

BC Building Trades Submission to  
Minister of Labour

**BC Building Trades' Feedback on Recommendations for Amendments to the Labour  
Relations Code**

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## SUMMARY

The BC Building Trades welcomes the opportunity to provide feedback on the August 31, 2018 report by the Review Panel composed of Michael Fleming, Sandra Banister Q.C., and Barry Dong.

The BC Building Trades supports many of the changes the Panel has recommended.

However, the Panel's few recommendations relating to the construction industry are seriously flawed and will have a negative effect on construction workers and unions. A particular problem is the Panel's recommended definition of "construction" - a definition that no-one asked for in the public submissions process. Without explanation, without a clear precedent, and without having received any public input on whether and how "construction" should be defined in the *Code*, the Panel has recommended a very restrictive definition, one that will negatively impact our members.

We continue to call for an independent review of construction industry labour relations.

## RECOMMENDATIONS THE BC BUILDING TRADES SUPPORTS

The BC Building Trades supports the following recommendations.

### **Recommendation No. 3: Employer Communication with Employees.**

The recommendation to return to the pre-2002 provisions regarding employer speech will help to restore employee choice and will limit improper employer interference in union certification campaigns.

### **Recommendation No. 18: First Collective Agreements.**

The recommendation to remove the strike vote requirement to access first collective agreement mediation is an important step in facilitating access to collective bargaining. Requiring employees with a new union to take a strike vote before their union can engage in a mediation process creates an unnecessarily confrontational dynamic rather than promoting the cooperative resolution of collective bargaining disputes.

### **Recommendation No. 21: Essential Services and Education.**

The recommendation to remove education as an essential service is consistent with international law, which defines essential services as those services that protect the life, health, and safety of citizens. The provision of education, while important, is not a "life and limb" service that justifies interference with the fundamental right of workers to collectively withdraw services. This recommendation is also consistent with BC's historical approach to essential services, as education was not included in essential services legislation until 2001.

### **Recommendation No. 29: Resources for the Labour Relations Board.**

The Labour Relations Board needs to be properly funded. The Board plays a central role in ensuring that employees have meaningful access to their conditionally guaranteed rights under the *Code* and it cannot discharge that role without proper funding.

## RECOMMENDATIONS THE BC BUILDING TRADES SUPPORTS IN PART

The BC Building Trades supports aspects of the following three recommendations, but would like to see amendments.

### **Recommendation No. 10: Changes in Union Representation.**

This will be dealt with below under the heading “Construction-specific recommendations”.

### **Recommendation No. 12: Successorship.**

The recommendation to amend the successorship provision to capture some contract re-tendering is needed to protect marginalised workers and maintain a modern Labour Relations Code which achieves its objective of supporting workers’ rights and avoiding employer manipulation. Having said that, there is no apparent policy reason for limiting this protection to certain industries as recommended. The BC Building Trades supports a general provision providing for successorship rights on contract re-tendering.

### **Recommendation No. 14: Statutory Freeze of Terms and Conditions after Certification.**

The recommendation to extend the post-certification statutory freeze provision from 4 to 12 months is a positive update to the Code however, there is no reason to limit the freeze to 12 months. There should be a freeze pending completion of a first collective agreement. First Collective Agreements now take longer to negotiate and few are now completed within 4 months. The limited restriction that the statutory freeze imposes on businesses is needed to provide stability for groups of workers seeking to establish a union in their workplace.

### **Recommendation No. 19: Sectoral Collective Bargaining.**

While we support the call to have industry councils and industrial inquiry commissions examine issues of sectoral bargaining on an ad hoc basis, the BC Building Trades calls for the immediate appointment of the single issue commission to examine Sectoral Collective Bargaining.

## RECOMMENDATIONS THE BC BUILDING TRADES CANNOT SUPPORT

*NOTE - The BC Building Trades does not support the Panel’s overall approach to the construction industry, including several key aspects of Recommendation No. 10. We will explain our concerns about Recommendation No. 10 in the next section, as part of our comments on the Panel’s overall approach to construction labour relations. In this section we will deal with the Panel’s other recommendation the BC Building Trades cannot support, Recommendation No. 5.*

The BC Building Trades opposes the Panel’s **Recommendation No. 5: Access to Collective Bargaining**. The BC Building Trades cannot support the majority of the Panel’s recommendation to maintain mandatory certification votes. The majority notes that most jurisdictions in Canada (7 out of 11) have a card-based certification system and yet they recommend that BC maintain the conservative norm of mandatory certification votes. The reasons provided in support of this recommendation do not withstand scrutiny.

The majority suggest that this choice (mandatory votes vs. card-based) does not really make much of a difference – quoting a statistic that says the success rate in card-based systems is only 9% higher. With respect, that statistic is profoundly misleading and significantly understates our experience in this province about the actual difference between the two systems. According to the statistics published by the BC Labour Relations Board, the difference between the two systems is far more dramatic:

- 1974-1983 (card check): average of 7411 employees each year became unionised;
- 1985-1992 (mandatory vote): average of 4106 employees each year became unionised;
- 1994-2000 (card check): average of 8762 employees each year became unionised; and
- 2002-04 & 05-15 (mandatory vote): average of 2526 employees each year became unionised.

The majority's suggestion that shortening the time frame for a vote by a few days (10 days to 5 business days) will not meaningfully support employee choice. With respect, the proposed time frame will make little difference – employers will still have at least 7 days to engage in an anti-union campaign. Employees should be free to select a union without having to withstand their employer's campaign be it a 10 day campaign or a 5 business day campaign.

The government should support employee choice and facilitate access to collective bargaining by implementing a card-based system of certification.

## COMMENTS ON APPROACH TO THE CONSTRUCTION INDUSTRY

The Panel's treatment of construction labour relations is superficial and fails to address the serious problems with the current Code. The BC Building Trades therefore maintains its call for the immediate establishment of a separate panel to focus specifically on reviewing labour relations in the construction industry.

Before commenting upon the Panel's recommendations on the construction industry, the BC Building Trades wishes to comment upon several aspects of the Panel's treatment of the construction industry. We will then go on to comment on Recommendation No. 10: Changes in Union Representation, including explaining our view that the Panel's recommended definition of "construction" is unduly restrictive.

### ***The construction industry – unique features and unique needs***

The construction industry has several unique features that demand legislation specifically geared to facilitate workers' access to collective bargaining. General labour relations legislation is, for the most part, designed for fixed industries - industries where employers have significant capital invested in fixed assets, and where workers can expect to have stable, continuing employment with the same employer. But the construction industry lacks these attributes. It is characterised by mobile employers and a mobile workforce. It is a cyclical, seasonal, and project-driven industry. Construction employers are often small companies that have little capital invested and few if any fixed assets. Construction workers are generally hired on a project-by-project basis and have no expectation of long-term employment with any particular employer.

These features of the construction industry make it very difficult for workers in the industry to exercise their right to bargain collectively. Even if a group of construction workers manages to become organised during the life of a project, they are likely to be laid off before a first collective agreement can ever be reached. And laid-off workers have no right to be recalled when their former employer starts a new project. This creates a significant barrier for workers in the industry wishing to access their fundamental right to bargain collectively.

Every province in Canada has specific legislation dealing with construction labour relations. In almost all the provinces, that construction-specific legislation is specifically designed to facilitate workers' access to meaningful collective bargaining in the specific context of the construction industry. In contrast, the construction-specific provisions of the BC legislation (s. 41.1 of the *Labour Relations Code* and s. 3.1 of the *Labour Relations Regulation*), both of which were enacted in 2001, were designed to actually inhibit workers' access to meaningful collective bargaining.

Our construction labour relations legislation needs to change. Unlike every other province in Canada, BC's labour legislation is designed to inhibit access to bargaining by construction workers. It is now time for the government to order an industry-specific review.

### ***Earlier reviews of the construction industry***

The Panel concludes its brief discussion about the construction industry by stating, at page 35, that "the construction industry was extensively reviewed in 1992, 1998 and 2012. Accordingly, a further review of the construction industry is not warranted at this time." With respect, that is incorrect. The construction industry was not "extensively reviewed" in 1992, 1998 and 2012.

Here is a summary of what did happen in 1992, 1998 and 2012.

- **1992.** A Committee of Special Advisors (John Baigent, Vince Ready and Tom Roper) were tasked with reviewing the construction industry. However, they had to defer that mandate because they did not have the time or resources needed to deal adequately with construction.
- **2012.** While the Labour Relations Board did review bargaining in the construction industry in 2012, they did so only in the context of the existing legislation. There was no public consultation, no meaningful input from the trade union community, no examination of potential changes to the Code and, critically, no analysis of the need for specific provisions to facilitate access to collective bargaining in the construction industry.
- **1998.** The only modern comprehensive review of construction industry labour relations in BC was conducted over 20 years ago in 1997-98 when a Construction Industry Review Panel composed of Stan Lanyon and Stephen Kelleher was asked to look at whether construction-specific labour relations legislation was necessary and, if so, to recommend appropriate language. At page 1 of their February 25, 1998 report, *Looking to the Future: Taking Construction Labour Relations into the 21st Century*, Lanyon and Kelleher stated that: "**construction is unique and merits separate consideration in the Labour Relations Code.**" They therefore recommended a comprehensive scheme for what they called Industrial, Commercial and Institutional (ICI) construction labour relations.

In 1998, the government of the day accepted Lanyon and Kelleher's recommendations, and promptly enacted Bill 26, amending the *Code* to establish a limited form of sectorial certification in the ICI construction industry. Bill 26 provided for a rational and balanced system of collective bargaining in the construction industry and provided employees with meaningful access to collective bargaining.

Unfortunately, the new construction-specific provisions of the *Labour Relations Code* were short-lived, since the Liberal government removed them shortly after taking power in 2001. In their place, the Liberals enacted s. 41.1 of the *Labour Relations Code* and section 3.1 of the Labour Relations Regulation, provisions specifically designed to inhibit access to meaningful collective bargaining. Section 41.1 has subjected building trade unions to a wildly dysfunctional and unfair system of collective bargaining, in which their representation by the Bargaining Council of BC Building Trades Unions (*BCBCBTU*) has been mandatory and subject to Labour Relations Board oversight, while the corresponding employer bargaining agent, the Construction Labour Relations Association, has been voluntary and not subject to any oversight whatsoever.

To sum it up, the Panel was simply wrong when they stated that the construction industry has been "extensively reviewed" three times in recent years. There has only been one meaningful review, the 1998 review by Kelleher and Lanyon, and it specifically concluded that there needed to be construction-specific legislation that facilitates access to collective bargaining. That legislation was enacted, but repealed shortly thereafter, and has not been replaced to date.

#### ***Faulty rationale for leaving s. 41.1(2) in place***

The Panel recommended leaving s. 41.1(2) in place purportedly on the basis that there has not been a strike or lockout in the construction industry for over 30 years (see p. 35 of the Panel's report). The Panel states it is concerned that removing s. 41.1(2) would "not be conducive to stable labour relations."

With respect, a lack of strikes or lockouts is not the measure of effective labour relations legislation. While no one wants strikes or lockouts, they are an important part of our system of labour relations and their absolute avoidance is not a valid policy objective.

#### ***Recommendation No. 10: Changes in Union Representation***

The BC Building Trades supports the raid window for construction being in the summer, but does not support restricting raids to every 3 years in construction. Furthermore, we do not support the restrictive definition of "construction" recommended by the Panel. This section will summarize our concerns.

In order to understand the importance of effective legislation governing raids in the construction industry, it is necessary to understand the ongoing corrosive effects of employer-dominated unions of convenience. Unfortunately, the Panel ignored this issue. In Alberta, however, a recent review of construction industry labour relations did not ignore the issue. On the contrary, Andrew Sims' 2013 report to Government, *Alberta Construction Labour Relations Review*, tackled this issue in depth, noting that in the construction industry, unions of convenience are "used by Employers as a means of blocking organizing efforts by the building trade unions". Mr. Sims went so far as to note that these unions of convenience had emerged from BC, and were starting to cause problems in Alberta.

The Panel should have recognized, as Arbitrator Sims did in Alberta, that unions of convenience need to be effectively regulated in this province too. The BC Building Trades seeks an independent review of unions of convenience to look at their negative effect on workers both within and beyond the construction industry.

There are a number of different techniques used by employers and their unions of convenience to undermine legitimate trade unions. One of the most common is for large construction employers to come into the province and start working on a very small project – usually a small subcontract - with a small group of employees. They make sure that this original small group of employees will support their union of convenience, and they become certified to that union. They then “negotiate” the collective agreement they want, with the union they have chosen, and then bid on the work that they actually came to the province to perform – often, major construction projects that require them to hire many more employees. Once the employer’s union of convenience is certified, the majority of the employees who actually end up working on the major project have no say in the selection of their bargaining agent. That decision was made by their employer.

This is why raiding is important in the construction industry. It is the only way many construction workers will have a choice in the selection of their bargaining agent. We wish to comment on three aspects of the Panel’s recommendations with respect to raid legislation.

1. **Summer Raid Window.** Employers and their unions of convenience try to prevent employees from changing unions. One common technique is to set the raid window in a collective agreement for the winter – when few, if any, workers are employed. This is why a mandatory summer raid window is important in construction. It ensures that the raid window occurs when construction is in full swing and allows employees an effective choice in their bargaining agent. The BC Building Trades supports the recommendation for a summer raid window in construction.
2. **Limiting Raids to every 3 years.** We do not, however, support the Panel’s other recommendation about raiding, that the annual raid window in the construction industry be removed and that raids should be limited to once every 3 years. Few construction projects last 3 years. If employers and their union of convenience are able to limit raiding to every 3 years, most construction workers will never have any say in the selection of the bargaining agent. The whole purpose of a summer raid window will be defeated. Moreover, there is nothing in the recommended Legislation that would prevent an employer and their union of convenience from renewing their 3-year agreement every two years, effectively ensuring that there would never be a raid window.
3. **Definition of "construction".** As part of their recommended provisions on raiding, the Panel recommended that the *Code* contain a definition of “construction”. The BC Building Trades does not support this recommended definition. It is flawed in a number of ways and until the question of whether and/or how to define “construction” is properly examined there should be no express definition in the *Code*.

The BC Building Trades has the following further and more specific comments on item 3 above, the Panel’s approach to the definition of “construction.”

Procedurally speaking, the proposed definition is flawed because **it was crafted without any public input whatsoever**. None of the public submissions filed with the Panel asked that a definition of “construction” be included in the *Code*. There was no opportunity to make submissions regarding the notion of a definition generally, nor on the specific definition the Panel

decided to put forward. The recommended definition of “construction” is not based on any precedent, as far as we are aware: while labour legislation in the other provinces define “construction” in various ways for labour relations purposes, the recommended definition cited above differs materially from those examples. Furthermore, while previous incarnations of the BC *Labour Relations Code* in BC have also contained definitions of “construction”, and the “construction industry”, the Panel’s recommended definition is also unlike either of those earlier definitions. The Panel, to sum it up, gave no indication of how or why they arrived at the definition they have recommended.

The Panel’s recommended definition also has several substantive flaws. For ease of reference, recommended definition reads:

“construction” means construction, alteration, decoration, restoration or demolition of buildings, structures, roads, sewers, water or gas mains, pipelines, dams, tunnels, bridges, railways, canals or other works, but does not include

- (a) supplying, shipping or otherwise transporting supplies and materials or other products to or delivery at a construction project, or
- (b) services directly or indirectly related to servicing and maintenance of the premises;

For comparison’s sake, a definition of “construction” was originally introduced in this province’s labour relations legislation in the *Labour Code Amendment Act*, 1984 c. 24. That definition read:

“construction” means the construction, alteration, decoration, repair or demolition of buildings, structures, roads, sewers, water or gas mains, pipelines, dams, tunnels, bridges, railways, canals or other works but does not include

- (a) supplying, shipping or otherwise transporting supplies and materials or other products to and delivery on a construction project, or
- (b) routine maintenance work;

The above definition stayed in place for 8 years until the *Labour Relations Code* was introduced in 1992. The new *Labour Relations Code* did not contain a definition of “construction.”

Six years later, Lanyon and Kelleher recommended that a definition of “construction industry” be included in the new *Code*, and in Bill 26 the government amended Part 4.1 to add the following definition:

“construction industry” means the employer and employees engaged in the construction, alteration, decoration, repair or demolition of buildings, structures, roads, sewers, water or gas mains, pipelines, dams, tunnels, bridges, railways, canals or other works but does not include those employers and employees engaged in

- (a) delivering supplies and materials to a construction project, or
- (b) routine maintenance work;

The above definition remained in the *Code* until 2001 when the then Liberal government repealed Part 4.1 of the *Code* altogether, including the definition.

The definition recommended by the Panel is most similar to the definition of “construction” in the Alberta *Labour Relations Code*. It reads:

“construction” includes construction, alteration, decoration, restoration or demolition of buildings, structures, roads, sewers, water or gas mains, pipelines, dams, tunnels, bridges, railways, canals or other works, but does not include

- (i) supplying, shipping or otherwise transporting supplies and materials or other products to or delivery at a construction project, or
- (ii) maintenance work;

Whereas the Alberta definition is inclusive (i.e., “construction” includes...’), **the Panel’s recommended definition is problematic because it is exclusive** (i.e., “construction” means...’). The construction industry is, of course, not limited to the expressly listed areas. But the recommended exclusive definition would arguably foreclose the Board from interpreting the definition to include any aspects of the industry other than those expressly listed. For example, excavation is an integral part of most construction projects, and is characterized by the same unique features (mobile workforce, short projects) as other construction work. Yet excavation is inexplicably left out from the proposed definition. Whereas an inclusive definition like Alberta’s would likely be interpreted as including excavation, an exclusive definition may well not be. This creates a real risk that the scope of the *Code’s* provisions with respect to construction will be inappropriately limited, with no apparent policy justification.

The BC Building Trades is also concerned that **the recommended definition excludes a very broadly-defined class of maintenance-related work**: “services directly or indirectly related to servicing and maintenance of the premises.” The corresponding exclusion in Alberta’s definition is much narrower: it simply excludes “maintenance work”. The exclusions previously in force in BC were narrower still, excluding only “routine maintenance work” from the definition of “construction”. Again, there is no explanation as to why the Panel has recommended that such a wide swath of maintenance-related work be excluded, nor is there any clarity about just how broadly such an exclusion might be interpreted.

The BC Building Trades also takes issue with the Panel’s unexplained decision to recommend following Alberta’s lead with a **definition that excludes supply, shipping and transportation work**. There is an ongoing dispute in the construction industry about work involving “supplying, shipping or otherwise transporting supplies and materials or other products to or delivery at a construction project”. There has been a drive by many employers and employer organizations to exempt these activities, even though most of them fall into a traditional definition of construction. By adopting the same language as the Alberta provision and recommending a definition that would exempt these activities, the Panel has essentially weighed in on this controversial debate – again without any explanation or justification. Before the Legislature redefines these activities as falling outside the scope of “construction”, it needs to examine this issue more closely.

Finally, the **recommended definition fails to adequately explain which employers would and would not be in “construction”**. In other jurisdictions, there are provisions that address situations where employers in other sectors (school boards, for example) employ construction workers to construct their own buildings. The recommended provision does not address this issue and will result in litigation and confusion.

To sum it up, the recommended definition of construction is not a neutral definition. While the full scope of the Panel’s intentions are not known, the recommended definition will significantly narrow the scope of the construction industry. Before the Legislature adopts a definition which will significantly change the current law, it needs to examine this issue more closely.

## CONCLUSION

While there are positive aspects of the Panel's report, which the BC Building Trades supports, some of its recommendations, especially the provisions dealing with construction, fall short. We continue to call for an independent review of construction industry labour relations and an independent review of the role of unions of convenience.

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