2018

B.C. Labour Code Review Submission

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Summary

MoveUP (the Movement of United Professionals) is asking the B.C. provincial government to restore balance to the B.C. Labour Relations Code. Over the last decade and a half, the Labour Code, and with it labour relations, has become unbalanced and increasingly favours employers over employees.

We at MoveUP believe that this balance is an important part of the fabric of a civil society that builds trust and gives all members a sense of fairness within society and within government regulations. A balanced labour code can provide social license and fosters greater social cohesion between employees and employers but also the general public. It is to that end that we provide some feedback on the existing process and subsequently provide key recommendations to re-balance the B.C. Labour Relations Code (Code).

Summary of Recommendations

Rebalance Labour Code

1. To amend section 2b of the Code to restore balance by ensuring the governing principle is about fostering balanced labour relations and not using labour relations to economically support business.
2. To ensure a viable process in section 3
    a. for an ongoing review of the Code not just every 15 years.
    b. The representation on the committee be balanced to include all key stakeholders
3. Support the work of the Labour Relations Board by encouraging government to properly fund the board so that critical services like certification votes are not delayed, or conducted by mail, simply because of a lack of resources.
4. Ensure effective and timely decisions by extending the timelines for decisions provided by vice-chairs to those given by arbitrators. s. 91, s. 128, s. 159.1.

Unfair Labour Practices

5. Avoid infringement of workers' Charter right of association by increasing the use of remedial certification in cases of unfair labour practices. s. 14.

Acquisition of Bargaining Rights

6. Repeal of the Employer Speech provisions during organizing drives, because they infringe workers' Charter rights to choose to join a union. s. 8.
7. Clarify when open (raiding) periods fall by setting them in a regular period in the calendar year, rather than the anniversary of the collective agreement - which is often unknown to interested parties. s. 19.
8. Restore a system of union certification on the basis of membership cards alone. s. 24.
9. Establish faster timelines to ensure labour peace by causing more expeditious voting. If certification votes are necessary, the application threshold shall be in line with those in other Canadian provinces. The timeline for a vote on any issue shall be not more than two working days. s. 24.

a. Improve and modernize the card signing process to ensure secure but efficient use of systems—such as electronic card signing—is possible to more adequately match the current ways that most members of society function.

10. Upon the completion of a certification
    a. increase the time period for completion of a first contract to more than 4 months
    b. if there is violation of the Code and regulations during that period to ensure enforcement and allow for immediate forced mediation of a first contract.

Successorship Rights

11. Broaden Section 35 to strengthen successorship rights to prevent subverting collective agreement obligations through contract flipping; and Repeal s. 6 of Bill 29-*Health and Social Services Delivery Improvement Act, 2002* and s. 4 and 5 of Bill 94- *Health Sector Partnerships Agreement Act, 2003.*

Replacement Workers

12. Protecting workers' Charter-protected collective bargaining rights, including the right to withdraw their labour by re-committing to British Columbia's laudable ban on replacement workers. s. 67.

Essential Services

13. Restore Charter-protected collective bargaining rights to teachers by removing education as an essential service. s. 72.

Variations of Certifications

14. Correct issues with partial decertification applications by extending the rules and timelines for full certifications to this type of application s. 142.

Returning to Balance

MoveUP is calling for a number of changes to the B.C. Labour Relations Code which will restore balance to labour relations in B.C. and help foster a stronger civil society where all members are treated equally under the law. These include:

a) meaningful remedies for unfair labour practice;
b) improvements to the regulation of workers' right to choose to join a union (including the repeal of employer speech provisions and automatic certification);
c) faster timelines when a vote must be conducted by the Board;
d) stronger successorship language to prevent contract flipping being used to reduce union representation and to drive down wages in some of British Columbia's key sectors;
e) a continued ban on replacement workers during labour disputes;
f) meaningful bargaining rights for teachers; and
g) fairness during partial decertifications.

The success of these changes relies on sufficient funding for the labour relations system which is regulated by the Code, so that workers can be confident that their Charter rights will not be infringed through deliberate underfunding.

Background

In 2015, the Supreme Court of Canada released a landmark trilogy of cases which clarified the character and scope of a number of important union rights (*Saskatchewan Federation of Labour v. Saskatchewan, Mounted Police Association of Ontario v. Canada, and Meredith v. Canada*) (known as "The New Labour Trinity"). These cases together extend *Canadian Charter of Rights and Freedoms* protection to common labour activities such as the right to choose a union, the right to bargain collectively, and the right to strike.

In British Columbia, these rights are regulated by the *B.C. Labour Relations Code* ("the Code"), which is administered largely by the Labour Relations Board. One of the chief purposes of the Code in our view, and of the board's role in overseeing union-employer relations in British Columbia, is to ensure labour peace in the province. This peace is the result of an historic compromise whereby union workers and employers in the province agreed to be ruled by the board in exchange for union recognition, stability for viable businesses, and the timely resolution of disputes.

For the last 16 years however, the B.C. Liberal government has employed a number of tactics to disrupt the fine balance upon which the compromise, and labour peace in the province, are predicated. A series of legislative changes shifted the playing field in favour of employers and business interests, resulting in hardship and instability for workers in a number of sectors. The Code was not reviewed to recognize workers' distinct Charter rights during that time, even while aspects of Bills 27, 28 and 29 restricting union rights were struck down by the Supreme Court of Canada.

The disparity between top and bottom income earners has been growing in recent decades. This disparity has a deleterious effect on the economy, and society. Organizations like the OECD[1], the World Bank and the IMF[2] have recognized that this is a serious and growing problem that needs to be addressed. They have identified declining rates of unionization as a

[1] 2012, OECD, "Reducing Income Inequality While Boosting Economic Growth: Can It Be Done?," https://www.oecd.org/eco/growth/49421421.pdf
[2] 2015, International Monetary Fund, "Power From the People," http://www.imf.org/external/pubs/ft/fandd/2015/03/jaumotte.htm

factor in this growing discrepancy in incomes, and have noted that increasing rates of unionization is one possible means to reverse this growing[3] gap[4].

Any changes to the Code must be made in a fashion that is mindful both of the nature of the historic compromise embodied by the Code and the labour relations regime it creates; and of the newly-recognized Charter rights of working people to choose a union, to bargain collectively, and if bargaining fails, to strike.

Key Recommendations

Rebalance Labour Code

1. **Restore balance to governing principles**
   The B.C. Labour Code in 2002 included a dramatic shift in the governing principles in section 2b that shifted the Code from a focus on labour relations to a Code that was now devised to support the economic viability of a business. It is not the purpose of regulation to prop up businesses, but rather to provide a stable, fair and consistent focus on balanced labour relations. As such *we recommend taking out section 2b of the Code* "(b) fosters the employment of workers in economically viable businesses." This amendment will start to create that balance at the core of the Code.

2. **Ensure a viable and balanced future process**
   a. **Ongoing review of Labour Code (s. 3)**
      For the last 15 years, the B.C. government has not had the benefit of an ongoing review of the labour Code that seeks to find balance and improvements to the Code. We are pleased that the B.C. government has begun this process to review the Code and we recommend that this not simply be a once-in-15-years-experience, but an ongoing process that engages all the stakeholders. B.C. Liberal changes to the Code tilted the playing field away from one where working people could choose to join a union, to bargain and to exert their combined economic power, without undue employer interference. Given the recently clarified Charter character of these rights, these kinds of changes cannot be made based on political whim. We would feel most comfortable that an expert panel continue to evaluate the Code and the regime it creates and *we recommend the Section 3 Review Committee continue to be tasked with the work of labour relations improvement on an ongoing basis*.

   b. **Finding ongoing balance (s. 3)**
      Once again for the last 15 years, the B.C. government has not provided balance in the review of the labour code. Labour relations in B.C. function well when all key stakeholders that directly work with the Code and the system are involved. This

[3] 2016, Alana Semuels, "Fewer Unions, Lower Pay for Everybody", The Atlantic, https://www.theatlantic.com/business/archive/2016/08/union-inequality-wages/497954/

[4] 2017, Vaughan-Whitehead, Daniel, United Nations International Labour Organization, "Inequalities and the World of Work: What role for industrial relations and social dialogue?." http://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---travail/documents/meetingdocument/wcms_544236.pdf

includes: Employers/Employer Associations, Unions/Employees, Government, and Arbitrators. *We recommend that future processes include and balance representation from all key stakeholders so that they may work together to review and build a better system.*

3. **Proper funding**

The success of a system and organization relies on good and balanced structures, policies and systems, but they also rely on proper funding to do the work needed--in this case to provide a functional and balanced labour relations system in B.C. Sadly, sixteen years of underfunding have reduced the capacity of the board to deliver the certainty upon which the parties are entitled to rely, and upon which British Columbia's labour peace rests. This raises a significant access to justice issue.

In our experience, the Charter rights of B.C. workers to choose a union has been impaired by chronic underfunding of the Labour Relations Board, and for Industrial Relations Officers charged with conducting certification votes. We hear reports of mail-in ballots being used instead of in-person votes, purely for budgetary reasons, or due to understaffing. As then-Chair Mullin wisely stated in Norbord, "An expeditious vote in a certification application helps to ensure employees are able to express their wishes freely. It is generally accepted that delay between the date of application and the date of a vote can impede the ability of employees to exercise their fundamental right to choose. Similarly, worksite disruption, tension, and the potential for unlawful interference can be prolonged by several weeks or more where a ballot is conducted by mail" (at para 27). Adequate funding is essential to protecting workers' Charter right to organize. *We recommend a review of funding to ensure that it allows for a fair and balanced process and decisions.*

4. **General - Timely decisions (ss. 91, 128, 159.1)**

One factor that also skews the potential of bias to one side or the other is the lack of timely decisions. Our experience has been unacceptable delays when awaiting arbitrators' decisions on often critical workplace matters. An arbitrator's decision can have significant impact on a worker's situation, and the absence of timelines for arbitrators leads to an access-to-justice concern. *We recommend applying the timelines set out in the Code for decisions from vice-chairs to apply equally to decisions given by arbitrators*.

Unfair Labour Practices

5. **Unfair Labour Practices and Remedial Certification (s. 14)**

When employees are affected by an unfair labour practice, a vote would be unlikely to disclose their true wishes. Unfair labour practices, and the conditions leading to them, have a chilling effect on workers in the context of their choice to join a union. Given that the right to choose a union is a Charter-protected right to associate, we submit that remedial certification is the most meaningful way to make these workers whole in the face of unfair labour practice whereby the employer seeks to interfere. *We recommend that the board be able to offer a meaningful remedy to workers seeking to join a union when employers unduly interfere with their choice*.

Acquisition of Bargaining Rights

6. Employer speech (s. 8).

One of the more egregious B.C. Liberal changes to B.C.'s labour regime was to grant employers the unfettered ability to dissuade workers from improving their wages and working conditions by joining a union. This advantage was extended to employers, but not to unions. The changes in Section 8 gave government sanction to the employer's right to infringe a worker's Charter right to associate through captive audience meetings, and constant anti-union messaging in the workplace. The same sanction to these tactics was not extended to unions. The concept of employer speech is incompatible with the principles articulated in the recent Supreme Court decisions. The only way to safeguard the rights of union workers to choose to organize, and to choose between unions is to repeal Section 8 of the Code. *We recommend the repeal of Section 8 of the Code.*

7. Open (raiding) period (s. 19).

The right to choose to join a union, or to choose between unions, is a Charter right belonging to workers. Members of certain organizations may not agree that their bargaining agent is sufficiently free from the influence of an employer. They may feel that they are represented by bargaining agents which lack sufficient democratic traditions, or which are of an unduly sectarian character. Workers in this situation may not be able to ascertain when the anniversary of the collective agreement falls in the calendar year because of a lack of transparency from their bargaining agent. This impairs their ability to choose another union under Section 19 of the Code which states that this period of choice (the "open period"') shall fall in the 7th and 8th months of the collective agreement. *We recommend that the open period set out in Section 19 be reset to a regular place in the calendar year to give working people some certainty of when the open period will fall.*

8. Membership cards (s. 24)

One key element in creating a balanced labour code is to ensure the systems we have do not unfairly ask workers to jump through extra hoops and thus create barriers for fair participation. Sadly, the B.C. Liberal government altered the Code to require working people to jump through extra hoops to join a union. In fact, changes to the Code by the previous government meant that workers have to choose to join a union twice. The first time they choose by signing a membership card with a certified bargaining agent. They are forced to choose a second time by forced by a mandatory certification votes held some time later.

This change represented a departure from the Canadian tradition and imported a process more familiar to American labour relations. As a result, the rate of unfair labour practices increased dramatically, and the rate of certification fell by approximately 50%[5]. In our experience, the requirement for a certification to confirm a worker's choice to join a union--essentially a second vote--granted employers a de facto campaign period to oppose unionization. A 1992 report of special advisers to B.C.'s—then labour minister—noted with disapproval that "secret ballot votes and their concomitant representation campaigns invite

[5] 1992 Code review report, p 6 "Since the introduction of secret ballot votes in 1984, the rate of employer unfair labour practices has increased by more than 100%" (1992 report p 26).

an unacceptable level of unlawful employer interference in the certification system"[6]. This, coupled with the employer speech provisions discussed earlier, led to an astronomical increase in unfair labour practices associated with union organizing drives. Workers seeking to join a union were unclear about what signing a union card actually meant. The rate of unionization in British Columbia plummeted. We submit that the right to associate belongs to the worker; and employers ought not be given a special opportunity to infringe upon this Charter right. Further, the choice of a union is the result of a dialogue between workers and a trade union, and ought not be unduly fettered by the requirement that workers confirm their initial decision to sign a membership card by also participating in a certification vote. *We recommend to the committee that we restore a system of union certification based on membership cards alone.*

9. Threshold for certification and faster vote (s. 24)

Obviously, there are very specific occasions that will require a vote of workers in order to confirm a certification. This will arise when the number of memberships fails to surpass an application threshold. The general average in common law jurisdictions is 50%+1, even in those jurisdictions that have automatic certification. *We recommend 50%+1 as an appropriate threshold for automatic certification.* In the case when this threshold is not met, we recommend a reduction in the prescribed time to conduct a vote from within ten days currently set out in the Code to not more than two working days. Following Norbord, we insist that this vote should be conducted in person unless mutually agreed to by all parties. We note the rise in mail-in ballots that took place under the B.C. Liberal government. This method of voting adds additional delay and increases the margin of error and fraud, and was clearly being used as a cost-containment measure due to lack of appropriate human resources to fairly administer the Code. *We would welcome changes that allow this vote to take place at a location convenient to the workers away from the employer's premise, including any government office.*

a. Our world is changing. The way we communicate and make decisions is slowly modernizing and so should our regulations and practices. *We recommend that the card signing process be improved and modernized to ensure secure but efficient use of systems such as electronic card signing is possible to more adequately match the current ways that most members of society function.*

10. New Contracts (s.55)

Once a certification is completed the next stage is to negotiate a mutually agreed upon contract between the two parties. This is also a point where the Code has been tilted in favour of employers where employers run out the clock or violate Code or regulations with impunity.

a. Increase time period for new contracts

Sadly a tactic that is used to disrupt the completion of a first contract is where employers run out the proverbial clock of negotiations (set at 4 months*). We*

[6] 1992 report, p 26.

recommend increasing the time period for completion of a first contract to more than 6 months.

b. Enforcement of rules and forced mediation

Sadly, some employers get away with violating workers' rights by violating the Code and regulations during that period of negotiating a first contract. This creates an unlevel playing field. *We recommend that LRB staff be empowered (meaning: authorizations and time to do the work) to enforce the Code and regulations. We also recommend that the Labour Relations Board be given the right to impose contracts, or provisions of contracts, in these circumstances.*

Successorship

11. Successorship Rights (s. 35, Bill 29, and Bill 94)

Successorship can be understood as the principle that workers' rights and benefits that come from their union membership and their collective bargaining agreement are not lost as a result of business operation changes. Successorship laws are meant to provide job security and make sure that employers cannot undermine the efforts of workers to organize and bargain collectively simply by selling off all or parts of their business.

Successorship provisions of the B.C. Labour Relations Code stipulate that if a business or part of it is sold, leased, or transferred, the new owner is bound by any collective agreement in force at that business on the date of sale. Wages, benefits, and rights contained within the collective agreement apply to the new employer and bind them to the same extent as if they had signed the original agreement with the employees and their union. They are considered the "successor" employer.

However, the B.C. Liberals took further steps to limit successorship in health care by passing Bills 29 and 94, which limit the application of Section 35 of the Code. These laws have allowed employers to evade collective bargaining responsibilities and terminate employees in a manner which undermines the intent of successorship protection in the first place. Current successorship legislation does not apply to contracting out or to contract flipping, and is silent with respect to changes in private service providers. As a result, legally obtained certifications and freely negotiated collective agreement rights simply disappear as a result of a business decision to contract out. This has become a feature of work in British Columbia for many health care, utility, food service and construction workers.
The application of Section 35 of the Code is limited in the health sector by the Health and Social Services Delivery Improvement Act (Bill 29) and the Health Sector Partnership Agreement Act (Bill 94). Bill 29 prevents Section 35 of the Code from applying to an entity that contracts with a health sector employer. This means that a person who contracts with a health sector employer cannot be determined to be the successor of that employer.
Bill 94 extends that protection against a finding of successorship to designated private sector partners. This means that an entity that contracts with a private employer who is in a P3 (Public Private Partnership) arrangement with a health sector employer cannot be determined to be the successor of that private employer.

As a result of these changes, we have seen a reduction in wages and working conditions for workers in these sectors, and a loss of industrial stability across the sectors because of the high turnover this produces. The advantages of this system go entirely to employers, while workers see their Charter rights to organize to improve their working conditions eroded by the architecture of the Code. The absence of successorship provisions in the Code encourages employers to exploit these conditions, resulting in greater insecurity for workers and the services they deliver to B.C.'s public.

In order to level the playing field, *we recommend that the application of Section 35 be broadened to prevent subverting collective agreements through contract flipping.*

Replacement Workers

12. Replacement Workers (aka Scabs) (s. 67)

A mature system of collaborative labour relations involves concerted collective bargaining in good faith. Should the parties reach an impasse, they then seek to increase their bargaining power by exerting economic pressure either by withdrawing their labour, or by locking out their workers, as regulated by the Code and the Board. In other jurisdictions, the power of one party is unfairly undermined by allowing employers to hire replacement workers to do bargaining unit work. British Columbia should be proud of its continued ban on replacement workers. *We recommend no change to this section of the Code, and respectfully submits that any amendment would run counter to the good faith spirit of labour relations and would threaten British Columbia's economic stability and labour peace.*

Essential Services

13. Essential Services (s. 72)

We do not take issue with a system which determines that some services are so essential to the preservation of life that workers in these areas are not able to withdraw their services when collective bargaining between evenly matched parties reaches an impasse. Our affiliates participate willingly in making essential services decisions, often erring on the side of undue designations in the name of expedience. We do, however, take issue with the historical abuse of the essential services designation in British Columbia which, at times, designated teaching assistants, and K-12 teachers to be essential.

In light of this, and recent jurisprudence from the Supreme Court of Canada condemning the B.C. Liberal infringement of the Charter-protected collective bargaining rights of classroom teachers, *we recommend that education be removed as an essential service, and that the committee recommend a tightly restricted use of essential services designations outside of the health care sector.*

Variations of Certification

14. Variations of Certification- Partial decertification applications (s. 142)

We are for the most part satisfied with the rules and timelines in place for dealing with certain employees' applications to decertify bargaining units. While we feel this type of application is more often than not brought forward or funded by employers, each case

should be decided on its merits before a vice-chair of the Board. Our affiliates have raised concerns for many years about the process for partial decertification applications conducted under Section 142, when certain employees seek to have an existing certification altered to exclude some, but not all, union members.

Matters conducted in this way are not expedited in the same manner as full decertifications, and the rules for such applications are opaque. *We recommend that the Code be amended to prevent applications for partial decertifications from being entertained by the Board. In the alternative, we ask that such matters be resolved using the same rules provided for in Division 2 of the Code.*

Legislation

- Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c. 11.
- Bill 29, Health and Social Services Delivery Improvement Act, SBC 2002 c. 2.
- Bill 94, Health Sector Partnerships Agreement Act, SBC 2003 c. 93.
- Labour Relations Code RSBC 1996 c. 244.

Jurisprudence

- Meredith v. Canada (Attorney General), 2015 SCC 2.
- Mounted Police Association of Ontario v. Canada (A.G.), 2015 SCC 1.
- Norbord Inc. v United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, Local Union Number 1-425, 2016 CanLII 23791 (BC LRB), Retrieved from: <http://canlii.ca/t/gpqtl>.
- Saskatchewan Federation of Labour v. Saskatchewan, 2015 SCC 4.

Reports

- Restoring Fairness and Balance in Labour Relations: The BC Liberals' Attacks on Unions and Workers 2001-2016. MacTavish J, and Buchanan C. Retrieved from: http://bcfed.ca/sites/default/files/attachments/lrb%20paper.pdf
- Recommendations for Labour Law Reform: A Report to the Honourable Moe Sihota Minister of Labour. John Baigent, Vince Ready, Tom Roper (Sub-committee of Special Advisers). September 1992.
- Managing Change in Labour Relations - The Final Report prepared for the Minister of Labour, Government of British Columbia. Labour Relations Code Review Committee (Section 3 Committee). February 25, 1998.