1518 UFCW

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March 20, 2018

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Labour Relations Code Review Panel
Michael Fleming (Chair),
Sandra Banister, Q.C., (Member)
Barry Dong (Member)

Dear Sirs/Mesdames:

Re: Submission to the Labour Relations Code Review Panel from the United Food and Commercial Workers International Union, Local 1518 (UFCW 1518)

This submission is made on behalf of the UFCW 1518 in response to the invitation for submissions by the panel of special advisors (the "Panel") appointed by the Honourable Minister of Labour, Harry Bains, to review the *Labour Relations Code* (the "*Code*").

We thank the Panel for the opportunity to provide it with our insight as to what minimum changes need to be made for a more balanced *Code* which addresses the modern needs of workers and their unions.

1. UFCW 1518

We trace our roots to 1899 when a group of retail clerks in Vancouver met to discuss how they could improve their working conditions. Today, we represent over 20,000 workers in a diverse range of industries including community health, seasonal agriculture, and professional services.

2. Introduction

Undoubtedly the Panel will receive a large number of very well-crafted submissions from the community. The submissions of the BC Federation of Labour and unions will more than adequately cover a wide range of deficiencies in the current *Code*. Rather than speak a little about a large number of topics, we believe it is important to focus on a few key concepts and then provide specific recommendations encapsulating those concepts.

We believe that the Panel ought to

(1) Ensure the *Code* captures constitutional developments since 1992;
(2) Ensure the *Code* provides meaningful access to collective bargaining;
(3) Ensure the *Code* protects workers in new forms of businesses, including franchised and contract services; and
(4) Ensure the *Code* captures the BC Federation of Labour recommendations in *Restoring Fairness and Balance.*

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3. Ensuring the *Code* captures constitutional developments

In 1992, when the government enacted the *Code*, no one could question the importance of labour rights in Canada. However, at that time, labour rights were not recognized as constitutional rights.

So, while the government of the day carefully set out a fair and balanced approach to labour relations, it did not do so from the perspective that labour expression and collective action were rights guaranteed under the *Charter*.

UFCW 1518 was fortunate enough to help usher in a new era of the Supreme Court of Canada re-examining labour rights as being constitutional rights. UFCW 1518 went before the Supreme Court of Canada to argue successfully that the definition of picketing contained in the *Code* was unconstitutional: *U.C.F.W. Local 1518 v Kmart Canada*, [1999] 2 S.C.R. 1083. Since that time the Court has held

- collective bargaining is a fundamental constitutional right
- collective action, such as striking, is a constitutional right.

In *Health Services and Support - Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27, the Court recognized that collective bargaining is protected by the fundamental *Charter* right freedom of association. The Court held in paragraph 82:

> The right to bargain collectively with an employer enhances the human dignity, liberty and autonomy of workers by giving them the opportunity to influence the establishment of workplace rules and thereby gain some control over a major aspect of their lives, namely their work.

The Court commented on the importance of collective agreement being an association protected right under the Charter at paragraph 85:

> Finally, a constitutional right to collective bargaining is supported by the *Charter* value of enhancing democracy. Collective bargaining permits workers to achieve a form of workplace democracy and to ensure the rule of law in the workplace. Workers gain a voice to influence the establishment of rules that control a major aspect of their lives.

The Court concludes, at paragraph 86, “Recognizing that workers have the right to bargain collectively as part of their freedom to associate reaffirms the values of dignity, personal autonomy, equality and democracy that are inherent in the Charter”.

In *Saskatchewan Federation of Labour* v. Saskatchewan, 2015 SCC 4, the Court of held that the right to strike is an associational activity protected by section 2(d).
These three landmark decisions profoundly alter our understanding of the purpose of the *Code*, which provides the statutory access to constitutional rights of expression and association. These decisions also demonstrate a need to change the essential elements of the *Code* to provide greater access to those rights and greater opportunity to exercise those rights. It is not enough to

merely talk about the importance of *access to* and *exercise of* constitutional rights; this Panel has to ensure that the *Code* not only meets but exceeds what is constitutionally required.

General review of the Code to enhance access to and exercise of Charter *rights*

This is the first review of the *Code* after the Supreme Court Canada fully and forcefully determined freedom of association for the purpose of collective bargaining and the right to strike as constitutional rights.

Because of these landmark legal developments, the Panel needs to review **all** sections of the *Code* to revise and enhance access to collective bargaining and the exercise of constitutionally protected right of picketing and striking.

Changes to the *Code* ought to expressly provide that the revisions ensure workers have actual, meaningful access to collective bargaining and not simply theoretical access. Changes to the *Code* ought to strengthen the ability of unions and their members to exercise their right to strike.

Some might fear that enhancing the opportunities for unions and their members to strike and communicate about their labour dispute might lead to more strikes or more detrimental impacts on the economy. However, that is not necessarily the case. Collective agreements are typically much longer than in the past, reducing the opportunity for a labour dispute. But, also, it may lead to the end of prolonged strikes, such as what we have witnessed, such as at IKEA.

Changes to Section 2: the duties

One small but significant change that ought to be made is to amend section 2 of the *Code* to expressly take into account the constitutional developments when interpreting and applying the *Code*.

Section 2 places obligations on the Board and persons exercising powers and performing duties under the *Code*. Section 2 at minimum needs to be revised to include the following duty:

> (a.1) Recognizes the constitutionally protected freedom of association and freedom of expression of trade unions and their members;

This change will make significant steps when it comes to interpreting the rest of the *Code* in light of the Supreme Court of Canada's decisions over the past fifteen years.

Changes to section 66

When the Legislature enacted the *Code* in 1992, it did not have the benefit of knowing that the activities listed in the section are constitutionally protected rights of association and expression. We propose that section 66 provide as follows:

66. No action or proceeding may be brought for
    (a) ~~petty~~ trespass to land which a member of the public ordinarily has access
    (b) interference with contractual relations, or
    (c) Interference with the trade, business or employment of another person resulting in a reduction in trade or business, impairment of business of opportunity or other economic loss

    Arising out of collective bargaining, strikes, lockouts or picketing permitted under this Code or attempts to persuade employees to join a trade union made at or near but outside entrances and exits to an employer's workplace

The original intent of the phrase "petty trespass" was to ensure that courts would not intervene when the only unlawful conduct by a union was trespassing. However, the inclusion of the word petty has caused considerable confusion in the Courts and even more confusion among employers who believe peaceful attendance exceeds the scope of what constitutes petty. The removal of the word "petty" would still restrain conduct that is not peaceful but provides a clearer intent of the original statute and better protection for the constitutionally protected speech.
Further, there has been confusion surrounding when the rights are triggered. Unions and their members have, or ought to have, the right to communicate about a collective bargaining dispute prior to a strike or lockout occurs. This change would eliminate any doubt that unions and the workers have the right to leaflet about their collective bargaining dispute on land which the public ordinarily has access to without needing to commence a strike or lockout. Such a change is consistent with the public interest being served by minimizing disruption caused by strikes and lockouts, and the public interest being served by lawful leafletting about a labour dispute without the need for a union to trigger a strike or an employer to lockout.

Conclusion

The most important task for this Panel in its review is to instil into all parts of the *Code* the findings of the Supreme Court of Canada in the recent cases. The purpose of statutes such as the *Code* is to allow access to and exercise of constitutional rights. Therefore, the current barriers to access to collective bargaining and the current restrictions on the exercise of rights under the *Code*, which were created when labour rights were not constitutional rights, needs to be changed.

4. Ensure the *Code* meets the need for meaningful access to collective bargaining

What has been lost on earlier panels, but will not be lost on this Panel, is that there are unnecessary barriers that prevent employees from meaningful access to collective bargaining. Unless those barriers are eliminated, or at least diminished, many employees will not be able to access their constitutional right of association not because the employees do not want to be unionized but because of a number of impediments that they face.
UFCW 1518 recommends that there be at least four changes to the *Code* to allow meaningful access to collective bargaining:

(1) Access to the employee list
(2) Return to card-based certification
(3) Change to the maximum time for a vote
(4) Restoring prohibition to anti-union campaigning

Access to the employee list

Where a union is able to demonstrate a threshold of 20 percent support of employees in the proposed unit, the employee list and contact information should be disclosed within a reasonable period of time.

One of the most fundamental changes to the economy over the past 25 years has been changes to the workplace and the workforce. As technology advances, the notion that there is a single work location where all the employees attend and know each other is antiquated. It is no longer realistic to premise access to the constitutional right of collective bargaining and freedom of association on the theory that co-workers know each other, they know where each of them works, and even how to contact each other. Sometimes this occurs because the workforce is spread across a large geographic area and number of worksites. Sometimes this occurs because the workforce is composed of a large number of part-time, casual, temporary or auxiliary employees. Sometimes this occurs because employees do not even regularly attend their worksite; instead, they receive their direction from their employer through email, texting, smartphones and other devices.

Therefore, the *Code* should be amended to include an administrative process similar, but not identical, to that recently enacted in Ontario: section 6.1 of the *Labour Relations Act*, 1995, S.O. 1995, C. 1. In short, once a trade union can establish it has achieved 20 percent membership support, the Board ought to disclose to the union a list of employees with contact information. Unlike Ontario, there ought not to be any attempt to adjudicate bargaining unit appropriateness or fix the proposed bargaining unit description as this creates unnecessary legal disputes, costs, and delay. This administrative process is not to pre-determine appropriateness, but to ensure that modern workers have meaningful access to their rights under the *Code*.

Further, unlike Ontario, there should be a time by which the Board must determine and provide the employee list. It should take a reasonable period of time, no longer than a week, from the date of the union's application for the Board to determine whether the union has at least 20 percent support. The legislation ought to require appropriate safeguards about protecting the information and limiting the use of the information to address privacy concerns with this process. The public policy interests must be balanced against privacy interests.

Return to card-based certification

UFCW 1518 recommends that card-based certification be restored, bringing B. C. in line with the majority of jurisdictions in Canada. The majority of Canadian jurisdictions employ card-based systems. Card-based certifications are available in the federal jurisdiction and all three territories, Newfoundland and Labrador, New Brunswick, PEI, Quebec, and Alberta. In addition, card-based

certifications are available for certain industries in Ontario and Nova Scotia. Saskatchewan and Manitoba are the only other jurisdictions that require a representation vote in all instances. The Code should be made more consistent with labour legislation elsewhere in Canada be reinstating card-based certification.

Opponents of card-based certifications raise false allegations about the reliability of card-based certification or concerns about the conduct of unions. Mandatory vote systems are a demonstrated invitation to improper and unlawful employer conduct that prevents the exercise of constitutionally guaranteed freedom of association by employees. For example, in 1992 the province's Committee of Special Advisors charged with examining overall industrial relations strategy for B.C. unanimously recommended a return to the card-based certification:

> 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. The statistical profile in British Columbia since the introduction of the vote was confirmed by the repeated anecdotes our Committee heard in its tours across the Province. It is also borne out in decisions of the Board and Council. Unions would sign up a clear majority of employees as members and a vote would be ordered. Then key union supporters would be fired or laid-off while threats of closure dominated the campaign and the vote itself was viewed as a vote on whether or not to continue with employment rather than as a vote on redefining the employment relationship. 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. A shorter time framework will not deter an employer intent on "getting the message" to his employees. Neither is the imposition of fines and/or the expeditious reinstatement of terminated employees likely to introduce attitudinal or behavioural changes in employers intent on ensuring that their employees do not join unions. The simple reality is that secret ballot votes and their concomitant representation campaigns invite an unacceptable level of unlawful employer interference in the certification process.

Reinstating card-based certification is the restoration of a democratic means of accessing constitutional right to collective bargaining.

Change to the maximum time for a vote

Even with the restoration of card-based certification, there will still be instances in which a vote must be held. The current ten-day time for a vote is unnecessarily long. The maximum length has turned into the *defacto* time: so votes are commonly held on the ninth or tenth day. There is essentially no instance in which the time for the vote is less than seven days.

There is no longer any reason that a vote cannot earlier than seven days. Therefore, the *Code* should be changed so that a vote ought to be held no later than five, or seven days, from the date of the certification application.

Previously, technological and administrative reasons existed why a vote might need to take up to ten days to occur. In 1992, when the ten-day limit was set, facsimiles were new, few people had email, and cell phones did not exist. It would take time to contact and coordinate inspection of payroll records, membership cards, and schedule a vote.

With the ease of communication and lack of payroll inspection, ten days is no longer needed for an IRO to prepare a report and conduct a vote. An IRO's report ought to take no more than three to four days to be prepared and provided to the Board. Therefore, a vote should be scheduled no more than five to seven days from the time of application.

Thus, a minor but important change to the *Code* is to adjust the maximum time for a vote to better reflect the technological developments and administrative changes, such as no payroll inspection.

Eliminate anti-union campaign

UFCW 1518 recommends that section 8 be changed by reinstating the previous wording of Section 8 of the *Code*. Doing so will help to address employer interference during certification campaigns and assist in levelling the inherent employer-employee power imbalance in the employment relationship that has been recognised as an improper barrier to access to collective bargaining.

Previously, the Code contained the following prohibition:

> An employer or a person acting on behalf of an employer must not participate in or interfere with the formation, selection or administration of a trade union or contribute financial or other support to it.

In the ten years or so that the *Code* provided this limitation, the Board found that the wording placed significant restrictions on an employer attempting to influence a decision by employees whether or not they would join a union.

The current section 8 of the *Code* has allowed employers to conduct anti-union campaigns during working hours at work. It has long been recognized that the power imbalance inherent of the employer-employee relationship has an especially intimidating impact on employees. That is why the Code had restricted the anti-union campaigning that is presently permitted.
As currently provided, the Code legislatively, and we submit improperly, enshrines unequal access to the employees. Section 7 restricts unions from entering the campaign. Therefore, employers enjoy unfettered access to employees to conduct anti-union campaign at work on company time.

Employers typically perform anti-union campaigning at work on company time while unions are not permitted to counter such conduct.

One option to eliminate the legislated power imbalance would be to remove 7(1) in its entirety, thereby allowing unions to be able to counter the anti-union campaign. Doing so would mean both unions and employers would be allowed to campaign on company time and company property. But that option is not the preferred option as it would create a greater impact on the employees and the workplace.

The preferable solution is to reinstate the reasonable restriction against anti-union campaigning found in the prior section 8. Therefore, UFCW 1518 urges the immediate reinstatement of the old language.

5. Ensure the *Code* protects workers in new forms of businesses, including franchised and contract services

Protecting workers in franchised businesses

Since 1992, there has been a discernible change in the nature of the economy and workforce. One such development is the growth of franchised businesses. In such arrangements, the decision-making for the business is shared by both the franchisor and franchisee, and there is a shared community of interest of the employees working for the different franchises.

The *Code* and the Board's policy of true employer and common employer do not adequately protect workers in this new and prevalent business structure.

Therefore, this panel ought to recommend changes to the Code, similar to the recommendations found in the recently released Final Review of the *Ontario Labour Relations Act*: The Changing Workplaces Review: An agenda for Workplace Rights, at pages 357-361. The only substantive change we would make to those recommendations would be the inclusion of the franchisor in the new bargaining structure. UFCW 1518's specific recommendation would be:

> The *Code* would require certified, or voluntarily recognized, bargaining units of different franchisees of the same franchisor by the same union in the same geographic area, required to bargain together centrally, with representatives of the franchisee employers in that area and the representatives of the franchisor, as set out below:
>
> a) An employer's organization, composed of representatives of the franchisees, will represent the franchisee employers at the bargaining table. The Board should be given the authority to require the formation of an employer bargaining agency and set its terms, if necessary. The employer's organization to bargain centrally would remain so long as the union held bargaining rights.

b), the Board would have the authority, if requested by a party involved, to direct that the terms of a collective agreement between a franchisee and a union could be extended to apply, with or without modifications, to a newly certified bargaining unit involving the same union and a different franchisee (in the same franchise organization). The Board would also have the power to require that the franchisee employers bargain centrally.

c) In exercising its authority, the Board should consider whether the proposed terms and bargaining structure contribute to the development of an effective collective bargaining relationship and serve the development of collective bargaining in the sector/industry.

d) Each franchisee would have individual responsibility for compliance with the resulting collective agreement and would sign an agreement binding on its location(s). In this model, agreements by the parties to distinct provisions applicable to some but not other franchisees can be dealt with in collective bargaining.

e) Multiple locations owned by the same franchisee, a common situation in the franchise industry, could be consolidated as a single bargaining unit by the Board in appropriate circumstances pursuant to the recommendation on newly certified locations of a single employer, but that employer would also participate in central bargaining under this recommendation as a franchisee of the same franchisor. Similarly, if corporate stores owned by the franchisor of the franchisees governed by central bargaining were certified, these could be consolidated as a single bargaining unit of the same employer pursuant to the recommendation on newly certified locations of a single employer as well. In addition, if it was the same union as the union centrally bargaining with the franchisees that certified the franchisor, collective bargaining with the franchisor employer would be part of the franchisee central bargaining process.

f) In centralized bargaining, any strike or ratification vote would involve the entire constituency of bargaining units and not the individual bargaining units.

This proposed change would meet the purpose of the *Code* by putting in place a rational structure that would place the entire employer at the table with the employees and their union to bargain all terms and conditions of employment of their workplace instead of allowing fragmented bargaining that undermines the rights of employees.

Protecting workers in contracted services

As with the development of franchised businesses, since 1992 there has been an explosion of contracted services, including in building maintenance, food, security and health. While contracting out and contract flipping has existed for years, changes in the economy and workforce have led to a tremendous development on the frequency of such occurrences. Labour legislation

in Canada has been slow to evolve to prevent the harm caused to the employees and the public by contracting out and transferring of work between contractors.

Nearly 40 years ago, in *Metropolitan Parking*, [1980] 1 Can LRBR 197, the Ontario Labour Relations Board recognized that the successorship provision as it existed in Ontario (and as it now exists in British Columbia) was deficient:

> In reaching our conclusion we are not unmindful of the rights of the employees and their union, nor have we rejected the applicant's contention that the "mischief" present here is virtually identical to that which Section 55 is designed to remedy. There is no doubt that the periodic retendering of the management contract can frustrate the employees' established collective bargaining rights, threaten their job security, and significantly undermine the possibility of establishing a stable collective bargaining relationship at the parking location. The need to continually reorganize the individuals employed at the site not only poses a problem for the trade union, but also for the Federal Government and any previously unorganized subcontractor who becomes the successful bidder. There may well be a new application for certification, a new round of bargaining and threat of industrial conflict and disruption of service each time a new employer takes over. This is obviously not the intention of the parties…but it will be the result of the transaction where the circumstances are similar to those existing in the present case. And, for the reasons which we have already set out, we do not think section 55, as presently drafted, can cover the situation. To so hold, in the present case, would be to root bargaining rights in the location, the employees or the work, rather than the "business". Whatever may be the case in other subcontracting situations, we do not think the change of subcontractors in the circumstances of this case constitutes a transfer of a business from one to the other (page 218)

In 1997, our Provincial Government introduced legislation to address some of these issues: Bill 44. However, the Government subsequently withdrew Bill 44 and appointed a Section 3 Committee to hear submissions and make recommendations regarding the issues addressed in the Bill. Subsequent Section 3 committees have all held that this a pressing issue that needs to be addressed. But what has prevented protecting these workers has been political pressure by the employer community, plain and simple. Everyone knows the problem; and everyone knows the solution. It is time to protect these workers from the harm caused by contracting out and contracting flipping.

Ontario has now taken steps to address the deficiencies in the successorship provisions of its legislation: see sections 69.1 and 69.2 of the *Labour Relations Act*, 1995, S.O. 1995, C. 1.
Therefore UFCW 1518 recommends a change to section 35 of the *Code* to provide for successorship upon contracting out in the building maintenance, food, security and health (including long-term residential care) sectors in keeping with the Ontario model.

Further, the Panel may wish to recommend the repeal of repeal Section 6(5) of the *Health and Social Services Delivery Improvement Act*, SBC 2002, c. 2, and the Repeal Sections 4(4) and 5(5) of the *Health Sector Partnerships Agreement Act*, SBC 2003, c. 93.

Conclusion

The Code needs to address the needs of the modern workers by addressing issues impacting tens of thousands of workers working for franchised businesses and contracted services. This Panel ought to facilitate meaningful collective bargaining rights for these workers and protect them dealing with fractured businesses.

6. Adopting the BC Federation of Labour recommendations

In a recent paper, *Restoring Fairness and Balance in Labour Relations***,** the British Columbia Federation of Labour set out some proposed legislative changes that ought to be implemented immediately. Given the limited time and space, we will not elaborate further other than to say the BC Federation of Labour's conclusion is based on the experience and insight of a large number of unions and workers in this Province. The proposals, of course, were intended to be immediate steps while a section 3 committee, or another panel, considered more significant changes. So the proposals ought to be viewed as the first steps, not the all steps, that this Panel ought to take.

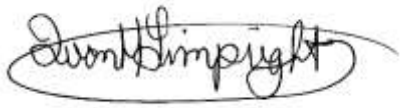
Further, we have reviewed the BC Federation of Labour's submission to this Panel. We join in and adopt its recommendations.

7. Conclusion

Since 2002, the B.C.'s labour laws have been unbalanced, favouring employers over workers. As the economy has evolved and technology has developed, the failure of B.C.'s labour law to change has compounded the inequity.
This Panel's recommendations must restore fairness and balance to our labour laws. Employees in the modern workforce must have access to their fundamental freedoms to associate, recognized by the Supreme Court of Canada as a critically important constitutional right – the right to organize, to engage in meaningful collective bargaining and to strike.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Yours truly,



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President

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