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BC Labour Code Review Panel
Sent by email: LRCReview@gov.bc.ca

Dear Panel Members,

On behalf of the membership and Board of the Progressive Contractors Association of Canada (PCA), thank you for the opportunity to present our thoughts and recommendations on the Government of British Columbia's Labour Relations Code Review.

Introduction

PCA members are leaders in non-residential construction across Canada, including construction of many of BC's major projects such as the Port Mann bridge, the Sea-to-Sky highway, Site C, numerous Water & Sewage Treatment facilities and many hospitals and schools throughout the province.

Our members have been vital contributors to BC's labour and construction picture for the last 30 years, and employ thousands of British Columbians. We remain committed to being a positive and substantial presence in BC's construction industry now and in the future.

Our Association members are eminently qualified to speak to the need (or absence of need) for change in BC's Labour Relations Code. As major employers in BC, we are concerned that substantial Labour Code change—especially if it has the effect of changing the labour relations climate in BC or privileging one labour model over another—will do irreparable harm to this province, its economy, and its workforce.

PCA has actively participated in Labour Code review processes in other jurisdictions, including Ontario's Changing Workplaces review and, most recently, Alberta's review of its Labour Code and Employment Standards legislation. In both those reviews we were able to provide practical advice and feedback. We are eager to follow the same path here in BC and would welcome the opportunity to meet directly with the Review Panel.

We recognize that the call for these submissions is an important first step in this review, along with the town hall meetings that are being planned. However, we respectfully suggest that, should the Review Panel identify areas that it feels need further policy development, the Panel should identify these specific areas so that the labour relations community can make submissions knowing the initiatives that the Panel may be considering for recommendation. It is our respectful view that this is the only way that the Panel can be assured that it has engaged in a meaningful consultation.

PCA is pleased to see, and agree with, the general tenor of~~,~~ the terms in your mandate letter. We fully appreciate that the terms include the recognition that "there have been significant changes in the workplaces, economy and workforce of British Columbia over the past several decades." One of the most significant changes is the proportion of workers who no longer work under the traditional building trades model. Today, of the 90,000 people working in **non-residential** construction, roughly 30,000 are unionized. Our members represent roughly one-third of all unionized construction in the province. Important to note, the number of non-residential construction workers is expected to increase tremendously in BC over the next few years, and we expect PCA members will employ many of them.

We also appreciate that the terms of reference state that changes to the Labour Code should "…ensure workplaces support a growing, sustainable economy with fair laws for **workers and businesses**." PCA member companies completely support fairness for workers. We believe "fairness" means paying workers competitive wages and benefits and, most important, keeping them working. This can only be accomplished if there is an economic environment in BC that supports investment and thriving businesses. We believe that fairness for workers and businesses is best arrived at through stronger, more collaborative partnerships between workers and employers, rather than what can sometimes become a more adversarial relationship. Therefore, our proposal will focus on encouraging initiatives that foster collaboration, cooperation and build trust, and discourage proposals that undermine the collaboration, cooperation and trust so necessary to British Columbia's long-term economic well-being.

<u>BC Labour Code: Need for Continuity and Change</u>

Overall, PCA believes that British Columbia's Labour Code has served the people of this province well. While we acknowledge that some things have changed since the Labour Code's last revisions, we believe that the Code, as it currently stands, gets the balance between worker and company rights just about right, and has contributed to a lengthy period of labour peace. It is no coincidence, in our view, that the current labour-management climate has contributed to this province's current prosperity. The existing labour stability and predictability is critical to continued economic investment in British Columbia, and we are concerned about how possible changes to the labour code might discourage investment.

In your considerations, PCA urges you to consider our perspective on the following aspects of BC's Labour Code:

Section 8 – Right to Communicate

We believe the current policies are working and should not be changed, for the following reasons:

First, the Code already safeguards unions and union members against intimidation or coercion, thereby guaranteeing the freedom of expression that are their Charter rights. This has been underlined by case law from the Labour Relations Board (LRB) which has

issued decisions with clear guidance about what is and is not acceptable. And there have been relatively few cases where the LRB has had concerns that individual rights of free expression have been at risk.

Second, we believe that changes to Section 8 may be contrary to Section 1 of the Charter of Rights and Freedoms. Seeking to further restrict employers' right to communicate may constitute an unjustified restriction on their Charter rights, and would very likely be challenged in court. We believe there is no basis for further restriction on expression rights or their elimination.

PCA recommendation #1: no changes be made to the current regime related to Right to Communicate.

Section 19 – Open Period – 7th and 8th month.

BC's current Open Period happens within the 7th & 8th month of each year of a collective agreement. The Open Period is an opportunity for competing unions to "raid" a workforce. It should be noted that BC, with its annual open periods, is an outlier among its provincial counterparts. For most other jurisdictions in Canada Open Periods typically fall during the last two months of a two-year or three-year collective agreement.

From PCA members' perspective annual Open Periods are unnecessary, are disruptive and impede the productivity of any construction project. Excessive union raiding activity on or around a job site not only disrupts the workforce, but imposes significant costs through supervision of visitors, additional safety briefings, personal protective equipment, escorts around the project, and time with the workforce away from their regular duties

Union raids often involves highly aggressive and confrontational tactics and can have a direct negative impact on the morale of the workforce and the public perception of the project itself. Project Investors and Project Owners want to know that they can rely on labour stability during the course of a multi-year project, and that the project schedule and budget will meet required targets. All of those critical project elements are in jeopardy due to the uncertainty and instability created by BC's yearly Open Period.

PCA recommendation #2: that the Labour Code be amended so the Open Period falls during the last two months of a Collective Agreement, at a minimum every 3 years.

Section 24 (1) – Representation Vote Required

PCA believes that the current labour voting processes have served BC's labour market well and should not be changed. In particular, we object to proposals for automatic certification, either through card-based certification (certification occurring without a vote when a union signs up a given threshold of workers within a bargaining unit — e.g., greater than 50%) or imposed certification based on alleged unfair labour practices committed by an employer. We believe that both are undemocratic and undermine employees' representational rights and freedom of association.

The fundamental problem with card-based certification is that it removes the democratic right of employees to vote for or against a union. Card-based certification allows unions to get signatures and unionize an employer without employees necessarily knowing what they are signing or being fully informed as to the consequences of signing. Employees may sign because of peer pressure or fear of offending a union organizer or coworkers—common realities in workplaces. Employees also could be improperly coerced into signing, although we recognize there are provisions to make that illegal. Experience proves that signing a card does not mean the signer would vote the same way. This is true not only for certification and revocation votes, but in any election —a person's initial inclinations may change once they have more facts. The truest, safest, and fairest way to determine what employees want is a secret ballot vote.

Another critical point to make about the problem of card-based certification is that workers commonly belong to more than one union. In that environment, it is not an accurate premise that union membership means employees support certification of any particular employer. That is, displaying a card in a particular union is not an endorsement of that union in the present circumstances as employees will have. That employee could easily have membership in other unions at the same time. Furthermore, automatic certification would distort labour relations outcomes. Certification orders would be granted in cases where a secret ballot vote would lead to the opposite outcome. This is contrary to competitiveness, fairness, worker mobility, and investor confidence and is therefore contrary to the interests of workers and the public.

In Canada, certification usually requires employee affirmation through a vote, which is an important safeguard. BC, Saskatchewan, Manitoba, Newfoundland, Ontario (non-construction), and Nova Scotia (non-construction) all currently require a secret ballot vote, as does the Canada Labour Code. Card-based certification is not a mainstream process in Canada and should not be adopted in BC. The trend over the last few decades has been towards mandatory votes, not away from them.

The International Labour Organization (ILO) Committee of Experts has stated that safeguards should attach to compulsory recognition of unions, including "the representative organization to be chosen by a majority vote of the employees in the unit concerned." Automatic certification is inconsistent with the freedom of association because it forces employees to be associated with a union without the safeguard of a vote.

PCA recommendation #3: that the Labour Code retain current requirements for a representation vote, and reject any move towards automatic certification.

As noted above, PCA is not in favour of providing unions with the opportunity for automatic certifications (or card check). However, if the panel determines that automatic certifications should be permitted, PCA suggests that the following guidelines be established as the requirements and procedure for an automatic certification.

Membership in a union should not be taken as proof of or an indication of support in the union for the following reasons:

a. Most bargaining units and collective agreements require the employee to be a member of the union to remain employed, regardless of support.
b. In the construction industry many trades people are members of multiple unions in order to increase their employment opportunities.
c. Some employees in the construction industry only keep their membership active and current to remain in good standing for the union's pension plan and/or benefit plan even when they are not working for an employer not certified to that union.
d. It further may be that the employee supports a union when working for one employer but when working for a different employer the employee may not support the union.

Therefore, the following requirements should be created to ensure that the employees true wishes are being heard.

1. *"Fresh" and "Legitimate" Evidence*

   Given that union membership cards are not a clear indication or proof of a support of that union worker's intention, the evidence should be in the form of an individual petition that the employee signs and acknowledges that they are allowing the union to file a certification application of their behalf. We would be happy to consult with you on appropriate form that should take.

   Furthermore, any evidence – preferably a petition form but even in the case of using membership cards – that the Labour Board requires to show employee support should be "fresh". By this we mean that the evidence should be gathered within ninety (90) days of the certification application. This shows that this is the current wishes of the employee.

   Lastly, employees should have the right to 'rescind' the support at any time during the ninety (90) day period. See point 3 below.

2. *Evidence at or above seventy-five percent (75%)*

   Whether the preferred course of action is a petition form or membership cards, the threshold to waive an employee's fundamental right to a secret ballot vote should be significant. PCA proposes a minimum threshold of 75%.

3. *Rescind Support*

   Employees additionally require a clear and straightforward process to rescind their support before the union submits the certification application. This allow would employees the right to change their mind before the application. Once the application

has been filed the ability to change their mind no longer is permitted. This should apply whether the preferred process is by petition form or membership card.

Ideally employees should be able to send the Labour Board a form that rescinds their initial petition form with the union. The Labour Board would then send this form to the union (and only the union) so that the Employer is not aware of who supports or who does not support the union.

Section 24 (2) - Vote conducted within 10 days

Timeliness is a key consideration for all parties when it comes to Labour Relations activities. Ensuring a reasonable time frame is followed is important to employees who have requested a change, either certification or decertification, and the Employer who that affects. Unions also have their own agenda on whether they want a long or short time frame depending if they are incoming or potentially outgoing union.

Reasonable time frames for the Employer and the Employees would be in the range of 7 to 10 Business Days. Employers large or small, have different impacts of an application. Large Employer need time and manpower to pull the data out of complicated systems, check the data for accuracy, and may have to work with remote offices as sometimes the back office functions exist outside of the geographical regions. Small Employers need to pull staff away from their existing work to dedicate time to the effort, and may need to spend extra time to understand what is being asked and how they may be impacted by the labour relations code. Seven to Ten Business days is also reasonable as it is a usual time frame that an employee can expect to see the impact of changes in their workplace, mainly, a wage increase. If an Employer increases an employees' wage on the first of the month (for example, October 1st), then the employee will not actually see the new pay cheque and increased financial gain until October 11th, 9 days later, when he/she receives the weekly payroll deposit.

PCA recommendation #4: that the Labour Code retain current requirements for a vote conducted within 10 working days.

Sections 35-38 – Successor Rights, Mergers and Common Employer provisions

These sections govern the nature of the relationship between the employer and the respective union when two companies are involved, either through the future purchase or acquisition of a new company, or possibly a previous relationship between two companies that are currently considered separate. The industry term for two legally separate entities that might share a similar history and/or name is 'double breasting'.

<u>If removing the ability of employers to double-breast their operations is being considered, PCA strongly opposes such measures</u>. BC construction and maintenance organizations have engaged in double-breasting for decades. Changing the rules at this point would cause massive instability in the industry, which is not in the public interest. It would cause great

uncertainty and prompt unnecessary litigation. It would divert resources from their best economic use. It would also make BC less attractive as a place to operate compared to many other jurisdictions where double breasting is also available. This issue is a major concern to the construction industry.

PCA recommendation #5: no change be made to existing Successor Rights, Mergers and Common Employer provisions.

Sections 41-44 – Registration, certification or accreditation of councils of trade unions or employer associations

We believe these sections as currently written are effective and strike a balance between employer and employee rights. Specifically, we believe the voluntary nature of membership in employer associations in section 43 is particularly important as it allows employers to decide if they want to be part of a master agreement or go it alone. This is a critical element in maintaining flexibility for employers in bargaining and maintaining competitive advantages.

Furthermore, we believe a change to the Code that would prohibit wall-to-wall certifications or multi-trade certifications would be very harmful to the industry, and quite possibly unconstitutional (ie. contrary to freedom of association).

PCA recommendation #6: no change be made to existing registration, certification or accreditation of councils of trade unions or employer associations

Section 55 – First Collective Agreement

PCA believes that the current regime for establishing a first collective agreement is working well and should not be changed. In particular, we reject any move towards First Contract Arbitration, which allows a party to a round of collective bargaining for a first collective agreement to require arbitration rather than the normal recourse of strike or lockout. We reject the concept for the following reasons:

It is arguably contrary to the *Charter of Rights and Freedoms*. If the right to strike is a fundamental Charter right so, too, is the right of employers and employees to establish – or not establish – a collective agreement.

Requiring arbitration interferes with an employer's right to lockout, which is the flip-side of the right to strike and arguably a fundamental right also.

Arbitration often leads to collective agreements that are more expensive than they otherwise might be. It compels parties to enter an agreement they might not otherwise make.

Arbitration often skews collective bargaining. Rather than bargaining to get a deal, parties often bargain to best position themselves for arbitration. Fundamentally, arbitration results in a different process and often a different result than free collective bargaining. It is an interference for the sake of unions, not workers.

PCA recommendation #7: the Labour Code retain current requirements for arriving at a first collective agreement.

Other – Project Labour Agreements/Community Benefits Agreements

The Government of BC has given ample evidence of their intent to apply Project Labour Agreements (PLA), also called Community Benefits Agreements (CBA), to major public infrastructure expenditures in the future to ensure various social and labour policy outcomes. (It should be noted that PCA members are leading innovators in the areas of training and hiring under-represented worker groups such as First Nations and women, and apprentice training.) If that is indeed the case, then the Government may ask you to consider including language to that effect in the Labour Code. (This is the case in seven Canadian provinces and the Government of Canada.)

In various Canadian jurisdictions – including British Columbia – PLA's have been used as a means of restricting labour choice by designating a single "employer" that has entered into collective agreements with identified building trades. In practice the result has been to privilege one particular labour model – usually those affiliated with the Building Trades – at the expense of all the others. PCA strongly rejects the rationale behind restrictive PLA's: in our view they are regressive, inhibit competition, impair overall competitiveness, and are quite possibly unconstitutional. All qualified British Columbians should be able to share in work commissioned and funded by the public purse.

Should the Government insist upon pursuing PLA's for public infrastructure investments PCA asserts that all PLAs – whether governed by the Labour Code or not – must be subject to the following three conditions:

a) Workers must be free to choose the union they wish to work for;
b) All qualified companies must be allowed to bid for work, regardless of labour model they employ;
c) Bidding should be as competitive as possible (open to all qualified companies and workers regardless of union affiliation or lack thereof) so as to bring the best value for taxpayer dollars.

Conclusion

Overall, PCA believes that the province has been well served by its existing labour relations regulatory regime, and extreme changes will only harm the province in its delicate economic and fiscal situation. No one wants or needs a renewed round of labour unrest that will harm

British Columbia workers the most. As a result, we urge caution and prudence in the matter of Labour Relations Code review.

PCA largely supports leaving the legislation as it is; however, if there are to be changes, they should be modest and seek to avoid damaging investor confidence by way of increasing uncertainty, instability, unfairness, or regulatory burdens. Further, changes should not occur without clear and comprehensive discussion of the issues and specific proposals.

One final point: while PCA appreciates the opportunity to be consulted in the current review, we are concerned that the open-ended approach taken by the government, compounded by the compressed timetable that has been set for the present review, creates an environment of instability and uncertainty. If the government does proceed with changes, we ask for the opportunity to consult over the specific proposed changes.

Respectfully Yours,

Rieghardt van Enter

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BC Director
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cc. Paul de Jong, President, PCA
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