services meets that threshold. In addition, given government engaged a separate Industrial Inquiry Commission to address successorship in the forestry sector, we make no recommendation to add forestry services to the list in section 35(0.1).

Accordingly, we do not recommend any additions to the list in section 35(0.1) at this time. Section 159(f)(ii) remains an option should sufficient appropriate information be available.

Commentary and Dissent of Sandra Banister, K.C.

The incremental extension of successorship in contract retendering has proven successful. It has not resulted in a flood of applications and no legitimate concerns were brought to our attention. There is no principled reason to limit successorship protection to those services currently listed in section 35(0.1). This point was illustrated by an example in the live event sector; when the operations of the facility were retendered, the food service workers enjoyed successorship protection but the live event services did not.

I recommend:

A. The definition of “contract for services” in section 35(0.1) be deleted; or

B. Alternatively, at a minimum, the definition of “contract for services” in section 35(0.1) be amended to add:

(g) waste management services;
(h) live event services; and
(i) forestry services

Reverse Onus

Another union request, with respect to both successorship and common employer applications, was to impose a “reverse onus” on employers. However, during our consultations it became clear this request was actually directed at requiring employers to produce all facts and documents relevant to the application given evidentiary difficulties unions face in these cases.

Although unions will be aware of some information relevant to the transaction, they will not typically have knowledge of an alleged successor’s operation or the details relating to the disposition of the business sufficient to prove a discernible continuity of business. In recognition of the difficulties faced by unions in successorship cases, the Board allows them to seek disclosure of particulars or documents or take other steps to obtain the relevant information, such as summonsing witnesses: *Vancouver Thermal Services Ltd.,* 2022 BCLRB No. 131. The Board has generally required a relatively low threshold for the production of relevant documents and information possessed by employers in successorship cases: *TBC Teletheatre B.C.*, BCLRB No. B 126/2006 para 24-27

Since the *Code* already provides the Board the ability to address the challenges identified by the unions and the Board exercises those powers appropriately in the context of these types of applications, no change to the *Code* is necessary.

Recommendation No. 17

> No change is required to sections 35 to enable unions access to the information and documents necessary to advance successorship or common employer applications.

Common Employer – Section 38

In common employer applications the Board determines whether there is more than one company carrying on business under common control and direction which are involved in associated or related activities or businesses. The Board has the discretion to determine whether there is a labour relations purpose served in making a common employer declaration for the purposes of the *Code*.

Unions advocated eliminating the Board's discretion under section 38 primarily because of the difficulty, particularly in the construction industry, in persuading the Board collective bargaining rights have been undermined. Unions also say common employer cases are often very complex, costly to pursue and they often lack the documents and information necessary to persuade the Board a declaration is required. The Unions say, as proposed in the successorship context, when a common employer is filed, there should be a reverse onus on the employers to establish they are not common employers.

Employers noted the Board has always had discretion to determine if there is a labour relations purpose served in granting a common employer which is critical to the effective and appropriate use of common employer declarations: *Baywood Enterprises* BCLRB No. B161/74. Employers also say unions have not provided a substantive rationale for this proposal which, if accepted, would reflect a fundamental *Code* change for the sole reason of benefiting unions.

The changes sought would require the Board to grant a common employer application in the absence of a labour relations purpose. In our view, consistent with the Board's long-standing policy, it is important the Board retain its discretion to determine if a labour relation purpose is served in deciding whether a common employer declaration should be issued, to ensure the effective and appropriate use of such declarations.

We previously discussed the establishment of a reverse onus in common employer applications under successorship above.

Recommendation No. 18

> Retain the existing language of section 38.

Part 4 – Collective Bargaining Procedures

Statutory Freeze of Terms – Section 45(1)(b) and 45(1.1)

Canadian jurisdictions have various statutory freeze periods after certification:

- 90 days (Alberta and Manitoba);
- until a first collective agreement is concluded (Saskatchewan);
- until strike/lockout or the conclusion of a first collective agreement (Ontario, Canada and Quebec);
- from the date notice to commence bargaining is provided until a collective agreement is concluded or a prescribed time after mediation/conciliation has failed (Nova Scotia, Newfoundland and Prince Edward Island)

Generally, the statutory freeze provisions do not apply to reasonably expected changes such as annual salary increments previously paid, scheduled business closures or seasonal layoffs etc.

In B.C., the 2019 Amendments significantly increased the statutory freeze from four to 12 months. In addition, the new section 45(1.1) extends the freeze period if an application is made under section 55 (first collective agreement). In that case, provided the application is made within 12 months of the certification application, the freeze continues until the conclusion of a collective agreement, the commencement of a strike or lockout or another conclusion of the process under section 55.

During the current review process, unions advocated extending the statutory freeze until a first collective agreement is concluded, which could be longer than 12 months, to remove any incentive for employers to delay bargaining.

In our view, the current 12 month freeze, combined with the ability to extend the freeze beyond 12 months if an application is made under section 55, provide sufficient protection and encourage the timely conclusion of a first collective agreement.

Recommendation No. 19

Retain the existing language of sections 45(1)(b) and 45(1.1)

Joint Consultation and Adjustment Plans – Sections 53 and 54

During our consultation process, unions expressed concern there is currently no mechanism to provide a final resolution in the event parties cannot agree on an adjustment plan. They proposed strengthening section 54 to allow a mediator to impose the terms of an adjustment plan.

Employers disagree such a change is necessary or appropriate. Some employer associations advised they have successfully developed many adjustment plans with unions under the existing language, particularly in the context of closures, indicating employers and unions often have a shared interest in establishing a viable adjustment plan. Employers say the amendment proposed by the unions could create a disincentive to make the difficult compromises sometimes required and incentivize litigated outcomes which would be inconsistent with the purpose of section 54 as well as sections 2(c) and 2(e) of the *Code.*

Unions also raised more general concerns regarding the introduction and use of AI, in particular generative AI, relating to: job security, employee privacy, monitoring and evaluating performance, evaluating applications for hiring/advancement, automation, use of personal information or work product without credit or compensation, and the use of employee work and data to train AI models. One union reported that some employers require employees, as a condition of obtaining work, to agree to the recording of their voice or image to be used by generative AI to potentially replace the employee. Many unions called for a single issue commission to be created to examine the impacts of generative AI on B.C. workplaces.

We understand B.C. government has initiated a consultation within the public service concerning the responsible use of AI. The Information and Privacy Commissioner, Ombudsperson and Human Rights Commission have publicly called on government to expand its consultation to all members of the public as they will unquestionably be affected by any introduction of AI into the delivery of public services. We are concerned the introduction of AI will impact all areas of the economy, not just public services, and may have a profound impact on some workplaces. We recommend the government's consultation process be expanded to include involvement of unions, employers and employees to determine, amongst other things, whether any changes to employment related legislation are required.

Section 54 (Adjustment plan) and its companion, section 53 (Joint consultation), were enacted as a result of the 1992 Review Panel's recommendations. Prior to 1992, the *Code* only contained a technological change provision requiring notice and consultation where new technology was introduced. That provision had a 90 day notice requirement and permitted a disagreement regarding the impact of technology to be resolved by arbitration.

The 1992 Review Panel recommended a less adversarial and more cooperative labour relations approach which included both expanding the application of section 54 beyond technological change to cover a much broader range of issues, eliminating binding arbitration provision and promoting ongoing cooperative consultation under section 53. The panel noted that during the consultation process both employers and unions expressed a strong desire for a new, less adversarial, relationship. The rationale for those provisions is set out in the 1992 Report, p. 38:

> ... we think it important that the legislation strongly signal the desirability of a different relationship to deal with issues such as work reorganization, productivity, technological change and other operational concerns which affect both the competitiveness of the business and the working lives of employees. In finding the balance between these two themes we recognize that it is in each party's interest to build a viable enterprise while at the same time preserving their right to freely negotiate the division of the economic pie created by their joint efforts. Put another way, while labour and management might argue over how the pie is sliced, they should be working together to bake a bigger pie. (p. 38)

Section 54 requires an employer to provide the union at least sixty days' notice if it intends to introduce a measure, policy, practice or change that affects the terms, conditions or security of employment of a significant number of employees. The parties are then required to meet in good faith and endeavor to develop an adjustment plan.

The purpose of section 54, which is unique in Canada, is to ameliorate the impact of an employer's decision to introduce a measure, policy, practice or change that impacts a significant number of employees once a decision has been made. No other Canadian legislation requires notice or consultation on the range of matters captured by section 54.The labour codes of Canada, Manitoba, Saskatchewan and New Brunswick all contain technological change

provisions much like that which existed in B.C. prior to 1992. Canada, Manitoba and Saskatchewan allow for mid-contract bargaining to be available to negotiate necessary changes to a collective agreement to deal with the impact of the introduction of new technology. New Brunswick authorizes arbitration to resolve issues related to the introduction of new technology where the parties are unable to resolve them.

Section 54 was expanded in 2019 by providing for the appointment of a Board mediator empowered to make non-binding recommendations for the development of an adjustment plan.

Section 53 requires all collective agreements to contain a provision for a joint labour management consultation process to deal with issues relating to areas such as productivity, competitiveness and skill development. This section is the primary mechanism for discussing a broad range of important issues, particularly those that may result in a decision captured by section 54: *Canfor Pulp Ltd.,* B104/2021; *Health Employers' Association of British Columbia v Hospital Employees' Union* BCLRB No. B393/2004 ("*HEABC"*).

In *HEABC* the Board stated:

> **70** Section 53 is intended to provide a venue for such discussions. While unions and employers are entitled to keep certain matters confidential from each other (given the underlying, adversarial nature of their relationship), Section 53 clearly indicates the wide range of topics, issues and concerns which they should be prepared to discuss with each other on an ongoing, consultative, problem-solving basis. One purpose of the ongoing consultation envisioned under Section 53 is to provide the union with an opportunity to suggest solutions to a problem the employer may be facing, such as a change in the economy which causes a decrease in demand or an increase in costs, or some other factor which causes the employer to contemplate a measure (such as a layoff or contracting out) that might negatively impact a significant number of employees in the bargaining unit. For example, the union may be able to suggest an approach or solution which would provide an alternative to laying off a significant number of employees.

Section 53 was amended in 2019 to allow either party to apply to the Board for assistance in developing a more cooperative labour relations approach, which includes an effective joint labour management committee process. If a party believes their joint consultation language is not being followed, they have recourse to the grievance and arbitration procedures: *ADT Security*, BCLRB No. B120/2016.

In our view, the introduction of arbitration to resolve disagreements about the terms of an adjustment plan could incentivize more adversarial approaches and litigation, which would be inconsistent with the intention of sections 53 and 54 generally.

Together, section 53 and 54 provide a framework for parties to develop co-operative, consultative, problem-solving approaches to workplace issues. That approach is premised on the principles underlying consultation, which include good faith discussions and parties having meaningful opportunities to give and receive information necessary for informed and productive discussions: *BCPSEA and BCTF (Mainstreaming and Integration)*, [2019] B.C.C.A.A.A. No. 98.

While some sectors effectively utilize joint consultation based on section 53 principles, this is not universal. In our view it is important that all parties appreciate the opportunity that section 53 provides to discuss significant issues in the workplace before an employer makes an irrevocable decision which requires notice under section 54. While unions and employers are entitled to

keep certain matters confidential from each other (given the underlying, adversarial nature of their relationship), these discussions provide an opportunity for the union to learn, at an earlier stage, problems facing an employer, the options being considered, have informed discussions and suggest approaches or solutions that could potentially impact the employer's ultimate decision.

We are recommending amendments to section 53 to clarify the types of workplace issues that may be discussed under this provision as originally identified by the 1992 Review Panel.

Recommendation No. 20

A. Amend section 53(4) as follows:

> 53(4) The purpose of the consultation committee is to:
> a) promote the cooperative resolution of workplace issues, **including but not limited to work reorganization, productivity, technological change,**
> b) respond and adapt to changes in the economy,
> c) foster the development of work related skills and
> d) promote workplace productivity.

B. The B.C. government undertake a consultation process on the impacts of AI which must involve unions, employers and employees to determine, amongst other things, whether any changes to employment related legislation (including the *Employment Standards Act*, *Labour Relations Code*, *Human Rights Code, Personal Information Protection Act* and *Freedom of Information and Protection of Privacy*) are required.

Commentary and Partial Dissent of Sandra Banister, K.C.

While I agree the consultation process noted above is critical, given the pace of the introduction and evolution of generative artificial intelligence ("Generative AI") I am concerned that process will be unable to deal with the challenges to employment posed by Generative AI in a sufficiently timely manner. Accordingly, I propose adding section 54.1 to encourage consultation and specifically address the impacts on employment caused by Generative AI before the decision becomes irrevocable.

54.1 (1)If an employer intends to introduce generative artificial intelligence that may affect the terms, conditions or security of employment of a significant number of employees to whom a collective agreement applies,

> (a) the employer must give notice to the trade union that is party to the collective agreement at least 120 days before the date on which generative artificial intelligence may be introduced;
>
> (b) the notice provided must include:
>
> > (i) the nature of the proposed generative artificial intelligence;
> > (ii) the earliest date on which the employer intends to introduce the generative artificial intelligence;
> > (iii) approximate number and type of jobs which may be affected by the generative artificial intelligence; and

(iv) the rationale for the proposed generative artificial intelligence

(c) after notice has been given, the employer must consult with the trade union concerning potential alternatives to the proposed introduction of generative artificial intelligence; and

(d) if generative artificial intelligence will be introduced the parties must endeavor to develop an adjustment plan which may include provisions respecting any of the following:

(i) human resource planning and employee counselling and retraining;
(ii) notice of termination;
(iii) severance pay;
(iv) entitlement to pension and other benefits including early retirement benefits;
(vi) a bipartite process for overseeing the implementation of the adjustment plan.

(2)If, after meeting in accordance with subsection (1)(d), the parties have agreed to an adjustment plan, it is enforceable as if it were part of the collective agreement between the employer and the trade union.

(3)If, after meeting in accordance with subsection (1)(d), the parties have not agreed to an adjustment plan, either party may apply to the associate chair of the Mediation Division for the appointment of a mediator to assist the parties in developing an adjustment plan.

(4)An application under subsection (3) must include a list of the disputed issues.

(5)If a mediator is appointed, the parties must provide the mediator with the information the mediator requests concerning the proposed measure, policy, practice or change, the anticipated impact of the proposal and the efforts to develop an adjustment plan.

(6)If, after mediation, the parties have not agreed to an adjustment plan, the mediator may make recommendations for the terms of an adjustment plan for consideration by the parties.

(7)If, after mediation, the parties have agreed to an adjustment plan, it is enforceable as if it were part of the collective agreement between the employer and the trade union.

(8)Subsections (1), (2) and (7) do not apply to the termination of the employment of employees exempted by section 65 of the *Employment Standards Act* from the application of section 64 of that Act.

Part 5 - Strikes, Lockouts and Picketing

Picketing and Replacement Workers – Sections 65 and 68

The *Code* restricts picketing to the employer's primary site, that is the location where the work that is the subject of the labour dispute is performed. Picketing at other sites including the employer's other sites is prohibited except in the case of an ally or where struck work has been

transferred to the site. The Board must restrict common site picketing, unless to do so would prohibit picketing in which case the Board may regulate picketing as it considers appropriate. Section 65(8) requires the Board to treat separate and distinct divisions of an employer as separate employers for the purposes of the picketing provisions, including for ally and common site applications. Section 68 of the *Code* significantly restricts the use of replacement workers during a labour dispute.

The 1973 *Code* provided the right to picket the employer's entire enterprise, including primary and secondary sites and the operations of an entity who assists the employer in resisting a strike (ally). The right to picket was significantly restricted by the 1984 amendments which limited picketing to the employer's primary site and generally prohibited picketing of an employer's secondary sites. The 1987 amendments further restricted the right to picket by defining the primary site to be a site where the work is an integral and substantial part of the employer's operation and is performed under the control or direction of the employer.

The 1992 Review Panel maintained those restrictions because they agreed picketing should generally be limited to the site where employees work and that picketing at secondary sites should be prohibited except where a struck employer uses another site or ally to avoid the effects of a strike and picketing. However, Vince Ready and John Baigent expressly noted the restrictions on secondary picketing were only defensible if some form of replacement worker restrictions were enacted. The 1992 *Code* substantially incorporated John Baigent's replacement worker recommendations.

While accepting that common site picketing should, where possible, be limited to the employer involved in the labour dispute, the 1992 Review Panel differed on whether separate divisions of a corporation must be treated as separate employers for the purposes of picketing, even when located at the same site. The legislature adopted the recommendations of the majority and the *Code* continued to require separate and distinct divisions of an employer be treated as separate employers for the purposes of picketing.

The 2018 Review Panel declined to make any changes to the picketing provisions of the *Code*. That panel acknowledged the restrictions on both secondary picketing and the use of replacement workers during a labour dispute work together to provide balance and enhance industrial stability. The panel concluded:

> There has been a significant decline in person days lost due to labour disputes in B.C. since the mid-1990s…. we agree that Sections 65 and 68 have contributed to this decline.

The comprehensive scheme regulating picketing is unique to B.C. In most Canadian jurisdictions picketing is regulated by the common law and is generally permissible unless there is tortious or criminal conduct. B.C. and Quebec are the only jurisdictions in Canada that restrict replacement workers, although Manitoba and the federal government have tabled replacement worker legislation.

During our consultations, several unions proposed an expansion of secondary picketing based on the Supreme Court of Canada's recognition of the right to picket under the *Charter of Rights and Freedoms* (the "*Charter*"). They advocate permitting picketing at another worksite of a struck employer being used to perform work, supply goods or deliver services which are substantially similar to the struck work. Unions also propose deleting section 65(8) which

requires the Board to treat separate and distinct divisions of an employer as separate employers for the picketing provisions, including for the purposes of ally and common site applications.

Employers say the current restrictions appropriately balance the economic power exerted by both parties resulting in stability. They warn that investors will avoid any jurisdiction that permits a labour dispute to expand beyond the location of a strike or lockout. They also emphasize B.C. is the only common law jurisdiction in Canada that currently restricts employers' use of replacement workers during a labour dispute and that this provision itself can disincentivize investment.

We agree it is socially desirable to confine labour disputes to insulate uninvolved employees and employers and to protect the public interest.

Where an employer seeks to insulate a division from the effects of a strike at another location under section 65(8), the Board's policy is to require that employer to demonstrate its divisions are in fact separate and distinct: *Westfair Foods Ltd.* BCLRB No. B155/2006 ("Westfair")*; Ellwood Properties Ltd.* IRC No. C135/89, 2 Can LRBR (2d) 161, pp 176-77. In determining whether operations are separate and distinct the Board considers the extent of functional integration of the two divisions examining factors including the integration of management teams, the authority over labour relations or collective bargaining decisions, the use of common facilities, services, machinery and production of the same or similar products: *Westfair*, para 17*; Kmart* BCLRB No. B270/94, 24 Can LRBR (2d) 1, para 143.

A separate and distinct division of an employer can be found to be an ally: *Canada Bread Ltd.* BCLRB No. B101/2017.

Two employer groups sought changes to replacement worker provisions to permit managers hired later than the date on which notice to bargain was given and to allow managers who ordinarily work at more than one location to be utilized. The latter circumstance is already permitted by section 68: *BCAA,* BCLRB No. 94/99.

Additional Commentary and Recommendation of Michael Fleming and Lindsie Thomson

We are satisfied the current replacement worker provisions and picketing provisions which have been in place for more than 30 years provide an appropriate balance which should not be upset.

Recommendation No. 21

No changes to section 65 or section 68

Commentary and Partial Dissent of Sandra Banister, K.C.

I accept the balance between the current picketing provisions and replacement workers have had a positive impact on labour stability and investment and therefore no major change is required. However, s. 65(8) is a significant and unwarranted fetter on the exercise of the Board's discretion in picketing cases.

I recommend:

Repeal section 65(8)

Continuation of Health and Welfare Benefits During a Labour Dispute – Section 62

To ameliorate the potential deleterious impacts of benefit loss during a labour dispute, the 1992 Review Panel recommended an amendment, which is now section 62(1). This allows for the continuation of benefits during a labour dispute if the union pays the premiums.

Some unions sought a change to section 62(1) of the *Code* to require the employer to continue providing benefits if the union and/or its members agree to reimburse the employer at the conclusion of the dispute. They say the cost of maintaining premium payments is prohibitive and, therefore, unions are unable to continue benefit coverage during a strike or lockout, sometimes with devastating impacts. In one example cited, a member died during a labour dispute and, since the striking union was unable to pay the premium costs, his family was ineligible for life insurance.

Employers oppose this proposal saying that while it is obvious losing access to benefits during a strike or lockout presents serious concerns, section 62 enables unions to ensure the continuation of the benefits by paying the premiums. They suggest unions could save funds in advance of a dispute to enable them to do so. In their view, the proposal would render employers loan agencies for employees during a labour dispute. This would be antithetical to the reality of labour disputes during which all parties suffer. Requiring employers to assume this additional significant cost during a labour dispute would tip the scales in the unions' favour.

When a strike/lockout occurs, a collective agreement ends, including the employer's obligation to continue to pay health and welfare benefit premiums. We do not believe the onerous financial burden on unions under section 62(1), justifies imposing an additional economic obligation on employers as that would be contrary to the economic leverage inherent in labour disputes.

Some unions questioned whether section 62(1) allowed them to pay to continue coverage for only some health and welfare benefits, such as life insurance or extended health (drug plans), during a labour dispute and sought clarification in that regard. We agree the current wording of section 62(1) it is not clear on this point and we propose an amendment to provide such clarity.

Recommendation No. 22

> Add section 61.1:
>
> **61.1 Under section 61, the union may elect to pay to continue only certain health and welfare benefits and if so, provided it tenders payment as required under 61(1)(a) and (b) for those benefits, section 62(2) applies to continue those benefits, unless prohibited by the terms of the plan.**

Part 8 - Arbitration Procedures

Review of Arbitration Awards – Sections 99 and 100

The B.C. *Code* is unique in Canada in providing the Board, under section 99, with the jurisdiction to review arbitration awards on the basis of a denial of a fair hearing or an inconsistency with *Code* principles. In all other Canadian jurisdictions the courts review arbitration awards.

Section 100 of the *Code* provides for the review of arbitration awards by the B.C. Court of Appeal on matters involving the general law which are unrelated to a collective agreement, labour relations or related determinations of fact.

Some parties suggest section 100 be eliminated as the Court of Appeal has interpreted its jurisdiction under section 100 very narrowly. The 2018 Review Panel noted the Court of Appeal has concluded there are very few cases involving a collective agreement that are not captured by section 99, even when the interpretation of other statutes is involved. That panel's recommended amendment to section 100, which was adopted in the 2019 Amendments, was intended to reflect the Court of Appeal's narrow view of its jurisdiction. We continue to believe there may be cases that warrant review by the Court of Appeal under section 100.

Others expressed frustration this jurisdictional uncertainty results in parties often filing applications in both forums which adds expense and delay. The Court of Appeal rules require a Notice of Appeal be filed within 30 days of the award unless otherwise provided by statute. This problem can be alleviated by amending section 100 to provide that a Notice of Appeal must be filed within one year of the arbitration award. This would eliminate the necessity of filing appeals simultaneously in both forums and provide the Board the opportunity to exercise its expert opinion on the jurisdictional question.

Recommendation No. 23

> Amend section 100 to add:
>
> **(2) The time limit for filing and serving a notice of an appeal under the Court of Appeal Rules is one (1) year from the date of the decision or award of an arbitration board.**

Expedited Arbitration – Section 104

The expedited arbitration process under section 104 of the *Code* originated in the 1992 *Code* amendments and was significantly revised by the 2019 Amendments. The 2019 Amendments focused on enhanced case management, mediation and greater access to a settlement officer.

Since these changes to section 104, the Board has advised us where a settlement officer or deputy registrar is appointed to assist the parties the majority of the cases are resolved without the need for arbitration.

As was the case during the 2018 *Code* Review, there are differing views on the most appropriate means of ensuring the section 104 process operates as efficiently and effectively as possible. Some employers maintain section 104 decisions should be non-precedential while unions respond that it is essential they be precedential in order to resolve ongoing conflicts in a timely manner. Some employers noted that not all cases are appropriate for the expedited timeframe set out in section 104. Unions responded that these restrictions would deny access to

an important dispute resolution process. Several stakeholders suggest section 104 should not be available if the collective agreement contains an expedited arbitration process while others note those processes are often designed to be extremely limited. In one sector, concern was expressed regarding the misuse of section 104, for example the filing of a large number of applications on the eve of bargaining to advance collective bargaining objectives and a proposal was made to limit the number of section 104 applications that can be filed by a party at one time.

The reaction to the 2019 amendments to section 104 was largely positive. In our view it is important to encourage mediation while continuing to move hearings to a timely conclusion and we are making recommendations to further those goals. While either party can elect to request a settlement officer and consensus is not required, we recommend including provisions requiring the parties to make that decision promptly. We also recommend delaying the appointment of an arbitrator for a brief period in order to permit sufficient time for settlement discussions with the Board's assistance prior to the appointment. Thereafter, the parties are free to continue settlement discussions with the arbitrator. In recognition of this extension, the time limit for concluding the hearing should commence with the appointment of the arbitrator.

We do not agree section 104 should be limited to specific categories of cases nor should decisions be non-precedential. However, we accept that not all cases are appropriate for expedited arbitration, for example those requiring expert evidence or extensive extrinsic evidence. We therefore propose providing the arbitrator appointed under section 104 the jurisdiction to make that determination.

We also agree the current seven page limit for awards can be problematic and recommend increasing it to ten pages.

Accordingly, we propose the following changes to improve the efficiency and effectiveness of section 104 and address some of the concerns raised in this review process.

Recommendation No. 24

Amend section 104 as follows:

(i) Add section 104(1)(a): "**When a difference is referred under this section, the applicant must indicate if they request the appointment of a settlement officer pursuant to section 104(4)(c)"**

(ii) Add section 104(1)(b): "**Within three (3) days of the referral under this section, the respondent must indicate if they request the appointment of a settlement officer pursuant to section 104(4)(c)"**

(iii) Amend section 104(5): "If a settlement officer is appointed under subsection (4), the settlement officer must, within **14** days after the appointment or within such further time as the director may allow,

(a) inquire into the difference
(b) endeavor to assist the parties in settling the difference, and
(c) report to the director on the results of the inquiry and the success of the settlement effort.

(iv) Amend section 104(a):

(4) if a difference is referred to the director within the time periods specified in this section, the director

(a)(i) "must, **if a settlement officer is not appointed,** appoint an arbitrator **within three (3) business days of the time limited by section 104(1)(b); or**

(a)(ii) "must, if a settlement officer is appointed and the matter is not resolved within the time period stipulated under section 104(5)(c), appoint an arbitrator within three (3) business days of the report to the director under section 104(5)(c).

(v) Add section 104(8.1)(0.a):

"on application of either party, decide the matter is not appropriate to be dealt with under section 104, and in the that event will remain seized to arbitrate the matter under section 89 of the *Code*;"

(vi) Amend section 104(6.1)(b):

"conclude the arbitration **hearing** within 90 days after the date on which **the arbitrator was appointed**".

(vii) Amend section 104(7)(b)

(b) the arbitrator must issue a decision with reasons not exceeding **10** pages within 30 days after the conclusion of the **arbitration hearing** unless an oral decision has been issued under paragraph (a) of this subsection and the parties agree that written reasons are not required.

Other Issues

Construction Industry

The *Code* currently contains only three provisions dealing expressly with the construction industry: section 19(2) raids; section 21 craft unions; and section 42 the CLR.

Labour legislation in many Canadian jurisdictions devotes extensive provisions to the construction industry: Ontario, Alberta, Saskatchewan, Prince Edward Island and New Brunswick.

Construction industry stakeholders identified a wide range of issues specific to the industry, including: the functioning and structure of the current collective bargaining processes; instability concerns relating to the existence of two unions representing carpenters; issues relating to the interface between wall-to-wall and craft unions, particularly in the B.C. Bargaining Council of Building Trades Unions (the "Bargaining Council"); the fact all building trades unions are

required to belong to the Bargaining Council while there is no equivalent requirement on the employer side; raids; and double breasting.

The History of Construction Labour Relations and the Code

A historical review is helpful to understand the current challenges for this industry. CLR was accredited in 1970 and represented most employers with collective bargaining relationships with building trades unions. The Board's general policy following the creation of the Bargaining Council, was to deny employers' applications to withdraw from CLR, except in unusual circumstances.

Prior to 1978 building trades unions negotiated with CLR on a loose "common front" basis under the auspices of the B.C. and Yukon Building Trades and Construction Trades Council, which was a voluntary council of unions. At that time most construction was performed by building trades unions representing crafts.

Under that regime it was not unusual for CLR and a majority of building trades to successfully negotiate individual trade agreements with a minority being unable to reach agreement. It was also not unusual for one or several of those trades to attempt to secure better terms than the trades which had already settled ("whipsawing"). Not surprisingly, that was resisted by CLR resulting in strikes which affected the entire industry, including the trades which had successfully reached agreements.

That scheme produced significant stability concerns. In response, in 1978 under Section 41 of the *Code,* the Board established the Bargaining Council comprised of all building trades unions as a mechanism to achieve labour relations stability in the sector.

The 1984 *Code* amendments gave employers the right to withdraw from accredited employer organizations, including CLR. Some employers withdrew from CLR a short time later.

Until the mid-1980's general contractors were the foundation of the industry. At that time they increasingly sub-contracted, particularly the mechanical and electrical components of their businesses, to focus more and more on business development and project management: *Interim Report Regarding a Section 41 Inquiry into Labour Relations in the B.C. Building Trades Sector of the Construction Industry, December 19, 2012 ("Interim Report")* p.7. The shift in focus by general contractors coincided with the growth in the size and expertise of non-building trades unions and contractors organized on a wall-to-wall basis. There was a corresponding reduction in the share of work performed by building trades unions.

The 1992 Review Panel deferred consideration of the construction industry due to time constraints.

In 1998 the Construction Industry Review Panel (Lanyon/Kelleher Panel) issued its report, making a number of recommendations. Many of those were adopted in the 1998 *Code* amendments: a separate construction component of the *Code* (Part 4.1); CLR was made the accredited employer collective bargaining entity in the industrial, commercial and institutional ("ICI") sector of the industry; all building trade unions in the ICI sector were required to belong to the Bargaining Council and CLR and the Bargaining Council were given the authority to bargain project collective agreements.

Those changes were largely repealed in the 2001 *Code* amendments: Part 4.1 was eliminated and CLR ceased to be the accredited employer bargaining entity. However, since sections 41 and 42 were retained all building trades unions were still required to belong to the Bargaining Council with the Board having the authority to review, approve and direct necessary changes to the operation of the Bargaining Council and its constitution.

The next review of the industry occurred in 2012 in the *Interim* Report. In keeping with the limited scope of the Board's authority under section 41, the 2012 *Interim Report* focused on recommendations relating to instability concerns arising from the existence of two competing carpenter unions (which while permitted by the Board was never intended to be permanent), how collective bargaining should begin, continue and conclude and the development of consultative processes to deal with contentious issues between rounds of bargaining.

Collective bargaining in construction is increasingly complex. For example, some building trades unions represent workers on both a craft and wall-to-wall basis, while some only represent workers on a craft basis. Non-building trades unions only represent workers on a wall-to-wall basis.

CLR and the Bargaining Council negotiate standard agreements for CLR members. CLR and the Bargaining Council also negotiate some project agreements. CLR also negotiates with individual building trades for some individual contractors. Some single trade employer associations negotiate with a single trade outside of the CLR, Bargaining Council framework. Some employer organizations only negotiate wall-to-wall agreements with non-building trades unions.

The construction industry is an important component of the B.C. economy. In 2021 it accounted for approximately 10% of the provincial GDP, totaling $25.4 billion, and employed more than 215,000 workers, representing 8.1% of the workforce in B.C.: Statistics Canada Labour Force Survey. In 2023, the construction industry employed approximately 235,000 workers: WorkB.C. Construction Industry Profile.

The industry has many unique features and is particularly susceptible to economic pressures. Stakeholders identified numerous issues and advocated for a range of different solutions, including a separate panel to review labour relations in the construction industry.

Given the changes that have occurred, the challenges facing the industry and the time that has transpired since the last review, a detailed review of labour relations and collective bargaining issues in the construction industry should be undertaken. Since the issues identified by stakeholders are more complex and broader than the limited scope of section 41, an Industrial Inquiry Commission under section 79 of the *Code* is required. That inquiry should consult with all interested parties in the construction industry to conduct a review of collective bargaining and labour relations issues.

Recommendation No. 25

> An Industrial Inquiry Commission be appointed under section 79 of the *Code* to conduct a thorough review of collective bargaining and labour relations issues in the construction industry and make recommendations to the Minister for any necessary changes to the *Code.*