August 19, 2024 |

Briefs

Submission to the BC Labour Relations Code Review Panel - BCFED response to presentations and submissions made to the Panel

A pdf of the complete submission can be found here. See our original submission here.

The BC Federation of Labour (“BCFED”) submits the following additional information in response to the presentations and submissions made to the Labour Relations Code Review Panel (“Panel”).

Economic outlook

We strongly disagree with assertions that the 2018 changes to the *Labour Relations Code* (“Code”) and additional improvements will negatively impact BC’s economic outlook. We encourage you to review the submissions and presentations made by the Centre for Future of Work and the CCPA BC office which demonstrate that strong and effective labour laws are the foundation of a successful economy and instrumental in reducing income inequality and systemic discrimination.

Fairness

Several presenters argued that a balance in labour-relations has been achieved, and, in fact, tipped too far towards workers.

From where workers stand, that statement has little to do with reality. It’s a measure of how spectacularly the scales were tilted against working people that modest steps to improve fairness are described that way.

Low-wage workers, precarious workers and gig workers still struggle to access their right to fair working conditions, to unionize and collectively bargain. Sectors with high numbers of Indigenous, Black, racialized workers, gender diverse workers and workers living with disabilities continue to see markedly lower pay, worse working conditions and fewer employment benefits.

A balanced economy and labour market shouldn’t leave large numbers of people behind.

We encourage the Panel to look beyond scorecards and instead focus on what needs to change to ensure that every worker has access to meaningful collective bargaining.

Equity, Diversity and Inclusion

The BCFED calls on the Panel to make recommendations that will further reduce barriers to unionization for workers who are marginalized and to strengthen protections so that workers who have existing bargaining rights don’t lose them.

Workers experience marginalization based on race, Indigeneity, ability, and sexual and gender orientation and identity, among other grounds prohibited in the *BC Human Rights Code*. One of the most effective ways to bring equality to workers' wages, their hours of work, their working conditions and benefits is through a union and a collective agreement.

Marginalized groups continue to be overrepresented in low-wage and precarious work. Upcoming research from the CCPA BC using Statistics Canada data will demonstrate that women and racialized workers in BC are much more likely to earn less than the living wage. Specifically, one-in-two racialized women in the Lower Mainland earns less than the living wage. Statistics Canada data shows that in Canada, Indigenous women and women who are recent immigrants continue to experience a wage gap of more than 20%.[1]

Accessing collective bargaining is a concrete way for workers to address systemic discrimination and economic inequity. Wage inequities can be narrowed through wage grids and classification processes. Bias in hiring can be addressed through clear post-and-fill provisions. Workers who face marginalization are protected by clear procedures to address bullying and harassment. And workers with disabilities benefit from representation in duty to accommodate processes and access to extended health benefits and sick leave provisions to support their full participation in the workplace. Collective agreements include a host of other provisions to promote equity including but not limited to leave for gender affirming care, cultural and ceremonial leave for Indigenous workers, recognition of days of observance for various faith-based communities and equitable hiring practices.

While those who have access to collective bargaining experience these benefits, too many workers who face marginalization continue to experience significant barriers to unionization. These barriers are especially well documented for migrant workers, new immigrants and those who speak languages other than English. We see this reflected in low union density in sectors with a high number of migrant workers and racialized workers like farm work, live-in care work, food delivery, hospitality, cleaning, security and residential construction.

Sectoral bargaining

The BC Federation of Labour recommends establishing a tripartite, single-issue commission to consult stakeholders over a period of six-to-nine months on how to implement sectoral bargaining.

The BCFED has been working with migrant farm workers, ride-hail and food delivery workers who face significant structural challenges when trying to join a union. These sectors have high numbers of migrant workers, new immigrants, and racialized workers who contend with systemic discrimination, such as reduced minimum employment standards. Failing to address their needs increases their experiences of precarity, drives down working conditions and entrenches the systemic discrimination they already face. This leaves workers even more vulnerable and at higher risk of un-ending economic insecurity.

The panel heard from organizations representing domestic care workers about the challenges and power imbalances they face. The panel also heard from our affiliates about the experiences of workers in the food and beverage sector struggling to attain bargaining rights with deep-pocketed, multi-national corporations.

Significantly, our affiliates have come together to recommend implementing sectoral bargaining to expand access to collective bargaining and improve working conditions and economic security for precarious and low-wage workers. Broader-based and sectoral bargaining is also supported by several community organizations. Some of them have been calling for it – for decades.

This is not a new idea for BC. We have extensive experience with sectoral and broader-based bargaining in both the private and public sectors. Film and Television, Construction, Forestry, Health Care, K-12 Education and Community and Social Services currently or previously engaged in broader-based or sectoral bargaining.

We believe implementation will have the biggest chance of success if it is built on the feedback of stakeholders and is customized to our province's needs. To achieve this, the commission should consult on a specific model or models of sectoral bargaining. While we have our own views on what should be implemented, consulting on a proposal or proposals will garner the most helpful feedback by making it easier to identify opportunities and challenges. Feedback received through the consultation should be used to customize the proposal to meet the diverse needs of BC workers.

There are a number of existing proposals that could form the basis of the consultation, including but not limited to the Baigent Ready proposal from the 1992 Review and Sara Slinn and Mark Rowlinson's adaptation of the NZ Fair Pay agreement. While the models are based on different foundations – one uses a more traditional collective agreement structure and the other creates a negotiated employment standard – they offer many concepts worthy of consideration.

For additional background, we suggest reviewing the following articles.

- Sectoral Certification: A Case Study of British Columbia, Diane MacDonald

- Broader-based and Sectoral Bargaining Proposals in Collective Bargaining Law Reform: A Historical Review (yorku.ca), Sara Slinn

The Centre for Future Work's website also brings together a number of useful resources.

Online platform work

We recommend that the panel review the definition of employee and propose amendments to provide online platform workers clear access to the right to organize and collectively bargain. This could be a simple as adding online platform workers to the definition of employee.

As discussed, online platform work is growing rapidly in BC and across Canada. While most people are familiar with ride-hail and food delivery apps – platform workers perform various types of work including home care, grocery shopping, household chores with new areas emerging all the time.

We are calling for an affirmation that online platform workers are covered by the definition of employee in the Code and have the right to organize.

Inclusion in the *Employment Standards Act* ("ESA") and the *Workers Compensation Act* ("WCA") should be sufficient to prove coverage under the Code, but the large multi-national companies who employ these workers have deep pockets and a history of leveraging their political and legal power to limit workers' rights. Organizing thousands of workers will be challenging in and of itself. We do not believe these workers should then have to litigate whether they even have the right to bargain collectively.

Further, while ride-hail and food delivery workers will be offered some basic employment protections through the ESA, the government has indicated they will receive only partial coverage. Workers will not have access to many core rights including paid sick leave and overtime pay. It would be unjust to limit their rights under the ESA and then slam the door on their ability to collectively bargain something better.

Acquisition of bargaining rights

We oppose changes to eliminate single-step certification and extend the timelines for representation votes.

Single-step certification removes barriers for workers and supports BC's most vulnerable workers in their efforts to form a union and improve their working conditions through collective bargaining. It reduces employer interference and improves safety and security for workers who face marginalization in their workplace and our broader communities.

We have not heard any compelling argument supporting a return to representation votes for all certifications. To the contrary, the evidence shows that single-step certification is working very effectively. More workers have been able to join a union and few, if any, problems have been identified. In 2023, on average, certifications were granted with 76% membership support. Of the 1,920 cards that were audited, only one card was questioned and following investigation, there was sufficient explanation, and no issue was found with the veracity of the application or membership evidence[2].

Further, we do not agree with lengthening the voting period for representation votes for applications demonstrating at least 45% but less than 55% membership. The current five-day timeline is consistent with other jurisdictions and helps to prevent "improper interference" as noted in the Panel's 2018 report. We did not hear any concrete explanations for how employers would use the additional time.

Access to employee lists

Where a union has made an application with the support of at least 20% of the workers in a proposed unit, the list of employees should be provided.

Fair organizing practices rely on the ability to communicate with other workers. Workers must be provided with access to their colleagues if they are going to have any meaningful ability to freely associate and have a union in their workplace.

Workplaces are changing. Many workers do not have a central work location. In online platform work, a single company may have 10,000 plus workers with no central dispatch location or office. More and more workers work from home and may not be located in the same community. Workplaces that traditionally relied on centralized operations are turning to remote work. USW reported that up to 50% of call centre agents for Telus now work from home. IBEW 213's submission notes that their technicians employed by Rogers receive assignments and complete reports remotely and rarely attend a central dispatch location anymore.

Other structures in traditional brick and mortar workplaces are changing. Just-in-time scheduling uses AI and algorithms' ability to track demand trends and respond instantly to order levels to replace the role of managers in making decisions around labour needs. Workers are no longer assigned regular shifts and receive little advance notice of when they will work. For workers there is no predictability around shifts and often last-minute call outs or shift cancellations[3]. This is being implemented not only in retail and hospitality, but also being used in industries like manufacturing[4]. All of these changes are structured in a manner that makes it nearly impossible for workers to get to know their colleagues and connect with each other.

We echo the recommendation of the 2016 Ontario Changing Workplaces Review – where a union has made an application with the support of at least 20% of the workers in a proposed unit, the list of employees should be provided. This recommendation was implemented by the Ontario government in Bill 148 in 2017 but has since been repealed by the Ford government.

The Panel also asked about privacy considerations. We have included the text of Bill 148 at the end of this submission for your reference as it provides guidance on privacy matters through defined parameters on what information must be provided and how it is to be handled.

Section 54 and restructuring

USW has made additional recommendations around Section 54 of the Code, including recommending the appointment of an economic commissioner to review and make recommendations on the community impacts of business restructuring. We support this recommendation.

Remote work

Ensure that all workers regardless of the structure of their workplace (remote, hybrid, central) can picket and that virtual or cyber pickets have the same standing as physical pickets.

As more workers are employed remotely and businesses operate through on-line websites and platforms, we believe updates are needed to ensure that workers can exercise their right to strike through meaningful picketing including by establishing “virtual” picket lines.

Striking workers have the right to use pickets to persuade anyone “not to enter the employer’s place of business, operations or employment; deal in or handle the employer's product; or do business with that person.” All workers must have a meaningful way to strike.

The definition of a picket in the Code refers to “attending at or near a person’s place of business, operations or employment” but not all workers report to a place of business outside of their home.

This is an issue that Labour Boards across the country are having to grapple with. There is a recent case from Alberta, *Bioware ULC v United Food and Commercial Workers Canada Union, Local No. 401*, where the arbitrator found that remote workers were entitled to establish physical pickets at the place of business of their primary contract holder. While this decision provides some clarity on where remote workers can picket when there is a connection to a physical worksite, there are other scenarios the decision does not address.

Many companies operating in the tech industry and e-retail have no brick-and-mortar stores or offices leaving workers no ability to signal to customers and contract holders that there is a strike. Workers who perform on-line platform work don’t have a central work location to report to and the companies they work for often don’t even have offices in the province. Where could they lawfully picket?

There are other challenges – workers at a brick-and-mortar location must have the means to signal their job action to those who work remotely. Their employers may argue that remote workers can’t honour the physical picket lines of their colleagues because they don’t report to the physical location and have not encountered the picket line. Or employers may attempt to circumvent physical picket

lines by directing workers to work remotely during a strike.

While the scenarios may seem a bit complicated, the issue is quite simple: Workers must have the ability to establish virtual or cyber pickets to achieve the same aims as a physical picket.

There are various forms where virtual picketing could take place including but not limited to; the use of social media, push notifications, auto responders, status updates in inter-office programs and group chats, voicemail messages, and pop-up banners on websites.

We encourage the panel to review and recommend any necessary amendments to the definition of picketing in Section 1(1) and Sections 65 and 66 to ensure workers can establish, communicate about and honour virtual pickets the same way as physical picket lines.

Bill 9 and picketing

Maintain the picketing improvements established in Bill 9 that permit provincial workers to honour federal and other provincial picket lines.

The affiliates of the BCFED strongly hold the view that protecting the right to honour picket lines regardless of the jurisdiction is a fundamental expression of worker solidarity and ultimately shortens disputes. Forcing workers to cross picket lines causes significant confusion, frustration and disappointment amongst union members. It also creates worker-to-employer and worker-to-worker tension and resentment that can build during difficult job actions. These tensions can take years to resolve.

Bill 9 addresses a problem that is real, not hypothetical. As you have heard from others, workers were forced to cross picket lines at their places of work due to their jurisdiction.

We support Bill 9 and its goal of ensuring provincially-regulated workers can honour federal and other provincial pickets.

With respect to employers' concerns related to common site relief, employers would have the ability to seek relief through the courts.

BCGEU's reply submission provides additional background on this matter.

Section 104, Expedited arbitration

Do not limit the ability of unions to access the expedited arbitration provisions of the Code.

We do not support proposals that seek to restrict the application of Section 104 of the Code. We do not support creating limits on the number of applications that can be filed or limiting the precedential value of a decision without both parties' agreement. We do not support proposals that call for expedited arbitration language in a collective agreement to supersede the Code and eliminate the ability of the parties to file under Section 104. We see no reason to close off a resolution option that may assist the parties to find a timely resolution to their disputes.

Common and true employer test

We do not support the four-part test proposed by the Canadian Franchise Association or any other changes that would make it more difficult to succeed on a common or true employer application. Businesses should have fewer, not more, avenues to divide their interests and avoid their obligations to workers.

Particulars in discipline arbitrations

We support BCGEU and CUPE BC's submissions in response to the Canadian Association of Counsel to Employers' proposal on requiring union particulars in discipline arbitrations.

Broadening the definition of a trade union

We do not agree with broadening the definition of a trade union or creating a new subset of organizations that can operate like a trade union. We are strongly opposed to including management in bargaining units. We believe moving ahead with these requests would create a dangerous precedent. Workers who are properly classified as employees under the Code have existing avenues to access the benefits of a trade union should they choose to do so.

Remedial certifications

We disagree that there is a substantial increase in remedial certifications and that the Labour Relations Board ("Board") is using its power to grant remedial certifications capriciously. Remedial certifications continue to be a rarity despite revised legislation. Since 2019, fewer than 15% of applications for remedial certification have been granted. While 2022 appears to be an outlier with five remedial certifications granted, no remedial certifications were issued in 2021, and of the 19 requests made in 2023, only one was granted.[5]

Funding

We note that there is widespread agreement between employers and unions that the Board needs more funding.

Appendix: Bill 148, Fair Workplaces, *Better Jobs Act*, 2017

Application for employee list

6.1 (1) Where no trade union has been certified as bargaining agent of the employees of an employer in a unit that a trade union claims to be appropriate for collective bargaining and the employees are not bound by a collective agreement, a trade union may apply to the Board for an order directing the employer to provide to the trade union a list of employees of the employer.

Notice to employer

(2) The trade union shall deliver a copy of the application under subsection (1) to the employer by such time as is required under the rules made by the Board and, if there is no rule, not later than the day on which the application is filed with the Board.

Content of application

(3) An application under subsection (1) must include,

(a) a written description of the proposed bargaining unit, including an estimate of the number of individuals in the unit; and

(b) a list of the names of the union members in the proposed bargaining unit and evidence of union membership, but the trade union shall not give this information to the employer.

Notice of disagreement

(4) If the employer disagrees with the description of the proposed bargaining unit or with the estimate of the number of individuals in the unit included in the application under subsection (1), the employer may give the Board notice of the disagreement and shall do so within two days (excluding Saturdays, Sundays and holidays) after the day the employer receives the application.

Content of notice

(5) A notice under subsection (4) must include,

(a) a statement that,

(i) the employer agrees with the description of the bargaining unit included in the application under subsection (1) but not with the estimate of the number of individuals in the unit, or

(ii) explains why the employer believes the description of the bargaining unit included in the application could not be appropriate for collective bargaining; and

(b) a statutory declaration setting out the number of individuals in the bargaining unit described in the application under subsection (1), if the employer disagrees with the trade union's estimate.

Board determinations, etc., no notice of disagreement

(6) The following rules apply if the Board does not receive a notice under subsection (4):

1. If the Board determines that 20 per cent or more of the individuals in the bargaining unit proposed in the application under subsection (1) appear to be members of the union at the time the application was filed, the Board shall direct the employer to provide the list to the trade union.

2. If the Board determines that fewer than 20 per cent of the individuals in the bargaining unit proposed in the application under subsection (1) appear to be members of the union at the time the application was filed, the Board shall dismiss the application.

Same, notice of disagreement

(7) The following rules apply if the Board receives a notice under subsection (4):

1. The Board shall determine whether the description of the bargaining unit included in the application under subsection (1) could be appropriate for collective bargaining. The determination shall be based only on that description and the notice under subsection (4).

2. If the Board determines that the description of the bargaining unit included in the application under subsection (1) could not be appropriate for collective bargaining, the Board shall dismiss the application. 31

3. If the Board determines that the description of the bargaining unit included in the application under subsection (1) could be appropriate for collective bargaining, the Board shall determine an estimated number of individuals in the unit as described in the application.

4. After the Board determines the estimated number of individuals in the unit, the Board shall determine the percentage of the individuals in the bargaining unit who appear to be members of the union at the time the application under subsection (1) was filed.

5. If the percentage determined under paragraph 4 is fewer than 20 per cent, the Board shall dismiss the application.

6. If the percentage determined under paragraph 4 is 20 per cent or more, the Board shall direct the employer to provide a list of employees of the employer to the trade union.

No hearing or consultation required

(8) The Board is not required to hold a hearing or to consult with the parties when making a determination under subsection (7) and may make a determination under paragraphs 3 or 4 of subsection (7) based only on the information provided in the application under subsection (1) and the notice under subsection (4).

Mandatory content of employee list

(9) If the Board directs an employer to provide a list of employees of the employer to the trade union under subsection (6) or (7), the list must include,

(a) the name of each employee in the proposed bargaining unit; and

(b) a phone number and personal email for each employee in the proposed bargaining unit, if the employee has provided that information to the employer.

Discretionary content of employee list

(10) If, in the opinion of the Board, it is equitable to do so in the circumstances, the Board may order that the list also include,

(a) other information relating to the employee, including the employee's job title and business address; and

(b) any other means of contact that the employee has provided to the employer, other than a home address.

Security and confidentiality of employee list

(11) If the Board directs an employer to provide a list of employees of the employer to a trade union under subsection (6) or (7), the employer shall ensure that all reasonable steps are taken to protect the security and confidentiality of the list, including protecting its security and confidentiality during its creation, compilation, storage, handling, transportation, transfer and transmission.

Restriction on use of listed information

(12) If a list of employees of an employer is provided to a trade union in compliance with a direction made by the Board under subsection (6) or (7), the use of that list is subject to the following conditions and limits:

1. The list must only be used by the trade union for the purpose of a campaign to establish bargaining rights.

2. The list must be kept confidential and must not be disclosed to anyone other than the appropriate officials of the trade union.

3. The trade union shall ensure that all reasonable steps are taken to protect the security and confidentiality of the list and to prevent unauthorized access to the list.

4. If the trade union makes an application for certification in respect of the employer and employees on the list and the application for certification is dismissed less than one year after the Board's direction to provide the list, the list must be destroyed on or before the day the application is dismissed.

5. If the list is not destroyed in accordance with paragraph 4, it must be destroyed on or before the day that is one year after the Board's direction to provide the list was made.

Destruction of list

(13) For the purposes of paragraphs 4 and 5 of subsection (12), a list must be destroyed in such a way that it cannot be reconstructed or retrieved.

Deemed compliance FOI Acts

(14) Any disclosure of personal information made by an employer in compliance with a direction made by the Board under subsection (6) or (7) shall be deemed to be in compliance with clause 42 (1) (e) of the Freedom of Information and Protection of Privacy Act and clause 32 (e) of the Municipal Freedom of Information and Protection of Privacy Act.

Subsequent certification application

(15) Where a list of employees is provided to a trade union by an employer in compliance with a direction made by the Board under subsection (6) or (7), and, within one year after the Board's direction to provide the list, the trade union makes an application for certification in respect of that employer and employees on the list, if that application is dismissed, the Board shall not consider another application under subsection (1) from any trade union in respect of a proposed bargaining unit that is the same or substantially similar to the one that was described in the original application under subsection (1) until one year after the application for certification is dismissed.

Effect of determination

(16) A determination made by the Board under this section does not limit the Board's ability to consider or determine matters under section 7, 8, 8.1, 9 or 10.

Non-application to construction industry

(17) This section does not apply with respect to an employer as defined in subsection 126 (1).

[1] https://canadianwomen.org/the-facts/the-gender-pay-gap/

[2] https://www.lrb.bc.ca/media/21808/download?inline

[3] https://www.deseret.com/indepth/2020/9/5/21417148/just-in-time-scheduling-fair-work-week-shift-project-brookings-institution-clopening-child-care/

[4] https://appliedsmartfactory.com/pharmaceutical-blog/pharma-4-0/jit-scheduling/

[5] https://www.lrb.bc.ca/media/21808/download?inline