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Written submission to the Labour Relations Code Review Panel

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Introduction

I am a legal advocate in the Employment Standards Legal Advocacy Project (ESLAP) at Together Against Poverty Society. ESLAP supports low-waged, non-unionized workers by providing public education and advice on the BC Employment Standards Act, and by assisting them file complaints with the Employment Standards Branch. This program grew out of TAPS' work in helping low income individuals obtain justice through various administrative laws that govern their lives. In addition to Employment Standards, TAPS provides direct legal advocacy services in regards to welfare/disability benefits, and tenancy rights. TAPS has provided free, face-to-face legal advocacy and education for over 25 years, serving over 5,000 people annually.

In my work, I speak to many workers on a range of employment-related issues. The commentary I make below is based on the conversations I regularly have with low-income, often vulnerable, workers. I do not represent unionized workers. However, I have had many conversations with workers, both unionized and not, that I believe speak to two important positions put forward by the BC Federation of Labour and other worker-supporting organizations. The first position is to amend Section 3 of the Employment Standards Act so that unionized workers in BC will once again have access to the very basic rights afforded to non-union workers. The second position is that the Labour Relations Code be amended to protect vulnerable low-waged workers from intimidation when they attempt to exercise their right to form or join a union.

Amend Section 3 of the *Employment Standards Act* to restore ESA protections as the statutory minimum for all workers

In my work as an advocate for non-union workers, I have taken a number calls from unionized workers. Some of these calls involve complaints about losing grievances that the worker thought should have been won. Some calls are from workers who don't know who to call in their union, or to complain that their union representative did not call them back quickly enough. However, a number of my calls have been from members of unions who want to complain that they are not protected from basic minimums under the ESA. The most recent was from a member of the Christian Labour Association of Canada (CLAC), who called to complain that her employer had her working one hour shifts on a regular basis. When she complained to her employer, she was told that the union had negotiated a one hour

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minimum on calls outs. Section 34 of the ESA provides a minimum two hours pay, once a worker has reported to work. Other CLAC members have complained to me about excessive hours without overtime pay – again, apparently agreed to by their union, and enshrined within a collective agreement.

I have had to explain to these workers that, while pre-2002 versions of the Act contained a "meet-or-exceed" provision, Section 3 (2) now *excludes* union members from the most basic protections found within the *Act*, including all of Part 4 (Hours of work or overtime), Part 5 (Statutory holidays), and Part 7 (Annual vacation or vacation pay), if their collective agreement "contains any provision respecting a matter" covered by that part of the *Act*. Similarly, Section 3 (4) excludes union members from almost all of Part 3 (Wages, special clothing and records), if their collective agreement "contains any provision respecting a matter" covered by that part of the *Act*.

Prior to 2002, unions could only negotiate workplace conditions that met or exceeded the bare minimum offered under the Act. It is an obscene fact that employers in BC who wish to see their workers excluded from the protections under the ESA can now do so by offering voluntary recognition to a compliant, employer-friendly union, such as CLAC. Changes to the language in Sections 6 and 8 of the Code, provided by Bill 48, in 2002, make such a scenario all the more likely, as employers are largely free to encourage their employees to join a union that the employer finds agreeable.

Restoring restrictions on employer intimidation

Workers bring to our office a range of workplace issues and problems. Many of these issues can be resolved through the ESA. Some can be resolved through a referral to the Human Rights Tribunal or to WorkSafe BC. However, many, very legitimate concerns brought to our attention can only be addressed through the process of unionization and collective bargaining. Issues around unfair scheduling, arbitrary management decisions, or favoritism – to name just a few – are issues that currently can only be dealt with by workers who are organized to collectively negotiate the terms and conditions of their work. I have discussed the process of unionization with many, many, low-income workers. The response I get to almost every single offer to put them in contact with a union is fear. Sometimes a palatable sense of terror. Paraphrases of comments I have heard many times:

- "My boss won't allow that to happen."
- "My boss would kill me if I tried to join a union."
- "I would lose my job."
- "We tried that once. My boss called us together and said he would close the shop if we did."
- "Someone else tried that once. But they were fired."

Labour codes in North America were brought into being to regulate the struggle between what is often perceived as two powerful forces: capital, and organized labour. Putting aside the erroneousness of this power analysis, there is a good reason behind the push to make it easier for workers to start a union and harder for an employer to interfere: the workers who are trying to start a union are not yet organized, and not yet protected by collective agreement. In fact, they are at their most vulnerable. This vulnerability should outweigh academic or philosophical concerns about an employer's right to "free speech."

As noted by the submission prepared by MacTavish and Buchanan, Bill 42 "widen(s) the scope of permissible employer speech," allowed in an employer's efforts to intervene during a union drive. This is because the former (pre-Bill 42) limitations on employer speech were designed in such a way that an employer could communicate facts or opinions on their business. This allowed, for example, an employer to tell employees that the business could not afford wage increases, regardless of whether or not the workers joined a union. The qualification of Section 6 (1), and the changes to Section 8, brought into force by Bill 42, now allow for an employer to communicate anything – fact or fiction – to employees that they believe to be forming a union, so long as the employer does not intimidate or coerce those employees. It is clear from *Convergys Customer Management Canada Inc*. and *RMH Teleservices International Inc*. that the Board currently holds a very narrow understanding of what constitutes intimidation and coercion.

The submission made by the BC Chamber of Commerc, and other employer associations, asserts that the changes brought in by Bill 42 are consistent with the Charter, and represent a constitutionally coherent balance between freedom of association and freedom of speech, because the employer is not allowed to use intimidation and coercion. There are two problems with this assertion. The first is that the balance between employer speech and an employee's right to association with their fellow workers has not been tested by the Supreme Court. The second problem is that the "views" of an employer regarding the workplace are always coercive. Workers are dependent upon waged work for survival. When one individual has the power to interfere with the ability of another individual to continue working for wages, there is no balance in the expression of their individual views. Low-income workers are particularly vulnerable in this regard as even a temporary loss of employment can have catastrophic implications, including homelessness. Employees – particularly those not yet covered by a collective agreement – are not, in practice, free to challenge the speech of their employer on the topic of unionization, or any other workplace topic. To suggest otherwise is either dishonest or naïve.

The broad scope given to employers to express their views allows for employers to not only argue against unionization, but also to encourage employees to sign up with a particular union. It is clear from the conversations I have had with poorly represented unionized workers that there are cases where employers have pre-emptively approached the union, and then encouraged their workers to vote for that union. Whether by design or by accident, the changes brought about by Bill 42 have encouraged a situation where employers can pre-empt a worker-driven organizing drive by initiating a drive in collusion with a union that agrees to a weak contract. As mentioned above, in some cases these agreements actually deprive workers of their statutory minimums under the ESA.

Changes to the process of union certification brought about by Bill 18 exacerbate this problem. The card-check process that once existed, allowed workers to organize quietly, quickly, and, therefore, with less fear of confrontation with their employer. The new system has allowed for the certification process to take an average of over three months. As noted by the submission by MacTavish and Buchanan, the introduction of a mandatory vote is not the only variable in extending the amount of time it takes to certify a union (6). Nonetheless, it is an important variable in producing a long, drawn out confrontation with the employer, and acts as an impediment to low-income workers starting a union.

Vulnerable workers need to organize in a quiet, low-key manner so as to avoid a drawn out confrontation with their employer, and thus risk the loss of their employment. Against this need, is a shallow, self-serving argument by employer groups that conflates democracy with a secret ballot vote.

The submission of the Chamber goes so far to suggest that there is a "fundamental belief in our society in secret ballot votes," and conflates joining a union with electing a government, as if a union had anything near the power of a state. Once again, they float unsubstantiated constitutional theory in arguing that "(a)ny recommendation to remove the right to a certification vote would be contrary to this fundamental principle in the Code and the constitutional guarantees in the Charter" (8). As the case with their earlier cited argument about constitutional balance, this has not been tested in the Supreme Court of Canada, despite well-organized and well-funded anti-union business organizations in Canada, and despite the fact that the card-check system still exists in Manitoba, Quebec, Newfoundland, New Brunswick, and Prince Edward Island. Democracy involves a voice as well as a vote, and workers vote to join a union when they sign a union card, and they vote not to join a union when they refuse to sign a card.

Finally, and in a similar vein, I would like to address another unsubstantiated argument put forward by employer organizations: that the secret ballot prevents people from being coerced or threatened by union organizers or coworkers. I have never had a worker suggest that they did not want to talk to a union because they were afraid of being bullied by an organizer, or that their coworkers will be upset with them. Nonetheless, I feel this needs to be addressed because it has been put forward by some – including the BC Green Party Leader Andrew Weaver, who suggested that his "first-hand experience" of the union drive proved to him that some people feel "pressured" by their colleagues to sign a union card.[1] What is missing from this hyper-ventilated argument is evidence that union organizers or coworkers have some form of coercive power over an individual at work. It is unfortunate that some highly vulnerable tenured faculty felt peer-pressure during the union drive there. Undoubtedly, there were some hurt feelings. However, none of them faced the wrath of their employer; none faced dismissal for organizing a union; none of them faced any threat to their livelihood. This is not the case for low-income workers who are brave enough to start a union drive under the current legislation. The ability to organize quietly, and to present an employer with a *fait accompli* is essential to meaningfully extending the right to organize to the most vulnerable workers in BC.

Contrary to the assertions of the employers groups in BC, the Supreme Court has upheld a number of limitations to such constitutionally protected rights as the right to speech. Canada has human rights legislation that, in part, protects vulnerable populations from hate speech. At one time, the Labour Relations Code of BC had similar restrictions on the speech rights of employers; the right to speak did not over-ride the right to associate free from intimidation These *constitutionally valid* protections still exist elsewhere in Canada, because the Supreme Court *has* determined many times that the abstract concept of freedom needs to be balanced against the concrete realities of unequal power in Canadian society. They need to be returned to the Code in BC.

[1] http://vancouversun.com/news/politics/b-c-greens-kill-ndps-proposed-change-to-unionized-secret-ballots