COALITION OF BC BUSINESSES

Labour Policies that WORK

A New Vision for BC

Response to Fair and Effective:
A Review of Employment Standards
in British Columbia

Submitted by the Coalition of BC Businesses

December, 2001

SUMMARY OF RECOMMENDATIONS

Recommendation: Employees earning more than the average industrial wage should be excluded from coverage of the *Act*.

Recommendation: The Coalition recommends that unionized workplaces covered by a collective agreement be excluded from coverage of the *Act*.

Recommendation: The current exclusions from the *Act* should be continued. Further appropriate exclusions should be considered in consultation with the relevant industry stakeholders.

Recommendation: The current exclusion of managers from the application of the hours of work and overtime, and statutory holiday provisions of the *Act* should continue. The definition of manager should be expanded to include those persons who are responsible for the supervision and direction of work, whether it be supervision and direction of employees or supervision and direction of contract performance, or who participate in the formulation of management initiatives and policies, and who have a reasonable level of independence and action, authority, autonomy and discretion, in the performance of his or her job duties.

Recommendation: Amend the *Act* to recognize the unique circumstances arising from incentive based compensation schemes.

Recommendation: Hours of work and overtime for commissioned salespeople should be compensated based on gross earnings (including commissions and any salary or hourly wage) over a four week period so long as this amount is greater than what the employee would have earned at minimum wage (including overtime rates) for all hours worked over the period.

Recommendation: The hourly rate for the purposes of calculating the amount of holiday pay to which the employee is entitled, is deemed (if the employee is remunerated 100% on commission) to be the minimum wage or (if the employee is remunerated partly on commission and partly on salary) to the employee's hourly rate taken from the salary component of remuneration or the minimum wage, whichever is greater.

Recommendation: The Coalition recommends that persons who have structured the working affairs to obtain whatever tax or other corporate advantages, which may be available to individual business entities, should not be entitled to coverage under the *Act*.

Recommendation: Voluntary arrangements outside the Act between employers and employees should be permitted, but the statute should reflect that such arrangements are only permissible and enforceable, if they are voluntary. If there is evidence that such an arrangement was entered into as a result of coercion or intimidation on the part of the employer the agreement will not be enforced and the strict provisions of the Act will apply.

Recommendation: The hours of work and overtime provisions of the *Act* should be significantly revised to create a flexible system wherein hours of work are averaged over a multi-week period, for the purposes of determining payment of overtime premiums, while maintaining protections for employees. The minimum daily hours of work and split shift restrictions should be lifted.

Recommendation: The variance process in the *Act* should be expanded to cover a broader range of provisions of the *Act* and should be revised to be a variance registration process, which is straightforward, expeditious and predictable.

Recommendation: Hours of work notices should be posted at least 24 hours in advance, wherever possible. The notices should include the time work is to start, a best estimate of when it is to end, and an indication of the time frame during which eating periods may occur.

Recommendation: Employers should be able to provide wage statements in electronic form, so long as employees have ready access to the information.
Recommendation: Double time premiums for overtime should be eliminated.

Recommendation: The qualifying period for statutory holiday entitlements should be increased to 90 days and the qualifying conditions of working the scheduled day before and day after the holiday should be introduced.

Recommendation: Employees who work on a statutory holiday should be given the option of simply receiving a regular day's pay and taking a day off with pay at a later date or receiving overtime pay at 1.5 times their hourly rate for the hours worked on the statutory holiday. The employee must select the option at the time of working on the statutory holiday.

Recommendation: Employers and individual employees should be able to mutually agree to allocate the employee's statutory holiday to a different day, as they see fit, even if this results in some employees observing different days as statutory holidays than the majority.

Recommendation: The time limit for a former employee to file a complaint under the *Act* should be reduced to 60 days following the date of termination of employment. The period for which an employer may be liable for a violation of the *Act* should be limited to six months prior to the date of termination or the date upon which the employer receives notice of the complaint, as the case may be.

Recommendation: The period of time for which employers are required to maintain payroll records should be reduced consistent with reductions in the limitation and liability periods.

Recommendation: Section 67 be abolished entirely, or, in the alternative, be amended to provide that the notice becomes void only if work continues more than three months beyond the stated termination date.

Recommendation: The construction industry exemption should be retroactively amended so as to make clear that on-site construction employees are exempt from application of the notice of termination provisions.

Recommendation: The period of temporary layoff should be extended to 20 weeks and should allow for further extension by agreement between the employer and the employee.

Recommendation: "Compensation for length of service" should be referred to as "pay in lieu of notice of termination".

Recommendation: The provisions regarding termination pay of one week after 3 months and up to 12 months should remain as they currently exist.

Recommendation: The content requirements of the notice should be amended so that the individual employees need not be notified of the number of terminations. Most importantly, as recommended above, Section 67 should be abolished entirely, or amended to provide that group termination notice becomes void only if work continues for more than three months beyond the termination date.

Recommendation: The concept of just cause for termination, and the exemption from entitlement to notice of termination or pay in lieu thereof should be maintained. However, the Branch should work with industry groups to develop guidelines for determining whether just cause for termination exists.

Recommendation: The administrative tribunal should have the power to enforce settlement agreements.

Recommendation: The administrative tribunal should work with industry groups to promote compliance with the *Act* through education. Third party complaints should not be permitted.

Recommendation: Penalties should be imposed upon repeat offenders who have failed to correct their practices after being warned and educated. The current levels of penalties should be maintained.

Recommendation: The determination and appeal process must be substantially overhauled, so as to ensure that there is separation of advocacy, mediative and adjudicative functions, and to ensure that parties receive a fair hearing. The process must be streamlined to be more efficient and conclusive.

Recommendation: The minimum wage should be frozen at its current level until it is on a more competitive footing with neighbouring and other Canadian jurisdictions.

Recommendation: The government should consider targeted alternatives to increase net income for low wage earners, such as tax cuts or tax credits. For example, increase the tax-exempt limit to $12,000 per year to match Alberta's.

Recommendation: The Government should introduce a lower minimum wage rate for employees in those jobs in which a significant portion of their income is earned in gratuities.

Recommendation: The requirement that an employer cover the costs of cleaning and maintaining employee uniforms or other “special clothing” should be deleted, except in special circumstances.

Recommendation: The definition of “special clothing” should be restricted to uniforms, logo clothing or other special clothing articles specific to the performance of the employee’s job.

INTRODUCTION

The Coalition of BC Businesses welcomes the opportunity to respond to the government's discussion paper on employment standards in British Columbia.

This is a challenging time for British Columbia employers and employees. The Coalition supports the guiding principles enunciated in the Review:

- Employment standards are needed to protect vulnerable workers;
- Employment standards in BC need to promote personal choice, employment growth and prosperity;
- Standards need to be fair, enforceable and effective;
- Government is committed to less intervention in the economy and increased self-reliance.

The *Employment Standards Act* should provide basic standards for workplaces in British Columbia. It should protect employees from unfair or unscrupulous treatment by employers. However, it should also be sufficiently flexible so that employers and employees are able to structure their working relationship to their mutual benefit. Further, it should ensure that British Columbia's small and medium-sized businesses are able to remain competitive and to create jobs to restart BC's economy.

In this paper, we will respond to the issues raised by the government in *Fair and Effective: A Review of Employment Standards in British Columbia.* In addition, we provide recommendations and specific proposals for amendments to certain provisions of the *Act*. These recommendations and proposals are designed to promote the key principles that the Coalition believes should govern a new employment policy vision for British Columbia, as discussed in the Coalition's 2000 paper, *Labour Policies that Work: A New Vision for BC*. These key principles are consistent with the guiding principles of the Review and include: flexibility, realism, mutual fairness, individual choice, promotion of voluntary cooperation between employers and employees, and protection of basic standards of compensation for employees.

THE PRESENT EMPLOYMENT STANDARDS ACT — AN ABSENCE OF FLEXIBILITY AND REALISM

The fundamental problem with the current *Employment Standards Act* is its lack of flexibility. At present, the *Employment Standards Act* is modeled on a "9 to 5" industrial plant type of workplace, where the work routine is set, the employer can predict well in advance any fluctuations in its business flow, and the workers are married men with wives at home caring for their children. The *Act* is out of touch with the business realities and social aspects of the new world of work. The new world involves 7 days a week, 24 hours a day, "just in time" demands on businesses and a diverse workforce with many and varied needs and interests. It necessitates an employment standards regime with sufficient flexibility to adapt itself to the changing needs of participants in this new world of work.

As the Coalition has stated in *Labour Policies that Work: A New Vision for BC*, there are many problems with the present *Act*. Currently employers and employees cannot agree to alter the daily schedule of work in order to accommodate an employee's personal needs or preferences unless the employer incurs increased financial costs. For example, an employee and an employer cannot agree that the employee will work an extra hour on Tuesday afternoon in order to leave early on Wednesday to take her child to a doctor's appointment — unless the employer pays the employee overtime for the extra hour worked on Tuesday. The work arrangement might suit both the employer and the employee, but the overtime requirement renders the arrangement economically disadvantageous for the employer, regardless of its benefit to the employee.

Nor, under the present *Act,* can employers and employees agree to trade certain legislated entitlements under the *Act* for other benefits that the employees may prefer to have. For example, an employee may wish to work extra hours at straight time one month (and forego the overtime pay) in order to take that time as additional vacation the following month. This is currently prohibited.

There is no provision for employees and employers to structure the working hours around the availability of work. Many industries are cyclical, with busy periods and slow periods of little or no work. Employees in these industries often

seek to maximize their hours during the busy periods so they can have adequate income to tide them through the slow periods. They would prefer to work longer hours at straight time rates during the busy period rather than have the employer hire additional workers. The *Act* does not allow this.

The existing variance and flexible work schedule provisions of the *Act* do not assist in dealing with these flexibility issues. They are limited in scope and have proven to be extremely rigid in application. Essentially, these provisions of the *Act* do not allow the Employment Standards Branch to recognize the need for flexibility in an employee's personal life, or an employee's desire to increase his or her working hours as valid reasons to grant variances from the *Act*. Even where a variance application may be approved by the Director, the application process is extremely cumbersome, and may take months to process. By the time approval is granted, the value of the variance is lost.

COMPETITIVENESS AND JOB CREATION

In addition to its lack of flexibility, British Columbia's *Employment Standards Act* is presently one of the most expensive statutes of its kind for employers in North America. The basic standards in the present *Act* substantially exceed those of our neighbours in Alberta and Washington State in virtually all respects, and are uncompetitive with the rest of Canada and the US. This puts BC employers at a substantial competitive disadvantage with their closest business competitors, and is a significant disincentive to investors looking to invest in business opportunities in British Columbia. This in turns limits the ability of small and medium-sized businesses in BC to create jobs for British Columbians.

In order to encourage job creation and prosperity, the legislative regime of employment standards must be entirely revised, to allow British Columbians to meet the challenges of the world of work in the new millenium.

The approach of the Government as set out in its Review Paper clearly recognizes these problems and the Coalition supports the principles underlying the options presented. In this paper, the Coalition will respond to the questions posed in the Review Paper, and provide its position on the options presented.

RESPONSES TO THE ISSUES RAISED IN "FAIR AND EFFECTIVE: A REVIEW OF EMPLOYMENT STANDARDS IN BRITISH COLUMBIA"

A. COVERAGE ISSUES

A1. Do workers with higher incomes need the protection of minimum standards?

The Coalition believes that the *Employment Standards Act* should ensure that vulnerable workers receive baseline standards in their terms and conditions of employment. Currently, the *Act* is designed to provide basic minimum standards to ensure that employees are not taken advantage of by employers who seek to impose unacceptable terms and conditions of employment on them. However, this rationale loses its legitimacy when applied to employees who, by virtue of the skills and experience they bring with them to the job, are able to negotiate their terms and conditions of employment on a relatively even footing with the employer. The Coalition believes that the *Act* should recognize that many workers, whether due to the market value of their skills, professional or managerial status, income levels or union representation are not in vulnerable positions and are able to command significant wages and benefits. In those circumstances, employers and employees should be left to negotiate between themselves the manner in which they wish to structure their employment relationship.

The Coalition believes that those workers with higher income levels do not need the protection of the *Act*. If such employees are excluded from coverage under the *Act*, the Government will be able to target its scarce resources on: (a) vulnerable workers/employees who are in need of the protection of minimum standards; and (b) providing an effective mechanism to enforce those standards.

The Government has provided a number of options with respect to coverage under the *Act*. The Coalition believes that employees should be excluded from the application of the *Act* if they earn over a certain income threshold. However, the thresholds set out in the three options in the Review Paper are problematic because they are simply too high. The Coalition recommends that the threshold should be set at the average industrial wage. Any employee earning over the

average industrial wage, which is approximately $19.00 per hour or $40,000 per year as a base salary, should be exempt from coverage under the *Act*. We have used the average industrial wage calculated on both an hourly and annual basis to ensure flexibility in the application of the threshold, so that it is equally applicable to employees with varying compensation arrangements. This flexibility puts all employers on an equal footing, regardless of the method of compensation used for the employee.

Recommendation: Employees earning more than the average industrial wage should be excluded from coverage of the *Act*.

A2. Should workers with a collective agreement under the *Labour Relations Code* be governed by the *Act?*

The Coalition submits that, if a workplace is unionized, it is the terms of the collective agreement, which should govern the terms and conditions of employment and not the *Act*.

The Coalition submits that in the union environment the present "meets or exceeds" test for substitution of collective agreement provisions for the provisions of the *Act* is too restrictive and is unnecessary to protect employees. First, it does not allow employers and unions, on behalf of employees, to structure the terms and conditions of employment to best reflect the needs and interests of the employees and the employer. In many cases, employees and their unions may wish to "trade off" overtime or hours of work benefits in exchange for increased wages overall or enhanced benefits in other areas. This is not permissible under the present *Act*. Second, there is no legitimate basis for concern about protecting employees when the employees are represented by a trade union, with all of the associated rights and protections.

The Coalition believes that the legislation should allow employers and trade unions to freely negotiate trade-offs in terms and conditions of employment so the parties to the employment relationship can tailor a package, which most closely addresses their needs. Furthermore, it is a requirement of the *Labour Relations Code* that all collective agreements contain a dispute resolution mechanism. A breach of the terms and conditions of the collective agreement

can be addressed and enforced through the grievance and arbitration procedures under the agreement and the enforcement mechanisms in the *Act* are not necessary where there is a collective agreement in place.

Recommendation: The Coalition recommends that unionized workplaces covered by a collective agreement be excluded from coverage of the *Act*.

A3. Should professionals be covered by the *Act*?

The Coalition believes that the professions and occupations currently excluded under s. 31 of the *Regulations* to the *Act* should continue. Those entities all have self-governing bodies that both license and regulate the practice of those professions.

The Coalition believes that exclusions from the *Act* should not be limited to the self-regulating professions. However, additions to the list of the exclusions should be examined carefully to ensure that the employees in those professions are not vulnerable workers who are in need of the protection of baseline employment standards. In any event, the Coalition believes that any issues relating to exclusions from coverage should be dealt with in consultation with the relevant industry stakeholders.

Recommendation: The current exclusions from the *Act* should be continued. Further appropriate exclusions should be considered in consultation with the relevant industry stakeholders.

A4. Should managers be covered by the *Act*?

Currently, managers are excluded from the hours of work and overtime, and statutory holiday provisions of the *Act*. The Coalition believes that this exclusion from coverage should be maintained. However, the term “manager” is defined too narrowly.

Under the *Regulation* to the current *Act* a manager is defined as:

a. A person whose primary employment duties consist of supervising and directing other employees, or

b. A person employed in an executive capacity.

This definition has been interpreted to mean persons who have final responsibility for hiring, firing and discipline of others, or who have final decision making powers with respect to decisions affecting the operation of the business.

This excludes many middle management employees who participate in the formulation of company policy, who have a significant level of autonomy in the performance of their job duties and who are compensated for that independence. These persons may not have the ultimate responsibility for the supervision or direction of other employees, or for decisions affecting the conduct of the business, but they are clearly a valued part of the management team.

For example, sales account managers in the hotel industry are responsible for securing significant contracts for the hotel. They determine the methods and means by which the sales department achieves its goals and targets. They operate relatively independently, for the most part without supervision, and they set their own hours in order to accomplish those goals. They are responsible for managing their accounts and account areas, and they perceive themselves to be "managers". However, these employees may not fall within the present definition of "manager" because they do not supervise or direct others, nor are they employed in an executive capacity because their duties don't involve the control, supervision and administration of business affairs and the exercise of substantial authority in decisions affecting the business.

Another example is project managers in the construction industry. Project managers are responsible for ensuring that a construction project is completed in accordance with the specifications of the construction contract, on time, and on budget. Typically, they do not have responsibility for supervising or directing other employees. Thus, they do not meet the first branch of the current definition. Instead, they are responsible for ensuring that subcontractors are properly performing in accordance with their subcontracts, on time and on

budget. They are responsible for coordinating the work of other employers, and liasing with the construction client, design professionals and inspection authorities. They are "managing" the project. However, they may not be "employed in an executive capacity" because their decisions may be reviewed either by a senior member of management, the principal of the construction company, or the construction client, yet the project managers have significant responsibilities and wield significant authority with respect to the particular construction project on which the Company is engaged.

The employees in the two above examples clearly exercise what are commonly viewed as managerial responsibilities; however, they are arguably not caught by the managerial exemption in the *Regulations*. In the Coalition's view, the current definition draws an arbitrary and unrealistic line between persons who perform certain functions which are commonly viewed as managerial, who fall within the definition, and other persons who perform functions which are also commonly viewed as managerial, but fall outside the definition. An employee, who is exercising the responsibilities set out in the above examples, is as much a part of the management team as the employees who are exercising responsibilities, which are currently caught by the definition of manager. A manager is someone who exercises a level of independence and action, authority, autonomy and discretion, in the performance of his or her job duties.

The Coalition is not advocating that any employee who is called a "manager" should be excluded from the operation of any part of the *Act*. It is the substance of the job, and not the form of the title, which should be determinative. However, the definition of manager must be expanded to include persons who exercise managerial responsibilities.

Recommendation: The current exclusion of managers from the application of the hours of work and overtime, and statutory holiday provisions of the *Act* should continue. The definition of manager should be expanded to include those persons who are responsible for the supervision and direction of work, whether it be supervision and direction of employees or supervision and direction of contract performance, or who participate in the formulation of management initiatives and policies, and who have a reasonable level of independence and action, authority, autonomy and discretion, in the performance of his or her job duties.

A5. Should workers who receive earnings through a compensation system other than wages or salary, such as commission, use of vehicles (eg. taxi leasing) or other equipment be covered by the *Act*?

The Coalition does not believe that, as a general principle, workers who receive earnings through compensation systems other than wages or salary, such as commission, use of vehicles (e.g. taxi leasing) or other equipment should necessarily be excluded from the operation of the *Act*.

Rather, the Coalition recommends that certain portions of the *Act* be amended to recognize the unique situations of employees and employers who structure their working relationships based on incentive programs. In particular, the Coalition recommends that the minimum wage, hours of work and overtime and statutory holiday provisions of the *Act* be amended to allow employees to maximize their freedom of choice to balance their earning capability with time away from work.

1. Commission sales or other incentive based pay

(i) Overtime and statutory holidays

Commissioned salespeople and others in incentive-based jobs such as piecework jobs earn in accordance with the amount of sales or production, which they are able to achieve. Their ability to maximize their earnings does not fit with a 9 to 5 schedule or, indeed, within any strict schedule of hours of work. The salesperson must deal with his customers at their convenience, and cannot simply cut off a sales transaction because it is "quitting time". Nor do commissioned salespersons expect their earnings to be based on the hours they actually work; rather, they expect their compensation to reflect their sales success.

Similar problems exist for employees who are paid on a day rate, piece rate or other incentive basis. These rate structures have been developed to allow employees an opportunity to maximize their flexibility in productivity and earning capability and the time spent away from work, while at the same time increasing the chances of success of the business operation.

These types of incentive-based pay structures exist in the trucking, forestry and construction industries. The rationale for these pay structures varies with the industry concerned but takes into account such factors as weather conditions, employee desires for maximization of both income and time off from work, operational considerations and seasonal income averaging.

The present *Act* wholly fails to recognize these realities for employees who are compensated on an incentive basis.

Currently, an employer who allows a commissioned salesperson or other incentive based employee to work beyond an eight hour day in order to close a sale or complete a piece of work is penalized for doing so, because the employer is required to pay that person overtime for the time worked over eight hours. This is despite the fact that the person is already being compensated for that time through the incentive pay. Further, the manner in which the overtime rate for such people is calculated is extremely complex and punitive to the employer: the employees' gross earnings (including salaries and commissions) for the pay period must be divided by the actual hours worked to get an hourly rate, which is then multiplied by the overtime premium to determine the overtime rate.

The same problems exist in the area of statutory holidays.

At present, employees who are paid on an incentive basis, whether paid partly or entirely on the incentive basis, receive statutory holiday pay based upon their gross earnings. Aside from being incompatible with the nature of the commission or another incentive based employment relationship, and the understandings of the parties entering into such a relationship, the calculation of the amount owing for statutory holiday pay is complex. It is complex enough when the employee does not work on the statutory holiday, because to determine statutory holiday pay the incentive rate must be reduced to an hourly rate, which fluctuates depending on the employee's performance and the hours he or she chooses to work. The calculation becomes nightmarish if the employee works the statutory holiday and is then entitled to overtime and another day off with pay.

(ii) Minimum Wage

Employers are currently required to pay employees the minimum wage for all hours worked in each two-week period. This is the case even if, in the following two-week period, the employee earns 4 or 5 times the minimum wage. The Coalition believes that employees should receive at least minimum wage for all hours worked, but that minimum wage level should be calculated over a four-week period.

(iii) A new compensation scheme for incentive-based jobs

A different scheme for compensating these people for overtime and statutory holidays, while ensuring they still receive minimum wage, is necessary; one which allows employees to maximize their earnings in these positions while ensuring a base-line level of compensation, without penalizing the employer. The Coalition submits that an appropriate mechanism is that which is utilized in Alberta for commissioned salespeople.

Under the Alberta legislation, to determine overtime pay the gross earnings of a commissioned salesperson, including salary and commissions are assessed over a four-week period in relation to the hours actually worked by the employee. So long as the gross earnings exceed the minimum wage for all hours worked (including overtime hours at 1.5. times the minimum wage), the employee is deemed to have been properly compensated. Any deficiency between the amount actually earned and what would be required at minimum wage for all hours worked must be paid by the employer. This ensures that employees receive at least the minimum wage (including overtime rates where appropriate) for all hours worked, while avoiding penalties to employers for allowing salespeople or other incentive-based workers to work beyond regular hours to maximize their earnings.

With respect to statutory holidays, the Alberta approach is to calculate statutory holiday pay entitlement for commissioned salespeople as follows:

a. If the salesperson is remunerated 100% on commission, the hourly rate is deemed to be the minimum wage;

b. If the salesperson is remunerated partly on commission and partly by salary, the hourly rate is calculated on the basis of the salary component of the remuneration or, if that is less than the minimum wage, on the basis of the minimum wage.

(iv) Other Provisions of the *Act*

The Coalition recommends that employees who are paid on a commission or other incentive basis be covered by all other provisions of the *Act*.

Recommendation (1): Amend the *Act* to recognize the unique circumstances arising from incentive based compensation schemes.

Recommendation (2): Hours of work and overtime for commissioned salespeople should be compensated based on gross earnings (including commissions and any salary or hourly wage) over a four week period so long as this amount is greater than what the employee would have earned at minimum wage (including overtime rates) for all hours worked over the period.

Recommendation (3): The hourly rate for the purposes of calculating the amount of holiday pay to which the employee is entitled, is deemed (if the employee is remunerated 100% on commission) to be the minimum wage or (if the employee is remunerated partly on commission and partly on salary) to the employee's hourly rate taken from the salary component of remuneration or the minimum wage, whichever is greater.

2. Dependent Contractors

The Coalition does not believe that persons who organize their business and working affairs as freestanding business entities such as dependent contractors,

should be covered under the *Act*. These persons have chosen to avail themselves of whatever tax or other advantages are available as free standing business operations – whether it be a sole proprietorship or partnership, and they should not be entitled to assert their lack of employee status for tax or other corporate purposes, while at the same time asserting employee status to receive the protection of the *Employment Standards Act*.

Recommendation: The Coalition recommends that persons who have structured the working affairs to obtain whatever tax or other corporate advantages which may be available to individual business entities should not be entitled to coverage under the *Act*.

A6. Should employment standards statutes provide that employers are in compliance if their workers agree to terms and conditions of employment different from that provided for in the *Act*? If so, how would workers be protected from unfair practices?

1. Mutually agreed-upon variations to the requirements of the *Act*

The Coalition believes that where employers and employees have freely entered into agreements to work outside the strict requirements of the *Act*, those agreements should be respected. Currently, contracting out of the *Act* is prohibited, even if it is at the request of the employee and is to both the employer's and employee's mutual benefit. For example, if an employee wishes to work more hours in order to earn extra money to meet certain personal needs and the employer has work available, but does not wish to pay overtime for that work, they cannot agree to have that work performed at straight time rates, even though both the employer and the employee mutually benefit from that arrangement.

The Coalition believes that the *Employment Standards Act* should be flexible enough to allow for such mutually beneficial arrangements. The Coalition recognizes that workers need to be protected from unfair employers, but where such arrangements are freely entered into, they should be respected.

Recommendation: Voluntary arrangements outside the Act between employers and employees should be permitted, but the statute should reflect that such arrangements are only permissible and enforceable, if they are voluntary. If there is evidence that such an arrangement was entered into as a result of coercion or intimidation on the part of the employer the agreement will not be enforced and the strict provisions of the Act will apply.

2. Commission sales or incentive-based paid workers

The Coalition believes that the *Act* must recognize the unique circumstances arising from incentive based compensation structures. Ideally, the Coalition recommends that the *Act* be amended in the manner set out in Section A5 above, to provide for this. If this is done, there would be little need for such employers and employees to agree to working arrangements different from those provided in the *Act*. However, as stated above, if arrangements outside of the *Act* are voluntarily entered into, they should be respected and enforced by the legislation.

3. Dependent Contractors

The Coalition recommends that dependent contractors be excluded from the application of the *Act*, for the reasons stated in Section A5 above.

B. FLEXIBILITY

The Coalition fully agrees with and supports the need to increase flexibility within the workplace so as to allow employers and employees to tailor their workplace arrangements to respond both to business requirements and to the personal needs of employees. The present *Act* fails to recognize that neither modern businesses nor modern lifestyles fit within a nine to five framework, and penalizes employers who endeavour to respond flexibly to today's realities. At present, BC's *Ac*t is one of the most restrictive in Canada, in terms of hours of work and overtime provisions, with the result that British Columbia businesses face significant competitive hurdles in the North American marketplace. In order to allow BC businesses to respond appropriately to business realities and to the needs and interests of employees, it is vital that the hours of work and overtime provisions be significantly altered in order to provide for increased flexibility and cost-effectiveness.

This is achieved in two ways. The first is to make specific changes to the hours of work, overtime and statutory holiday provisions of the *Act* to allow for greater flexibility in the scheduling of work and working hours to accommodate the needs of employers and individual employees.

The second is to allow employers and employees to jointly tailor their overall packages of wages, hours of work and overtime, statutory holidays, vacations and vacation pay, special clothing, and layoffs and terminations, to best suit the needs of the enterprise and the interests and needs of the employees. In the unionized context, this requires that unions, on behalf of employees, and employers be able to freely and effectively negotiate packages of terms and conditions which reflect the needs and interests of both parties. In the non-union context, this requires reform of the variance process under ss. 72 and 73 of the current *Act*.

B1. Flexible Work Schedules and Overtime

The Coalition appreciates the effort that the Government has engaged in to provide options to increase flexibility with respect to hours of work and overtime. However, with respect, the options of work schedule agreements and specific work schedules suggested by the Government as options 1 and 2 are overly

complex and will be difficult, if not impossible, to administer. These options would require complex calculations of the hours worked by employees, and, at least with respect to employee agreements, pose the difficulty of determining whether employees have genuinely agreed to certain variations on the hours of work. Further, it is simply not practicable to have work schedule agreements, upon which an employer will have based its budgeting, workforce scheduling and business projections, which can be cancelled at any time by employees.

In place of the specific options proposed by the Government, the Coalition recommends an hours of work and overtime system which is straightforward and easily applicable to a variety of workplaces as well as individual employee circumstances. Such a system would be premised on an averaging of hours over a multi-week period for the purpose of determining payment of overtime premiums, along with certain built in protections for employees. This hours of work and overtime system would have a number of specific components, as follows:

1. Overtime Premiums

Overtime premiums should be based upon an averaging of hours over a multi-week period, with overtime premiums payable for hours in excess of an average of 40 hours per week. The default number of weeks for averaging purposes should be four weeks, with employers and employees being able to agree to longer or shorter averaging periods if they wish.

2. Maximum Daily Hours

In addition, in order to protect employees from excessive daily hours, overtime should be payable, regardless of averaging, for hours worked over 12 in a day.

3. Overtime Rate

All overtime should be payable at the rate of 1.5 times the hourly rate. Double time should be eliminated.

4. Minimum Hours Free from Work

Employees should be entitled to a minimum of eight hours free from work between shifts. Overtime should be payable if this restriction is not met.

5. Minimum Days Free from Work

Employees should be entitled to a minimum of one day free from work per week, although this requirement may be "averaged" and scheduled in a manner which best suits the circumstances of the workplace. Thus, if the period over which overtime averaging is occurring in the workplace is four weeks, an employee must receive four 24-hour periods free from work during the four-week period. If this requirement is not met, the employee must receive overtime for the hours worked during what ought to have been the periods free from work.

6. Time off in lieu of overtime pay

For hours with respect to which an employee is entitled to overtime premiums under the averaging process, the employee should be entitled, at his or her option, to bank those hours, and take them as time off at a mutually agreeable time, instead of receiving overtime pay for those hours. However, unlike the situation under the present *Act*, the time off should be taken as one hour off for each hour of overtime worked. If not taken as time off within six months (or such longer period as is agreed by the employer and the employee), the hours should be paid out at the rate of time and one-half.

This is consistent with the manner in which banked overtime is dealt with under the Alberta *Employment Standards Code* and makes logical sense. The Alberta approach is a more realistic and appropriate method of dealing with banked overtime hours which is more amenable to workplace flexibility and accommodation of the personal needs of employees and/or the production and operational needs of the business. In essence, the employee is receiving additional paid "time off" as a result of working additional hours. At present, in British Columbia, there is a disincentive to employers agreeing to establish a time bank for overtime hours because for every hour of overtime worked, the employer is required to give 1.5 hours of time off, thus causing the employer significant cost in terms of production time.

7. Minimum daily hours of work

The present daily minimum of four hours' pay should be abolished entirely or should be reduced to no more than two hours.

The present four-hour minimum daily hours of work is a substantial burden for employers in British Columbia, particularly those in the service and hospitality industries. It is generally incompatible with the realities of the hospitality industry, in which there are short periods during a day, which are intensely busy, and significant periods with little or no business. Further, it reduces job opportunities for students and others who wish to work only the short, busy periods in a day when they can maximize their gratuities or sales commissions. Finally, the present four-hour minimum constitutes a substantial penalty for employers who need to schedule employee meetings outside of regular operating hours.
Most such meetings occupy only about one or two hours: however, the employer is presently required to pay each employee four hours' pay. This requirement should either be eliminated entirely or reduced to no more than two hours minimum pay per workday.

8. Split shifts

The current restriction on split shifts, such that all hours in a split shift must be completed within a twelve-hour period, should be eliminated. Split shifts are often beneficial to employees, especially in industries such as the hospitality industry in which there are certain defined "busy periods" in a day. Employees in such industries often appreciate the opportunity to maximize their income by confining their work periods to the busy periods. An employee who works the lunch shift (11:30 a.m. to 1:30 p.m.) and the dinner shift (6:00 p.m. to closing) in a restaurant may not be able to complete his or her shift within 12 hours. However, the employee does not wish to sacrifice his gratuities by being sent home at 11:00 p.m. regardless of whether his tables have completed their meals, nor should the employer be required to pay overtime in order to ensure that the employee can receive his gratuities.

Recommendation: The hours of work and overtime provisions of the *Act* should be significantly revised to create a flexible system wherein hours of work are averaged over a multi-week period, for the purposes of determining payment of overtime premiums, while maintaining protections for employees. The minimum daily hours of work and split shift restrictions should be lifted.

B2. Should the scope or method of providing variances to standards be changed?

The present variance system in the *Act* is overly restrictive, inflexible, time-consuming and practically unworkable.

At present, the provisions of the *Act*, which can be subject to a variance, are very limited. Non-union employers and employees are not entitled to vary all the same provisions of the *Act*, which unionized employers and employees can vary. In addition, the criteria applied by the Director in determining whether to grant a variance is extremely strict and appears to be based solely on the Director's subjective assessment of whether the variance is "consistent with the intent of the *Act*". In essence, the Director will not grant variances if they seem to deviate from the minimum requirements of the *Act*, regardless of the wishes of the employees or the benefits to employees of greater working hours, more flexibility, and/or greater overall income as a result of the proposed variance. Further, even assuming that the necessary variance could be obtained, the process is often unworkable given the amount of time required to obtain a variance — the project or circumstance for which the variance is required is often completed or the opportunity has passed by the time the variance is granted.

In the Review Paper, a variety of options are presented with respect to reforming the current variance process. In large measure, if the Coalition's recommendations with respect to changes in the hours of work and overtime and statutory holiday provisions are accepted, the need for variances will be significantly reduced, because the legislation will allow for appropriate accommodations between employers and employees. This statutory flexibility will provide the additional benefit of freeing up resources previously expended on administering the variance procedures and enforcing the overly rigid requirement of the *Act*.

However, variances will likely still remain necessary for specific industries and workplaces with particular requirements which cannot be satisfied even within the framework of a more flexible hours of work and overtime system. To deal with these situations, it is necessary to have a straightforward, expeditious and predictable variance process to which employers and employees can turn to have their particular needs met.

In this regard, the Coalition submits that the variance process in ss. 72 and 73 must be significantly revised to provide for majority employee support among affected employees as the sole criterion for the approval of variances. Further, variances should be available for a wider range, if not all, of the substantive provisions of *Act* (with the possible exception of the leave provisions).

Finally, the variance approval process should be changed to a variance registration process: variances will be deemed to be approved for the period specified in the variance (up to two years, subject to renewal) if registered by the employer with proof of majority employee support, with further investigation necessary only if complaints are filed about the variance.

Recommendation: The variance process in the *Act* should be expanded to cover a broader range of provisions of the *Act* and should be revised to be a variance registration process, which is straightforward, expeditious and predictable.

B3. Should the requirements of the hours of work notice be changed?

The current requirements for posting of work schedules are onerous and inconsistent with business realities in certain industries, particularly the hospitality and tourism industries. In such industries, the length of a shift cannot realistically be anticipated in advance as it is determined by the customer demands. Employees in the restaurant industry not only accept some level of uncertainty as to when their shift will end, they wish to have their worktime determined by the level of business, as their compensation is often derived substantially from gratuities.

Further, the present notice requirements are problematic for all industries because they do not allow for flexibility to meet unexpected conditions such as employee illness, unanticipated absence, or employee desires to exchange shifts among themselves.

The Coalition recognizes that employees need notice generally of their hours of work to manage their private lives and meet obligations.

Recommendation: Hours of work notices should be posted at least 24 hours in advance, wherever possible. The notices should include the time work is to start, a best estimate of when it is to end, and an indication of the time frame during which eating periods may occur.

C. INCREASED COMPETITIVENESS

C1. Is it necessary for wage statements to be in written electronic format?

The Coalition supports any Government initiative which reduces the paper burden on employers. Accordingly, the Coalition supports the proposed option which allows the employer sole discretion as to whether statements are electronic or written as long as the employee has confidential, ready access and the ability to print a copy of his or her statement. The Coalition further agrees that where such access is not readily available, employers should be required to provide a wage statement in written format.

Recommendation: Employers should be able to provide wage statements in electronic form, so long as employees have ready access to the information.

C2. Should the rate of overtime premiums be changed?

As stated above, BC's overtime premium pay requirements are a serious competitive disadvantage to BC companies. In addition, they render it uneconomical for employers to allow employees to maximize their hours of work. The Coalition recommends that the "double time" overtime premium be abolished and replaced with a consistent premium of 1.5 times the hourly rate for all overtime worked.

Recommendation: Double time premiums for overtime should be eliminated.

C3. Should statutory holiday pay overtime premiums be reduced as long as hours worked on a statutory holiday are recognized financially?

At present, the calculation for statutory holiday entitlements under the *Act* is extremely complex, particularly for employees who work part-time, or who work irregular hours. Payment of statutory holiday premiums is also excessively expensive for employers. Further, the present entitlement in the *Act* goes beyond the purpose of statutory holidays, which is to ensure that employees are

able to have certain designated days free from work, without loss of pay and/or to receive a premium for working on those days. The current *Act* provides statutory holiday pay to employees who have scarcely worked for the employer and for whom the statutory holiday would not have been a workday in any event. Further, the current *Act* has no qualifiers of working the day before and day after the holiday, to ensure that employees do not abuse the statutory holiday entitlement.

This is in contrast to the situation in Alberta, where a distinction is drawn between employees who are regularly scheduled to work on a statutory holiday and those who are not. Only those employees who are regularly scheduled to work on the holiday (i.e. have worked that day in at least 5 of the previous 9 weeks) are entitled to the paid holiday. Other provinces have a longer qualifying period than the 30 days in British Columbia.

The Coalition has a number of recommendations for the reform of statutory holiday entitlements under the *Act*. Taken together, they create a statutory holiday system which the Coalition believes is fair and flexible, to the benefit of both employers and employees.

1. Qualifying conditions

The Coalition recommends that the qualifying conditions for entitlement to statutory holiday premiums be altered to better reflect the purpose of statutory holiday entitlements and to prevent abuse. The Coalition makes two specific recommendations in this regard. First, the qualifying period for statutory holiday entitlements should be increased to 90 days' employment.

Second, as in most other provinces, eligibility for statutory holiday pay should be dependent upon the employee meeting the "qualifying conditions" of working the last scheduled day prior to the holiday and the first scheduled day after the holiday, unless excused from working for some bona fide reason, such as illness, vacation, or other authorized leave of absence.

Recommendation: The qualifying period for statutory holiday entitlements should be increased to 90 days and the qualifying conditions of working the scheduled day before and day after the holiday should be introduced.

2. Statutory Holiday Calculations

At present, the *Act* requires that employees who work on a statutory holiday not only receive payment at the rate of 1.5 times the hourly rate for all hours worked on the statutory holiday, but also must receive an additional day off with pay in lieu of the statutory holiday within 6 months of the holiday.

In Alberta, the employer has the following options in compensating employees who work on a statutory holiday, which falls on the employee's regular workday:

a. pay the employee a regular day's wages plus 1.5 times the hourly rate for all hours actually worked on the statutory holiday OR

b. pay the employee at his or her regular hourly rate for all hours worked on the statutory holiday plus give the employee another day off with pay prior to the employee's next annual vacation.

The payment options for regular employees in Alberta are thus much less expensive than the payment requirements in British Columbia. In addition, Alberta limits entitlement to statutory holiday premiums for employees who regularly work on the day of the week on which the statutory holiday falls.

The Coalition does not propose to limit eligibility for statutory holiday entitlements to employees who regularly work on the day on which the holiday falls. However, the Coalition does say that the present premiums in the *Act* are expensive for employers and are often inconsistent with the wishes of employees. In many cases, the employee does not actually wish to have an additional day off with pay – he or she would prefer to work his or her regular hours and to simply receive the overtime rate for the hours worked on the statutory holiday, to increase his or her income.

This is especially true for employees who work in industries such as the retail or hospitality industries where the number of hours worked is generally less than full-time hours and where statutory holidays are busy business days in which employees can earn substantial gratuities or commissions.

Therefore, the Coalition says that holiday premiums should be reduced and should allow for employee choice as to whether to take another day in lieu of the holiday or simply to receive overtime pay for the holiday.

Recommendation: Employees who work on a statutory holiday should be given the option of simply receiving a regular day's pay and taking a day off with pay at a later date or receiving overtime pay at 1.5 times their hourly rate for the hours worked on the statutory holiday. The employee must select the option at the time of working on the statutory holiday.

3. Statutory Holiday Selection

In our society, there are many reasons why employees may wish to select days other than the designated statutory holidays as their "holidays". This could be for religious or cultural reasons, out of a desire to work on the day generally celebrated as the holiday in order to maximize income, or simply to take the holidays at a time which is most convenient for the employee in the context of his or her family life. At present, our *Act* allows for employers and employees to agree to substitute another day for the designated statutory holiday only if a majority of affected employees agree or, in a unionized workplace, if the substitution is provided for in a collective agreement. In the Coalition's view, this should be amended to allow employers and individual employees to make arrangements which suit them, even if these arrangements may be different than those pertaining to other employees.

Recommendation: Employers and individual employees should be able to mutually agree to allocate the employee's statutory holiday to a different day, as they see fit, even if this results in some employees observing different days as statutory holidays than the majority.

C4. Are the time limits for filing complaints with the branch fair to both employers and employees?

C5. Is the length of time an employer is exposed to liability for back wages reasonable?

The Coalition will address these two issues together.

At present, former employees have six months from the date of termination of their employment, to file a complaint against their former employer for an alleged violation of the *Act.* Current employees of the employer are faced with a limitation period only for violations of s. 8, 10 or 11 of the *Act*, which deal with hiring violations. There is no limitation period for current employees to complain of a breach of the *Act*. A form of limitation on the employer's liability does exist, in that an employer can only be liable for violations occurring up to the earlier of two years prior to the complaint being filed or two years prior to the date of termination of employment.

Given the very lengthy period prior to an employer even receiving notice of a complaint (over six months in some cases), this means that employers can be liable for alleged violations of the *Act* occurring three to four years prior to the employer receiving notice of the complaint.

Aside from imposing what the Coalition believes is an excessive and unfair degree of liability on an employer well after the period in which the alleged violations occurred, these lengthy limitation periods do not advance the purpose of avoiding violations of the *Act* in the first place, or of treating employers and employees fairly. Many employers are not aware that they are in violation of the *Act* until a complaint is brought to their attention. Further, many of the complaints under the *Act* are filed by former employees or disgruntled employees who have expressly sought out extra work without overtime pay or who asked for other variations to the *Act*, and who later make a claim under the *Act* which is contrary to the earlier agreement.

Had the complaint been raised earlier, many employers who were not aware they were in violation of the *Act* would willingly have corrected their conduct. In cases where the employee and employer have expressly agreed to an arrangement

outside the terms of the A*ct*, it is manifestly unfair for the employee to reap the benefits of that agreement, in terms of extra hours of work or extra income from other sources, and later renege on the agreement. The Coalition believes that an employee should be held to an agreement for terms outside of the *Act*, however it is the Coalitions' position that if the employee wishes to revert to his or her rights under the *Act*, he or she should be required to advise the employer of that wish in a timely fashion.

However, with the present ability to claim backwards for two years, employees have little incentive to advise their employer that they perceive a violation of the *Act,* or that they wish to enforce their strict rights under the *Act*.

In the Coalition's view, a time limit of 60 days following termination of employment for a former employee to file a complaint is fair. Employees are to receive all sums owing to them under the *Act* within 48 hours of termination (or six days if the employee quits). Therefore, the employee should be aware well in advance of the 60-day deadline if he or she has received the entitlements under the Act with respect to termination, and would have been already aware of the terms and conditions under which he or she was compensated while employed.

With respect to the limitation of employer liability for violations of the *Act*, this should be reduced to six months. Aside from being a much more reasonable penalty to impose upon employers who may have simply misunderstood or miscalculated their obligations under the *Act*, this shorter period provides an incentive for employees to quickly raise alleged violations of the *Act*. The situation can then be corrected, with all parties conducting themselves in compliance with the *Act* from that point forward.

Recommendation: The time limit for a former employee to file a complaint under the *Act* should be reduced to 60 days following the date of termination of employment. The period for which an employer may be liable for a violation of the *Act* should be limited to six months prior to the date of termination or the date upon which the employer receives notice of the complaint, as the case may be.

C6. Payroll record keeping

At present, the *Act* requires that employers maintain a wide range of records relating to each employee for a period of five years from the date the record was created. This is an improvement from the previous seven-year requirement, but still results in employers being required to retain vast quantities of records for a long period after they could be relevant. Particularly if the limitation periods under the *Act* are shortened as suggested above (but even if they are not), it is simply not necessary for employers to maintain records for five years. Consistent with our recommendations for reducing the limitation periods, the record-keeping period should be reduced in accordance with those reduced limitation periods, so that an employer is not required to retain certain records after the limitation periods under the *Act* have expired. This should require the maintenance of records for no more than 30 months.

Recommendation: The period of time for which employers are required to maintain payroll records should be reduced consistent with reductions in the limitation and liability periods.

C7. Are the termination provisions fair to both employers and employees?

1. Building flexibility into the termination provisions of the *Act* to allow business to respond to cyclical changes in the economy.

The Coalition agrees that it is necessary to build more flexibility into the termination provisions of the *Act* so as to allow businesses to respond to economic changes, while maintaining employment as long as possible. At present, the termination provisions of the *Act* penalize employers who are unable to predict with accuracy precisely when business levels will fall. In many cases, the result is that employers are required to terminate the employment of employees early, in order to avoid substantial termination pay liabilities. The Coalition has a number of recommended changes to the termination pay provisions which we believe will serve to prolong employment without creating financial penalties for employers.

2. Eliminate the provision whereby notice of termination is voided if the employee works past the termination date in the notice.

At present, s. 67 of the *Act* provides that a notice of termination given under the *Act* is void if the employee's employment continues for even one day beyond the date set out in the notice of termination. It is often difficult for an employer to estimate with precision when all work available for the employee will be completed. The result of s. 67 is that the employer must terminate the employee on the date provided or incur significant liability. Thus, an employer who discovers that it is able to provide additional work to an employee who was going to otherwise be let go cannot do so without being required to provide an entirely new period of working notice or pay in lieu thereof. If the employer only has a few days' work or is not sure when the work will end, the employer cannot afford to incur this cost. The employee must be let go on the original date, despite the existence of available work. The employer must hire someone new rather than utilizing his existing, skilled employee.

Clearly this is not to the advantage of the business or the employee. Nor is this provision necessary to protect the employee. The purpose of notice of termination is to allow the employee some advance warning that her job will no longer be available, or compensation for that period, so that the employee can find other work. Where an employer is able to provide additional work to the employee after the termination date, the employee can either accept or refuse this work. Most employees would prefer to have the opportunity for additional work – they are still aware that their job may be ending shortly, and can look for other work while continuing to earn in the meantime.

Recommendation: Section 67 be abolished entirely, or, in the alternative, be amended to provide that the notice becomes void only if work continues more than three months beyond the stated termination date.

3. The construction industry exemption

Section 65(1), which sets out the exemptions from the requirement in s. 63 to provide individual notice of termination or pay in lieu of notice of termination contains an exemption for the construction industry. This exemption has been in the *Act* since the *Act's* inception in the mid-1980's. It is designed to reflect the unpredictable nature of work in the industry. Until recently, the exemption was understood by all participants in the construction industry to apply to all on-site construction workers – they were not entitled to receive notice of termination or pay in lieu thereof.

However, in 2000, the Employment Standards Tribunal issued a decision which restricted the application of the exemption to employees who work on only one construction site for a construction employer. As soon as the employee works on a second site, he or she must receive notice of termination or pay in lieu. Aside from being wholly contrary to the understanding of the industry and contrary to the wording of the *Act*, this interpretation means that construction employers cannot afford to keep their employees employed by utilizing them on more than one project. This is entirely contrary to the interests of employees in the industry.

The Employment Standards Tribunal's decision has been appealed to the BC Supreme Court on the basis that it is patently unreasonable and a decision is expected within the next few months. However, the industry remains in a state of uncertainty pending the decision.

The Coalition believes that the government should retroactively amend the language of the construction industry exemption to refer to "on-site construction workers" instead of employees "employed at a site", so as to remove any uncertainty about the application of the exemption.

Recommendation: The construction industry exemption should be retroactively amended so as to make clear that on-site construction employees are exempt from application of the notice of termination provisions.

4. Temporary layoffs

The period after which a temporary layoff is deemed to be a termination should be increased from the present 13 weeks in a period of 20 weeks, to a flat 20 weeks. Further, the employer and the employee should be entitled to agree in writing to extend this period for a further period, if there is a reasonable prospect of recall to work.

Recommendation: The period of temporary layoff should be extended to 20 weeks and should allow for further extension by agreement between the employer and the employee.

5. Compensation for length of service

The Review Paper suggests that compensation for length of service be referred to as severance pay. The Coalition believes this proposal, while initially attractive, is problematic because of the jurisprudence which has developed in other jurisdictions surrounding the specific use of the term "severance pay" in other legislation. Instead, the Coalition recommends that for clarity, compensation for length of service be referred to as "pay in lieu of notice of termination".

Recommendation: "Compensation for length of service" should be referred to as "pay in lieu of notice of termination".

6. Postponement of requirement to provide notice of termination

The Review Paper also proposes, as an option, that the requirement to provide notice of termination or pay in lieu thereof could be postponed until the employee has been employed for six months, rather than the current three months. The Coalition believes that, generally speaking, three months is a sufficient period for an employer to assess an employee to determine whether he or she is suitable to perform the work in question and, if problems are discovered after this point, that it is fitting that the employee should receive one week's notice or pay in lieu thereof, as the *Act* presently provides.

Recommendation: The provisions regarding termination pay of one week after 3 months and up to 12 months should remain as they currently exist.

7. Elimination of Group Termination Provisions

The group termination provisions as they currently exist are particularly onerous for employers who are facing difficult financial circumstances because they do not provide sufficient flexibility. As is the case with individual termination, a significant problem with the group termination provisions is the inability to continue employment beyond the effective date of the termination because of the provisions in Section 67 which void a group termination notice if the employment continues after the notice period ends.

In addition, the content requirements of the notice are overly broad. While it may be appropriate that the group termination notice provided to a trade union specify an estimate of the number of employees affected, it is not necessary that each employee be provided with that information individually. The Coalition agrees that employees in a group termination situation should be advised of the expected date of termination and the general reason for the termination but they need not be advised of the number of employees affected.

Recommendation: The content requirements of the notice should be amended so that the individual employees need not be notified of the number of terminations. Most importantly, as recommended above, Section 67 should be abolished entirely, or amended to provide that group termination notice becomes void only if work continues for more than three months beyond the termination date.

8. Just Cause Issues

The Review Paper presents the option of eliminating determinations of just cause, and requiring that notice of termination or pay in lieu thereof be provided regardless of the reasons for the termination. In the alternative, the Review Paper suggests that "just cause" could be narrowly defined to encompass only certain types of misconduct.

With respect, the Coalition strongly disagrees with both of these options. An employee who engages in employment-related misconduct and whose employment is terminated for just cause should not be entitled to notice of termination or pay in lieu thereof. This is an accepted principle of employment law. If it were otherwise, then employees would be rewarded for engaging in misconduct.

Nor should the meaning of "just cause" be restricted to certain defined employment offences, such as fraud, theft and violence, as is suggested in the Review Paper. First, this list of offences is far too narrow, and does not encompass many forms of misconduct, which would clearly constitute just cause for termination in many cases, such as sexual harassment, discrimination against another employee contrary to the *Human Rights Code*, insubordination, conflict of interest, etc. Second, it is really not possible to develop an exclusive list of types of conduct which could constitute just cause for termination of employment. Although certain types of conduct, such as theft, fraud or violence will virtually always constitute just cause, there is broad range of other conduct which may so undermine the employment relationship as to constitute just cause for termination. Whether there is cause in any given case may depend on the nature of the business and the employee's role within that business.

The Coalition appreciates that "just cause" determinations constitute much of the work of the Employment Standards Branch. Although the Coalition does not agree that the concept of just cause can be constrained in its definition, the Coalition does believe that education of what types of conduct can and do constitute just cause would be useful for both employers and employees. In this regard, the Coalition believes that adjudicators responsible for applying the *Act* should develop guidelines for employers and employees describing the types of conduct which will generally constitute just cause for termination of employment.

Recommendation: The concept of just cause for termination, and the exemption from entitlement to notice of termination or pay in lieu thereof should be maintained. However, the Branch should work with industry groups to develop guidelines for determining whether just cause for termination exists.

C8. What are other options for enforcement of employment standards?

1. Timing of payment of settlements

The Review Paper suggests that the Director could be empowered to set terms regarding the timing of payment when claims under the Act have been settled. While the Coalition is not aware of there being problems in achieving payment of settlements, if such problems exist, the Coalition does not object to there being deadlines for payment of settlement funds, failing which the matter will be referred to adjudication for enforcement of the settlement agreement.

Recommendation: The administrative tribunal should have the power to enforce settlement agreements.

2. Working with industry councils to promote compliance through self-regulation

The Coalition's members are industry associations. These associations would welcome the opportunity to work with the Branch and with Government to promote compliance within their respective industries. In the Coalition's view, non-compliance with employment standards minimums is not in the best interests of anyone – employees, employers, the affected industries, or the public generally.

However, in the Coalition's view, much of the non-compliance with the *Act* that presently occurs is not deliberate. Rather, it occurs as a result of employers being unfamiliar with the requirements of the *Act*, being stymied by complex rules and calculations, or being confronted with employees who seek to make arrangements outside the *Act*. Simplification and increased flexibility in the *Act*'s requirements will go a long way towards achieving compliance. Education, in the form of practical guidelines and explanations as to the manner in which the *Act* is to be applied, is also necessary. An example of this is the creation of guidelines with respect to conduct which constitutes cause for termination, as discussed in the preceding section. Similar guidelines with respect to the calculation of overtime premiums, statutory holiday entitlements, and the definition of a manager, among others, should be developed. The Coalition's members would be pleased to assist in the creation and dissemination of such information.

The Review Paper suggests that trade unions would also be involved in promoting employment standards compliance. With respect, the Coalition queries what role trade unions could appropriately have in this regard. Certainly trade unions have a role, indeed a mandate, to ensure compliance with collective agreements which they have negotiated on behalf of their members in unionized workplaces. However, in non-union workplaces, which are the workplaces to which the *Act* will apply, the employees have chosen not to be represented by a trade union. Trade unions therefore have no representative capacity with respect to such workplaces and no legitimate role or involvement with them.

The Coalition believes strongly that third party complaints should not be permitted. These are complaints filed, not by an employee of a particular employer, but by an outside third party. Such complaints are sometimes filed by a competitor of an employer or by a trade union seeking to organize the employees of a particular employer. As such, they are filed for strategic reasons, unrelated to the well being of the employees of the workplace, and are often not supported by the employees themselves. Further, because the complaint has not been filed by individual employees, it does not easily admit of settlement.

At most, a third party complaint should result in the employer being advised that a complaint has been filed and being informed of the requirements of the *Act* in relation to which the complaint was filed. In this way, the employer is educated, but the *Act is* not utilized to advance the purposes of third parties.

Recommendation: The administrative tribunal should work with industry groups to promote compliance with the *Act* through education. Third party complaints should not be permitted.

3. Penalty System

The Coalition agrees that a penalty system should be based upon repeated non-compliance. As stated above, most initial instances of non-compliance result from innocent error or misunderstanding on the part of employers. Penalties are not appropriate in these circumstances. Further, the Coalition agrees that further instances of non-compliance of the same or a similar nature should result in greater scrutiny of the employer in question, and a requirement that the employer

work with its industry association to ensure that it has proper processes in place to ensure compliance. Repeated non-compliance with a particular requirement or provision of the *Act* once the matter has been brought to the attention of the employer and the employer has received educational assistance as to the requirements of the *Act* is inexcusable and should be penalized.

In the Coalition's view, it is not necessary to increase the monetary amount of penalties. The current penalties provide substantial deterrence. Compliance is better achieved through more realistic and flexible standards which allow employers to remain competitive and allow businesses to adjust to changing marketplace requirements, and through increasing education and industry involvement.

Recommendation: Penalties should be imposed upon repeat offenders who have failed to correct their practices after being warned and educated. The current levels of penalties should be maintained.

4. Reform of the Determination and Appeal processes

The current determination and appeal processes are simply not working. They do not meet the goals of fair or efficient application and enforcement of basic standards of compensation in the workplace. The problems, which exist, are fundamental, and in the Coalition's opinion, require a complete restructuring of the decision making processes under the *Act*.

The primary structural problem which taints the entire process is the confusion surrounding the role of the Branch's Industrial Relations Officer. Currently, the Officer who acts as an information provider for the Complainant also acts as the investigator and mediator. And, if the mediation efforts are unsuccessful, that same person is then the decision maker who issues the Determination. Further complicating the situation is the fact that frequently, the parties are not given a proper opportunity to hear the case or allegations made against them, nor are they given a proper opportunity to respond if they do know the allegations. The result is that the participants, and in particular employers, do not feel that they have been treated fairly. Consequently, they are more likely to appeal a Determination because, in their view, the decision reached was the result of a flawed process.

The second problem is the length of time it takes to process a complaint from beginning to end. In many cases an employer first becomes aware of a complaint more than six months after it was filed. This type of delay is not in the interests of either the employee or the employer. This delay is then exacerbated by the length of time it takes for an investigation to be conducted and a Determination issued.

That brings us to the third problem, which is the confusion of the roles of the Employment Standards Branch and the Employment Standards Tribunal. Because of the natural justice problems which exist at the Branch level, although the appeal is not supposed to be a hearing *de novo*, in many instances it is the first time that the parties are able to put forward the facts and circumstances relating to the claim(s) in question. As a result the Tribunal is, in reality, often forced to act as a decision maker of first instance, which renders the determination stage superfluous.

Further, the Director's Delegate often appears at the Tribunal hearing to defend the merits of his or her decision. As well, representatives of the Director, either legal counsel or the Programme Advisor for the Branch, often appear before the Tribunal to make legal and other arguments with respect to the merits of the Director Delegate's determination. This compounds the concerns about unfairness and apprehension of bias.

Finally, once a decision is issued by an adjudicator at the Tribunal, either party may apply for reconsideration of that decision. This unnecessarily lengthens the process.

In sum, the entire process, as it currently operates, is neither fair nor efficient. In order for the employment standards process to work properly, a number of significant changes must be made.

First, there must be a separation of the information giving and mediation functions of the Industrial Relations Officer (IRO) from any adjudicative function. Those roles must be clearly separate and distinct.

Second, in order to streamline the process, the Coalition recommends that the investigative function of the IRO be restricted to information gathering. Currently, investigations are not being performed adequately and the investigative function is being combined with the decisionmaking function. Both these practices produce the unacceptable result of breaching the principles of natural justice and procedural fairness.

Third, the initial decisionmaker must be properly trained in decision making. That includes training in how to conduct a fair hearing, which requires that both parties be provided with an opportunity to put forward their cases and respond to the other side's facts and arguments.

Fourth, any appeal from the initial decision should be structured so that it is a real appeal – not a hearing *de novo*. Except in very well defined circumstances, there should be no hearing of evidence. Rather, the appeal should be on the basis of the findings of fact made by the initial decision maker. The appeal should be restricted to interpretative and natural justice issues.

Finally, there should be no ability to reconsider the appeal decision. It is important that there be some finality to the process, and the reconsideration power does not add anything but a further layer of unnecessary litigation to an already protracted process.

The Coalition looks forward to participating further in discussion and submissions about how best to restructure the employment standards process to ensure fair, efficient and effective employment standards enforcement.

Recommendation: The determination and appeal process must be substantially overhauled, so as to ensure that there is separation of advocacy, mediative and adjudicative functions, and to ensure that parties receive a fair hearing. The process must be streamlined to be more efficient and conclusive.

D. OTHER AREAS OF CONCERN UNDER THE CURRENT ACT

In addition to the areas identified by the Government in its Review paper as requiring reform, the Coalition wishes to bring to the Government's attention certain other areas of substantial concern to the Coalition's members. These are additional features of the Act which serve to undermine the ability of BC employers to be competitive and to create jobs for British Columbians. Reform in these areas is also needed if the goals of competitiveness, realism and flexibility are to be met.

D1. Minimum Wage

1. Freeze the minimum wage

British Columbia's minimum wage is significantly higher than in neighbouring jurisdictions and throughout most of Canada. This places BC employers at a significant competitive disadvantage, and raises the cost of goods and services for BC consumers.

It is clear that a higher minimum wage restricts the job opportunities that can be offered to youth and to lower-skilled employees by rendering these positions too expensive for small business. Raising the minimum wage ultimately results in a loss of jobs, rather than an increase in the standard of living of low-income earners.

Recommendation: The minimum wage should be frozen at its current level until it is on a more competitive footing with neighbouring and other Canadian jurisdictions.

2. Find other targeted alternatives to help minimum wage households

As stated above, increases in the minimum wage have generally been found to be ineffective to really assist those who are endeavoring to support a household on a sole minimum wage. Increasing the minimum wage may result in an actual loss of the job for that individual. Further, it is questionable whether small business employers should bear the brunt of supporting such households.

In the Coalition's submission, there are other, more direct, more effective and more equitable means, which the government should consider to assist low-income families in British Columbia. These include targeting tax cuts or tax credits at low-income households. The Coalition acknowledges that the government has already introduced significant tax cuts, which should assist low-income families. However, more can be done. The income level for tax-exempt status in British Columbia remains significantly lower in British Columbia (approximately $8000) than in Alberta (approximately $12,000). Coupled with BC's provincial sales tax, the result is that any benefit to low-income families of a higher minimum wage rate in British Columbia is largely, if not entirely, negated by higher taxes.

Recommendation: The government should consider targeted alternatives to increase net income for low wage earners, such as tax cuts or tax credits. For example, increase the tax-exempt limit to $12,000 per year to match Alberta's.

3. Separate minimum wage for gratuity-based jobs

The present very high minimum wage is a job-killer in the hospitality industry. In that industry, many employees earn a substantial portion of their overall income from gratuities: often two to three times (if not more) than what is earned in wages. Therefore, the employee's actual wage rate matters little to him or her. What is important to that employee is to work in a busy establishment, during busy periods, so as to maximize gratuities. The higher the minimum wage payable by the employer, the higher the prices the employer must charge with corresponding risks to the competitiveness and success of the enterprise.

Many other North American jurisdictions have a lower minimum wage rate for employees in gratuity-based jobs. The Coalition submits that it is time for British Columbia to follow suit.

Recommendation: The Government should introduce a lower minimum wage rate for employees in those jobs in which a significant portion of their income is earned in gratuities.

D2. Special Clothing Requirements.

1. Requirement to clean and maintain "special clothing"

British Columbia's "special clothing" requirements place obligations on employers which far exceed the requirements on employers in other jurisdictions. Not only are BC employers required to provide to their employees, without cost, any uniform or designated clothing that the employee is to wear on the job, but the employer must incur all costs of cleaning and maintaining that clothing, regardless of whether there are any special features of the job which make cleaning of clothing an issue. This is an extraordinary cost to the employer and goes far beyond the legitimate concerns of the employee.

Everyone must clean and maintain their own clothing for work. An employee who wears some form of uniform is actually at a significant advantage over other employees – she need not incur wear and tear on her own clothing by wearing it to work, and need not incur the expense of purchasing new clothing for work on an ongoing basis. There is no need to remove from the employee the responsibility for cleaning and maintaining her work clothing, except where there are features of the job which make cleaning an issue, such as where the employee works with grease, chemicals, dirt or other substances which require extra or special cleaning.

Recommendation: The requirement that an employer cover the costs of cleaning and maintaining employee uniforms or other "special clothing" should be deleted, except in special circumstances.

2. Definition of Special Clothing

The present definition of "special clothing" is vague and overly broad. It has been interpreted to include circumstances, such as employees working in a retail store, where the employer seeks to have employees wear the employer's brand of clothing, or where an employer specifies a certain type of clothing that the employees should wear. In the Coalition's submission, there is no basis for the employer to be responsible for the costs of the employee's clothing in these circumstances. Again, all persons must wear clothing to work. All persons must incur those costs. The mere fact that an employer requires that the clothing be of

a certain type or style should not be sufficient to require the employer to cover the costs of that clothing. In the absence of the employer's requirement, the employee would still be incurring clothing costs. This is an unwarranted cost to impose on small businesses.

Recommendation: The definition of "special clothing" should be restricted to uniforms, logo clothing or other special clothing articles specific to the performance of the employee's job.

CONCLUSION

The Coalition wishes to thank the government for this opportunity to make submissions in response to the Government's Review paper on Employment Standards in British Columbia. The Coalition believes strongly that a reformed employment policy in British Columbia is necessary to kickstart the BC economy and to create a climate for investment and advancement. The Coalition looks forward to working with the government to create workplaces which are competitive, successful, and which are governed by standards that are fair and beneficial to employees and employers.

COALITION OF BC BUSINESSES – MEMBER ORGANIZATIONS

BC & Yukon Hotels' Association
BC Automobile Dealers Association
BC Chamber of Commerce
BC Horticultural Coalition
British Columbia Restaurant and Foodservices Association
British Columbia Technology Industries Association
British Columbia Trucking Association
Building Owners & Managers Association
Building Supply Dealers Association
Canadian Federation of Independent Business
Canadian Home Builders' Association
Canadian Restaurant & Foodservices Association
Canadian Retail Hardware Association
Council of Tourism Associations
Greenhouse & Nursery Trades
Independent Contractors & Businesses Association
Insurance Brokers Association of BC
International Council of Shopping Centers
Recreation Vehicle Dealers Association
Retail Council of Canada
Retail Merchants' Association of BC
Steel Service Centre Institute
Vancouver Board of Trade
Western Silvicultural Contractors' Association