Submission to the Labour Code Review Panel

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March 18, 2024

Further to the February 2, 2024 invitation from the Panel to the labour relations community for submissions related to the Panel's review of the *Labour Relations Code*, the Independent Contractors and Businesses Association ("ICBA") is pleased to provide this submission. In addition, the ICBA would like to appear in person before the Panel on either May 6 in Surrey or May 7 in Vancouver.

By way of background, ICBA is the largest construction association in Canada. We're proud to represent more than 4,000 entrepreneurs, businesspeople, skilled construction professionals, independent contractors, sub-trades, and responsible resource development companies – who together employ more than 150,000 Canadians.

ICBA is the single largest sponsor of trades apprentices in British Columbia, with more than 2,000 people working toward their Red Seal accreditations. We also sponsor more female and Indigenous apprentices than any other group, association, union or business in B.C. Our group health, dental, and retirement business has more than doubled in the past few years, with more than 170,000 people relying on an ICBA Benefits plan. ICBA is also the industry leader in mental health services and public policy advocacy.

At the outset, we must note that our submission is relatively brief given the very short time frame provided for interested members of the labour relations community to offer comments. We also note that the government has given no indication of specific areas it wishes the Panel to explore in connection with possible further changes to the *Code*. Accordingly, we respectfully request that, as was done in 2018, an additional opportunity be provided to stakeholders to consider and respond to submissions to the Panel. Further, if the Panel decides to recommend significant changes to the *Code*, we suggest that these be outlined in an Interim Report, in order to give parties the opportunity to digest and respond to the recommendations.

The Economic and Business Environment

The current business environment in British Columbia is best described as fragile and uncertain. Many enterprises are struggling with significant debt, higher borrowing costs and reduced access to credit. Economic growth stalled last year after a solid 3.8% advance in real GDP in 2022. According to the 2024 B.C. budget, growth will barely reach 1% in 2024 and accelerate only modestly in 2025, even as the province's population continues to expand by at least 2% per annum. Rising business bankruptcies – up 142% in January on a year-over-year basis – are one sign of increased financial stress in the business community.[1] It is striking that private sector payroll jobs have scarcely risen at all in British Columbia since 2019, while public sector employment has soared by more than 20%.[2] These lopsided labour market dynamics are worrisome and fiscally unsustainable over time.

Last month, the chief economist of the Conference Board of Canada published an article on the "frail" Canadian economy and the risk of a prolonged period of stagnation.[3] Real per capita consumer spending is declining, even though overall employment has been growing. The national business environment, in the Conference Board's view, is "deteriorating dramatically." Aggregate business revenues have flatlined, "while financing costs and wages continue to climb." Many Canadian firms are grappling with high levels

[1] Innovation, Science and Economic Development Canada, February 2024.
[2] Business Council of B.C., B.C. Economic Review and Outlook, February 2024.
[3] Pedro Antunes, "A frail Canadian economy risks plunging into further turmoil," Globe and Mail, February 27, 2024.

of debt, and in goods-producing industries most are stuck with unusually large inventories with sales falling and "stock-to-sales ratios reminiscent of the early nineties recession." These observations apply to British Columbia as much as they do to Canada as a whole.

The next two years in particular will be a time when B.C. policymakers should be doing everything possible to shore up a struggling and – in some industries – shrinking business sector, and refrain from introducing policy measures that lead to higher costs and greater uncertainty for both small and medium-sized enterprises (SMEs) and the export-focused industries that largely underpin the province's prosperity.

This will require a shift in the provincial government's mindset and behaviour. Since 2017, government has been regularly adding fiscal and regulatory costs across the B.C. private sector. A study published last year by the Greater Vancouver Board of Trade concluded that from 2022 to 2024, "B.C. businesses are expected to pay a cumulative $6.5 billion in additional costs imposed by governments," with most of these attributable to decisions by the province.[4]

In truth, the Board of Trade's report significantly **underestimates** the true cost of government policy changes. That's because it does not systematically consider or quantify non-tax-related legislative and regulatory developments that have increased costs and complexity for parts of the private sector. Examples include many elements of the government's CleanBC plan, serial increases in the provincial minimum wage, other changes in the Employment Standards Act and regulations (such as, the introduction of a five-day sick pay rule), a host of new regulations adopted by WorkSafeBC, and a long list of environmental and land use policy measures that have impinged on access to Crown land and resources as well as the day-to-day activities of companies operating in the affected industries. We would also include the *Labour Code* changes made following the 2018 review (discussed below) and the B.C. government's sudden move, amidst the COVID pandemic in 2022, to scrap the secret ballot vote for union certification drives.

More recently, again absent any consultation or engagement with the employer community, the government has amended the *Code* to update and widen the definition of a "strike," such that labour disputes in industries falling under federal jurisdiction will now result in more disruptions to industries under provincial jurisdiction, thereby making it harder for some B.C. businesses to function during future strikes and lockouts in federally regulated sectors. ICBA is greatly troubled that this rash decision was made before the Labour Code Review Panel has completed its work. Further comments on this matter are provided later in this submission.

A Look Back: The 2018 Report

On August 31, 2018, the previous Panel (prior Panel member Barry Dong has been replaced by Ms. Thomson) issued a comprehensive report, *"Recommendations for Amendments to the Labour Relations Code"*, that considered a wide range of submissions from across the B.C. labour relations community (the "2018 Report")

[4] Greater Vancouver Board of Trade, Counting the Costs, 2023. This estimate does not include measures announced in the 2024 B.C. budget.

The 2018 Panel issued 29 formal recommendations. It also included several additional recommendations not to implement certain changes, notably in the areas of sectoral bargaining and certification and secondary picketing. More will be said on these issues below.

One of the key principles recognized by the 2018 Panel was the need to ensure an appropriate balance in labour relations legislation and avoid "pendulum swings" that render legislative changes unsustainable from one administration to the next. The Panel made the following comments on this important issue:

> *There have been a number of pendulum swings in important Code provisions over the past 30 years largely depending on the governing political party. This is not consistent with predictability, certainty or balance. Although not an easy task, it is essential to avoid pendulum swings by implementing balanced changes that are sustainable. Certainty and predictability are important considerations for investment decisions and the competitive position of B.C. in an increasingly globalized economy.*
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> *In our view, the principles enunciated by the Woods Task Force and Professor Weiler in striking a balance between the interest of employers to operate their businesses and the right of employees to join unions remain important and relevant.*
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> *Collective bargaining and freedom of association are essential features of Canadian society and must be given meaningful effect. At the same time creating an environment supportive of business, particularly in the context of our rapidly changing economy, is also important.*
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> *Labour relations in B.C. should not result in a binary mutually exclusive choice between the protection of fundamental workers' rights, productivity and business success. Economic growth can be achieved alongside flexible, innovative protections and practices under the Code.*[5]

The Panel's comments were sound and remain relevant to today's economic and labour relations environment. The need to avoid disruptive policy shifts was key to the 2018 Report and, ultimately, to the legitimacy and acceptability of the current process of reform of the *Code*. Inherent in this are several critical considerations: certainty; predictability; balance; sustainability; and investment and competitiveness.

The Panel's comments in 2018 also reflected the lessons learned from a review of British Columbia's labour relations history, as outlined in the 2018 Report and in the submissions made by the Joint Business Community in 2018.[6]

The Pendulum Has Indeed Swung

[5] *A Report to the Honourable Harry Bains Minister of Labour; Recommendations for Amendments to the Labour Relations Code*, Submitted by the Labour Relations Code Review Panel, Michael Fleming, Sandra Banister, Q.C., Barry Dong, August 31, 2018, at p.7.

[6] See, for example, Joint Business Community Submission to the Minister of Labour, March 20, 2018 ("March 20, 2018, Joint Submission"), at pages 3-5.

The pendulum has now significantly swung out of balance as result of both the adopted 2018 recommendations as well as further legislative changes made by the provincial government that either exceed or, in one key instance, ignore the 2018 Panel recommendations.

i. The Adopted Recommendations

As noted above, the 2018 Panel made twenty-nine formal recommendations. Almost all were intended to enhance the rights of unions and their ability to seek certification of unrepresented employees. Virtually all the recommendations were adopted in some form by the government in the 2019 *Code* changes[7]. Some of the main ones were:

- Automatic successorship in certain sectors upon re-tendering of a contract[8]
- Increased discretion for the Labour Relations Board to impose remedial certifications
- Period between certification application and vote shortened to 5 business days
- Directed that raid periods in the construction sector occur in July and August of each year[9]
- Permitted applications to re-open collective agreements after a successful raid
- Excluded education as an essential service
- Removed strike vote requirement for access to first collective agreement mediation/arbitration
- Allowed employer conduct during certification process to be considered in the first collective agreement mediation/arbitration process
- Extended freeze on decertification applications
- Doubled validity of union membership evidence to 180 days

As can be seen from the above, the adopted recommendations were all intended to, and did, "swing the pendulum" – in some cases quite sharply – in one direction: toward organized labour and away from the interests and concerns of the entrepreneurs and small and medium-sized business owners who make up most of the province's private sector economy. With such significant amendments to the *Code*, one would ordinarily expect a period for the labour relations community to adapt to these changes and the impact on the affected businesses. The 2018 Report expressly recognized the wisdom of an incremental approach in several areas, most notably with respect to its recommendation to retain the secret ballot until the impact of the other "enhanced measures" could be assessed.[10]

Unfortunately, an incremental approach evidently did not suit the B.C. government.

ii. Additional Changes

In 2022, the provincial government swung the pendulum even further by making additional statutory changes to the *Code*.[11]

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[7] *Labour Relations Code Amendment Act, 2019* (Bill 30 - 2019)

[8] It is important to note that the actual *Code* change went beyond the Committee's recommendation. Specifically, the 2018 Report recommended that food services *in the health sector* fall within the scope of the automatic successorship provisions. The 2019 amendments to Section 35 do not have such a limitation, such that all "food services" without any further definition fall within the scope of the provision. This has already led to anomalous results. See, for example, *Sky Café*, 2023 BCLRB 61, application for reconsideration pending.

[9] But left in place the limitation that the raid period be in the final year of a three-year agreement.

[10] 2018 Report, p. 12

[11] *Labour Relations Code Amendment Act, 2022* (Bill 10 – 2022) ("Bill 10")

Elimination of the Secret Ballot

By far the most significant new change was to remove the right for employees to privately express their choice about union representation by way of a secret ballot for certification applications.[12] In taking this far-reaching and controversial step, the government ignored the majority recommendation from the 2018 Panel -- a recommendation that was guided by the need to maintain a balanced approach and proceed in an incremental fashion. The Panel articulated this balance as follows:

> *In the majority's view, notwithstanding the legitimate concerns relating to the secret ballot vote, it is the most consistent with our democratic norms, protects the fundamental right of freedom of association and choice, and is preferred. However, the exercise of that right must be protected by meaningful and effective remedial authority.*
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> *…*
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> *The exercise of employee choice through certification votes must be protected by shortening the time-frame for votes, ensuring the expeditious and efficient processing of certification applications and unfair labour practice complaints, together with expansion of the Board's remedial authority. If these enhanced measures are not effective, then there will be a compelling argument for a card check system.*[13]

There is no evidence that the "enhanced measures" referred to by the 2018 Panel have been ineffective, or that there have been a material number of unfair labour practice complaints or findings from the Labour Relations Board in this regard. In fact, the removal of the secret ballot short-circuited the balanced approach recommended by the Panel in 2018.

Given the lack of evidence that the enhanced measures have failed to address any concerns about employer interference, we submit that the current Panel should re-confirm its 2018 recommendation that the secret ballot be maintained (in present circumstances, restored), and that this fundamental democratic right should be reinstated to ensure that neither side in a certification drive is able to use intimidation or exert undue influence over the outcome.

As can be seen from the Labour Relations Board's recently published annual report,[14] the removal of the secret ballot has already had a major impact. There has been an enormous jump in certification applications and orders, with 2023 seeing the highest number of certification applications since 2001, when B.C. last had card-check in place. Over 90% of these applications resulted in certification orders. At the very least, the current Panel should take this very significant change into account when considering the "pendulum swing" that has occurred and whether the pendulum should be swung further.

Annual Raid Periods in the Construction Sector

The 2018 Report recognized the disruptive nature of raids in the workplace and noted that British Columbia was an outlier in Canada in this area. The Panel observed as follows:

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[12] *Ibid*

[13] 2018 Report, p. 12

[14] 2023 Annual Report of the British Columbia Labour Relations Board, published March 1, 2024

> *Although employees should have a right to change their bargaining representative, raids are divisive and disruptive to employers, unions, and employees. In the public consultation process, there was considerable support from unions and employers for reducing the frequency of the open period for raids to correspond to other Canadian jurisdictions. The annual open period in B.C. is the exception in Canada.*[15]

As a result, the Panel recommended that the raid period be eliminated for the first two years of any collective agreement, and then become annual after that in the seventh and eighth month of the agreement.

In response to submissions from the B.C. and Yukon Territory Building and Construction Trades Council and the Bargaining Council of B.C. Building Trades Unions, the 2018 Panel recommended that the raid period in the construction sector be legislated to be in July and August, rather than in the seventh and eighth months of the agreement. Both recommendations were accepted and implemented in the 2019 *Code* changes. However, in 2022 the government reversed, in part, the 2019 changes that had been recommended by the Panel and implemented an annual raid period in the construction sector beginning in the first year of the agreement.[16]

Enabling Federally Regulated Picketing to Harm British Columbia Businesses

As noted above, even during this current review, the government has introduced legislation that seeks to further swing the pendulum in favour of organized labour by tabling Bill 9.[17] These amendments to the *Code* will permit provincially regulated employees to refuse to cross picket lines set up by striking employees from federally regulated employers. This change is very ill-considered and will allow work stoppages outside the jurisdiction of the B.C. Labour Relations Board to spill over and potentially have a profound impact on provincially regulated businesses that are not involved in the labour dispute, yet who could have their operations shut down by federally regulated picketers with little or no recourse. These changes run directly contrary to the *Code* duty to "minimize the effects of labour disputes on persons who are not involved in those disputes."[18]

Bill 9 was tabled without any consultation with the labour relations community and without any opportunity for this Panel to seek submissions or assess its potential impact. We respectfully urge the Panel to take this most recent pendulum swing into account when considering whether the appropriate balance is being brought to *Code* reform.

The Current Review

In conducting its review, it is important for the Panel to consider the many amendments to the *Labour Relations Code* that have been made over a relatively short period of time and ensure that it is guided by the same principles it adopted and articulated at pages 6-7 of the 2018 Report.

The labour policy pendulum has shifted significantly, and the employer community is concerned that changes aimed at swinging the pendulum further will create a significant imbalance that will have a

[15] *Ibid*, p. 15
[16] Bill 10, Section 1
[17] Bill 9 – 2024, *Miscellaneous Statutes Amendment Act, 2024,* Section 57
[18] Section 2(f), *Labour Relations Code* [RSBC 1996] c. 244

detrimental effect on investment, jobs and business confidence in B.C. Any further amendments to the *Code* should only be contemplated if compelling evidence emerges to show that such changes are necessary to maintain balance in labour relations, or are needed to attract investment, jobs and opportunity. We are aware of no such evidence. Nor has the government provided any relevant evidence or other information on this matter.

Given the lack of any clear guidance in the terms of reference provided by the Panel on the nature, scope or scale of changes being contemplated, we are left to speculate as to what further *Code* changes are being sought by other parties -- or the government. Drawing on previous employer community submissions and other public statements, we will address two potential positions that may be advanced by some representatives or organized labour - sectoral certification/bargaining and secondary picketing.

i. Sectoral Bargaining/Certification

The mandatory imposition of a sectoral certification or bargaining scheme would be a profound alteration of the labour relations model in the affected sector. The labour relations community is already in the process of adapting to the significant pendulum swing brought about by the 2019 and 2022 *Code* changes. To now go further and proceed with sweeping structural bargaining changes in certain sectors would be highly destabilizing to businesses in these sectors and strip away all pretense of a balanced approach to labour relations in this province. Rather, any such series of *Code* amendments would be remembered as one of the periodic pendulum swings in B.C. history referenced by the 2018 Panel Report – developments inconsistent with "predictability, certainty or balance". Coupled with the breadth of the 2019 and 2022 *Code* amendments, the addition of mandatory sectoral bargaining would constitute one of the most dramatic pendulum swings the province has ever experienced.

As explained in the 2018 Joint Business Community submission, signed by thirteen (13) organizations representing every part of B.C.'s economy, the imposition of a legislated sectoral bargaining scheme undermines the rights of autonomy and self-determination protected by Section 2(d) of the *Charter of Rights & Freedoms*.

We repeat from the 2018 Joint Business Community submission on this point, as follows:

> *These schemes violate the Code principle that employees and the parties be given a direct voice in the terms and conditions which will govern employment. Only in this way will they be able to ensure their employment relations and collective agreements reflect the needs and circumstances of their individual businesses. This is currently reflected in the 1992-3 ("cooperative participation") and 2002 (fostering "the employment of workers in economically viable businesses") reforms in the Code. These directions should not be undermined.*
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> *This is particularly imperative for small and medium-sized businesses. They are the engine of economic growth and job creation in our economy. It is imperative that they should not be over regulated. Their success is needed to provide opportunities for people to support their families and build their communities.*
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> *Legislated sectoral bargaining removes the ability of employees and their employers to directly address the individual needs and circumstances of their businesses. It thereby inhibits their ability to succeed. It does so by ignoring and negating the key insights in the 1992-93*

and 2002 reforms. Legislated sectoral bargaining would be a step back in time, not forward. It is noteworthy that the previous attempt at forced sectoral bargaining in Part 4.1 of the Code was a failure and the sectoralism which remains in the CLR-Building Trades situation is still replete with difficulties and declining market share despite multiple efforts to rescue it.

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

Further, if it is felt that certain publicly funded services have problematic labour relations, the answer is not a one-size-fits-all amendment to the Code affecting all parties, including the critically-important private sector. Instead, the proper response would be for government to identify those specific problematic situations and address them through the mandate and funding of the applicable commercial contracts. That would surgically, as well as transparently, address the issues without causing harm beyond the specific circumstances.

Accordingly, improper attempts to dictate employee choice or the parties' labour relations through either project labour agreements or legislated sectoral bargaining should be rejected.

It is important to note that labour relations has evolved in important ways – workers want more flexibility and more choice and employers are structuring their businesses to be more flexible and to be able to respond more rapidly to changes in technology that are driving changes in customer needs and desires.[19]

As noted by the Panel in its 2018 Report, British Columbia would be an outlier in North America, should it proceed down the path of sectoral certification. The imposed combination of competing employers with different bargaining histories, financial positions, customers, and economic circumstances into a single bargaining unit would be both unworkable and potentially extremely harmful to at least some of those businesses. The Panel expressly recognized these concerns in the 2018 Report and concluded that there was "insufficient information and analysis" upon which to make any recommendations. The 2018 Report stated that this matter should be examined in depth, perhaps by a single-issue commission.[20] Such an analysis has not been done, and this Panel is left in the same position today as it was in 2018.

The 2018 Panel came to the same conclusion with respect to sectoral bargaining. It recognized that there was insufficient information to support the consideration of sectoral bargaining, and it did not view itself as the appropriate forum to address the issue. Rather, it recommended that this topic be examined by Section 80 industry councils and, if appropriate, an industrial inquiry commission. Once again, this has not been done, and we submit that there is no basis for this Panel to reach any other conclusion.

The concerns recognized by the Panel in 2018 are equally applicable today. We maintain, as we did in 2018, that there is no basis upon which to engage in the inquiries suggested by the 2018 Report, with the consequent uncertainty that this surely would introduce into the labour relations environment.[21] However, at the very least, nothing has occurred since 2018 to suggest that the current Panel should

[19] March 20, 2018, Joint Submission, p.6-7
[20] 2018 Report, p. 17
[21] November 30, 2018, Joint Submission, p. 8 & 10

abandon the 2018 conclusions and now embark on a consideration of sectoral bargaining and certification.

ii. Secondary Picketing

We also submit that this Panel should continue to resist any suggestion that it consider upsetting the long-standing and delicate balance between the replacement worker provisions in the *Code* and the restriction on picketing other than at an employee's place of work.

As noted in 2018 in the Joint Business Community submission,

> *…the restriction on replacement workers in section 68 does provide a fair counter- balance to the restrictions on picketing in Part V of the Code. In that regard, you may hear from the union community that they feel the picketing provisions of the Code are too restrictive. They are restrictive, but the restrictions were brought about piece-by-piece as a result of hard-earned experience in which the workplaces and workforces of BC were unduly harmed under previous picketing provisions. The classic example of this is from the forest industry. Previous picketing provisions allowed a striking union to picket the entire operations of the employer. For the integrated forest companies, which dominated both the industry and the economy of the province at the time, this meant that striking sawmill workers could also picket the non-struck pulp mills, and striking pulp workers could picket the non-struck sawmills. This proved harmful not just to the employers but also to the non-striking workers and the economy of the province itself. Restricting picketing to sites where the striking employees actually worked was necessary.*
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> *The current picketing provisions in the Code are the very sort of legislated scheme expressly allowed by the Supreme Court of Canada in Pepsi. Further, in the BC Code they are uniquely balanced by the most restrictive replacement worker provision in Canada, if not in all Wagner Act labour codes. To be fair and balanced, any amendment of the Code's current picketing provisions would also require the removal of the replacement worker provision.*[22]

In the 2018 Report, the Panel agreed that the appropriate balance had been struck by these *Code* provisions, and explained its position as follows:

> *The restrictions on both secondary picketing and the use of replacement workers during a labour dispute were proposed by the 1992 Report which recommended the Code should restrict the picketing of a secondary location provided the ability to use replacement workers was also restricted. Those corresponding restrictions were intended to provide balance and enhance industrial stability. We agree that is an appropriate balance.*
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> *There has been a significant decline in person days lost due to labour disputes in B.C. since the mid -1990s. Employers maintain the Code has been an important factor in this decline. While additional factors play a role, we agree that Sections 65 and 68 have contributed to this decline. The restrictions on secondary picketing and the use of replacement workers were intended to be a package. In our view, the countervailing restrictions on secondary*

[22] March 20, 2018, Joint Submission, p. 10

picketing and use of replacement workers during a labour dispute have worked well and should be maintained.[23]

We believe this conclusion remains as correct now as it was in 2018, and that nothing has occurred in the meantime to indicate that this balance should now be upset in the manner that in the past has been proposed by some unions.

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ICBA appreciates the opportunity to share the views of our member companies and affiliated industry organizations on the current *Labour Code* review. We look forward to engaging with the Panel and B.C. policymakers on the issues that will be examined during your review.

[23] 2018 Report, p. 26