Joint Business Community response to the BC Law Institute: "Consultation on the Employment Standards Act"

Prepared for:

Mr. Tom Beasley, Chair, and Committee Members
Employment Standards Act Reform Project Committee

Prepared and Endorsed by:

Business Council of British Columbia

BC Chamber of Commerce

British Columbia Hotel Association

Canadian Federation of Independent Business

Canadian Manufacturers & Exporters

Greater Vancouver Board of Trade

Independent Contractors and Businesses Association

Restaurants Canada

Retail Council of Canada

Urban Development Institute

August 31, 2018

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Attention: Greg Blue, Q.C.
Submitted Via Email: gblue@bcli.org

Mr. Tom Beasley
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Dear Chair Beasley and Committee Members:

Re: Joint Business Community Response to the BCLI Employment Standards Act Reform Project, August 2018

The business community, represented by a diverse group of ten employer associations, is pleased to provide this joint response to the BCLI report on updating and reforming the *Employment Standards Act*, published in June of 2018 (the "Consultation Paper").

The last BC *Employment Standards Act* (ESA) review was conducted by Professor Mark Thompson, and his report – Rights and Responsibilities in a Changing Workplace: A Review of Employment Standards in British Columbia – was submitted to the provincial government in February 1994. We agree with the widely-held view that the provincial ESA requires some updating and modernizing given the changing nature of the business environment and the workplace and the increasingly diverse workforce.

The Consultation Paper examines the British Columbia business and employment landscape but also considers "contemporaneous initiatives to reform employment legislation in Ontario and Alberta." We offer the following comments as part of the BCLI's process to obtain feedback before submitting a final report to the Minister of Labour later this year.

The Associations that are signatories to this submission recognize and appreciate the work and extensive thought and research that underpins the Review Project. The Consultation Paper is thorough and detailed, and collectively we wish to offer our thanks and recognition of the comprehensive nature of the report.

Contemporary Context: The Changing Nature of Work and the Economic Landscape in British Columbia

The economy and the nature of the workplace have evolved since the Thompson Commission reviewed BC's ESA almost 25 years ago. The traditional model of "full-time" employment is less common than it was two decades ago. Even more significantly, technology facilitates people working from different locations. The majority of jobs in today's modern provincial economy are in service industries. Over the past decade, for example, there were 22 new jobs created in the services sector for every job created in the goods sector. Many of these new service jobs are conducive to more flexible work arrangements. Both employers and workers alike are increasingly seeking more flexible work arrangements. The "gig economy" is expanding, bringing with it more contract and consulting work at the expense of full-time work.

At the same time, the traditional work model with employees routinely reporting to a worksite is still the most common employment arrangement. One of the challenges in updating and modernizing

employment standards is that the minimum levels set out in the ESA need to work for emerging industries and new technology-enabled employment relationships as well as for more traditional employment arrangements. As a general principle, the ESA should be as flexible as possible while still affording workers an appropriate amount of protection.

The substantive work of the Review Committee is set out in 311 pages of carefully researched material and will undoubtedly act as a valuable reference guide for many years when considering the historical underpinnings of both current and future Employment Standards legislation. We do not offer comments on all 78 recommendations. Rather, our more substantive comments are provided for the recommendations where the business community has concerns. For the majority and minority recommendations, we outline our position and provide commentary as appropriate.

Given the wide array of areas covered by the ESA and the large number of recommendations in the report, it is difficult to summarize the Committee's work succinctly. Businesses operating in different industries may have differing perspectives, and potentially differing concerns and differing degrees of support, relating to specific recommendations. Similarly, proposed changes will have different impacts or may be more challenging for different businesses, depending on their size and their industry sector. While the Consultation Paper is comprehensive in that it covers all aspects of the ESA, on balance it does not propose a major reworking of the ESA or a substantial deviation from the current ESA framework. Instead, most of the recommendations propose general amendments that are aligned with updating and modernizing the ESA. In this regard, we note that, despite the wide range of topic areas covered, most of the recommendations reflect a consensus view of the Committee. Only 21 recommendations were not reached by way of consensus, meaning that 57 recommendations, or approximately 73% of the total, are consensus recommendations for reform.

The proposed amendments to the Act address aspects of Parts 1 through 11 of the Act. The substantive recommendations are set out in Chapters 3–11 of the Consultation Paper. This submission is intended to provide useful feedback to the Committee in advance of the final Report being submitted to government. We have collected thoughts and comments from numerous business associations into a single document to help expedite the feedback process and provide thorough and thoughtful input. As an organizing framework, the comments and responses below follow that chapter format used in the original Committee report.

Chapter 3 – Scope of the ESA

Chapter 3 covers non-standard employment, independent contractors, wrongful dismissal and other aspects of the employment relationship. Our group of business associations supports recommendations 1–3, 5 and 6. Specifically, we agree the Act should not apply to independent contractors, as articulated in recommendation 1 of the Consultation Paper. We also concur with recommendation 2, to not include a definition of dependent contractor in the Act. A majority of the Committee believes the Act should not supplant or supplement the common law regarding wrongful dismissal, nor should it provide for the administrative adjudication of wrongful dismissal claims. We support the majority position reflected in recommendation 4.

We fully endorse recommendations 5 and 6 that principles should be developed to govern future applications for inclusion and exclusions from the Act, and that existing exclusions from ESA standards "should undergo a systematic review by government to determine whether they continue to be justified." Employers have strong views about the interplay between the ESA and collective agreements. In this regard, we believe collective agreements reflect choices and decisions made by management and unions (on behalf of employees), arrived at through free collective bargaining. A contract is not a menu from

which an employee is free to pick a preferential clause governing an aspect of the workplace while also relying on the ESA for other elements of workplace rules. As such, the signatories to this submission strongly believe the ESA should continue to include a provision that clearly confirms collective agreements take precedence over the Act. In other words, employees should not have the option of being able to select the most favorable "agreement" terms, depending on the issue.

Chapter 4 – The Hiring Process

While not a specific numbered recommendation, we note, at page 49, that a majority of the Committee believes it would be unnecessary and unworkable to require a written contract of employment in all cases, "given the varying sophistication of employers and the information concerning the ESA…" (p. 49) A minority proposed that the ESA should require a basic written agreement in all cases. We agree with the majority view on this point and submit that it would be unworkable to require all employment relationships to be documented in writing.

Chapter 5 – Hours of Work, Overtime and Flex Time

Recommendations 7–22 address the often-contentious areas of scheduling, work week, overtime and hours of work averaging. We support the majority position contained in recommendation 7 that the Act should allow one or more alternate standard patterns of working hours within the 40-hour week and require a notice period for a change from one pattern to another. We do not support the minority recommendation 7a that a pattern of working hours different than 8 hours per day, 40 hours per week, should require worker consent by means of an averaging agreement in every case. In our view, the minority position would be too rigid and onerous for both employers and workers.

We support recommendation 8, which proposes amending the ESA to allow an employer to designate the day of the week when the consecutive seven-day work week commences.

In the Committee's report, recommendation 9 is to abolish the banking of overtime, which is presently permitted by the Act. The Committee believes time banks are "excessively complicated and costly to administer, and that the concept of the time bank is also abused to avoid paying employees for earned overtime."

Employers have found that voluntary arrangements are often helpful and provide additional flexibility. We find it difficult to reconcile the Committee's concerns with the fact that time banks are voluntary. Indeed, we believe the Committee should consult with a broad selection of small, medium and large businesses prior to formalizing a final recommendation around time banks. We believe time banks provide additional flexibility that is helpful to both employees and employers and as such, at this stage, we do not support this recommendation.

We support recommendation 10, which provides that the Act should continue to have a provision for averaging working hours. Our support for recommendations 11 and 12 dealing with averaging agreements is tentative. The Committee proposes that Section 37 of the Act be replaced/amended to permit averaging agreements for terms of up to 2 years, and to restrict the period over which hours of work may be averaged for purposes of paying overtime to not exceed 8 weeks. We support the majority recommendation on this particular matter.

Our concern, however, lies with recommendation 12(d), which proposes that the number of "working hours per week within an averaging period must not exceed 48 hours unless overtime is paid for hours worked in excess of 12 in any one day." Frequently, employers and employees enter into mutually

beneficial agreements for longer work periods, balanced off by a longer stretch of days off. Such arrangements are common in remote locations and work camps but are also used on large projects and in other circumstances where these mutually beneficial agreements are reached. The difficulty is that the suggested 48-hour average is quite restrictive. Consider an employee who agrees to work six 12-hour days in return for having 4 consecutive days off. This arrangement would result in a substantial amount of overtime being paid, despite the fact it is a mutually beneficial arrangement that the employee agrees to. As it is currently cast, the 48-hour limit is too restrictive. We strongly encourage the Committee to revisit this recommendation and expand the number of hours permitted within an averaging agreement or provide more flexibility to accommodate work specific circumstances (such as, but not limited to, remote work camps) where employees and employers both benefit from extended working periods and extended periods of days off.

In keeping with above comment about the need for more latitude around hours worked in averaging agreements, we do not support the minority recommendation in 12, that the period for averaging hours should be less than 8 weeks.

We understand and appreciate the intent of recommendations 13 and 14, which provide for a 60% affirmative vote by employees for an averaging agreement, with a minimum of 50% of the affected employees having voted (13), and that the method for the vote must assure confidentiality (14). However, the practical application of these recommendations is more complex. In some companies it is common to have averaging agreements with a single employee, or sometimes two or three individuals. Similarly, administering a vote in a small business setting with only a few employees is probably an unnecessary administrative burden and also a workplace environment where it would be difficult to assure confidentiality. Some employers have also commented that averaging agreements are frequently adopted for a specific project and are unique to a specific job, again meaning there is no reason for a vote on the matter. The Committee may want to include some threshold provision for holding a vote.

Recommendation 15 addresses refusal of overtime and justifications for such refusal. The Committee recommends allowing an employee to decline to work outside the employee's regularly scheduled hours if the additional work conflicts with significant family-related commitments, interferes with scheduled educational commitments, creates a scheduling conflict with other employment, or conflicts with another significant obligation. Further, this recommendation would allow an employee to decline to work more than 12 hours in a day or 48 hours in a week "except in the event of an emergency, or as otherwise provided in an applicable regulation, variance, or averaging agreement."

We do not support recommendation 15 as written, as the justifications for refusing mandatory overtime are too widely drafted and do not allow employers sufficient flexibility – something that is increasingly important in today's highly competitive and time-sensitive work environment. Input from some signatory associations and their members indicates there may be occasions when the need to work overtime could reasonably be anticipated, yet the proposed change as outlined in the recommendation would not leave sufficient scope to accommodate this circumstance. For example, in the trucking industry, delays on regular routes could arise due to construction or road closures. Such delays could be anticipated and are not likely to be viewed as an "emergency," but also may be unavoidable, depending on the route in question. Similarly, road congestion is widely known to cause long and highly variable delays, so may not be considered "unanticipated". In the construction sector, similar delays could be problematic for the delivery and unloading of material, cement pours and so on, because of the somewhat restrictive way that recommendation 15 is cast.

Recommendation 16 proposes definitions of "emergency" or "emergency circumstances" that would justify exceeding statutory limits on hours of work. We support the "emergency" exception definition found in recommendation 16 (referring to recommendation 15), but only when recommendation 15 is revised (as discussed in the paragraph above). More specifically, when recommendation 15 is more precisely drafted, we would support the recommendation that an employer can require work of more than 12 hours in a day or 48 hours in a week in an emergency, along with the definition of emergency as set out in recommendation 16.

The signatories of this letter are divided on their support for recommendation 17, which addresses minimum pay for an employee reporting for work and minimum pay for an employee who actually starts work. The Committee consensus is that an employee be paid for 4 hours of work if he/she is scheduled to work more than 4 hours and starts work. If work does not commence, a minimum of 2 hours pay is required. If an employee is scheduled to work less than 4 hours, then 2 hours pay is required. As the Consultation Paper recognizes, minimum pay requirements are a contentious area and an issue that has taken on greater significance with the growth in part-time work. The nature of work has also changed so that many employers need to adjust workforces to meet staffing requirements during peak periods. Further, some work requires short shifts or shifts of variable duration. It is important for the Committee to recognize that some sectors do not support recommendation 17. We believe the Committee should undertake additional consultation on this matter.

We support recommendation 18, which sets out that if the Act authorizes an employee to make, and an employer to grant, a request for a flexible work schedule, that provision should only extend to hours of work and scheduling of work, <u>but not to the location of the work</u>.

Recommendation 19 relates to informal employer-employee agreements around making up time taken off. Such *ad hoc* arrangements are common in today's workplace but are technically illegal under the current ESA unless overtime is paid for time worked above 8 hours in a day. All members of the Project Committee recognize the need to relax overtime requirements to some extent to accommodate mutually convenient arrangements. As such, recommendation 19 is to amend the ESA to allow an employee to voluntarily work up to 3 hours on one or more days within a pay period to make up an equivalent time taken off, without the employer being required to pay overtime. We believe flexibility in this area is especially important and endorse recommendation 19. Indeed, support for greater flexibility in these mutually beneficial arrangements is such that we encourage the Committee to consider enhancing the size of the time bank.

We support recommendation 20, which is a clarification amendment to address meal breaks.

Recommendation 21 proposes restoration of 24-hours' notice to employees of a change to a shift or work schedule. We agree with this proposal, including the qualifiers. We do not agree with the minority recommendation of 48 hours' notice to change a shift. Further to the notice of shift change requirements, recommendation 22 proposes amending the ESA so that an employee may refuse to report to work if 24 hours' notice of the change is not provided. Implementing this change would be somewhat restrictive, but we tentatively support recommendation 22 because recommendation 21 provides for less than 24 hours' notice of a shift change due to "unforeseen circumstances". Some businesses are concerned that recommendation 21 may be unduly restrictive. We recognize it indicates an employee "may" refuse the shift change, which presumably means the employee may also accept the shift change. However, some businesses have suggested the Committee might consider rewording the recommendation to permit less than 24 hours' notice if an employee is informed that he or she has the right to refuse the work but agrees to the additional work.

Further, some jobs by their nature involve responding to unforeseen circumstances, so the Committee could consider providing additional flexibility for such circumstances.

Chapter 6 - Wages and Wage Payment

This section of the Consultation Paper covers when and how wages must be paid. Many of the related recommendations are intended to modernize payment processes and bring them in line with current practices. In that regard, we agree with recommendations 23, 24 and 25, which pertain to simplifying and streamlining direct deposit of pay and employee repayment of wage advances.

Recommendation 26 addresses the issue of a wage assignment to meet a "credit obligation." This is a complex area with many contradictory decisions and many ambiguities regarding wage assignments. Unlike garnishing orders, wage assignments are not subject to an exemption of a portion of wages needed for basic support of the debtor and dependents. Because people in debt may be more susceptible to coercive pressures, the Committee "believes it is desirable to maintain a complete separation between wages and debts owed to the employer." (p. 95) The Committee believes the one exception to this is to allow an employer to use wage assignments to repay an advance in salary, vacation pay or other unearned allowances from a final paycheque. Recommendation 26 proposes that a written assignment of wages to meet a credit obligation be abolished, except as previously stated. We agree with this recommendation to keep wage payments and assignment of wages separate from credit obligations to the employer, except in the circumstances outlined by the Committee.

Recommendation 27 deals with tips: The Project Committee "leans" toward the Ontario model of distributing tips. Essentially, the Ontario legislation does not permit an employer to share in the tips unless the employer, as a regular part of his/her duties, does work of the same nature as other employees in the tip pool. The Committee states that the Ontario model has "sufficient flexibility to deal with variations in organizations and overlapping roles between different workplaces." We believe that, prior to implementing the Ontario model, submissions and input should be sought from employer stakeholders in the hospitality industry on this important topic. While we agree with the Project Committee that "legislative protection of employees' proprietary rights in tips and gratuities and regulation of tip pooling is required," it is not clear that there has been sufficient input from the applicable stakeholders.

We agree with recommendation 28, which permits various methods of paying out vacation pay. This, essentially, recognizes and adopts the current reality within B.C.

The proposed eligibility rules set out in recommendation 29 are problematic for the business community. Business recognizes and appreciates that the Committee is recommending the new eligibility requirements in part because of the growing share of employees engaged in part-time work and a belief that the eligibility rules should "allow a greater opportunity for part time workers who remain with an employer for more than a transitory period to accumulate sufficient working time to qualify for statutory holiday pay." While we agree with the Committee's analysis and the need to recognize shifting employment arrangements, we believe recommendation 29 goes too far.

Statutory holidays are expensive for employers. Recommendation 29 proposes employees must work 16 of the 60 days preceding the statutory holiday to be eligible for this benefit. While the recommendation appears to extend the time-period a worker must be employed (a further comment on this is offered below), it is effectively half of the current eligibility requirement of having to work 15 days of the preceding 30. As framed, this recommendation will be very costly for employers. Some member

companies of participating associations examined their schedules and payrolls and determined recommendation 29 would double their statutory holiday pay expenses.

From our perspective, enshrining payroll increases of this magnitude into the ESA is not appropriate. For most businesses payroll costs are about to jump significantly when the Employer Health Tax kicks in January 2019. Recent and forthcoming increases to BC's minimum wage are also driving up payroll costs for many employers across the province.

Business believes the Committee should consider a more measured change in the eligibility requirements. One option is to increase the required number of work days. Something like 25 or perhaps 27 or 28 days worked out of the 60 days preceding a statutory holiday would provide some enhanced access to statutory pay for workers but not dramatically increase costs for employers. We support the 60-day continuous employment requirement for eligibility. Expanding the period of continuous employment from 30 to 60 days might help encourage more secure employment relationships. We agree with the Consultation Report where it notes that "[i]n fairness, employers should not be required to bear this burden unless there is a relationship of some permanence with the employee." (p.109). In keeping with this reasoning, for clarity we believe the wording of the recommendation should explicitly state there is a requirement of 60 days of continuous employment to be eligible for statutory holiday pay. As it is currently outlined, an employee could meet the requirement of working or earning wages "on 16 of the 60 days preceding the statutory holiday" if he or she worked 16 of the first 25 or 30 days of being hired.

The Committee should consider explicitly stating paid vacation time during the 60-day period does not count toward the requirement of meeting the necessary number of days that an employee "worked or earned wage". We recognize the recommendations do not propose altering the interpretation that paid vacation time does not count as noted in the Committee Report (p.103), but some businesses report confusion on this point.

We support the requirement for an employee to work the last regularly scheduled day before, and the first regularly scheduled day after, the statutory holiday. As the Report notes, this requirement is intended to prevent "employees from abusing the statutory holiday entitlements by claiming holiday pay to cover a loss of pay for a day on which the employee deliberately does not report for work." (p. 110) Finally, we note that some of the signatory associations believe the eligibility requirements for statutory pay should remain unchanged.

Recommendation 30 deals with the setting and indexation of minimum wages. The Committee did not reach a consensus on how minimum wages should be determined. We are generally in favour of the majority recommendation, which is to have the ESA amended to include a formula for the indexation of the minimum wage at regular, fixed intervals. However, some businesses prefer the minority recommendation to not make any amendments to the ESA regarding minimum wages, apart from requiring the Lieutenant Governor in Council to review the minimum wage every 2 years to determine if a change is required. In either circumstance, the overarching consideration is to have the minimum wage adjusted in small and predictable increments. Any individual or entity overseeing increases to the minimum wage should opt to use indexation as a primary determinant of increases to the minimum wage.

Recommendations 31-34 deal with farm contractors and farm labour. Recommendation 31 is in two parts: (i) that the Act be amended to require that farm workers who may be paid on a piece rate basis must receive at least the equivalent of the general hourly minimum wage, but (ii) that the implementation of this recommendation be suspended until an expert committee appointed by the Minister has reported on appropriate measures for its implementation. The Committee states that it did not have the expertise

nor the empirical evidence to make recommendations as to the "how and when" of such changes. We do not support amending the ESA to require the minimum wage equivalence until an expert committee has done a careful examination of the unique circumstances of British Columbia farm workers.

We agree with the other farm sector recommendations 32 and 33 and the majority recommendation 34. Specifically, regarding the minority recommendation 34a, we do not support joint and separate liability for a producer and a farm labour contractor where the farm labour contractor is licenced under the Act and the producer satisfies the Director of Employment Standards (the "Director") that the producer paid the farm labour contractor for wages earned by each employee of the farm labour contractor for work done on behalf of the producer. As such, we do not support repealing Section 30(2) of the Act.

Chapter 7 - Annual Vacation and Special Leaves

We support the majority recommendation 35 that annual vacation entitlements should remain unchanged. We agree with the rationale, found on page 145 of the Consultation Paper, that adding an additional week of mandatory vacation time could be an incentive to dismiss longer-serving employees because of added costs. Additional vacation time is especially difficult for smaller employers to absorb, and the incremental cost of extra staffing to cover longer absences is a significant challenge for many smaller employers.

Recommendation 36 is a clarification to Section 54(4) of the Act. This recommendation now stipulates that non-union employees whose leaves end during a period when the employer's operations are in a suspended stage are not to be recalled in preference to other non-unionized employees. Currently the Act and its application are unclear, and this recommendation is intended to address this anomaly.

Recommendation 37 has four different components dealing with the definition of "immediate family" for purposes of Family Responsibility Leave. A majority of the Committee members recommend amending the ESA to include a parent or a child of the employee's spouse. Two minority recommendations (37a and 37b) suggest even broader inclusions, while one minority recommendation (37c) states that the definition of "immediate family" in the Act should remain unchanged. The definition of "immediate family" is key to the interpretation of who is entitled to "family responsibility leave" pursuant to Section 52 of the Act. The rationale of the majority for expanding the definition, set out at page 160, relies on jury duty and reservist leave as an equivalency to broader family caregiving responsibilities which should be borne by the employer. We do not support the majority recommendation. We agree with the minority recommendation 37c that the definition of "immediate family" should remain unchanged.

We support recommendation 38 that an employer may require an employee to "provide evidence, reasonable in the circumstances of the employee's entitlement to take a non-discretionary form of leave" provided under the Act. In that regard, we also agree with recommendation 39, which is a majority recommendation that the Act should not be amended to add new non-discretionary leave entitlements.

Recommendation 40 has several different components, including one majority recommendation and 3 minority ones, dealing with expanding the types of leave and the maximum number of leave days in a year. The majority of Committee members believe the current 5 days of unpaid leave provided in Section 52 of the Act (Family Responsibility Leave) should be increased to 7 days, and that Section 52 should be amended to include an employee's own illness or injury as reason for leave. One minority recommendation (40a) proposes increasing the number of unpaid leave days to 10. Another minority recommendation (40b) proposes having an employee's leave due to own illness or injury paid at the employee's regular wage rate by the employer. A third minority recommendation (40c) is for an employee's own sickness or injury not to be introduced into this section and if unpaid leave days are

increased the expansion be limited to 7 days. The undersigned business associations support minority recommendation 40c.

We offer some additional comments for the Committee to consider. Some businesses indicated combining sick leave and family responsibility leave and expanding the number of days from 5 to 7 should only apply to employees who do not have sickness and accident coverage. For those with coverage, a distinction should be made so the current provision for 5 days of leave continues to apply, otherwise employees with coverage will receive 2 windfall days in addition to their coverage. We also note that paid sick leave is especially difficult for smaller businesses to manage and absorb, which reinforces our support for recommendation 40c. Further, the additional cost from enhanced leave provisions could discourage some employers from hiring additional workers and instead opt for contract arrangements.

Recommendation 41 proposes that a "reasoned dialogue involving the health professions, major employers' organizations, and major organizations representing organized and unorganized labour should take place regarding medical certificates to justify absence from work due to illness ("sick notes"). This is suggested by the Committee with a view to developing mutually acceptable guidelines" regarding medical certificates to justify absence from work due to illness. We agree with this recommendation.

Recommendation 42 addresses consequences of an absence due to a false pretext of illness. The majority recommendation proposes that a false pretext of illness disentitles the employee to the benefit of statutory leave. Minority recommendation 42a proposes that such a provision is unwarranted, as the employer already has enough power to discipline an employee. We agree with the majority that if there is a new provision in the Act to grant statutory leave for illness or injury, then any false explanation/note should disentitle the employee from that leave.

We agree with the majority recommendation in 43. Currently, there are no qualifying periods of employment before an employee is entitled to any of the non-discretionary leaves under Part 6 of the Act. Most other provinces and the Canada Labour Code have such qualifying periods. The majority recommendation is for 3 months' continuous employment with the same employer as a minimum requirement to be eligible for statutory leaves, other than annual vacation, leave for jury duty, or reservist leave. The 3 minority recommendations would expand entitlement to statutory leaves of absence with less qualifying periods, while recommendation 43c suggests there be no qualifying period of employment for a non-discretionary statutory leave of absence. We do not support these minority recommendations.

Chapter 8 - Termination

The report notes that the ESA does not interfere with the common law principle that an employee may be dismissed for just cause, or without cause on reasonable notice. Instead, the Act establishes minimum notice periods based on length of employment and requirements for payments in lieu if sufficient notice is not given.

Currently, Section 67(1)(b) of the Act invalidates a notice of termination if the employee is allowed to work past the expiration of the notice period. If a need arises to have a terminated employee work after the notice period has expired, an employer is compelled to hire a new employee or must incur the cost of providing a new notice. We strongly support the majority recommendation 44 which provides that a "Notice of Termination, validly given to an employee, should not be rendered invalid by reason only that the employee is allowed to work for up to one month after the end of the notice period" (p. 199). We support the rationale of the majority recommendation that "any, if not most, employees who have received a notice of termination and have not found a new job would rather keep working as long as possible past the end of the notice period. It is arguably a case of win-win if an experienced worker being

let go to work as long as there is work for that worker, rather than lose the benefit of the additional earnings …" (p. 198). Historically, in order to not run afoul of section 67 of the current Act, an employer would have to hire a new employee for a short period after the expiration of the written notice period, which makes little sense if the current employee is ready and willing to continue to work.

Recommendation 45 clarifies that when an employee gives notice of an intention to quit and the employer terminates prior to the end of that notice, the employer is required to pay the employee the lesser of the amount the employee would have earned during the rest of the notice period or the full amount the employee would have been paid had that employee been terminated without notice pursuant to the Act. Currently the Act is silent on this point, and the practice varies. We agree with this recommendation.

Recommendation 46 addresses the literal reading of the current Section 64(4), which deals with group terminations. If the notice of group termination is defective, the employer cannot satisfy the requirements of Section 64(4) by a combination of notice and termination pay. Rather, the employer must give termination pay for the full notice period. Recommendation 46 provides that a combination of notice and termination pay satisfies the group termination provisions of the Act, whether or not the employer has given the required notice to the Minister within the required time frame. We support this recommendation.

Recommendation 47 proposes that there be no amendment to the exclusion of "those employed at one or more construction sites by an employer whose principal business is construction …" from the individual and group termination provisions of the Act (Sections 63 and 64). The majority recommendation of "no change" to this exemption is supported by the undersigned, on the basis of the project-based nature of construction and long-standing industry custom. The majority recommendation also points to the fact "that a similar exception exists in all but three Canadian jurisdictions…" (p. 202). We agree with this majority recommendation.

Chapter 9 - Vulnerable Classes of Employees

Recommendation 48 addresses vulnerable classes of employees, in particular the employment of children. Currently, Section 9 (1) of the Act prohibits the employment of a child under 15 without written consent of the child's parent or guardian, while Section 9(2) prohibits employment of a child under 12 without a permit from the Director.

Recommendations 48, 49, 50 and 51 all deal with the employment of children. We agree with the proposed changes in all of those recommendations, including the majority recommendation in 51. That majority recommendation would permit, with parental consent, children ages 14 and 15 to perform an artistic endeavour and "light work," as designated by the Director and listed on the Employment Standards Branch website. In all other cases, a permit from the Director would be required. The minority recommendation 51(a) would prohibit the employment of anyone under 15 years without a permit from the Director, except as allowed by the Regulations applicable to the recorded and live entertainment areas. British Columbia is following the lead of Alberta in the recognition of "light work," however Alberta has not yet set out a listing of "light work" permitted in that province.

We favour the recommendations providing for greater protection of children while at the same time recognizing a role for flexibility in certain industries as long as parents and the Director are fully engaged.

Recommendations 52, 53 and 54 address migrant workers under either the Temporary Foreign Workers Program (TFWP) or the International Mobility Program (IMP).

Recommendation 52 proposes that section 12 of the Act be amended to clarify that anyone engaged on behalf of employers in recruiting employees who are not Canadian citizens or permanent residents be "subject to the license requirement for employment agencies". We agree with this recommendation.

Recommendation 53 proposes that the licensing exception for an employment agency or talent agency which has as its sole purpose the hiring of employees exclusively for one employer be re-examined given "the interests and special circumstances of migrant workers recruited from their home countries." We agree with a re-examination of this licensing exception.

Recommendation 54 proposes an amendment to the Act to provide legislative authority for the Minister to enter into an information-sharing agreement with the appropriate Federal agencies for the purpose of facilitating the enforcement of the Act in relation to migrant workers. We support this effort to coordinate the Provincial and Federal initiatives.

Recommendation 55 proposes that the definition of "domestic" in the Act should be amended by repealing the requirement to reside at the employer's residence. This arises because of the elimination of the live-in requirement at the Federal level in 2014 under the Live/In-caregiver Program. Currently, in-home workers admitted into Canada pursuant to the TFWP who do not live in their employer's residences cannot qualify as "domestics" under the ESA. Those in-home workers living outside their employer's residence may either be employees with the full protection of the Act or "sitters" who are completely excluded from the Act. We support the change to the definition of domestic, to give greater protection to those living outside of the residence of their employer.

Recommendation 56 suggests a change in definition to "residential care worker." This is proposed to avoid confusion between work in a one family dwelling and a group home setting. The signatory associations support this proposed clarification.

Recommendation 57 addresses the definition of "sitter" in the Employment Standards Regulations. The Committee recommended the definition of "sitter" must be restricted to a casual, non-occupational caregiver. The majority recommendation was that a sitter be "a person employed in a private residence solely to provide their service of attending to a child or an adult for an average of not more than 15 hours per week in any 4-week period …". The minority, 57a, favoured a 15 hour per week ceiling without averaging. We support the majority recommendation.

Chapter 10 - The Complaint and Enforcement Process

The remainder of the recommendations (58-78) all deal with procedures for filing a complaint, pursing the complaint and enforcement of decisions.

Recommendation 58 proposes that the Director be empowered to carry out investigations, whether or not a complaint of contravention has been made. We support this.

Recommendation 59 proposes that the use of the self-help kit by an employee should not be a prerequisite to an employee pursuing any and all remedies under the Act. Currently, the employee (or ex-employee) must use the self-help kit as a prerequisite to initiate a complaint. The Project Committee unanimously viewed this requirement as a barrier to accessing the ESA process. We agree with this recommendation.

Recommendations 60, 61 and 62 are important process recommendations which require that a complaint be investigated on intake (a "threshold investigation"), without limiting the discretion of the Director over

the procedure subsequent to a threshold investigation (recommendations 60 and 62). We support these recommendations.

Recommendation 61 proposes that the Act should specify a full range of procedural alternatives be available to the Director to resolve complaints; set out the procedural steps associated with each alternative; and allow a complaint to be transferred from one alternative procedure to another in the course of being resolved. We support this recommendation.

Recommendation 62 provides that the Act should require the findings made in the investigation of a complaint be summarized in a report to the Director; copies of the report be provided to the employer and the complainant; each party be given an opportunity to respond; and, the responses of the parties must be considered together with the investigation report in making a determination. We accept these recommendations, but only if sufficient resources are provided by the Government to properly set up, operate and staff these newly recommended processes. It is in the interests of both employers and workers to have fair and expeditious investigations and resolution of complaints.

Recommendation 63 proposes that a determination should be a decision of the Director "other than the investigator on whose findings the determination was based." This is a basic procedural fairness/natural justice issue which we support.

Recommendation 64 proposes that the Act should clearly permit a complaint to be filed on behalf of another person with the written authorization of the complainant (majority recommendation). Minority recommendation 64(a) would allow for the Director to dispense with the requirement for written authorization of the complaint by the employee on whose behalf it is made. The Committee acknowledges that there is the potential for mischief when a complaint is filed by a third party on behalf of an employee. This understates the concern, in our view. Recommendation 64(a) would not only allow vexatious complaints, but it would also potentially permit third parties to pursue complaints on behalf of persons who do not wish to have a complaint pursued on their behalf. The recommendation that the employee provide written authorization is seen to be a safeguard against a vexatious use or abuse of third party complaints; i.e. complaints filed by third parties against the wishes of an individual. The Project Committee states: "There are situations in which factors such as intimidation, language barriers, or lack of knowledge operate to discourage employees from asserting their rights and preventing third party complaints on behalf of vulnerable and unsophisticated employees would amount to denying them access to the complaint process" (p. 270).

We do not support recommendation 64. If a complainant is providing written authorization to have a third-party file on his/her behalf, there is no practical reason that the complainant cannot pursue the complaint directly, with the assistance of that same third party. Recommendation 64(a) is even more problematic, as it would potentially allow a third party to pursue a complaint against the wishes of an employee. One of the purposes of the Act in Section 2 is "to promote the fair treatment of employees." Forcing an employee to have his or her issues litigated in a public forum against their express wishes cannot be consistent with this purpose.

We agree with the majority recommendation 65 that the Act should be amended to provide that a complaint based on a contravention of Section 10 (prohibition on charging a prospective employee for obtaining employment) must be delivered within the shorter of 6 months from the last date of employment and 2 years from the date of the contravention. We recognize that simply having a 6-month limitation in this situation would often result in a complaint being filed out of time. We do not agree with

the minority recommendation, 65a, that the limitation be 2 years from the date of contravention in all cases.

We support the majority recommendation 66 which leaves unchanged the maximum amount of wages that a determination may require an employer to pay, except with regard to contraventions of Section 10 of the Act (which are addressed in recommendation 67). We are not in favour of further extending the maximum amount of wages a determination may require an employer to pay as proposed in minority recommendation of 66a.

In the unique circumstances of a violation of Section 10 of the Act, as addressed in recommendation 67, we agree with the 2-year limitation to prevent precluding recovery of payments illegally extracted from lower-paid workers before they were admitted to Canada, or lower-paid workers who have work permits that are valid only with a single authorized employer. Often it would be unrealistic to assume that those workers would file a complaint while employed, as it could jeopardize not only their employment but their status in the country.

Recommendation 68 has both a majority and a minority recommendation. This important recommendation deals with the current mandatory penalties whenever a contravention is found. The majority recommendation, which we support, confers a discretion on the Director to waive an administrative penalty based on criteria set out for the exercise of this discretion. The minority recommendation, 68a, would keep the current mandatory penalties which, as noted in the Consultation Paper, can operate unfairly when a contravention is inadvertent or results from a misunderstanding of the Act.

Recommendation 69 is supported by the signatory associations. This provides for discretion to increase the amount of an administrative penalty, subject to a specified maximum, on a discretionary basis by reason of the gravity of the contravention.

Recommendation 70 is a proposal that the model of workers' and employers' advisers under the Worker's Compensation scheme be examined for possible adaptation for the representation of otherwise unrepresented parties in appeals to the Employment Standards Tribunal. As with a number of other recommendations, this would require an ongoing monetary and staffing commitment by the Government.

Chapter 11 - Enforcement Mechanisms under the ESA

Recommendations 71 and 72 address the statutory lien for unpaid wages and expanding the priority of that lien "over all other secured and unsecured claims, subject to the paramountcy of federal insolvency legislation" (recommendation 71). Further, recommendation 71 states that this lien should not be subject to a monetary limit. We agree with these recommended changes.

Recommendation 72 removes the higher priority given to advances under registered land mortgages over advances perfected under the Personal Property Security Act (PPSA). The Committee stated that the "policy reasons for subordinating PPSA security to the wage lien logically apply equally to security on land and the priority of the wage lien relative to advances made by secured creditors should not depend on the nature of the property that is charged" (p. 295). We agree with this recommendation.

Recommendation 73 proposes that the Act be amended to clarify that accrued interest should be included in a third-party demand pursuant to Section 89 of the Act. Currently, such a demand cannot include interest payable by the employer or other person named in a determination. The Committee comments

that this is a "serious impediment to the usefulness of third party demands as a collection mechanism" (p. 297). We agree with this recommendation.

We support the majority recommendation 74 that Section 96 (2) of the Act not be changed. This relieves directors and officers for up to 2 months' unpaid wages per employee if the corporation is a subject of a proceeding under the federal Insolvency Act (including bankruptcy), or if a bank realizes its security on the assets of the corporation under Section 427 of the Bank Act. The minority recommendation, 74a, would remove this exemption. The Committee reviews the rationale for this exemption at pages 297-302 of the Consultation paper and we support this rationale for justifying the exemption.

Recommendation 75 proposes that the Act contain a definition of both director and officer which draws upon the definitions in the Business Corporations Act (and possibly also corresponding definitions in the Societies Act and federal corporate legislation). We agree with this recommendation.

Recommendation 76 proposes that, in the event a director or officer satisfies wage liabilities of the employer, that director or officer should have rights of contribution and subrogation to the priority that the employee's claim would have against the assets of the corporation. We agree with this recommendation.

Recommendation 77 proposes that the "sale of business or assets" section of the Act (Section 97) be amended by deleting the words "or a substantial part of the assets," to correspond with the successor employer provision in the Labour Relations Code. The Committee commented that the phrase recommended to be deleted did not add to the protection given by Section 97 to employees, and that repealing those words would assist in the consistent development of case law under similar provisions of the Act and the Labour Relations Code. We agree with this recommendation.

Recommendation 78 also addresses Section 97 of the Act and proposes that it be amended by adding the operation of a business under a receiver or receiver-manager "as a circumstance in which the employment of an employee of the business is deemed to be continuous for the purposes of the Act." The Committee proposes that continuity of employment should be assured when an employer's business continues to be operated in receivership, "regardless of how the receiver or receiver-manager's appointed." We agree with this recommendation.

Conclusion

The undersigned business organizations commend the Committee for its work and for the comprehensive review of BC's ESA, which is reflected in the Consultation Paper. Employment standards law, regulation and policy is an important part of British Columbia's overall competitive position. The ESA needs to ensure that workers are protected while also providing employers with a legislative framework that is not unduly restrictive and is sufficiently flexible to work for business of all sizes and across all sectors. We are encouraged by the balanced and measured approach evident within the BCLI Employment Standards Review Committee's report, and the extensive expert research and professional deliberations which underpin the report. Further, we commend the Committee for reaching consensus recommendations for nearly three-quarters of all recommendations.

The above commentary reflects input and advice from legal counsel, the signatory associations and businesses that are members of the associations. Our intention is to provide feedback that is helpful for the Committee. In general, we support most of the recommendations contained in the Consultation Paper and we agree with the majority of the consensus recommendations. In the instances where we disagree with recommendations, we have made every effort to provide the employers' perspective and offer constructive explanations to assist the Committee in the preparation of its final report.

We look forward to seeing the Committee's final report to the Minister of Labour.

Sincerely,

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President & CEO

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Iain Black
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BC Chamber of Commerce
Know what's on BC's mind.

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