Submission to the Section 3 Panel Regarding British Columbia *Labour Relations Code* Reform

Submission By:

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The Canadian Union of Public Employees, BC Division, represents over 87,600 members in municipalities, schools, colleges, universities, libraries, health, emergency medical services, social services, and transportation. We welcome the opportunity to participate in the review of British Columbia's workplace laws, including the *Labour Relations Code*.

A review of the BC *Labour Relations Code* (the "*Code"*) is long overdue. For far too long the people of our province have worked under a legal framework that privileges employers over workers. The balance originally struck in our model of labour relations, which was premised on labour stability by regulating strikes on the one hand, while facilitating unionization through the certification process on the other hand, has been progressively tipped against workers over the past 17 years. Change is needed to restore balance and meet the needs of modern workplaces.

Unions give workers an opportunity to negotiate for improvements to wages and conditions of employment. Unionized workers have greater job security, and better access to vacation, extended health benefits, pensions, and a host of other employment-based benefits. Higher union density jurisdictions see improvements for all workers, in part because all employers have to offer better terms and conditions to attract employees, and in part because a strong labour movement helps to raise legislated minimum standards. Barriers to unionization that exist in the *Code* ultimately drag down the standards for all workers in the province.

The deleterious effects of BC's regressive labour code are exacerbated by trends in the labour market that increase worker vulnerability. Trends towards precarious work (including, among other things, part-time, contract, contingent employment in which workers are denied job security and decent wages) make unionization more difficult. But these trends also make unionization even more necessary. Unions have demonstrated strength in raising wages for members and non-members alike, in setting workplace standards that can be applied to all workers and in acting as a counterbalance to the power of employers. Balancing aspects of the *Labour Relations Code* that are unfair toward workers and unions must be coupled with measures that improve prospects for organizing vulnerable, precariously employed workers.

Any review of labour law must also be done in light of recent Supreme Court of Canada decisions that give constitutional protection to the right to join a union and to engage in meaningful collective bargaining and the right to strike. These decisions emphasize that governments must create legislation that gives real and meaningful access to unionization and collective bargaining to all workers. Changes to the *Code* are required to fulfill this obligation.

On February 6, 2018, Minister Harry Bains appointed a three-member panel under s.3 of the *Code* (the "Panel") with a broad mandate to review the *Code*. The Panel has been directed to "…assess each issue canvased from the perspective of how to 'ensure workplaces support a growing, sustainable economy with fair laws for workers and businesses' and promote certainty as well as harmonious and stable labour management relations".

These are CUPE BC's recommendations for reforms to the *Code*. We firmly believe that these recommendations are a step in the right direction to better align with the realities of the 21st century workplace. These changes, if adopted, will make a positive difference in the lives of working people by restoring balance in labour relations in our province.

We would like to highlight several areas that we are particularly concerned about, which we believe should be the first areas on which the government acts:

- Introduction of card check certification.
    - Certification should be granted when a union can demonstrate membership support of 50% of employees at a worksite. Secret ballot votes should be held only in cases in which a union has submitted membership evidence for more than 40% of employees, but less than 50%.
- Where votes occur, eliminate delay in holding of certification votes by instituting a maximum time of three working days between the certification application filing and the vote being held.
- Extend the post-certification "statutory freeze" period until a first collective agreement is reached.
- Increase penalties for unfair labour practices, including the use of remedial certification.
- Introduce successor rights so that unionized workers maintain their collective agreements and collective bargaining rights when work is contracted out and contracts are flipped between successive contractors.
- Amend provisions of the *Code* related to picketing so that they comply with the *Charter*.

Recommendation 1: Restore Card-Based Certification, granting automatic certification to unions demonstrating more than 50% support from workers in a proposed bargaining unit. Certification votes will be held when applications for certification demonstrate between 40% and 50% support.

Union organizing and certification are cornerstones of our model for labour relations. Workers have a constitutionally-protected right to join unions, and our labour laws should facilitate rather than hinder this process. Both the 1992 Baigent Section 3 Panel and 1998 Ready Section 3 Panel Reports, which can be provided if needed, recognized the fundamental role card-based certification plays in creating balanced labour relations.

Two-stage certification processes such as the one presently in place in BC, whereby a union must first obtain threshold for a vote to be ordered and then succeed with 50%+1 in a secret ballot up to (and usually at) ten days after the certification application is filed, are rife with employer interference.

The 1992 Baigent Section 3 Panel Report rejected arguments in favour of maintaining a secret ballot certification vote as follows in their Report (at p.26):

> "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 British Columbia has increased by more than 100%. When certification hinges on a campaign in which the employer participates the lesson of experience is that unfair labour practices designed to thwart the organizing drive will

> inevitably follow. The statistical profile in British Columbia since introduction of the vote was confirmed by the repeated anecdotes our Committee heard in its tours across the Province. It is also borne out in decisions of the Board and Council. Unions would sign up a clear majority of employees as members and a vote would be ordered. Then key union supporters would be fired or laid-off while threats of closure dominated the campaign and the vote itself was viewed as a vote on whether or not to continue with employment rather than as a vote on redefining the employment relationship. It is not acceptable that an employee's basic right to join a trade union be visited with such consequences and illegal interference. Nor is there any reasonable likelihood of introducing effective deterrents to illegal employer conduct during a representational campaign. A shorter time framework for voting will not deter an employer intent on "getting the message" to his employees. Neither is the imposition of fines and/or the expeditious reinstatement of terminated employees likely to introduce attitudinal or behavioural changes in employers intent on ensuring that their employees do not join unions. 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."

The 1998 Ready Section 3 Panel Report also expressed the Panel's support for maintaining card-based certification as follows:

> "We affirm our proposal in the Discussion Paper to not recommend a mandatory certification vote. We affirm the individual right, recognized provincially, nationally and internationally, to join or form trade unions. Experience demonstrates that employers do seek to affect employees' right to choose. In our view, extending the certification process by introducing a mandatory certification vote would only further invite such illegal activity."

These observations are still highly relevant today. There is no evidence that membership cards do not adequately reflect employee wishes. Furthermore, employer and union campaigns that take place between the filing of the certification application and the ultimate vote on whether to join the union are frequently hotly contested and may poison workplaces.

Employers regularly use intimidation tactics to dissuade employees from joining a union, including threatening workers with discipline or discharge, or threatening job loss if employees unionize. The ease and frequency at which employers engage in these kinds of tactics is amplified in mandatory certification vote systems, such as the system presently in place in BC.

Parties expend significant resources responding to unfair labour practice complaints. Adversarial interactions between workers and their employers cause mistrust and damaged relationships, which negatively impacts the ability to reach a first collective agreement once a union is certified.

Card based certification is one of the most significant amendments that could be made to the *Code* to balance labour relations and achieve the purposes enshrined in s.2 of the *Code*. Card based certification provides the greatest opportunity for workers to exercise their constitutional right to join a union and limits undue influence by employers in exercising this right. Card based certification protects vulnerable workers from hostile employers, and effectively levels the playing field in matters of union certification.

Jurisdictions that utilize card-based certification have higher rates of success in unionization campaigns. As Sara Slinn notes in her comprehensive survey of the literature on union certification regimes, when mandatory vote systems are introduced the number of certification applications and votes declines.[1] Clearly the system by which union certification is granted has a significant and material effect on certification outcomes. It is not the case that the use of a mandatory vote system diminishes the desire of workers to join a union. Instead we can see that mandatory vote systems act as a barrier to unionization.

There are those who might argue that mandatory votes are more democratic. That line of argument, however, fails to recognize that when workers sign a union card in a certification drive, they are in fact voting for the union. When more than 50% of employees sign cards, the majority should rule, and the union should be certified automatically. A mandatory vote, on the other hand, is regularly tainted by employer intimidation tactics. It might seem counter-intuitive, but the mandatory vote system is actually less democratic because the vote takes place under regular threats of potential reprisals, and in the context of significant power imbalance between workers and their employers. Without access to a free and fair election, the process is slanted in favour of the only group that has the power to discipline and intimidate the workers, and as such mandatory vote systems are tilted towards employers and against workers.

Recommendation 2: Reduce voting period from ten days to three days where a vote is required. Expedite adjudication of bona fide objections raised in the certification process.

As outlined above, long delays between certification applications and votes cause hostile work environments and mistrust among employees and employers, and undermine the purposes of the *Code* as enshrined in section 2. Such long delays are more akin to the labour relations regime in the United States, which has demonstrated a profound weakness in guaranteeing workers' associational rights through union certification. Delays in certification votes, where votes are required, are correlated with significantly lower success rates in union certification applications. Employer use of unfair labour practices during these long delays are undoubtedly the primary cause of the decline in success in these cases.

Clearly, the best way to avoid long delays between application and certification is to introduce automatic certification where the union can demonstrate majority support (i.e., card-based certification as discussed above). However, in cases in which the union chooses to apply for a vote with 40% to 50% membership support, there should be a maximum time between the application and the vote to mitigate the harms associated with drawn out voting campaigns. We say this period should be three days.

Additionally, any objections to the unit applied for or arising out of the certification vote must be dealt with expeditiously and decisions rendered quickly so that workers are not stuck in "limbo" unsure of whether they will be joining the union or not, when they are particularly vulnerable.

We have had a number of cases wherein we applied for certification and it took four months for the Board to render a decision on an employer's objection to the proposed bargaining unit. This meant

[1] Sara Slinn, "Collective Bargaining", *Changing Workplaces Review Research Projects*, 2015, https://cirhr.library.utoronto.ca/sites/cirhr.library.utoronto.ca/files/research-projects/Slinn-9-Access%20to%20Collective%20Bargaining.pdf

that, for four months after the vote took place, prospective members waited patiently (and anxiously) to learn whether they would be certified or not. During that period, the employer typically refused to meet with workers or worker representatives to discuss workplace issues or working conditions, as employers are often not prepared to engage in any discussions with employees until they know whether there will be a union or not. This places serious hardship on workers and cannot be permitted to continue.

Recommendation 3: Eliminate the use of mail-in ballots except where all parties consent.

The normal requirement that a vote be conducted within ten days of the filing of an application for certification does not apply for a vote conducted by mail, per s.24(2) of the *Code*. In fact, where a vote is ordered to occur by mail the voting period is significantly protracted, often in the range of three weeks or so in our experience.

The use of mail-in ballots has been fraught with difficulty in BC. The extended campaign period exacerbates pressure on workers and the impact of unfair labour practices by employers and increases workplace hostility. Until very recently, the Board was routinely ordering mail in ballots even where the parties opposed this process, due to administrative costs of holding in-person votes. While this troubling trend was recently limited after outcry by the labour community, the *Code* itself does not restrict such use of mail ballots. As such, there is a very real possibility that budget cuts in the future may result in an increase in the use of mail ballots contrary to the wishes of the labour community.

As such, we propose amending s.24(2) to read as follows:

> 24 (2) A representation vote under subsection (1) must be conducted within 10 days from the date the board receives the application for certification or, if the vote is to be conducted by mail per s.24(2.1), within a longer period the board orders.
>
> (2.1) A representation vote under this section may be conducted by mail only on agreement by the parties.

Recommendation 4: Extend the statutory "freeze" post-certification until the parties reach a first collective agreement.

A statutory freeze on terms and conditions of employment after union certification is a standard principle in Canadian labour relations. As the 1998 Ready Section 3 Panel observed in their Report, "The statutory freeze… is designed to level the playing field during first contract negotiations." It prevents employers from engaging in reprisals against employees who choose to unionize and fosters conditions for a smooth collective bargaining process. There is no guarantee that any particular condition will remain in place; but there is a guarantee that during the freeze period there will not be constant disruptions to collective bargaining that would happen with unilateral changes to working conditions. In fact, one goal of unionization is to prevent the unilateral imposition of employment terms by employers.

As the 1998 Ready Section 3 Panel Report noted, "the [current] four-month period was reflective of the average time it took to conclude a collective agreement." The Ready Panel further noted that, in

1998, it took on average of six to nine months to conclude a first agreement, and recommended extending the “freeze” period to eight months to better align with that timeframe.

However, there is no rational basis for time-limiting the freeze period at all. Employers can readily delay bargaining by engaging in tactics that extend negotiations beyond whatever time period is established. There is an incentive to do so, as employers then have free reign to change terms and conditions of employment with little consequence or remedy for the affected workers, who are particularly vulnerable.

On the other hand, where parties are bargaining successive collective agreements, the “expired” agreement is extended until a new agreement is reached, or until strike or lockout occurs (pursuant to s.45(2)). This promotes stable labour relations and maintains appropriate balance between employers and workers as they negotiate their working conditions in a collaborative, minimally disruptive manner, in line with the purposes of the *Code*.

Given this, it makes abundant sense to remove the reference to a time-duration for a statutory freeze post-certification. This would simply require deleting s.45(1)(b)(i) and adding language similar to that in s.45(2)(a). We propose that an amended s.45(1)(b) read:

> 45 (1) When the board certifies a trade union as the bargaining agent for employees in a unit and a collective agreement is not in force,
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> (b) the employer must not increase or decrease the rate of pay of an employee in the unit or alter another term or condition of employment until
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> (i) a strike or lockout has commenced, or
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> (ii) a collective agreement is executed.

Note that this change would not prevent an employer from making bona fide changes to working conditions or wages, but would require application to the Board under s.45(3). This would balance an employer’s legitimate business needs while protecting workers when they are most vulnerable, restoring balance in labour relations in a manner that is consistent with the purposes of the *Code*.

Recommendation 5: Institute multi-employer, sectoral certifications (“Broad Based Bargaining”) for traditionally difficult to organize sectors with 50 or less employees per worksite.

Certain sectors of the economy are significantly more difficult to organize under the Wagner model. Additionally, there are sectors, or types of workplaces, in which the Wagner model does not provide sufficient bargaining strength to unions to give meaningful access to good collective agreements. While we are unable to outline a comprehensive proposal within the confines of this submission, we strongly urge the Panel to consider alternatives to the Wagner model to give access to collective bargaining to workers in those sectors/workplaces that are currently difficult to unionize, where union density is currently relatively low.

Recommendation 6: Restore provisions concerning communications such that employer communications are only permissible where they serve a legitimate business purpose.

Section 8 used to read as follows:

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

The Board's approach to s.8 under this previous language struck the appropriate balance between workers and employers, and was outlined as follows in *Cardinal Transportation*, BCLRB No. B344/96 (wherein the Board also upheld s.8 as a reasonable limit on freedom of expression under the *Charter*) at para. 212:

> "In summary, the Board's policy respecting Section 8 (employer free speech) will be as follows:
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> (a) Employers have a general right to express their views. However, to fall within Section 8, communications must be either statements of fact or opinions reasonably held regarding the business. An employer's statement can influence the choice of an employee provided it is protected by Section 8 (or does not in any way contravene the Code).
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> (b) Coercion is defined as any effort by an employer to invoke some form of force, threat, undue pressure, or compulsion for the purpose of controlling or influencing an employee's freedom of association.
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> (c) There is no "statutory immunity" for statements about the employer's business which are coercive, as set out in (b) above.
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> (d) The definition of "business" in Section 8 includes statements concerning all aspects of managing the business including collective bargaining matters; however, it does not include statements concerned with union membership. Such latter statements can be permissible under the Code so long as they fall outside the prohibition contained in Sections 6 and 9. "Business" does not include negative comments about unions in general.
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> (e) Captive audience meetings will continue to be given a strict level of scrutiny. Statements that would otherwise be permissible may, in the context of a captive audience meeting, be impermissible. This is especially true in the areas of the economic dependence of employees and union membership requirements.
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> (f) The longstanding policy of this Board and other labour boards in Canada is that an employer is not entitled to engage in an anti-union political-style campaign in an effort to prevent the union from certifying. The greatest point of resistance by employers to trade unions is at the initial point of employees attempting to exercise their statutory choice in favour of collective bargaining. A statutory choice has been made to restrict employer speech at this point in favour of ensuring employees' freedom of association. An employer's vigorous presentation of its anti-union views may be reasonably perceived by most

> employees as one that is not "safe to thwart". The American experience seems to verify this."

Despite the fact that this language struck the appropriate balance in labour relations and was upheld as a demonstrably justified limit on *Charter*-protected freedom of expression, in 2002 the BC Liberal government amended s.8 to its current language, which significantly expands permissible communication by employers:

> "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."

The Board has interpreted this change in a way that is significantly unfavourable to unions and workers. For instance, the Board has held that, while outright lies are prohibited, statements that are incorrect or unreasonable were not. So, for instance, the Board has permitted statements that the Union is disrespectful and should not be trusted, even when that view is mistaken and unreasonable: *Convergys Customer Management Canada Inc*, BCLRB No. B62/2003, upheld on reconsideration BCLRB No. B111/2003, at para.122. The Board has upheld statements that the Employer does not have to bargain if the Union is certified: *Convergys*, at para. 123. The Board has also upheld a statement that signing a union card has the same legal effect as signing a contract: *Convergys*, at para. 124.

There are a number of other Board decisions with similar outcomes. The overall effect of these decisions is that employers have virtual free reign to do and say what they wish, in a context where employees are very vulnerable and there is a significant power imbalance.

One must bear in mind that virtually unfettered employer free speech, on the one hand, is in no way counterbalanced under the *Code*: union supporters and organizers are prohibited from attempting to persuade workers at the worksite during working hours to join a union pursuant to s.7(1) of the *Code*. This further entrenches the gross imbalance at worksites in relation to union campaigns, and favours employers' ability to pressure workers over workers' ability to communicate with each other regarding unionization while at work.

Limiting employer speech, particularly during organizing drives, to "fact or opinion reasonably held with respect to an employer's business" would restore the balance in workplaces and allow workers to decide whether they wish to join a union, which is their constitutionally protected right, without undue influence from their employer.

In our view, the previous wording of s.8 appropriately balanced competing interests of workers and employers. It is consistent with the *Charter* right to freedom of expression, as it has been held to be a demonstrably justified limit under s.1. As such, it ought to be restored.

Recommendation 7: Institute tougher penalties in relation to unfair labour practice violations, including the use of remedial certification.

Employer interference in organizing campaigns often happens very early in the process, before the union has been able to sign enough cards to apply for a certification vote. For employers, the

consequences of engaging in such activity are insignificant compared to the benefit of achieving their goal of worker intimidation and union avoidance. There are cases in which the most effective remedy is to certify the union because the true wishes of the employees cannot be revealed through a vote, and the unfair labour practices have made it impossible for the union to get enough membership evidence to apply for certification.

While some of the negative effects of rampant unfair labour practices seen in some organizing drives will be reduced or even eliminated with a move to card-based certification, there must be more of a risk to employers for engaging in anti-union behaviours that violate the *Code*. Under the present legislative and policy regime, there is little disincentive for such behaviours, given they will not result in any significant consequence even if a complaint is founded. As such, we recommend legislative change that entrenches remedial certification as a likely outcome in response to unfair labour practice violations.

Recommendation 8: Amend successorship provisions so that the certification follows a transfer of workers and work to reflect the modern realities of contracting, subcontracting, contract flipping, and modern forms of corporate transfer. Place the primary evidentiary burden on the employer where a successorship or common employer application is filed.

Successor rights are a necessary protection for workers and their unions. The practices of contracting out, contract tendering and contract flipping are used by employers to undermine the democratic rights of workers to join and remain in unions, and to undermine collective bargaining. In cases of contracting out, unions lose bargaining rights and negotiated agreements, and workers lose their jobs. Successor rights will help protect vulnerable workers.

There has been a rise in the vulnerability of workers in a number of sectors that are regularly subjected to the practice of contracting out, such as residential and long-term care in the healthcare system. We support the broadest possible extension of successor rights. That is to say, any work that is covered by a collective agreement should be protected by successor rights provisions.

When workers choose to exercise their constitutional rights to freedom of association by joining a union, they expect that they will be able to maintain that association at their workplace. They do not expect to lose their hard-fought rights through contract flipping, contracting out or transfer of workers or work functions that fall outside the Board's interpretation of successorship provisions in the *Code*.

The only truly effective way to protect workers' bargaining rights is to guarantee that their union certificate, their collective agreement, and their bargaining rights follow them when work is transferred from one company (or public sector organization) to another employer. The new employer will thus be responsible for upholding the terms and conditions of the collective agreement, and subsequently negotiating a new collective agreement upon its expiry.

As such, we recommend that an extension of collective bargaining rights and collective agreements in cases in which work is contracted out, contract flipping occurs; work or workers are transferred, and in all sale of business cases regardless of the form taken.

Furthermore, given that unions and workers do not have ready access to documentation required to establish successorships as this information is normally solely in the possession of employers, we

recommend that the *Code* be amended to place the evidentiary burden on employers, and require that they disclose all relevant documents, in cases where a successorship or common employer application is filed.

Recommendation 9: Repeal "the provision of education" as an essential service.

Section 72 of the *Code* creates a process whereby the Board may designate services essential where a potential labour dispute poses a threat to "the health, safety or welfare of the residents of British Columbia."

In previous years, "educational services" were included in the essential service provisions, however, this was removed via Bill 84 which replaced the *Industrial Relations Act* with the *Labour Relations Code* in 1993.

In 2001, the BC government amended the *Code* to add education as an essential service. To this end, ss.72(1)(a)(ii) and 72(2.1) were added, which reads:

> 72 (1) If a dispute arises after collective bargaining has commenced, the chair may, on the chair's own motion or on application by either of the parties to the dispute,
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> (a) investigate whether or not the dispute poses a threat to
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> …
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> (ii) the provision of educational programs to students and eligible children under the *School Act*,
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> …
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> (2.1) If the minister
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> (a) after receiving a report of the chair respecting a dispute, or
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> (b) on the minister's own initiative
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> considers that a dispute poses a threat to the provision of educational programs to students and eligible children under the *School Act*, the minister may direct the board to designate as essential services those facilities, productions and services that the board considers necessary or essential to prevent immediate and serious disruption to the provision of educational programs.

This amendment has been rife with difficulty since its enactment, as education does not lend itself to the same analysis as "health, safety and welfare" which are more logically candidates for protection as "essential" in the event of a work stoppage. This has led to protracted litigation before the Labour Relations Board and has fueled already heated labour disputes in the public education sector.

Furthermore, legislators must be cognizant of workers' constitutionally-protected right to strike, as a starting point. In our submission, "the provision of educational programs" is not truly essential as a standalone public service, and any real and significant threat to students' education posed by a protracted labour dispute is more appropriately dealt with under "health, safety and welfare"

provisions of s.72(1) and (2), which was the precise avenue for dealing with such threats prior to the enactment of ss.72(1)(a)(ii) and 72(2.1).

In 1993, following the repeal of "educational services" from the essential services provisions of the *Code*, the Board nonetheless concluded in *Bulkley Valley School District Number 54 (Re)*, BCLRB No. B147/93, that certain aspects of education may fall within the ambit of "health, safety and welfare" pursuant to s.72.

At issue in *Bulkley Valley* was whether certain educational services should be declared essential in order to protect grade 12 students' ability to graduate high school and complete their provincial exams. The Board concluded that, in exceptional circumstances, education may be an "essential service" under the "welfare" head of s.72:

> "Is education therefore capable of falling within the concept of welfare, notwithstanding the removal of "educational services" from Section 72? There may be exceptional circumstances in which education falls within the concept of welfare?
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> It is our view education falls within the concept of a profound social and human need, and we draw support for this conclusion from the Supreme Court of Canada decision in *Jones v. The Queen, supra*…
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> …
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> If education therefore, can, under certain exceptional circumstances, fit within the concept of "welfare", do the circumstances of the affected Grade 12 students fit within this exception? We believe the potential impact of this dispute on Grade 12 students does fall within the concept of "welfare"."

The Board ultimately concluded that it could fall under this concept, and ordered that the matter be further investigated by an industrial relations officer.

Given the degree to which essential services legislation limits workers' constitutionally protected right to strike, given the protracted and complex legal disputes that have arisen under the current provisions related to "the provision of educational programs" as an essential service, and given that "health, safety and welfare" provisions will protect educational services where there is a real and substantial risk of significant harm, we recommend that ss.72(1)(a)(ii) and 72(2.1) be repealed and "provision of education services" no longer be included as an express ground for essential service designation under the *Code*.

Recommendation 10: Repeal restrictions on secondary picketing.

Secondary picketing is a constitutional right, as the Supreme Court has ruled. It is guaranteed by the *Charter* rights to both freedom of expression and freedom of association. It is perplexing that the BC *Labour Relations Code* continues to include restrictions on such a fundamental right. Throughout Canada, secondary picketing is regulated by the courts per the jurisprudence from the Supreme Court of Canada, and there is no suggestion that this causes any difficulty for industry.

Recommendation 11: Amend provisions related to common site picketing relief to comply with the right to strike under s.2(d) of the Charter.

Where picketing impacts "neutral third parties" who share a common site with a struck employer, the *Code* provides for relief for such common site employers under s.64. While employees who are on strike or locked out may picket at or near a site where they work under their employer's control and direction, on application the Board "must restrict the picketing in such a manner that it affects only the operation of the employer causing the lockout or whose employees are lawfully on strike, or an operation of an ally of that employer, unless it is not possible to do so without prohibiting picketing that is permitted by subsection (3) or (4), in which case the Board may regulate the picketing as it considers appropriate" (per s.65(7)).

The Board's approach to applications for common site relief is set out in *Sovereign General Insurance Co.*, BCLRB No. B451/94, wherein the Board set out a two-stage approach to applications for common site relief under the *Code*, still the leading case on the Board's policy in this area, as follows:

> "We come now to a more detailed examination of the Board's inquiry at both the first and second stage of Section 65(6). It might initially seem that there is very little distinction given the determination that the same options are available in both restricting and regulating picketing (i.e., time, place and manner). However, there is an important difference to which reference has already been made: at the initial stage, primary emphasis is placed on the protection of third parties -- the Board is directed to restrict the picketing in such a manner that it only affects the operation of the struck or locking out employer, unless to do so results in a complete prohibition of the picketing; at the second stage, regulation of picketing may result in third parties being affected.
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> Except for the stipulation that restrictions on picketing not amount to a prohibition, the first stage adopts language found in the *Industrial Relations Act*. That is, both the former Section 85(5) and the current Section 65(6) contain an express direction that "...the board *shall* restrict the picketing in such a manner that it affects *only* the operation of the [primary employer]" (emphasis added). This language does *not* engage any of the discretionary factors which were previously adopted by the Board in cases such as *Vancouver Symphony Society, supra* (e.g., functional interrelationship or lack of "neutrality").
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> Given this primary emphasis at the first stage on insulating third parties, we believe that there should be a concomitant obligation on persons seeking relief under Section 65(6) to specifically propose the minimum restrictions necessary for their protection. The onus will then shift to the union to demonstrate that these restrictions would amount to a prohibition, before the Board will move beyond the first stage.
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> At the second stage, primary importance is no longer placed on the protection of third parties. Instead, the Board must balance (perhaps "weigh" is a more appropriate description) their rights with those of the striking or locked out employees. This requires a broader examination of the competing interests -- recognizing that in no circumstances will there be a complete prohibition of picketing. Although the right to picket may be diminished as well through regulation at the second stage, unlike the first stage, there may also be a

> continuing effect on third parties. Further, if no regulation short of prohibition is possible, the Board may exercise its discretion to deny relief entirely."

Thus, the Board's approach entails the "neutral" third party proposing picketing restrictions that would relieve them from being impacted by the labour dispute. Those proposals will be adopted by the Board unless they result in a complete prohibition on picketing, in which case the Board will restrict picketing geographically or temporally to limit the impact on the neutral third party.

The *Code* language related to common site relief, and the Board's approach to this language, are not consistent with workers' constitutionally-protected rights to strike and picket under ss.2(b) and 2(d) of the *Charter*. The starting point must be the right to strike and picket, and any restrictions must be minimally impairing of those rights, and demonstrably justified in a free and democratic society pursuant to s.1 of the *Charter*. Instead, the Board's policy and the language of s.64(7) limits picketing up to the point of complete prohibition. Clearly, this is not consistent with the *Charter* and ought to be amended as follows:

> (7) If the picketing referred to in subsection (6) is common site picketing, the board may only restrict the picketing in such a manner that is demonstrably justified in a free and democratic society.

Recommendation 12: Restore the definition of "strike" to include the intention to compel the employer to agree to terms of employment.

Prior to 1984, the definition of "strike" contained a subjective intention, the intention to compel, as follows:

> "strike" includes
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> (i) a cessation of work; or
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> (ii) a refusal to work; or
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> (iii) a refusal to continue to work; or
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> (iv) an act or omission that is likely to, or does, restrict or limit production or services,
>
> by employees in combination, or in concert, or in accordance with a common understanding, <u>for the purpose of compelling their employer to agree to terms or conditions of employment</u> or of compelling another employer to agree to terms or conditions of employment of his employees, and "to strike" has a similar meaning.

The current definition of "strike" in s.1 no longer contains this subjective intention to compel, and reads as follows:

> **"strike"** includes a cessation of work, a refusal to work or to continue to work by employees in combination or in concert or in accordance with a common understanding, or a slowdown or other concerted activity on the part of employees that is designed to or does restrict or limit production or services, but does not include
>
> (a) a cessation of work permitted by section 63(3), or

(b) a cessation, refusal, omission or act of an employee that occurs as the direct result of and for no other reason than picketing that is permitted under this Code,

and **"to strike"** has a similar meaning;

On the other hand, the current definition of "lockout" under s.1 still includes an intention to compel:

> **"lockout"** includes closing a place of employment, a suspension of work or a refusal by an employer to continue to employ a number of his or her employees, done to compel his or her employees or to aid another employer to compel his or her employees to agree to conditions of employment;

The definitions of "strike" and "lockout" are not balanced in the *Code*, meaning that employers can engage in conduct that would constitute a "lockout" (i.e., significant changes to terms and conditions of employment) but the Union is unable to prove the subjective element required to establish the employer's unilateral action constitutes an unlawful lockout. On the other hand, employees are prohibited from stopping or slowing down work, or limiting production, in combination or concert whether or not they intended to compel their employer to agree to terms or conditions of employment.

This results in a significant imbalance: whereas the Union must rely on the grievance process to deal with unlawful changes to working conditions rather than file an application alleging an unlawful lockout, the Employer can bring the Union before the Board and ultimately seek significant damages even where workers did not intend their conduct to amount to a "strike".

Thus, the definition of "strike" should be restored to the pre-1984 language in order to restore this balance. Alternatively, the intention element should be removed from the definition of lockout so that the two acts, "strike" and "lockout" are defined in parallel terms.

CONCLUSION

The BC *Labour Relations Code* clearly needs overhaul in order to restore balance and fairness in labour relations in our province. In many cases its provisions are also contrary to workers' constitutional right to freedom of association, as defined through recent Supreme Court cases. Furthermore, changes in the labour market, and the structure of employment relations exacerbate the limitations of the *Code*. A broad array of reforms, set out in this submission, is therefore necessary to redress the inadequacies of the *Code* and bring it in line with the realities of modern employment relations.

APPENDIX A: SUMMARY OF RECOMMENDATIONS

1. Restore Card-Based Certification, granting automatic certification to unions demonstrating more than 50% support from workers in a proposed bargaining unit. Certification votes will be held when applications for certification demonstrate between 40% and 50% support.

2. Reduce voting period from ten days to three days where a vote is required and expedite the adjudication of any bona fide objections raised in the certification process.

3. Eliminate the use of mail-in ballots except where the parties consent.

4. Extend the statutory "freeze" post-certification until the parties reach a first collective agreement.

5. Institute multi-employer, sectoral certifications ("Broad Based Bargaining") for traditionally difficult to organize sectors with 50 or less employees per worksite.

6. Restore provisions concerning communications such that employer communications are only permissible where they serve a legitimate business purpose.

7. Institute tougher penalties in relation to unfair labour practice violations, including the use of remedial certification.

8. Amend successorship provisions so that the certification follows a transfer of workers and work to reflect the modern realities of contracting, subcontracting, contract flipping, and modern forms of corporate transfer. Place the primary evidentiary burden on the employer where a successorship or common employer application is filed.

9. Repeal "the provision of education" as an essential service.

10. Repeal restrictions on secondary picketing.

11. Amend provisions related to common site picketing relief to comply with the right to strike under s.2(d) of the *Charter*.

12. Restore the definition of "strike" to include the intention to compel the employer to agree to terms of employment.