COALITION OF BC BUSINESSES

BC's Labour Code Changes

Assessing the impact

May 2004

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Executive Summary

- This report measures whether the decisions of the BC Labour Relations Board between 2002 to present were consistent with the BC government's 2002 amendments to the *Labour Relations Code*.

- The report finds that Labour Board rulings on employer communications to employees were consistent with government amendments to protect individual employee rights. However, certain other Labour Board rulings, particularly those relating to partial decertification were inconsistent with government amendments to the *Code* to enhance individual employee rights and free choice about union representation.

Board Enhanced Employees' Right to Access Information

- Board decisions on employees' right to access information and opinions, including employer communications, on union-related matters were consistent with government amendments to the *Code* protecting individual employee rights.

- The Board gave fair interpretation to the amended section 8 of the *Code* that enhanced the right of employees to access all available information and opinions related to certification and decertification.

- In recent decisions, the Board supported the rights of employees to hear employers' views on the impact of unionism on a business and industry.

- The Board illuminated the employees' right to receive information from all available sources, noting that employer communications critical of the union would not constitute an unfair labour practice, even during certification drives, provided the messages were expressed as a "view."

- The Board came under fire from the labour movement for doing its job by interpreting legislative amendments to the *Code* that protect employees' right to access employer communications.

- The Board's ruling on picketing provided a clear and pragmatic approach to communication issues during union picketing in terms of what constitutes picketing and what type of labour activities will be included and exempted from the Board's regulation.

Board Limited Employees' Rights on Decertification and Fair Representation Complaints

- Board decisions on employee complaints against unions and applications for partial decertifications were inconsistent with the purposes and rationale behind government amendments to the *Code* protecting individual employee rights and promoting employee free choice about unionization.

- Board decisions advanced union interests ahead of individual member interests by consistently recognizing union interests over employee rights.

- On the issues of Duty of Fair Representation Complaints and partial decertification applications, the Board limited the rights of individual and minority groups of employees where these rights collided with the interests of the union.

- The process for employee complaints filed against a union (Section 12) is not user-friendly. Individual employee rights were undermined as the Board imposed difficult conditions on employees filing complaints against their union. Complaints would now have to be established from an evidentiary

basis before proceeding to a hearing, essentially requiring employees to retain legal counsel before approaching the Board. The Board also imposed a burdensome standard requiring employees to show that their union blatantly and recklessly disregarded the employees' interests.

- The Board has frustrated employee applications for partial decertifications by placing very complex legal and evidentiary burdens on applicants and by taking the approach that any employer funding for employees' legal fees in these matters is *per se* illegal.

Little Emphasis to Date on *Code's* Economic Goals

- The Board arrived at a fair interpretation of the government's amendment to section 2 of the *Code,* where the Board recognized that the economic goals of competitiveness and investment need to be encouraged in every labour relations activity and decision.

- Despite the government's legislative amendment to the *Code* promoting "viable businesses" and the Board's emphasis on competitiveness and investment, a recent decision suggests that the Board has not made this goal a priority.

Recommendations

Recommendations to Labour Relations Board

- Board decisions should continue to reflect the *Code's* emphasis on employee rights by ensuring employees have access to information and opinions on union-related matters, including communications from employers.

- The Board should carry out government amendments to the *Code* that empower individual employee rights by relaxing some of the rigid standards and requirements for employees who seek to decertify part of a larger bargaining unit.

Recommendations to BC Government

- Government amendments to the *Labour Relations Code* in 2002 added more balance and fairness to labour relations in BC. Government reforms provided a framework for labour and management to build healthy workplaces and competitive enterprises that can succeed in the global market.

- The job of developing fair and balanced labour laws in BC is incomplete. Protecting the individual rights of employees and fostering economically viable businesses are paramount goals for the BC government. The BC government should move forward with a second wave of priority *Labour Relations Code* amendments focused on:

    1. *Unfair labour practices* — The BC Government should ensure that the rights and restrictions on employees, employers and unions are the same during certification and decertification drives.

2. *Partial decertification* — The BC Government should amend the *Code* so that the rules governing decertification are the same as for certification. A group of employees must have the right to decertify if they no longer want union representation and they should not be confronted with difficult rules or unnecessary roadblocks in doing so.

3. *Successorship rights* — The BC Government should amend the *Code* so that employees have a choice about union representation when a bankrupt business is restarted. The new owners should not be required to inherit the previous union certification and collective agreement.

4. *Picketing* — The BC government should enact a new definition of picketing to provide clarity in terms of what constitutes picketing and what type of labour activities will be included and exempted from the Board's regulation. For certainty, the definition should be enshrined in legislation.

5. *Replacement Workers* — The BC government should amend BC's labour laws to allow an employer to maintain business operations by hiring replacement workers when a union applies pressure through a strike or walk out designed to paralyze a business.

1.0 Coalition of BC Businesses

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 economic growth, opportunities and jobs.

1.1 Coalition Principles and Approach

Since 1992, the Coalition of BC Businesses has played an active role representing member businesses 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 regulation of employment matters in the province. In 2003, the Coalition submitted recommendations to the BC *Labour Relations Code* Review Committee.

The Coalition's position is that employment policies in British Columbia should reflect the principles of fairness, realism, flexibility and individual choice. Policies should allow employers and employees in British Columbia to design 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, these fundamental principles of collective bargaining were significantly undermined in the 1990s, to the extent that our collective bargaining system 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. BC's economic recovery depends on it.

2.0 Introduction

The following report is an analysis of decisions rendered by the BC Labour Relations Board between January 2002 and the present. The purpose of this report is to determine whether the Board's decisions were consistent with the BC government's legislative amendments to the *Labour Relations Code* in 2002.

The report tests the Board's interpretation and application of the *Code* against the stated principles in Bill 42—*the Labour Relations Code Amendment Act*. The new principles recognize the rights and obligations of employers, employees and unions, and the need to foster employment in economically viable businesses.

Shortly after forming government, the BC Liberals charted a new course in labour policy consistent with its New Era commitments to create a more flexible and a modern work environment and to restore workers' rights and modernize employment standards.

Government amendments to the *Code* provided a framework for labour and management to build healthy workplaces and competitive enterprises that can succeed in the global market.

BC government amendments to the Code restore workers' rights

The amendments provided greater protection for employees by ensuring that job security and viability of business are considered in Board decisions. The BC government's *Labour Relations Code* amendments included:

- Restoring workers' democratic right to a secret ballot vote on certification and ensuring the same rules apply for certification as decertification
- Replacing the membership card-based system for certification with a mandatory secret ballot vote in all cases
- Legislating employers' right to free speech during certification drives
- Restoring all workers' right to negotiate contracts by outlawing sectoral bargaining
- Adding a clause to the Purposes Section of the *Code* to ensure that continuing financial viability of a business is considered when Board decisions are rendered

The government's labour law amendments sent a clear message to the labour relations community and to investors that labour relations in British Columbia are not only fair and balanced, but they support provincial growth and prosperity.

The application of these labour law reforms would be put to the test by the Labour Relations Board, whose job is to interpret the *Code,* resolve complaints, hear applications for union certification and decertification, regulate collective bargaining, and help employers and employees reach collective agreements.

The decisions rendered by the Board beg the question, were the Board's decisions consistent with the government's amendments to provide greater protection and rights for individual employees? Did the decisions improve employee access to all relevant information and opinions related to certification and decertification, including communications from employers? And finally, did the decisions conform to the *Code*'s new emphasis to foster viable businesses?

Two general trends appear in the decisions rendered since January 2002. The first is increased access for employees to information and opinions on union-related issues. The Board has confirmed that the amended *Code* provides employees more access to employer communications even during certification drives.

The Board has drawn considerable fire from the labour movement for some of its rulings in this area. The Board has also, however, made clear that the expanded range of permissible speech applies as much to unions and employee organizers for unions as it does to employers.

The second trend is an apparent restriction of employee rights, where these rights conflict with union rights or interests. Whether or not this is an intended result, it is manifested in the Board's approach to partial decertification applications, and to a lesser degree, in the Board's approach to duty of fair representation complaints. (A partial decertification policy means that employees in multi-location collective agreements or portions of employees in a bargaining unit may be able to leave the bargaining unit.)

This trend is significant for two reasons. First, it undermines the Legislature's attempt, through amendments to the *Code,* to recognize and protect individual employee rights. Second, it strengthens the power of an incumbent union by making it more difficult for employees to challenge the decisions of and continued representation by their union.

Another development in labour relations worth noting is the Board's interpretation of the amended Purposes Section of the *Code*—i.e. *fostering the employment of workers in economically viable businesses*. The Board's interpretation of the section is significant in so far as it acknowledges a "statutory recognition of the need to find ways of enhancing productivity, competition and economic growth." The Board noted the importance of unions, employers and government working toward the realization of these economic goals in every labour relations activity and decision.

3.0 Increased Protection for Employer Free Speech

The Labour Relations Board has given fair interpretation to the amended section 8 of the *Code* that enhanced employee access to information and opinions related to union matters, including communications from employers.

3.1 New Amendments to *Code*

In 2002, the BC Government amended s. 8 of the *Code*. It now reads:

> *Right to communicate – Subject to the regulations, a person has the freedom to express his or her views on any matter, including matters relating to an employer, a trade union or the representation of employees by a trade union, provided that the person does not use intimidation or coercion.*

If there was any doubt that the amendment was intended to broaden the employees' right to gather all information and opinions on union issues, the Board's decisions interpreting the new s. 8 have laid that doubt to rest. The Board has, however, stated that an employer's right to communicate to employees will be balanced against the employees' freedom of association.

3.2 Employers' View as a Test of Free Speech

In recent decisions, the Board illuminated the employees' right to access union-related information, noting that employer communications critical of the union would not constitute an unfair labour practice provided the messages were expressed as a "view," even during certification drives.

The first case that considered the amended s. 8 was *Convergys Customer Management Canada Inc.*, BCLRB No. B62/2003 (upheld on reconsideration BCLRB No. B111/2003). The union complained of several unfair labour practices, including the employer's distribution of bulletins in which it expressed views that were critical of the union. One of the issues was whether or not these communications were protected by s. 8. The Board found that the comments were not coercive or intimidating, and said that, even if the comments were mistaken or inaccurate, so long as they reflected genuinely held views, they were protected by s. 8. In essence, the Board has correctly ruled that the real test now is whether or not speech by an employer is "coercive or intimidating."

…the Board illuminated the employees' right to access union-related information

In two cases—*Excell Agent Services Canada Co.* BCLRB No. 171/3003 and *RMH Teleservices Inc. v. British Columbia Government Employees Union* BCLRB No. B345/2003—the Board said that as long as the employer communication expressed a "view," it would not constitute an unfair labour practice, unless it was coercive or intimidating. A "view," the Board said, was a personally held opinion or belief, but would not extend to "acts taken in furtherance of those views" or "facilitating or formulating the speech of others."

In *RMH Teleservices Inc. v. British Columbia Government Employees Union* BCLRB No. B345/2003 the Board also made it clear that the amendments to s. 8 provide some latitude for the employer to express its opinions during an organizing drive. The Board focused on the means and the manner in which the message was conveyed in determining whether the

employer's views were genuinely held and thus protected by the *Code*.

In *RMH*, the Board found that a message that was critical of the union would not violate s. 8 of the *Code*, even if made during an organizing campaign, unless it were coercive or intimidating. The labour movement has attacked the *RMH* decision as allowing "American-style" anti-union campaigning by an employer, and has claimed that the Board went too far in favour of protecting employers in this decision, and farther than it was legislatively directed to go.

…the Board provided a clear and pragmatic approach to free speech issues during union picketing

This decision has been appealed, with virtually every major trade union in the province seeking to intervene in the appeal. The BC Federation of Labour passed a resolution stating that should the Labour Relations Board not grant an appeal, the BC Federation of Labour would boycott the Board. The Board has since constituted a Section 141 panel to hear the union's application for reconsideration of the decision and limited intervenor status has been granted.

Despite this increased protection for employees' right to access employer communications, knowingly false and derogatory comments about a union remain outside the purview of s. 8. Unfortunately, however, the Board seems to be continuing to apply something of a double standard with respect to speech by union supporters as compared to employers.

That is, the Board has said that the amended s. 8 does protect false comments about the employer and the impact of certification on job security by a union supporter: e.g. *BC Lottery Corporation*. It appears that the rationale for this differential treatment is a continued emphasis by the Board on the relative power of the speaking party to affect the economic security of the employees to whom the message is directed. The Board continues to underemphasize the coercive effect that a union organizer's statements could have on employees, relative to the effect of employer statements.

3.3 Clarifying Free Speech at the Picket Line

A recent ruling by the Board provided a clear and pragmatic approach to free speech issues during union picketing in terms of what constitutes picketing and what type of labour activities will be included and exempted from the Board's regulation.

In *Overwaitea Food Group, A Division of Great Pacific Industries Inc. and United Food and Commercial Workers International Union, Local 1518 et al.* BCLRB No. 361/2003, the union initiated a "leafleting" campaign in front of Overwaitea stores. The collective agreement had not yet expired and the employees did not have the right to strike. The employer applied to the Board for an order that the union had gone beyond leafleting and was engaged in prohibited picketing activity under the *Code*. The union members' actions included wearing signs and sandwich boards, resulting in some suppliers refusing to deliver goods across a perceived picket line.

This case raised the issue of the application of the Supreme Court of Canada's decisions relating to picketing and free speech in *Kmart* and *Pepsi-Cola*. The Original Panel of the Board addressed the issue of how to distinguish picketing from leafleting. The Panel held that the starting point was the recognition that leafleting was free speech and rejected Overwaitea's argument that the use of placards or other signage automatically constituted picketing. The Original Panel argued that placards may or may not constitute picketing and that the approach it was adopting required looking at the message

and the method of delivery. Applying this approach, the Original Panel found that some placards did constitute picketing because their message tried to invoke the response of a traditional picket line. Where the placards did not contain these messages, the Original Panel found they did not constitute picketing.

Overwaitea sought reconsideration of this decision. The Coalition of BC Businesses intervened in this appeal in support of Overwaitea, arguing for a clear and pragmatic approach to define picketing which recognized that the use of placards and "parading" was indeed a picketing activity and could and should be regulated as such.

The Reconsideration Panel rejected the approach of the Original Panel, noting that scrutinizing the message and method of delivery would lead to uncertainty in practice and prolonged litigation. It thus adopted the simpler approach advocated by the Coalition and Overwaitea: a bright line test between consumer leafleting (which would remain exempted from regulation by the Board pursuant to the *Kmart* case) and picketing. The Reconsideration Panel clarified this approach by saying that activities traditionally associated with picketing, such as wearing placards and signs will be enjoined. To determine whether conventional picketing is present, the Reconsideration Panel said it would look at factors like the number of individuals involved, their location, the nature of their activities and the presence or absence of placards or sign boards.

This decision provides clarity as to what constitutes picketing and it limits the type of activities that will be exempted from the Board's regulation. The issue was made more complicated by the provincial government's failure to enact a new definition of picketing in light of the *Kmart* decision. However, the Board did a good job in weighing the "free speech" interests enunciated by the Supreme Court of Canada and in coming up with a clear and pragmatic approach to this issue.

4.0 Restriction of Employee Rights

On the issues of Duty of Fair Representation Complaints and partial decertification applications, the Board has actually limited the rights of individual and minority groups of employees where these rights are at odds with the interests of the union. The Board's inclination to frustrate employee complaints against unions and employee applications for partial decertifications is inconsistent with government amendments to the *Code* protecting individual employee rights and promoting employee free choice about unionization.

4.1 New Purpose in the *Code*

One of the recent amendments to the *Code* was to change the purposes (now renamed the "duties") section of the *Code*. In addition to s. 2(b), the Legislature also added the following:

> *The board and other persons who exercise powers and perform duties under this Code must exercise the powers and perform the duties in a manner that*
>
> *(a) recognizes the rights and obligations of employees, employers and trade unions under this Code…*

By adding this purpose or duty to the *Code*, the Legislature gave express protection to employee rights, a protection that did not exist in this form before. This amendment is an important step in realizing that, notwithstanding the benefits of collective representation by a union, individual employee rights and freedom of choice should not be sacrificed.

Despite this amendment, it appears that the Board has limited, rather than expanded, the protection under the *Code* for individual employee rights in at least two contexts: Duty of Fair Representation Complaints (Section 12) and partial decertification applications.

4.2 Section 12 Complaints not User Friendly

A "Section 12" or "duty of fair representation complaint" can be filed by an employee against a union if the union acts in a manner that is arbitrary, discriminatory or in bad faith in representing the employee's interests.

Section 12 complaints occupy an inordinate amount of the Board's time and resources. However, the process for section 12 complaints is not user-friendly. The Board has established onerous conditions on employees filing complaints against their union. Complaints must be established from an evidentiary basis before proceeding to a hearing, effectively requiring employees to retain legal counsel before approaching the Board. The Board also imposed a difficult standard requiring employees to show that their union blatantly and recklessly disregarded the employees' interests.

The process for section 12 complaints is not user-friendly

In *Re Judd* (BCLRB No. B63/2003), the Board raised the bar for an employee seeking to establish that its union breached s. 12 of the *Code* by failing to represent him/her fairly. Although the Board asserted that it was not changing its jurisprudence in this area, the Board appears to have done more than merely clarify the existing case law. The Board stated that s. 12 was not to be used by employees as an appeal on the merits of union decisions, nor by employees who were simply unhappy with their union or who thought they were receiving poor service from their union.

The Board continued:

> *In this next section, we hope to correct the misconception: "make a complaint to the Board and they'll look into it". The Board is not a government agency that investigates unions. It is an independent and impartial adjudicative body like a court. If someone alleges a party has violated the Code, and wants to obtain a remedy for that violation, it is up to them to establish that the Code has been violated. It is up to them to make their case. (para. 72)*

While Section 12 complaints should not use the Board as an appeal route, the concern is that the evidentiary burden placed on employees is too high. The Board appears to be indicating that only those complaints that are clearly established from an evidentiary basis will succeed. This standard ignores the fact that most s.12 complainants are not represented by legal counsel at the Board.

In turning to the legal test to show a breach of s. 12, the Board said that it does not have the authority to intervene just because someone lied to someone else. Ironically, union dishonesty is not enough to apply the "bad faith" requirements in s. 12. Further, in relation to the reference to "arbitrary" in s. 12, the Board said that the employee would have to show that the union blatantly and recklessly disregarded the employee's interests. This imposes an extremely difficult standard on any employee seeking to show that its union acted contrary to s. 12.

The Board justified its narrow interpretation of s. 12 by resorting to the new purposes of the *Code*. It says that "an enlarged interpretation of s. 12 concepts would undermine the union's ability to control its resources and actions, and ultimately, would be detrimental to the rights of employees: Section 2(a)." However, it can also be argued that so prioritizing the union's ability to control its resources and actions may undermine the independent rights of employees who have no recourse other than through their union.

4.3 Reduced Employee Rights in Partial Decertifications

Employee rights should be paramount in all Board decisions related to partial decertification applications. The record shows, however, that the Board has actually frustrated employee applications for partial decertifications by placing very complex legal and evidentiary burdens on applicants and taking the approach that any employer funding for employees' legal fees in this regard is *per se* illegal.

In 2001, in the *White Spot* (BCLRB No. B440/99) decision, the Board significantly eased the test on employees seeking to obtain a partial decertification. However, in a number of decisions rendered since then, it has become clear that the Board is limiting any benefit that may have flowed to employees from the *White Spot* decision.

In *Re 7-Eleven, Inc.* (BCLRB No. B354/2002), the Reconsideration Panel overturned a decision to allow partial decertification applications from two different 7-Eleven stores on the basis that the employer and the union were engaged in collective bargaining at the time of the application. In *White Spot*, the Board said that the timing of the partial decertification application was a factor in the exercise of the Board's discretion over whether or not to allow the partial decertification.

However, the Reconsideration Panel in *7-Eleven* interpreted the *White Spot* decision as meaning that whenever the parties were in collective bargaining, the application would be dismissed (rather than a mere factor to consider). It also stretched the meaning of "during collective bargaining" to include situations where, as in *7-Eleven*, the union had sent to the employer a notice of its intention to commence bargaining,

but no real bargaining was underway, and the union had not even met with the employees.

…employee rights should be paramount in all Board decisions

The Original Panel in *7-Eleven* had allowed the applications based on the perceived unfairness of depriving the employees their right to be free from involvement in a dispute during negotiations. The Reconsideration Panel dismissed this justification, holding that no such right exists.

In another *7-Eleven* decision (BCLRB No. B331/2002), the Reconsideration Panel upheld the Original Panel's decision to dismiss a partial decertification application. The Original Panel had dismissed the application because the employee applicant failed to appear for the hearing at the Board and because the employee had failed to establish a *prima facie* case (a case that will succeed if no contradictory evidence is offered) in the parties' decertification application filed with the Board.

While the Reconsideration Panel did hold that the Original Panel erred in dismissing the application based on the employee's failure to attend, it held that the employee had not established a *prima facie* case that both the group seeking to leave the larger bargaining unit and the remaining bargaining unit were "appropriate bargaining units" under the *Code*. It noted that to do so, employees must provide details of evidence in support of each aspect of the test for a bargaining unit.

The employer argued that the Original Panel could have reviewed its own records to find a *prima facie* case, as the Board had recently granted a partial decertification to another 7-Eleven store in Langley. However, the Board held that it was not required to review its records to determine the validity of an application. That may seem reasonable in some cases, but not in this one. The applicant, who missed the hearing because of a medical appointment, reasonably assumed that her application met the requirements, given that the employees in Langley had been granted their application for partial decertification a short time before her application. The Board officer who reviewed her application had not advised her of any potential deficiencies in the application, and she had not been given notice of any objections to the application.

The Board's approach is not user-friendly. In this case, the Board placed an extreme onus on employees (most of whom appear before the Board without representation) to address the complex law and facts with respect to the issue of appropriate bargaining units, and to do so in their initial written application to the Board.

In another decision, *Re Starbucks Corp.* (BCLRB No. B233/2003), the Board took a further step in restricting the ability of employees to obtain a partial decertification, by deciding that the union could inquire into whether or not the employer paid the employees' legal fees associated with the application. The Board rejected the argument that such an inquiry would breach solicitor-client privilege and strongly suggested that if the union could show that the employer was paying the employees' legal fees, this could be evidence of employer interference with the employees' application.

In *Re 7-Eleven, Inc.* (BCLRB No. B204/2003), the Board went so far as to allow a union to make an independent unfair labour practice complaint with respect to partial decertification applications which had been dismissed almost six months before based on the issue of whether or not the employer paid the employees' legal fees. This complaint was allowed to proceed even though the Union's only evidence related to a different *7-Eleven* store in another part of the province involving different management and different legal counsel for the employer. The

employer and the employees' appeal of this decision was dismissed. However, the union ultimately withdrew the complaint (some two and a half years after the decertification applications were filed) when ordered by the Board to provide further details in support of its complaint.

It may be a legitimate inquiry to ask who funded a partial decertification application, if there is some indication that involvement by the employer had a coercive or intimidating effect on the employees involved in the application. However, the Board's approach to these cases thus far appears to indicate an attitude that any employer funding is *per se* illegal.

By combining this approach with the very complex legal and evidentiary burdens placed on applicants for partial decertification, it is apparent that this Board intends to make it more difficult, rather than easier, for employees to obtain partial decertifications. This is a surprising and disappointing turn following the *White Spot* decision, and seems inconsistent with the emphasis in the recent amendments to the *Code* on promoting employee free choice whether or not to be represented by a union.

5.0 Toward Increased Competitiveness and Productivity

The Board made a fair interpretation of the government's amendment to s. 2 of the *Code* where it recognizes that the economic goals of competitiveness and investment need to be encouraged in every labour relations activity and decision. However, despite the BC government's legislative amendment to the *Code* promoting "viable businesses" and the Board's stated goal of enhancing competitiveness and investment, there has yet to be any real application of this principle by the Board.

5.1 Board's Application of Section Two

Thus far, the Board has rendered one decision outlining its approach to the new s. 2 of the *Code*. In *Forest Industrial Relations Limited* (BCLRB No. B312/2003), the employer alleged that the union had breached s. 59 of the *Code* by conducting a strike vote before it had bargained with the employer in accordance with the *Code*.

The employer argued that the new s. 2 of the *Code* constituted a profound change requiring the Board to examine the quality and reasonableness of bargaining proposals to ensure they accord with the *Code's* purposes. In particular, the employer argued that the Board had a duty to ensure that parties not take to impasse bargaining proposals that will undermine the economic viability of a business. The Board rejected the employer's argument.

The Board did, however, characterize the amended s. 2 as a "statutory recognition of the need to find ways of enhancing productivity, competitiveness and economic growth." While the Board was not prepared to impose on the parties the goals of enhanced productivity and competitiveness, it did recognize the importance of these objectives and the fact that unions, employers and government all have an active role to play in realizing them. A number of cases currently before the Board have raised the issue of this new duty under s. 2, and it remains to be seen how much emphasis this provision will be given by the Board going forward.

6.0 Conclusion

Over the past two years, the Labour Relations Board has enhanced employees' rights to access information on union-related matters, employers' rights to speak about such matters, and has given a full and fair interpretation to the amended s. 8 as it relates to employer communications. These decisions of the Board were consistent with government amendments to the *Code* and are under significant attack from the labour movement. It remains to be seen whether the Board will "stay the course" in this regard.

In the areas of Duty of Fair Representation Complaints and partial decertification applications, however, the Board has effectively limited the rights of individual and minority groups of employees where these rights are at odds with the interests of the union. This is a surprising and disappointing result, especially in view of the legislative attempt to give more recognition to employee rights and free choice in the 2002 amendments to the *Code*.

Finally, notwithstanding the legislative goal of enhancing productivity and competitiveness in BC, and the government amendment adding s. 2(b) to the *Code*, this goal has not yet received significant attention in Board decisions, and it remains to be seen how the Board will address such arguments in future cases.

Government amendments to the *Labour Relations Code* in 2002 added more balance and fairness to labour relations in BC. Government reforms provided a framework for labour and management to build healthy workplaces and competitive enterprises that can succeed in the global market.

However, the job of developing fair and balanced labour laws in BC is incomplete. Protecting the individual rights of employees and fostering economically viable businesses are paramount goals for the province.

The Coalition encourages the government to continue down the road of labour law reform and carry out the *Labour Relations Code* changes outlined in the *Report of the BC Labour Relations Code Review Committee to the Minister of Skills Development and Labour, 2003.*

Recommendations to Labour Relations Board

- Board decisions should continue to reflect the *Code's* emphasis on employee rights by ensuring employees have access to information and opinions on union-related matters, including communications from employers.
- The Board should carry out government amendments to the *Code* that empower individual employee rights by relaxing some of the rigid standards and requirements for employees who seek to decertify part of a larger bargaining unit.

6.1 Partial Decertification

> *…the ultimate issue is whether employees have the right to determine, in appropriate circumstances, whether to continue to be represented by a trade union.*[1]

Employees working for franchise or multi-location operations have great difficulty exercising their right to decertify, and are often forced to remain unionized when they no longer want union representation. The Coalition of BC Businesses believes that a group of employees must have the right to decertify if they no longer want union representation, and that they should not be confronted with difficult rules or unnecessary roadblocks in doing so. The rules governing decertification should be the same as those for the certification process.

6.2 Unfair Labour Practice

> *Our research indicates that the Code itself may foster employers' perception of a difference between how unfair labour practices are treated in a certification compared to a decertification matter.*[2]

Unions argue that rights and restrictions should differ depending on whether the union is being certified or decertified because being a member of a union is a fundamental right. Employers believe that the right not to belong to a union is equally fundamental.

The Labour Relations Review Committee's Report acknowledges that the rights and restrictions on employees, employers and unions during certification and decertification drives should be the same, and that the current structure of the *Code* creates at least a perception that it favours unions and certifications over decertification.

[1] *Report of the BC Labour Relations Code Review Committee to the Minister of Skills Development and Labour*, April 11, 2003, p. 37
[2] Ibid, p. 24

The Coalition of BC Businesses believes that the rights and restrictions on employees, employers and unions should be the same during certification and decertification drives.

6.3 Successorship Rights and Obligations-Bankruptcy

> *It is clearly in the best interest of British Columbia that every opportunity be created to find a way to allow businesses in difficulty to continue, rather than being broken up with the assets being sold, possibly outside British Columbia.*[3]

Currently, if an entrepreneur tries to buy and resurrect a bankrupt business, the new business is covered by the certification and collective agreements of the old, bankrupt business. The current provisions undermine employee rights by essentially allowing jobs to be certified instead of workers. Employees of the new business are not given the choice of whether they want union representation or which union represents them. This occurs in spite of the fact that the pre-existing collective agreement may have been a contributing factor to the bankruptcy in the first place, and may be inconsistent with the successful operation of the new business.

The Coalition of BC Businesses believes that it is in the public interest to promote re-entry into the marketplace of business principals who are willing to take entrepreneurial risks and that employees should have the choice about whether to be represented by a union and which union that should be. Successorship rights after bankruptcy act as a deterrent to re-entry and frustrate employee free choice.

6.4 Replacement Workers

In keeping with the *Code's* new emphasis on fostering viable businesses, the government should amend BC's labour laws to allow an

[3] Ibid, p. 46

employer to maintain business operations by hiring replacement workers when a union applies pressure through a strike or walk out designed to paralyze a business.

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

Recommendations to BC Government

The BC government should move forward with a second wave of priority *Labour Relations Code* amendments focused on:

1. *Unfair labour practices* — The BC Government should ensure that the rights and restrictions on employees, employers and unions are the same during certification and decertification drives.

2. *Partial decertification* — The BC Government should amend the *Code* so that the rules governing decertification are the same as for certification. A group of employees must have the right to decertify if they no longer want union representation and they should not be confronted with difficult rules or unnecessary roadblocks in doing so.

3. *Successorship rights* — The BC Government should amend the *Code* so that employees have a choice about union representation when a bankrupt business is restarted. The new owners should not be required to inherit the previous union certification and collective agreement.

4. *Picketing* — The BC government should enact a new definition of picketing to provide clarity in terms of what constitutes picketing and what type of labour activities will be included and exempted from the Board's regulation. For certainty, the definition should be enshrined in legislation.

5. *Replacement Workers* — The BC government should amend BC's labour laws to allow an employer to maintain business operations by hiring replacement workers when a union applies pressure through a strike or walk out designed to paralyze a business.