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VIA EMAIL: ***LRCReview@gov.bc.ca***

Labour Relations Code Review Panel

Panel Members:
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Dear Panel Members

Re B.C. *Labour Relations Code* Review

On February 6, 2018, the Minister of Labour appointed a three-member panel as a Labour Relations Code Review Panel (the "Panel") under Section 3 of the *Labour Relations Code* (the "*Code*"), with a broad mandate to review the *Code*.

In response to the Panel's invitation for input from stakeholders, the BCGEU makes the following submission.

I. INTRODUCTION

The BCGEU is uniquely situated to provide input on this issue. Our union is incredibly diverse, encompassing a broad spectrum of interests and perspectives. The BCGEU represents approximately 75,000 workers in various sectors and occupations in more than 550 bargaining units throughout British Columbia.

Our membership includes direct government employees who protect children and families, provide income assistance to vulnerable individuals, fight forest fires, protect the environment, manage our natural resources, deliver care to people with mental health issues and addictions, administer B.C.'s public system of liquor control, licensing and distribution, staff correctional facilities and the courts, and provide technical, administrative and clerical services.

Our membership also comprises workers throughout the broader public and private sectors where members provide clinical care and home support services for seniors, a diverse range of community social services, highway and bridge maintenance, post-secondary instruction and administration, as well as other non-governmental industries, including financial services, hospitality, retail and gaming.

Many of the sectors in which the BCGEU is a bargaining agent are the subject of essential services designation under the *Code*.

The BCGEU is also the most active union is B.C. in terms of organizing non-union employees. We have a separate organizing department and frequently appear at the Labour Relations Board (the "Board") on organizing matters. As a result, we have special insight into the certification, unfair labour practice, collective bargaining and strike and lockout provisions of the *Co*de.

Based on this significant knowledge and experience, and after careful consideration, we have identified several potential changes to the *Code* to properly reflect the needs and interests of workers in the modern economy.

To that end, the BCGEU's submission revolves around three general themes:

1. Workers are entitled to make internal decisions without outside pressure

Employers would never accept interference by workers in internal day-to-day business decisions. Virtually every collective agreement includes a management rights clause to protect the employer's ability to make its own managerial decisions unfettered by the union and workers. In the same vein, the BCGEU submits that workers should be left to make their own internal decision to unionize without employer pressure.

2. *Workers and employers are entitled to fairness, timeliness and finality*

Workplace justice is not served by pendulum swings in law and policy, the increasing centralization of authority in the Chair of the Board, or by delay and procedural wrangling.

3. The Code must be responsive to erosion of workers' rights in the modern economy

The modern economy has seen a significant change in employer-employee relationships. Part-time and precarious work has increased appreciably. The rising use of contract-flipping, subcontracting, outsourcing and other forms of business reorganization, has resulted in workers losing hard-won labour rights. The *Code* should be revised to stem the tide of workers being left behind by the modern economy.

II. SUMMARY OF THE BCGEU'S RECOMMENDATIONS

The BCGEU proposes the following changes to the *Cod*e:

1. In cases where 60 per cent of workers have already voted to unionize, by signing their names to membership cards, the bargaining unit should be certified. Workers should only be required to vote once.

2. Representation votes should occur not later than three days following the certification application. Mail-in votes should be limited to cases where all parties consent.

3. Representation votes should be respected as internal worker votes. Employers should not be entitled to attend unless invited.

4. Employer communications during certification and decertification campaigns and labour

disputes should be limited to those that serve a legitimate business purpose. Workers should be able to have their own internal discussions free of employer pressure.

5. Employers should be prohibited from changing the terms and conditions of employment after certification until a first collective agreement is reached.

6. The destabilizing effect of partial decertification should be ended and brought in line with the rest of Canada.

7. The introduction of truly expedited arbitration. Arbitrators appointed under s. 104 should be required to issue a decision within six months of appointment.

8. More flexibility in the *Code* to protect workers' rights in the modern economy, including the introduction of multi-employer sectoral certification; provisions to encourage organizing in traditionally difficult-to-organize sectors; and stronger and more expansive successorship, common employer and true employer provisions—particularly to address the loss of unionization as a result of contracting, subcontracting, outsourcing and contract flipping.

9. All references in the *Code* to "proper cause" should be replaced with "just and reasonable cause." Vulnerable workers, including those who have recently unionized but not yet reached a first collective agreement, should not receive less job security than other unionized workers, and less legal protection than even non-union workers.

10. The picketing restrictions at s. 65 of the *Code* should be repealed in order to align the *Code* with ss. 2(b) and 2(d) of the *Charter*.

11. The s. 141 reconsideration power should be limited to narrow circumstances, such as breaches of natural justice.

12. The reintroduction of member appointees (i.e., "wingers") representing union and employer communities to hearing panels.

13. The Chair of the Board should be limited to a single five-year term.

14. A commitment to a well-funded Board with sufficient resources.

15. The BCGEU has also been afforded the opportunity to review the submissions of the BC Federation of Labour, the BC Teachers' Federation and the Canadian Union of Public Employees. We fully endorse the proposals set out in these submissions, without reservation.

III. ORGANIZING AND CERTIFICATION

Membership card-based certification: Workers should only be required to vote once (s.24)

Make no mistake—when workers complete a union membership card, they are engaging in an internal vote to unionize their workplace. These are not simply "membership" cards, but an express demand to have the union act as exclusive bargaining agent. Every union card is required in law to include the following passage:

> In applying for a membership, I understand that the union intends to apply to be certified as my exclusive bargaining agent and to represent me in collective bargaining.

Membership cards are rigorously reviewed by officers of the Employment Standards Branch and Labour Relations Board for veracity and clarity.

Unions applying to certify workplaces are required to have workers vote once, by submitting recently signed cards representing a substantial portion of the workforce and, after 10 days, the workforce is required to undergo a "second vote" in a ballot attended by the employer.

A common refrain from the employer is that the second vote by secret ballot protects workers who have been intimidated into signing membership cards. This is an entirely evidence-bereft assertion. A simple review of Board decisions makes it clear that this is a myth. Workers who bring unfair labour practice complaints against their employer risk antagonizing an entity that has tremendous power over them. In contrast, workers who bring unfair labour practice complaints against unions do so with little or no risk. Yet the number of such complaints are few and far between, with virtually none being found by the Board to have merit.

There is only one reason right-wing governments introduce the second vote: to allow employers to pressure workers to vote against unionization. In some cases, this pressure is overt and heavy-handed—enough to establish an unfair labour practice. However, in other cases, such pressure is simply a manifestation of the imbalance in power between employers and workers. The very presence of employers at the second vote is a form of pressure.

The BCGEU proposes that, in cases where 60 per cent of workers have already voted to unionize by signing their names to membership cards, the bargaining unit should be certified. These workers should not be required to vote again under employer pressure.

Employee lists determined by payroll audit

Payroll audits of employer-provided employee lists should be conducted by Industrial Relations Officers (IROs) as a matter of course. This will help ensure the accuracy of the tentative voters list in representation votes. It will also assist in reducing disputes, and thus submissions/hearings, regarding the composition of the voters list.

Timely in-person representation votes and restrictions on mail-in votes (s. 24)

Representation votes have been structured to allow employers to exert maximum pressure on workers. Despite the *Code* requiring votes "within 10 days" of the certification application, the actual votes have almost all been held on the 10th day, not earlier. The Board's policy has essentially been to allow employers the maximum number of days available to pressure workers. The Board has also increased the number of mail-in ballots in recent years, essentially providing employers with a month or more to exert pressure on workers.

The BCGEU proposes that representation votes, where required, should be mandated by the *Code* to occur within three days of the certification or variance application. The BCGEU further proposes the elimination of the use of mail-in ballots except where all parties consent.

Representation votes should be respected as internal worker votes (s. 24)

Typically, representation votes are held in the worksite with the union and employer attending. It makes perfect sense for the vote to be held at that location: higher turnout is likely when workers do not have to travel a far distance to cast their ballot. A robust turnout is in all parties' interest.

The long-accepted presence of employers at representation votes is an entirely different issue. There is simply no reason for an employer to be able to attend such internal votes. All that is accomplished is workers—often underpaid, vulnerable persons—are subjected to the inherently intimidating gaze of the boss.

The expected reason given for this practice is to allow the employer and union to challenge ballots cast by persons whose eligibility is in dispute. However, such challenges are easily cast in advance by direction to the IRO conducting the vote to segregate ballots cast by persons not on the voters list. The employer could easily advise the IRO in advance of any voters on the list to whom they object.

The BCGEU proposes that s. 24 be amended to ensure only workers, the union and the IRO conducting the vote may attend representation votes (unless the union consents to the employer's presence).

An end to employer pressure under the cloak of "free speech" (s. 8)

For the first three decades of the *Code*, internal worker discussions about matters such as unionization, bargaining, grievances, job action were just that—internal worker discussions. During much of this period, employers were expected to have no role at all in these internal worker discussions. The earlier 1990s version of the *Code* still permitted employers to communicate to workers "a statement of fact or opinion reasonably held **with respect to the employer's business**" (emphasis added). Employers were not deprived of free speech. They were simply restricted to their own affairs.

In 2002, the BC Liberals significantly revised s. 8 under the guise of encouraging "free expression." This provision simply allowed the party with the loudest megaphone to use it in a manner that no employer would ever accept from a group of workers. Employers are no longer restricted to actual facts or opining about their own affairs. During certification campaigns this has allowed employers to subject employees to all manner of American-style anti-union propaganda and "alternative facts."

The BCGEU proposes that Section 8 of the *Code* be deleted in order to allow workers to have their own internal discussions free of employer pressure. The BCGEU further proposes that during certification and decertification campaigns as well as during labour disputes, that employers be restricted to communications that serve a legitimate purpose.

Extend the statutory freeze post-certification until a collective agreement is concluded (s. 45)

Section 45 of the *Code* prohibits an employer from changing the terms and conditions of employment after certification for four months. This prohibition is an essential component of labour relations. It prevents employers from taking advantage of the power imbalance between employers and workers during the vulnerable period of bargaining for a first collective agreement.

However, the laudable purpose of the statutory freeze is often entirely undone by the arbitrary four-month limit on s. 45. There is no evidence to support this time limit. A removal of the time limit would encourage employers to make efforts to quickly reach a collective agreement.

The BCGEU proposes s. 45 of the *Code* be amended to have the statutory freeze apply until a first collective agreement is reached.

Eliminate partial decertification (s. 142)

Once a bargaining unit is certified, it operates as a single coherent entity. Decisions around bargaining, job action and grievances are made on a bargaining unit basis.

The exception is decertification. Under s. 142 of the *Code*, a disaffected part of the bargaining unit may apply to leave, notwithstanding the impact on the bargaining unit as a whole. The decision to allow a partial decertification is up to the Board's discretion, applying a vague ill-defined legal test. What often ensues are lengthy and expensive legal proceedings attributable to the existence of a disaffected sliver of the bargaining unit. In many cases, the group of employees seeking to destabilize the bargaining unit are mysteriously able to retain expensive law firms.

The common response to the problem of partial decertification is that unions are entitled to building bargaining units on a piece by piece basis (the "building block" approach), so it is only fair that bargaining units may be decertified on the same piecemeal basis. This position misses two key points: first, the building block approach is essentially forced on the union by the Board's preference for larger bargaining units; and second, to the best of the BCGEU's knowledge, British Columbia is one of the few (if not the only) jurisdictions to permit partial decertification.

The BCGEU proposes that the *Code* be amended to remove the jurisdiction of the Board to order partial decertification.

IV. TIMELY AND FAIR WORKPLACE JUSTICE ATTUNED TO THE MODERN ECONOMY

True expedited arbitration

One of the underlying bases of Canadian labour relations is speedy workplace justice.

Workers give up the only leverage available to them—mid-contract withdrawal of labour—in exchange for a speedy grievance arbitration system.

Workers are not the only beneficiaries of this this trade-off. Employers are saved the time and expense of the courts in resolving disputes.

This is also the premise of the Board's policy of deferring disputes, wherever possible, to grievance arbitration.

The past decade has seen the arbitration system degenerate into a slow crawl, beset by procedural and scheduling delays. Arbitration hearings are routinely scheduled months, if not years, in advance. Arbitrators' awards are often delivered after a comparable period has passed. Such delays are not limited to weighty legal disputes, but relatively straightforward terminations, which routinely see workers jobless for extended periods of time before their rights are determined.

In contrast, all Board matters, including weighty policy disputes, are required by regulation to be decided within six months.

The *Code*'s deeply flawed s. 104 expedited arbitration process does nothing to repair this broken arbitration system. This provision requires that the arbitration hearing commence within 28 days of the grievance being filed under s. 104, and that an arbitration award be issued within 21 days after the conclusion of the hearing.

Unfortunately, s. 104 is routinely "gamed" by lawyers and arbitrators. The "hearing" commences by conference call with the arbitrator to schedule the actual hearing. A decision rendered within 21 days of the conclusion of the hearing is cold comfort when the grievance is a year old.

The BCGEU proposes s. 104 be amended by requiring a final decision be issued within six months of the appointment of the arbitrator. Any extensions would be granted by the Chair of the Board and only in exceptional circumstances.

Protecting workers in the modern economy

Since the last *Code* review, the modern economy has changed appreciably. Work is more precarious, including part-time, contract and contingent employment, and workers are left more vulnerable. Migrant workers, particularly in caregiver occupations, are left isolated, vulnerable and with little hope of unionization. The employer-employee relationship has changed appreciably as the private and public sectors see more and more contracting, subcontracting, outsourcing, contract flipping and other forms of corporate reorganization. The Supreme Court of Canada recently recognized these changes in *British Columbia Human Rights Tribunal v. Schrenk*, 2017 SCC 62.

The familiar refrain when issues around the modern economy arise is "flexibility." Too often this term acts as a justification for eroding workers' rights. The BCGEU submits that the *Code* should be amended to allow the Board more flexibility to *protect* workers' rights, including:

- the introduction of multi-employer sectoral certification;
- the renewal of the long-dormant principles promoting organizing in traditionally difficult-to-organize sectors; and
- stronger and more expansive successorship, common employer and true employer provisions, particularly to address the loss of unionization as a result of contracting, subcontracting, outsourcing and contract flipping.

Replacing "proper cause" with "just and reasonable cause"

In general, non-union workers may have their employment terminated with just cause or reasonable notice. Over time, the standard for just cause has heightened such that it is rarely relied upon. It is generally easier for employers to negotiate an amount representing reasonable notice.

Unionized workers covered by a collective agreement may not be terminated or disciplined without just and reasonable cause. This is one of the most important rights secured by the union movement. It is a principle enshrined in the *Code*—all collective agreements are deemed to include this provision (s. 84).

It is only those highly vulnerable workers who have unionized, but not yet reached a first collective agreement, who are subjected to a lower standard for discipline and discharge. Such workers may be

terminated for "proper cause," a lesser threshold that essentially requires the employer to show it acted reasonably. The same workers are also left without the right to reasonable notice as provided to non-union workers. It is profoundly unfair for workers who have taken the risk of unionizing but have not secured a collective agreement to be more vulnerable than non-union workers.

The BCGEU proposes that the *Code* be amended to replace all references to "proper cause" with "just and reasonable cause."

V. PICKETING

In *R.W.D.S.U., Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd.* [2002] 1 S.C.R. 156 [*Pepsi*], at para. 32, the Supreme Court of Canada held that "Picketing, however defined, always involves expressive action. As such, it engages one of the highest constitutional values: freedom of expression, enshrined in s. 2(*b*) of the *Charter of Rights and Freedoms*. The Supreme Court of Canada went on to note that "free expression is particularly critical in the labour context" (para. 33). The Court specifically found that picketing is not only an expressive activity, but high value speech.

In *Pepsi*, the Supreme Court of Canada specifically found a blanket ban on "secondary picketing" (i.e., picketing at sites other than the struck or locked out worksite) to be contrary to the *Charter* value of freedom of expression. Put another way, a prohibition on expression based solely on location of that expression is unconstitutional.

Section 65 of the *Code* bans virtually all secondary picketing, contrary to the ss. 2(b) and 2(d) *Charter* rights to freedom of expression and freedom of association. The *Code* treats picketing like no other form of speech, banning it on the basis of location. For example, ss. 65(3) and (8) of the *Code* prohibit unionized workers from engaging in expressive activity, specifically picketing speech, at separate operations of *the struck or locking out employer*. The purpose of this ban is to artificially hamper workers' ability to fully attack the entire economic strength of a typically deeper-pocketed employer.

These restrictions on picketing are particularly onerous in the modern economy. As employers have further reorganized their operations (through contracting, subcontracting, contract flipping, outsourcing and other forms of corporate reorganization), the path available to workers to engage in job action has narrowed greatly.

The BCGEU proposes the repeal of s. 65 of the *Code* in order to align the *Code* with ss. 2(b) and 2(d) of the *Charter*.

VI. AN END TO THE OVERWHELMING CENTRALIZATION OF POWER IN THE CHAIR

Limiting the reconsideration power

To the best of the BCGEU's knowledge, British Columbia is the only province where Board decisions are internally appealed to a "reconsideration panel" with seemingly unlimited authority to overturn decisions.

In the first several decades of the Board, the reconsideration panel was not necessarily the Chair. However, in recent years the previous Chair is always on the reconsideration panel. The method of selecting the two other members of the reconsideration panel is something of a "black box," presumably left to the discretion of the Chair.

In some recent years, close to one-third of reconsideration applications have been successful. There is no clear standard of review—at times it appears to boil down to the whim of the Chair and who they pre-select to serve on the reconsideration panel.

The result is a profound centralization of power in the hands of the Chair to single-handedly control the law and policy of the Board. This centralization is further exacerbated by the fact that the Chair has significant (if not determinative) input in recommending reappointment of Vice-Chairs. These are not circumstances conducive to independent decision-making by Vice-Chairs.

The extraordinary scope of the reconsideration power has expanded to the point of being entirely contrary to the concept of independent decision-making. It is also inconsistent with the actual language of the *Code*. Both the s. 99 power of the Board to review arbitration awards and the s. 141 reconsideration power only permit the panel to disturb the decision under appeal where it "is inconsistent with the principles expressed or implied in this *Code* or another *Act* dealing with labour relations." Under s. 99 this has quite sensibly resulted tremendous deference to arbitrator's award. In sharp contrast, the same language in s. 141 has produced a seemingly limitless power to overturn original decisions of the Board.

Limiting reconsideration to narrow circumstances, or eliminating it altogether would provide certainty, finality and independent decision-making.

The BCGEU disputes any notion that such a move would limit the Board's ability to ensure consistent, predictable labour policy. First, the current regime has hardly provided coherence and predictability given the prevalence of reconsideration decisions overturning or significantly altering original decisions. In most cases, the law and policy are no clearer than they were before countless reconsiderations (e.g., partial decertification).

Second, the easy fix is bringing back "members" or "wingers" for policy-related decisions, or allowing parties to apply to the Registrar to have policy-related applications or other matters heard by a three-member panel.

The BCGEU proposes limiting the s. 141 reconsideration power to narrow circumstances, such as breaches of natural justice.

The Chair of the Board should be term-limited

Until 2002, the Chair was a positon that was often renewed and refreshed. To the best of our knowledge, no Chair served more than a single term.

The most recent Chair of the Board was appointed for approximately 15 years. This is not healthy for labour relations in British Columbia, or the Board.

The BCGEU proposes limiting the position of Chair to no more than a single five-year term.

VII. FUNDING

The BCGEU is mindful that the Panel's mandate is to review the *Code*. However, we would be remiss if we did not address the most pressing requirement to give effect to the purposes and objects of the *Code*—a well-funded Board with sufficient resources.

The financial starvation of the Board has deprived workers (and employers) of labour justice in numerous ways. Industrial Relations Officers are rarely, if ever, available to conduct investigations of voter lists or unfair labour practices, meaning that the parties are left to fight these issues in hearings, at great expense.

The growing practice of ordering mail-in ballots because of a lack of Board resources not only provides employers with more time to pressure workers, but also results in tremendous delay and uncertainty for workers, unions *and* employers.

As alluded to above, prior to 2002, it was common to have hearings heard by not only Vice-Chairs, but also members representing the union and employer communities. Such three-member panels promoted consistency of Board policy, ensured a broad range of perspectives in important decisions, and likely avoided unnecessary reconsideration applications.

The benefits of a well-funded Board are not only visited upon unions and employers. Until the extreme budget cuts by the previous government, the Board was equipped with a well-stocked library for members of the public to access and learn about their labour rights. This has disappeared and been replaced with a bare-bones website.

VIII. CONCLUSION

The BCGEU welcomes the provincial government's decision to review the provincial labour code and we thank the Panel for hearing our submission.

This review is a good first step in the process of restoring fairness to both the B.C. *Labour Relations Code* and the BC Labour Relations Board. We hope to see the B.C. *Labour Relations Code* amended to ensure balance and fairness for workers in B.C.

The BCGEU would be happy to provide elaboration or clarification on our submission at the Panel's convenience.

Yours sincerely

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