CPHR British Columbia & Yukon

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VIA EMAIL

3 August 2018

URGENT AND CONFIDENTIAL (but subject to public disclosure requirements)

To: Labour Relations Code Review Panel c/o Michael Fleming - Chair of Panel
From: CPHR BC & Yukon

Re: CPHR BC & Yukon Submission on Labour Relations Code Review

On behalf of the Chartered Professionals in Human Resources Association of B.C. & Yukon ("CPHR BC"), we are pleased to make this late submission to your panel.

CPHR BC only first formed a Public Policy Committee to address public policy topics affecting human resource professionals in July, 2018. This submission was thus drafted in great haste in hopes of receiving consideration by the panel, who we understand are drafting their report to the Minister. We appreciate that we missed the formal deadline for submissions by affected and interested parties to your panel. That was simply due to our organization having no experience participating in such consultations, nor any framework such as the Public Policy Committee for doing so. We therefore hope you will nonetheless give consideration to our submission below given our Association represents over **5,800 human resource professionals and their service providers and advisors in B.C**. Many of our members work every day in labour relations within the framework of the Labour Relations Code ("LRC") and so are not only directly affected by any changes to the LRC but offer a wealth of practical experience on the topics addressed below.

We attach as Appendix A a more complete summary of CPHR BC as an organization.

Scope of Submission

Given the tight timing, the Public Policy Committee decided to concentrate on a total of 7 substantive areas of possible reform, as well as 2 procedural ones and to limit ourselves to a short summary of the Association's views.

Our members, while typically working for an employer, play a unique mediating role, often serving as a trusted intermediary between both individual employees and their unions and management. We have tried to stay true to this unique perspective in the submissions which follow.

Substantive Areas of Reform

1. Proposed Card Check Certification

Our Association feels the current promptly held secret certification vote system works effectively and do not support a move to "card check" certification. Other organizations, including the International Labour Organization, have pointed out the many reasons why the secret ballot is widely considered the best and fairest method of certification in a "monopoly representation" model of union representations like we have in B.C. (i.e. Wagner Act model of union representation where once certified a union enjoys monopoly powers of representation). We feel that card check certification would be to open to several potential risks which could lead to certification that does not reflect majority employee preferences, including the following:

a) Some employees signing cards not appreciating the consequences, including due to language barriers in some cases. A more formal LRB-supervised vote conveys the importance of the decision to unionize by voting, as opposed to the less self-evident implications of signing a card, much more clearly;

b) Employees who have signed cards changing their minds, in some cases after receiving more information on unionization, but not being able to make, knowing how to take the

formal steps or effort to cancel their card in a valid manner to remove the card from the count;

c) Employees being subject to "peer pressure" from others supporting unionization and signing a card to "get along" or "fit in";

d) Employees being induced into signing a card based on either misunderstandings of the role and powers of a union or, in a few cases, outright misrepresentations by organizers (see below).

We also believe a formal vote, in which substantially all potentially impacted employees get to "have their say" gives more legitimacy to the outcome, both for the employees and the employer, than the more informal card collection drive approach. Under a secret ballot, each employee has a confidential opportunity to express their preference on certification, whereas a card drive may not even reach some employees who are nonetheless then forced into the union.

As the LRC allows very short and infrequent windows of a month or two every few years, employees seeking to change their minds and decertify, face a daunting process under the LRC. Given the barriers to decertification, it is critical that the fundamental and de facto quasi-permanent decision to be certified to a union, with all the limits it places on individual employees' economic freedom to contract for their own terms of employment, be made based on a LRB supervised secret ballot.

2. Union Access to Employee Contact Information

Our Association understand that with the more distributed modern workforce, it can be very challenging for unions to even contact workers to organize them. However, as the guardians of the privacy of employees' personal information, including contact information, HR professionals are reluctant to grant a blanket right of union access to employee contact information ("ECI"). CPHR BC would support an approach with checks and balances to both protect employee privacy and prevent misuse of ECI. Some suggestions would be that:

a) The LRB verify a minimum level of support (e.g. 20%) and lack of other practical means of contacting employees before ordering union access to ECI from the employer;

b) ECI provided by the employer to be limited to work emails and phone numbers only. Unions would almost certainly prefer to use "non-work" contact but can use the work contact information to obtain that from willing employees;

c) Unions using ECI provided by the employer would be required to explain to employees contacted that the ECI was provided by statutory requirement, not volunteered by their employer;

d) Unions be required to both seek affirmative written consent to continue communicating with employees beyond the initial contact and provide an easy and effective means for employees to terminate all further communications by a union e.g. an easy to use "unsubscribe" link on emails. This will prevent unwanted repetitive use of the contact information.

We believe these requirements reflect existing privacy and electronic communications (e.g. Canada's Anti-Spam Law aka "CASL") legislation which requires consent of a recipient to such contact while still allowing unions to have an initial point of contact.

3. Employer Rights of Expression During Organization

We understand some may be pushing for further curtailment of the current limited employer rights to communicate employer views on unionization under the LRC. Our Association does not support change to the current regime on this topic. We believe the current rules, which allow the LRB to strike a balance between the employer's constitutional right and critical economic interest in communicating its views on proposed unionization, as well as explanatory information on the impact of unionization and bargaining powers of unions and "coercive" employer communications. The existing case law strikes the appropriate balance in CPHR BC's view. We

question whether any further curtailment of employers' rights to communicate would be contrary to Charter freedom of expression rights of employers.

4. Sanctions for Union Misrepresentations

While not in any way suggesting that all or even most union organization drives succeed because of misrepresentations by union supporters and organizers, this is a common problem often made worse by language barriers and a general lack of knowledge amongst employees of how our labour relations system works e.g. by way of examples only: how difficult it is to decertify, the impact of monopoly union representation on employer and employee rights to set their own terms of employment.

One employer reported that after a recent certification drive was successful after a vote, a significant number of employees who were recent immigrants showed up at the HR office asking the employer to grant or facilitate granting immigration visas for family members overseas. They stated to HR that they been given the impression that unionization would empower the employer to grant such visas or facilitate them when this was simply not true. They may well have voted for the union based on such a fundamental misrepresentation/misunderstanding. This case demonstrates the need for controls on such misrepresentations that are rarely challenged or remedied under the current law.

We therefore suggest that the LRC be amended to include specific provisions prohibiting misrepresentations as union Unfair Labour Practises. Breach would allow the LRB to provide remedies, from mandating corrective communications through to holding a second certification vote or even denial of certification in cases of material misrepresentations such as described above.

5. Secondary Picketing

CPHR BC understands unions are asking for expansion of existing rights to engage in secondary picketing and related tactics. We consider the current regime, which we note also bans

replacement workers, a key trade-off in the area of employer options to mitigate the impact of a strike, strikes the right balance between union and employer, as well as third party suppliers/business partners interests and generally reasonably protects third parties from being the incidental victims of strike action by a union. We are not aware of any compelling evidence to show that employers are abusing the current rules.

6. Education as an Essential Service

Feedback from members indicates support for our Association's view that favouring no change to the current regime under which elementary and secondary education is deemed an "essential service" and thus teachers and support staff may be subject to mandatory minimum staffing requirements during strikes. In the modern economy, most union or non-union households, including the many single parent households, do not have a person at home (or elsewhere) able to look after children who cannot go to school during a strike. They depend on the education system to provide both education and care for their children. Without it, they are unable to work or are forced to make difficult last minute decisions about child care to keep their jobs, including potentially exposing their children to unsafe or unsupportive care arrangements out of necessity. By contrast, education workers, who are highly unionized, still enjoy strong leverage in collective bargaining even under the current rules.

7. Successorship on "Contracting/Recontracting Out"

We understand the labour movement is pressing for automatic certification of new employers taking over the provisions of contracted out services. Given the increasing prevalence of contracted services, such as for food and housekeeping in the health and residential care sectors but also elsewhere (e.g. building services, contract mining services), this is understandable. However, CPHR BC does not support a blanket approach to full traditional successor employer obligations in all contracting out or "recontracting" situations.

On first time contracting out, where the contracting out is permitted by the collective agreement and keeping in mind that as many unions negotiate for limits on contracting out, those without them must be deemed to implicitly accept some contracting out risk. We therefore see no need to amend the LRC "successor employer" provisions on this point, as they have generally been applied in a practical way in such cases by the LRB. Moreover, contracting/recontracting out is often done for competitive costing reasons and forcing a new service provider to adopt a prior service provider's collective agreement may fundamentally undermine any potential for such competitive efficiencies in labour costs, which are commonly a very high portion of total service provider costs.

Furthermore, any automatic successorship on contracting/recontracting out undermines the fundamental (and constitutional) right of the actual affected employees to choose union representation or not so exceptions to a secret vote should be rare.

In cases of "recontracting", i.e. an employer obtaining a new service provider to provide the already contracted out services, there may be situations where the new service provider should be required to recognize the certification only, but not be bound by the collective agreement and the full range of traditional "successor employer" obligations, which extends to being liable for pending grievances etc. The test for such "mandatory recognition" should be a flexible one but based primarily on whether the new provider has hired all or most of the existing unionized workforce.

Procedural Issues

8. Expanded Availability of Interest Arbitration to Resolve Bargaining Impasse

Feedback from some members leads us to support considering modestly expanded rights in select cases of both employers and employees to seek binding arbitration to set collective agreement terms after impasse, but only on strict conditions which must include:

a) A finding by the LRB that the requesting party (and possibly the other party as well) has fully complied with the duty to bargain in good faith, with a remedial power to require further efforts be made before arbitration is ordered by the LRB; and

b) In most cases, the arbitrator must use a "final offer" or similar type of term-setting approach to the award to force the parties to really table their bottom line fairest offer rather than just digging in on a position in bargaining to then access arbitration in hopes that an arbitrator will award more than they have been able to bargain for.

9. Mandatory Pre-Hearing Mediation Rights

We understand some groups have suggested that a broader formalized role for mediation be included in the LRC. Although mediation is already a very popular and common form of dispute resolution both at the LRB and in arbitration, CPHR BC would support the right, analogous to the right of litigants in BC Supreme Court actions, of one party to require the other party to engage in a speedy mediation prior to an LRB or grievance arbitration hearing. Given the LRB already offers such mediation on request in LRB proceedings and that some leading arbitrators push or offer to the parties to mediate before commencing an arbitration hearing on the merits, we see formalizing a right of one party to require mediation as only a small further step. Such a non-consensual mediation will rarely be sought given the risk that an unwilling party may prove inflexible at an involuntary mediation, but may nonetheless be helpful in some cases. However, parties requiring urgent relief should not face further material delay due to an opponent's request to mediate. Thus we recommend some general timeliness requirements for completion of the mediation be included to protect against this risk.

Closing

In closing, CPHR BC and its Public Policy Committee are pleased to make this submission and hope the submissions above are helpful to the panel. Any questions should be directed to the Chair of the Public Policy Committee, J. Geoffrey Howard, ghoward@meplaw.ca 604-891-1184.

Sincerely,

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