RESTORING FAIRNESS AND BALANCE IN LABOUR RELATIONS:

THE BC LIBERALS' ATTACKS ON UNIONS AND WORKERS 2001-2016

John MacTavish and Chris Buchanan

BCFED

November 2016

moveUP

This paper was produced by John MacTavish and Chris Buchanan for the BC Federation of Labour

John MacTavish is a partner at the Hastings Labour Law Office.

Chris Buchanan is a founding partner at the Hastings Labour Law Office.

November 2016

INTRODUCTION

It enhances human dignity, equality, liberty, and autonomy.[1]

It "carries the hallmark of democracy."[2]

It increases prosperity, leads to a higher standard of living, and contributes to the "economic health of a country."[3]

These are just some of the words the Supreme Court of Canada and others have used to describe the importance of the fundamental right of workers to join and be represented by a union.

When governments deny the ability of workers to come together to collectively bargain, either directly or indirectly, such as by creating practical or economic barriers to unionization, they are not only attacking unions but also undermining our society, our Canadian values, our democracy and our prosperity.

Unfortunately, these attacks have become far too commonplace in the past few decades. Both provincial and federal governments in Canada have been chipping – and in many instances bluntly chopping – away at workers' rights and freedoms at an alarming rate. They have done so with the complicity of large corporations and the dominant media, as part of a larger neo-liberal agenda of cutting social programs and dismantling the welfare state.[4]

One of the governments to head in this direction, and one of the worst offenders, has been the British Columbia Liberal government. The BC Liberals have governed BC for the past 15 years. Almost immediately upon gaining power in 2001, they began publicly chiseling away at workers' rights, and they have not slowed down since.

While some of the BC Liberals' attacks on workers are well-known, such as the anti-union legislation that prompted multiple successful *Charter*[5] challenges, the full extent of the damage done may be less understood and appreciated outside of the labour relations community.

For example, the BC Liberals have, by design, made the Labour Relations Board more remote from the community it is intended to serve, more irrelevant as an adjudicative body, and condoned the Board's creating barriers to access to collective bargaining, including but not limited to institutional delay and increased costs for certifications.

Perhaps the most pernicious anti-worker legacy of the BC Liberals is the sense that the current status quo is what should be expected or what meets the needs of workers in this province.

The BC Liberals have governed BC for the past 15 years. Almost immediately upon gaining power in 2001, they began publicly chiseling away at workers' rights, and they have not slowed down since.

It is simply not possible in a paper to set out all the ways that, in the past decade and a half, the BC Liberals have fundamentally undermined workers' rights, the operation of the *Labour Relations Code*,[6] and the Labour Relations Board itself. We have limited our review to just a few of the prongs of this many-pronged attack.

We have divided the paper into three main sections, which can be summarized as follows:

1. The *Labour Relations Code* and its administration by the Labour Relations Board under the BC Liberals;
2. The *Employment Standards Act*[7] and its administration under the BC Liberals; and
3. The BC Liberal government's attacks on particular groups of workers.

In the first section, we will survey in detail the BC Liberals' amendments to the *Code*, which made it harder for employees to join unions and easier for employers to intimidate and pressure employees into not doing so.

We will review the way these amendments have been interpreted and administered by the Board, which served to magnify their negative effects on workers and unions.

We will review the Board's conduct under the BC Liberals generally. This will include the Board's shift toward isolation from the labour relations community and the decline of its mediation services. It will also include an analysis of the Board's decision-making under the BC Liberals, focusing in on particular areas in which the Board has failed in its duty to provide workers with clear and consistent policy they can count on.

In the second section, we will review the BC Liberals' amendments to the *ESA*, and the accompanying budget cuts to its enforcement, resulting in fewer rights for non-union workers and more barriers to enforcing the meagre rights that remain. Given that this paper focuses primarily on the BC Liberals' actions with respect to unionized workers, this section will be less detailed than the others, but will provide a brief overview of the BC Liberals' actions in this area.

In the third section, we will describe the BC Liberals' attacks on particular groups of workers and their bargaining rights, many of which were found to be Charter violations.

The first step in repairing the damage the BC Liberal government has done is understanding it, which is the primary goal of this paper. However, we will also conclude the paper with some recommendations for the next steps to take in repairing the damage described herein.

With that in mind, we turn first to the *Code* and its administration by the Board under the BC Liberals.

> While amendments to the *Code* can improve workers' lives for the better, the opposite has been the case under the BC Liberals. The BC Liberals' amendments have served to negatively affect workers.

THE *LABOUR RELATIONS CODE* AND ITS ADMINISTRATION BY THE LABOUR RELATIONS BOARD UNDER THE BC LIBERALS

The *Code* is the most important piece of legislation affecting workers under the control of a provincial government, as it regulates when and how employees can join unions and the rights and obligations of unions and unionized employers.
By tinkering with the *Code*, governments can drastically affect workers' wages, working conditions and quality of life. This goes not only for those workers represented by unions, but for non-union workers as well, whose working conditions are indirectly affected by union rights.[8]

While amendments to the *Code* can improve workers' lives for the better, the opposite has been the case under the BC Liberals. The BC Liberals' amendments have served to negatively affect workers, and the Board's interpretation and administration of these changes has only magnified that effect.

History of pendulum swings

The BC Liberals were not the first government to amend the *Code*. Since it was first enacted, it has undergone many changes which are worth a brief review in order to understand the current context. These changes have been described as "pendulum swings" in which right-wing governments amend the current labour legislation to create barriers to accessing collective bargaining and workers' rights, while progressive governments change the legislation to restore fairness.[9]

The *Code* was first enacted in 1973 by Dave Barrett's newly elected NDP government. It was intended to balance the rights of workers and management and to establish the Board as a specialized tribunal tasked with adjudicating labour disputes. Certification was achieved through a "card-check"

system – if a union was able to sign up a majority of employees at a workplace, the workplace became unionized.[10]

In 1984, Bill Bennett's Social Credit ("Socred") government, which had defeated Barrett's NDP in 1975, introduced major changes to the *Code*, including changing the certification process from the card-check process to a mandatory vote, as well as making it easier for employers to become decertified.[11]

In 1987, the Socreds, under new leader Bill Vander Zalm, introduced Bill 19, which replaced the *Code* with the *Industrial Relations Act*.[12] The IRA contained many anti-union changes, including further facilitating decertification and restricting unions' picketing activity. There was widespread dissatisfaction with these changes and the lack of consultation that led up to them. This discontent resulted in a plethora of protests, unrest, and ultimately a union boycott of the Industrial Relations Council (the Board's new name under the IRA) that lasted several years.[13]

The NDP came to power again in 1991 with Premier Mike Harcourt. The new government recognized that the community was divided as a result of what had occurred in the 80s, and that there was a need to reform the legislation yet again. In 1992, the Harcourt government appointed a three-person subcommittee, tasked with addressing "the promotion of harmonious labour/management relations to ensure that the Province maintains and enhances its competitive position in the world market place."[14]

The subcommittee was composed of Vince Ready, John Baigent, and Tom Roper, Q.C., described by current LRB Chair Brent Mullin as "three leading practitioners in the province."[15] Mullin, in his paper "Towards a Progressive Labour Relations Board," praised this subcommittee and endorsed its goals of "Fairness and Balance" and Progressive Labour Relations."[16]

The subcommittee embarked on widespread public consultation and ultimately issued a 60-page report including a brand new draft *Labour Relations Code* that included many changes and reversed many of the anti-union features of the IRA. Among these were changes to the "purpose clause" and a return to card-based certification.[17]

In 1993, the NDP government enacted the changes recommended by the subcommittee.

On May 16, 2001, Gordon Campbell's BC Liberals defeated the NDP to form government. A few short months later, on August 16, 2001, they passed Bill 18, which, among other things, did the following:

- eliminated card-based certification in favour of mandatory representation votes;
- eliminated sectoral bargaining in the construction industry; and
- made education an essential service.

The following year, in 2002, the BC Liberals further amended the *Code* with Bill 42, which changed the unfair labour practice provisions in the *Code* to widen the ways in which employers can communicate with employees during an organizing campaign. It also introduced further changes to the wording of the "purposes" section of the *Code* to deviate the focus of the *Code* even further from access to unionization – which, again, is a touchstone of both our democracy and our values as a nation.

The BC Liberals were re-elected in 2005 and 2009 under Campbell and again in 2013 under current Premier Christy Clark.[15]

We will now address the BC Liberals' changes to the *Code* in more detail, as well as how these changes have been carried out by the Board. We will start with Bill 18 and move on to Bill 42.

Bill 18 - change from card-based to vote-based certifications

As mentioned, the BC Liberals passed Bill 18 a mere three months after being elected. In contrast to the committees and public consultation engaged in by the previous government before amending the *Code*, the BC Liberals did not feel it was necessary to consult the labour community or the public at all.

The BC Liberals passed Bill 18 a mere three months after being elected, and did not feel it was necessary to consult the labour community or the public at all. Bill 18's amendments to the certification process were intended to, and did in fact have a significant negative effect on the labour movement in BC.

The BC Liberals had campaigned on an explicitly anti-union "New Era" agenda, and believed their electoral success was all the public consultation that was needed.[18]

The main effect of Bill 18 was to eliminate card-check certification and return to mandatory votes. A union was now required to show 45 per cent membership support, at which time the Board would order a vote of the proposed bargaining unit members. The vote was to be ordered within 10 days of the application, and the union would become certified if it won a majority of the vote.

As a result of this amendment, the BC legislation is now the least favourable to workers in Canada in terms of the procedures to apply for certification. Five provinces still allow for certification by card-check.[19]

Of the provinces that require membership votes, BC has the highest threshold required before a vote will be ordered. Of the provinces that specify a time-frame in which the vote must occur, BC has double the time-frame of the others, which all only allow for five days.[20]

While the BC Liberals did not engage in any consultation before changing back to mandatory votes, they did have at their disposal the two very comprehensive reports, mentioned earlier, which had both looked at this very issue, as well as a great deal of research previously done on the effects of moving to a mandatory vote both in BC and in other jurisdictions.[21]

The 1992 Baigent, Ready and Roper report had this to say about the Socred period beginning in 1984 where certification was subject to mandatory votes:

> *While the statute still retained prohibitions against employer interference in the certification process, after the introduction of the vote the rate of unfair labour practices by employers during organization campaigns increased dramatically. The rate of new certification dropped by approximately 50%.*[22]

The report later states:

> *The surface attraction of a secret ballot vote does not stand up to examination. Since the introduction of secret ballot votes in 1984 the rate of employer unfair labour practices in representation campaigns in BC has increased by more than 100%.*
> ...
> *The simple reality is that secret ballot votes and their concomitant representational campaigns invite an unacceptable level of unlawful employer interference in the certification process.*[23]

The 1998 Section 3 committee (a committee of special advisors to undertake a review of the *Code*) composed of Vince Ready, Stan Lanyon, Miriam Gropper, and Jim Matkin, again looked at the issue and recommended against returning to mandatory votes:

> *We continue to believe that the risk of increased incidence of unfair labour practices during certification outweighs any advantage in using the secret ballot during the certification drive. We believe that other responses from the public research – namely that 74% of the respondents supported tough penalties against companies who engaged in unfair labour practices during union organizing as well as legal protection for employees before their first*

agreement – lend support to our position.[24]

What is missing from mandatory voting, especially when there is little or no restriction on anti-union campaigning, is a recognition that the employer's power imbalance creates fear: individuals do not have the confidence that their employer will accept and respect their rights; and individuals do not have the confidence that the Board will protect their rights when their employer does not. There is no evidence to suggest that a mandatory voting system establishes a more accurate assessment of employees' wishes. On the contrary, the evidence suggests that mandatory voting distorts employees' wishes.

In short, it was well-known in 2001 when Bill 18 was passed (and continues to be well-known) that mandatory votes dramatically increase unfair labour practices and decrease the rates of certification, resulting in reduced access to collective bargaining for workers.[25]

And to no one's surprise, this is exactly what has occurred since the BC Liberals' reintroduction of mandatory voting. In fact, in the BC Liberal era, certifications have decreased to significantly more dramatic lows than in the Socred period, in a manner described by some as "striking."[26]

A useful statistic to look at when examining the results of this legislative amendment is how many previously unorganized employees were certified in any given year. The following are the stats for the four distinct periods in recent history:

- 1974-1983 (NDP legislation/card check): average of 7411 per year
- 1985-1992 (Socred legislation/mandatory vote): average of 4106 per year
- 1994-2000 (NDP legislation/card check): average of 8762 per year
- 2002-2015 (Liberal legislation/mandatory vote): average of 2526 per year[27]

The average number of employees who achieved unionization under the BC Liberals is substantially lower than under the NDP. But what is even more alarming is that it is significantly lower than even the meagre organization rate under the Socreds with their extreme anti-union agenda.

The same trend is present when looking at the number of certifications granted per year. In the card-check period of 1993 to 2000, there was an average of 394 certifications granted per year. In the BC Liberal era of mandatory votes, between 2002 and 2015, there was an average of only 85 per year.[28]

Mandatory votes dramatically increase unfair labour practices and decrease the rates of certification, resulting in reduced access to collective bargaining for workers.

The rate of unfair labour practice complaints also increased substantially from an average of 0.89 per certification application between 1993 and 2000, to an average of 1.22 per application between 2002 and 2015.[29]

A final statistic that merits note is union density. It went down across Canada in the 1980s and 90s due to shifts in the economy and other factors. However, BC is the only province in which this decline continued in the 2000s, when the BC Liberals were in power.[30] BC also experienced the greatest decline in union density of any province.[31]

The unionization rate in BC is currently around 30 per cent, which is below the national average.[32] Clearly, Bill 18's amendments to the certification process were intended to, and did in fact have a significant negative effect on the labour movement in BC

Bill 18's other amendments, which targeted construction workers and teachers, will be discussed later on in this paper, in the section dealing with attacks on particular groups of workers. We now continue with the subject of membership votes and the LRB's and the ESB's carrying out of the BC Liberals' changes to the certification process.

The LRB's (and ESB's) policy and procedure surrounding certification votes

> Instead of a quick, inexpensive certification hearing, unions now face a process that can take months to resolve. Further, the Board does not require an employer to establish a prima facie case for its objections before compelling delay and costs to the certification proceedings.

The negative effects of the switch from card-check to mandatory votes have been worsened by the LRB's and the ESB's administrative procedures surrounding the now mandatory votes. The problems surrounding votes at both tribunals have been steadily getting worse during the entire reign of the BC Liberal government.

In order to prevent unfair labour practices and employer interference, it is necessary to process certification applications as quickly as possible and to hold representation votes as quickly as possible. Unfortunately, under the BC Liberal government, the LRB and ESB have fallen short of both these goals.

The number of days it takes the LRB to process a certification application has more than tripled, from an average of 28.7 days in the 1993-2000 era to a whopping 94.4 days in the BC Liberal era of 2001-2015.[33]

The BC Liberals have expressly or implicitly approved of this delay in certifications. There is a marked difference between the Board's practices under previous regimes – under which certification applications were truly expedited – and their current practice, under which employers are permitted to delay certification applications; for example, by advancing meritless objections.

Previously, the Board would compel quick hearings to resolve objections to certifications. The hearings in many instances would be completed within the 10 days' outer limit for a vote, if a vote was necessary.

In a true change in approach, in the Board's 2014 annual report, Chair Mullin stated that "an oral hearing will be held only where it is necessary – parties at the Board need to earn their way into a hearing room."[34] While the stated purpose was to prevent unnecessary expense and delay caused by an oral hearing, in reality, compelling an exchange of written submissions (which is generally what occurs when there is no oral hearing) in fact creates delay and additional costs to the parties, especially for unions.

Instead of a quick, inexpensive certification hearing, unions now face a process that can take months to resolve. The Board appears not to recognize that written submissions frequently cost parties more than oral hearings and certainly result in additional delay.

Further, the Board does not require an employer to establish a prima facie case for its objections before compelling delay and costs to the certification proceedings.

There is a clear incentive for employers to raise objections at the Board to put pressure on unions to withdraw or change certification applications to avoid delay and costs.

Quick oral hearings on certifications, certainly after the employer provides a prima facie case for its objections, are beneficial and necessary.

What will be well-known to unions and their organizers but perhaps not apparent to others, is that there is a momentum in union organizing. The timing of the Board's decision on the certification application is critical. While a delay of a few months may not be seen by the public as a long period of time, it is very difficult for unions who do not have access to the worksite to keep employees engaged and keep them informed. At the critical time when employees are seeking to exercise their rights to collective bargaining, if the labour relations system is non-responsive and full of delays it undermines confidence in its usefulness.

Some may try to lay the blame for these delays on parties and their lawyers, but the Board controls its own practice and procedure. And ultimately, the BC Liberals

are responsible for allowing the delays to applications for certifications to occur and expand.

It is not only the processing of certification applications that is being unduly delayed, but also the conducting of the membership votes themselves. As mentioned earlier, the 10-day period it takes to have a vote is longer than what is allowed in other jurisdictions, and even so, in practice the LRB usually orders votes near the end of the 10-day period.[35]

In the past, there may have been some practical reasons for this approach. But that is not the case anymore. Previously the Board would actually investigate certification applications within that period, and the Board would convene a meaningful hearing that could result in the adjudication of contested certification applications. But the Board no longer investigates certification applications and the Board no longer has expedited certification hearings, so there is no reason why the Board does not order votes within a few days of the certification application being filed.

A further concerning trend is the Board ordering mail ballots on a routine basis. Mail ballots are not required to conform to the 10-day period, and should only be ordered in exceptional cases where an in-person vote would not allow the voters to have a reasonable chance to cast a ballot.[36] Until recently, the Board's policy meant that it would rarely order mail ballots, given that certifications (in theory) are supposed to be processed on an expedited basis.[37]

Recently, however, mail ballots have become the norm rather than the exception, allowing employers even more time to wage anti-union campaigns and to improperly interfere in organizing efforts.

The reason for this development can be traced back to none other than the BC Liberals, who, shortly after being elected in 2001, began gutting the ESB of its funds and reducing the number of Industrial Relations Officers (IROs). These cuts had widespread effects on non-union workers, which will be discussed further in this paper in the section dealing with the *ESA*.

With respect to membership votes, however, IROs are responsible for investigating certification applications and producing reports, as well as holding and counting votes. Unfortunately, due to the BC Liberals' funding cuts, IROs have not been able to carry out their duties effectively.

Others have already noted that after the BC Liberals came in and started laying people off, IROs stopped routinely performing payroll inspections. This means that the number of employees in the bargaining unit is determined solely by the employer's say-so.[38] More recently, IROs have begun regularly asking for mail ballots due to not having enough resources to conduct in-person votes, and the LRB has gone along with it.

In *Walter Canadian Coal Partnership*,[39] the LRB decided, contrary to its earlier decisions and the principle that votes should be held on an expedited basis, that the IRO's stated lack of resources to hold an in-person vote was a good enough reason for the Board to order a mail ballot.[40]

In subsequent cases, the Board continued to rely on "practical concerns" regarding IRO resources for ordering mail ballots and seems to have distanced itself from the requirement to hold membership votes on an expedited basis.[41]

Recently, the Board's routine use of mail ballots due to IRO lack of resources has become such a pressing threat to workers' right to join a union that a reconsideration panel of the Board was forced to address it head-on.

IROs are responsible for investigating certification applications and producing reports, as well as holding and counting votes. Unfortunately, due to the BC Liberals' funding cuts, IROs have not been able to carry out their duties effectively.

In *Norbord Inc.*,[42] a raid application, the IRO asked for a mail ballot, while both the unions and the employer requested an in-person vote. The original panel issued a bottom-line decision that the vote would be held by mail, a decision for which the unions requested written reasons.

It then came to light that the IRO had sent an erroneous ballot by mail to the voters. To remedy this error, the original panel then decided to hold an in-person vote. The unions still wanted written reasons for the initial decision to hold a mail ballot. The original panel decided that the issue was moot because the vote had ultimately been held in person, and did not give written reasons.

This government has effectively hamstrung both the ESB and the LRB so that they are unable to fulfill their legislative purposes.

The unions applied for reconsideration, which was dismissed. However, in relation to the routine use of mail ballots, the unions made submissions that the reconsideration panel felt were compelling enough that they needed addressing. The unions submitted that the shift to mail ballots has "effectively turned the 10-day rule into a 31-day rule" and that scarce resources "are making the mail ballots the norm, to the detriment of the union side of the labour relations community."[43]

The reconsideration panel attempted to address the union's concerns, but unfortunately offered no solution to the serious issues posed by the routine use of mail ballots.

The reconsideration panel's decision initially appears to confirm that the Board's previous policy still stands: that is, that votes should be expedited where possible, and mail ballots only ordered in exceptional cases where an in-person vote would not allow everyone in the bargaining unit a reasonable opportunity to vote.[44]

However, after paying lip service to those principles, the reconsideration panel goes on to say that the IRO resource concerns addressed in *Walter Canadian Coal* are still a valid reason to hold a mail ballot, and that the issue "is to be determined on a case by case basis."[45]

The reconsideration panel acknowledges that mail ballots have been more frequent and concludes by saying that "The Board will continue to meet and consult with the labour relations community with respect to this fundamental issue."[46]

While it is commendable that the Board has recognized that this is an issue that needs to be addressed, the fact that it appears unable to do so is an example of how far the BC Liberals' attacks on unions and workers have gone. This government has effectively hamstrung both the ESB and the LRB so that they are unable to fulfill their legislative purposes.[47]

While we will address more concerns with the LRB and the ESB further in the paper, we now turn to address the other major amendment the BC Liberals made to the *Code* – Bill 42's changes to the *Code's* unfair labour practice provisions.

Bill 42 - change to unfair labour practice provisions

In 2002, a year after Bill 18, the BC Liberals advanced a further legislative attack on unions with a change to the *Code*'s unfair labour practice provisions, specifically providing employers with more leeway in their communications with employees during organizing drives.

While Bill 18 gave employers more opportunity and time to influence employees not to join a union, Bill 42 (among other things) now further facilitated that process by widening the scope of permissible employer speech during that delicate time period.

The BC Liberals made this change, along with a change to the purposes of the *Code* to required consideration of "economically

viable businesses," at the urging of the employer community.[48]

In terms of employer communication, Bill 42 amended sections 6(1) and 8 of the *Code*. Before the amendments, Section 6(1) was a blanket prohibition on employer interference with trade unions. It said that an employer "must not participate in or interfere with the formation, selection or administration of a trade union or contribute financial or other support to it."

Before the amendments, Section 8 provided:

> *Nothing in the Code deprives a person of the freedom to communicate to an employee a statement of fact or opinion reasonably held with respect to an employer's business.*

After the Bill 42 amendments, Section 6(1) contains the same wording as before, but is preceded by "Except as otherwise provided in Section 8."

The new Section 8 says:

> *Subject to the regulations, a person has the freedom to express his or her views on any matter, including matters relating to an employer, a trade union or the representation of employees by a trade union, provided that the person does not use intimidation or coercion.*

While the changes could be interpreted any number of ways, the LRB has chosen to interpret them in a way that is very unfavourable to employees and unions. We describe the Board's interpretation in the following section.

The LRB's policy and procedure surrounding employer speech and unfair labour practices

The Board's first decision to consider the amended sections was *Convergys Customer Management Canada Inc.*[49] The Board interpreted the new sections 6(1) and 8 as dramatically broadening the scope of permissible employer speech. That is, the balance had now shifted away from employee freedom of association in favour of employer freedom of expression.

The Board noted the multiple ways in which more expression was now allowed. Employers could now communicate about "any matter," not just in relation to their businesses. Their statements were no longer required to be "reasonable." "Undue influence" was deleted, meaning this type of speech was now allowable. And finally, the word "view" was included, rather than "statement of fact or opinion."[50]

The Board interpreted this as meaning that although outright lies were not permitted, statements that were incorrect or unreasonable could be. Thus, when applying its interpretation to the facts of the case, the Board found the following to be permissible speech:

- Statements that imply that the Union is disrespectful and should not be trusted, even when that view is mistaken and unreasonable.[51]
- Statements that the Employer does not have to bargain if the Union is certified.[52]
- A statement that signing a Union card has the same legal effect as signing a contract.[53]

The Board continued this laissez-faire approach to employer speech in subsequent cases. In *RMH Teleservices International Inc.*,[54] the original panel found that the following actions were permissible and did not contravene the *Code*:

- Bringing in managers from other locations to circulate throughout the call centre during the union's organizing campaign;

- Holding meetings discussing the union's organizing campaign, where the employer repeatedly referred to the money it was losing;

- Having managers give out gifts emblazoned with anti-union messages, and flashing the anti-union messages with a projector onto the workplace wall. The messages included:
  -A union does not ensure job security;
  -The union does not understand the employer's business and would interfere with productivity;
  -Employees will become "one in the crowd" to the union;
  -The union cannot guarantee anything;
  -A series of questions the employees should ask the union, such as whether or not the union could guarantee a contract.[55]

The Board's current approach to unfair labour practices and employer speech effectively allows employers to scare employees into not exercising their Charter-protected rights. In combination with the other anti-union changes that have occurred under the BC Liberal government, this creates a real barrier to workers' access to collective bargaining.

With respect to the slide show, the original panel found that the images were "impossible to miss" and "pervasive," yet did not find them to be intimidating or coercive because the employees were apparently free to look away and ignore the message.

The union in *RMH* applied for reconsideration, which was granted, with the reconsideration panel finding that the gifts and the slide show constituted "forced listening" and were indeed prohibited by Section 6(1).[56] The reconsideration panel emphasized, however, that the amendments to Sections 6 and 8 had widened the scope of permissible employer speech and that it was now permissible for employers to engage in "political style anti-union campaigns," even during working hours.[57]

The overall effect of these decisions has been described as "staggering."[58] Essentially, employers now have "a free hand during organizing drives, short of outright threats to job security and terminating employees. Not only can employers say almost anything to employees…they can say it in almost any fashion they wish."[59]

In later decisions, the Board maintained this broad interpretation of permissible employer speech, although it did confirm that there were certain limited circumstances, such as captive audience meetings, in which employers' conduct would attract closer scrutiny.[60]

In addition to its interpretation of the amendments to sections 6 and 8, another issue that merits mention with respect to unfair labour practices is the Board's reluctance to award meaningful remedies when employers are found to have breached the law in this manner. In particular, the Board rarely uses the remedy of remedial certification (where certification is granted as a remedy for unfair labour practices, despite the union not having achieved sufficient support to become certified the regular way).[61]

This reluctance to properly remedy unfair labour practices pre-existed the BC Liberal government; however, it has likely contributed to some of the issues discussed above; namely, the dramatic decrease in certifications and increase in unfair labour practices.[62]

The Board's current approach to unfair labour practices and employer speech effectively allows employers to scare employees into not exercising their Charter-protected rights. In combination with the other anti-union changes that have occurred under the BC Liberal government, this creates a real barrier to workers' access to collective bargaining.

If there was more confidence in the labour relations system, the harm would not be so great. But a perfect storm exists of an underfunded, remote, and diminished Board that does not instill confidence that rights will be protected, and a government that openly attacks and denigrates those rights.

With that in mind, having examined the BC Liberals' changes to the *Code* and the

LRB's interpretation of them, we turn now to the LRB's conduct generally under the BC Liberals, beginning with its trend toward isolation from the community, and continuing on to its failure to be clear and consistent in its decision-making.

The LRB: Isolation and irrelevance

The Board used to be a very important administrative tribunal, and it used to place a high priority on consulting with and involving the labour relations community. Under the BC Liberals, however, it has become increasingly irrelevant and isolated from the community it is supposed to serve. Its shift in this direction is consistent with the BC Liberal government's animosity toward workers.

Although it is and should be an impartial adjudicative body, the Board has the unique role of setting labour relations policy in this province. In this respect, the Board is not like the courts. The Board is given wide discretion on whether and how rights, such as the right to collective bargaining, are accessed.

Under previous regimes, there were both formal and informal mechanisms by which the Board consulted with and involved the labour relations community to arrive at sensible and fair policies and procedures. For example, the Board previously held meetings with employer groups and unions, which it stopped doing for a long period of time during the BC Liberal era.

Another invaluable way the Board used to involve the community, and no longer does, was by using members as part of the adjudicative process.

Members were individuals with extensive experience and knowledge of how labour relations works in a real way. Many members' backgrounds included experience as workers themselves, in a plethora of diverse workplaces throughout the province. This real-world experience provided members with insight and knowledge that lawyers (either representing the parties or as a vice-chair) did not have.

Members provided the Board with a greater opportunity to come to decisions that would make sense in the real world. Further, the members would be able to convey to the Board the actual impact of the Board's policies. Members would also be able to assist in settling disputes, with effective members being able to move parties to solutions that may not even have been considered by a group of lawyers. By no longer using members, the Board is denied a valuable resource and valuable opportunities.

Given the unique role of the Board, consultation with the labour relations community is absolutely essential to ensure that the Board's policies and procedures are grounded in reality. This trend of isolation creates not only the apprehension but the actuality of decisions that are incongruous with the true experiences of individuals in today's world.

It is important to have a Board that commands respect within the community, since the Board must be viewed as important and a respected place to work, in order for the best candidates to want to become vice-chairs, members (when they existed), mediators, special investigating officers and staff.

Unfortunately, as a result of the trend toward isolation just described, the stature of the Board has been diminished. It is easy to see how the BC Liberals' lack of respect toward workers' rights and underfunding of the labour relations system sends a message that the Board and its role is not important.

Related to this issue of isolation from the community is another issue the public might not be aware of: the systemic problem with the Board's mediation services.

A perfect storm exists of an underfunded, remote, and diminished Board that does not instill confidence that rights will be protected, and a government that openly attacks and denigrates those rights. Under the BC Liberals, it has become increasingly irrelevant and isolated from the community it is supposed to serve.

Mediating disputes and collective bargaining is one of the LRB's critical functions. A properly functioning mediation service helps workers access collective bargaining, particularly when a group of workers is attempting to attain a first collective agreement with a union-resistant employer.

Effective mediation remains important in subsequent rounds of bargaining, to assist parties in coming to agreeable solutions.

Unfortunately, the BC Liberals have not recognized the importance of the Board's mediation services, and have taken steps to undervalue them. For example, there used to be a dedicated associate chair of mediation, which has now been eliminated. To the public, this may not seem important, but to the labour relations community this is a subtle but meaningful statement that the BC Liberals do not view the Board's mediation services as valuable.

As a result of this undervaluing of the Board's mediation services, mediation at the Board under the BC Liberals has not always been effective, and in some cases has even been detrimental to the resolution of disputes. In many recent labour disputes – both high-profile and lesser-known – the parties have started to more frequently seek mediation outside the Board.[63]

This is not to say that there are not hard-working mediators – and other staff, for that matter – at the Board. Many of the Board's mediators and other staff members have made the most of the limited resources they have been given, and have continued to serve parties to the best of their abilities. It is important to recognize these individuals' contributions, while still holding to account the BC Liberal government and the LRB generally.

As this section has demonstrated, then, the BC Liberals have effectively both diminished the relevance of the Board as well as its connection to the labour relations community. This damage will take some time, and much effort, to repair.

In addition to this shift toward irrelevance and isolation, the Board's decision-making under the BC Liberals has also been problematic. We examine some examples of this in the following section.

The LRB's decision-making under the BC Liberals

In his 1998 paper "Toward A Progressive Labour Relations Board," Brent Mullin, who was then a former Vice-Chair and is now the Chair of the LRB, described the benchmarks by which the LRB's decision-making should be judged. The first of these, mentioned earlier, was "Fairness and Balance." That is, "labour legislation must be perceived as fair by the employer and worker community, and by the general public."[64]

Part of this fairness and balance, Mullin submitted, was that the dramatic "pendulum swings" described earlier in this paper between employer-friendly and worker-friendly policies should be avoided.[65]

Mullin's second benchmark was "Progressive Labour Relations." That is, the Board should be responsive to the key economic concerns of "productivity" and "flexibility."[66]

Using these benchmarks, Mullin was critical of the LRB – which at the time had been chaired by Stan Lanyon – and accused it of issuing decisions that were "theoretical," "unclear," and "inconsistent."[67]

Unfortunately, 18 years after Mullin's paper was written, his criticisms still stand, and the problems he identified with the Board have arguably only gotten worse.

In terms of Mullin's first benchmark of "Fairness and Balance," as we have seen, the policies of the BC Liberal government and

the LRB have gone through yet another one of the dreaded "pendulum swings." Rather than moving from what Mullin criticized as a stance that was too favourable to workers toward being balanced between the two sides, the LRB and the government have swung in the opposite direction in what is perceived as being policies far too favourable to employers.

With respect to Mullin's second benchmark of "Progressive Labour Relations," the BC Liberals did follow his suggestion (supported by the employer community) to change the "Purposes" section of the *Code* to compel the Board to consider "economically viable businesses" and "productivity" in coming to its decisions. Mullin believed this change would lead the Board's decisions to be more responsive to current economic concerns. However, evidence has shown that the Board has not changed its decision-making in response to this amendment.[68]

The Board is not performing well, then, based on the two benchmarks Mullin himself set out. Moreover, and perhaps more importantly, decisions that are perceived to be "inconsistent" and "unclear" remain a problem at the LRB, as he claimed they were back when he wrote his paper.

One of the Board's key roles is to create clear, consistent policies that parties can count on so that they have some idea what their rights and liabilities are. In the words of a Review Committee appointed by the BC Liberal government in 2003:

> *We believe the proper functioning of the Board is vital to a healthy labour relations climate…for the Code to be effective, it is essential that the Board have the ability to provide clear, understandable and timely policy decisions regarding these issues.*[69]

Unfortunately, despite this strongly worded advice, it appears the BC Liberal government has not made the Board's "proper functioning" a priority. In this section we will provide some examples of Board decision-making under the BC Liberals that have fallen short of being clear and consistent. These examples include the Board's treatment of the following subject matters: partial decertifications, applications for standing, and estoppel.

Partial decertification

Partial decertification – the ability of employees to decertify only a portion of an established bargaining unit – has been a contentious area of Board decision-making for some time. The *Code* spells out what is required when employees want to decertify an entire unit, but it is silent on the issue of partial decertification. It has therefore been an issue that is governed by LRB policy – a policy which has not only changed several times over the years, but that has been applied in a seemingly inconsistent manner.

The Board set out its current policy on partial decertification in *Certain Employees of White Spot Ltd*.[70] Prior to *White Spot,* employees applying for partial decertification were required to show that circumstances had changed since the unit was certified, such that "it is no longer appropriate for them to be included in the unit."[71]

In *White Spot*, the Board established a new test, intended to place more emphasis on employee wishes, given that the previous test had rarely resulted in successful partial decertification.

The new test involves, first, the threshold requirement that the group leaving the bargaining unit and the group remaining be appropriate for collective bargaining; that is, a rational, defensible line must be able to be drawn around both groups.

Once the threshold requirement is met, the Board considers and weighs a number of

other factors in deciding whether to grant the partial decertification application.

Those factors are:

- Impact on the employees remaining in the bargaining unit;
- Impact on the collective bargaining relationship; and
- Other considerations including:
  - Timing of the application (cannot be during a strike, lockout or during collective bargaining);
  - Improper interference by the employer;
  - Whether the application is a disguised raid, and
  - Whether it would be difficult or impossible to decertify the unit as a whole.[72]

The new policy has been applied in a number of cases with many different results depending on the facts involved. Different results depending on the facts is to be expected. The problem has arisen primarily with reconsideration panels interfering with these factual issues in an inconsistent manner.[73]

When a court or tribunal sets out a test like the one in *White Spot*, where the original panel hearing the case is to weigh different factors in coming to a decision, as long as the original panel cites and applies the correct factors, the weighing and balancing of the factors is a discretionary decision and should not be interfered with on appeal. This non-interference with discretionary decisions is a fairly standard rule that applies in various different appeal contexts.

In the context of the Board's reconsideration power over partial decertification decisions, the Board has confirmed that where "the threshold requirement is met and bargaining unit appropriateness is not an issue, the question of whether to allow or disallow the application is a *discretionary decision* based on the considerations and policy enunciated in *[White Spot]*."[74]

In *British Columbia Automobile Association*,[75] the Board firmly reiterated the importance of this rule when partial decertification decisions are being reviewed on reconsideration.

BCAA involved a group of employees who wanted to decertify one location of a nine-location bargaining unit. The original panel found that the threshold test from *White Spot* was met.

He then analyzed the factors to be considered in the second, discretionary part of the test. He found that the departure of the one location would have a real impact on the employees remaining, in that it would "reduce the pool of available bumping and recall opportunities."[76] It would also affect the collective bargaining relationship in that it would reduce the union's ability to exert pressure in a strike.[77]

The original panel then looked at the interests of the employees who wanted to decertify and found that it would not be practically possible for them to decertify the entire unit.[78]

The original panel balanced and weighed these factors and decided that the employee wishes should win out, and therefore the partial decertification application should be granted.[79]

The union applied for reconsideration on a number of grounds. The reconsideration panel found that the original decision properly applied the *White Spot* test to the facts before it. The reconsideration panel said that the White Spot test for partial decertification is a good example of a "polycentric context" – that is, a context which "demands a delicate balancing between different constituencies with different and competing interests."[80]

The reconsideration panel emphasized that this context was the type in which an original panel's weighing of the facts should

not be interfered with. In doing so, the reconsideration panel made some powerful statements about the way the Board's policy decisions are supposed to function:

> **11** *Within that balancing of interests it will virtually always be possible for a losing party to argue that either its part of the balance has been inadequately considered or the competing interests have been overstated. There are, however, in our view, significant, potential consequences if the Board too readily accedes to these arguments, or perhaps even the request that in each and every case each and every argument that can be thought of be exhaustively considered. The potential, perhaps even likely, practical results can readily be anticipated. The accessible guidance of having a leading, policy decision, as in White Spot, would potentially be undermined by a proliferation of jurisprudence. That whole body of jurisprudence from a practical perspective would likely only be known by those few who have the occasion, resources, and patience to access and master it. The further consequences would be that the benefit of having an accessible (even if necessarily multi-factored and thus somewhat complex) leading decision would be lost. That in turn would render the underlying provisions and rights in the Code less accessible and practically meaningful. We think it obvious that is to be avoided.*
>
> ...
>
> **13** *... the Board needs to take a practical, as opposed to an overly legalistic and technical, approach to the interpretation and application of the Code's provisions. That includes the nature and requirements of the provisions ultimately being knowable and practically applicable without the interpretation and application of them being subject to never ending debate, minute dissection or constant attack.*[81]

The reconsideration panel ultimately found that the union's grounds for reconsideration amounted to asking it to re-weigh the factors as found by the original panel. The reconsideration panel dismissed the union's reliance on a number of post-*White Spot* decisions as being an undesirable attempt to develop a "doctrinal body of jurisprudence."[82] The reconsideration panel emphasized that as long as the *White Spot* test was applied, the original panel was able to determine the facts and how to balance them. Reconsideration was denied.

BCAA represents an admirable attempt by the Board to make its policies accessible and practical. Unfortunately, subsequent panels tasked with deciding partial decertification applications have failed to follow it and have in fact taken steps toward developing the "doctrinal body of jurisprudence" the *BCAA* reconsideration panel advised against.

Perhaps the most striking example of this reversal was in *Brandt Tractor Ltd.*,[83] decided by the exact same reconsideration panel as *BCAA* and mere months after that decision with its strong cautions was issued.

In *Brandt*, a group of employees at the Fort St. John branch of the employer applied to decertify that branch. The bargaining unit consisted of 12 branches across the province.

The original panel found that the threshold requirement was met, and went on to weigh the other factors set out in *White Spot*. She found that there would be a significant impact on the remaining employees and on the collective bargaining relationship, due to work jurisdiction issues and the union's ability to make tough choices in bargaining, particularly in the context of a two-tiered wage system.[84]

She also found that it was not practically possible for the applicant employees to decertify the entire unit.[85]
She weighed the factors and found that the effect on the remaining employees and the collective bargaining relationship outweighed the wishes and interests of the applicant employees. She dismissed the application.[86]

The applicant employees and the employer applied for reconsideration. There was no issue as to appropriateness, so the reconsideration panel was only dealing with the second, discretionary part of the *White Spot* test. Accordingly, the reconsideration panel identified the issue on reconsideration as the application of the *White Spot* policy to the facts. The reconsideration panel cited the relevant portion of *BCAA* as the correct approach to this issue.

It then proceeded to do precisely what *BCAA* had warned against: it interfered in the delicate, discretionary weighing and balancing done by the original panel and decided that she had weighed and balanced wrong:

> *Overall then, there is a general contrast between the factors under White Spot supporting dismissing the partial decertification application and the factors which support granting it. The former, while strong, have mitigating circumstances with them. The latter simply results in the removal of choice entirely, with no mitigation of that.*[87]

Essentially, the reconsideration panel decided that the impossibility of decertifying the entire unit was the most important factor, rather than one factor to be weighed and balanced with all the others, as instructed in *White Spot*. The reconsideration panel allowed the reconsideration and granted the employees' application.

There was no suggestion that the original panel had misstated or misapplied the *White Spot* test. The reconsideration panel simply did not like the result and so substituted its own opinion of the way the factors should have been weighed – precisely what it had warned against in *BCAA*.

Something similar happened in *WW Hotels Limited Partnership*.[88] A group of employees in the front office of a hotel applied to decertify from the hotel-wide bargaining unit. The original panel granted the application. She found that it wasn't impossible to decertify the whole unit, but that the effects on the other employees and the bargaining relationship were not enough to outweigh the wishes of the applicant employees.

The reconsideration panel again took issue with the original panel's weighing and balancing of the factors in the *White Spot* test. According to the reconsideration panel, the original panel's "reasons…are inadequate because they do not adequately respond to the *White Spot* factors."[89]

The matter was remitted to the original panel, and she ended up reversing herself and denying the application.[90]

The test in *White Spot* was intended to right the balance between employee wishes and the effect on the bargaining unit and the remaining employees. It gave original panels a threshold question followed by a contextual weighing of factors. In *BCAA*, the Board confirmed that this discretionary weighing of factors should not be interfered with provided the correct test was followed.

Parties should be able to rely on a clear and concise policy like the one set out in *White Spot*, but as we have seen, subsequent cases have failed to keep the policy consistent and concise and have made it difficult for parties to know where they stand.

Partial decertification is an area that many have suggested would be better addressed through specific legislation;[91] however, the

BC Liberals have not taken the opportunity to remedy the situation.

Standing

Another issue in which the LRB's decision-making has been inconsistent is with respect to whether to grant parties' applications for standing. In a way that bears some similarity to the partial decertification cases, the Board has not followed its own advice on when an original decision should be interfered with on reconsideration.

There are essentially three ways a party can obtain standing in a matter before the LRB:

- Standing as an interested party, where the party is affected by the application in a direct and legally material way;
- Standing as an intervenor, where the party's participation in the matter will help the Board canvass an issue of general interest to the labour relations community; and
- A third category of standing granted in limited circumstances such as:
  - Where the Board's resources are insufficient to bring key issues to light;
  - Where the immediate parties are not sufficiently adversarial; or
  - Where there is the potential for a fraud being perpetrated on the Board.[92]

Like a decision to allow a partial decertification application, a decision to grant standing is a discretionary one.[93]

As mentioned earlier, the Board has confirmed on a number of occasions that review of discretionary decisions "will only be allowed in the rarest of circumstances," such as a "clear departure from established policy."[94]

Not only is it discretionary, but the decision to grant standing is interlocutory, meaning that it is not a final disposition of the case. This should make it even less likely that the Board would allow leave for reconsideration. The Board has refused to grant leave for reconsideration of interlocutory or interim decisions, except in the rare circumstances that an issue of jurisdiction or "irreparable harm" arises.[95]

Nonetheless, in *Saipem Canada Inc.,*[96] the Board appeared to completely disregard the above policy.

In the original decision, a group of unions applied for standing in a certification application filed by the Christian Labour Association of Canada (CLAC). The unions applied under the third category of standing outlined above, in order to argue appropriateness issues, such as concerns with build-up, that would not otherwise come to the Board's attention due to CLAC and the employer not being sufficiently adversarial.

The original panel cited *Armscon* and subsequent cases that had considered standing for parties wishing to raise concerns about the build-up principle. She found that, as in those cases, the unions had made out a prima facie case that there was a significant issue with the build-up principle and neither the employer nor CLAC would raise it. She therefore exercised her discretion to grant the unions' application for standing.

CLAC applied for reconsideration. The reconsideration panel, shockingly, allowed the reconsideration and remitted the matter back to the original panel. Although it explicitly acknowledged that the original panel's decision was discretionary,[97] its reasons for overturning it rested mainly on its disagreement with the original panel's findings of fact, such as her conclusion that a build-up was "certain and imminent."[98]

This is in complete contravention of the Board's previously established policy on review of discretionary and interlocutory decisions. There was no suggestion of any jurisdictional issue, irreparable harm, or clear departure from policy.

Ironically, much like in the partial decertification decisions described above, the exact same reconsideration panel as in *Saipem*, mere months later, decided another reconsideration in a case about standing, and did another about-face back to its previously non-interventionist stance.

In *Forensic Psychiatric Services Commission*,[99] the original panel granted the applicant unions standing as intervenors but not as interested parties. One of the unions appealed, arguing that standing should have been granted as an interested party.

The reconsideration panel, in a brief, four-paragraph decision, dismissed the application, without addressing the merits, on the basis that it was interlocutory, and the Board "is reluctant to review interlocutory rulings under Section 141 of the *Code* except in exceptional circumstances."[100]

This is another example of the Board completely disregarding its own policy and making it difficult for parties to know their rights and where they stand.

In theory, the Board is supposed to be fairly deferential to arbitrators' applications of the law of estoppel. In practice, the Board has gone against its policy and been fairly interventionist in its review of arbitral awards dealing with estoppel, and moreover it has done so in a surprisingly inconsistent manner.

Estoppel

A final example that we will touch on in regards to the Board's inconsistency is in its jurisprudence on estoppel.

Estoppel is an equitable principle that has been applied by courts for well over a century.

There are many variations on estoppel, but it usually involves one party who makes an unequivocal representation to the other party that it will not rely on its strict legal rights (usually under the contract). The other party relies on that representation to its detriment – for example, it does not take the opportunity to negotiate a change to the written contract. In such situations, courts will find that it is unfair for the first party to revert to relying on its strict legal rights.[101]

Labour arbitrators have been applying the doctrine of estoppel in collective agreement arbitrations for many decades as well, with the Board playing a supervisory role over arbitrators' application of estoppel to ensure it is being applied in a manner that is appropriate to the labour relations context.

Under the *Code*, parties are able to appeal arbitrators' awards to either the Board or the Court of Appeal, depending upon the basis of the award. Awards that involve arbitrators' applications of the law of estoppel generally go to the Board.

In theory, the Board is supposed to be fairly deferential to arbitrators' applications of the law of estoppel. Generally, according to its own policy, as long as the arbitrator has a correct understanding of the law of estoppel, the Board should not interfere with his or her findings of fact as to whether a representation was made or whether there was detrimental reliance.[102]

In practice, the Board has gone against its policy and been fairly interventionist in its review of arbitral awards dealing with estoppel, and moreover it has done so in a surprisingly inconsistent manner.

Many of these inconsistencies were pointed out, quite critically, by Arbitrator James Dorsey, Q.C., in *TFL Forest Ltd*.[103] Arbitrator Dorsey is a highly regarded arbitrator with over 40 years of experience in labour relations. He applied the doctrine of estoppel in an award involving a dispute between a union and an employer about student employees.[104] Dorsey had found, among other things, that the union had represented by its actions and silence that it was agreeing to the employer's continued use of student employees, despite the fact that a written agreement to that effect had not been continued.

The union applied to the Board for review of Dorsey's earlier award. The Board found that (despite Arbitrator Dorsey's many

years as a senior and respected arbitrator) it was not "sufficiently confident that the Arbitrator proceeded on a correct understanding of the modern principles of estoppel."[105] The Board remitted the matter back to Dorsey to give him an opportunity to "provide a reasoned analysis."[106]

It is an understatement to say that Dorsey took the Board up on that opportunity. His 175-paragraph decision is an indictment of the Board's wildly inconsistent review over the years of arbitrators' application of estoppel.

In his award, Dorsey goes through a detailed history of the way estoppel has been applied by courts, arbitrators, and the Board. He points out many inconsistencies in the Board's cases dealing with estoppel.

A particularly glaring example was in *West Fraser Mills Ltd.,*[107] in which the Board overturned then arbitrator (now Justice of the Supreme Court) John Steeves' award. Arbitrator Steeves had found that the employer, through its long-time continuation of a practice along with its silence during bargaining that it intended to change the practice, had represented to the union that it would continue the practice. The union had relied on this representation to its detriment, with the result that the employer was estopped from ceasing the practice until the next round of bargaining.

The Board held that the arbitrator was wrong to find that a mere longstanding practice and the employer's silence with respect to its intent to change the practice, without more, could amount to a representation.

The Board held that before a long-time practice could found an estoppel, there had to be "something more…the mere existence of the practice alone is insufficient."[108]

The union applied for reconsideration, which was denied, with the reconsideration panel stating, rather remarkably, that the review of arbitral estoppel decisions would nonetheless remain "narrow."[109]
As Dorsey points out, *West Fraser Mills* is inconsistent with the Board's prior decisions. For example, in *Harbour Cruises Ltd.,*[110] the Board said that "the existence of a practice may be sufficient to found an estoppel."[111]

Similarly, in *District of Chilliwack,*[112] the Board discussed the liberal approach arbitrators should take to estoppel and stated that estoppel would "arise where one party's silence on an issue raised leads the other to reasonably infer acquiescence..."[113]

What is even more striking, though, is what happened after *West Fraser Mills*. In *City of Vancouver*,[114] arbitrator Steeves was again asked by a union to apply estoppel to prevent the employer from discontinuing a long-time practice.

Steeves, following *West Fraser Mills* – and citing directly from that decision – said that some evidence had to be adduced beyond silence or acquiescence, and that a practice on its own was not sufficient to found an estoppel. Since there was no evidence of anything beyond the practice and the employer's silence, Steeves found that estoppel had not been made out.

The union applied to the Board for review of Steeves' award. The Board, remarkably, overturned the award and found that Steeves had been wrong to follow what the Board itself had said in *West Fraser Mills*.

To be clear, the arbitrator was following a Board decision – the very part of that Board decision which had resulted in it overturning that same arbitrator's previous decision – and the Board was now saying he was incorrect to follow it, and overturning his new award because he had followed it.[115]

The BC Liberals have amended the *Code* in ways that dramatically disadvantage workers and make it more difficult for them to join unions. The LRB's interpretation of these changes – along with its isolation from the community and inconsistent decision-making in other areas – have exacerbated the negative effect of the legislative changes.

The Board in *City of Vancouver* explicitly said it was not overturning *West Fraser Mills,* despite the fact that the decisions are directly contradictory. Rather, it said that the statement in *West Fraser Mills* that "the mere existence of the practice is insufficient" was simply intended to apply to the facts of that particular case.[116]

Since the existence of an unequivocal representation was a question of fact for the arbitrator, the Board in *City of Vancouver* reasoned that the statement from W*est Fraser Mills* could not decide that question of fact in future cases.[117]

While this was a creative attempt to reconcile the two inconsistent decisions, it falls short of doing so. If the finding of an unequivocal representation is a question of fact for the arbitrator (which numerous Board decisions say it is), and it is not a legal error to say that estoppel can be based on a longstanding practice, then the Board in *West Fraser Mills* was clearly incorrect to overturn Steeves' decision in that case.

After reviewing these and other authorities on the law of estoppel, Dorsey concluded that it had been open to him as an arbitrator in his prior award to find that "what was agreed by both parties to be an acceptable practice cannot be retroactively renounced by either party."[118]

Dorsey also took the opportunity to criticize the Board for another inconsistency – its insistence on arbitrators applying "judicial criteria and approaches to estoppel." This insistence is arguably inconsistent with arbitrators' statutory mandate and with prior Board decisions urging arbitrators to apply estoppel more liberally in the labour relations context.

Estoppel, like the other areas of law we have surveyed above, is clearly the subject of problematic and inconsistent decision-making on the part of the Board.

As we have seen in this section, then, the BC Liberals have amended the *Code* in ways that dramatically disadvantage workers and make it more difficult for them to join unions. The LRB's interpretation of these changes – along with its isolation from the community and inconsistent decision-making in other areas – have exacerbated the negative effect of the legislative changes.

In the next section, we examine another area in which the BC Liberals have gutted workers' rights – the *ESA* and its enforcement. While our paper focuses primarily on unionized workers and the labour relations scheme, it is important to briefly touch on some of the many negative changes affecting non-union workers.

THE *EMPLOYMENT STANDARDS ACT* AND ITS ADMINISTRATION UNDER THE BC LIBERALS

Employment standards legislation exists to create a floor of minimum standards beneath which employers cannot go, and it is important for all workers. It is particularly important, however, for the most vulnerable workers in society, such as women, immigrants, racial minorities, young workers, and precarious workers such as those that are on call, casual, or do not have permanent full-time employment.

The BC Liberals' attacks on unions have, as noted above, resulted in fewer and fewer workers having the opportunity to join a union. This means that more and more of the workforce now has to rely on the *ESA* as their only legal protection against employer abuses. Unfortunately, the protections the *ESA* offers – already fairly minimal – have also been gutted dramatically by the BC Liberal government.

The BC Liberals' attacks on unions have, as noted above, resulted in fewer and fewer workers having the opportunity to join a union. This means that more and more of the workforce now has to rely on the *ESA* as their only legal protection against employer abuses. Unfortunately, the protections the *ESA* offers – already fairly minimal – have also been gutted dramatically by the BC Liberal government.

In the name of "flexibility," the BC Liberals made changes to "nearly every significant aspect of employment standards law and its enforcement."[119] The great majority of these

changes were negative for workers and represented a “dramatic rollback of worker rights.”[120]

This rollback of rights, like the BC Liberals’ rollback of rights for unionized workers through the *Code* and the LRB, was done through legislative (and regulatory) change but also through administrative, procedural, and budgetary measures involving the ESB. In this section, we will highlight each of the primary changes and their negative effects on workers.

Legislative and regulatory changes

In their first few years in power, the BC Liberals made sweeping changes to the *ESA* and its accompanying regulations. These were primarily brought in through Bill 48 in 2002, Bill 37 in 2003, and Bill 56 in 2004. Much like their changes to the labour relations scheme, the BC Liberals did very little consultation on these changes, other than to take the advice of employers and large corporations.

One of the major changes was to exclude employees covered by collective agreements from significant sections of the *ESA*. This change means that unionized workers could potentially be working under conditions that are below the *ESA*’s minimum standards, and, alarmingly, has also led to “corrupt arrangements between employers and pseudo/employer dominated unions which now exist in BC.”[121]

Another result of unionized workers being excluded by these amendments means that the Director of Employment Standards, who is responsible for enforcing the *ESA* by, for example, collecting unpaid wages from employers, is no longer responsible for doing so with respect to unionized workers. This means that unions must now attempt to collect unpaid wages from employers through collective agreement arbitration and ultimately through the courts, which in some cases has proven difficult or even impossible, despite every effort being made.[122] These workers thus simply lose out on wages they are owed.

Another disturbing change the BC Liberals brought in was to make it easier for employers to use child labour. Employers can now hire children as young as 12 with their parents’ permission, and can even hire children under 12 with permission from the ESB.[123] The BC Liberals also increased the hours that employers can require children to work.[124] This change has resulted in BC now being the worst jurisdiction in the western world in terms of protection for child workers. Moreover, studies have shown that some employers have been allowed to hire children without even getting the meagre permissions required.[125]

The BC Liberals also gutted the *ESA*’s protections for hours of work and overtime, reducing the minimum daily hours an employer can pay employees, and allowing “averaging agreements” under which employers are not required to pay overtime when workers work over eight hours a day or 40 hours a week. They reduced the ability of employees to be paid for statutory holidays, with some part-time workers now not even being eligible for holiday pay.[126]

The BC Liberals further reduced the liability of employers to repay wages that they owe to workers, as well as adding more categories of workers who are completely excluded from the protections of the *ESA*.[127]

One of the major changes was to exclude employees covered by collective agreements from significant sections of the *ESA*. This change means that unionized workers could potentially be working under conditions that are below the *ESA*’s minimum standards, and, alarmingly, has also led to “corrupt arrangements between employers and pseudo/employer dominated unions which now exist in BC.”

Minimum wage

One of the BC Liberals’ worst offenses against the most vulnerable workers in society was their gutting of the minimum wage. In 2001, when the BC Liberals came to power, the minimum wage was $8 per hour. At the time, this was the highest minimum wage in Canada, which is not surprising given that BC has one of the highest costs of living in the country.[128]

In 2001, when the BC Liberals came to power, the minimum wage was $8 per hour. At the time, this was the highest minimum wage in Canada. Under the BC Liberals, the minimum wage dropped to one of the lowest.

Shortly after being elected, the BC Liberals introduced the "training wage," which meant that workers who were new to the workforce could be paid as little as $6 an hour. They also introduced a regulatory change that meant that some farm workers could also be paid less than the minimum wage.[129]

Not only did the BC Liberals allow some of the most vulnerable workers to be paid less than the minimum wage, but they also failed to increase the minimum wage for a whopping 10 years after being elected. In 2011, the minimum wage was still only $8 an hour, and in that decade under the BC Liberals, the minimum wage in BC went from the highest in Canada to the *lowest*.[130]

It was only when current Premier Christy Clark replaced Gordon Campbell that she decided to raise the minimum wage. Unfortunately, at $10.45, it is still one of the lowest in Canada.[131] Clark also thankfully eliminated the training wage but replaced it with a lower wage for servers.[132]

Administrative, procedural and budgetary changes

Not only did the BC Liberals drastically reduce the protections the *ESA* offers workers, they also made it much more difficult for workers to enforce the rights that still remain.

As mentioned previously in this paper, shortly after they were elected, the BC Liberals cut the ESB's resources dramatically. In 2001/2002, the BC Liberals initially eliminated 15 ESB positions (which represented almost 10 per cent of the then 162 positions). In the years that followed, as the province's population increased, the ESB's staff was further reduced by one-third (down to 109) and the number of offices across the province was cut almost in half (from 17 to 9).[133]

As a result of these changes, the ESB's previous role of investigating employer compliance was basically eliminated, and it now primarily operates in a "rigid office-based complaints-processing mode."[134]

Moreover, the BC Liberals have made it much more difficult for workers to file employment standards complaints against their employers. In fact, the BC Liberal government, anticipating that the now understaffed ESB would be incapable of responding to a large backlog of complaints, consciously took measures to reduce the number of complaints coming in, and were successful in doing so.[135]

Employers are no longer required to inform employees of their rights under the *ESA*, meaning many workers may not even be aware when their employers are breaking the law.[136]

Employees are required to use a "Self-Help Kit" – which essentially means they complain directly to their employer about the abuse – before they can file a complaint with the ESB. This intimidating process likely dissuades many employees from complaining at all.[137]

If an employee does submit a complaint, they are required to go through a "dispute resolution process" which favours the employer and often allows the employer to get away with paying them less than what is owed under the *ESA*.[138]

The chilling effect of these changes resulted in a 60 per cent reduction in the number of complaints coming into the ESB.[139]

As this section has demonstrated, then, the BC Liberals' attacks have not been limited to unionized workers. They have used legislative, administrative and budgetary changes to reduce the rights of vulnerable non-union workers as well.[140]

Having surveyed many of the BC Liberals' actions affecting workers generally, we turn, in the final section, to their attacks on specific groups of workers, many of which were so extreme that they have been found by courts to be unconstitutional.

THE BC LIBERAL GOVERNMENT'S ATTACKS ON SPECIFIC GROUPS OF WORKERS

Shortly after being elected, at the same time as the BC Liberals were introducing the sweeping changes to legislation affecting all workers, they also introduced legislation attacking the collective agreements and bargaining rights of specific groups of workers.

Many of these actions were so extreme that they were later found by courts to breach the workers' Charter rights. The three groups that bore the biggest brunt of the BC Liberals' attacks were construction workers, health care workers, and teachers.

Attack on construction workers

As discussed earlier, one of the BC Liberals' first pieces of anti-union legislation was Bill 18. Earlier we addressed its main effect on workers generally, which was to change the certification procedure from card-check to mandatory votes, making it more difficult for workers to access their rights under the *Code*. Bill 18 also contained another amendment which magnified this reduced access to rights for a specific group of workers who already experience barriers to accessing their rights: those working in the construction industry.

Bill 18 amended the portions of the *Code* which deal specifically with labour relations in the construction industry, and in doing so, it made it far more difficult for construction workers to access collective bargaining.

The construction industry is a unique industry in many respects and it is generally recognised as requiring industry-specific labour relations legislation to facilitate access to collective bargaining.

The industry is often fragmented with small specialised sub-contractors performing a relatively small amount of the work on a large project. Employees are often hired on a project by project basis and have no expectation of continued employment. These features of the construction industry make it very difficult for workers in the industry to access their rights under labour legislation.

As a result of the unique nature of the construction industry and the barriers that exist for workers in the industry to access their fundamental rights, nine other provinces and experts commissioned to write reports in BC have unanimously recognized that there needs to be specific legislation making it easier for construction workers to access collective bargaining.

In 1995, the NDP government appointed a Construction Industry Review Panel, comprised of Stephen Kelleher and Vince Ready, to review changes in the construction industry and their impacts on training, employment, safety, equity and labour relations. The panel held public meetings, received over 100 submissions, and in February 1996 issued their initial report.[141] In 1998, following further open and comprehensive public consultation, the panel – now comprised of Stephen Kelleher and Stan Lanyon – issued a further review and report.[142]

The Panel recommended a comprehensive scheme for Industrial, Commercial and Institutional (ICI) construction labour relations. The NDP government accepted the recommendations and passed them into legislation with Bill 26 in 1998.[143] The new legislation established a limited form of sectorial certification in the ICI construction industry.[144]

Employers are no longer required to inform employees of their rights under the *ESA*, meaning many workers may not even be aware when their employers are breaking the law. The BC Liberals' attacks have not been limited to unionized workers- they have reduced the rights of non-union workers as well.

The new legislation contemplated bargaining between an employers' association – the Construction Labour Relations Association (CLRA) – and a council of unions – the British Columbia Bargaining Council of Building Trade Unions (BCBCBTU). Each of these organizations was required to submit their constitution and by-laws to the LRB for its approval. Together, the CLRA and the BCBCBTU were empowered to negotiate standard ICI collective agreements in the construction industry. Membership in these organizations was required for both employers and unions, and both the CLRA and the BCBCBTU were regulated under the *Code*.

This legislation provided for a rational system of collective bargaining in the construction industry and provided employees with meaningful access to collective bargaining.

In a familiar pattern reminiscent of their abrupt, non-consultative changes to the certification process, one of the first things the BC Liberals did when they came to power was to remove most of this legislation. In its place, they enacted Section 41.1 of the *Code*,[145] a confusing and vague provision which reads:

> *Bargaining council*
>
> *41.1 (1) In this section, "CLRA" means the Construction Labour Relations Association of BC incorporated under the Society Act.*
>
> *(2) The bargaining council established under section 55.18, as that section read before its repeal by the Skills Development and Labour Statutes Amendment Act, 2001, is continued, is deemed to be a council of trade unions established under section 41 and is authorized to bargain on behalf of its constituent unions with the CLRA.*
>
> *(3) Within 6 months from the date that this section comes into force, the board must review the constitution and bylaws of the bargaining council to ensure that they are consistent with section 41.*

The BC Liberals thus removed provisions that other provinces and panels of experts all agreed were necessary to make it easier for construction workers to have meaningful access to collective bargaining. The BC Liberals instead decided to make it more difficult for this group of workers to access their fundamental rights.

While the implications and meaning of this provision remain unclear (despite having been in the *Code* for many years), it is clear that this provision is intentionally unbalanced and is designed to limit the rights of construction employees rather than to enhance them.

Under this provision, while the CLRA appears to have maintained a significant statutory role, all vestiges of government oversight have been removed. The CLRA is not required to be an accredited employers' association – it is now simply a voluntary society which sets its own rules for membership and is not required to have its constitution and by-laws approved by the Board. The CLRA is now comprised of a changing group of employers which are free to come and go on whatever terms that they decide. Subject only to the Society Act,[146] this voluntary association is free to set all of its own rules and is not subject to oversight by the Board.

The freedom enjoyed by the CLRA and its members stands in stark contrast to the limits imposed on the BCBCBTU and its members. The Board has interpreted Section 41.1 of the *Code* as making membership in the BCBCBTU seemingly mandatory.[147] The traditional construction unions – the building trades unions – are required to belong to the BCBCBTU. Moreover, the Board maintains a close supervisory role in governing the affairs of the BCBCBTU, harkening back to the very different world of 1970s construction in support of their interventionist policies.[148]

The expressly unbalanced nature of Section 41.1 of the *Code* clearly offends one of Chair Mullin's previously discussed key measures for evaluating labour legislation – "Fairness and Balance."

In addition to being blatantly unfair and unbalanced, these changes initiated by the BC Liberal government, as interpreted by the Board, have resulted in a wildly dysfunctional bargaining system. Bargaining has taken up to four years to complete and individual unions have had little ability to engage their employers in the important issues facing their sector of the construction industry. If an employer wants to bargain outside of this system, they are free to do so while building trades unions are bound to this anachronistic system designed to limit the rights of their members.

The BC Liberals thus removed provisions that other provinces and panels of experts all agreed were necessary to make it *easier* for construction workers to have meaningful access to collective bargaining.

Instead of facilitating access for this group of workers recognized to have significant barriers to access due to the nature of their industry, the BC Liberals instead decided to make it more difficult for this group of workers to access their fundamental rights.

Construction workers were unfortunately not the only group of workers targeted by the BC Liberals for reductions in their access to fundamental rights. The BC Liberal government also mounted attacks on both health care workers and teachers, which we address in the following sections.

Bill 29 - Attack on health care workers

One of the most egregious of the BC Liberals' legislative attacks on specific groups of workers was Bill 29, introduced in early 2002.[149]

Bill 29 was a "vicious"[150] attack on health care workers, which are disproportionately women and minorities. It has been described as "one of the most extreme anti-labour laws in Canadian history"[151] and as "a shocking and cruel attack on long-serving employees in health care."[152]

In a familiar pattern, the BC Liberals introduced this legislation with little to no consultation.[153] It also went against explicit promises that Gordon Campbell had made to health care unions in the 2001 election.[154] It was, however, praised by the right-wing Fraser Institute.[155]

Bill 29 was a "vicious"attack on health care workers. It has been described as "one of the most extreme anti-labour laws in Canadian history" and as "a shocking and cruel attack on long-serving employees in health care."

The background to Bill 29 was that since the 1980s, both federal and provincial governments had been gradually reducing funding for health care as part of a trend toward neo-liberalism, which was, in part, orchestrated by business interests.[156]

The NDP government that was in power in BC in the 1990s was somewhat affected by this neo-liberal trend; however, unlike what was occurring in other provinces in the 90s, the NDP government did not privatize or contract out health care workers' jobs, instead respecting the provisions in legislation and collective agreements which prohibited such contracting out.[157]

With Bill 29, the BC Liberals changed all of that.

Among other things, Bill 29 allowed health care employers to contract out a large number of services to private companies which would hire workers at much lower wages. It invalidated portions of existing collective agreements that prohibited this contracting out. It also prohibited any future bargaining that would go against what Bill 29 allowed (for example, the re-introduction of prohibitions on contracting out).[158]

Some of the freely-negotiated contract provisions that Bill 29 wiped out had been in place for many decades.[159]

In addition to ripping up negotiated contracts, Bill 29 also eliminated other potential legal avenues for health care workers whose jobs were contracted out. It repealed

legislative provisions that prohibited contracting out and required consultation with unions before putting through restructuring initiatives that impacted job security.[160] It eliminated job security provisions in place to support workers' transitions during health care restructuring.[161]
Bill 29 also provided that two sections of the *Code* which normally protect workers – sections 35 and 38 – could not apply to health employers and contractors.

Section 35 deals with successorship, and normally applies when an employer transfers or sells all or part of its business. In such situations, the collective agreement continues to bind the successor employer and protect the workers. Unfortunately, under Bill 29, Section 35 could not be applied to name private contractors as successor employers.

Section 38 allows the LRB to declare two organizations common employers when they are under common control and direction and engaged in related activities. It is designed to prevent employers from avoiding union rights through corporate reorganizations. Bill 29 made this section inapplicable to contractors and health employers as well.

Bill 29 further limited employees' bumping rights, which had allowed workers to locate jobs using their seniority rights, and which had been in negotiated collective agreements for up to 30 years.[162]

Bill 29 came at a time when health authorities faced large budget shortfalls due to lack of funding from the provincial and federal governments. As a result, health authorities took advantage of their new ability to contract out, and it resulted in thousands of health care workers being laid off.

Bill 29 came at a time when health authorities faced large budget shortfalls due to lack of funding from the provincial and federal governments. As a result, health authorities took advantage of their new ability to contract out, and it resulted in thousands of health care workers being laid off.

The contractors were not required to rehire the laid off workers, and when they did hire some of these workers, it was with much lower wages and benefits.[163] Some workers were hired back by contractors at wages as low as 40 per cent lower than their previous wages.[164] At some facilities, workers have been fired and re-hired several times, each time at lower wages.[165]

The effect of Bill 29 on workers has been "harmful and sometimes devastating."[166] Many workers reported disastrous effects on their lives, such as losing their homes, and even experiencing mental health and medical problems due to the emotional stress of losing long-term, well-paying jobs.[167] At worksites, morale, working relationships, and efficiency suffered.[168]

A group of health care unions mounted a legal challenge to Bill 29. They were initially unsuccessful at the BC Supreme Court and the BC Court of Appeal, but the Supreme Court of Canada ultimately found that parts of the bill violated workers' right to freedom of association under the *Charter*.[169]

In its groundbreaking decision, the Supreme Court reversed its previous rulings and held that Section 2(d) of the *Charter*, which protects freedom of association, protects the process of collective bargaining.

In doing so, the Court reviewed the history of collective bargaining and found that it was a "fundamental aspect of Canadian society."[170] The Court also discussed Canada's obligations under international law and found that they supported a recognition of collective bargaining as part of the *Charter*'s freedom of association guarantee.[171]

The Court further found that protecting collective bargaining would promote *Charter* values such as "human dignity, equality, liberty, respect for the autonomy of the person and the enhancement of democracy."

The right to collective bargaining under the *Charter*, according to the Court, means that:

> *...the state must not substantially interfere with the ability of a union*

to exert meaningful influence over working conditions through a process of collective bargaining conducted in accordance with the duty to bargain in good faith...it requires both employer and employees to meet and to bargain in good faith, in the pursuit of a common goal of peaceful and productive accommodation.

The Court also described the types of government action that would run afoul of the *Charter*'s freedom of association guarantee:

Laws or state actions that prevent or deny meaningful discussion and consultation about working conditions between employees and their employer may substantially interfere with the activity of collective bargaining, as may laws that unilaterally nullify significant negotiated terms in existing collective agreements.

Applying this standard to the BC Liberals' legislation in Bill 29, the Court found that the sections of the legislation that dealt with layoff and bumping rights and contracting out – invalidating collective agreement terms and prohibiting future collective bargaining on those subjects – substantially interfered with collective bargaining and therefore Section 2(d) of the *Charter*.[175]

In holding that the violations could not be justified under Section 1 of the *Charter*, the Court noted that there had been "no meaningful consultation" and no attempt by the BC Liberal government to reach its stated objectives through the least intrusive means:

This was an important and significant piece of labour legislation. It had the potential to affect the rights of employees dramatically and unusually. Yet it was adopted with full knowledge that the unions were strongly opposed to many of the provisions, and without consideration of alternative ways to achieve the government objective, and without explanation of the government's choices.[176]

The Court therefore struck down the impugned sections of Bill 29, giving the BC Liberal government 12 months to address the decision.

After the Court's ruling, the BC Liberals responded by saying they were "disappointed" that the Court had recognized collective bargaining as a constitutional right.[177]

They nonetheless repealed the unconstitutional sections of the legislation, and in 2008, the unions reached a deal with the BC Liberal government which provided some compensation for workers who had lost their jobs and put the issue of contracting out back on the bargaining table.[178]

Unfortunately, the full damage done by Bill 29 could not be reversed, and in addition, many of the employees who received compensation through the settlement have experienced problems with Employment Insurance and other issues.[179]

Another group of workers that has been attacked by the BC Liberals in a similar way is teachers. We discuss their actions toward that group in the following section.

Attack on teachers

The BC Liberals' multi-pronged attack on workers included an assault on another female-dominated profession: teachers. The primary attack on teachers resembled the attack on health care workers in that the BC Liberals tore up negotiated contract terms and forbade bargaining on certain matters, which was found by courts to violate the *Charter*. We will describe this attack in detail, after which we briefly touch on the BC Liberals' inclusion of teachers in essential service legislation.

The BC Liberals' multi-pronged attack on workers included an assault on another female-dominated profession: teachers. The primary attack on teachers resembled the attack on health care workers in that the BC Liberals tore up negotiated contract terms and forbade bargaining on certain matters, which was found by courts to violate the *Charter*.

Bills 27 and 28

By way of background, teachers in BC and their union, the BC Teachers' Federation (BCTF), have a long history of struggle and conflict with governments.[180] Up until 1987 they were in fact excluded from the labour relations scheme and did not have full collective bargaining rights. In the 80s, the BCTF successfully complained to the International Labour Organization about their exclusion and its violation of their fundamental rights.

Ironically, teachers were included in labour legislation for the first time by Bill Vander Zalm's right-wing Social Credit government in 1987, as a result of a "legal miscalculation."[181]

The BCTF had filed a *Charter* challenge, claiming that its exclusion from the labour relations scheme violated their right to freedom of association, among other things. The Vander Zalm government obtained legal advice that the *Charter* challenge would likely be successful, and amended the legislation accordingly to include teachers.

Not long after this amendment was passed, the Supreme Court of Canada released a trilogy of cases that made it clear that the *Charter* did not protect collective bargaining. It was not until the *Health Services* decision, referenced above, that this finding was reversed.

The NDP era of the 90s was slightly more favourable for teachers. Although the NDP took some steps the BCTF did not like, such as changing the teachers' bargaining structure to a province-wide one and using back-to-work legislation, the NDP did also negotiate collective agreements with the BCTF directly (instead of through the BC Public School Employers' Association) that the union viewed as favourable.[182] These changes were subsequently voluntarily negotiated into the collective agreement by the BCTF and BCPSEA, the employer bargaining agent.

When the BC Liberals were elected in 2001, the BCTF and BCPSEA were in the middle of ongoing negotiations. The teachers engaged in a partial job action in late 2001. With no resolution in early 2002, the BC Liberals passed Bill 27, which imposed a new collective agreement, and Bill 28, which, similarly to Bill 29 for health care workers, stripped collective agreement terms regarding class size and composition (among others), and prohibited bargaining about those items in future negotiations.[183]

All three bills were part of the BC Liberals' view that "the government had the right to impose legislation which unilaterally overrode provisions of existing collective agreements, and which prohibited collective bargaining on the same subject matters in the future."[184] Hundreds of provisions were removed from the collective agreement.

The BCTF mounted a *Charter* challenge to the bills but it was held in abeyance pending the results of the health care unions' challenge to Bill 29. Once Health Services was decided, the BCTF's challenge was revived. In 2011, the BC Supreme Court ruled in favour of the teachers and found that Bill 28 (but not Bill 27) violated the *Charter* in the same way that Bill 29 did – by "voiding previously negotiated terms of collective agreements, or prohibiting collective bargaining on matters that had previously been the subject of bargaining, or both.[185]

In coming to its decision, the Court observed that the legislation and the manner in which the BC Liberal government had implemented it was likely "seen by teachers as evidence that the government did not respect them or consider them to be valued contributors to the education system."[186]

The BC Liberals did not appeal the Court's decision.

The Court suspended the declaration of invalidity for a year, during which time the BC Liberals purported to engage in some discussions with teachers, but no resolution was reached. A year after the Court's decision, the BC Liberals passed Bill 22, which repealed the legislation that was unconstitutional, but then re-enacted new legislation with "essentially identical terms."[187]

The new legislation again stripped teachers' collective agreement of the terms dealing with class size and composition and again prohibited future bargaining on those issues, although the prohibition on bargaining was now time-limited.[188]

As would be expected, the BCTF again challenged the new legislation, claiming it too violated the *Charter*. The BC Liberal government argued that the new legislation was not a *Charter* violation, despite it being nearly identical to the legislation previously struck down, because of the new time limit and especially because it claimed it had now consulted with the teachers, which it had not done with respect to the prior legislation.[189]

The BC Supreme Court did not find these arguments persuasive and again struck down the BC Liberal government's legislation, finding it violated freedom of association under the *Charter*.

The BC Supreme Court considered and rejected the government's "consultation" argument. The Court found that it would be unlikely for a government to be able to save unconstitutional legislation by "consulting" with the affected union after the fact, which was essentially the case here.

The Court reasoned that when a court is dealing exclusively with impugned legislation and not with the government's actions as an employer, consultation is only relevant to the Section 1 analysis regarding whether the law can be saved as a "reasonable limit."[190]

The Court found that the government's discussions with the BCTF after the initial decision striking down Bill 28 were not employer/employee discussions and could not change the fact that the legislation was a violation of Section 2(d).[191]

The Court went on to find that if it was wrong, and consultations were relevant, they were nonetheless not conducted in good faith. The Court found that the discussions after the previous decision could not be considered true "consultations" because the BC Liberal government was always planning on passing the same legislation – it merely wanted to document that it had "consulted" with the teachers so that it would be successful in a further *Charter* challenge.[192]

The BC Liberal government's only proposal during those negotiations was to start a process outside of collective bargaining in which the BCTF would be consulted about the allocation of a "class organization fund." Unlike their negotiations with health sector unions following Bill 29 being struck down, the BC Liberals were completely unwilling to consider returning class size and composition issues to the bargaining table.

The Court described the BC Liberal government's positions in the negotiations as "manifestly unreasonable"[193] and "extreme."[194] The government further did not show a commitment to the process, given that its representatives did not even read the collective agreement terms that were previously deleted by Bill 28 and were now at issue.[195]

In addition to its unreasonable positions during negotiation, the Court also found as a fact that during this time period, the BC Liberal government had taken a disingenuous political strategy against teachers in which it deliberately attempted to provoke a strike in the hopes of turning the public against teachers.[196]

Ultimately, the BC Supreme Court found that the government's supposed "consultation" was not in good faith and could not save otherwise unconstitutional legislation.[197]

With respect to the BC Liberal government's other argument for saving the legislation – the fact that the prohibition on collective bargaining was now time-limited – the Court found that the government's arguments were "not supported by the evidence or by logic"[198] and likewise did not save the legislation. The Court described the BC Liberals' re-enactment of legislation previously found to violate rights as "extremely destructive to the dignity and autonomy of the teachers."[199]

Bill 22, then, was not surprisingly found to be unconstitutional in a similar way to its near-identical predecessor, Bill 28, and struck down immediately.

The government appealed the BC Supreme Court's decision and the BC Court of Appeal allowed the government's appeal. The Court of Appeal disagreed with the BC Supreme Court's interpretation of the law relating to the relevance of consultations to the Section 2(d) analysis, and found that the BC Liberal government's new legislation could in fact be saved from being unconstitutional because of the government's "consultations" with the teachers prior to re-enacting it.

The Court of Appeal's decision overturns key findings of fact made by the BC Supreme Court, which appeal courts rarely do. It also appears to mean that governments can re-enact legislation that violates *Charter* rights merely by sitting in a room with those affected and listening to their representations.

One of the three-member panel of judges at the Court of Appeal strongly dissented from the majority and found that, although the lower court made some legal errors with respect to the Section 2(d) test, he agreed with the trial judge's finding of fact that the consultations were not conducted in good faith and, in any case, a properly deferential appellate approach to its findings of fact meant that its decision that the legislation was unconstitutional should stand.

The BCTF has appealed the Court of Appeal's decision to the Supreme Court of Canada and the Supreme Court has granted leave to appeal.[200] Arguments on the appeal are scheduled for later this year.

Regardless of the outcome at the Supreme Court of Canada, it is apparent that the BC Liberals' actions toward teachers with respect to Bills 27 and 28 were heavy-handed and did not show these workers the respect they deserve.

Teachers and essential services

As mentioned briefly earlier in this paper, another action the BC Liberals took with respect to teachers is to include education as an essential service under the *Code*. This was part of Bill 18, the BC Liberals' first anti-worker bill, discussed earlier, which was passed shortly after they were elected in 2001.

Education has been included as an essential service at other times in history. It was included by the Socreds in the 80s and removed by the NDP in the 90s, although during that time, the LRB held that education was still an essential service even though it was not expressly included in the legislation.[201] Despite the fact that the essential service provisions were available for teachers' disputes during these times, they were rarely used. The BC Liberals, on the other hand, have changed this trend.[202]

Ironically, during the litigation surrounding Bills 27 and 28, one of the BC Liberal government's representatives talked about the inconvenience of a partial strike due to

essential service designations, when what the government really wanted was a full strike so as to turn public support away from the teachers.[203]

More importantly, the inclusion of education as an essential service at all is very likely unconstitutional in and of itself.

In Saskatchewan Federation of Labour v. Saskatchewan,[204] the Supreme Court of Canada held that the right to strike, like the right to the process of collective bargaining, is protected by Section 2(d) of the Charter. At issue in SFL was new essential services legislation passed by Saskatchewan's right-wing government.

Given that it limited the right to strike (as all essential services legislation does), Saskatchewan's legislation could only be saved if it could be justified as a "reasonable limit" under Section 1 of the *Charter*.

In order to be saved by Section 1, the Court made clear that essential services legislation, which inherently limits the constitutional right to strike, must be based on a proper interpretation of the term "essential services." That is, it must only pertain to services "whose interruption would endanger the life, personal safety or health of the whole or part of the population."[205]

Education, while important, self-evidently does not fit this description. Yet, despite over a year having passed since the Supreme Court's decision in SFL, the BC Liberal government has made no move to amend the *Code* to comply with the constitution.

The BC Liberals' attacks on construction workers, health-care workers, and teachers are part and parcel of their actions toward all workers since coming to power, and, like their actions toward workers generally, demonstrate a blatant disrespect toward these individuals who provide such valuable services to society.

CONCLUSION

As we have set out, the BC Liberals have used the many tools at their disposal to decimate the rights of workers in this province. They have amended legislation that applies to all workers such as the *Code* and the *ESA* in manners that damage employees' rights to join unions and to challenge employer abuses.

In addition to the sweeping legislative changes, which on their own caused significant negative effects on workers, the BC Liberals have mismanaged and underfunded the associated tribunals – the LRB and the ESB – rendering them incapable of effectively fulfilling their purpose of resolving workplace disputes. These tribunals can no longer be relied on by workers to investigate, adjudicate and resolve claims in a clear, consistent and effective manner.

Moreover, the BC Liberals have egregiously attacked three important professions that are full of hard-working people just trying to earn a living while serving their communities: construction workers, health care workers, and teachers. Despite being repeatedly chastised by courts for violating these workers' *Charter* rights and undermining their dignity, the BC Liberals continue to insist on taking the same actions over and over again.

The results of this many-pronged attack on unions and the workers they represent are clear. Fewer and fewer workers are joining unions and more and more employers realize they can violate workers' rights without consequences. Workers' wages become lower, affecting families, the economy, and society as a whole.

The results of this many-pronged attack on unions and the workers they represent are clear. Fewer and fewer workers are joining unions and more and more employers realize they can violate workers' rights without consequences. Workers' wages become lower, affecting families, the economy, and society as a whole:

> *BC has acquired the dubious distinction of being home to Canada's largest income gap, highest poverty rate, and second highest child poverty rate. It also has greater employment insecurity and*

lower hourly wages than the national average, even though BC is the province with the highest cost of living in Canada.

Work, and the ability to earn a living and support one's family, is an area of great concern and importance in people's lives. The ability to have a say over one's working conditions, in general but especially as a member of a union, can either positively or negatively affect one's entire life.

As the Supreme Court of Canada and others have repeatedly recognized, union membership and collective bargaining allow people to have a voice in the workplace and enhance the values of equality, dignity, liberty, autonomy, and democracy which are enshrined in our constitution and essential to the functioning of any free and democratic society.

Given all the opportunities that have been lost over the last fifteen years for workers to come together to build a better workplace and a stronger community, and given that these opportunities have been lost due to the deliberate actions of the BC Liberal government, it is easy to become disillusioned and pessimistic. However, it is important to start identifying some of the changes that will be necessary to restore our Canadian values to the labour relations system in this province. A better tomorrow is only achievable by recognizing and addressing the problems of the past.

With that in mind, the final section of our paper will set out our recommendations for undoing the damage the BC Liberals have done.

RECOMMENDATIONS

It will likely take many years and a great deal of work to undo the damage the BC Liberals have done and to restore our status as a province where workers' rights are properly acknowledged and protected.

While this paper outlines many of the areas where changes are required, there are many areas beyond what we have covered here in which modernization and improvements are essential.

With that in mind, there are some changes that can and should be made immediately in order to restore some fairness and functionality into the system. Our primary recommendation is for the province to implement immediate changes as follows:

- **Restore a reasonable level of funding to the LRB and especially to the ESB.**
- **Restore the card-check certification process.**
- **Amend the Code so that when a membership vote is necessary (although this will not be the norm), an in-person vote must be held within five days, and mail ballots must only be held in exceptional circumstances.**
- **Repeal the new Sections 6 and 8 of the Code and restore them to the language that existed from 1992 to 2002.**
- **Restore the ESA as a statutory minimum floor of rights for workers, by repealing the sections that exclude workers covered by collective agreements.**

Our secondary recommendation is for the province to appoint a new panel of labour relations experts with a broad mandate to survey the need for changes to both the labour relations and the employment standards schemes. This will likely include changes to the legislation as well as changes to the way the LRB and the ESB are managed and funded. The panel, much like the successful subcommittees convened in the 1990s, should embark on consultation with both the labour relations community and the public.

Unlike the subcommittees of the 1990s, the new labour relations panel will have to be especially mindful to ensure that the new, modernized labour relations and employment standards systems not only respect, but enhance and protect workers' constitutional rights. Given that the Supreme Court of Canada has recognized that the *Charter* protects collective bargaining and the right to strike, close attention will need to be paid to areas such as essential services and other restrictions on strikes and picketing, where these rights are at risk of being violated by governments.

It may also be desirable for this new panel, or other government representatives, to sit down with the unions representing those workers whose *Charter* rights have already been violated, to figure out how those past wrongs can be alleviated and how trust and a working relationship between these groups and the government can be restored.

While waiting for the panel to produce new recommendations, it will be critical to make immediate changes as we have outlined in our primary recommendation. In many cases, these immediate interim changes would simply restore the system to what it was before the BC Liberals gutted it. Experience and past research tells us that these changes are not only practical but necessary.

These changes should, at the very least, stem the tide of unfair labour practices and allow workers to start organizing again. They should allow non-union employees to hold their employers accountable for breaches of their rights.

This restoration of the pre-BC Liberal system may seem like a reversion to the past; but it is only an interim step. Ultimately, we hope that the panel's recommendations will bring us into a better, more fair and balanced future for workers and for society as a whole.

REFERENCES

1 *Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia,* 2007 SCC 27 at para. 81 [*Health Services*].
2 *Lavigne v. Ontario Public Service Employees Union,* [1991] 2 SCR 211 at para. 183.
3 Lynne Fernandez, *Unions Boost Democracy and Prosperity for All*, online: Canadian Centre for Policy Alternatives https://www.policyalternatives.ca/sites/default/files/uploads/publications/Manitoba%20Office/2015/11/UnionsBoostDemocracy.pdf.
4 *Ibid*; Debra E. Gillespie, *The Impact on Organized Labour of the Health and Social Services Delivery Improvement Act: A Case Study*, online: University of Victoria https://dspace.library.uvic.ca/bitstream/handle/1828/1233/ThesisDGillespie.pdf?sequence=4&isAllowed=y.
5 *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 [the *Charter*].
6 RSBC 1996, c 244 [the *Code* or the *LRC*].
7 RSBC 1996, c 113 [the *Act* or the *ESA*].
8 *Fernandez, supra* note 3.
9 Brent Mullin, *Towards a Progressive Labour Relations Board* (1998) [unpublished, archived in author's files]; John Baigent, Vince Ready & Tom Roper, *A Report to the Honourable Moe Sihota: Recommendations for Labour Law Reform* (Sub-Committee of Special Advisors: September, 1992).
10 *Ibid* at 5.
11 *Ibid*.
12 SBC 1987, c 24 [*IRA*].
13 Baigent *et al, supra* note 9 at 6.
14 *Ibid* at 4.
15 Mullin, *supra* note 9 at 2.
16 *Ibid* at 2-4.
17 Baigent *et al, supra* note 9.
18 British Columbia, Legislative Assembly, *Hansard*, 37th Leg, 2nd Sess, No 18 (16 August 2001) at 13 (Hon. G. Bruce).
19 Canadian Labour Laws, online http://www.canadianlabourrelations.com/canadian-labour-laws.html. The provinces that still allow card-check are Manitoba, Quebec, Newfoundland, New Brunswick, and Prince Edward Island. Unfortunately, Manitoba's new Progressive Conservative government has announced that it will change to a vote-based system, despite the fact that the province has done well economically with its current card-check system: see Andrew Jackson, *Another unjustified attack on worker rights*, online: The Broadbent Institute <http://www.broadbentinstitute.ca/andrew_ajackson/yet_another_unjustified_attack_on_worker_rights?utm_campaign=may17_16_mbrigh&utm_medium=email&utm_source=broadbent>.
20 Ontario, Newfoundland, and Nova Scotia all specify a 5-day period.
21 *Hansard, supra* note 18 at 11-12.
22 Baigent *et al, supra* note 9 at 6.
23 *Ibid* at 26.
24 Vince Ready, Stan Lanyon, Miriam Gropper & Jim Matkin, *Managing Change in Labour Relations: The Final Report* (Section 3 Committee, February 25, 1998) at 7.
25 See e.g. Sara Slinn, "The Effect of Compulsory Certification Votes on Certification Applications in Ontario: An Empirical Analysis" (2003) 10 CLELJ 367.
26 Patrick Dickie, *The Crisis in Union Organizing under the BC Liberals*, online: https://www.freelists.org/archives/turc/07-2015/pdfTPNfqgO65.pdf.
27 *Reports Page*, online: Labour Relations Board of British Columbia <http://www.lrb.bc.ca/reports/> [*LRB Reports*]. This average excludes 2005, in which a procedural irregularity resulted in artificially high numbers.
28 *Ibid*.

29 *Ibid*.
30 Diane Galarneau & Thao Sohn, *Long-term trends in unionization*, online: Statistics Canada <http://www.statcan.gc.ca/pub/75-006-x/2013001/article/11878-eng.htm>.
31 Paul Luke, *The long decline of BC's unions…and how they could rediscover their strength*, online: The Province <http://www.theprovince.com/business/long+decline+unions+they+could+rediscover+their+strength/11341880/story.html>.
32 *Ibid*.
33 *LRB Reports, supra* note 30.
34 *Annual Report 2014*, online: Labour Relations Board of British Columbia <http://www.lrb.bc.ca/reports/ANNUALREPORT2014.pdf>.
35 Dickie, *supra* note 26 at 18.
36 *TBC Transport Ltd.*, BCLRB No B93/2006 at para 34.
37 *Pan Fish Canada Ltd*., BCLRB No B20/2005 at para 6.
38 Dickie, *supra* note 26 at 18-20.
39 BCLRB No B51/2014.
40 *Ibid* at paras 58-60.
41 See e.g. *First Line Security Inc.,* BCLRB No B102/2014; *Arbocare Tree Service Ltd.*, BCLRB No B13/2016; *Living Well Home Care Services Ltd.,* BCLRB No B14/2016.
42 BCLRB No B42/2016, upheld on reconsideration: BCLRB No B58/2016.
43 *Ibid* at paras 23-24.
44 *Ibid* at paras 26-31.
45 *Ibid* at para 32.
46 *Ibid* at para. 36.
47 The LRB has recently announced some structural changes and an upcoming review of the certification processes at the Board and the ESB. This appears to be a step in a positive direction.
48 See *Discussion Paper: A review of Labour Relations in British Columbia* (Victoria: Ministry of Skills Development and labour, 2002). It is interesting to note that the changes to the purpose clause (similarly to earlier changes to this section) does not seem to have affected the Board's behavior: see Sara Slinn, "Untamed Tribunal? Of Dynamic Interpretation and Purpose Clauses" (2009) UBC L Rev 42.1 at 125-174 [Slinn, "Untamed"].
49 BCLRB No B62/2003, upheld on reconsideration: BCLRB No B111/2003.
50 *Ibid* at paras 104-114.
51 *Ibid* at para 122.
52 *Ibid* at para 123.
53 *Ibid* at para 124.
54 BCLRB No B345/2003 [*RMH original*], overturned in part on reconsideration: BCLRB No B188/2005 [RMH recon].
55 *Ibid*.
56 *Ibid*.
57 *Ibid* at paras 54-56.
58 David Tarasoff & Brandon Quinn, *Employer Free Speech after the Convergys Decision*, online: Hastings Labour Law Office <http://www.labourlawoffice.com/wp-content/uploads/2015/07/7-EMPLOYER-FREE-SPEECH-AFTER-THE-CONVERGYS-DECISION-2002.pdf>.
59 *Ibid*.
60 *Simpe "Q" Care Inc.,* BCLRB No B171/2006, upheld on reconsideration: BCLRB No B161/2007.
61 See Dickie, *supra* note 26 at 14-16; Sara Slinn, "*No Right (to Organize) Without a Remedy: Evidence and Consequences of the Failure to Provide Compensatory Remedies for Unfair Labour Practices in British Columbia*" (2008) 53 McGill LJ 687.
62 *Ibid*.
63 A somewhat recent high-profile example was when Vince Ready was brought in to resolve a teachers' strike in late summer, 2014: see Jenny Sheppard, *BC Teachers' strike: Who is mediator Vince Ready?* Online: CBC News <http://www.cbc.ca/news/canada/british-columbia/b-c-teachers-strike-who-is-mediator-vince-ready-1.2737773>. Later that same year,

the Teamsters, Local 213, and IKEA in Richmond also used Ready to resolve their long-term dispute: Marsha Lederman, *17-month-long labour dispute at Richmond IKEA resolved*, online: the Globe and Mail <http://www.theglobeandmail.com/news/british-columbia/17-month-long-labour-dispute-at-richmond-ikea-resolved/article21251407/>.
64 Mullin, *supra* note 9 at 2.
65 *Ibid*.
66 *Ibid*.
67 *Ibid*. at 16-19.
68 Slinn, "Untamed," *supra* note 48.
69 Daniel Johnston, John Bowman, Eric Harris, Bruce Laughton & Marcia Smith, *Report of the BC Labour Relations Code Review Committee to the Minister of Skills Development and Labour* (Labour Relations Code Review Committee, April 11, 2003) at 64.
70 BCLRB No B16/2001 [White Spot].
71 *Ibid* at para 38.
72 *Ibid* at para 113.
73 Under s. 141 of the Code, a party affected by a decision of the Board can apply for reconsideration, in which a new panel will review the decision on a limited basis.
74 *White Spot Ltd*., BCLRB No B437/2001.
75 BCLRB No B184/2011 [*BCAA recon*] (reconsideration of BCLRB No B106/2011 [*BCAA original*]) [emphasis added].
76 *Ibid* at para 28.
77 *Ibid* at para. 35.
78 *Ibid* at para. 52.
79 *Ibid* at para. 53.
80 *BCAA recon, supra* note 75 at paras 9-10.
81 *Ibid* at paras 11, 13.
82 *Ibid* at para 29.
83 BCLRB No B54/2012 [Brandt recon], reconsideration of BCLRB No B229/2011 [Brandt original].
84 *Ibid* at pa ra 187.
85 *Ibid* at paras 181, 188.
86 *Ibid* at para 187.
87 *Brandt recon*, *supra* note 83 at para 17.
88 BCLRB No B206/2014, reversed on reconsideration: BCLRB No B87/2015.
89 *Ibid* at para 20.
90 BCLRB No B161/2015.
91 See e.g. *Johnston et al, supra* note 69 at 34-37.
92 *Armscon Enterprises Ltd*., BCLRB No B98/94 at 4 [Armscon].
93 *Ibid*.
94 *Cantex Engineering,* BCLRB No 147/87. See also Brinco Coal Mining Corp, BCLRB No B6/93 [Brinco].
95 *Corboy*, BCLRB No B195/2000 at para 9. See also Brinco, supra note 94.
96 BCLRB No B207/2015, leave for reconsideration of BCLRB No B147/2015.
97 *Ibid* at para 26.
98 *Ibid* at paras 22-25.
99 BCLRB No B39/2016, leave for reconsideration of BCLRB No B36/2016.
100 *Ibid* at para 3.
101 See generally *BC Rail*, BCLRB No C152/92.
102 *Ibid* at 20; *Maple Ridge (District)*, BCLRB No B209/2001 at para 25; Surrey (District), BCLRB No B448/97 at para 37; *TFL Forest Ltd*, BCLRB No. B267/2007 at para 38 [*TFL LRB*].
103 [2008] BCCAAA No. 36 [*TFL Dorsey*].
104 [2006] BCCAAA No. 63. There were also several subsequent awards in the same dispute.

105 *TFL LRB, supra* note 102 at para 39.
106 *Ibid* at para 50.
107 BCLRB No B199/2006 [West Fraser Mills].
108 *Ibid*.
109 BCLRB No B311/2006 at para 4.
110 BCLRB No B181/2004.
111 *Ibid* at para 44.
112 BCLRB No L362/82.
113 *Ibid*.
114 BCLRB No B12/2008.
115 *Ibid* at paras 10-30.
116 *Ibid* at para 15.
117 *Ibid*.
118 *TFL Dorsey, supra* note 103 at para 157.
119 David Fairey, *Eroding Worker Protections: British Columbia's New "Flexible" Employment Standards*, online: Canadian Centre for Policy Alternatives <http://www.policyalternatives.ca/sites/default/files/uploads/publications/BC_Office_Pubs/bc_2005/employment_standards.pdf> at 8 [Fairey, "Eroding"].
120 David Fairey, "New 'Flexible' Employment Standards Regulation in British Colubmia" (2007) 21 Journal of Law and Social Policy 91 at 97 [Fairey, "Flexible"]; David Fairey & Marjorie Griffin Cohen, *Why BC's Lower-wage Workers are Struggling*, online: The Tyee <http://thetyee.ca/Opinion/2013/04/24/BC-Employment-Standards/>.
121 Fairey, "Flexible," supra note 120 at 100, citing professor and former ESB regional manager Mark Thompson and former IRO and ESB policy advisor Graeme Moore.
122 See e.g. *Locke Insulation Systems,* BCLRB No B228/2014.
123 Fairey, "Flexible," *supra* note 120 at 100-101. On June 8, 2016, the Government of Canada ratified the International Labour Organization's *Minimum Age Convention*, 1973, which requires member states to set a minimum age for employment of at least 15 years, among other things. The convention comes into force in June, 2017. The BC Liberals will likely need to amend their legislation during that time to comply with the convention, or risk an ILO complaint. See: Employment and Social Development Canada, *Canada ratifies international convention, takes stand against child labour and exploitation,* online: Government of Canada <http://news.gc.ca/web/article-en.do?nid=1081459>.
124 *Ibid* at 109.
125 *Ibid*.
126 *Ibid* at 102-103.
127 *Ibid* at 104-106.
128 *Hourly Minimum Wages in Canada for Adult Workers*, online: Government of Canada http://srv116.services.gc.ca/dimt-wid/sm-mw/rpt2.aspx [Hourly].
129 Fairey, "Flexible," supra note 120 at 107-108.
130 Hourly, supra note 128.
131 *Ibid*.
132 Fairey & Cohen, *supra* note 120.
133 Fairey, "Flexible," *supra* note 120 at 109-110; Fairey, "Eroding," supra note 119 at 29-30.
134 Fairey, "Flexible," *supra* note 120 at 110.
135 *Ibid* at 110.
136 *Ibid* at 101.
137 *Ibid*.
138 *Ibid* at 112.
139 *Ibid* at 113.

140 While we have not covered it in detail, it should also be noted that the BC Liberals gutted the workers' compensation and occupational health and safety schemes as well. See e.g. B*C Liberals Attack Workers' Health and Safety: O&S Regulation Under Siege*, online: Health Sciences Association <http://www.hsabc.org/news/bc-liberals-attack-workers-health-and-safety-ohs-regulation-under-siege>.
141 Stephen Kelleher & Vincent Ready, *First Interim Report to the Honourable Dan Miller Minister of Skills, Training and Labour* (Victoria: Construction Industry Review Panel, 1996).
142 Stephen Kelleher & Stan Lanyon, *Looking to the Future: Taking Construction Labour Relations into the 21st Century* (Construction Industry Review Panel, February 25, 1998).
143 *Labour Relations Code Amendment Act, 1998*, SBC 1998, c 33.
144 *Ibid*.
145 The only other construction specific labour relations legislation in BC is Labour Relations Regulation 3.1 which provides for additional requirements for membership evidence in the construction industry.
146 RSBC 1996, c 433.
147 *Heat and Frost Insulators, Local 118,* BCLRB No B121/2014.
148Michael Fleming, *An Interim Report regarding a Section 41 Inquiry into Labour Relations in the British Columbia Building Trades Sector of the Construction Industry* (BC Labour Relations Board, December 19, 2012).
149 *Health and Social Services Delivery Improvement Act*, SBC 2002, c 2 [Bill 29].
150 Bill Tieleman, *Legal strike is a response to Liberal attacks,* online: Georgia Straight <http://www.straight.com/article/legal-strike-is-a-response-to-liberal-attacks>.
151 *Bill 29 Settlement*, online: Hospital Employees Union <http://www.heu.org/sites/default/files/uploads/BILL%2029/communityhealthbill29report.pdf> at p. 1 [*Settlement*].
152 Tom Sandborn, *Campbell Government Violated Charter Rights: Supreme Court*, online: The Tyee <http://thetyee.ca/News/2007/06/08/Bill29Dies/>.
153 *Health Services, supra* note 1 at para 7.
154 Tieleman, *supra* note 150.
155 Ibid.
156 Gillespie, *supra* note 4 at 8-14.
157 *Ibid* at 22.
158 *Health Services, supra* note 1 at para 11.
159 Gillespie, *supra* note 4 at 72.
160 *Ibid* at 30.
161 *Ibid*.
162 *Ibid* at 70.
163 Tieleman, *supra* note 150.
164 Gillespie, *supra* note 4 at 89-90, 96, 140.
165 Sandborn, *supra* note 152.
166 *Ibid* at 125.
167 Gillespie, *supra* note 4 at 76.
168 *Ibid* at 89.
169 *Health Services, supra* note 1.
170 *Ibid* at para 41.
171 *Ibid* at para 69. The International Labour Organization has also found that Bill 29 violates freedom of association.
172 *Ibid* at para 81.
173 *Ibid* at para 90.
174 *Ibid* at para 96.
175 *Ibid* at para 131.
176 *Ibid* at para 160.
177 Sandborn, *supra* note 152.

178 Settlement, *supra* note 151.
179 *Update for health care workers affected by Bill 29 settlement and EI payments*, online: BCGEU <http://www.bcgeu.ca/update-health-care-workers-affected-bill-29-settlement-and-ei-payments>.
180 See generally Sara Slinn, "Structuring Reality So That the Law Will Follow: British Columbia Teachers' Quest for Collective Bargaining Rights" (2011) 68 Labour 35 [Slinn, "Structuring"].
181 *Ibid* at 50.
182 *Ibid* at 60-64.
183 *Ibid* at 65-67.
184 *British Columbia Teachers' Federation v British Columbia,* 2011 BCSC 469.
185 *Ibid* at para 276, 295, 382.
186 *Ibid* at para 380.
187 *British Columbia Teachers' Federation v British Columbia,* 2014 BCSC 121 at para 12 [BCTF 2014].
188 *Ibid*.
189 *Ibid* at para. 18.
190 *Ibid* at paras 79-81.
191 *Ibid* at paras 181-182.
192 *Ibid* at paras 186-194.
193 *Ibid* at para 332.
194 *Ibid* at para 356.
195 *Ibid* at para 343-344.
196 *Ibid* at paras 382-392.
197 *Ibid* at para 397-399.
198 *Ibid* at para 410.
199 *Ibid* at para 460.
200 [2015] SCCA No 266.
201 Slinn, "Structuring," *supra* note 180 at 57.
202 *Ibid* at 66.
203 *BCTF 2014, supra* note 187 at para 207.
204 2015 SCC 4 [SFL].
205 *Ibid* at para 84.
206 Fairey & Cohen, *supra* note 120.