Balance at Work

Restoring Balance, Respect and Fairness to the British Columbia Labour Relations Code

New Westminster & District Labour Council Submission to the BC Labour Relations Code Review Panel

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Executive Summary

The New Westminster & District Labour Council is pleased to have this opportunity to present our recommendations for changes to the *British Columbia Labour Relations Code* to the Review Panel. We see a strong, balanced and fair Labour Relations Code with robust support from the Ministry of Labour to be the foundation for a successful economy that works for everyone in British Columbia. Our recommendations are guided by the following principles:

- Respect for all working people and their Charter Right to join a union.
- Maintain a functional Labour Relations Board with improved, transparent, and consistent processes that promote trust and stability

NWDLC's Recommendations

Respect for all working people and their Charter Right to join a union

1. A regular review of the Labour Relations Code to allow for ongoing improvements and amendments that recognize the changing nature of work. S3
2. Reinstate card-based certification. S24
3. Repeal Employer Speech provisions during union organizing drives. S8
4. Use remedial certification as a remedy in cases of Unfair Labour Practice Complaints. S14
5. Strengthen Successorship Rights to deter 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.
6. Remove education as an Essential Service. S72
7. Retain and re-commit to the ban on replacement workers during lockouts or strikes. S68

Maintain a functional Labour Relations Board with improved, transparent, and consistent processes that promote trust and stability

1. Encourage the government to adequately fund the work of the Labour Relations Board so that critical services are delivered in a timely, appropriate manner.

2. Ensure timely arbitration processes by instituting timelines for arbitrators. S91, S128, S159.1
3. Establish shorter timelines where certification votes are necessary. S24
4. Establish a consistent timeline for open (raiding) periods that is known to all parties. S19
5. Repeal the process for partial decertification. S142

Introduction

The New Westminster & District Labour Council is a community-based central labour organization representing trade union members at the local level. We are a chartered organization of the Canadian Labour Congress, Canada's national voice for workers and their families. Our goal is to ensure our communities and our elected representatives at all levels of government in Canada respond to the needs of all people and workers, both union and non-union. We represent more than 60,000 union members in fourteen municipalities in the Lower Mainland, and this submission continues our proud union tradition of workers speaking out on issues affecting them in their workplaces and in their communities.

A thorough review of the regulations which govern Labour Relations in British Columbia, with a balanced approach that includes the needs of both workers and employers, and which examines the role of government, is long overdue. We welcomed the commitment to working people embodied in the mandate letter to Minister Bains that stated:

"It has never been more important for new leadership that works for ordinary people, not just those at the top. It is your job to deliver that leadership in your ministry." [i]

And included as a priority to:

"Ensure British Columbians have the same rights and protections enjoyed by other Canadians by reviewing the Labour Code to ensure workplaces support a growing, sustainable economy with fair laws for workers and businesses."

We believe our recommendations to the Review Panel will promote certainty as well as stable and harmonious labour/management relations. It is unfortunate, in our view, that for the last sixteen years the BC Liberals sided with employers and the business community at the expense of workers, upsetting the balance of labour relations in BC. Legislative changes have disadvantaged workers and infringed on

their Charter rights; processes for enforcement and investigation have been underfunded, slow, inconsistent and lacking in transparency. This has led to a critical lack of trust and the belief of working people in BC that their needs are less important than those of their employer and they are not likely to get a fair, balanced or timely hearing on their issues.

It is our hope that the Labour Relations Code Review Panel will first and foremost seek to restore the trust of working people in the Labour Relations Code by returning it to a state of balance between the needs of business and the needs of working people, respecting that the contributions of *both* parties are the foundation for a successful economy and a healthy society.

Our Recommendations

Respect for all working people and their Charter Right to join a union

1. A regular review of the Labour Relations Code ("the Code") to allow for ongoing improvements and amendments that recognize the changing nature of work. S3

Given that the current review is the first since 2003 under Section 3 of the Code, we feel it is important that there be a strong commitment to regular reviews that include consultations with employers, workers and their unions on an ongoing basis. The changes in technology alone in fifteen years are staggering, there must be a commitment to keep the Code up to date as a living document that is responsive to the changing nature of both work and Canadian society. Such a panel must be balanced in its approach and grounded in experience and expertise. Harmonious labour relations are not served by changes made to advantage a particular side, in response to a political ideology, or to address generally issues impacting only a single sector which may lead to unintended consequences elsewhere. Expertise and consideration are also required to ensure that changes to the Code are consistent and not in conflict with the *Canadian Charter of Rights and Freedoms* and other legislation. For these reasons it is our recommendation that an expert panel remain in place to examine labour relations on an ongoing basis.

2. Reinstate card-based certification. S24

When the BC Liberals eliminated card check certification shortly after coming to power in 2001, and without consultation with workers and unions, they effectively forced workers to join a union twice. Workers express a desire to join a union by signing a card, and then have to reaffirm that desire in a vote at a later date. In their 2016 paper *Restoring Fairness and Balance in Labour Relations,* John MacTavish and Chris Buchanan examined four distinct periods in recent history and determined that rates of

certification for two periods with mandatory voting had significantly fewer certifications, and conversely higher rates of Unfair Labour Practice complaints than the two periods where card check certification was in place[ii]. It was their conclusion that reduced rates in certification resulted in reduced access to collective bargaining for workers. In view of the Supreme Court of Canada's 2015 decisions clarifying the right of workers to choose to belong to a union[iii], we believe returning to a system of card check certification best upholds workers' rights under the Charter and reflects their desire to exercise these rights in a straightforward manner.

Workers often seek to unionize in workplaces where there is discrimination, harassment, and lack of access to wage and other improvements and there is also both a fear and a risk of reprisal by the employer for taking this step. Workers should not fear to exercise their protected rights, and the process of joining a union should not be onerous. In fact, the delay and additional administration required by secret ballot votes would only appear to serve the employer who may seek to inhibit or delay the process. In a 1992 report it was noted that *"The simple reality is that secret ballot votes and their concomitant representational campaigns invite an unacceptable level of unlawful employer interference in the certification process."*[iv]

3. Repeal Employer Speech provisions during union organizing drives. S8

Similarly to the move away from card check certification, the BC Liberals' addition of Employer Speech provisions to the Code undermines the already expressed choice of the workers to join a union, invites interference from the employer by allowing for 'captive audience' situations, and disregards the fact that employers already have access and the ability to speak to their workers at any time prior to the start of an organizing drive. Conversely, unions are not afforded similar access, so this provision is not balanced in its approach in addition to infringing on the workers' Charter rights as clarified by the Supreme Court in *Mounted Police Association of Ontario v. Canada*. Section 8 also does not account for the fact that the employer is in a position of power that is reinforced by the provision to express what is almost guaranteed to be negative or anti-union sentiment regarding the workers choice to join a union, or their choice between unions. The workers are seeking empowerment, to have a voice by bargaining collectively and to gain union protections at work. Employer speech, like secret ballot voting, seem to act more as a remedy for employer neglect and inattention to the conditions of their workplaces, instead of meaningful additions to balanced labour relations. For these reasons we recommend the repeal of all employer speech provisions during organizing drives from the Code.

4. Use remedial certification as a remedy in cases of Unfair Labour Practice Complaints. S14

Unfair Labour Practice complaints expose situations where the employer has acted in such a way as to infringe on the workers' Charter right to choose to join a union. We believe with such infringement there should be meaningful redress and so we recommend that remedial certification be the means for such redress. In the wake of such employer actions, a vote gives more space to a party who has already acted in bad faith, and by this point workers may not feel able to express their true desire without fear. Again, given that the Supreme Court decisions in 2015 effectively extended the *Canadian Charter of Rights and Freedoms* to include common labour activities, Unfair Labour Practice in this context is an infringement on workers' rights and remedial certification serves to balance the scales. It also offers a deterrent to bad behaviour from employers facing a union organizing drive in their workplace.

5. Strengthen Successorship Rights to deter 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.

The sweeping changes implemented by the BC Liberals' Bill 29 in 2002 fundamentally altered successorship rights and has negatively impacted workers in the healthcare sector. Where Successorship is understood to be the continuation of bargaining agreements and representation for workers in the event of a sale of business so that there is continuity and job security, this change in the healthcare sector has brought about a race to the bottom for workers where wages, rights and protections have been eroded. It has also burdened unions with reorganizing the same workers each time the contract is 'flipped' and has resulted in high turnover which negatively impacts patient quality of care. In a 2007 Tyee article, the Supreme Court's decision was highlighted, noting that: "The section 2(d) infringement is not justified under s. 1 of the Charter. While the government established that the Act's main objective of improving the delivery of health care services and sub objectives were pressing and substantial, and while it could logically and reasonably be concluded that there was a rational connection between the means adopted by the Act and the objectives, it was not shown that the Act minimally impaired the employees' s. 2(d) right of collective bargaining. The record discloses no consideration by the government of whether it could reach its goal by less intrusive measures. A range of options were on the table, but the government presented no evidence as to why this particular solution was chosen and why there was no meaningful consultation with the unions about the range of options open to it. This was an important and significant piece of labour legislation which had the potential to affect the rights of employees dramatically and unusually. Yet, it was adopted rapidly with full knowledge that the unions

were strongly opposed to many of the provisions, and without consideration of alternative ways to achieve the government objective, and without explanation of the government's choices. [143 144] [147] [149] [156] [158] [160 161]"[v]

That there were alternatives available and there was no meaningful consultation with workers and their unions underlines the way in which the Code can be manipulated to serve a political ideology rather than a reasoned and considered approach to promoting balanced labour relations. The same article at the time quoted Carolyn Askew, a union-side labour lawyer for more than 30 years, who said Bill 29 was a disgrace. "*The bill itself was a shocking and cruel attack on long serving employees in healthcare," she told the Tyee. "It was an attack on patients too, an attack that changed the workforce from one that was well paid, experienced and valued into a constantly shifting cast of itinerant workers. This is not what patients want or what they need. Patients need stability of care, and Bill 29 undercuts that stability."*[vi]

We strongly recommend that the statutory exemptions in health care be repealed, specifically Sections 6 of Bill *29 Health and Social Services Delivery Improvement Act* and of Section 4 and 5 of Bill 94 *Health Sector Partnerships Agreement Act,* and that Section 35 of the Code be broadened to prevent employers from jettisoning collective agreements and their obligations through contract flipping.

6. Remove education as an Essential Service. S72

While the right to strike has been recognized as a Constitutional right by the Supreme Court in *Saskatchewan Federation of Labour v. Saskatchewan, 2015 SCC 4*, we also understand that there are some services which are essential to the preservation of life and safety, and that workers in those sectors are not able to withdraw those services when collective bargaining fails to reach agreement. Education, however, is not such a sector. The designation of K-12 teachers and classroom assistants as essential seems more like expediency and deliberate disregard for the Charter rights of these workers than a considered and measured approach under the Code. It is understandable that the province wants to avoid potential disruptions caused by a strike, however this is precisely the point of workers being able to withdraw their services, that the potential for such a drastic action provides them with a strong position to meet the employer at the table as equal parties in bargaining. We strongly recommend the removal of the essential service designation from teachers and workers in education in order to avoid what is an unnecessary infringement on their collective bargaining rights. Further, we seek that the Code strictly confines essential service designations to the healthcare and emergency services sectors for the preservation of life and safety, that there be no abuse and unnecessary infringement on workers' Charter right to strike.

7. Retain and re-commit to the ban on replacement workers during lockouts or strikes. S68

Balanced labour relations require a balance of power between the parties. There can be no meaningful negotiation without a parity of leverage, and so we recognize that the right to withdraw labour is a way for workers and unions to exert economic pressure when collective bargaining reaches an impasse. The ability of an employer to use replacement workers in the event of a strike or lockout upsets the balance at the bargaining table and unfairly undermines workers and their unions. Submissions to labour code reviews from other jurisdictions in Canada[vii] rightly cite the strength of our current ban on replacement workers in BC as providing a fair system based on good faith and respectful labour relations. We recommend no changes to Section 68 and that the ban on replacement workers in BC continue to be upheld.

Maintain a functional Labour Relations Board with improved, transparent, and consistent processes that promote trust and stability

1. Encourage the government to adequately fund the work of the Labour Relations Board so that critical services are delivered in a timely, appropriate manner.

In *Restoring Fairness and Balance in Labour Relations*, MacTavish and Buchanan noted in 2016 that "A perfect storm exists of an underfunded, remote, and diminished Board that does not instill confidence that rights will be protected, and a government that openly attacks and denigrates those rights. Under the BC Liberals, it has become increasingly irrelevant and isolated from the community it is supposed to serve."[viii] If harmonious labour relations rely on a balanced and fair Code, administered by an impartial and respected Labour Relations Board ("Board") relied upon by both workers and employers, it follows that the Board must be adequately resourced and staffed. That has not been the case for the last sixteen years, and the result has been a slow, understaffed, under resourced Board that is impairing instead of promoting workers' access to justice. Using mail-in ballots instead of in-person votes solely for budgetary reasons or understaffing does not respect the workers' right to join or choose a union. MacTavish and Buchanan also note that "…the Board's routine use of mail ballots due to IRO lack of resources has become such a pressing threat to workers' right to join a union that a reconsideration panel of the Board was forced to address it head-on."[ix] Providing adequate staffing and resources for the Board demonstrates a respect for and commitment to workers' right to organize and their status as equal partners in the labour relations relationship in the province.

2. Ensure timely arbitration processes by instituting timelines for arbitrators. S91, S128, S159.1

Issues proceeding to arbitration often have significant impacts on workers, and a lack of regulated timelines can exacerbate these impacts and raise the issue of access to justice for the workers involved. Issues at arbitration can involve disputed wages, benefits, and unjust terminations and the lack of timely resolution to these issues can create a hardship for the worker. For these reasons we recommend instituting timelines for arbitrators similar to those in already in place for vice-chairs for decision making on critical workplace issues.

3. Establish shorter timelines where certification votes are necessary. S24

For reasons already stated, we believe it does not serve justice and the fair exercise of workers' rights to unionize as recognized under the *Canadian Charter of Rights and Freedoms* to have delays in the certification process. The decision to exercise these rights is not lightly made and represents a step into an often unknown realm for workers, with the prospect of a different dynamic in their relationship with the employer. To introduce further uncertainty by having delays in the process, during which there is sure to be communication, if not negative pressure from the employer, creates stress and a chilling effect for the workers. We believe where there is a 50% plus one threshold met certification should be automatic, in cases where this threshold is not met, the Board should facilitate an in person vote at a site away from the workplace within two working days. The site of the vote would ideally be a government office or other neutral place, so long as there is no hardship imposed on the worker in time or distance. Alternatives should be avoided unless mutually agreed by the parties. As MacTavish and Buchanan noted "Until recently, the Board's policy meant that it would rarely order mail ballots, given that certifications (in theory) are supposed to be processed on an expedited basis. Recently, however, mail ballots have become the norm rather than the exception, allowing employers even more time to wage anti-union campaigns and to improperly interfere in organizing efforts."[x]

4. Establish a consistent timeline for open (raiding) periods that is known to all parties. S19

Because there may be situations where workers have concerns that their bargaining agent is not free from influence by the employer, are unduly sectarian in nature or do not appear to have democratic, transparent processes, members may wish to exercise their right to choose another union as their bargaining agent. Workers in these situations may not be able to find out when the anniversary of their collective agreement falls to exercise this right under Section 19 of the Code, and so we recommend fixing the open period for collective agreements to set and clear dates in the calendar. The current

language for the open period is entirely dependent on the worker knowing the anniversary of their agreement, which in some cases they may not be able to easily ascertain.

5. Repeal the process for partial decertification. S142

The process for decertification or the termination of bargaining rights is clear in Part 3, Division 2 of the Code, and as such we feel the practice of conducting partial decertification under Section 142 is both inconsistent with this provision and lacking in transparency. We would recommend that partial decertification be prevented by the Board, failing that, that they be conducted in the same manner as laid out for full decertification so that the processes remain transparent and that workers can trust the matter receives due process in a clearly defined way.

Conclusion

In the past sixteen years, working people have been negatively impacted both by changes to provisions in the Labour Relations Code which have unfairly advantaged employers and by a failure to address the changing nature of work and workplaces. We are pleased to see that a meaningful consultation process has begun, and one which working people can have confidence that their voices are being heard. We believe this process, together with our recommendations, many of which simply repeal the erosions that have undermined labour relations in BC in recent years, will allow workers to again feel confident in trusting in the fairness and balance of both the *BC Labour Relations Code* and the BC Labour Relations Board. We view the rebuilding of this trust and relationship as the new foundation for future prosperity for workers and stable and harmonious labour relations for employers, and a successful economy for our province.

We would like to thank the British Columbia Labour Review Panel for their commitment to this process and their time in considering the recommendations we have put forward. Our recommendations are consistent with other central labour bodies in BC and speak to the priorities of our affiliated unions and the issues that are important to working people. We are happy to answer any questions or elaborate further, and are committed to supporting this process to ensure a balance and fair outcome for working people in British Columbia.

Endnotes:

[i] Mandate letter to Hon. Harry Bains, MLA Retrieved from: https://www2.gov.bc.ca/assets/gov/government/ministries-organizations/premier-cabinet-mlas/minister-letter/bains-mandate.pdf

[ii] 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

[iii] Mounted Police Association of Ontario v. Canada (A.G.), 2015 SCC 1

[iv] John Baigent, Vince Ready & Tom Roper, A Report to the Honourable Moe Sihota: Recommendations for Labour Law Reform (Sub-Committee of Special Advisors: September, 1992).

[v] *Campbell Government violated Charter Rights: Supreme Court,* Tom Sandborn, The Tyee, June 8, 2007.

[vi] Ibid.

[vii] Ontario Nurses' Association, *Submission to Changing Workplaces Review, Ministry of Labour – September 18, 2015*

[viii] 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

[ix] Ibid.

[x] Ibid.