

BC FEDERATION OF LABOUR
SUBMISSION TO

THE *LABOUR RELATIONS*
CODE REVIEW COMMITTEE

REGARDING PROPOSED
CHANGES TO THE *BC*
LABOUR RELATIONS CODE



March 2018

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Email: LRCReview@gov.bc.ca

Labour Relations Code Review Committee (Section 3 Committee)
Ministry of Labour

Dear Committee Members,

We write to express the position of the BC Federation of Labour (the “Federation”) on the *Labour Relations Code*.

The *Labour Relations Code* provides the legal framework for many aspects of the relationship between employers, employees and their unions, including collective bargaining, dispute resolution, and access to union representation.

Over the course of the last 16 years under the BC Liberals, our labour laws and their application have become unfair and unbalanced. They have become radically tilted in favour of employers who are allowed to intervene with near impunity to try to prevent workers from exercising their constitutional right to join a union to improve wages and conditions. “Captive audience” communication, forced listening, employees being paid by the boss to vote against the union, and other anti-union tactics are now regular tools for employers.

Administratively, the board has been starved of resources to carry out its work. This too adds to the employer advantage.

Meanwhile the lack of balance and fairness have given employers carte blanche to prevent workers from being able to fully exercise their constitutional right to bargain collectively. The notorious “contract flip” allows employers to target tens of thousands of workers in predominantly female jobs to keep wages low and prevent them from maintaining stable union representation.

The last comprehensive review of the Code was done in 2003. There have been significant changes in the workplaces, the economy and the workforce in British Columbia since then. Other jurisdictions, notably Ontario and Alberta, have undertaken significant review of their labour relations legislation in the past two years.

We are pleased to submit our recommendations to you as part of your consultation under Section 3 of the Code. We support the minister of labour’s mandate “to ensure British Columbians have the same rights and protections enjoyed by other Canadians by reviewing the *Labour Relations Code* to ensure workplaces support a growing, sustainable economy with fair laws for workers and business.”

It is important that our Code be fair and balanced, and that it be reviewed and amended to

reflect developments in our legal framework and in society. BC's workforce is changing. More and more jobs are precarious, insecure, and exploitative. Unions help to make work and workplaces more fair. Our Code must reflect the role that unions play in supporting good jobs and healthy workplaces by removing barriers to joining a union and keeping a union.

Our position is respectfully submitted on behalf of the Executive Officers of the BC Federation of Labour and represents the views of more than 500,000 affiliated union members across the province of British Columbia.



Irene Lanzinger
President

Executive Summary

The BC Federation of Labour members calls on the BC government to level the playing field between workers and employers by making the following changes to the British Columbia

Labour Relations Code:

General

1. Continue the ongoing review of the *Code* by allowing the Section 3 committee to be seized of the question of labour relations improvement on an ongoing basis – rather than every 16 years. s.3.
2. Support the work of the Labour Relations Board by encouraging government to properly fund the board so that critical services like certification votes are not delayed, or conducted by mail, simply because of a lack of resources.
3. Ensure effective and timely decisions by extending the timelines for decisions provided by vice-chairs to those given by arbitrators. s. 91, s. 128, s. 159.1.

Unfair Labour Practices

4. Avoid infringement of workers' Charter right of association by increasing the use of remedial certification in cases of unfair labour practices. s. 14.

Acquisition of Bargaining Rights

5. Repeal of the Employer Speech provisions during organizing drives, because they infringe workers' Charter rights to choose to join a union. s. 8.
6. Clarify when open (raiding) periods fall by setting them in a regular period in the calendar year, rather than the anniversary of the collective agreement - which is often unknown to interested parties. s. 19.
7. Restore a system of union certification on the basis of membership cards alone. s. 24.
8. Establish faster timelines to ensure labour peace by causing more expeditious voting. If certification votes are necessary, the application threshold shall be in line with those in other Canadian provinces. The timeline for a vote on any issue shall be not more than two working days. s. 24.

Successorship Rights

9. Broaden Section 35 to strengthen successorship rights to prevent subverting collective agreement obligations through contract flipping; and Repeal s. 6 of Bill 29-*Health and Social Services Delivery Improvement Act, 2002* and s. 4 and 5 of Bill 94- *Health Sector Partnerships Agreement Act, 2003*.

Replacement Workers

10. Protecting workers' Charter-protected collective bargaining rights, including the right to withdraw their labour by re-committing to British Columbia's laudable ban on replacement workers. s. 67.

Essential Services

11. Restore Charter-protected collective bargaining rights to teachers by removing education as an essential service. s. 72.

Variations of Certifications

12. Correct issues with partial decertification applications by extending the rules and timelines for full certifications to this type of application s. 142.

Background

In 2015, the Supreme Court of Canada released a landmark trilogy of cases which clarified the character and scope of a number of important union rights (*Saskatchewan Federation of Labour v. Saskatchewan*, *Mounted Police Association of Ontario v. Canada*, and *Meredith v. Canada*) (known as "The New Labour Trinity"). These cases together extend *Canadian Charter of Rights and Freedoms* protection to common labour activities such as the right to choose a union, the right to bargain collectively, and the right to strike.

In British Columbia, these rights are regulated by the *BC Labour Relations Code* ("the Code"), which is administered largely by the Labour Relations Board. One of the chief purposes of the Code in our view, and of the board's role in overseeing union-employer relations in British Columbia, is to ensure labour peace in the province. This peace is the result of an historic compromise whereby union workers and employers in the province agreed to be ruled by the board in exchange for union recognition, stability for viable businesses, and the timely resolution of disputes.

For the last 16 years however, the BC Liberal government has employed a number of tactics to disrupt the fine balance upon which the compromise, and labour peace in the province, are predicated. A series of legislative changes shifted the playing field in favour of employers and business interests, resulting in hardship and instability for workers in a number of sectors. The Code was not reviewed to recognize workers' distinct Charter rights during that time, even

while aspects of Bills 27, 28 and 29 restricting union rights were struck down by the Supreme Court of Canada.

Any changes to the Code must be made in a fashion that is mindful both of the nature of the historic compromise embodied by the Code and the labour relations regime it creates; and of the newly-recognized Charter rights of working people to choose a union, to bargain collectively, and if bargaining fails, to strike.

Our position

The BC Federation of Labour is calling for a number of changes to the *Labour Relations Code* which will put workers back on a more even footing with their employers. These include:

- meaningful remedies for unfair labour practice;
- improvements to the regulation of workers' right to choose to join a union (including the repeal of employer speech provisions and automatic certification);
- faster timelines when a vote must be conducted by the board;
- stronger successorship language to prevent contract flipping being used to reduce union representation and to drive down wages in some of British Columbia's key sectors;
- a continued ban on replacement workers during labour disputes;
- meaningful bargaining rights for teachers; and
- fairness during partial decertifications.

The success of these changes will of course rely on sufficient funding for the labour relations regime which is regulated by the Code, so that workers can be confident that their Charter rights will not be infringed through deliberate underfunding. The Federation will also look for more consistent and transparent enforcement of existing worker rights, and will support the ongoing work of the Section 3 Review committee.

Recommendations

General - Ongoing review (s. 3)

The BC Federation of Labour is please to participate in this review of the *Labour Relations Code*, the first review since 2003. For the last 15 years, the BC government has not had the benefit of

our direct expert experience in labour relations matters. This approach ignored the spirit of labour relations in British Columbia, which is one of ongoing dialogue and compromise in good faith. BC Liberal changes to the Code tilted the playing field away from one where working people could choose to join a union, to bargain and to exert their combined economic power, without undue employer interference. Given the recently clarified Charter character of these rights, these kinds of changes cannot be made based on political whim. We would feel most comfortable that an expert panel continue to evaluate the Code and the regime it creates and we recommend the Section 3 Review Committee continue to be seized of the question of labour relations improvement on an ongoing basis.

General - Proper funding

Sixteen years of underfunding have reduced the capacity of the board to deliver the certainty upon which the parties are entitled to rely, and upon which British Columbia's labour peace rests. This raises a significant access to justice issue. In our experience, the Charter rights of BC workers to choose a union has been impaired by chronic underfunding of the Labour Relations Board, and for Industrial Relations Officers charged with conducting certification votes. Our affiliates report mail-in ballots being used instead of in-person votes, purely for budgetary reasons, or due to understaffing. As then-Chair Mullin wisely stated in *Norbord*, "An expeditious vote in a certification application helps to ensure employees are able to express their wishes freely. It is generally accepted that delay between the date of application and the date of a vote can impede the ability of employees to exercise their fundamental right to choose. Similarly, worksite disruption, tension, and the potential for unlawful interference can be prolonged by several weeks or more where a ballot is conducted by mail" (at para 27). Adequate funding is essential to protecting workers' Charter right to organize.

General - Timely decisions (ss. 91, 128, 159.1)

Our affiliates also report unacceptable delays when awaiting arbitrators' decisions on often critical workplace matters. An arbitrator's decision can have significant impact on a worker's situation, and the absence of timelines for arbitrators leads to an access-to-justice concern. We recommend applying the timelines set out in the Code for decisions from vice-chairs to apply equally to decisions given by arbitrators.

Unfair Labour Practices and Remedial Certification (s. 14)

We recommend that the board be able to offer a meaningful remedy to workers seeking to join a union when employers unduly interfere with their choice. When employees are affected by an unfair labour practice, a vote would be unlikely to disclose their true wishes. Unfair labour practices, and the conditions leading to them, have a chilling effect on workers in the context of their choice to join a union. Given that the right to choose a union is a Charter-protected right to associate, we submit that remedial certification is the most meaningful way to make these workers whole in the face of unfair labour practice whereby the employer seeks to interfere.

Acquisition of Bargaining Rights- Employer speech (s. 8).

One of the more egregious BC Liberal changes to BC's labour regime was to grant employers the unfettered ability to dissuade workers from improving their wages and working conditions by joining a union. This advantage was extended to employers, but not to unions. The changes in Section 8 gave government sanction to the employer's right to infringe a worker's Charter right to associate through captive audience meetings, and constant anti-union messaging in the workplace. The same sanction to these tactics was not extended to unions. The concept of employer speech is incompatible with the principles articulated in the recent Supreme Court decisions. The only way to safeguard the rights of union workers to choose to organize, and to choose between unions is to repeal Section 8 of the Code.

Acquisition of Bargaining Rights- Open (raiding) period (s. 19).

As we have said, the right to choose to join a union, or to choose between unions, is a Charter right belonging to workers. Members of certain organizations may not agree that their bargaining agent is sufficiently free from the influence of an employer. They may feel that they are represented by bargaining agents which lack sufficient democratic traditions, or which are of an unduly sectarian character. Workers in this situation may not be able to ascertain when the anniversary of the collective agreement falls in the calendar year, because of a lack of transparency from their bargaining agent. This impairs their ability to choose another union under Section 19 of the Code which states that this period of choice (the "open period") shall fall in the 7th and 8th months of the collective agreement. We recommend that the open

period set out in Section 19 be reset to a regular place in the calendar year to give working people some certainty of when the open period will fall.

Acquisition of Bargaining Rights – Membership cards (s. 24)

The BC Liberal government altered the Code to require working people to choose a union twice: first, by signing a membership card with a certified bargaining agent; and secondly, with mandatory certification votes held some time later. This change represented a departure from the Canadian tradition and imported a process more familiar to American labour relations. As a result, the rate of unfair labour practices increased dramatically, and the rate of certification fell by approximately 50%¹. In our experience, the requirement for a certification to confirm a worker's choice to join a union--essentially a second vote--granted employers a de facto campaign period during which to oppose unionization. A 1992 report of special advisers to BC's then labour minister noted with disapproval that "secret ballot votes and their concomitant representation campaigns invite an unacceptable level of unlawful employer interference in the certification system"². This, coupled with the employer speech provisions discussed earlier, led to an astronomical increase in unfair labour practices associated with union organizing drives. Workers seeking to join a union were unclear about what signing a union card actually meant. The rate of unionization in British Columbia plummeted. We submit that the right to associate belongs to the worker; and employers ought not be given a special opportunity to infringe upon this Charter right. Further, the choice of a union is the result of a dialogue between workers and a trade union, and ought not be unduly fettered by the requirement that workers confirm their initial decision to sign a membership card by also participating in a certification vote. We recommend to the committee that we restore a system of union certification on the basis of membership cards alone.

Acquisition of Bargaining Rights- Threshold for certification and faster vote (s. 24)

The BC Federation of Labour concedes that some issues will require a vote of workers in order to confirm a certification. This will arise when the number of memberships fails to surpass an

¹ 1992 Code review report, p 6 "Since the introduction of secret ballot votes in 1984, the rate of employer unfair labour practices has increased by more than 100%" (1992 report p 26).

² 1992 report, p 26.

application threshold. The general average in common law jurisdictions is 50%+1, even in those jurisdictions that have automatic certification. We recommend 50%+1 as an appropriate threshold for automatic certification. In the case when this threshold is not met, we recommend a reduction in the prescribed time to conduct a vote from within ten days currently set out in the Code to not more than two working days. Following *Norbord*, we insist that this vote should be conducted in person unless mutually agreed to by all parties. We note the rise in mail-in ballots that took place under the BC Liberal government. This method of voting adds additional delay and increases the margin of error and fraud, and was clearly being used as a cost-containment measure due to lack of appropriate human resources to fairly administer the Code. We would welcome changes that allow this vote to take place at a location convenient to the workers away from the employer's premise, including any government office.

Successorship Rights (s. 35, Bill 29, and Bill 94)

Successorship can be understood as the principle that workers' rights and benefits that come from their union membership and their collective bargaining agreement are not lost as a result of business operation changes. Successorship laws are meant to provide job security and make sure that employers cannot undermine the efforts of workers to organize and bargain collectively simply by selling off all or parts of their business.

Successorship provisions of the *BC Labour Relations Code* stipulate that if a business or part of it is sold, leased, or transferred, the new owner is bound by any collective agreement in force at that business on the date of sale. Wages, benefits, and rights contained within the collective agreement apply to the new employer and bind them to the same extent as if they had signed the original agreement with the employees and their union. They are considered the "successor" employer.

However, the BC Liberals took further steps to limit successorship in health care by passing Bills 29 and 94, which limit the application of Section 35 of the Code. These laws have allowed employers to evade collective bargaining responsibilities and terminate employees in a manner which undermines the intent of successorship protection in the first place. Current successorship legislation does not apply to contracting out or to contract flipping, and is silent with respect to changes in private service providers. As a result, legally obtained certifications

and freely negotiated collective agreement rights simply disappear as a result of a business decision to contract out. This has become a feature of work in British Columbia for many health care, utility, food service and construction workers.

The application of Section 35 of the Code is limited in the health sector by the *Health and Social Services Delivery Improvement Act* (Bill 29) and the *Health Sector Partnership Agreement Act* (Bill 94). Bill 29 prevents Section 35 of the Code from applying to an entity that contracts with a health sector employer. This means that a person who contracts with a health sector employer cannot be determined to be the successor of that employer.

Bill 94 extends that protection against a finding of successorship to designated private sector partners. This means that an entity that contracts with a private employer who is in a P3 (Public Private Partnership) arrangement with a health sector employer cannot be determined to be the successor of that private employer.

As a result of these changes, we have seen a reduction in wages and working conditions for workers in these sectors, and a loss of industrial stability across the sectors because of the high turnover this produces. The advantages of this system go entirely to employers, while workers see their Charter rights to organize to improve their working conditions eroded by the architecture of the Code. The absence of successorship provisions in the Code encourages employers to exploit these conditions, resulting in greater insecurity for workers and the services they deliver to BC's public.

In order to level the playing field, the BC Federation of Labour recommends that the application of Section 35 be broadened to prevent subverting collective agreements through contract flipping. A functional regime will also require the repeal of the statutory successorship exemptions in health care; specifically, a repeal of Sections 6 of Bill 29-*Health and Social Services Delivery Improvement Act* and of Sections 4 and 5 of Bill 94- *Health Sector Partnerships Agreement Act*.

Replacement Workers (aka Scabs) (s. 67)

A mature system of collaborative labour relations involves concerted collective bargaining in good faith. Should the parties reach an impasse, they then seek to increase their bargaining

power by exerting economic pressure either by withdrawing their labour, or by locking out their workers, as regulated by the Code and the board. In other jurisdictions, the power of one party is unfairly undermined by allowing employers to hire replacement workers to do bargaining unit work. British Columbia should be proud of its continued ban on replacement workers. The BC Federation of Labour recommends no change to this section of the Code, and respectfully submits that any amendment would run counter to the good faith spirit of labour relations and would threaten British Columbia's economic stability and labour peace.

Essential Services (s. 72)

The BC Federation of Labour does not take issue with a system which determines that some services are so essential to the preservation of life that workers in these areas are not able to withdraw their services when collective bargaining between evenly matched parties reaches an impasse. Our affiliates participate willingly in making essential services decisions, often erring on the side of undue designations in the name of expedience. We do, however, take issue with the historical abuse of the essential services designation in British Columbia, which at times designated teaching assistants, and K-12 teachers to be essential.

In light of this, and recent jurisprudence from the Supreme Court of Canada condemning the BC Liberal infringement of the Charter-protected collective bargaining rights of classroom teachers, we recommend that education be removed as an essential service, and that the committee recommend a tightly restricted use of essential services designations outside of the health care sector.

Variations of Certification- Partial decertification applications (s. 142)

The BC Federation of Labour's affiliates are for the most part satisfied with the rules and timelines in place for dealing with certain employees' applications to decertify bargaining units. While we feel this type of application is more often than not brought forward or funded by employers, each case should be decided on its merits before a vice-chair of the board. Our affiliates have raised concerns for many years about the process for partial decertification applications conducted under Section 142, when certain employees seek to have an existing certification altered to exclude some, but not all union members.

Matters conducted in this way are not expedited in the same manner as full decertifications, and the rules for such applications are opaque. We recommend that the Code be amended to prevent applications for partial decertifications from being entertained by the board. In the alternative, we ask that such matters be resolved using the same rules provided for in Division 2 of the Code.

Conclusion

Our *Labour Relations Code* sets the framework for a complex and discrete administrative regime. This system is predicated on an historical compromise between workers and employers made in good faith. For the last 16 years, the ability of the working people to participate fully and to productively resolve disputes has been impaired because the employers have been given an unfair advantage. The BC Federation of Labour is hopeful the committee will recommend to the BC NDP government a series of *Labour Relations Code* changes that will level the playing field, and which will properly protect the Charter rights of working people to choose to join a union, to bargain collectively, and--when necessary for the expeditious resolution of disputes--to strike.

Due to page limits we have not appended draft wording for our recommendations, but if we can be of assistance to the committee in this regard, we would be happy to oblige.

All of which is respectfully submitted.

LEGISLATION

Canadian Charter of Rights and Freedoms, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c. 11.

Bill 29, *Health and Social Services Delivery Improvement Act*, SBC 2002 c. 2.

Bill 94, *Health Sector Partnerships Agreement Act*, SBC 2003 c. 93.

Labour Relations Code RSBC 1996 c. 244.

JURISPRUDENCE

Meredith v. Canada (Attorney General), 2015 SCC 2.

Mounted Police Association of Ontario v. Canada (A.G.), 2015 SCC 1.

Norbord Inc. v United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, Local Union Number 1-425, 2016 CanLII 23791 (BC LRB), Retrieved from: <<http://canlii.ca/t/gpqt/>>.

Saskatchewan Federation of Labour v. Saskatchewan, 2015 SCC 4.

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Restoring Fairness and Balance in Labour Relations: The BC Liberals' Attacks on Unions and Workers 2001-2016. *MacTavish J, and Buchanan C*. Retrieved from: <http://bcfed.ca/sites/default/files/attachments/lrb%20paper.pdf>

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