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

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

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

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

I. CALL-ACAMS

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

II. INTRODUCTION

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

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

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

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

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

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

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

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

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

[1] 2015 SCC 4

III. SUMMARY OF RECOMMENDATIONS

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

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

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

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

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

5. Amend successor rights to address contract flipping.

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

IV. SUBMISSIONS ON RECOMMENDATIONS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Section 8 of the Code states as follows:

> **Right to communicate**
>
> 8 Subject to the regulations, a person has the freedom to express his or her views on any matter, including matters relating to an employer, a trade union or the representation of employees by a trade union, provided that the person does not use intimidation or coercion.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

5. Amend successor rights to address contract flipping

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[16] [1980] 1 Can LRBR 197

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

[18] S.O. 2017 c. 22

[19] *Supra*, at footnote 8

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

V. CONCLUSIONS

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

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

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

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

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

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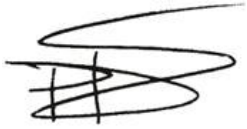

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