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

The Review Committee's Mandate

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

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

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

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

The B.C. Road Builders & Heavy Construction Association

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

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

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

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

The Current Labour Relations Code

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

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

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

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

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

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

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

Potential Changes to the Code

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

Section 8: Free Expression Regarding Unions and Union Representation

Section 8 of the Code provides:

> "Subject to the regulations, a person has the freedom to express his or her views on any matter, including matters relating to an employer, a trade union or the representation of employees by a trade union, provided that the person does not use intimidation or coercion."

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

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

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

Section 24: Requirement for a secret vote

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

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

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

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

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

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

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

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

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

Section 63(3): Picketing

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

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

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

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

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(f) minimizes the effects of labour disputes on persons, who are not involved in those disputes,

(g) ensures that the public interest is protected during labour disputes

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

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

Sectoral Bargaining In Construction

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

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

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

Section 91 - Delay by an Arbitrator

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

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

Section 104: Expedited Arbitration

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

Respectfully submitted

Kelly Scott

President

B.C. Road Builders & Heavy Construction Association.