Unifor Submission to the BC Labour Relations Code Review

March 2024

UNIFOR
theUnion | lesyndicat

Contact

Gavin McGarrigle
Western Regional Director
Gavin.McGarrigle@unifor.org

Unifor Submission to the BC Labour Relations Code Review 2024

Unifor is Canada's largest union in the private sector, representing 315,000 workers across all economic sectors, including nearly 30,000 workers in BC. As trade union members, we inherently recognize the immense importance of ensuring workers are able to collectively organize and bargain for good pay and decent working conditions. The nature of Canada's labour market is rapidly changing, particularly through the spread of digital platforms and decentralized work, and it has become more important than ever to review whether the *Labour Relations Code*, RSBC 1996, c 244 (the "*Code*") has remained relevant to current working environments and employment relationships.

In this context, Unifor applauds the BC government's recent efforts to address longstanding issues around workers' rights and benefits, including extending the right to unpaid job-protected parental and compassionate care leave, eliminating the liquor server minimum wage, establishing stronger protections for young workers, extending the recovery period for owed wages, and implementing paid sick leave, among other key measures. We also acknowledge the tremendous impact that the restoration of single-step certification has had upon extending the rights of collective bargaining to more workers across the province, and the other improvements to the *Code* as a result of Bill 30.[1]

However, much remains to be done to protect workers, including the most vulnerable workers performing what are increasingly fragmented and non-standardized forms of labour within the private sector. Misclassification and the absence of an available broad-based bargaining scheme – especially for those engaged in precarious work and in difficult-to-organize occupations and workplaces – continue to be fundamental issues that are undermining the province's capacity to protect workers from systemic abuse, overwork and low pay, which entrench existing inequalities. In what follows, Unifor makes a number of recommendations to address outstanding issues through reforms to the *Code*, as well as recommendations to promote the efficient resolution of disputes brought before the British Columbia Labour Relations Board (the "Board").

Summary of Unifor's Key Recommendations

1. Expand protections for gig workers and provide gig workers a meaningful path to unionization.
2. Create a scheme under the *Code* allowing for broad-based collective bargaining structures in the private sector.
3. Amend the *Code* to allow trade unions to apply to the Board to direct employers to provide early disclosure of employee lists and employee contact information.
4. Implement a pay equity regime in line with the federal *Pay Equity Act* and add a provision to the *Code* mandating that all collective agreements entered into after January 1, 2025, must contain a process to identify, evaluate and rectify any

[1] Bill 30 – *Labour Relations Code Amendment Act, 2019*.

systemic gender-based wage gaps, including a process for arbitration of any differences.

5. Amend the *Code* to require respondents to common employer and sale of business applications to present all facts uniquely within their knowledge material to such applications.
6. Grant the Board jurisdiction to adjudicate breaches of settlement agreements concerning complaints brought under the *Code*.
7. Amend the *Code* to ban an employer's use of any employee or contractor to perform bargaining unit work during a strike or lockout, and implement the recent amendments to the *Code* allowing provincially regulated workers to honour federally regulated picket lines.
8. Expand protections against contract flipping.

Recommendation 1: Expand protections for gig workers and provide gig workers a meaningful path to unionization.

Recommendations 1 to 3 of Unifor's submission go hand-in-hand. While Unifor recognizes that improvements to employment standards for gig workers under Bill 48 are matters that do not encompass the *Code*, Unifor maintains that any reform to employment standards aimed to protect the rapidly growing number of gig workers across the province must occur in lockstep with providing precarious workers in BC greater rights of representation and access to collective bargaining.[2] Simply put, the employment standards reforms in Bill 48 do not address some of the key vulnerabilities faced by gig workers – including the absence of paid sick leave, overtime, and a guaranteed wage floor that meets or exceeds the minimum wage, and Bill 48 did nothing to make the right to unionize for gig workers meaningful.

Organizing gig workers presents significant practical and legal hurdles under the current scheme for certification in the *Code*. The work of app-based dispatch companies, which comprises a significant portion of gig work, happens across broad geographic areas, with workers attending no centralized dispatch location, or any company location at all. Compounding this problem, app-based dispatch companies experience high turnover in their workforces. As a result, gig workers and unions alike have no practical means to identify an eligible list of employees or assess an appropriate bargaining unit of employees for purposes of applying to certify a new bargaining unit to bargain collectively.

Union organizing, and the certification scheme presently in place under the *Code*, was designed to provide access to unionization in more traditional workplaces—in a single-location worksite with a sizeable workforce. The nature of app-based dispatch work, however, is fundamentally different and the scheme for certification under the *Code* is not well suited to address the changing nature of workplaces and workplace technologies that create disperse and precarious work. As a consequence, the province should adopt a new

[2] Bill 48 – *Labour Statutes Amendment Act, 2023*.

certification scheme for workers in the app-based dispatch sector that provides a meaningful path to unionization by creating means for unions and employees to evaluate the number of workers employed by an app-based dispatch company, and an avenue for access to employee contact information in order to facilitate organizing efforts. Absent a legislative response to this issue, unions and gig workers face insurmountable obstacles in organizing and no meaningful path to access rights under the *Code*. Recommendations 2 and 3 in this submission support this framework.

Such reforms would recognize that gig work is quickly becoming the primary source of income for many workers across the province and gig workers should be afforded a right to organize and collectively bargaining without the significant legal and practical hurdles that presently exist.

Recommendation 2: Create a scheme under the Code allowing for broad-based collective bargaining structures in the private sector.

Possibly the most important change to address labour market inequity, and to enable large numbers of BC workers the opportunity to enjoy decent working conditions, would be to amend the *Code* to further expand collective bargaining coverage for workers in workplaces historically under-represented by unions.

Sectoral, multi-employer, and other broad-based bargaining are certainly not new concepts in Canada, and both federal and provincial governments, including BC, currently have legislation in place to support broad-based bargaining structures for workers in sectors such as construction, fisheries and the arts. Public sector bargaining structures in education and health care are also proven mechanisms for putting workers on a more even footing with employers.

Legislated rules for broad-based bargaining are absent primarily in the private sector and, in particular, for its most precarious workers and those working in difficult-to-organize sectors. According to the most recent *Labour Force Survey* data, among the 1.5 million private sector workers in BC without a union, fully one-third are found in just two industries: retail and hospitality.[3] Business strategies, the changing nature of workplaces as a result of technology, and failures of public policy have allowed this anomaly to become the norm.

The absence of a legislated broad-based bargaining scheme has also resulted in significant costs to the province. An example of the failure to implement a broad-based bargaining scheme can be seen in the BC container trucking industry where action by justifiably aggrieved drayage truckers has resulted in unexpected bargaining on a sectoral basis on numerous occasions. Each time the *ad hoc* sectoral bargaining structure of these units has become an issue, there has been significant disruption to activity at BC's ports, often the result of an undefined, unstructured, and conflict-fuelled industrial relations framework.

[3] Statistics Canada Table 14-10-0069-01

It is clear that BC's labour laws have not kept pace with the evolution of the private sector economy, or changes in the nature of workplace technologies, and it is no coincidence that workers without meaningful access to collective bargaining are highly concentrated in sectors defined by precarious work, non-standardized employment relationships and low pay. This is particularly true of the gig economy where work is inherently fragmented and a worker might operate on behalf of multiple platform companies to make ends meet. A broad-based collective bargaining scheme for traditionally difficult-to-organize sectors is as needed now as it was when it was strongly recommended by the majority of the 1992 Review Panel *Recommendations for Labour Law Reform*.[4]

Unifor's contribution to the *Changing Workplaces Review* process in Ontario proposed measures that would address the increasingly fragmented nature of work and assist precarious workers by permitting and encouraging broader based bargaining units:

> *While sectoral standards should reflect a broad community of interest between all workers, unionized and non-union, the institutions of collective bargaining must also adapt to the growing fragmentation of labour markets through the specific application of multi-employer certifications and bargaining rights. These include measures to enable organization and collective bargaining by workers in franchise operations, as well as within the growing workforce of self-employed and single dependent contractors.*[5]

Unifor recommends that the Review Panel recommend to the province a clear legal framework for amending the *Code* to support workers in fragmented, small, low-union density, or difficult-to-organize workplaces to engage in broader based bargaining in the private sector.

Specifically, Unifor recommends a legal framework for broad-based bargaining in BC that would provide the following:

Multi-Employer Certification & Multi-Employer Bargaining:

- A scheme allowing for easy access to certification for multi-employer bargaining units, both through initial certification and through variance applications.

- This scheme should compel multi-employer bargaining where a multi-employer bargaining unit exists.

---

[4] British Columbia, Ministry of Labour and Consumer Services, Sub-committee of Special Advisers, *Recommendations for Labour Law Reform: A Report to the Honourable Moe Sihota, Minister of Labour* (Victoria: Ministry of Labour and Consumer Services, 1992) at pp 30-33.

[5] "*Building Balance, Fariness and Opportunity in Ontario's Labour Market"*, Submission by Unifor to the Ontario Changing Workplace Consultation, 2015. Online: https://www.unifor.org/sites/default/files/legacy/attachments/unifor_final_submission_ontario_changing_workplaces.pdf.

- This scheme should allow the Board, by applying its well-established legal test of community of interest, to establish appropriate bargaining units for multi-employer certifications. The Board is best situated to evaluate whether a proposed bargaining unit is appropriate for collective bargaining, thereby ensuring fairness to employers.

Sector or Industry-Wide Collective Agreements:

- A legal framework for sector or industry-wide agreements should implement the following principles:
    - Employer neutrality
    - Guaranteed union security, i.e., automatic dues check-off
    - Respect for fundamental workers' rights, including the right to strike
    - Unrestricted bargaining table expansion
    - Access to dispute settlement

- Such a scheme would allow the benefits of the gains made by collective bargaining power to be applied across a sector broadly, lifting up both unionized and non-unionized employees alike.

- This scheme should be tailored to allow gains bargained through a central agreement on certain matters like wages to apply as employment minimums in a sector.

Recommendation 3: Amend the *Code* to allow trade unions to apply to the Board to direct employers to provide early disclosure of employee lists and employee contact information.

Unifor recommends that the *Code* be amended to allow unions to apply to the Board to seek direction that an employer must disclose a list of employees in a proposed bargaining unit if it has the support of 20 per cent of the workers in the proposed bargaining unit. Once that threshold is reached, an employer should be required to disclose an employee list and employee contact information, including names, addresses, phone number and email addresses, to the bargaining agent engaged in organizing efforts.

While the *Code* was amended in 2019 to allow the Board to make declarations for provision of employee lists, Bill 30 did not implement a scheme to allow unions to apply for such information if a certain threshold is met.

Given that access to collective bargaining is a constitutional right of Canadians, it is imperative that disclosure of employee contact information be obtained at a 20% threshold.

To account for the privacy interests of affected employees, and to ensure fairness to employers, such an amendment should be tailored to require unions to only use and retain such information for a specified period of time before being required to demonstrate renewed support. Additionally, unions should be required to include an "unsubscribe" feature in all communications to employees. The requirement to provide information under this provision should be timely and be accompanied by requirements for an audit mechanism instead of just accepting employer information without question. The Board should be conferred the jurisdiction to address any complaints under such provisions.

This particular amendment would ensure that unions could provide workers with information where a threshold level of interest in unionization has been demonstrated. This would not give unions an unfair advantage. Rather, it would give unions a fair opportunity to provide workers with access to information to permit them to make informed decisions about their democratic rights, regardless of whether those decisions are made in support of or in opposition to unionization.

This recommendation is particularly important for workers in sectors or industries that are traditionally difficult-to-organize, and those working in the new sector of gig work.

Recommendation 4: Implement a pay equity regime in line with the federal *Pay Equity Act* and add a provision to the *Code* mandating that all collective agreements entered into after January 1, 2025, must contain a process to identify, evaluate and rectify any systemic gender-based wage gaps.

According to Statistics Canada, the province of British Columbia has the second highest gender wage gap in Canada (after Alberta), with women earning 16% less than men in hourly wages during 2023. The true extent of the gender pay gap is substantially larger when total annual income is taken into account, with women in BC making 26% less than men in average annual income during 2021.[6]

While the recent implementation of the *Pay Transparency Act*, SBC 2023, c 18, mandates employers to prepare and submit a report on payroll data related to the gender pay gap, the *Act* contains no provisions requiring employers to close the gap.

The pay transparency rules in BC, which will be phased in over the next three years, fall significantly short of the *Pay Equity Act*, SC 2018, c 27, s 416, introduced by the federal government in 2018 and implemented in 2021. The *Act* requires federally regulated employers to establish and periodically update a pay equity plan that identifies and eliminates gaps between predominantly male and predominantly female classes of jobs. Employers who fail to adhere to the new rules are subject to a range of administrative monetary policies based on the severity of the infraction.

[6] Statistics Canada Table 11-10-0239-01

What this has effectively meant is that some workers in BC will see gender-based wage gaps narrow as federally regulated employers in the province implement the new pay equity regime, while the majority of workers will merely experience less wage secrecy since employers have few incentives to reduce any gender-based wage gaps that are identified. Unifor recommends that the BC government follow the lead of the federal government and implement a robust pay equity regime, which mandates employers to identify predominantly male and female job classes, calculate differences in compensation, and increase compensation for predominantly female job classes that fall short of their male counterparts.

Belonging to a union and setting wages through collective bargaining tends to reduce the gender wage gap, although differences remain. The most recent *Labour Force Survey* data for January 2024 reveals that, in BC, the hourly gender wage gap was 6% for workers with union coverage, compared to 18% for those without union coverage.

While it may take some time to implement a comprehensive pay equity regime in the province, unions have the capacity to bargain for the elimination of gender-based wage gaps now. Therefore, in addition to the need for provincial legislation in line with the federal *Pay Equity Act*, the *Code* should be amended to include a provision requiring that all collective agreements entered into after January 1, 2025, must contain a process to identify, evaluate and rectify any systemic gender-based wage gaps, including a process for independent arbitration of any differences.

Recommendation 5: Amend the *Code* to require parties to common employer and sale of business applications to present all facts uniquely within their knowledge material to such applications.

Currently under the *Code*, there is no statutory requirement that parties to common employer (section 38) or sale of business (section 35) applications be compelled to present or disclose at a hearing all facts within their knowledge that are material to such applications. This circumstance imposes significant legal and practical hurdles on trade unions in bringing such applications.

The practical hurdle for unions is that they may only be aware of a limited amount of information concerning the transaction or relationship between companies at the time of filing such applications, and may have no means of acquiring information about such matters that are squarely and uniquely within the knowledge of the parties to a transaction or the companies involved.

The *Code* should be amended to impose a reverse evidentiary onus on responding parties to applications made under sections 35 and 38 of the *Code*. Similar requirements on common employer and sale of business applications are found in sections 1(5) and 69(13) of Ontario's *Labour Relations Act, 1995*, SO 1995, c 1, Sch A:

> 1 (5) Where, in an application made pursuant to subsection (4), it is alleged that more than one corporation, individual, firm, syndicate or association or any combination thereof are or were under common control or direction, the respondents to the application shall present at the hearing all facts within their knowledge that are material to the allegation.
>
> …
>
> 69 (13) Where, on an application under this section, a trade union alleges that the sale of a business has occurred, the respondents to the application shall present at the hearing all facts within their knowledge that are material to the allegation.

Full pre-hearing disclosure, both of particulars and relevant documents, is necessary to achieve the purposes set out in section 2 of the *Code*. Imposing a reverse evidentiary onus on responding parties to section 35 or 38 applications would add efficiency to proceedings, ensure fairness in the hearing process for trade unions, ensure the Board has before it all relevant materials to dispose of such applications on their merits, and encourage settlement of disputes. Absent a reverse evidentiary onus, unions are more likely to require the direct assistance of the Board to acquire pertinent information to such applications, which can be time-consuming and contrary to the orderly and expeditious resolution of the dispute.

An example of the pressing need for this change to the *Code* comes from the drayage trucking industry. The Office of the British Columbia Container Trucking Commissioner (the "Commissioner") recently released a request for submissions on a consultation process addressing, among other things, proposed changes to rules implemented under the *Container Trucking Act*, SBC 2014, c 28, that would address common employer issues.[7] The Commissioner is proposing implementing requirements that employers in the industry must disclose information concerning "Related Persons" of employers, including those that act as the "Directing Mind" of related entities. This initiative is being taken by the Commissioner to address the rampant sub-contracting out of work between related employers intended to undermine drayage truckers' employment conditions and collective bargaining rights.

Unfortunately, this issue is not unique to the drayage trucking industry, and legislative initiative is required to ensure the Board is agile enough to adequately deal with common employer and successorship situations, to adequately address the mischief and damage being done to workers in the province where employers undermine bargaining rights through complex corporate arrangements. Implementing similar requirements to sections

---

[7] Office of the British Columbia Container Trucking Commissioner, *2024 CTS License Reform Proposed Changes*, January, 2024. Online: https://obcctc.ca/wp-content/uploads/2024/01/2024-CTS-Licence-Reform-Proposed-Changes-FINAL.pdf.

1(5) and 69(13) of Ontario's *Labour Relation Act, 1995* would further the *Code*'s purpose under section 2(e) of promoting conditions favourable to the orderly, constructive and expeditious settlement of disputes.

Recommendation 6: Grant the Labour Relations Board jurisdiction to adjudicate breaches of settlement agreements concerning complaints brought under the *Code*.

A feature that is absent from the *Code* is the jurisdiction of the Board to hear complaints that a party to a settlement agreement concerning an application brought under the *Code* has breached that settlement agreement. This circumstance occurs where a settlement agreement has been reached without the intervention of the Board in the issuance of a consent order under Section 133 of the *Code*. The law in British Columbia currently requires parties to go before the British Columbia Supreme Court to make and resolve such complaints.

Requiring trade unions and employers to use the traditional court system to resolve these types of disputes is costly, time-consuming, and drains limited judicial resources.

Evaluating whether a party has breached a settlement agreement pertaining to matters under the *Code* is an area squarely within the expertise of the Board, which already has the jurisdiction to address alleged breaches of its own Orders. Allowing parties to complain before the Board that a settlement agreement on a matter proceeding under the Board has been violated encourages the private settlement of disputes, preserves the limited resources of the Board by avoiding the need for the issuance of consent orders in each case, and preserves the limited resources of the province's judiciary.

There is precedent in other jurisdictions in Canada that allow labour boards to hear such complaints. Section 96 of Ontario's *Labour Relations Act, 1995*, provides the following:

> **96** (1) The Board may authorize a labour relations officer to inquire into any complaint alleging a contravention of this Act.
>
> …
>
> (7) Where a proceeding under this Act has been settled, whether through the endeavours of the labour relations officer or otherwise, and the terms of the settlement have been put in writing and signed by the parties or their representatives, the settlement is binding upon the parties, the trade union, council of trade unions, employer, employers' organization, person or employee who have agreed to the settlement and shall be complied with according to its terms, and a complaint that the trade union, council of trade unions, employer, employers' organization, person or employee who has agreed to the settlement

has not complied with the terms of the settlement shall be deemed to be a complaint under subsection (1).

The *Code* should be amended to introduce a similar provision. Granting the Board similar jurisdiction would further the *Code*'s purpose under section 2(e) of promoting conditions favourable to the orderly, constructive and expeditious settlement of disputes.

Recommendation 7: Amend the *Code* to ban the use of any employee or contractor from performing bargaining unit work during a strike or lockout, and implement the recent amendments to the *Code* allowing provincially regulated workers to honour federally regulated picket lines.

As Unifor documented in *Fairness on the Line: The Case for Anti-Scab Legislation in Canada*,[8] empirical evidence on the frequency and duration of labour disputes strongly supports the case for fulsome anti-scab legislation, since the use of replacement workers leads to longer work stoppages and a higher incidence of violence on the picket line. British Columbia and Quebec are the only two jurisdictions with effective limitations on the use of replacement workers, although more robust federal anti-scab legislation (Bill C-58) is currently making its way through Parliament.

However, as we note in *Fairness on the Line*, the *Code*'s provisions under section 68 limiting the use of replacement workers in BC contains a number of critical loopholes, which permit the use of managers, non-bargaining unit employees and contractors as replacement workers, as long as they were hired or engaged prior to the notice to commence bargaining. Unlike Quebec, section 68 also permits bargaining unit members to cross the picket line.

Unifor's own history with strikes and lockouts reveals that some of the longest and most fractious labour stoppages our members have experienced occurred in cases where managers were deployed as replacement workers.[9] And we know that the potential for acrimony and violence only increases in situations where bargaining unit members are able to cross the picket line.

Section 68 (1) should therefore be amended to stipulate that an employer cannot use the services of any person, paid or not, to perform bargaining unit work during a strike or lockout, irrespective of when they were hired or engaged. Additionally, the *Code* should be amended to prohibit employees from crossing a picket line.

Unifor recognizes that these provisions will not apply to operations that the Board designates as essential services, however, we encourage the Board to weigh all the facts

---

[8] Unifor. "*Fairness on the Line: The Case for Anti-Scab Legislation in Canada*", 2021. Online: https://www.unifor.org/resources/our-resources/fairness-line-case-anti-scab-legislation-canada-0

[9] Ibid, 12-13.

carefully when rendering decisions on what activities constitute essential services. The Board must ensure that the right to strike and apply economic pressure on an employer through a labour stoppage is not arbitrarily delimited or undermined through an overly broad designation of essential services, and applications must be judged in a timely manner on their merits. Unifor members in BC have had firsthand experience with labour stoppages where replacement workers were brought in under the cover of essential services, leading to unnecessarily protracted disputes.

Unifor applauds the government for its recently tabled amendments to the *Code*, which would reverse a 2022 reconsideration decision by the Board that would force members of provincially certified units to cross federally regulated picket lines.[10] The decision in question held that provincial rules on picketing did not apply to provincially regulated workers who refused to cross the picket line in solidarity with federally regulated tugboat operators on strike at Seaspan's North Vancouver shipyard. As a result, the very act of respecting federally regulated picket lines effectively constituted an illegal strike.

The recent amendments to the *Code*'s definitions of "person" and "strike" in section 57 of Bill 9 – 2024*: Miscellaneous Statutes Amendment Act, 2024*, eliminate the loophole established by the LRB's 2022 reconsideration decision. While employers' groups, including the Business Council of British Columbia, have come out in full-throated opposition to Bill 9's welcome clarification of provincial picketing rules, they neglect to acknowledge the fact that the Board's stated motivation was to interpret the *Code* in a manner consistent with the Board's jurisdiction and ability to regulate. As the Board contended: "From a policy perspective, we see no principled difference between honouring a provincially regulated picket line and honouring a federally regulated one."[11]

Unifor strongly urges the government of BC to pass these amendments without delay and avoid future situations that would pit provincially and federally regulated workers against one another.

Recommendation 8: Expand protections against contract flipping

In 2019, the *Code* was amended with the passage of Bill 30 to protect the bargaining rights of workers against contract flipping.[12] This was an important step forward for protecting workers that would otherwise face the loss of collective bargaining when a contract was retendered between contractors. The purpose of that amendment was to protect workers against a potential race to the bottom by preventing both contractors and

---

[10] Vancouver Shipyards Co. Ltd. v Construction, Maintenance and Allied Workers Bargaining Council, Local Unit Number 506 of Marine & Shipbuilders, 2022 BCLRB 146. Online: https://www.canlii.org/en/bc/bclrb/doc/2022/2022bclrb146/2022bclrb146.html?autocompleteStr=2022%20BCLRB%20146&autocompletePos=1

[11] Ibid., paragraph 86.

[12] *Labour Relations Code Amendment Act, 2019*, SBC 2019, c 28 ("Bill 30").

companies that award contracts for services from undermining pay and other conditions of work for workers through contract flipping.

Section 35(2.2) now applies to certain types of contracts for services, including building cleaning services, security services, bus transportation services, food services, and non-clinical services provided in the health sector. That section also allows for further services to be prescribed by regulation undersection 159(2)(f) of the *Code*.

Unifor submits that the categories of contracts for services should be expanded to cover any group of workers in the province that may face the loss of union representation as a result of contract flipping.

Unifor also submits that the *Code* must be amended to address circumstances where a contract is awarded to a successor contractor during on ongoing labour dispute with the predecessor contractor, ensuring that any bargaining rights of unions and employees is retained.

Jr:cope343