

March 20, 2018

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

Dear Panel Members,

HSABC is a health sector union representing over 18,000 health science professionals, working in more than 100 professions at over 250 hospitals and agencies in acute care, long-term care, and community health (including child development centres and transition houses). We represent employees in the nurses, health sciences professional, community, and community social services sectors. We also represent health sciences professionals in the private sector. In addition to negotiating collective agreements for our members, HSABC is active on many other fronts, including health care policy, labour issues, occupational health and safety, wage equity, and women's issues.

On behalf of its members, HSABC is pleased to provide this submission in response to the invitation of the Section 3 Panel issued February 16, 2018.

Since the last comprehensive review of the *Code* in 2003, there have been significant and wide-ranging changes to the BC economy and workplaces since that consultation took place. There have also been significant changes to the legal landscape. Both types of changes need to be reflected in the *Labour Relations Code*.

In many ways, and on many levels, the current labour relations system is out of step with both the changing workplace of the 21st century, and the fundamental nature of employees *Charter* protected rights to freedom of association. We need a *Labour Relations Code* that more appropriately balances the interests and concerns of all its constituents, and a *Labour Relations Code* that reflects and can respond to the actual nature of the workplace.

We are pleased to submit these recommendations as part of the consultation under section 3 of the *Code*. We want to work together to ensure that workers in British Columbia have the same rights and protections enjoyed by other Canadians, and to ensure that workplaces support a growing, sustainable economy with fair laws for workers and businesses.

I therefore respectfully submit this report on behalf of HSABC and its 18,000 members.

Sincerely,



Val Avery
President

HEALTH SCIENCES ASSOCIATION OF BC

VA:ws
Attach.



HEALTH SCIENCES ASSOCIATION
The union delivering modern health care

*Submission to the Labour Relations Code
Review Panel*

Bringing back balance to labour relations in British Columbia

March 20, 2018

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Executive Summary

In order to take into account the changing nature of the BC economy and workplaces, and the needs and interests of workers in the context of their *Charter* protected freedom of association rights, the Health Sciences Association of British Columbia (“HSABC”) recommends the following changes to the B.C. *Labour Relations Code* (the “Code”):

General Provisions

1. Properly and fully fund the Labour Relations Board.
2. Develop a model of sectoral bargaining, and ongoing review of the legislation.
3. Amend the *Employment Standards Act* to remove provisions that provide employers with the ability to negotiate standards lower than the *ESA* minimums into collective agreements.

Acquisition of Bargaining Rights

4. Reinstate card check where a union has simple majority support.
5. Statutorily reduce the length of time required to process certification applications through:
 - a. Reducing the period of time between application and representation vote;
 - b. Removing the ability of the Board to order mail-in ballots unless all parties consent;
 - c. Return to a process of truly expedited oral hearings on certifications rather than first requiring written submissions; and
 - d. Amending the *Code* to require that the processing and final decision of a certification application occur within 20 working days.
6. Extend the validity of signatures on union membership cards to six months.
7. Provide unions with the ability to apply for access to employee information where they are able to establish support of 20% of the employees in an appropriate unit.

Unfair Labour Practices and Employer Speech

8. Repeal Bill 42 provisions relating to employer speech.
9. Create more explicit requirements that the Board award remedial certifications when the employer commits unfair labour practices.

Variations of Certifications

10. Introduce more stringent procedures for decertification applications.
11. Eliminate partial decertification.
12. Charge procedures for change in union representation.

Successorship, Common Employer and True Employer

13. Repeal Bill 29 and Bill 94 in their entirety.
14. Expand the application of the *Code* to contract flipping and with respect to changes in private services providers

Background

HSABC is a health sector union representing over 18,000 health science professionals, working in more than 100 professions at over 250 hospitals and agencies in acute care, long-term care, and community health (including child development centres and transition houses). We represent employees in the, health sciences professional, nurses, community health, and community social services sectors. We also represent health sciences professionals in the private sector. In addition to negotiating collective agreements for our members, HSABC is active on many other fronts, including health care policy, labour issues, occupational health and safety, wage equity, and women's issues.

On behalf of its members, HSABC is pleased to provide this submission in response to the invitation of the Section 3 Panel issued February 16, 2018. In that invitation, the Panel noted the following:

“We hope that the views provided will take into account the context of the changing nature of the BC economy and work places”, and

“We are particularly interested in whether you believe any changes to the *Code* are necessary to properly reflect the needs and interests of workers and employers in the context of our modern economic realities”.

The last comprehensive review of the *Code* was done in 2003. There have indeed been significant and wide-ranging changes to the BC economy and workplaces since that consultation took place.

These changes include an ongoing shift from full time permanent jobs to part time and temporary jobs (contract, freelance, and other forms of precarious work). Precarious work is now the fastest growing sector of the labour market in Canada. The current statutory regime, based on a very different employment model, is failing to provide the most vulnerable employees with a realistic opportunity to organize and negotiate. This changing workforce requires fundamental changes to the *Code*.

In addition, there have been significant changes to the legal landscape in the 15 years since the *Code* was last reviewed. In 2007, the B.C. Supreme Court ruled in *Health Services and Support – Facilities Subsector Bargaining Association v. British Columbia*, 2007 SCC 27, that the collective bargaining process is protected by the freedom of association rights in s. 2(d) of the *Charter*. In the 2015 labour trilogy, the Supreme Court of Canada confirmed that freedom of association protects the right of employees to establish, belong to, and maintain a trade union; to join a trade union of their choosing that is independent from management, to engage in a meaningful process of collective bargaining, and to strike. In the 2016 *British Columbia Teachers’ Federation v. British Columbia* decision (2016 SCC 49), the Supreme Court of Canada clarified the scope of the freedom of association protections attached to collective bargaining. Yet despite these significant developments in the law, the *Code* has not been reviewed to recognize these distinct *Charter* rights.

These changes, taken collectively, require fundamental changes to the existing labour law legislation to ensure that all workers, and in particular the most vulnerable, are provided with real access to union membership and collective bargaining. In the remainder of this submission, we will outline the changes that we seek to the existing labour law: changes that we see as responding to developments that have occurred, and that will assist the province of British Columbia in navigating the challenges of the modern economy.

General Issues and Provisions

1. Properly and fully fund the Labour Relations Board

The chronic and ongoing underfunding of the Labour Relations Board has been a significant impediment to a labour relations system that is properly reflective and responsive to the

needs and interests of all parties, but the impact of underfunding is disproportionately borne by unions and workers. The impact of underfunding has been felt in a number of areas.

For example, the underfunding of the Board in general, and Industrial Relations Officers (IROs) in particular has led to a situation where these officers of the Board are not able to carry out their duties effectively. IROs are responsible for investigating certification applications and producing reports, as well as holding and counting votes. As a result of underfunding and layoffs, the manner in which IROs conduct these investigations is extremely limited. Whereas in the past IROs routinely performed payroll inspections, these are not now conducted. The result is that the number of employees in the bargaining unit is determined solely on an employer's information, with the union having limited options for testing that information. We note in addition that the ability to review the employer's information is particularly important given the realities of the modern economy, where workplaces rely on larger pools of labour with more tenuous connections to the employer, and often in a more expansive geographic area.

Other results of the underfunding of the Board include the use of mail-in ballots as a rule rather than an exception, and the Board's reliance on written submissions rather than in-person hearings. Both of these concerns will be dealt with in more detail below, in the context of recommended changes to the certification process. However, it is important to see the issue as not only a legislative one, but also one of appropriate funding. Again, it needs to be kept in mind that what is at stake are freedom of association rights under the *Charter*.

2. Develop a model of sectoral bargaining, and ongoing review of the legislation.

In order to ensure that labour law and policy is responsive to the changing realities of the modern workplace, we recommend as follows:

- a. The implementation of sectoral or franchisee based bargaining options. This concept is not new. For example, sectoral bargaining in the health sector is well

established, being in place since 1995. But even in the private sector, the concept is not new. Between 1973 and 1984 the Labour Code provided for a form of multi-employer certification. In the *Recommendations for Labour Law Reform* submitted by the Sub-committee of special advisers in 1992, two of the three members of the subcommittee recommended a return to a modified form of sectoral bargaining for those small enterprises where employees were historically underrepresented by trade unions (at p. 30). That report stated, in part:

It is simply impractical and unacceptably expensive for unions to organize and negotiate collective agreements for small groups of workers if the dues cannot begin to cover the costs involved in developing separate collective agreements for each of their work sites. As a result, persons employed as clerical support staff in small business, farm workers or gas station attendants do not have any real prospect of ever being represented by a trade union under present labour legislation. Yet, these are the very workers who are most in need of trade union representation.

The advisors noted that they considered this recommendation as among the most important and significant they were making (p. 30). The recommendation was not implemented.

The issues flagged in the 1992 report have not dissipated. They have, indeed, increased as the modern workforce has become increasingly fragmented and stratified. Most recently, labour law reviews in both Alberta and Ontario have devoted significant discussion to potential uses of sectoral certification. While a full discussion of the possible types and models of sectoral certification is not within the scope of this submission, we strongly recommend that the Panel consider these options as changes necessary to properly reflect the needs and interests of workers in the context of our modern economic realities.

- b. A more consistent review process under section 3, or the creation of a standing committee or task force. It is not possible for the legislation to keep pace with changes in the economy if it is only reviewed once every decade. To this end, we

recommend either the creation of a long-term task force to explore modern employment realities on an ongoing basis to ensure maximum responsiveness, or the use of regular section 3 panels to fulfil this purpose.

3. Amendments to the *Employment Standards Act*

A review of the *Labour Relations Code* cannot be undertaken outside of broader employment law context. Employment standards legislation exists to create a floor of minimum standards beneath which employers cannot go, and it is important for all workers. However, a significant legislative change wrought by the Liberal government in the early 2000s was to exclude employees covered by collective agreements from the minimum guarantees in significant sections of the *Employment Standards Act*. This means that unionized workers can potentially be working under conditions that are below the *ESA* minimum standards. In order to ensure that all employees in BC have the same basic entitlements and protections, we recommend the removal of the exclusions from the sections of the *ESA* that provide employers with the ability to negotiate standards lower than the *ESA*. The *ESA* should provide a common floor below which employees should not be permitted to fall.

Acquisition of Bargaining Rights

HSABC has a number of recommendations relating to the provisions of the *LRC* dealing with the acquisition of bargaining rights. Currently, the legislation provides for mandatory certification votes, to be held when a union is able to show 45% membership support. The vote is to be ordered within 10 days of the application, with the union being certified if it wins the majority of the vote. Our recommendations for reform are as follows:

4. Reinstate card check when the union has simple majority support.

From 1973 to 1984, and from 1993 to 2001, BC labour legislation provided for certification by card check. In periods, like today, where the legislation has been amended to provide for mandatory certification votes, rates of unfair labour practices have dramatically increased, and rates of certification have concomitantly decreased. This is not surprising: mandatory voting, especially when coupled with very few restrictions on anti-union campaigning by

employers, creates an environment where employers can use their inherent power advantage to induce fear and influence employee votes.

The mandatory certification vote requirements contained in the current *Code* fail to protect worker interests and freedom of association rights, and are out of step with the provisions in other provinces. In addition to the federal jurisdiction, five provinces allow for certification by card check. One additional province, Ontario, provides for certification by card-check in certain industries. Our recommendation is that the *Code* be amended to provide for this alternative as well.

In the alternative, we note that of the provinces that have mandatory membership votes, B.C. has one of the highest thresholds required before a vote will be ordered, at 45%. The *Canada Labour Code* provides for a vote if the Union can show support between 35-50% (with automatic certification over 50%). Other legislation provides for votes if a threshold of 40% support is reached. As a result, we recommend that if card-check certification is not reinstated, the threshold for the ordering of a vote be lowered, in line with the legislation in other jurisdictions.

5. Statutorily reduce the length of time required to process certification applications.

In order to prevent unfair labour practices and employer interference, on the one hand; and to minimize disruption to both employees and employers, it is necessary to process certification applications, and hold representation votes, in a truly expedited manner. This is not occurring.

Since 1993, there has been a significant increase in the number of days required to process a certification application. In our submission, this increase in the length of time acts to the disadvantage of workers and unions, as a faster processing of certification applications decreases the potential of unfair labour practices and employer interference. There are a number of legislative and policy changes which could effectively reduce this time period, including the following:

- a. One driver of this overall increase is the length of time it takes to conduct the representation vote. The current 10-day period during which the Board has to hold a vote after an application for certification is submitted is significantly longer than what is provided for in other jurisdictions (generally five days). The length of time required may be understandable if the Board was actually investigating certification applications (for example by conducting payroll audits). But, as outlined below, the Board does not do this. There is therefore no reason for this significant period of time between the application and the vote: a period of time where employees are the most vulnerable to employer pressure and interference. As a result, HSABC recommends reducing this 10-day period to a maximum of two business days.

- b. A further driver of the overall increase is the routine use of mail-in ballots by the Board. Mail-in ballots are not required to conform to the 10-day period. Although initially the purpose of the mail-in ballot option was to respond to exceptional cases where an in-person vote would not allow the voters to have a reasonable chance to cast a ballot, it has more recently become the norm, rather than the exception. Given that the Board itself has noted that the main reason for this increase in mail-in votes is lack of IRO resources, this recommendation is closely aligned with our general recommendation to appropriately fund the Board.

As a result, HSABC recommends that the *Code* remove the ability of the Board to order mail-in ballots unless all parties consent or truly exceptional circumstances are established.

- c. Yet another driver of increased processing time is a Board policy which was, in its conception, designed to expedite the process: the Board default to written submissions rather than an oral hearing. In practice, requiring an exchange of written submissions creates delay and additional costs to the parties. Further, the Board does not require an employer to establish a *prima facie* case for its objections before moving to a written submission schedule. This creates a clear incentive for employers, in particular, to raise objections at the Board to put pressure on the unions and delay the process.

HSABC recommends that the Board return to its previous process of quick oral hearings on certifications in cases where a party provides a *prima facie* case for any objections it raises, and furthermore, that oral hearings be required unless all parties expressly agree to move to written submissions.

- d. Further, HSABC submits that the *Code* should be amended to require that the processing and final decision of a certification application occur within 20 working days after receipt of the application, placing an outer limit on the length of time such applications are outstanding. Such a provision was recently added to the Alberta legislation, requiring that the Board finish all considerations regarding an application for certification no later than 20 working days after receipt of the application (with authority in the Chair to approve an extension of the timelines). This would represent a vast improvement from the average of over 90 days that certification applications have been taking to complete more recently.

6. Extend the validity of signatures on union membership cards to 6 months.

Currently, signatures on membership cards are valid for 90 days. A longer time period is consistent with legislation in other jurisdictions, including Canada and Alberta (which implemented this amendment in its most recent labour law reform process). Again, such an extension is a recognition of the changing nature of the workplace, with workplaces relying on larger pools of part-time and casual workers in more geographically spread out workplaces. It is increasingly challenging to identify and access all employees of any given employer.

7. Provide unions with access to employee information where they are able to establish support of 20% of the employees in an appropriate unit.

Included in the recent amendments to the Ontario labour legislation was the addition of a process whereby unions with an appropriate level of support in the bargaining unit (20%) are able to obtain contact information for employees in the proposed unit in advance of a certification application. This information includes employee names, phone numbers and

personal e-mail addresses. There are, in addition, processes to ensure that employee privacy is maintained over the information in relation to the period of time the union can retain it, and the uses the union can make of it. In recommending this process, the authors of the *Changing Workplace Review* noted that, under the *Charter* guarantees of freedom of association, employees have a constitutional right to effective access to collective bargaining. Further, employees cannot band together to pursue their workplace goals if they don't know who the other employees are, how to contact them, or how many of them there are. Again, this type of diffuse and fragmented employer structure is an impediment to union certification and is a hallmark of the modern employment context, which the *Code* in its current form is not fully equipped to handle. As noted in the report:

Workplaces can be large and geographically spread out and it can be very difficult and onerous, if not impossible, to know the number of employees and where they work. Moreover, in the changing workplaces of today, employees can be employed on numerous shifts, or on a part-time or temporary basis or away from the workplace altogether, and it can be difficult for other employees to know how and where to reach them. These many practical obstacles should not be placed in the way of the exercise of the constitutional right to freedom of association, especially when the employee contact information exists and can be easily provided.

The concerns outlined by the working group in Ontario, and accepted by the government when this provision was included in the legislation, are equally applicable in British Columbia. As a result, HSABC recommends that a similar provision be included in an amended *Code*, in particular in the absence of a mandatory card check system.

Unfair Labour Practices and Employer Speech

Bill 42, enacted in 2002, changed the unfair labour practice provisions of the *Code* to widen the ways in which employers can communicate with employees during an organizing campaign. Specifically, Bill 42 amended sections 6(1) and 8 of the *Code*. Prior to the amendments, s. 6(1) prohibited employer interference with trade unions. Section 8 provided that nothing deprived a “person” of the freedom to communicate to an employee a statement of fact or opinion reasonably

held with respect to an employer's business. The amendments specifically made s. 6(1) subject to s. 8, and amended section 8 to provide:

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

Subsequent Board decisions have interpreted this provision in a manner that shifts the balance away from employee freedom of association in favour of employer freedom of expression. HSABC submits that this balance needs to be reassessed, especially in light of the Supreme Court of Canada's labour trilogy.

In addition to the amendments to s. 6 and 8 of the *Code*, another concern is the Board's reluctance to award meaningful remedies when employers are found to have breached the law, and specifically the Board's unwillingness to use the remedy of remedial certification. The combination of these issues: the expansive interpretation of the employer free speech provision, and the very restricted use of effective remedies, create real barriers to workers' access to collective bargaining. As a result, HSABC recommends the following amendments.

8. Repeal Bill 42 provisions relating to Employer speech.

The concept of employer speech as currently reflected in the *Code* is inconsistent with the principles articulated in the Labour trilogy. The most appropriate way to safeguard the rights of workers to organize is to repeal these provisions.

9. Create more explicit requirements that the Board award remedial certifications when the Employer commits unfair labour practices.

The Board must be able and willing to offer a meaningful remedy to workers seeking to join a union where employers unduly interfere with that choice. As outlined above, the right to choose a union is an issue of freedom of association, protected by the *Charter*. Remedial certification is the most meaningful and effective way to respond to employer violations of this right.

Variations of Certifications

HSABC also has a number of recommendations relating to the ongoing relationship between employers and unions through the variation of certifications.

10. Introduce more stringent procedures for decertification applications.

The *Code* currently prohibits applications for decertification during the 10 months immediately following the certification of the trade union. This provides some recognition of the fact that a union must be provided with time to develop and grow in its relationship as the representative of the employees. But HSABC is concerned that these provisions do not go far enough. In the *Changing Workplace Review Summary Report*, the authors noted that a decertification application should not have priority over mediation or first contract arbitration processes, and that such applications should be untimely until those processes are completed.

Similarly, HSABC recommends that priority be given to first collective agreement mediation and arbitration proceedings under Part 4, Division 3 of the *Code* over a decertification application, even if the decertification application is filed before the mediation process is triggered.

11. Eliminate partial decertification.

Partial decertification has been a contentious area of Board decision-making for some time, with the Board acting largely in a legislative vacuum. While the *Code* clearly outlines the requirements for decertification of an entire unit, it is silent on the issue of partial decertification. The result has been a shifting and unclear application of Board policy.

Given that partial decertification represents a significant alteration in a bargaining unit that has previously been found to be appropriate for collective bargaining, HSABC recommends that the *Code* be amended to preclude such applications from being brought. In the alternative, HSABC states that partial decertification is an area that would be better addressed through specific legislation than through the vagaries of Board policy, and that instances in which it would be allowed should be strictly circumscribed.

12. Change procedures for change in union representation.

Section 19 of the *Code* provides that the open period for an application for a change in union representation (raid) is the seventh and eighth months in each year of the collective agreement or any renewal or continuation of it. Recent years have illustrated how the recurrence of the open period on a yearly basis has allowed for an ongoing cycle of raiding, in some cases sector-wide. This has brought significant levels of uncertainty and workplace disruption.

Other jurisdictions, such as Ontario and Canada, have less frequent open periods. In both cases, the legislation provides that, for collective agreements of three years or less, there is one open period: the three months before a collective agreement is set to expire. Where the duration of the collective agreement is more than three years, the open period is the last three months of the third year, and each subsequent year. In addition, in the Ontario construction industry, the open period is narrower: the two months preceding the expiration of a collective agreement, many of which are province-wide. In all these cases, this provides a period of stability after the negotiation of a collective agreement.

Given the level of uncertainty and disruption that can be caused by ongoing raiding, HSABC recommends that the open periods under the B.C. legislation be amended in a manner similar to Ontario and Canada, in the cases of unions certified under the Board's processes. The Panel may want to consider different procedures or provisions for unions that have been voluntarily recognized by the Employer.

Successorship, Common Employer, True Employer: Health Sector and Social Services Context

Bill 29, introduced in 2002, stripped collective agreement rights from employees in the health sector. Among other things, Bill 29 allowed health care and community social services employers to contract out a large number of services to private companies, who could then hire workers at much lower wages. It invalidated provisions in existing collective agreements which prohibited this contracting out, and which provided for employment security. Bill 29 also provided that two sections of the *Code* which normally protect workers (s. 35 (successorship) and s. 38 (common employer)) did not apply to health employers and contractors.

While the Supreme Court of Canada found that large portions of Bill 29 were constitutionally invalid, it did not find that all of its provisions were. The remaining pieces of Bill 29 continue to have a significant effect on health care unions and employees, as well as community social services unions and employees.

Bill 94, introduced in 2003, was to similar effect. That legislation has primarily been used for privatization in residential care and assisted living facilities but can also be used, by regulation, to designate a P3 facility as being outside of the public sector health bargaining structure established by the Korbin and Dorsey Commissions in the 1990s, intended to create industrial stability and reduce the proliferation of bargaining agents. Bill 94 also provides private sector entities operating in the health sector with exemptions to *Code* successorship and common employer provisions that are unavailable to any other industrial sector.

HSABC is concerned that Bill 94, and what remains of Bill 29, fundamentally weaken protections against contracting out and successorship; and that they continue to promote the privatization of our health care system. As a result of these concerns, HSABC recommends as follows:

13. Repeal Bill 29 and Bill 94 in their entirety.

The combined effect of Bill 29 and 94 is to allow employers to evade collective bargaining responsibilities and terminate employees in a manner that undermines the intent of successorship and common employer protection. This legislation has resulted in a reduction in wages, working conditions, and job security for workers in the health and community social services sectors, creating industrial instability and eroding the conditions of care for vulnerable patients and clients. HSABC recommends the repeal of both pieces of legislation in their entirety.

14. Expand the application of the *Code* to contract flipping and with respect to changes in private service providers.

In a number of sectors, services provided by third parties are periodically re-tendered in order to defeat collective bargaining. Current successorship legislation does not apply to contracting out or to contract flipping, and is silent with respect to changes in private

service providers. This means that certifications and freely negotiated collective agreement rights can simply disappear if a business decides to contract out or re-tender: even if the new service provider hires the same workers to provide exactly the same services.

The *Changing Workplaces Review – Summary Report* noted a similar concern in Ontario, recognizing that there are vulnerable workers in precarious work in this situation, and recommended that successor rights as a result of contracting out or retendering be applied in some industries, with an eye to future expansion.

Ultimately, the Ontario amendments provided for re-tendering to be deemed to constitute sale of a business in the building services industry. The legislation also includes a regulation making power that could result in the protection being extended to other service providers.

HSABC submits that a more expansive provision is appropriate for the BC context, and recommends that the application of s. 35 be broadened generally to prevent subverting collective agreements through contract flipping.

Conclusion

Above, we have highlighted the ways in which we believe the current labour relations system is out of step with both the changing workplace of the 21st century, and the changing legal terrain being hewn by the Supreme Court of Canada. We are hopeful that this review of the *Code* will yield amendments which will more appropriately protect the *Charter* protected rights of workers to choose to join a union and bargain collectively.

We thank you for the opportunity to provide these submissions.