Submission of ILWU Canada and the Retail Wholesale Union to the British Columbia Labour Relations Code Review Panel

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Introduction

The International Longshore and Warehouse Union of Canada (ILWU) and its locals represent more than 6,000 workers in ports and marine transportation facilities on Canada's Pacific coast. While the majority of its members are certified under the *Canada Labour Code*, ILWU locals also represent provincially regulated workers in the marine industry.

The Retail Wholesale Union represents 1500 workers in BC in various industrial settings, particularly warehousing and transportation. RWU is an affiliate of ILWU Canada.

Both ILWU and RWU have long histories of advocating strongly for workers in this province, and extensive experience with the changing legal regimes here since the advent of modern labour relations legislation.

The most pressing concerns for ILWU and RWU and their members in the provincial sector relate to organizing and first collective agreement negotiations, so those issues will be the focus of this submission.

Principles of review

Canadian workers have a *Charter* right to access meaningful collective bargaining, as affirmed by the Supreme Court of Canada over a decade ago in *Health Services and Support — Facilities Subsector Bargaining Assn. v. British Columbia.*[1] This finding has been confirmed in various subsequent decisions, including *Mounted Police Association of Ontario v. Canada (Attorney General),*[2] where the Court held:

> Individual employees typically lack the power to bargain and pursue workplace goals with their more powerful employers. Only by banding together in collective bargaining associations, thus strengthening their bargaining power with their employer, can they meaningfully pursue their workplace goals.
>
> The right to a meaningful process of collective bargaining is therefore a necessary element of the right to collectively pursue workplace goals in a meaningful way (*Health Services*; *Fraser*). Yet a process of collective bargaining will not be meaningful if it denies employees the power to pursue their goals. As this Court stated in Health Services: "One of the fundamental achievements of collective bargaining is to palliate the historical inequality between employers and employees . . ." (para. 84).

The Court in *Health Services* relied in its analysis on principles of international law and the international agreements on freedom of association to which Canada is a party. These instruments include the International Labour Organization's (ILO's) *Convention (No. 87)*

[1] [2007] 2 S.C.R. 391 [*Health Services*].
[2] 2015 SCC 1, at para 68 [*Mounted Police*]

Concerning Freedom of Association and Protection of the Right to Organize.[3] As the Court put it in *Health Services*[4],

> Canada's adherence to international documents recognizing a right to collective bargaining supports recognition of the right in s. 2 (d) of the *Charter*. As Dickson C.J. observed in the *Alberta Reference*, at p. 349, the *Charter* should be presumed to provide at least as great a level of protection as is found in the international human rights documents that Canada has ratified.

In *Saskatchewan Federation of Labour v. Saskatchewan*, the Court took a similar approach, and determined that the right to strike was protected under the *Charter* in part because of the content of international legal instruments including decisions of the ILO's Committee on Freedom of Association.[5]

In 1998, the ILO adopted the *Declaration on Fundamental Principles and Rights at Work and its Follow-up* in Geneva. One of the effects of this Declaration, as summarized in *Health Services*, was that:

> The right to collective bargaining is a fundamental right endorsed by the members of the ILO [including Canada] in joining the Organization, which they have an obligation to respect, to promote and to realize, in good faith (ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up).[6]

We suggest it is appropriate that this Panel take direction in its approach from the Supreme Court of Canada and the ILO; the clear message of both is that workers' access to collective bargaining in Canada ought to be promoted and increased, not curtailed.

Certification

ILWU and RWU believe amendments to the *Code* are required to facilitate better worker access to unionization in British Columbia. The biggest barrier to certification under the current *Code* is the secret ballot vote system, as this Panel will no doubt hear from many unions. Research has demonstrated that under a card check certification system, unionization rates are higher, and a change from a card check system to a mandatory vote can suppress certification rates significantly.[7]

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[3] 68 U.N.T.S. 17 [*Convention No. 87*].
[4] *Health Services*, *supra*, at para 70.
[5] 2015 SCC 4, at para 69 [*SFL*].
[6] *Health Services*, *supra*, at para 77, citing B. Gernigon, A. Odero and H. Guido, "ILO principles concerning collective bargaining" (2000), 139 *Intern'l Lab. Rev.* 33, at pp. 51-52.
[7] *Recommendations for labour law reform: a report to the Honourable Moe Sihota, Minister of Labour / submitted by the Sub-Committee of Special Advisers, John Baigent, Vince Ready, Tom Roper*. Victoria, [B.C.]: The Sub-Committee, 1992, at 6 (*1992 Panel Report*); Chris Riddell, "Union Certification Success Under Voting Versus

On its face, the vote system may appear more democratic. That is certainly the most common argument made in support of mandatory votes by the employer community. However, that position is supported by neither the research on the subject, nor the practical experience of many unions, including the ILWU and RWU, which is that mandatory votes are transparently no more than a public policy against unionization.

Employers almost invariably seize the opportunity provided by the mandatory vote system to campaign against unionization in the workplace. A 2002 study on the subject, which we note was based on data collected from surveys completed by employers, concluded that about 80 percent of employers "openly oppose" a certification drive.[8] The author of the study points out that the criteria for what constituted non-resistance was very generous to employers and that the more egregious forms of employer interference were likely underreported in the study.[9] Twelve percent of employers admitted to unfair labour practices during the certification drive.[10]

Whether or not an employer crosses the line into illegal conduct during a certification drive, however, union suppression tactics by employers have been shown to have lasting effects, including on bargaining units where the certification drive is successful. Such effects include an increase in the rate of decertification in the first two open periods after certification and a lower success rate in concluding first collective agreements.[11]

Card Check vs. Vote - Recommendations of Previous *Code* Review Panels

Prior panels tasked with a review of the *Code* who turned their minds to the issue all recommended a card check system over a mandatory vote. Importantly, in addition to leading Union side lawyer panelists, these panels also were composed of high-profile neutrals such as Vince Ready and Stan Lanyon Q.C., and high-profile employer counsel such as Tom Roper, Q.C. and James Matkin Q.C.

Some of the observations and recommendations of those panels, arrived at after extensive public consultation and research, bear repeating here. The first *Code* review panel was the 1992 Panel. In the 1992 Panel Report, Special Advisers John Baigent, Vince Ready and Tom Roper

Card-Check Procedures: Evidence from British Columbia, 1978-1998" (2004) 57:4 *Industrial and Labor Relations Review* 493 **at 509**.

[8] Karen J. Bentham, "Employer Resistance to Union Certification: A Study of Eight Canadian Jurisdictions" (2002) 57:1 *Relations Industrielles* 159 **at 172**.

[9] Bentham 2002 at 174-175.

[10] Bentham 2002 at 172.

[11] Bentham 2002 at 181.

noted that a vote system had been first introduced in 1984 after over 40 years of a card check system in BC.[12] The panel observed:

> While the statute still retained prohibitions against employer interference in the certification process, after the introduction of the vote the rate of unfair labour practices by employers during organization campaigns increased dramatically. The rate of new certification dropped by approximately 50%[13]

With respect to the "threshold question" of whether certification should be card based or based on a secret ballot vote, the panel stated:

> 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... 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.[14]

The panel went on to list some "good reasons" for returning to a cark check system:

> First, there is no compelling evidence that membership cards do not adequately reflect employees wishes. In those cases where improper influence by a union in a certification campaign is established, the Board has a plenary jurisdiction to dismiss the application for certification or to order a secret ballot vote…
>
> Second, a representational campaign, hotly contested by both employer and trade union, all too often poisons the atmosphere and fosters mistrust between the parties. A campaign fraught with allegations of unfair labour practices results in an atmosphere in which collective bargaining is not likely to succeed. This is to no one's advantage.

In response to these recommendations, the government enacted legislation which changed the process of certification back to a card check system.

The next *Code* review panel, which included Vince Ready, Stan Lanyon, Miriam Gropper and Jim Matkin, wrote a report titled *Managing Change in Labour Relations* in 1998.

Despite backlash from the Employer community, the 1998 Panel Report did not recommend a return to a mandatory certification vote. The 1998 Panel stated the following about this issue:

> Employers responded negatively to our Discussion Paper proposal to not recommend a mandatory certification vote. They continued to advocate for a vote before certification

[12] *1992 Panel Report*, *supra*, at 5.
[13] *Ibid*, at 6.
[14] *Ibid*, at 26.

> because they believe that is the only way they can be assured that their employees truly want to organize. We did not hear from employees that they wished a certification vote. Because the employer directly controls the ability of any employee to maintain his or her livelihood and therefore holds the balance of power, we feel that the concerns of employees and their unions must take precedence in this case.
>
> We affirm our proposal in the Discussion Paper to not recommend a mandatory certification vote. We affirm the individual right, recognized provincially, nationally, and internationally, to join or form trade unions. Experience demonstrates that employers do seek to affect employees' right to choose. In our view, extending the certification process by introducing a mandatory certification vote would only further invite such illegal activity.[15]

The only *Code* review panel since was convened by the Liberal government and produced a report in 2003. Notably, it was not asked to opine on the card check vs. mandatory vote question, as the Liberal government had already reinstituted a mandatory vote system (contrary to the recommendations of the 1992 and 1998 Panels) soon after taking office in 2001.

As noted by the 1992 and 1998 Panels, mandatory vote systems invite, and result in, illegal employer interference in employees' rights to choose whether to have union representation in the workplace. Under mandatory vote systems, certification rates decrease significantly as outlined above.

The ILWU and RWU strongly believe that there is no place in the *Code* for a mandatory vote system in this era of an expansive, purposive approach to employee rights, where the focus is on increasing, not curtailing, workers' bargaining power.

Threshold for Card Check Certification

We suggest that if a union meets a threshold of 55% of membership cards, the union should be certified to represent the employees in collective bargaining. Where a union has between 45 and 54% of cards, a secret ballot vote should be scheduled.

Votes

In a situation where a secret ballot vote is ordered, the ILWU and RWU suggest, as a matter of Board policy, that more frequent use of the Board's power to grant automatic certification in response to employer unfair labour practices is warranted.

Such an approach, coupled with expedited hearings into unfair labour practice complaints under section 6 as well as section 5 of the *Code*, would help to mitigate the harm illegal

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[15] *Managing Change in Labour Relations – The Final Report – Prepared for the Minister of Labour Government of British Columbia by the Labour Relations Code Review Committee (Section 3 Committee) Vince Ready, Stan Lanyon, Miriam Gropper and Jim Matkin*, Victoria, [B.C.]: The Review Committee, 1998, at 51-52 ("*The 1998 Panel Report*").

employer practices cause to union organizing drives Our position is that unfair labour practices during a certification drive should be treated with the same urgency as Part 5 complaints.

The ILWU and RWU also would support a policy approach that mail in ballots are only used as a last resort. In our experience, mail in ballots are often used in multi-site workplaces where more than one poll will have to be arranged. We appreciate that setup of multiple polls entails more resources but in our view in person votes are far preferable to ensure the most employees possible cast a vote and to avoid delay.

Bargaining Unit Descriptions

The ILWU and RWU also support a policy approach that the Board scrutinize proposed bargaining unit descriptions, regardless of whether there are objections raised, to ensure that the unit applied for accurately reflects the scope of the unit. This would prevent employers and unions they may have a preference for from trying to interfere with employees' ability to choose their bargaining agent by describing a unit in an overbroad broad manner.

For example, the USW was involved in an application to represent certain employees of Ledcor at a mill in 2013. There was a pre-existing certification with Ledcor and CLAC, and Ledcor raised a province-wide bargaining unit description as a bar to the application. The USW understood there may have been as few as 4 employees in the unit, but CLAC and Ledcor refused to disclose the scope of the bargaining unit, and the Board did not require them to as a preliminary matter, as requested by the Union. This was in spite of Ledcor's acknowledgement that there were no employees working at and from its head office (which was what the certification order referred to). CLAC satisfied the Board that it represented "somebody" employed by Ledcor and that the operations were interdependent. The dismissal of the USW's application was upheld on reconsideration and judicial review.[16]

Leaving aside the ultimate outcome on the appropriateness of a unit applied for, an approach such as this, where the scope of a bargaining unit does not have to be clearly delineated and disclosed, impedes employees' ability to freely choose their bargaining agent.

Changes in Union Representation

The ILWU and RWU support revisions to s. 19 of the *Code* to reduce the length of the time bar between open periods for changes in union representation. While we recognize that there is some disruption inherent in a raid at a workplace, in our experience employers and incumbent unions can mount aggressive campaigns that can result in many of the same issues for the proposed new union as unions face during initial certification drives.

[16] BCLRB No. B124/2013, recon upheld in B171/2013, and aff'd in 2015 BCSC 622.

The time bar in that context is a significant barrier to changes in representation, as nearly two years must elapse before another attempt to change representatives can be made. A more equitable balancing of the interests of employers and incumbent unions with those of employees dissatisfied with their bargaining agent and the representative they wish to change to is to reduce the time bar so as to allow for an application under s. 19 once per year of a collective agreement, during the seventh and eighth month.

Time Lines for Decisions Under the *Code*

We believe that the decision time lines under the *Code* require revision to reflect that applications which effect access to bargaining be given priority and be decided expeditiously. While some steps were taken in that regard with the promulgation of the *Prescribed Time Limits for Decision Regulation*[17], we do not feel that the current regime achieves this important goal.

In circumstances where a vote is required on a certification application, the ILWU and RWU believe that the time line for a vote should be truncated. In the context of a vote, any amount of delay permits employers to interfere in an organizing drive. However, a shorter delay could mitigate that issue at least to some extent.

We suggest that a vote be required to be conducted within five days of the application, subject to a discretion on the part of the Board to extend the time line for an additional two days, in circumstances where it is practically impossible to arrange a vote within 5 days.

In our view, the 180-day window for decisions to be rendered on complaints under the *Regulation* is too lengthy, particularly with respect to unfair labour practice complaints during an organizing drive or unit appropriateness objections. As we argued above, we believe these issues should be treated with the same urgency as Part 5 applications. Once six months have elapsed since the date of a complaint, the relationship between the union and the employer can have incurred irreparable damage and employees can lose faith in the union as their advocate.

The ILWU and RWU advocate for a requirement that decisions on these types of applications be rendered within 30 days. The ability of workers to access collective bargaining in the short and long-term hangs in the balance during a drive. This fundamental right should be no less of a priority than an application by an employer to limit strike action.

[17] B.C. Reg. 372/2002.

Supervisor Access to Collective Bargaining

The ILWU and RWU do not feel that section 29 of the *Code* requires revision. However, this provision is rarely used. We would like to suggest that the Board adopt a policy of encouraging use of this provision to include supervisors in units with other employees where they do not perform a management functions. Like the employees they work with, supervisors who are not excluded by the *Code* have a fundamental right to access collective bargaining.

In addition, in our experience in BC workplaces, where supervisors are excluded from a unit it can create a tense dynamic. Supervisors often share a community of interest with employees. However, they can become aligned with management by default because they are not part of the union and therefore not subject to the protections of the *Code*. It has also been our observation that supervisory employees can act as leaders within a bargaining unit and help to facilitate positive labour relations with management, which has typically placed the employee in a supervisory role having decided that the individual is competent and demonstrates leadership.

Unfair Labour Practices

The unfair labour practice provisions of the *Code* (ss. 5, 6, and 9 in particular) are an insufficient check on the practice of illegal employer interference, particularly during organizing drives. We believe this is a result of both the structure of the *Code* and Board policy.

As a matter of policy, decisions of the Board under the previous Chair set the bar for what constitutes intimidation and coercion very high. Consequently, it has become acceptable for employers to exert a significant amount of influence over whether their employees choose unionization without running afoul of section 9 of the *Code* (and the criteria in that section as repeated in the standard for breaches of sections 5 and 6).

Delay is another significant issue with unfair labour practice complaints, often filed in the stage between when the certification application is filed and the vote. Submissions and litigation ensue. This not only taxes the resources of the parties and the Board, it also can create a climate of uncertainty for workers and a relationship between the union and the employer that begins in a state of conflict before all important first agreement negotiations are even underway. Such disputes go squarely against the purposes of the *Code* in that they foster the kind of acrimony that is the antithesis of the harmonious labour relations that the *Code* is supposed to advance. They also make the collective bargaining relationship less likely to succeed.

Leaving aside the time lines for litigation of unfair labour practice complaints, as a practical matter, employees are often reluctant to come forward during a certification drive to testify.

The *Code* of course prohibits reprisals. However, testifying at a hearing at that stage may have the effect of outing an employee as a supporter. In our experience, employees typically feel vulnerable given the uncertainty of whether the organizing drive will succeed. Therefore, in practice, it is difficult for unions to fully litigate unfair labour practice complaints at the certification stage.

As a consequence of these issues, we believe the following provisions require amendment.

Section 6 should be revised so that it has the same expedited hearing process as s. 5, particularly in relation to complaints during a certification drive. This would significantly mitigate the harm to new collective bargaining relationships that results from protracted litigation of complaints at such a pivotal time in the parties' relationship.

Section 6 would also benefit from being broken down into individual sections (rather than a series of sub sections), to make the section more clear and readable, particularly to a lay person who wishes to inform him or herself about the protections available to employees who may wish to join a union.

We believe section 7 should be amended such that it applies to employers as well. Captive audience meetings on company time are inherently coercive. Since it is the employees' right and choice whether to join a union, employers should not be permitted to express their views about unionization to employees while on paid time.

We suggest that section 9 of the *Code* be amended to provide as follows:

> A person must not use coercion or intimidation of any kind that could reasonably have the effect of interfering in the exercise of a person's right to choose to become or to refrain from becoming or to continue or cease to be a member of a trade union.

As a matter of Board policy, this provision should be interpreted more strictly as against persons who seek to pressure employees into a decision about whether to support unionization.

We note that these changes are consistent with principles summarized by the ILO Committee on Freedom of Association. In particular, we refer the panel to the following:

> 861. The existence of legislative provisions prohibiting acts of interference on the part of the authorities, or by organizations of workers and employers in each other's affairs, is insufficient if they are not accompanied by efficient procedures to ensure their implementation in practice.

(See the 1996 Digest, para. 763; and 333rd Report, Case No. 2168, para. 358.)[18]

Under the unfair labour practice provisions of the *Code* as they stand, the provisions require amendment to ensure not only that they prevent illegal interference, but also ensure that complaints can be efficiently adjudicated.

First Collective Agreement Negotiations

The ILWU and RWU believe an amendment to section 55 of the *Code* is warranted to remove the requirement for a strike vote prior to accessing Board intervention in first collective agreement negotiations. In our opinion, while we do not contend that parties should be able to access s. 55 processes prior to making real efforts to reach a collective agreement, the strike vote requirement is prohibitive. Our experience has been that in the context of first collective agreement negotiations, new union members can be reluctant to vote in favour of a strike in general. This is particularly the case in the context of s. 55 where there is a disconnect between the strike vote and what the union actually proposes to do, which is access the Board's services to help conclude a collective agreement, not go on strike.

We find support for this view from the comments of the 1998 Panel Report, which recommended that the strike vote requirement be removed from s. 55 for similar reasons. Those comments state, in part:

> Inexperience, fear, mistrust, and a general lack of cooperation often exist during first agreement negotiations. Under these conditions the parties may not be able to conclude a first collective agreement without assistance.
>
> Where collective bargaining fails to result in a first collective agreement, we believe the parties should be able to access the *Code's* first agreement provisions. However, the strike vote precondition raises two significant problems associated with this process. First, requiring a union to conduct a strike vote in order to access the first agreement process places the union in an incongruous position. It is required to ask the bargaining unit to support a strike, when in fact, what it wants is bargaining unit support to conclude a collective agreement. Employees new to collective bargaining may be understandably reluctant to support a strike vote, with its potentially significant economic impact on themselves and their families, but truly desire to conclude a collective agreement. Second, an early strike vote can sour negotiations from the employer's perspective as well.[19]

Consequently, the 1998 Panel recommended elimination of the strike vote requirement in s. 55, which it characterized as "misguided", despite criticism and opposition from the employer community. It recommended that the s. 55 med-arb process be made available after s. 74

[18] (ILO, Freedom of Association: Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO (5th rev. ed. 2006))
[19] *1998 Panel Report* at 18-19.

mediation has been exhausted and the Associate Chair of Mediation has exercised discretion to allow the parties to access s.55.[20]

The ILWU and RWU suggest that an amendment similar to the 1998 Panel's proposal be implemented whereby unions can access s. 55 when they have exhausted s. 74 without reaching a collective agreement. However, we do not believe that access to s. 55 should be conditional on an open-ended exercise of discretion by the Associate Chair of Mediation as that would lead to significant uncertainty for unions and employers. In the event you consider that a discretionary decision is appropriate, we suggest that should be based on some limited and specific factors that would guide parties as to how that discretion will be exercised, such as a requirement that the applying party has bargained and participated in mediation in good faith.

In our view, the requirement to exhaust mediation under s. 74 before resort is had to s. 55 would mitigate employer concerns about premature resort to med-arb in first collective agreement negotiations.

Decertification

The ILWU and RWU believe that in order to ensure that first collective agreement negotiations have a greater chance for success, applications for decertification under s. 33 of the *Code* and applications for certification under s. 18(2) should not be permitted until after the parties have reached a first collective agreement, unless the parties are denied first contract med-arb.

This is consistent with the approach in some other Canadian jurisdictions. For example, under the *Canada Labour Code*[21], ss. 38-39, decertification applications cannot be filed for one year after certification. More critically, a union in bargaining is protected from decertification. Thus, employers cannot use delay in bargaining as a tactic to encourage decertification before a first collective agreement is reached.

Under the *Labour Relations Act* in Ontario, first contract med-arbitration can only be denied if the Board believes there should be further mediation (in which case it still would not proceed with a decertification application at that time), the party applying for med-arb has breached its duty to bargain in good faith or otherwise because the Board considers that "the process that the process of collective bargaining has been unsuccessful because of the uncompromising nature of any bargaining position adopted by the applicant without reasonable justification".[22]

[20] *Ibid*. at 54-55.
[21] R.S.C., 1985, c. L-2.
[22] S.O. 1995, Ch. 1, Schedule A, s. 43.1.

Mergers or Amalgamations

As a matter of policy, the ILWU and RWU suggest that the Board adopt an approach under section 37 of the *Code* that requires a strong evidentiary basis before placing any reliance on claims about changes to the structure of the employer's business that bear on whether a runoff vote is held between incumbent unions.

This approach would prevent employers in the context of a merger or amalgamation from attempting to select the union that will represent their employees on an ongoing basis, by relying on speculative and potentially unrealized plans for their business that favour the position of one union over another.

Conclusion

The ILWU and RWU support the foregoing revisions to the *Code* and Board policy. We believe they are necessary in order to facilitate workers' access to free collective bargaining and decrease opportunities for employers to interfere in the exercise of workers' rights to choose to join trade unions and to participate in their lawful activities.

We emphasize that the approach we have outlined is consistent with the conclusions of the Supreme Court of Canada that access to meaningful collective bargaining is a *Charter* right. It is also in harmony with Canada's international obligations, which include promotion of and respect for human rights including the fundamental right to bargain collectively.