March 20, 2018

Submission regarding the British Columbia Labour Relations Code

The Canadian Association of Counsel to Employers ("**CACE**") makes this submission to the Labour Relations Code Review Panel pursuant to its February 16, 2018 letter to the Labour Relations Community. This submission is solely the submission of CACE made on behalf of its members and does not necessarily represent the position of our clients.

Background on CACE

The Canadian Association of Counsel to Employers, CACE, is a national not-for-profit association of management-side labour and employment lawyers with a mandate to ensure that advancements in Canadian law reflect the experience and interests of employers. CACE was established in 2004 and comprises over 1300 members from across Canada working in every sector of the economy. It is overseen by a volunteer board of directors from all Canadian jurisdictions consisting of 18 members. CACE's membership includes lawyers employed in the private sector, employed by governments, and in private practice. CACE is the only national organization of management-side labour and employment lawyers.

CACE engages in legislation and law reform activities at the provincial and federal levels. Its objectives include providing governments, courts, labour boards, and other administrative tribunals with input in respect of policy and legislative reform from the perspective of lawyers acting on behalf of employers in Canada. CACE members include internal and external counsel to many British Columbia employers which will be impacted by the proposed legislative changes. CACE is also uniquely positioned to provide a national perspective on the issues in question.

One of CACE's top priorities is presenting timely and substantive submissions on public policy matters of interest to its membership and constituency. It regularly monitors key developments in the legislative and regulatory arena at both the provincial and federal levels with a view to identifying opportunities to make submissions on behalf of its members.

CACE draws upon the shared experience and expertise of its members to address legal issues affecting Canadian employers through the work of its Advocacy Committee, which has a mandate to participate in significant legal and policy development.

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CACE has recently made several important contributions to the legal and policy development dialogue:

- Making submissions to the British Columbia government in response to its consultation regarding re-establishing the Human Rights Commission.

- Making submissions to the Nova Scotia Labour Board in connection with its review of its policy in respect of casual employees.

- Making submissions to the Alberta government in response to its request for input in regard to changes to the Employment Standards Code, the Labour Relations Code and the Occupational Health and Safety System;

- Making submissions in response to the Ontario Changing Workforce Review Special Advisors' Interim Report and Bill 148 (proposing amendments to the *Employment Standards Act* and the *Labour Relations Act*);

- Making submissions on federal legislative and policy reviews relating to human rights tribunal procedure, genetic discrimination, privacy and surveillance, work stoppages, replacement workers, Part III of the *Canada Labour Code*, and the *Pension Benefits Standards Act*, 1985;

- Making submissions to the Alberta government relating to employment standards and essential services, and the Standing Committee on Alberta's Economic Future with respect to its review of the *Personal Information Protection Act*;

- Intervening before the Supreme Court of Canada on significant labour and employment law cases (e.g. *BC Teachers Federation v. The Queen; Wilson v. Atomic Energy Canada Limited; R. v. Cole*; *Bernard v. Canada (Attorney General)*; *UFCW, Local 503 v. Wal Mart Canada Corp*).

This submission is based on input from our British Columbia membership and our Advocacy Committee.

General Comments

The present review has asked the following questions (from the website):

1. Which specific sections of the *Labour Relations Code* (the "*Code*") do you wish to see amended, and why?

2. What are your top issues or concerns with the existing *Code*?

3. How do your proposals promote certainty and harmonious and stable labour/management relations?

4. What are your experiences or thoughts about BC's *Code*?

5. Is there anything else you would like the panel to consider when developing recommendations about amendments to the *Code*?

In response, CACE notes that these questions appear to assume that changes to the *Code* are necessary. In that regard CACE's fundamental position is that this premise is flawed and changes to the *Code* are unnecessary and will upset the labour peace that British Columbia has enjoyed for the last several decades:

1. Like all Canadian labour legislation, the *Code* is modelled on the 1935 *Wagner Act* from the United States. In that context, the passage of time alone does not necessitate revising the *Code.* Care must be taken in seeking to fix something that in our submission is not broken.

2. The *Code* is not out of date. In fact, concepts contained in the *Code* have been subsequently followed by other jurisdictions.

3. The *Code* has served British Columbians well. British Columbia labour relations have been increasingly stable over the years, and particularly in recent years. At the same time, employment in British Columbia has led Canada in growth, in income, in competition, and in opportunities created by new investment.

4. There have been no significant or broad-based private sector work stoppages in decades and the province has experienced the longest period of labour relations peace in modern history.

5. In our submission, the *Code* is in line with mainstream Canadian labour legislation. Nevertheless, we caution against over-emphasizing the goal of being "mainstream."

6. From our perspective on behalf of employers, the *Code* is currently fair, balanced, and effective. That does not mean there are not aspects of the *Code* we would advocate changing. However, making changes also comes at a cost of destabilizing labour relations and tipping the playing field. Ultimately, the measure of fairness, balance, and effectiveness should consider all perspectives and give priority to the public interest, not the interests of unions or employers. CACE agrees with the International Labour Organization (ILO) which recognizes that only in consensus can successful legislative change be achieved (see below).

7. Any changes to labour legislation must consider the impact upon the province's competitiveness in attracting investment and economic opportunities for employers.

Capital is mobile, and it is in the public interest that British Columbia's laws and regulations encourage employers to establish and build operations in British Columbia.

8. While participants in the labour relations system will no doubt have preferred areas of change, this is not the same as saying there is a need for change, and any decision to make changes should not be premised on preferences, when there are no real needs.

The Need for Meaningful Consultation and Tripartite Support

While periodic review of how labour and employment relations has changed and how legislation may need to evolve to reflect the needs of employers and workers within the British Columbia economy is important, dramatic recalibration, particularly without broad stakeholder support and consensus will only upset the stable labour relations environment that British Columbia has enjoyed for the past two decades.

Tripartite consultation in labour and employment matters should be the bedrock of stable labour relations dialogue and change. Meaningful tripartite participation and the introduction of amendments based upon overall consensus will avoid the "politicization of laws", which we expect the Panel wishes to avoid, and is also more likely to garner broad acceptance, support, implementation and compliance. Evolution based upon consensus among stakeholders will facilitate the broader goals of the Review, as effective protection for vulnerable workers in precarious jobs depends on the education of employees and employers concerning their respective legal rights and obligations; a respect for the law; compliance strategies (for employers) and consistent enforcement within a stable human resources environment. Each of these goals has a greater likelihood of success in an environment in which all stakeholders have understood and accepted the need to implement the changes ultimately recommended.

Balanced and stable workplaces in British Columbia will not and cannot be served by a swinging pendulum of workplace law that reacts to political ideology or influence. Tripartism must be the foundation for the evolution of labour and employment law in British Columbia. The Tripartite Consultation (International Labour Standards) Convention, 1976, of which Canada is signatory, at Article 1, paragraph 1, provides that:

> Each Member of the International Labour Organisation which ratifies this Convention undertakes to operate procedures which ensure effective consultations, with respect to the matters concerning the activities of the International Labour Organisation set out in Article 5, paragraph 1, below between representatives of government, of employers and of workers.

Fundamental legislative changes, should they be contemplated by the Review, must be reflective of the wishes and concerns of all stakeholders and shaped through consensus. The International Labour Organisation ("ILO") described the optimum decision making process in its National Tripartite Social Dialogue, An ILO guide for improved governance, as follows:

> To lead to agreements, tripartite negotiations involve choices and compromises between all parties. The golden rule is consensus-building. There must be a conducive atmosphere of willingness to give and take, and strike a win-win bargain. Both parties need to concede.
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> A decision reached by consensus is the expression of the collective will of all the parties involved. Consultations and negotiations take place until a decision that is acceptable to all is reached.
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> (National Tripartite Social Dialogue, page 34)

Only in consensus can successful legislative change be achieved in line with the principles set out in the Review. In this respect the ILO described the optimum result based process as follows:

> ILO experience shows that labour law reforms that have been crafted through an effective process of tripartite consultation involving the organizations of workers and employers, as real actors of the labour market, alongside relevant government agencies prove more sustainable, since they take into consideration the complex set of interests at play in the labour market. Also, they can ensure a balance between the requirements of economic development and the social needs.
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> Conversely, labour law reforms imposed without effective consultations not only often meet with resistance on the part of the labour market actors, but also, more importantly, will lack legitimacy and support and thus will face problems at the implementation stage. The development of a sound legal framework requires broad-based dialogue that guarantees support and ownership as well as effective enforcement of the legislative provisions. In this respect, it is important that the consultation of social partners starts early in the process and takes place at every step of labour law development.
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> (National Tripartite Social Dialogue, page 261)

CACE respectfully wishes to specifically address two aspects of the process relating to the current *Code* review:

1. We are concerned about the accelerated timetable of these changes. The *Code* is important legislation and deserves the appropriate time for study, input, consultation, and legislative drafting (if applicable). The current timetable should be extended. This concern is amplified when considering the next point.

2. We are concerned about the lack of transparency in this process. The areas identified in the communications to the labour community are vague and uncertain, leaving stakeholders unsure of exactly what the Panel or the government is contemplating. This will result in insufficient consultation and commentary from stakeholders on the issues that may result in new legislation. Many of the client groups represented by CACE are unaware of what the Panel or the government may be considering. Many are choosing not to make submissions because they are unclear about the issues. It would have been far more preferable to have specific issues and background information set out in advance which provided guidance to British Columbians, rather than forcing parties to construct "straw persons" at this stage for fear of losing the opportunity to address more concrete concepts at a later stage. At the very least, we ask that the government provide an opportunity for input once potential changes have been identified.

Specific Submissions

We have attempted to anticipate which proposals and policy issues the Panel will be considering in an effort to provide some substantive input at this stage. It is our hope that upon conclusion of the current canvas of proposals and ideas the Panel and/or the government will allow for further input once the community has articulated the proposals that it is considering.

Card-based Certification

CACE expects that a primary issue being considered by the Panel will be card-based certification. In our submission, removing the right to a secret ballot vote and allowing for card-based certification would be a significant mistake and step backward for British Columbia.

The secret ballot vote is a fundamental democratic right. The importance of this right is self-evident. We do not as a society entrust important decisions of mandatory representation, such as government, to procedures that do not ensure this most basic protection. History demonstrates the value of this right. The government of British Columbia should not be moving in a direction that is contrary to democracy.

Union representation under the *Wagner Act* model includes rights and obligations upon different parties. Employees are obliged to be represented by unions they may not want if

a majority of employees have voted for that representation. Part of the balance in our current system is that before we require union representation, support for a union must be demonstrated through the safeguards of a secret ballot vote.

This important safeguard is also recognized by the ILO Committee of Experts:

> "[W]hen national legislation provides for a compulsory procedure for recognizing unions as exclusive bargaining agents [representing all the workers, and not just their members], certain safeguards should be attached, such as: (a) the certification to be made by an independent body; **(b) the representative organization to be chosen by a majority vote of the employees in the union concerned**; (c) the right of an organization, which in a previous trade union election failed to secure a sufficiently large number of votes, to request a new election after a stipulated period; (d) the right of any new organization other than the certified organization to demand a new election after a reasonable period has elapsed." [Emphasis added]
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> (Freedom of Association and Collective Bargaining, Report III (Part 4B), International Labour Conference, 81st Session, 1994, Geneva, para. 240)

Any movement towards card-based certification is contrary to the process endorsed by the ILO and, we submit, contrary to the freedom of association under the *Canadian Charter of Rights and Freedoms (the "Charter")*.

Experience shows us that card-based certification is not a fair or accurate demonstration of employee wishes for certification:

1. Certification applications frequently fail despite initial support exceeding 50% in union cards or petition signatures. While unions argue this is because of employer unfair labour practices, there is no evidence that unfair labour practices are responsible for any significant impact upon failed certification votes. In any event, such practices are already prohibited by the *Code* and unions have remedies available to them when they have evidentiary support for their claim. It is rare for the Labour Board to order re-votes, which is within its current powers when it is persuaded that the initial vote did not reflect the true wishes of the employees. We note that unions also commit unfair labour practices in the context of certification drives, and the impact of those practices upon certification applications is similarly a concern to employers. The safest measure of employees' true wishes is still the secret ballot vote.

2. Employees are frequently members of more than one union. Membership in one union does not necessarily mean an employee wants that union to represent him or her at a particular employer.

3. Employees frequently sign union cards or petitions for reasons that do not show support for union representation. Employees are often unaware of the implications of signing a union card in a card-based certification system, and in many cases sign cards based on incomplete or inaccurate information provided to them by union organizers. They also may sign a card due to peer pressure, at a moment of pique, or otherwise for reasons other than truly wishing to have a union represent them.

CACE submits that depriving employees of a secret ballot vote is not fair to employees or employers, is not balanced, and is not an effective way of determining employee support. It is also unfair and not conducive to positive labour relations to impose a collective agreement upon employers and employees without a secret ballot vote. The implications in such situations are significant. Similarly, it is not fair to deprive employees of the opportunity to hear from both unions and employers when deciding whether to select a union or not. The *Code* and other Canadian legislation (including the *Charter*) allows for employer free speech with employees, provided certain safeguards are followed (e.g., no intimidation or threats). Like most contentious issues, better decisions result from a free flow of information.

In addition, card-based certification is not mainstream. At present, a mandatory secret ballot vote is required in most Canadian jurisdictions.

There is no evidence to support a compelling need for a card-based model in British Columbia. In CACE's submission, the consideration of such a model appears to be entirely based upon the unsubstantiated assumption that vote-based certification results in decreased levels of unionization. Such reasoning is not only illogical in our submission, it also lacks empirical support.

In fact, there is no statistical correlation provided that connects declining union rates with a vote-based model for certification. Statistics Canada, in its most recent review of unionization trends confirms that the unionization rate has been in steady decline since 1980. This trend is not unique to Canada.

Simply stated, the unionization rate is and continues to be more reflective of a shifting economy rather than the manner in which certifications are conducted. The evidence does not support revolutionary change of the *Code* and the current vote-based union certification model, under which there has been labour and business stability. Transformation is appropriate when a system has proven incapable of functioning and serving the purposes sought – this is not the case in British Columbia, where labour relations have been effectively regulated for decades, and stable for many years.

CACE is not aware of any empirically supported reasons that support amending the fundamental democratic principles in British Columbia workplaces to take away from employees the meaningful right to participate in determining whether they wish, by simple majority, to assign their personal contractual rights to an agent.

CACE also disagrees with the suggestion by labour organizations that the needs of workers can only be addressed through reversing the declining rates of unionization. If workers feel they need the support of a union, the existing provisions of the *Code* allow them to seek representation. It is submitted that the long term trend towards lower unionization rates reflects worker preferences for direct employment relationships with their employers having regard to transformational changes that have occurred in the modern workforce.

"Best Practices Elsewhere in Canada"

It is not possible to respond to this area without understanding what practices from other jurisdictions the Panel is contemplating. We have addressed comments above with regard to the fact that British Columbia is generally in line with the mainstream. From the perspective of employers, there are differences in the *Code* from other provinces that do promote the public benefit in British Columbia. Those aspects of the *Code* should not be changed. We are not proposing changes.

Period Before Certification Vote

The Panel may hear calls to shorten the 10-day statutory timeline from application to certification votes. In reality, the 10-day timeline has effectively been much shorter. A common practice is for unions to file certifications on a Friday, with employers receiving notice of the application the following Monday or Tuesday. This means that the vote is often scheduled for the following Friday or Monday, leaving an actual period of 3-4 business days for an employer to engage in its right to communicate with its employees, and for employees to consider the choice that is before them.

Shortening this period to 5 days (as has been suggested) would effectively eliminate the right of employers to respectfully and lawfully communicate with its employees upon the filing of an application. CACE submits that such a change is also unnecessary given that there has been no ongoing pattern of unfair labour practices or broad-based employer abuse of communication rights under the *Code* since communication rights were helpfully clarified by the Board in decisions such as *Cardinal* and *Convergys* more than fifteen years ago.

The period between application and secret ballot vote is also important for employees to properly investigate and consider the important and relatively permanent choice to give up their right to represent themselves in employment matters and instead have a union represent them as part of a collective. Truncating this period further would significantly impact employees' abilities to make an informed decision, having had the opportunity to hear from both the union and their employer, as well as to make investigations on their own, and to take appropriate time for reflection.

In addition, experience has shown that the logistics of scheduling a vote and generating the voter lists takes much of this 10-day period. A reduction to five days would put enormous and unnecessary pressure on Board resources.

Such a change would be a significant strike at the appropriate balance that has existed for decades.

Communication Rights

We expect that the Panel will be urged by some parties to attack the free speech rights of employers, even where such speech is neither coercive nor intimidating. This is a key area in which repeated legislative changes and Board policy balance has finally found an equilibrium. We respectfully submit that, were the Panel to succumb to these demands, any resulting legislative changes would have a significant impact on the balance that has led to peaceful labour relations in this province, and would increase the uncertainty and litigation that has been a thing of the past for some time.

The current legislation and jurisprudence is consistent with the free speech rights set out in the *Charter* and we strongly urge the Panel not to upset the current balance and unduly restrict non-coercive and non-intimidating employer speech.

Project Labour Agreements

The use of Project Labour Agreements (PLA's) by government and crown corporations, in which the government directs that a certain employer or employers, along with their bargaining relationships, be the employer of employees on a project, is of significant concern. CACE submits that PLA's directly impinge on the right of employees to choose for whom they wish to work, and by whom they wish to be represented. This practice, should it be adopted and expanded by this government, will likely lead to serious questions, and indeed litigation, over whether employees' *Charter* rights are being violated, particularly the freedom of association.

We urge the Panel to carefully consider these important and very complicated issues and the impact that they would have on labour stability in the province. Should the further use of PLA's become a potential recommendation by this Panel, then it would be very important to hear further from the labour relations community as detailed input would be necessary that cannot be accommodated in this format.

Conclusion

The issues in this review of the *Code* could have a significant impact upon employers, employees, unions, and the public should the government make changes to the current state. On behalf of employers, CACE recommends the following:

1. The time allotted to the current review should be extended, and the issues that the Panel is considering for amendment should be identified to the public in a more specific and transparent way so that comprehensive feedback and consultation may be obtained.

2. Do not change the *Code*. It is not necessary to do so. The *Code* continues to serve British Columbians well. BC's labour relations have been stable, and our employment opportunities and benefits have been tremendous. Significant changes to the *Code* will create instability, which in turn will discourage investment and employment growth, which will not benefit anyone.

3. If, despite our submissions the government proceeds to make changes, we recommend it take a cautious and incremental approach, rather than to make substantive changes that serve the interests of only unions. Some of the changes that appear to be under consideration by the Panel are radical in nature, would fundamentally change British Columbia's labour relations, would unfairly tilt the delicate balance currently in place, and are not mainstream.

We appreciate your consideration of these submissions and welcome the opportunity to provide further comments at one of the upcoming public hearings.

Yours truly,

CANADIAN ASSOCIATION OF COUNSEL TO EMPLOYERS

Per: *Adrian Frost*

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