

**JOINT BUSINESS COMMUNITY
SUBMISSION TO THE
MINISTER OF LABOUR
IN RESPONSE TO:**

**LABOUR RELATIONS CODE REVIEW COMMITTEE
RECOMMENDATIONS FOR AMENDMENTS TO THE LABOUR
RELATIONS CODE**

**BC Chamber of Commerce
BC Hotels Association
BC Trucking Association
Canadian Federation of Independent Business
Canadian Franchise Association
Canadian Home Builders Association BC
Canadian Manufacturers and Exporters
Greater Vancouver Board of Trade
Independent Contractors and Businesses Association
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November 30, 2018

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JOINT BUSINESS COMMUNITY SUBMISSION TO THE MINISTER OF LABOUR IN RESPONSE TO:

LABOUR RELATIONS CODE REVIEW COMMITTEE RECOMMENDATIONS FOR CHANGES TO THE BC LABOUR RELATIONS CODE

On October 25, 2018, the Minister of Labour released the Report on Recommendations for Amendments to the Labour Relations Code (the “Report”) by the panel of special advisors (the “Panel”). At the same time, the Ministry invited public feedback on the Panel’s recommendations. It was also announced that “additional consultations with key stakeholders” would be undertaken as government prepared amendments to the Code to be brought forward in the spring of 2019 (see the BC Government News Release Oct 25, 2018, accompanying the Minister of Labour’s public release of the Report).

The following is our feedback on the Report. We also address the suggestion of “additional consultation with key stakeholders,” which may undermine the legitimacy and acceptability of the process to date.

Together, the organizations signatory to this submission account for a substantial portion of the private sector economy in British Columbia. As noted in our submissions to the Panel, these organizations have a shared interest in growing the B.C. economy for the benefit of our employees, their families, and the communities in which we do business. The opportunities, investment and jobs that flow from our member companies are the foundation of the prosperity and quality of life we all enjoy in British Columbia.

We filed both an initial submission and a reply submission in the Labour Relations Code Review process. Members of our group also presented verbally in the regional hearings held by the Panel. We appreciate the Panel’s work, and for considering our submissions and presentations.

In the framework introduction portion of its Report, the Panel notes the “transparent, consultative” approach taken to reform of the Code in 1992 and how that “resulted in the perception of balance and provided legitimacy to that [1992] Report and its recommendations” (p. 6). The Panel then cautioned against a pendulum swing in the Code’s provisions:

There have been a number of pendulum swings in important Code provisions over the past 30 years largely depending on the governing political party. This is not consistent with predictability, certainty or balance. Although not an easy task, it is essential to avoid pendulum swings by implementing balanced changes that are sustainable. Certainty and predictability are important considerations for investment decisions and the competitive position of B.C. in an increasingly globalized economy. (p. 7) (emphasis added)

This need to avoid a pendulum swing is key to the Report and ultimately to the legitimacy and acceptability of the current process of reform of the Code. Inherent in this are a number of critical considerations: certainty; predictability; balance; sustainability; and investment and competitiveness.

These core concerns reflect the mandate given to the Panel by the Minister. That mandate, reproduced at p. 1 of the Report, included the direction to:

.....assess each issue canvassed from the perspective of how to “ensure workplaces support a growing, sustainable economy with fair laws for workers and business” and promote certainty as well as harmonious and stable labour/management relations.

Certainty, stability, and having “a growing, sustainable economy,” along with “fair laws for workers and businesses,” are key components of both the mandate and the Report.

With respect to workers’ rights, the Panel noted significant Charter developments. As explained in the Supreme Court of Canada passage quoted by the Panel, at the heart of these developments is the “choice and independence afforded to the employees in the labour relations process”: *Mounted Police Association of Ontario v. Canada (Attorney General)*, 2015 SCC 1 (“MPAO”), para 82, as quoted in the Report at p. 3.

We covered these matters in both our initial and reply submissions to the Panel. They include:

- the need to have a transparent, legitimate process in British Columbia labour relations, which has occurred at times and not occurred at other times;
- the need to avoid a pendulum swing;
- the need to respect employee rights;
- the need to protect and continue British Columbia’s successful economy, with all the benefits that brings; and
- the need for stability, particularly in light of the accumulating headwinds facing the province’s economy.

All of these points are central to the mandate given to the Labour Relations Code Review Panel, the success of the Report, and to the legitimacy and acceptability of the process overall.

Deviating from these core concerns will seriously undermine and threaten the legitimacy, success and acceptability of the process. In that regard, we have two major concerns.

1. Undermining the transparency and legitimacy of the public engagement process and Report through “additional consultations with key stakeholders”

We preface this first concern by acknowledging, as did the Panel, the differing views that exist regarding the Code and the reform of it (see the Report, for instance, at the top of p. 7). The inevitable result of this – if there is to be balance in the Code and the reform of it – is that no constituency or party is going to be entirely happy. That is as true for us as it is for others. One need only review our earlier submissions in relation to the recommendations in the Report to identify the concerns from our perspective. But that does not mean that the legitimacy of the process or the Report should be undermined.

However, we fear that may be exactly what is being contemplated in the suggested process of further consultations with “key stakeholders,” especially when both the nature of those consultations and the identity of the “key stakeholders” remain undefined.

As noted above, the 1992 process was much praised during the current Labour Relations Code Review process, including by the signatories to this and our previous submissions. Nonetheless it is important to recall that when the legislation was tabled in the Legislature in 1992, there arose an issue which, in the view of the Labour Minister of the day, threatened the credibility of the consultation process which had been undertaken. The issue arose when six business leaders in the province wrote a letter seeking to meet with the Premier in response to the intended labour relations reforms. The Minister, the Honourable Moe Sihota, made clear his position on this as follows:

Hon. M. Sihota: I want them to hear this very carefully. Six business elites -- individuals -- want to sit down with the Premier and negotiate labour legislation. I want Hon. members in this House to understand. Gone are the days when a single phone call or a single letter to the Premier will bring about changes in labour legislation.

Quite frankly, there are two ways in which one can change labour legislation in British Columbia: the old way of picking up the phone, talking to the Premier, working through the changes in the back room and engaging in confrontation as a consequence; or alternatively, the new way, the way in which people requested a year ago that government work through a process of consultation rather than confrontation, through public input rather than backroom deals.

British Columbia, Official Report of Debates of the
Legislative Assembly (Hansard), 35th Parl., 1st Sess., Vol.
6, No. 5 (5 November 1992) at 3877 (emphasis added)

Needless to say, Minister Sihota did not agree to abandon the public process in favour of backroom deals, saying "...this government will not acquiesce to the request of those who are asking us to go to the back rooms and engage in some kind of new negotiation process with respect to the labour legislation" (*ibid.* p. 3877).

To date, the current 2018 process for reform of the Code has been an open, independent and transparent "public engagement" process leading to the Panel's Report. The comprehensive and extensive nature of the engagement process has been described by the government on its public engagement website as follows:

A panel of three special advisors independently reviewed British Columbia's Labour Relations Code to ensure British Columbians have the same rights and protections enjoyed by other Canadians and that workplaces support a growing sustainable economy, with fair laws for workers and businesses. The Panel also assessed issues from the perspectives of promoting certainty as well as harmonious and stable labour relations.

...

The Panel initiated an extensive public consultation process by inviting written submissions, which have been posted online here. Individuals and organizations were invited to present their views in greater detail at one of 10 regional meetings around B.C. Further dialogue was then gathered through reply submissions, where individuals or organizations could comment on other submissions or provide further feedback.

Input received:

- 83 presentations were made at ten regional meetings held in 9 locations throughout B.C. including: Victoria, Courtenay, Prince George, Kelowna, Kamloops, Cranbrook, Terrace, Surrey and Vancouver (two meetings were held)
- 108 submissions, 19 replies (representing 26 organizations) and 94 emails were received

Input leads to action:

A report was submitted to government on August 31, 2018, with recommendations on amending the Labour Relations Code to better support a growing and sustainable economy. The report was publicly released on October 25, 2018.

<https://engage.gov.bc.ca/govtogetherbc/impact/labour-relations-code-review-results/>

We have, in good faith, participated fully in this public engagement process. Our first submission to the panel was the result of 13 business organizations working together to provide the Panel with a considered position on labour relations legislation in the province. Representatives of several of our signatory organizations presented to the Panel at the regional hearings and heard the presentations of other parties. We reviewed every submission posted on the engagement website and submitted an additional submission in response.

The Report is clearly responsive to the submissions made to the Panel and reflects the Panel having reviewed and carefully considered the submissions in reaching what they perceive to be a fair and appropriate balance.

We understand, however, that this process may be supplanted, potentially, by a whole set of new, private discussions.

As noted in its October 25, 2018 News Release, the Ministry invited public feedback on the Panel's recommendations, but then went on to announce its intention to embark upon further undefined consultations between the government and unidentified "key stakeholders" regarding the Code amendments, a process that will presumably occur beyond the public eye. The News Release states:

Public feedback on the panel's recommendations can be sent to LRCReview@gov.bc.ca by Nov. 30, 2018. Additional consultations with key stakeholders will also be undertaken as government prepares amendments to the code in spring 2019.

These "additional consultations" raise the spectre of private, backroom dealings and "new negotiation process" that Minister Sihota rejected in 1992. If pursued, the additional consultation process will be contrary to the transparently public Labour Relations Code Review. As Minister Sihota said in 1992, "the government stayed out of that process [in the 1992 Labour Relations Code review], wanting it to be an independent and clean process, unlike the sham that we saw with the previous administration with regard to Bill 19 [in 1987]" (*Hansard, supra*, at p. 3878).

Our concern is given further weight in light of some of the responses of some labour groups to the Report. The general theme from labour is that the Report is a "good first step" or a "good start", but only that (see the BCGEU and Steelworkers news releases). The implication is that more needs

to be done. Given the Ministry's News Release, we fear that will be done in the form of private backroom meetings, the very kind of non-transparent discussions and deals Minister Sihota rejected and this government committed to avoiding.

This is evidenced in the Steelworkers' news release of October 26, 2018 where they say the Report is "a good first step" but that "much more needs to be done to bring the Code into the 21st century." The Steelworkers' message is even more significant considering the following statement in the same news release:

We are grateful that Premier Horgan's working life has given him knowledge and understanding about the value of card-check certification. We need other B.C. legislators to remember working people and the barriers they face when trying to form unions.

United Steelworkers News Release, October 26, 2018
"B.C. Labour Code Recommendations a Good First Step"
Stephen Hunt, USW District 3 Director

The clear message from the union is that, in spite of the robust public engagement process and the Panel majority's recommendation in favour of retaining the secret ballot vote, the issue of card check certification is alive and well because the Premier is in favour of it. Comfort is being drawn from this, notwithstanding the express recommendation of the majority of the independent expert Panel

The government should heed the words of the Minister of Labour in 1992: if the public engagement process is undermined by backroom dealings with "key stakeholders", then the legitimacy of the Labour Relations Code Review process and the gains made through the good faith participation of the constituencies will be lost in favour of "confrontation as a consequence." We suggest the government not go down that road. Instead, we urge the government to maintain the legitimacy of the public process, respect the participation of the parties who have engaged in it in good faith, and preserve the integrity of the Report of the Panel members who have diligently applied their expertise to render what they consider to be a balanced set of recommendations in the face of inevitably conflicting views.

2. Certainty, Predictability, and Stability

As noted above, certainty, predictability and stability are key features of the mandate and the Report. As also noted, these concerns militate against a pendulum swing, which would be destabilising. To its credit, the Report is clear on this point (see page 7 of the Report, quoted above).

However, there are instances in the Report where the recommendation is open-ended and indefinite, and we must take issue with these. Where this occurs, it undermines the need for certainty and predictability in the Report, "[c]ertainty and predictability are important considerations for investment decisions and the competitive position of B.C. in an increasingly globalized economy" (Report, p. 7).

The instances where this occurs are as follows:

- Recommendation No. 2 – Section 3 Review Process - The recommendation that the Section 3 review process should occur at least every 5 years is destabilizing and is unhealthy for the Board. Having reviews within that short a timeframe undermines the certainty and stability that the Panel noted is needed for business and investment in the province.

The Board performs significant quasi-judicial functions and must operate, and be seen to operate, with a high degree of institutional independence. In particular, the Board is required to exhibit a high degree of independence from the government which, in its role as employer, is regularly the subject of applications under the Code and appears before the Board as a party. It is contrary to that independence, and the perception of that independence, for the Board to have to look over its shoulder at a Section 3 review process in the proposed maximum 5-year timeframe. This is particularly the case where the Board is operating under new legislation. The problem is compounded where the timing of the mandatory review is undetermined and uncertain; i.e., it could occur any time within the 5-year period.

If there is a need for a Section 3 review within that period, which is unlikely, it can be initiated by the Minister. The Minister would then bear the burden of justifying the need for ordering the review at that time, which is appropriately the Minister’s responsibility. As a quasi-judicial tribunal, the Board itself should properly answer to its enabling legislation, the Code, not a repetitively recurring Section 3 process.

- Recommendation No. 4 - Remedial Certification – Remedial certification is left to the discretion of the Board to be ordered where it “is appropriate and equitable.” The reality of that is that no one will know what that means until the Board starts issuing its decisions. Even then the meaning and practical upshot of the provision will be subject to the changing discretion of the Board over time. This will be an uncertain, unpredictable, and costly process. That undermines the certainty, predictability, and stability needed for business and investment in B.C. and, as the Report notes, the “growth of globalization and capital mobility ...raise significant concerns whether business will invest in B.C.” (p. 4).
- Recommendation No. 5 – Access to Collective Bargaining - The majority of the Panel recommends that the secret ballot vote be retained. However, it does so on the basis that if what are referred to as the “enhanced measures” designed to protect the exercise of choice “are not effective, then there will be a compelling argument for a card check system” (Report, p. 12). To the extent this undercuts the certainty and stability of the recommendation, we submit that is regrettable. It is difficult to imagine anything more open, transparent or consistent with respecting the right of workers to choose, than the secret ballot.
- Sectoral or Multi-Employer Certification – The Panel says this “issue should be examined in more depth, perhaps by a single-issue commission.” In responding to this comment, we are aware that sectoral certification is a contentious and divisive issue. However, the Panel’s comments result in a lack of certainty on the issue of sectoral certification. They thereby threaten the predictability and stability needed for business to invest in the province. Business and investment decisions require certainty; management and investors need to know what the law is.

As well, it needs to be recognized that there are often significant differences between businesses even though they are within the same sector. The employees and employers of these different businesses need to be able to directly address the individual needs and circumstances of their work and businesses. Only through that can they work to achieve their mutual success. This is particularly imperative for small and medium-sized businesses, who are the engine of growth, job creation, and prosperity in our market economy.

- Recommendation No. 11- Successor Unions and Collective Agreement – This recommendation provides that in certain circumstances following a raid, the “board may declare the collective agreement terminated or make other orders and determinations as the board considers appropriate.” This would be a departure for B.C., because in B.C. a raiding union has always taken the collective agreement as it finds it, which we strongly support.

In the recommended provision, what may occur is left to the discretion of the Board. As well, there is no guidance provided as to how that discretion is to be exercised. This produces a situation which is inherently uncertain, unpredictable, and, as a result, de-stabilizing. Again the parties and potential investors in B.C. will have to await the unfolding and perhaps evolving decisions of the Board to know what their rights and obligations are. This is problematic for businesses, particularly in respect to making investment decisions. The employer or potential employer will not know with certainty and predictability the collective agreement obligations of the operation. A deal will no longer be a deal in B.C. which is a problem.

This circumstance may be “interesting” to academics, some lawyers, and those who think of the workplace as a forum for debate or experimentation. But for business, the workplace is a place within which to succeed, or not, and to make an investment, or not. For workers, the workplace is a place within which to make a living, or not. For those very real parties with their very real concerns, the recommendation is regrettable in its uncertainty.

- Recommendation No. 12 -Successorship – For the most part, this is a specific, targeted recommendation by the Panel. While it may cover more sectors than we were aware needed to be addressed, presumably that was in response to specific information placed before the Panel.

The exception to the specific, targeted nature of this recommendation is subsection (1.3). It provides that cabinet by a simple order can, on its own, add other sectors to this provision. That presents the severe uncertainty and unpredictability. It also runs directly counter to the public, transparent nature of proper labour relations reform in B.C. The recommendation in respect to subsection (1.3) should be rejected.

- Recommendation No. 13 – Successorship in the Forestry Sector – A further difficulty arises with respect to this recommendation for a forest industry industrial inquiry commission (IIC). In its comments the Panel focuses on what it refers to as the “massive changes in the B.C. coastal forest industry” (Report, p. 21). However, the Panel then recommends there be an IIC regarding the entire forest industry in B.C. This is inconsistent with the Panel’s comments and is unwarranted.

- Recommendation No. 15 – Filing Collective Agreements with the Board – The explanatory comment to this recommendation states that “parties to a collective agreement who fail to comply [with filing their collective agreement with the Board under Section 51 of the Code] should not be able to rely on the collective agreement for Code purposes” (Report, p. 23, emphasis added). In contrast, the recommended amendment says if the collective agreement has not been filed, “the board may decline to consider it in any proceedings under the Code” (emphasis added). It should be clarified whether the provision is mandatory or discretionary. If discretionary, it gives rise to the same kind of concerns regarding uncertainty and unpredictability noted above.
- Recommendation No. 19 – Sectoral Collective Bargaining – The recommendation for Section 80 industry councils (presumably as revised by Recommendation No. 22), or an IIC, with respect to sectoral multi-employer collective bargaining is inherently uncertain in nature. If implemented it would have unpredictable results, thereby also giving rise to instability concerns.

As the Panel notes in its comments, broad based collective bargaining in B.C. “is mostly the result of an evolutionary and incremental process” (Report, p. 25). The Panel further notes that in “the private sector, apart from construction, it was voluntary”.

We agree that for certainly in the private sector, the development of broad bargaining structures is best left to the parties. If the parties want broader-based bargaining structures, they can create them. That is in effect what happened in the film industry in 1995, with strong leadership and agreement from both the employer and union sides.

The reality, however, is that most often the parties don’t want sectoral multi-employer collective bargaining, particularly in the private sector. As a result, without that initial commitment and drive of the parties, mandated efforts to force the point from the top down will not work. Instead, industry councils or an IIC will simply be imposed with costly bureaucratic diversion helping no one.

- Recommendation No. 22 – Industry Advisory Councils – See immediately above regarding Recommendation No. 19.
- Recommendation No. 25 -Review of Arbitration Awards – This recommendation appears to attempt to codify the Court of Appeal’s latest view on the section 99/100 divide in the Code. It would thereby, potentially at least, place more matters within the jurisdiction of the Board and its deferential approach to arbitration decisions. However, the exact nature or extent of this is unclear and the Panel’s concluding comment that the “issue requires further consideration and input” (Report, p. 31), while probably accurate, is of concern. In our view the better approach would be to garner further input first and then consider the matter further before recommending or embarking upon revision of the existing provisions.
- Recommendation No. 26 – Standard of Review of Board Decisions – Like Recommendation No. 25, this recommendation to delete the patently unreasonable standard of review from the British Columbia *Administrative Tribunals Act* is another very “legal” matter. And again,

achieving the outcome sought by the Panel is uncertain. Ironically the proposal, while intended to create uniformity, may not actually create greater clarity or certainty since the standard of review issue is yet again proceeding to the Supreme Court of Canada in *Minister of Citizenship and Immigration v. Vavilov*, [2017] SCCA No. 352 (case No. 37748). In granting leave in that case, the Supreme Court of Canada stated:

The appeal will be heard with *Bell Canada et al. v. Attorney General of Canada* (37896), and *National Football League et al. v. Attorney General of Canada* (37897).

The Court is of the view that these appeals provide an opportunity to consider the nature and scope of judicial review of administrative action, as addressed in *Dunsmuir v. New Brunswick*, [2008] 1 SCR 190, 2008 SCC 9, and subsequent cases. To that end, the appellant and respondent are invited to devote a substantial part of their written and oral submissions on the appeal to the question of standard of review, and shall be allowed to file and serve a factum on appeal of at most 45 pages.

It seems there is no end to the desire to deal with this standard of review issue. The upshot for our purposes here, however, is that the clarity sought through the recommendation may not actually be furthered by what is suggested. Ironically, it may be more certain to stay with the now somewhat unique, but at least settled, test of patent unreasonableness.

That concludes our comments providing feedback on the Report and the process to date.

However, if the public nature of the Labour Relations Code Review process and the resulting Report is breached by backroom meetings with unidentified “key stakeholders”, then the legitimacy and acceptability of both the process and the Report will be undermined. The context will have moved from public consultation, input and accountability, to the non-transparency of backroom deals, secrecy, and partisanship.

In that event, we will be unable to accept the balance that has been reached by the Panel in its Report and we will be forced to take a position on each of the recommendations. In those circumstances, and for the record, our position on each recommendation is attached as an “Addendum” to this submission.

ADDENDUM

The following is our response to each recommendation in the Report.

Recommendation No. 1 – Duties Under the Code – We support Recommendation No. 1. The balance in the current Section 2 of the Code is imperative and its history is instructive. The unique labour relations and political history exemplified in this provision in the Code was set out on pages 4 to 5 of our initial submission to the Panel. As noted there, it is “remarkable that in the usually fractured, polarized world of BC labour relations and politics, essential, fundamental reform had, in effect, been agreed upon between the left (the NDP in 1992-93) and the right (the Liberals in 2002)” (p. 4).

In the Report, the Panel has respected that accomplishment and recommended that Section 2 of the Code be maintained as is. We submit that recommendation is appropriate, and even critical.

The call to amend Section 2 is mistaken and excessive. In that regard we reproduce the submission on this point in our reply submission:

You are being asked by some stakeholders to swing the pendulum in British Columbia labour relations. In an orchestrated way, the union community has put forward a wish list. They have gone from the front of the Code to the back, setting out every reform they would find to be in their interest. This is reminiscent of ill-fated measures proposed in both 1987 and 1997 and it is clear from experience that this one-sided sort of reform is neither appropriate nor ultimately workable. It is also inconsistent with your mandate and we urge you not to proceed in this manner.

In essence the union community is asking you to produce a “Code for Labour” and not a “Labour Relations Code”. It is evident from the exhaustive reforms they propose that they want you to recommend, and the government to deliver, a Code which serves the interests of a specific group of organized labour interests. That may be what they think labour relations legislation should do, but that is in error. It misses and negates the whole positive course of labour relations reform in British Columbia starting in 1992.

CALL, the union community’s lawyers, submits “[i]t is not the appropriate function of the preamble to labour relations legislation to concern itself with corporate interests, such as flexibility, productivity and economic growth.” (p. 11). This position is supported in many other submissions by the unions. The Steelworkers, for instance, take direct aim at what they say was the introduction of “productivity” into section 2 of the Code in 2002.

But that latter assertion is factually wrong and it is manifestly in error. The mandate for reform in 1992 came from then Labour Minister Moe Sihota, and included creating “a climate conducive to the encouragement of investment...to ensure that the Province maintains and enhances its competitive position in the world market place.” In response, the Report recommended a new section 2(1)(b) of the Code which included “adapting to changes in the economy...and promoting workplace productivity.” That language became law in the Code in 1993, balanced with workers’ concerns. Further detail is contained in our previous submission.

It is simply wrong to say that the introduction of productivity into section 2 was a one-sided reform in 2002 as the Steelworkers have suggested.¹ It is a fundamental misunderstanding and your mandate is not to negate what has been uniquely accomplished in British Columbia in favour of one-sided, unbalanced reform.

Accordingly, we urge you not to unwind the gains which have been made in British Columbia labour relations and swing the pendulum in the one-sided way which has been advocated by representatives of traditional organized labour.

The panel was entirely correct to reject the calls to change section 2 of the Code.

Recommendation No. 2 -Section 3 Review Process – The Panel recommends that a Section 3 review process should occur no less than once every 5 years. We submit that such a short timeframe would compromise the independence, or perceived independence, of the Board in the performance of its quasi-judicial functions. The Board is recognized as operating at the uppermost level of administrative institutional independence, and as such, is accorded a high degree of deference from the courts. This recommendation would undercut that independence by subjecting the Board to excessive oversight through too-frequently recurring reviews. In effect, it would turn the Section 3 review panel into a super appellate body, putting the Board in the position of looking over its shoulder at frequent, recurring reviews of the Code and how it has been interpreted and applied. In our view, the timeframe for the Section 3 review process should be longer than 5 years, if it is set with a mandatory period at all.

Recommendation No. 3 – Employer Communication with Employees - Two things need to be remembered in respect to this issue regarding speech rights under the Code (often, though not correctly, referred to as employer speech rights).

First, speech rights in the Code have always been subject to the requirement that the expression not be coercive or intimidating. The Board has always given meaningful effect to this restriction. At the core of this restriction is respect for the employees and their decision-making process.²

Second, these speech rights are not just a Code right, they are also a Charter right, and freedom of expression is one of the most significant among Charter rights. The Supreme Court of Canada has recognized that expression rights include the right to hear or receive the views.³ Thus, speech rights include the right of a listener to hear the message; not forced listening, but the right to hear the views in order to make an informed choice.

In the Code context, that means the employees should have the Charter right to hear and consider the respective views, in a non-forced and non-coercive or intimidating way.

¹ The Steelworkers also take aim at the current section 2(b) in the Code, but that provision too, which is consistent with and built upon the former 2(1)(b), is also itself balanced: the need to have “economically viable businesses” is balanced with “fostering the employment of workers.” Producing successful businesses providing work for employees is part of the overall balance in the Code. As well, it should be noted that the 2002 reforms followed a discussion paper which had been issued by the Ministry of Labour followed by a written submission process.

² *SimpeQ’ Care Inc.*, BCLRB 161/2007 (Leave for Reconsideration BCLRB No. B171/2006) paras. 72-89

³ *Ibid.*, para 57; *RMH Teleservices International Inc.*, BCLRB No. B188/2005 (Leave for Reconsideration of BCLRB No. B345/2003) paras. 39-40 citing the Supreme Court of Canada jurisprudence.

This is part of the respect which should be accorded to the employees. They should be treated as adults with Charter rights who are engaged in a decision which is of great importance to them. In this decision-making process they should be afforded access to the potentially varying views and the opportunity to consider the respective views, including that of the employer.

In that context, we submit that the expression rights in Sections 6, 8, and 9 of the Code should remain in their current form.

Recommendation No. 4 – Remedial Certification - As the Panel notes in the Report, the Code has always provided the Board with discretion to impose remedial certification (p. 9). However, remedial certification is an extreme measure: it takes the employees' choice, which is the core of the Code and the rights in it, away from the employees. In doing so, it may also thereby certify a group of employees who do not want to be certified. In doing that, the order for remedial certification would be counter to the core right of employee choice in the Code, which is also a Charter right. For both reasons, the labour relations experts who have been appointed the adjudicators at the Board have for many, many decades reserved the ordering of a remedial certification for extreme circumstances. That has consistently been in the face of the unhappiness of the union community and its assertions otherwise.

In the current Section 3 process, labour came forward with a coordinated wish-list of amendments from the front to the back of the Code. Amending the Code's, and thus the Board's, long-standing approach to remedial certification was among the extensive points in that wish-list. In the Report, the Panel has agreed to that request. We submit that is regrettable, both for the reasons given above - all those decades of labour relations expertise confirming the current approach - and the fact that the suggested amendment is so vague. If adopted, it leaves the ordering of a remedial certification subject only to the Board finding it "appropriate and equitable" to do so. What that will consist of is unclear. It will have to await the Board's decisions which, also with the lack of guidance in the test, may vary from adjudicator to adjudicator (and with the exercise of that type of judgment, the Board has often been reluctant to intervene on reconsideration, the courts of course even more so on judicial review).

The result is that the suggested amendment would produce uncertainty, unpredictability, and would be de-stabilizing. As we set out at the outset of our submission, that is contrary to the Committee's mandate.

Recommendation No. 5 – Access to Collective Bargaining - An employee's choice to be represented or not, by a union, or by which union, is the employee's right. Former Labour Board Chair Paul Weiler explained long ago that employee choice is the "fundamental premise" of the Code. This has now been strengthened by the recent freedom of association decisions under the Charter.

Broadly speaking, employees now have the Charter right to unionize, bargain collectively, and strike (the Modern Labour Trilogy). A key part of the Supreme Court of Canada's analysis in the Trilogy relies upon Canada's ratification of International Labour Organization (ILO) Convention

(No. 87).⁴ For exclusive representation systems such as ours, the Convention requires that the employees' choice of representative be made via a secret ballot vote.⁵ That vote is an "essential safeguard" in the process of certifying a union as the exclusive bargaining agent of the employees.⁶ The Code is currently consistent with this requirement and it would be a violation of the freedom of association to move to a card-check certification system.

Secret ballot votes are also helpful, and often necessary, from a practical labour relations perspective. As experienced leaders and representatives on all sides of the labour relations community will acknowledge, a secret ballot vote in a certification application often clears the air as to whether the employees truly want to be represented by the union or not. This process serves to legitimize the results for all parties and fosters confidence in the labour relations system. If the employees choose in favour of the union in a Board or government-supervised secret ballot vote, that process can remove the employer's doubts about the employees' true wishes and eliminate any suspicion that the employees were coerced or pressured into that choice. It thus allows all parties (employer, employees, and union) to accept the results. This is especially important in a small business context where there is a close relationship between the employer and the employees.

Once the air is cleared with a supervised secret ballot vote, labour relations can then properly move on to the next step, which is the negotiation of a collective agreement. Without this degree of transparency, that crucial next step can remain clouded and even spoiled by suspicions, including inaccurate suspicions.

The recommendation in the Report to retain the secret ballot vote is thus necessary and advisable from all these perspectives.

We submit that is the case whether or not "there are sufficient measures to ensure the exercise of employee choice is fully protected and fully remediated in the event of unlawful interference", which is the proviso the Panel added to its recommendation. We believe that proviso is unnecessary given the current protections in the Code. The addition of the proviso adds uncertainty to the basic recommendation which is required by the Charter and good labour relations. As a result, if any amendment is to be made to the recommendation, it should be to remove the proviso.

Recommendation No. 6 – Certification Votes Time Frame - Recommending a reduced timeframe for conducting a secret ballot vote is an unfortunate example of the old way of thinking that labour relations is just about unions and employers, which it is not. The fundamental premise of the Code is employee choice. The Code, and the labour relations under it, is fundamentally about the employees, not the union or the employer. That is now confirmed by the Supreme Court of Canada, with the right of employee choice being recognized as a Charter right.⁷

⁴ International Labour Organization's (ILO's) Convention (No. 87) Concerning Freedom of Association and Protection of the Right to Organize, (1948) 68 U.N.T.S. 17.

⁵ Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO (5th rev. ed. 2006) (the "Digest") para. 969.

⁶ Ibid.

⁷ *Mounted Police Association of Ontario v. Canada (Attorney General)*, 2015 SCC 1 ("MPAO"), para 82.

It is thus wrong to undermine that right by shortening the time frame in which it can properly be given effect. The Board, for instance, has held that an essential part of the employees' right of choice is to "make inquiries and assess the views" being put forward. As well, under the Charter that should include the right to hear the relevant competing views about the issue and have the proper time to review and consider the matter.⁸

An individual's choice as to whether or not to be represented by a union is an important one. It affects many matters, including whether the individual can represent themselves, make decisions and speak on their own behalf in employment matters affecting them. Most employees have busy lives, typically with family responsibilities in addition to work obligations. On both counts, they should be afforded the proper time and opportunity to review, research, consider, and discuss with others what is before them. In our view, the 10-day period in the Code is the shortest period of time which should be allotted for this purpose.

Accordingly, while a shortened time frame is apparently attractive to unions in their self-interest, it is not respectful, reasonable, or fair to the employees. It is clearly and simply a partisan position in favour of unions at the expense of the employees and their rights. We submit that respect for the employees and their right to freedom of association under the Code and the Charter requires that no less than the existing 10-day time frame be allotted to the employees' ability to exercise their franchise.

Recommendation No. 7 – Voting Process – no comment.

Recommendation No. 8 – Membership Evidence - We oppose the proposal to extend the validity of membership cards to 6 months. Organizing campaigns are disruptive to the workplace. That is expressly, statutorily recognized in the raiding context. But it is often true of initial organizing campaigns as well. The competing views often pit employee against employee, thereby dividing and distracting the workforce and impacting the efficiency and productivity of the workplace overall.

As a result, the current approach of 90 days (3 months) for the validity of signed membership cards is appropriate. It is a sufficient period for the employees to learn of the organizing drive and make up their minds as to whether they wish to support it or not. Extending the organizing campaign period to 6 months is not required and wrongly exacerbates the problematic impacts in the workplace.

Recommendation No. 9 – Employee Lists - We support the Panel's respect for employees' privacy rights in their comments on the issue of disclosure of employee lists. We thus support the Panel's recommendation to, in effect, continue the current practice whereby the employer provides an employee list without personal information upon receipt of an application for certification. We do not oppose this practice be included as an express requirement in the Code, with the list being provided to the Board. Out of an abundance of caution, however, we add that there is no basis in

⁸ *Simpe'Q' Care Inc.*, supra; *RMH Teleservices International Inc.*, supra.

this recommendation, nor in the Panel's comments on the issue, to support a change to the Board's current approach which would see the employee list being provided to the union.

The overriding interest at stake is the employees' privacy rights. Employee privacy is, and should continue to be, strongly protected under provincial legislation. The union community's request regarding the production of employee lists would result in an egregious and unwarranted violation of that privacy. It would not meet the mandate's direction to have "fair laws for workers". Privacy is an employee's individual right and it is unacceptable to think that it could be dealt away for the convenience of others.

Recommendation No. 10 – Raids - In respect to raids, our view is that the Code should remain as is. The current Code provides the best balance of employee right of choice, non-interference with the collective bargaining period, and stability following a raid application, be it either the bar following an unsuccessful raid application or the continuation of a collective agreement following a successful raid application.

With respect to construction, we caution against legislatively setting the raid period in July and August. Depending on the circumstances, that may abut the raid period up against the expiry of the collective agreement or even place the raid period within collective bargaining itself. In either case it would destabilize collective bargaining.

Sectoral or Multi-Employer Certification - In its comments, the Panel suggested this "issue should be examined in more depth, perhaps by a single-issue commission". We do not agree. Legislated sectoral bargaining schemes undermine the autonomy and self-determination rights of the employees and the parties. They violate the Code principle that the employees and the parties be given a direct voice in the terms and conditions which will govern them. Only in this way will they be able to ensure their employment relations and collective agreements will reflect the needs and circumstances of their individual businesses and workplaces.

This is particularly imperative for small and medium-sized businesses. They are the engine of economic growth and job creation in our economy. They should not be over regulated. Their success is needed to provide opportunities for people to support their families and build their communities.

Legislated sectoral bargaining removes the ability of the employees and their employers to directly address the individual needs and circumstances of their businesses. It thereby inhibits their ability to succeed. It does so by ignoring and negating the key insights in the 1992-93 and 2002 reforms. As a result, legislated sectoral bargaining would be a step backward in time, not forward. In that regard, it is also noteworthy that the previous attempt at forced sectoral bargaining in Part 4.1 of the Code was a failure and the sectoralism which remains in the CLR-Building Trades situation is still replete with difficulties.

The parties themselves are the best monitors of their relations. If they feel their best chance for success is some form of sectoral arrangement, they can voluntarily agree to it. The reality is that, particularly in the private sector, they don't.

Accordingly, any attempt to dictate employee choice or the parties' labour relations through legislated sectoral bargaining should be rejected and does not warrant further study.

Recommendation No. 11 – Successor Unions and Collective Agreements - The recommendation to give the Board discretion to open up a collective agreement in certain circumstances following a successful raid should be rejected. It would be destabilizing as it would undermine the certainty the parties require to conduct their affairs. Businesses need to know with as much certainty as possible what collective agreement they will be dealing with when making business and investment decisions.

The recommendation also undercuts the fundamental principle of labour relations under the Code that “a deal is a deal”. This principle has been a cornerstone of labour relations in BC and the parties have relied upon it, including knowing that a successful raiding party will take on the existing collective agreement as it finds it. That produces certainty, predictability, and stability, all core aspects of the mandate in the current process.

The fact that the recommendation proposes to make the remedy discretionary merely exacerbates these concerns. The recommendation should be rejected.

Recommendation No. 12 – Successorship - This recommendation covers more industries or sectors than we were aware were at issue. However, presumably the recommendation is made upon the basis of specific facts put before the Panel. If that is the circumstance, we make no further comment regarding these specific industries or sectors.

However, we do object to subsection (1.3) of the recommendation. It allows cabinet to act on its own initiative, and in a closed-door context, to add other sectors to subsection (1.1). That proposed process runs directly contrary to what should be the public and transparent nature of proper labour relations reform in British Columbia. It is also unfair to the parties in the affected sector who may have no notice or opportunity to respond to that potential development. Subsection (1.3) should be rejected.

Recommendation No. 13 – Successorship in the Forestry Sector - In making their recommendation, the Panel notes that they “did not have the benefit of hearing from any forestry companies or experts.” Nonetheless, the Panel concludes “it is clear further consultation, study and analysis is required. This should be accomplished through an industrial inquiry commission.” With respect, that is not an appropriate response. In fact it is not a correct response.

The appointment of an industrial inquiry commission is governed by Section 79 of the Code. That section establishes a two-step process to be carried out by the Minister of Labour. First, the Minister of Labour must decide if inquiries are to be made regarding certain labour relations matters. Second, the Minister may decide, on the basis of those inquiries, to appoint an IIC, if warranted. Both of these steps can be contentious and even political in nature and thus it is appropriate for the Minister to bear that burden and responsibility.

Accordingly, the most the Panel should have recommended is that the Minister consider exercising his responsibilities under Section 79 of the Code: namely, to determine whether an inquiry should

be made and then, on the basis of those inquiries (which would presumably provide the Minister with the information the Panel lacks), decide whether to order an ICC, if warranted.

With respect to the partial dissent of the union side member of the Panel, we submit it is even more inappropriate to reach that conclusion and recommendation in the face of the lack “of hearing from any forestry companies or experts.”

Recommendation No. 14 – Statutory Freeze -The Panel recommends extending the statutory freeze on terms and conditions of employment after certification. We are prepared to accept Recommendation No. 14 as part of the overall balance struck by the Panel of experts. However, should the public review process of the Panel and its Report be undermined by backroom meetings resulting in a partisan cherry-picking of the recommendations, then we will oppose the recommendation. In that event, we will not support recommendation No. 14 as it clearly tilts the balance in the existing Code, a balance which has produced labour relations peace and prosperity in the province.

Recommendation No. 15 - Filing Collective Agreements with the Board – If we are forced into adversarial engagement, then we will also not support this recommendation. We do so on the basis that it intrudes too far into the parties’ self-governance and self-ordering. In a purely partisan, adversarial world, the parties’ collective and ancillary agreements are private matters.

Recommendation No. 16 – Appointment of Facilitators – This recommendation would allow the appointment of a facilitator under section 53 of the Code on the request of just one of the parties. Our response to this is in the same vein as our response to Recommendation No. 15 above. In short, if the transparent, public engagement process conducted by the Panel is abandoned in favour of partisan, backroom deals, then the Panel’s efforts to further cooperative labour relations will be undermined. If that occurs, it will result in a return to the adversarial labour relations we knew prior to 1992. In that period, appointments of Board facilitators under section 53(5) of the Code would only be appropriate with the agreement of both parties, again as a part of the parties’ shared self-governance and self-ordering.

Recommendation No. 17 – Adjustment Plans – The same can be said here as in respect to Recommendation 16.

Recommendation No. 18A – First Collective Agreements Mediation- Strike Vote – In the context we are considering (i.e., abandonment of the transparent, public engagement process in favour of backroom deals and partisanship), we cannot agree with the proposal in Recommendation No. 18 to remove the requirement for a strike vote as a prerequisite to first collective agreement mediation under Section 55 of the Code. Access to a strike vote at this point in the labour relations process under the Code is the second key juncture at which employee choice is given effect. The right of employees to have this control in the exercise of their rights is a critical principle in the Code. The requirement of a strike vote at this juncture thus operates as a safety valve ensuring that the employees have the right to choose whether they want to continue along the path the union is following toward strike or lockout or the potential imposition of a collective agreement. The employees’ voice at this crucial stage in the process should not be removed.

Recommendation No. 18B – First Collective Agreement following Remedial Certification – We cannot support the Panel’s recommendation to allow a first collective agreement mediator to consider the parties’ conduct *prior* to certification in the case of a remedial certification. Any conduct that occurred at the certification stage will have been adjudicated and remedied through the remedial certification process. These matters should not be considered again and remedied again. To do so would result in a double jeopardy. It is an accepted principle of law and fairness that there should not be double jeopardy.

Recommendation No. 19 – Sectoral Collective Bargaining – Sectoral or multi-employer collective bargaining violates the principle of the parties’ self-determination, self-governance, and self-ordering of their own affairs unless the parties voluntarily agree to it. If the parties see a sectoral collective bargaining structure as being in their self-interest, they will create that structure themselves. The reality in the private sector is that they rarely do so. It is thus inappropriate to force this issue upon the parties in a top-down way through either industry councils under Section 80 or an industrial inquiry commission under Section 79 of the Code.

Recommendation No. 20 – Definition of Picketing – This is effectively a housekeeping matter further to the decision of the Supreme court of Canada on leafletting, and we have no further comment on it.

Recommendation No. 21 – Essential Services – While the current provisions have presented challenges to the parties and the Board in having K-12 education under the essential services provisions in the Code, it is better to maintain that regime than to remove it from the Code.

Recommendation No. 22 – Industry Advisory Councils – see Recommendation No. 19 above. In our view, the hope for progressive, effective developments within an industry or sector cannot be forced in this top-down manner. They need to come from the parties themselves, together, as occurred in the film industry in 1995. Outside of that, top-down industry or sector councils will become expensive and ineffective talk-shops, imposing a whole further layer of unproductive, costly bureaucracy. That is neither warranted nor appropriate.

Recommendation No. 23 – Arbitration – The panel identified problems with scheduling arbitrations and receiving arbitration awards in a timely manner and concluded that “[a]rbitrations are no longer expeditious, efficient or inexpensive” (Report, p. 29). It recommended amendments to allow for “more aggressive case management” at the early stage of the grievance process. We have a number of responses to this recommendation. First, the better approach is for the parties themselves to address this issue, as the Panel notes has been done in some instances. We live in a competitive, private sector context and what should be an accountable, public sector context. Within those realities, impetus for reform should come from the parties themselves.

Second, we believe the problems with the arbitration system could largely be fixed by having a definite timeline requirement such as has been implemented at the Board. The imposition of that timeline was opposed by large segments of the community who asserted myriad potential problems with timelines, including the complexity of the matters being litigated. In fact, complexity is the third of the systemic problems of our legal system, the other two being cost and delays. Complexity enables, drives and exacerbates cost and delay. Although opposed prior to its implementation, the

timelines regulations at the Board have been effective. In our view, a similar solution needs to be imposed at arbitration. The legal system is otherwise too entrenched and a whole host of other qualities make it impervious to real change. The current court system has proven that.

Recommendation No. 24 – Expedited Arbitration – This recommendation regarding Section 104 arbitration is closer to what we have suggested above and to that extent we agree with it. However, the attempts at reform to the court system have proved that specific, piecemeal timelines and requirements are not effective. What they establish is simply a series of discrete requirements that the system – the parties, their counsel, and the adjudicators – merely work their way around, as they did with the requirements in the current Section 104 process. As a result, the better approach would be to simply implement an overall time requirement, as with the Board’s timelines provisions, and let the parties at the arbitration design how they wish to meet the requirements in each individual circumstance.

Recommendation No. 25 – Review of Arbitration Awards – We believe this recommendation is an attempt to codify the Court of Appeal’s most recent approach to the Section 99/100 divide in the Code regarding the review of arbitration awards. However, it is not at all clear this is the best way to approach this longstanding and difficult issue. In this instance, we believe the Panel’s concluding comment that the “issue requires further consideration and input” may be the most accurate view and effective approach to follow.

Recommendation No. 26 – Standard of Review – Like Recommendation No. 25, this is a very “legal” matter. As explained in our earlier analysis of it, the recommendation, though attempting to impose uniformity, may not achieve the certainty and clarity one would expect, since the legal issue of standard of review will once again be before the Supreme Court of Canada in 2019. As a result, we believe the better approach may well be to leave this issue for “further consideration and input.”

Recommendation No. 27 – Rights and Obligations Poster Prepared by the Board – In our view, this recommendation fundamentally misrepresents the nature and role of the Labour Relations Board. The Board is a quasi-judicial, adjudicative body, the hallmarks of which are that it must be both independent and impartial. It must also be seen to be independent and impartial and to that end must not advocate, or be seen to advocate for one set of rights or another under the Code.

This is particularly true of the rights of employees and the rights of employers during organizing drives and certification applications, which are the most sensitive and contentious contexts under the Code. It is not appropriate to have the Board act as an educational body in these matters which it will ultimately adjudicate. That educational function is best left to the Ministry. We note that in Ontario, which the Panel expressly references, it is the Ministry, not the Board, which undertakes this educational function. It should be the Ministry in B.C. as well.

Partial Decertification – We agree with the Panel’s conclusion on pp. 33-34 of the Report regarding partial decertification. Under the Code and its building block approach to certification, partial decertification is an important and integral part of the fundamental right of employee choice, which is both a Code and Charter right.

Recommendation No. 28 – Fines – We have no comment on this recommendation.

Recommendation No. 29 – Funding of the Board – We do not oppose this recommendation *per se* but submit that increased funding must be justified by, and tailored to meet, a demonstrated need. We believe that has been done in the case of both the Board’s computer system and the benefits which would flow from greater settlement officer services, for instance.

However, it has not been shown that there is a greater need for resources in order for the Board’s adjudicative role to function efficiently and expeditiously. This is an instance where increasing resources available will not necessarily make it better. It has not been shown that the Board has an insufficient number of adjudicators to handle its adjudicative case load, and all existing information and appearances are that there are sufficient resources available.

The effect of simply directing more money to adjudication, and then hiring more adjudicators absent a demonstrated need, will be opposite to what is intended. Instead of moving along cases and decisions efficiently and expeditiously, the Vice Chairs will have the “luxury” of retreating to their offices to write lengthy decisions. This would not be good for the parties or labour relations in general, nor would it be consistent with the duty of the Board under the section 2(e) of the Code to promote “conditions favourable to the orderly, constructive and expeditious settlement of disputes”. It would likely lead to complexity and delay in the decisions of the Board and that is not a good use of public resources.