Thank you for the opportunity to provide submissions regarding *The Labour Relations Code Review Panel recommendations - August 31, 2018* (the "Panel Report").

In these submissions, we will focus on issues of particular importance to our union, the United Food and Commercial Workers Union, Local 1518 ("UFCW 1518"). UFCW 1518 represents over 20,000 workers in diverse industries including retail grocery, food processing, community health care, seasonal agriculture and professional services.

First Principles

We urge the government to adopt principled and progressive reforms to the *Labour Relations Code* (the "Code"). While stability is an important goal in labour relations, the current Code does not sufficiently reflect labour legislation's fundamental purpose: to protect employees' right to organize and bargain collectively. The Code, according to one of its architects Professor Paul Weiler, is "the use of the law to facilitate the growth of union representation of unorganized workers".[1]

The Panel Report recognizes that private-sector union density has fallen precipitously but their recommendations do not go far enough to reverse this trend. Nor do the Panel Report recommendations fully reflect collective bargaining's status as a constitutionally-protected right.

The last major revisions to the Code were made in 2002, long before the Supreme Court of Canada recognized workers' constitutional right to associate in pursuit of workplace goals and access a meaningful process through which to achieve those workplace goals.[2] Since 2002, the Supreme Court of Canada has repeatedly recognized that the *Charter of Rights and Freedoms* protects meaningful access to collective bargaining.[3] Our submissions below seek to bring the provisions of the Code into compliance with the Charter.

First, we want to commend the Panel Report for its recommendations on extending successorship protection to vulnerable workers in building cleaning, security, bus transportation and health-care. We support this recommendation (Recommendation No. 12, page 20) in the strongest possible terms. We represent members in the

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[1] Paul Weiler, *Reconcilable Differences* (Carswell Company Limited, 1980) at page 5.

[2] *Ontario (Attorney General) v. Fraser*, 2011 SCC 20 at paras. 40-43.

[3] *Health Services and Support-Facilities Subsector Bargaining Association v. British Columbia*, 2007 SCC 27; *Ontario (Attorney General) v. Fraser*, 2011 SCC 20; *Mounted Police Association of Ontario v. Canada (Attorney General)*, 2015 SCC 1; *Meredith v. Canada (Attorney General)*, 2015 SCC 2; *Saskatchewan Federation of Labour v. Saskatchewan*, 2015 SCC 4.

community health-care sector and we have seen first-hand the dramatic erosion of working conditions for these vulnerable workers. By leaving these employees without the Code's successorship protection, there has been a race to corrode working conditions through incessant contracting out and re-tendering to the lowest bidder. This corporate shell-game has systematically eroded workers' bargained gains and workplace power and lead to an upsurge in precarious work.

Specific Responses to the Panel Report

UFCW will focus its remaining comments on areas of particular concern to our members.

1. Protecting the right to organize

We are disappointed by the majority's recommendation not to reinstate the card check system of certification. We urge the government to adopt the minority's dissent (pages 12 – 13).

In our view, the central reason for declining private-sector union density in British Columbia is the demand for a vote even after a union has proven it has majority support from the proposed bargaining unit. Card check is a well-established and widespread system for confirming union support and it is a vital check on employer intimidation tactics. It is not a radical departure from Canadian – or even British Columbian – law and practice.

The card check system is currently in place federally and in Alberta and Ontario (for some industries[4]). It is also used in New Brunswick, PEI and Quebec.

British Columbia used card check for almost 40 years, from 1947 to 1984.

In 1992, the Special Advisors to the BC Government on Labour Law Reform - Vince Ready, John Baigent and Tom Roper QC – *unanimously* recommended a return to card check certification, writing as follows.[5]

> The surface attraction of a secret ballot vote does not hold up to examination. Since the introduction of secret ballot votes in 1984, the rate of employer unfair labour practices has increased by more than

[4] Card check certification is allowed in these difficult-to-organize industries: construction, building services, home care and community service, and temporary help agencies.

[5] *Recommendations for Labour Law Reform,* Vince Ready, John Baigent and Tom Roper (September 1992) at page 26 [emphasis added].

> 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 … 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*.

The rationale for card check is simple, practical and reflects the Charter-protected status of collective bargaining. The Supreme Court of Canada has recognized that there is a "presumptive imbalance between the employer's economic power and the relative vulnerability of the individual worker".[6] Clearly, employees are susceptible to employers' overt or covert pressure tactics including firing union supporters, holding captive audience meetings to undermine union support or issuing threats or promises about layoffs, wages and benefits.

Card check allows the Board to measure employee support in the absence of employer pressure and misconduct in the period before a vote. Holding a vote after membership cards are signed and submitted gives the employer time to influence its employees. No doubt more people will vote against unionization if they fear for their job security or their wages and benefits.

We urge the government to restore card check for all certification applications.

At a minimum, we suggest that card check should be restored for smaller workplaces because in close quarters, employer power is amplified and individuals are more vulnerable to pressure tactics. Card check should certainly be adopted for certification applications in which there are fewer than 100 workers in the proposed bargaining unit.

If card check is not restored, it is crucial that the government strengthen other Code protections for organizing campaigns. These protections include the timeliness of votes, restrictions on employer campaigns against unionization and allowing the Board to issue remedial certification after an unfair labour practice.

If card check is not restored – or not restored for every worker - we suggest that the Panel's recommendations regarding organizing drives be strengthened and adopted as part of a systematic policy. Any one of these amendments on its own only marginally protects workers' rights. All of them together still do not effectively counteract employer anti-union tactics. However, these amendments together are the bare minimum of protection workers need in the absence of card check.

[6] *Mounted Police Association of Ontario v. Canada (Attorney General)*, 2015 SCC 1at para. 88

(a) Timeliness of votes (Code s. 24(s), Panel Report Recommendation No. 6)

The Panel Report recommends that votes must be held within 5 business days of the application being filed. We suggest that votes must be held as quickly as possible in order to minimize employer interference, occurring within 2 working days of the application being filed. This is a very expeditious timeline aimed at limiting employer obstruction as much as possible.

(b) Employer communication (Code s. 8, Panel Report Recommendation No. 3)

Employees depend on their employers for their livelihoods. In recognition of this economic reality, the Code must prohibit employer interference in union affairs and forbid coercion and intimidation. During an organizing drive, the employer must remain neutral and cannot be allowed to wield its coercive powers. We suggest that section 8 of the Code be deleted. At a bare minimum, the Code must be crystal clear that employer communication during an organizing drive (i) must be limited to neutral facts and (ii) cannot cross the line into undue influence, intimidation, coercion or threats.

If section 8 is retained, we propose the following.

> Nothing in this Code deprives a person of the freedom to communicate to an employee a statement of fact with respect to the employer's business so long as the person does not use undue influence, intimidation, coercion or threats.

(c) Remedying unfair labour practices (Code section 14(4)(f), Panel Report Recommendation No. 4)

We support the Panel Report's recommendation to expand the Board's power to order remedial certifications.

As pointed out by a recent Ontario labour law review panel, "[a] second vote, following employer misconduct, cannot rectify or eliminate the impact of employer misconduct and is an unreliable measure of free and voluntary support of the union. Once everyone knows the well is poisoned, no one will drink the water."[7]

2. Adjustment Plans (Code section 54, Panel Report Recommendation No. 17)

Adjustment plans are an important issue to our members because many members work in sectors undergoing rapid and significant change. We recently attempted to negotiate an adjustment plan with one of our major employers. It was a frustrating

[7] *The Changing Workplaces Review: Final Report* (C. Michael Mitchell and John C. Murray) at page 324

and inefficient experience. We believe that the Code's adjustment plan provision must be meaningful and practical.

Adjustment plans must be mandatory, not optional. In a workplace undergoing significant changes, it is imperative that the workers' union be fully involved in creating a transition plan. Without a firm obligation on employers to negotiate, the process may well be meaningless.

If adjustment plan negotiations are mandatory, then there must be a mechanism for dispute resolution. We suggest that the parties experiencing disputes over adjustment plans have the opportunity to refer such disputes to expedited interest arbitration.

Therefore, we propose the following amendments to section 54, with additions in italics and deletions underlined.

> 54 (1) If an employer introduces or intends to introduce a measure, policy, practice or change that affects the terms, conditions or security of employment of a significant number of employees to whom a collective agreement applies,
>
> > (a) the employer must give notice to the trade union that is party to the collective agreement at least 60 days before the date on which the measure, policy, practice or change is to be effected, and
> >
> > (b) after notice has been given, the employer and trade union must meet, in good faith, and ~~endeavour to~~ develop an adjustment plan, which may include provisions respecting any of the following:
> >
> > > (i) consideration of alternatives to the proposed measure, policy, practice or change, including amendment of provisions in the collective agreement;
> > >
> > > (ii) human resource planning and employee counselling and retraining;
> > >
> > > (iii) notice of termination;
> > >
> > > (iv) severance pay;
> > >
> > > (v) entitlement to pension and other benefits including early retirement benefits;

(vi) a bipartite process for overseeing the implementation of the adjustment plan.

(2) ~~If, after meeting in accordance with subsection (1), the parties have agreed to an adjustment plan, it is~~ An adjustment plan is enforceable as if it were part of the collective agreement between the employer and the trade union.

(3) Either party may, at any time, refer a dispute regarding an adjustment plan to expedited arbitration under section 104 of this Code.

~~(3)~~ (4) Subsections (1) and (2) do not apply to the termination of the employment of employees exempted by section 65 of the *Employment Standards Act* from the application of section 64 of that Act.

3. Franchise certification and sectoral bargaining (Panel Report Recommendation No. 19)

Sectoral bargaining rights are of particular importance in the retail food industry where employers are attempting to weaken those rights through a franchise-based business model.

Franchising will only accelerate in the future. At least one of our major unionized employers is moving to a franchising model for its stores.

UFCW 1518 strongly believes that all of a banner's locations – whether there is a franchisee present or not - should form a single bargaining unit. Workers at franchised locations have effectively identical terms and conditions of work, whatever the contract between head office and an individual operator. It is simply a charade for franchisors to point to the independence of their franchisees. In all material respects, franchisors continue to control the business.

We also believe that sectoral bargaining among multiple employers (e.g. all unionized employers in the retail food sector) could be an efficient labour relations model.

Under both franchise certification and sectoral bargaining, all interested parties sit at a common table, increasing the effectiveness and fairness of bargaining and better defending employees' Charter-protected rights.

We encourage the government to accept the Panel's proposal for an inquiry but with some caveats.

The Inquiry should be appointed and report back as soon as possible since this is an important issue to many sectors within the labour relations community.

We also strongly suggest that the Inquiry be conducted by a neutral, tripartite panel that seeks input from the public and industry stakeholders. Industry Advisory Committees do not have the resources or neutrality needed to investigate such a significant piece of labour relations policy.

4. Other comments

(a) Labour Relations Board principles (Code section 2; Panel Report Recommendation No. 1)

One of the Board's principles is to "foster[] the employment of workers in economically viable businesses" (s. 2(b)). This is only one of eight principles but it has historically been seized on by employers to justify overriding other considerations, such as workers' rights to organize. This language was adopted in 2002. We now know from the Supreme Court of Canada that collective bargaining is a Charter-protected right and therefore is more fundamental than the other principles expressed in section 2 of the Code.

We suggest the following italicized portion be added to section 2.

> *The purpose of this Act is to protect and enforce employees' rights to associate in pursuit of workplace goals and collectively bargain with employers.* The board and other persons who exercise powers and perform duties under this Code must exercise the powers and perform the duties in a manner that
>
> (a) recognizes the rights and obligations of employees, employers and trade unions under this Code,
>
> (b) fosters the employment of workers in economically viable businesses,
>
> (c) encourages the practice and procedures of collective bargaining between employers and trade unions as the freely chosen representatives of employees,
>
> (d) encourages cooperative participation between employers and trade unions in resolving workplace issues, adapting to changes in the economy, developing workforce skills and developing a workforce and a workplace that promotes productivity,
>
> (e) promotes conditions favourable to the orderly, constructive and expeditious settlement of disputes,

(f) minimizes the effects of labour disputes on persons who are not involved in those disputes,

(g) ensures that the public interest is protected during labour disputes, and

(h) encourages the use of mediation as a dispute resolution mechanism.

(b) Industry Advisory Councils (Code section 80; Panel Report Recommendation No. 22)

The Minister's power to appoint an Industry Advisory Council (IAC) has never been invoked. The Panel report recommends creating IACs that "identify[] and address[] industry specific issues" (page 28). While creating space for cooperative labour relations is a laudable goal, we are concerned about the scope of some powers the Panel recommends that IACs enjoy.

IACs members should be neutral, expert advisors to the Minister if they are to enjoy statutory appointment and legitimacy. However, several of the recommended powers of IACs weigh too heavily in favour of economic expansion and business advocacy. These subsections read as follows, with our areas of concern italicized.

> [IACs may] … (b) identify industry or sector issues, skills and training needs, health and safety related issues, *competitive and productivity challenges*, [and]
>
> (c) develop labour market information *and marketing initiatives*…

IACs should not be business associations advocating for greater market share. Their focus should be on good labour relations. We suggest removing the portions of (b) and (c) that are italicized above.

(c) Informational Posters (Panel Report Recommendation No. 27)

The Panel Report recommends that the Board publish a poster containing information about employees' and employers' rights and obligations. We agree. However, instead of leaving posting of this information to the Board's discretion, we suggest that the Code require that the poster be placed in a conspicuous location at every workplace with more than 10 employees.

Conclusion

UFCW Local 1518 urges the Government to adopt the proposals discussed above and all the Panel Report recommendations that we did not address.

We hope these submissions are of assistance to the Minister.