# COALITION OF BC BUSINESSES

913 10th Street, New Westminster, BC V3M 4A5
Phone: 604-682-8366 / Fax: 604-525-1409
www.labourpolicies.com

# Submission to
# Labour Relations Code Review Committee

**February 21, 2003**

The **Coalition of BC Businesses** was formed in 1992 to represent the voice of small and medium-sized businesses in the development of British Columbia's labour and employment policies.

The Coalition is made up of organizations that collectively represent over 50,000 small and medium-sized businesses active in all sectors of BC's diverse economy in communities throughout the province. The Coalition's focus is the development of labour policies that will help foster a positive relationship between employers and employees and a climate for new economic growth, opportunities and jobs.

**SUBMISSION OF THE COALITION OF BC BUSINESSES**
**TO THE BRITISH COLUMBIA**
***LABOUR RELATIONS CODE* REVIEW COMMITTEE**

## I. INTRODUCTION

The Coalition of BC Businesses (the "Coalition") is pleased to have this opportunity to provide submissions on behalf of its members to the *Labour Relations Code* Review Committee.

The Coalition is made up of associations representing small and medium-sized businesses in virtually all sectors of the BC economy.

Since 1992, the Coalition has been the voice of the small and medium size business employers with respect to regulation of employment matters in the province, including labour relations, employment standards, human rights and WCB issues. In 2000, the Coalition published *Labour Policies that Work,* which outlines the Coalition's view of the principles that should guide the regulations of employment matters in the province.

Throughout its existence, the Coalition's position has been that employment policies in British Columbia should reflect the principles of fairness, realism, flexibility and individual choice, so as to allow employers and employees in British Columbia to best fashion a workplace which meets the needs of the enterprise and its employees, and which allows the enterprise to successfully compete within the global marketplace. The best situation for employers and employees in British Columbia is one in which new and existing business can flourish, with the result that job creation and job opportunities are increased.

In the context of labour relations, the Coalition believes that British Columbia's collective bargaining laws must be premised upon and reflect two fundamental principles: employee free choice and enterprise-based bargaining which reflects the needs and circumstances of individual business enterprises. Collective bargaining is only valid and effective insofar as it is representative of the true wishes of the employees of a business enterprise, and businesses can only succeed where the terms and conditions of employment for the employees reflect the particular needs and circumstances of that enterprise.

In the Coalition's view, the 1990's saw these fundamental principles of collective bargaining significantly undermined, to the extent that our collective bargaining regime was no longer serving the interests of employees and employers. Some progress has been made over the last two years in reaffirming these principles, but more needs to be done in order to ensure that we have a fair and effective collective bargaining system, which truly reflects the wishes of employees and the needs and circumstances of individual business enterprises. This is necessary to ensure that BC's economy continues on the path to recovery, to the benefit of all British Columbians.

Below, the Coalition will address a number of the points set out in the Committee's Terms of Reference, as well as some additional areas in which the Coalition believes that consideration should be given to legislative change, in order to achieve a collective bargaining regime that truly serves the interests of our province.

## II. SUBMISSIONS ON THE MATTERS ENUMERATED IN THE TERMS OF REFERENCE OF THE COMMITTEE

The Coalition will address these matters in the order in which they are set out in the Terms of Reference.

### ISSUE 1: Definition of an Employee

The Coalition submits that the definition of a "manager" for the purposes of the *Code* must be clear and straightforward and must accord with the realities of the workplace. In relation to the specific question posed in the Terms of Reference, the Coalition supports expanding the definition of "manager" for the purposes of identifying persons who are excluded from bargaining units under the *Labour Relations Code* ("the *Code*"), to include members of the "management team".

The Coalition believes that the current approach by the Board to defining managers solely in relation to their disciplinary authority over other employees is, with respect, too narrow, with the result that it includes, in a bargaining unit, persons who have a serious conflict of interest with the other members of the bargaining unit.

In many businesses, there are persons who make important decisions about the allocation and expenditure of the resources of the business, as well as the direction of the business and/or the method of carrying out certain functions of the business. These decisions have significant repercussions for the business and all participants in it. These decisions can affect, directly or indirectly, the job security and prospects for employees of the business.

However, if these persons do not have direct hiring and disciplinary authority over employees, they are not considered managers for the purposes of the *Code*, and fall to be included in a bargaining unit. This leaves the Employer in an untenable position because it is then unable to have these employees continue to perform their important job functions because their duties to the Employer and their membership in the bargaining unit are in a direct conflict.

The Coalition is cognizant of the need to ensure that employees are not unnecessarily deprived of the right to access collective bargaining without a clear rationale for their exclusion from a bargaining unit. However, in the Coalition's submission, it is equally important that an employer be able to demand from its management team undivided loyalty so as to be certain that all members of its management team are making decisions in the best interests of the business.

The Coalition also believes that expanding the definition of manager to include all members of the management team would likely also aid in preventing unfair labour practices and simplifying the resolution of complaints when they occur. Members of the bargaining unit have a much larger scope to express their views regarding the advantages and disadvantages of trade union representation. However, most persons who are members of a management team are perceived as management by the employees in a prospective bargaining unit. This confusion often results in these persons' conduct and stated views being attributed to management.

A clear and easily understood definition of manager which includes those employees who are perceived to be members of management because they are part of the management team, will help to reduce the number of unfair labour practice complaints because the confusion regarding the status of those employees will be eliminated. Management will have the ability to ensure that managerial employees comply with the requirements of the *Code*, while bargaining unit members will be free to exercise their broader right to free speech.

Finally, and in any event, the Coalition submits that to expand the definition of manager to include all members of the management team would not, in fact, deprive a significant number of employees of access to collective bargaining. Unions rarely seek to include employees who are members of the management team in the bargaining unit, as these employees most often do not support the union's organizing efforts. The current inclusion of these individuals within the definition of employees under the *Code* is, therefore, really a polite fiction that fails to accord with either the reality of the business or the conduct of a union organizing campaign.

**ISSUE 2: Picketing**

The Coalition submits that the Legislature must re-enact a definition of picketing in the *Code*, so as to complete the statutory scheme for the regulation of picketing.

The Coalition was an intervenor in the *KMart v. UFCW* case, involving consumer leafleting throughout the progess 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.

Until recently, the absence of a statutory definition of picketing in the *Labour Relations Code* in the wake of the *KMart* decision was not a matter of great concern, because the Labour Relations Board, with the apparent acceptance of the labour relations community, was simply applying the Board's historical jurisprudence with respect to what constituted "picketing" for the purposes of the *Code*.

However, in the Coalition's submission, it has now become crucial that the Legislature act to re-enact a definition of picketing in the *Code*. There has recently been considerable doubt cast upon how picketing should be defined by the Board for the purposes of the

*Code* and, in particular, how the line should be drawn between leafleting and picketing at the premises of third parties to the labour dispute.

This issue has become more complex as a result of the Supreme Court of Canada's decision in *Pepsi-Cola* dealing with secondary picketing at common law. While it is fairly clear from the Court's decision in *Pepsi-Cola* that the Court did not intend to interfere with statutory schemes regulating picketing, such as exist in the BC *Code*, the absence of a statutory definition of picketing in the *Code* has raised questions about whether and how the Court's decision affects the definition of picketing in BC.

In a recent decision of the Board involving Overwaitea and the UFCW, one Vice-Chair of the Board ruled that, as a result of the *Pepsi-Cola* decision, many types of conduct which would clearly have been considered picketing in the past, such as carrying placards, were no longer necessarily to be considered picketing for the purposes of the *Code*. The Board drew what the Coalition submits are untenable distinctions between persons standing still with a placard and persons walking around with a placard, as well as distinctions based on the wording on the placard itself.

While this decision is currently under reconsideration by the Board (a reconsideration hearing was held February 17, 2003, in which the Coalition was an intervenor), the Coalition submits that it is essential that a definition of picketing be re-introduced, so as to ensure the integrity of the legislative scheme regulating picketing as a whole. At the *Overwaitea* reconsideration hearing the BC Federation of Labour argued that the result of the *Pepsi-Cola* decision is that the entirety of the legislative scheme regulating picketing in the *Code* should be struck down.

In the Coalition's submission, the legislative scheme in the *Code* regulating picketing has served the British Columbia labour relations community well for many years, and we should not be allowing the door to be opened to piecemeal attacks to that scheme due simply to the absence of a statutory definition of picketing.

Further, the Coalition submits that the statutory definition that is enacted must reflect as closely as possible the prior definition of picketing, subject to the modifications required by the Supreme Court of Canada's decision in the *KMart* case. As such, it should delineate clearly the circumstances in which consumer leafleting at the premises of a third party will be permissible. This is important so as to maintain as closely as possible the legislative balance struck by our picketing regime between the interests of employers, unions and employees.

In its decision in *KMart v. UFCW*, the Supreme Court emphasized a number of features of the consumer leafleting at issue before it 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 found to be permissible.

The Coalition offers the following revised definition of "picket" or "picketing" in s. 1(1) of the Code for consideration by the Review Committee:

> **"picket"** or **"picketing"** means attending at or near a person's place of business, operation or employment for the purpose of persuading or attempting to persuade anyone not to
>
> (a) enter that place of business, operations or employment,
> (b) deal in or handle that person's products, or
> (c) do business with that person,
>
> and a similar act at such a place that has an equivalent purpose, <u>but does not include consumer leafleting.</u>

Define "consumer leafleting" as follows:

> **"consumer leafleting"** means the distribution of lawful, accurate written information about a labour dispute to potential consumers of a place of business, operations or employment, where:
>
> (a) the information does not encourage or entice the commission of unlawful or tortious acts and is not misleading or defamatory;
> (b) the information is distributed in a manner which is not coercive or intimidating and which does not unduly impede access to or egress from the leafleted premises; and
> (c) the distribution of the information does not have the purpose or effect of preventing employees of the leafleted entity from working or interfering with the contractual relations between the leafleted entity and third parties.

In the Coalition's submission, the above language is clear and precise, ensures that freedom of expression is protected in the manner required by the Supreme Court of Canada, and will interfere no more than is necessary with the existing picketing regime.

**ISSUE 3: Unfair Labour Practices (Part 2)**

The fundamental principle of the *Code* upon which our collective bargaining system is based is employee free choice as to whether or not to have union representation. This applies not only to the initial period of the organizing campaign, but thereafter when the union is acting as the representative of the employees. The provisions of the *Code* must ensure that employees are truly able to exercise free choice with respect to all aspects of

their relationship with a trade union, and that they have the necessary information and resources to understand and to effectively pursue their choices.

In the Coalition's respectful submission, there must be symmetry in the *Code*'s provisions for and application to circumstances of certifications and decertifications, to the greatest degree possible, such that employees, employers and trade unions have equivalent rights and obligations in all situations relating to the exercise of employee choice whether or not to have union representation.

The Coalition submits that, at present, there is a serious imbalance in the *Code* with respect to the protections afforded to employees in the context of certification applications, as opposed to employees seeking to exercise a right to decertify. This imbalance arises in the following ways.

First, there are serious restrictions on an employer's ability to use any form of promise, threat, coercion or intimidation to try to prevent an employee from choosing to be represented by a union. However, there are virtually no such restrictions on a union using similar tactics to prevent a group of employees from seeking to decertify. Unions frequently threaten and indeed carry out loss of pension benefits, blacklisting, and other threats to job security, with respect to employees who are part of a bargaining unit which decertifies, in addition to disciplining employees who advocate in favour of decertification or spearhead a decertification attempt.

The Coalition submits that the unfair labour practice provisions of the *Code* should be expanded so as to ensure that employees enjoy the same protection from coercion, intimidation, threats or promises made by a trade union in the context of a decertification application as those which apply to employer conduct in the context of a certification application.

Second, employees who seek trade union representation through the certification process have access, through the union seeking to represent them, to both labour relations and legal advice and assistance throughout the process, from the commencement of an organizing campaign through what can be complex, lengthy and expensive Board proceedings.

By contrast, employees seeking to decertify are not only confronted by the opposition of the same trade union which is supposed to be "representing" them with respect to collective bargaining issues, but are almost always entirely without any assistance whatever in navigating the Board's processes. Further, if employees seek any advice or assistance from the employer in filing or pursuing a decertification application, this can result in the application being thrown on the basis of employer interference.

The Coalition submits that a more balanced approach should be taken in this regard, which would clarify that, unless there is coercion or intimidation involved, the provision to employees seeking to exercise rights under the *Code* of advice or assistance from any

source, including the employer, does not constitute an unfair labour practice or otherwise undermine an attempt by employees to exercise rights under the *Code*.

Finally, the Coalition submits that in raid situations, there is a lesser level of concern with respect to the above identified issues, as both *employees* who support the incumbent union and those who support a change in union representation will have access to support and assistance from a trade union in pursuing their interests. Further, given the presence of two competing unions, it is likely that each union will be able to sufficiently counter threats and inducements made by the other so as to ensure that employees are actually able to exercise free choice as to their union representative.

**ISSUE 4: Duty of Fair Representation Complaints**

The Coalition supports any steps that 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.

**ISSUE 5: Changes in Union Representation**

The principle of employee free choice means that employees must have the right to effectively change their minds about union representation, including which union represents them. However, this must be balanced with the disruption that is caused to a workplace by union representation issues, including the associated campaigns and workplace uncertainty.

In the Coalition's submission, given that raid applications appear to be more frequent and more disruptive in some industries or business sectors than in others, it may be appropriate for the Committee to give consideration to lengthening the period between raid applications on a sectoral or industry-specific basis.

**ISSUE 6: Revocation of Bargaining Rights -- Partial Decertification**

At present, there is a serious flaw in the current labour relations system in British Columbia, which is entirely contrary to the principle of employee free choice. That flaw is the inability of employee groups who form a discrete part of a larger bargaining and who choose to no longer be represented by the trade union to give effect to that choice.

The Coalition strongly submits that the *Code* must be amended to explicitly recognize a right to partial decertification. While it initially seemed that the Board had recognized in the *White Spot* partial decertification policy decision the importance of ensuring that employees had an effective right to choose not to continue with union representation, recent decisions of the Board have entirely undermined this policy and rendered access to partial decertification illusory.

The Board's recent decisions in the *7-Eleven* cases applying the partial decertification policy from *White Spot* make it virtually impossible for employees to achieve partial decertification. First, the Board has set a very high standard for employees putting together a partial decertification application -- they have to demonstrate in their application form why they themselves are an "appropriate bargaining unit", and that the bargaining unit remaining after they leave will also be appropriate.

Aside from the fact that this is a very complex area of labour law and employees cannot be expected to understand this test, much less clearly articulate the relevant arguments for their own situation, this is not a requirement that is imposed on unions applying for certification or variances. Rather, in those circumstances, the bargaining unit applied for is presumed to be appropriate unless the employer objects to it. There is no good reason for a different standard to be applied to employees seeking partial decertification, especially given that they are likely to be unrepresented.

Furthermore, the Board's ruling on this point applies regardless of whether the employee group applying for partial decertification could themselves be a stand-alone bargaining unit and/or were originally varied into a larger pre-existing bargaining unit, or whether they are simply a small segment of an otherwise integrated unit. Clearly in the former circumstances, it ought to be clear to all that the group seeking to leave is a sufficiently distinct group and thus is an appropriate unit and that the unit remaining will be appropriate for collective bargaining.

Second, the Board has now ruled that employees cannot apply for partial decertification after the Union has given notice to bargain a new collective agreement. Not only does this put control over these applications into the hands of the Union but, as in the *7-Eleven* case, collective bargaining can take months (it was over one year for 7-Eleven), thus depriving employees of their right to decertify for a very lengthy period. Further, this was not part of the policy enunciated in *White Spot*, where the Board stated that the impact on collective bargaining of granting the decertification should be just one of a number of factors to be considered by the Board.

Third, the Board's practice in dealing with these cases has made any real access for employees to partial decertification illusory. It is virtually impossible for employees to attempt partial decertification without legal counsel, which they are generally unable to obtain. The history of partial decertification applications at the Board is that they are opposed very strenuously by the affected trade union, with the result that they can take months or years to resolve. This is exacerbated by the fact that the Board does not process partial decertification applications on an expedited basis (in contrast to variance applications), but rather engages in a lengthy submission process before even proceeding to hold a vote of the employee group.

Therefore, the Coalition advocates the inclusion of a clear right to partial decertification in the *Code*, which clearly spells out the requirements for such applications and requires the Board to process them on an expedited basis if the requirements are met. Further, the Coalition submits that this provision in the *Code* should make it clear that employee groups who were varied into a larger bargaining unit at the time of certification are entitled to exercise a right to decertify on the same basis. This is the only way to ensure that these employees' choice to have union representation includes within it, as it must, the right to also choose at a later date to no longer have such representation.

**ISSUE 7: Revocation of Bargaining Rights due to Lengthy Shutdown**

The Coalition submits that the *Code* should be amended to provide 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.

The Coalition also believes 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 with 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.

**ISSUE 8: Applications for certification after a decertification**

The Coalition submits that the *Code* should be clarified to provide that there is a 10-month bar following a successful decertification on any union, including the union which has just been decertified, from applying for certification for the same group of employees.

The Coalition submits that the reason for the 10-month bar is to have a period of calm within the workplace, in which employees can assess whether they are satisfied with their choice to decertify, and for the workplace to recover from the disruption of the decertification process. It makes no sense to exempt from the bar the union which has just been decertified. This simply creates a potential see-saw of certification-decertification, depending upon the particular voting constituency on a given day. Further, to allow for such a see-saw is inappropriate where, because of the ten month time bar against decertifications which is statutorily provided to newly certified units, if the union was in fact recertified immediately after decertification, it would be protected for ten months from any further attempts at decertification.

The 10-month bar should simply apply to all trade unions seeking to organize a newly-decertified group of employees, regardless of the identity of the trade union.

**ISSUE 9: Successor Rights and Obligations -- Bankruptcy**

The Coalition strongly supports the elimination of the possibility of successorship after the bankruptcy of a business. It is in the public interest to promote the re-entry into the marketplace of business principals who are willing to take entrepreneurial risks, and the reuse of the assets of businesses that have failed. To require entrepreneurs who endeavour to renew or revive failed business enterprises to carry with them the collective bargaining obligations of that failed business imposes an unwarranted and often unbearable burden on the new business.

Collective bargaining rights attach to the "business" of the employer. On a bankruptcy, the business has ended. Currently, the successorship provisions place trade unions in an

entirely different position than any other entity or person that has previously dealt with the bankrupt business. The bankruptcy ends all other relationships and outstanding claims. It should end the collective bargaining relationship too.

Where a new entrepreneur or the owner of another business purchases the assets of a bankrupt entity, and starts a new enterprise utilizing those assets, this is a new business. The employees of that new enterprise must have the freedom to choose for themselves whether or not they wish to have union representation. In addition, if they choose to have union representation, they should have the ability to negotiate a collective agreement reflective of the needs and interests of both the new enterprise and the employees thereof.

**ISSUE 10: Successor Rights and Obligations -- Contracting Out**

The Coalition strongly opposes the introduction of any provisions which would provide for a successorship in cases of contracting out, whether in the situation of contracting out by an employer of work formerly performed by members of its bargaining unit, or where the work contracted out has initially been contracted to a unionized employer, and is later contracted to a different employer.

First, this type of provision would create a form of sectoral certification and sectoral bargaining which is entirely contrary to the premise of enterprise-based collective bargaining upon which our labour relations system is based, and which is necessary to ensure fair and effective collective bargaining consistent with the purposes of the *Code*.

Second, in both situations, this would impose collective agreement obligations on companies whose employees have not chosen union representation or have chosen representation by a different trade union. It would also require these companies to take the employees of another company, notwithstanding that one reason for the decision to award the contracted work to a particular company may be that the particular company has greater expertise in performing the work, or can perform the work more efficiently, than the company currently performing the work.

Third, and again in both situations, a provision of this nature would punish (through termination of employment or other forms of displacement) the employees of the business entity which successfully bids on a contract to provide services to a unionized employer.

Fundamentally, this type of provision is premised on the notion that there is something illegitimate either about an employer deciding to contract out services which it formerly performed in house, or about companies engaging in the business enterprise of providing selected services to other businesses, or both. That is simply not so.

The decision to contract certain functions to an outside firm with expertise in performing that function is an entirely legitimate business decision, and one which is generally undertaken because it is seen to be of benefit to the success of the primary business enterprise. The legitimacy of this decision is not altered because the employees currently

performing the function in question are unionized. And the decision to operate a business enterprise that provides specific services to other businesses is also entirely legitimate.

There are many avenues available to unions to endeavour to restrict an employer's ability to contract out, if the union believes that to be appropriate and legitimate in the context of a given business enterprise. First, the union can try to negotiate restrictions on contracting out. Many collective agreements contain such restrictions, which are carefully bargained in the context of the union, the employer, and the employees understanding the ramifications of that bargain within the workplace. Second, if the contracting out is either not *bona fide*, or is undertaken for the purpose of trying to dilute the union's bargaining rights, the union can challenge the situation in arbitration or through various provisions of the *Code*.

There is simply no basis for any further restriction on or undermining of what is otherwise an entirely valid business decision by a unionized employer to contract out some of the functions of the business enterprise. Nor is there any basis to deprive a legitimate contractor of the ability to perform the work with its own workforce and pursuant to the terms and conditions of employment that that contractor has negotiated with its own employees.

Further, there is no basis for requiring an employer with an existing business, whose employees have made their own decision regarding trade union representation, to displace its own employees just because it was successful in obtaining a contract that was formerly held by a unionized employer. Such a provision does not protect the rights of employees to freely choose whether they wish to be represented by a trade union, or to freely choose the trade union that they believe will best represent them.

The Coalition strongly urges the Committee to reject any notion of successorship in contracting out situations.

**ISSUE 11: Mergers of Union Locals**

The Coalition believes that this is primarily a matter for the labour community to address.

**ISSUE 12: First Collective Agreements**

The Coalition is opposed to changes to s. 55 that would either negate the requirement for a strike vote prior to the filing of a s. 55 application or would require that, in all cases, the Board order arbitration of a first contract if mediation is unsuccessful.

While the Coalition believes that the s. 55 process is of significant assistance to the parties to a new collective bargaining relationship to negotiate a first contract, the Coalition does not believe that the elimination of either the strike vote requirement or the ability to resort to strike/lockout in the context of a first collective agreement is warranted

or advisable. Indeed, the Coalition believes that this may undermine the utility and effectiveness of s. 55, as well as the legitimacy of this process in the eyes of the parties.

The requirement that a union succeed in a strike vote before either party makes recourse to the s. 55 process serves a number of purposes. First, it ensures that the parties have made genuine efforts to bargain about all issues before seeking the assistance of the Board under s. 55. Second, it ensures that the union maintains the support of the employees through the bargaining process and is actually advancing positions that are supported by the employees. Third, it demonstrates to the employer that the employees truly do support the union's position and are willing to engage in strike action in order to achieve their collective bargaining goals. Fourth, it puts pressure on the parties to make their best efforts to reach a negotiated agreement within a reasonable time frame. All of these elements assist in achieving negotiated settlements, which are reflective of the needs and interests of the parties.

Further, the ability of the Board to order that the parties resort to their strike or lockout rights is important to ensuring that the parties are genuinely working together to resolve the collective bargaining issues through the negotiation/mediation process. Eliminating the resort to strike/lockout would remove a substantial amount of pressure from both sides to reach a reasonable collective agreement.

Finally, the Coalition is opposed to greater intervention by the Board than is necessary in the negotiation of first collective agreements. While mediation assistance is beneficial, this should not take the place of free collective bargaining, which is best advanced by the parties making their best efforts to reach agreement, under the shadow of the economic sanctions, which can be imposed through the right to strike/lockout.

The existence of these potential sanctions goes a long way to ensuring that both parties are adopting reasonable and supportable positions and engaging in good faith collective bargaining, and are not seeking the assistance of the Board unless and until such efforts have been made.

**ISSUE 13: Last Offer Votes**

The Coalition strongly supports the retention in the *Code* of the option for "last offer votes". This option is important to ensure that collective bargaining outcomes reflect the interests of the employees of an enterprise. There are, on occasion, circumstances in which the position of the union or its bargaining committee deviates, or appears to deviate, from the interests of the majority of employees in the bargaining unit.

It is important in these circumstances that there be an avenue for the employer to put its position directly to the employees for their consideration, so that the employees can express their true wishes as to the terms of the collective agreement which will apply to them.

In the Coalition's submission, there is no sound basis for removal of the last offer vote provision from the *Code*.

**ISSUE 14: 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 expedited 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.

## III. ADDITIONAL ISSUES FOR THE CONSIDERATION OF THE COMMITTEE

The Coalition wishes to raise, for the consideration of the Committee, the following additional issues, which the Coalition submits are important to a fair and effective labour law regime in British Columbia.

### 1. Expedited hearings under s. 5(2) of the *Code*.

Recently, a number of trade unions have been making substantial use of the requirement in s. 5(2) that the Board hold hearings with respect to certain types of unfair labour practices within three days. While, in many cases, an urgent hearing may be warranted, the Coalition's concern is that s. 5(2) does not give the Board any discretion in determining whether to hold a hearing within three days, if the union does not agree to delay the matter.

This is an extremely difficult time frame for an employer to comply with, in terms of defending its actions, especially in proper cause cases, where the employer bears the onus and must proceed first. Further, the Board is not able to take into account that the Union might have delayed in filing the complaint -- one complaint was recently filed two months after the events in question, but the Board was still required to start the hearing within three days.

Therefore, the Coalition submits that s. 5(2) should altered to provide for discretion on the part of the Board as to whether to hold a hearing on an urgent basis, just as is the case for Part V applications for illegal strikes or picketing.

### 2. Remedial certification

The Board has recently ruled that s. 14(4)(f) of the *Code* still applies to allow the Board to order remedial certification without a certification vote. The Coalition submits that

this is inconsistent with the requirement for a secret ballot vote on all certification applications. Thus, the *Code* should be amended to clearly provide that the Board has the power to order a certification vote in circumstances where a union can demonstrate that it has been unable to achieve the requisite 45% membership support for a certification vote as a result of employer unfair labour practices, but should not provide for remedial certification without a vote.

A secret ballot vote, in conjunction with other remedies that the Board may provide, such as pre-vote meetings and publication of Board decisions, would be ample to remedy any likelihood of a continuing detrimental impact on the exercise of employee true wishes in a secret ballot certification vote.

### 3. Replacement workers

The Coalition submits that the restrictions on use of replacement workers in the *Code* must be repealed. Such provisions result in too great an imbalance between trade unions and employers, especially small business employers, in the context of a strike or lockout.

### 4. Regulation of picketing of provincial enterprises by employees of federally-regulated enterprises.

The Coalition submits that it is within the constitutional competence of the provincial legislature to include within the *Code* the regulation of picketing of provincially-regulated business enterprises in the province by employees of federally-regulated businesses. At present, as a result of the definition of "person" in the *Code*, which excludes persons governed by the *Canada Labour Code*, and the use of the term "person" in s. 67 of the *Code*, the Board lacks the power to regulate picketing by federally regulated employees at provincially regulated business enterprises in the province.

This results in a significant gap in the regulation of picketing, and creates significant problems for employers in the province who are picketed by employees engaged in a federally regulated labour dispute. Such employers cannot presently come to the Board for relief. Nor can they exercise the same rights as federally regulated employers under the *Canada Labour Code*, and require their own employees to cross the picket line and come to work. Such employers must go to BC Supreme Court in order to obtain relief from picketing, where their access to relief is likely to be very limited.

Therefore, the Coalition submits that it would be of great benefit to employers, trade unions and employees in the province to provide for regulation of picketing of provincially regulated businesses by employees of federally-regulated enterprises under the terms of the *Labour Relations Code*. All that would be required in order to achieve this is an amendment to the definition of "person" in s. 1 of the *Code* which makes clear that the exclusion from that definition of persons governed by the *Canada Labour Code* does not apply for the purposes of s. 67 of the *Code*.

## IV. CONCLUSION

The above are the submissions of the Coalition of BC Businesses. We would welcome the opportunity to address further any or all of these matters with the Review Committee.

## V. COALITION OF BC BUSINESSES MEMBERS

BC & Yukon Hotels Association
BC Automobile Dealers Association
BC Chamber of Commerce
BC Restaurant & Food Services Assn
BC Trucking Association
Building Owners & Managers Association
Building Supply Dealers Association
Canadian Federation of Independent Business
Canadian Home Builders Association
Canadian Restaurant & Foodservices Assn
Council of Tourism Associations of BC
Greenhouse & Nursery Trades
Independent Contractors and Businesses Assn.
Insurance Brokers Association of BC
Recreation Vehicle Dealers Assn. of BC
Retail BC
Retail Council of Canada
Steel Service Centers Institute
Vancouver Board of Trade
Western Silviculture Contractors Assn.