Labour Policies that WORK

A New Vision for BC

SUBMISSION OF
THE COALITION OF BC BUSINESSES
TO THE
GOVERNMENT OF BRITISH COLUMBIA
on
***LABOUR RELATIONS CODE* REFORM**

April 11, 2002

The Coalition of BC Businesses is pleased to have this opportunity to provide submissions on behalf of its members to the Government of British Columbia with respect to *Labour Relations Code* reform. The Coalition intends to respond to the Government's Discussion Paper for changes to the *Code* by focussing on those issues which are of primary importance to the Coalition and its member organizations, in addition to commenting on each of the matters raised in the Government's paper.

The Coalition notes the submissions made herein should be read in conjunction with the Coalition's previous policy statements with respect to labour relations in the province, including in particular, the Coalition's 2000 publication, *Labour Policies that Work*. This document can be found on the Coalition's website, www.labourpolicies.com.

1. Free Speech

The Coalition of BC Businesses has long advocated revisions to the free speech and unfair labour practice provisions of the *Labour Relations Code* to ensure that the free speech rights of employers are protected and that employees have access to full and fair information when making decisions about union representation in their workplaces.

The Coalition reiterates that, in order for the recently reinstated secret ballot vote to truly achieve its purpose of offering an opportunity for employees to express their true wishes with respect to union representation, employees must have access to full and fair information about the impact of union representation in their workplace and on their personal situation.

Further, the Coalition notes that the *Canadian Charter of Rights and Freedoms* requires legislatures to restrict the free expression of all persons as little as possible. Despite this, there continues to be a marked imbalance in the *Code* on the restrictions placed on employer speech as opposed to those placed on unions, and a double standard applied by the Board to assessing the impact on employee free choice of statements by employers versus those made by union organizers.

A recent decision of the Labour Relations Board demonstrates very clearly the existence and application of this double standard, and the unjustifiable degree to which employer speech is constrained under the present *Code*. In *BC Lottery Corporation*, BCLRB No. B87/2002, the Board found that the employer, BC Lottery Corporation ("BCLC"), had committed unfair labour practices in its communications with its employees during an organizing campaign by the BCGEU.

The Board found that three communications by BCLC management to employees were found to violate the Code. The first was a memo from BCLC management in response to complaints by some employees that they felt they were being harassed by employees organizing on behalf of the union. The memo, which was entitled "Harassment-free workplace", noted the existence of the complaints but did not say that any harassment was actually occurring, emphasized the right of all employees to freely choose whether or not to join a union, and reiterated the terms of the BCLC harassment policy which required all employees to respect the right of others to work in a harassment-free workplace.

The Board held that this memo was an unfair labour practice because BCLC had not fully investigated the complaints of harassment before issuing the memo and because the memo did not clearly state that it was employees who were allegedly harassing others and not union representatives.

The second communication was a memo from BCLC management to employees, which attempted to correct some of the misrepresentations in the union's campaign literature about the terms and conditions of employment presently enjoyed by BCLC employees on a non-union basis and what employees could expect to obtain through unionization. The BCGEU's campaign literature had stated or implied that without the union: there was no recourse if an employee was wrongly terminated; there was no clear way to determine who would get pay raises or when; that the employer could simply renege on its own benefits policies; that paid sick leave was either unavailable or inadequate; and that the rules for leave of absence "change for different employees". All of these statements were wholly false in the context of BCLC's workplace, which has advanced employee participation programs, including employee advisory committees, and a dispute resolution process for employee "grievances" which includes binding arbitration by outside adjudicators.

However, without even referring to the union's campaign literature and the many inaccuracies and misrepresentations contained therein, the Board found BCLC's chart comparing BCLC terms of employment with those set out in the Union's literature or in the BCGEU's collective agreement with the Government, to constitute an unfair labour practice because it did not address every term and condition of employment and because it contained some minor inaccuracies.

Finally, the Board found a brief oral communication to employees by a low-level BCLC manager to constitute an unfair labour practice, because the manager stated that he had had negative experiences with unions in the past, particularly with respect to jurisdictional issues. The manager had told the employees that these were his own personal views, that the Company had told him not to express these views and the Company's position was that all employees had the right to freely choose whether or not they wanted a union. Further, only one of the four employee witnesses testifying for the union even recalled this discussion, and she testified that she was not in any way coerced or intimidated by the manager's comments and she understood they were his personal views.

In the Coalition's view, the conclusions of the Board that these communications constituted unfair labour practices are outrageous. With respect to the "Harassment-free workplace memo", clearly employers must be and are entitled to advise their employees to refrain from harassing one another or interfering with each other's free choice with respect to union representation.

With respect to the chart on terms and conditions of employment, this is precisely the sort of comparative information that employees are seeking in making a decision whether or not they should pursue union representation in their workplace. There is no reasonable basis whatever to conclude that an employee would find such a comparison "coercive" or "intimidating" even if it were not 100% accurate. And, the absence of any consideration by the Board of the much more seriously misleading information distributed by the Union, clearly demonstrates the double standard applied by the Board.

In the end, it is clear from the *BC Lottery Corporation* decision that the Board's view is that any involvement by an employer whatever which appears designed to counter a union organizing campaign will be an unfair labour practice.

That is not what was intended by the unfair labour practice provisions in the *Code*. They are designed to protect employees from coercion or intimidation which could reasonably interfere with the employees' freedom of choice. However, it is clear from the Board's decision in *BC Lottery Corporation* that the Board views these provisions as preventing employers from saying anything to their employees which could be viewed as "campaigning" against unionization, regardless of whether the employer's comments can reasonably be said to in any way interfere with the employee's freedom of choice.

In the Coalition's submission, this decision of the Board makes it imperative that the Government amend the free speech provisions in the *Code* to make it clear that an employer's freedom of expression is protected except where it is coercive or intimidating. This is the only way to correct the double standard that is being applied by the Board, and to ensure that employees have access to full and fair information about union representation and that employers are able to discuss their business with their employees in a free and open manner.

In this regard, the Coalition believes that s. 8 of the *Code* must be amended to clarify that employers can discuss any issue with their employees so long as it is not coercive. The Coalition recommends that the amendment to s. 8 set out at page 5 of the Discussion Paper be adopted.

With respect to the proposal to allow for Board-supervised pre-vote meetings, the Coalition believes this is proposal requires more study and consideration. While the Coalition certainly supports any mechanisms which will assist in ensuring that employees make well-informed decisions about matters with respect to union representation and collective bargaining, the Coalition has some concerns whether formal processes such as Board-supervised meetings are practical or appropriate in a busy workplace.

In addition to the options set out in the Discussion Paper, the Coalition submits that some further amendments are required in order to properly tailor the unfair labour practice provisions to do what they are designed to do, which is to prevent employers from interfering with their employees' true wishes with respect to union representation, through coercion or intimidation. Two additional clarifications are needed to the existing unfair labour practice provisions in order to accomplish this.

First, s. 6(1) should be amended to remove the reference to "selection" of a trade union. It was this reference upon which the Board in *BC Lottery Corporation* relied in concluding that any "campaigning" by an employer could be "interference in the selection of a trade union", despite the absence of any coercion or intimidation of employees.

Second, s. 6(3)(d) should be amended, by removing the references to promises, wage increases or other alterations in terms and conditions of employment. In the Coalition's view, there is no rational basis to believe that employees may be coerced or intimidated by their employer improving working conditions during or even in response to a union organizing campaign. Further, if an employer has become aware that his employees have concerns about their terms and conditions of employment which are causing them to consider seeking union representation, and the employer is able to resolve the issues to the satisfaction of the employees, this is a matter to be celebrated, not punished by finding the employer's actions in meeting his employees' concerns is a breach of the *Code*. The legislature should not, through the *Code*, mandate that unionization is the only, or even a preferable, way for employers and employees to address and resolve workplace issues.

Finally, the Coalition submits that s. 14(4)(f) (the remedial certification provision) must be deleted from the *Code*. This provision was introduced in conjunction with the card-based automatic certification system implemented by the NDP government in 1993. While the Coalition has always been of the view that s. 14(4)(f) was misguided, in that it allowed for certifications to be granted in the absence of any evidence that a majority of employees actually wished this, it now simply has no place in the current *Code*. The concept of remedial certification is fundamentally incompatible with the present certification process under the *Code* which requires a secret ballot vote in all certification applications. Put simply, there is no way that a union could now ever obtain the "requisite support" for automatic certification (as s. 14(4)(f) assumes is possible), because automatic certification no longer exists.

The Coalition has attached to this submission its proposed revisions to sections 6(1), 6(3)(d), 8 and 14 of the *Code*.

2. Two-year Decertification

The Coalition agrees with and supports an amendment to the effect that if a company has not employed any persons in the bargaining unit for over two years, the collective bargaining relationship should be declared to be terminated. The only exception should be where the union and employer have bargained recall rights for laid off employees that extend beyond two years. Then, and only then, can it be said that the collective bargaining relationship is still alive after the passage of two years without there being any bargaining unit employees. The relationship would continue to be alive until the expiry of the recall rights.

The purpose of the *Code* is to protect the right of workers to have trade union representation if they want it; it is not to confer perpetual collective bargaining rights on unions. Therefore, if an operation has been shut down for two years, and the laid off employees no longer have any recall rights, a union’s certification should end.

In the event that the operation begins hiring employees again after two years, it should be up to the employees who are hired to decide whether they want trade union representation. This is consistent with the fundamental purpose of the *Code*, which is to protect employees’ freedom of choice.

We also believe this two-year decertification amendment should be drafted to include operations that are on strike for two years, if the *Code* is not amended to allow a struck employer to hire new employees during a strike.

As it now stands, an employer, particularly a small employer, has no bargaining power. A union can go on strike and shut the employer's business down, which exerts tremendous pressure on an employer to settle on the union's terms. An employer cannot put countervailing pressure on the union by continuing to operate during a labour dispute through new employees. This is both unfair and inconsistent with the basic tenet of collective bargaining, which is an equality of bargaining power.

If the Government does not remove the prohibition on replacement workers, then the Coalition submits that it is imperative that after an employer has been inactive for two years as a result of a labour dispute, the union's bargaining rights should be terminated. If the employees still want to work for that employer, this should give them some incentive to compromise their position to get a collective agreement. Or, to put it another way, it would give an employer some measure of bargaining power, to partially compensate for the inability to operate during a labour dispute by hiring new employees.

Finally, the Coalition supports the proposal of the Independent Contractors and Businesses Association to amend the *Code* to allow parties in the construction industry to terminate their relationship upon the expiry of a collective agreement. This is necessary to correct the inequality of bargaining power that exists in the construction industry, given the nature of construction trade unions as akin to labour brokers referring workers for specific projects, and the fact that union members can, and do, freely work for non-union firms.

3. Picketing

The Coalition was an intervenor in the *KMart v. UFCW* case involving consumer leafleting throughout the process of this case up to the Supreme Court of Canada. Since the Supreme Court's decision in 1999, the Coalition has advocated for the Government to introduce a reformed definition of consumer leafleting to comply with the Court's decision. In the Coalition's submission, it is vital that the definition of picketing which is adopted be one which is truly reflective of the Court's decision, and which does not open the door to conduct which would not have been considered by the Supreme Court of Canada to be permissible consumer leafleting.

In its decision in *KMart v. UFCW*, the Supreme Court emphasized a number of features of the consumer leafleting at issue before it in that case, which rendered the leafleting conduct worthy of constitutional protection from restriction. Those features included the accurate, non-defamatory content of the leaflets, the fact that the leaflets did not encourage or entice the commission of tortious or unlawful acts, the absence of coercion or intimidation in the manner of distribution of the leaflets, the fact that consumers were not prevented from entering the store and the fact that the leafleting activity did not have the purpose or effect of interfering with deliveries and suppliers or with the attendance at work of employees of the store.

It is important that any definition of permissible leafleting adopted by the Legislature make clear that these are necessary preconditions to the conduct being permissible.

In its discussion paper, the Government has put forward two possible definitions of consumer leafleting for consideration. The Coalition recommends that the second proposed definition be adopted as this definition is the most precise and will most clearly delineate permissible conduct from that which is impermissible and properly restrained. This Government should be cognizant of not disrupting, more than is absolutely necessary, the existing legislative scheme regulating picketing. This is particularly important in light of the Supreme Court of Canada's recent decision in *Pepsi-Cola*, dealing with common law restrictions on secondary picketing.

4. Definition of Manager

In its Discussion Paper, the Government notes that it has been proposed that the definition of a "manager", for the purposes of identifying persons who are excluded from bargaining units under the *Code* should be expanded to include members of the "management team". The Coalition agrees with and supports this proposal. It is important to expand the definition of "manager" to include members of the management team because this will more realistically reflect the way that businesses are actually organized and the distribution of decision-making authority within them. Further, it will better reflect the reasonable perceptions of participants in the workplace, both management and employees, as to who is a "manager" and thus ought properly to be excluded from collective bargaining.

Not only would this change better reflect reality in the structure of employment relationships, but it would also hopefully reduce the amount of litigation which takes place under the current definition of "manager".

5. Purposes of the Code

The Coalition agrees with the proposed amendments, set out in the Discussion Paper, with respect to the purposes of the Code. The proposed changes properly reflect an increased emphasis on the rights and mutual obligations of all three parties: employers, employees and trade unions, which should aid in the enhancement of the rights of employees to make free and informed decisions about trade union representation and collective bargaining matters.

Further, the proposed changes also emphasize the need for decisions with respect to labour relations and collective bargaining to be made keeping in mind the goal and necessity of maintaining the productivity and competitiveness of British Columbia businesses.

6. Review of the Code

The Coalition believes that a full tri-partite review of the *Code* is neither necessary nor advisable at the present time. The current revisions to the *Code* are necessary to correct the imbalances created the NDP Government under the 1993 *Code*. Further, the present process of offering Discussion Papers for comment by stakeholders provides an adequate opportunity for stakeholder participation in the reform process.

7. Duty of Fair Representation Complaints

The Coalition supports any steps which may be taken to streamline and deal more effectively and efficiently with s. 12 complaints filed by trade union members. However, the goal of a streamlined process must not be to simply process these issues more quickly, but to ensure that s. 12 complainants are given an efficient and effective forum in which to have their complaints heard and resolved. In many cases, this will require an adjudicative forum with access to a form of oral hearing.

An appropriate mechanism for addressing s. 12 issues is the introduction of a Labour Ombudsman, who could assist in preventing and resolving issues arising between union members and trade unions. The office of the Labour Ombudsman, with power to investigate complaints of improper or unlawful exercise of authority or discretion on the part of trade unions or employer organizations, and to issue recommendations to resolve such issues, was provided for in the original *Labour Code* introduced in 1973 (although these provisions never became operative). In the Coalition's opinion, the Labour Ombudsman should now be implemented. This should reduce substantially the number of s. 12 complaints, by providing union members with a more accessible means of resolving problems within their unions.

8. Successorship After Bankruptcy

The Coalition agrees with and supports the option set out in the Discussion Paper of eliminating the possibility of successorship after the bankruptcy of a business. It is in the public interest to promote the reentry into the marketplace of business principals who are willing to take entrepreneurial risks, and the reuse of the assets of businesses which have failed. To require entrepreneurs who endeavour to renew or revive failed business enterprises to carry with them the collective bargaining obligations of the failed business imposes an unwarranted and often unbearable burden on the new business.

The elimination of successorship after bankruptcy would not impose any hardship on employees or result in deprivation of access to collective bargaining. If the employees of the new enterprise wish to have trade union representation and to negotiate a collective agreement suitable to the circumstances of the new enterprise, they are free to do so.

9. Essential Services Designations

The Coalition supports the idea of giving LRB mediators dealing with essential services issues the ability to adjudicate issues upon which the parties cannot agree, so long as there is an appeal mechanism within the Board.

10. LRB Review of Arbitration Awards

The Coalition believes that the current LRB jurisdiction to review arbitration awards should be retained. However, the Coalition believes that a user fee should be charged for this review process, which would cover the LRB's costs in providing the review. This would ensure that s. 99 review applications are not being filed simply as a matter of form, but where important substantive issues are raised.

11. Reconsideration of Board Decisions

The Coalition supports some reduction in or limitation on the scope of reconsideration, while ensuring that the Board retains the ability to maintain consistency in Board policy through reconsideration on important policy issues. Further, the Coalition supports the consistent enforcement by the Board of its power to grant or deny leave for reconsideration, so as to ensure that the reconsideration power is utilized to deal with important policy and natural justice issues. Finally, the Coalition supports a streamlined process on reconsideration applications such that applications can be adjudicated more quickly than is the case at present.

12. Expedited Arbitration

While the Coalition supports the existence and use of expedited arbitration procedures, the Coalition also submits that the s. 104 system should not take the place of privately negotiated and agreed expedited arbitration processes. Parties who wish to should be able to "contract out" of the s. 104 by adopting their own expedition arbitration processes in their collective agreements, including processes for appointment of arbitrators. This protects labour arbitration as a private dispute resolution process agreed to by the parties to the collective agreement, and ensures that those parties who wish to can control their own selection of arbitrator in all cases.

13. Deadlines for Certain LRB Processes

The Coalition agrees that LRB deadlines for the filing of various applications be changed from "calendar days" to "working days". However, the Coalition submits that this change should be applied with respect to all deadlines or timelines in the *Code* in order to avoid confusion.

14. Fees for LRB Services and Privatization of Mediation Services (16)

The Coalition supports the introduction of user fees, at a minimum for s. 99 appeals of arbitration awards but potentially for all LRB services, if necessary in order for the LRB to retain its current levels of service. The Coalition further supports the introduction of fees for mediation services and/or the privatization of those services for parties with experience in collective bargaining. The exception to this is that it is in the public interest and consistent with the purposes of the *Code* to provide free mediation services for a maximum period of perhaps four days' mediation time, to parties engaged in bargaining a first collective agreement under s. 55 of the *Code*.

15. Strike Vote Supervision

The Coalition believes that the Board should supervise strike votes in the same way as other votes under the *Code*. The issue being determined in a strike vote is as important as that being decided in any other vote under the Code, and the possibility of undue influence, coercion or the lack of a secret ballot is at least as high, if not greater, due to the presence of only one party to the dispute -- the union.

16. Use of LRB Members

While the Coalition agrees that Members could play a useful role in ensuring that practical labour relations considerations are brought to bear in Labour Relations Board decisions, the Coalition respectfully submits that, over the past several years, the Member program has not fulfilled its potential.

The Coalition queries whether the continued maintenance of the Member program can be justified in light of the fiscal restraints facing the Labour Relations Board. If the Member program is to be continued, Members must be carefully selected to represent a full cross-section of the employer community, in particular, and must be carefully utilized in areas where they are most likely to make a valuable contribution.

17. Partial Decertification

The Coalition recognizes that the Labour Relations Board has revised its approach to partial decertification so as to make decertification more accessible for distinct groups of employees within a bargaining unit, and that the Board is currently in the process of adjudicating a number of partial decertification cases which are likely to further refine the Board's approach to such applications.

However, the present process undertaken by the Board in dealing with partial decertification applications is overly cumbersome, time-consuming and litigious. It often results in such applications not even getting to an initial hearing for some six months after the application is filed. This is not consistent with giving effect to employee wishes with respect to trade union representation.

In the Coalition's submission, the *Code* or the *Regulations* should be amended to require that an immediate vote be scheduled on all partial decertification applications which demonstrate the requisite support for the application, just as is the case with certification and regular decertification applications. In that way, a record can be made of the wishes of employees at the time the application is filed, as is the case with other applications dealing with representational wishes.

Conclusion

These are the submissions of the Coalition of BC Businesses with respect to labour law reform in British Columbia, and in response to the Government's Discussion Paper. The Coalition would be pleased to discuss any or all of these points further with Government.

Proposed Amendments to the free speech and unfair labour practice provisions of the *Labour Relations Code*

Coalition of BC Businesses

Section 8

Amend to read as follows:

> Nothing in this Code deprives a person of the freedom to express his or her views on any matter, including matters relating to an employer or a trade union, provided he or she does not intimidation, coercion or threats.

Section 6(1)

Amend to read as follows:

> **6(1)** An employer or a person acting on behalf of an employer must not participate in or interfere with the formation or administration of a trade union or contribute financial or other support to it.

Section 6(3)(d)

Amend to read as follows:

> **6(3)** An employer or a person acting on behalf of an employer must not
>
> > **(d) s**eek by intimidation, by dismissal, by threat of dismissal or by any other kind of threat, or by the imposition of a penalty, to compel an employee to refrain from becoming or continuing to be a member or officer or representative of a trade union.

Section 14

Amend by deleting s. 14(4)(f) – the remedial certification provision.