

**Submission by the  
Canadian Labour Congress**

**to the**

**Review of Labour Standards in the  
*Canada Labour Code***

**regarding**

**Canadian Labour Movement Priorities:  
Proposed Changes to  
Part III of the *Canada Labour Code***

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**Canadian Labour Congress**

**Congrès du travail du Canada**

# **Canadian Labour Movement Priorities: Proposed Changes to Part III of the *Canada Labour Code***

## **Introduction**

On behalf of over three million members, the Canadian Labour Congress (CLC) would like to present its views on modernizing labour standards under Part III of the *Canada Labour Code*. The CLC brings together Canada's national and international unions, provincial and territorial federations of labour, and more than 130 district labour councils. Our members work in all parts of Canada, in almost all occupations, in all sectors of the Canadian economy, including in the federal private sector.

After carefully assessing the potential repercussions of Professor Harry W. Arthurs Report entitled *Fairness at Work: Federal Labour Standards for the 21st Century*, and after reviewing the discussion paper provided by HRSDC for this consultation, the intent of this brief is to provide recommendations and technical comments to government officials on potential legislative amendments to the *Canada Labour Code*.

## **General Principles and Priorities to Legislative Changes**

The CLC has sought and continues to seek a model Labour Code at the federal level that takes full account of today's realities in the workplace and in wider society. Especially the growing imbalance of power between workers and employers; increased competitive pressure which exert downward pressure on labour rights and standards in the absence of countervailing public

regulation; the growth of more precarious forms of employment; growing difficulties reconciling paid work with caring responsibilities, especially for women; and a more racially diverse workforce.

We argued, and we continue to believe, that there should be effective access to minimum rights and standards for all workers under federal jurisdiction at least equal to the best standards at the provincial level, and that also reflect norms which have been clearly established in collective agreements and in international labour standards, such as those passed by the ILO.

The current federal Code falls well short of best provincial practice in a number of key areas, including enforcement, leave provisions, and protection of human rights. Labour rights and standards at the federal level in Canada also fall well short of the norm in other advanced industrial countries (e.g., paid leave, maximum hours, minimum pay standards, and protection of part-time and contract workers). A floor of widely observed labour rights and standards is an important part of creating a more productive economy, as well as a fairer society, as demonstrated by the good economic performance of many jurisdictions with high labour standards. Substantive reform of the Code is of no use to workers if its provisions are not reflected in workplace realities, and if the Code does not provide a vision of what constitutes decency at work.

We welcome the fact that the Arthurs Report embraced most of these key principles. The Report advances a compelling and well-argued case for the continued relevance and importance of decent labour standards. We commend Commissioner Arthurs for his strong philosophical commitment to the fundamental principles underlying labour standards, and wholeheartedly endorse the key

guiding principle of the Report, Principle 1: Decency at work.

*“Labour standards should ensure that no matter how limited his or her bargaining power, no worker in the federal jurisdiction is offered, accepts or works under conditions that Canadians would not regard as “decent.” No worker should therefore receive a wage that is insufficient to live on; be deprived of the payment of wages or benefits to which they are entitled; be subject to coercion, discrimination, indignity or unwarranted danger in the workplace; or be required to work so many hours that he or she is effectively denied a personal or civic life.”*  
(P.47.)

This principle should be inserted in Part III of the Code as a general purpose clause to which reference could and should be made in the interpretation of specific provisions, and for the purpose of making regulations.

We note and welcome the fact that Professor Arthurs argues that this fundamental principle should prevail if it comes into conflict with others; that it requires special attention to the needs of precarious employed workers, and that it limits and provides context for his recommendations for flexibility in the application of standards.

The Report also rightly emphasizes the important link between decent wages and working conditions, and building a highly productive economy. A highly competitive Canadian economy needs strong labour standards that set fair competition between

employers without jeopardizing decency at work while promoting social justice for all. In order to achieve this, compliance is essential if employers who adhere to Part III are not to be undercut by those who do not.

We welcome the fact that the Report places a very major focus on the need for compliance and effective enforcement. The CLC welcomes the fact that there was general agreement between employer and labour representations on the need to achieve greater compliance. The CLC strongly supports the intent to achieve greater compliance as expressed by Arthurs, even if we do not entirely agree with the structures and the processes he has proposed. The major responsibility for promoting and ensuring compliance with labour standards rests with the government. However, we support an expanded role for community organizations in terms of education and facilitating access.

While the Report does not by any means endorse all of the specific proposals which had been advanced by the labour movement, it recommends a number of important substantive changes to Part III which we had sought — including a federal minimum wage at a decent level, new rights to leaves, and protection of precarious workers. We particularly welcome the call for expanded rights to leaves from the workplace for reasons related to personal and family responsibilities, and to access education and training. Despite the fact that Arthurs Report does not go far enough, it makes some very worthwhile recommendations which would extend and improve the protections available to contract, agency, and other precariously employed workers. The Report thus meets the test of responding to some important contemporary challenges, and updating Part III to meet new realities.

However, we have some significant concerns with the degree of “flexibility” of standards which is advocated, particularly at the level of the individual workplace and the individual worker. These concerns exist with respect to both union and non-union workers.

The labour movement strongly believes that the federal Labour Code should exist as a firm and legislated floor to provisions of collective agreements. It cannot be assumed that the existence of a collective agreement automatically protects workers from employer pressure to lower standards. The Report sets out Principle 5: The workplace bargain.

*“Labour standards should respect the right of employers and workers (or their collective representatives) to negotiate the terms of their relationship, provided that the negotiations are authentic and the resulting employment bargain is clear, respects the basic decency principle and conforms to law. They should also ensure that workers and employers enjoy the fruits of their bargain.”*

We support this principle and also recognize that statutory work time and work schedule standards do have to be modified in some operations and for some groups of workers. However, care must be taken that the fundamental principles endorsed by Professor Arthurs will not be undermined by the “operationalization” of provisions for flexibility of standards, especially with respect to working time. Our interpretation of the fundamental principles endorsed by Arthurs and of labour standards calls for statutory minimums that apply to all and no

one can avoid. Negotiations have to continue, but without leaving room for flexibility that would jeopardize the spirit of labour standards as a means to guarantee minimum standards for all and decency at work as defended by Arthurs.

## Detailed Views and Comments on Recommendations

### **I. RESPONDING TO THE EVOLVING WORKPLACE**

#### **A. HOURS OF WORK**

##### **1. Overtime**

##### **a) Time Swaps**

#### **Commission Recommendations:**

An employer should be allowed to permit an employee, upon his or her written request, to work in excess of daily or weekly standard hours of work, at straight time rates, in order to make up for time off taken, or to be taken, at a time specified in the request.

However, the employee should not work more than 48 hours per week (R. 7.43).

#### **CLC:**

The CLC finds recommendation 7.43 problematic. This recommendation contemplates work schedule flexibility for individuals via individual/employer agreement. Such arrangements can have repercussions for the treatment of other workers, and there is potential for employer favouritism and abuse.

The application of such a recommendation would jeopardize the application of overtime provisions as set in Part III of the Code and in recommendation 7.40 and 7.41 discussed further. Employers would be tempted to enter into individual negotiations with employees to swap time worked beyond 40 hours a week to time off at straight time in order to avoid paying overtime. Also, there is no recognition in Part III of the Code that individual work times in unionized workplaces should be determined through the provisions of the collective agreement, not via individualized agreements.

## **b) Method of Compensating Overtime**

### **Commission Recommendations:**

Part III should permit an employee and his or her employer to agree that overtime hours will be compensated by time off with pay, at the rate of one and one-half hours for every hour worked as overtime, to be taken at a time mutually agreeable to the employer and employee.

Banked overtime should be used or paid out within three months of being earned, (unless otherwise provided by a collective agreement or in a proposal approved through the workplace-level consultations discussed on pp. 27-30). However, an employee should have the right to request an extension in writing. The employee should also have the right to immediate payment upon request, in which case the employer should pay out the banked overtime at the end of the pay period next following the request (R. 7.40; 7.41).

### **CLC:**

The CLC supports the ability to take overtime pay as time off at the premium rate (7.40). Banked overtime should be used or paid out as provided by a collective agreement or within a limited time frame (7.41).

## **c) Right to Refuse Overtime**

### **Commission Recommendations:**

An employee should have the right to refuse overtime if this would require him or her to work more than 48 hours per week or more than 12 hours per day, except in the event of an emergency. Other thresholds for refusing overtime could be provided by regulation,

ministerial permit, collective agreement, or a proposal approved through the workplace-level consultations discussed on pp. 27-30. In order to facilitate transition to this new arrangement, employers that presently require employees to work overtime above these limits should be allowed to continue doing so for a period of one year following the coming into force of the new provisions.

An employee should have the right to refuse work beyond his or her regularly scheduled work: if this would conflict with significant family-related commitments that the employee cannot reasonably be expected to alter or avoid; if this would interfere with scheduled educational commitments; and, in the case of part-time employees, if this would create a scheduling conflict with other employment (R. 7.37; 7.38).

**CLC:**

Arthurs broadly supported the CLC's call for limits on overtime and long hours. We argued that workers should have the right to refuse overtime (except in emergencies), and to take overtime pay as time off the job at the premium rate. Arthurs supports a right to refuse overtime after 12 hours in a day or 48 hours in a week, and a right to refuse work beyond the normal schedule if this conflicts with family, educational, or other employment needs (see below for definition). This right to refuse long hours could, however, be limited to less than 12 hours by permits and collective agreement provisions (7.37; 7.38).

**Other Issues related to Refusal of Overtime:**

**Definition of Emergencies:**

The definition of emergency work in Part III should be expanded to clearly specify that maximum hours of work may be exceeded to the extent necessary to deal with an emergency that poses a significant and immediate threat to human life, health or safety, or extensive damage to property. However, emergencies should not include foreseeable or regularly recurring cyclical functions in demand for the employer's goods or services. The definition of emergency work should also be expanded to cover urgent and essential work to assist customers facing similar emergencies (R. 7.36).

**CLC:**

The definition of emergency should cover significant and immediate threats to human life and health and safety, and if extensive damage to property could have a significant and immediate threat to human life and health and safety, it should be included. But the sole threat of extensive damage to property should not be exclusive criteria to include it as an emergency situation, unless a state of emergency has been called by the authorized authority.

**Definition of Family:**

The definition of family should be as broad as the one used for access to compassionate care leave provided in Part III of the CLC.

**Proof of Education:**

A *post facto* demonstration of education/professional training enrolment should be used as the sole criteria for educational reasons, or a copy of a schedule could be used as a statement of

fact for the reason refusing overtime for other work, not only part-time work. (Some workers have two full-time jobs.)

**Notification of overtime:**

An employer should be giving a notice for overtime, with a minimum of four hours, and the notice to refuse overtime should be half the time of the notice provided by the employer with a minimum of three hours less than the employer's notice for overtime work. This would give some time for the employees to try to adjust his/her schedule to meet his/her needs and the workplace demands.

**2. Meal Breaks and Rest Periods**  
**a) Meal Breaks**

**Commission Recommendations:**

A meal break of 30 minutes should be provided for every period of five hours of work. Meal breaks would be unpaid, unless the employee is not permitted to leave the work site. Meal breaks could be postponed in the event of an emergency, or in accordance with a proposal approved through the workplace-level consultations discussed on pp. 27-30. Exemptions and special rules could also be established by regulation (R. 7.58).

**CLC:**

We called for paid breaks during the working day, including a half-hour meal break after five hours (accepted in 7.58).

**Other Issues:**

Meal breaks should always be paid, if an employee is required to stay or perform work, including all exceptions. If an employee can't have his/her meal break, a 30-minute meal break should be paid

on top of the working day if the working day is more than five consecutive hours.

### **b) Daily and Weekly Rest**

#### **Commission Recommendations:**

The minimum weekly rest period should be increased from 24 to 32 consecutive hours. Employees should also be entitled to eight hours of rest without pay in every 24 hours. Rest periods could be postponed in an emergency, or in accordance with a proposal approved through the workplace-level consultations discussed on pp. 27-30. Exemptions and special rules could also be established by regulation (R. 7.38).

#### **CLC:**

A number of Canadian jurisdictions provide for 32 to 48 consecutive hours of rest per week. As stated before, the CLC believes that minimum federal standard has to be at least as good as provincial standards. The labour movement has a long history of fights to reduce working hours and expand periods of rest, so we believe the minimum period of rest per week should be 48 hours. A period of 48 consecutive hours of rest per week is a fundamental element to a more balanced work/life and is in line with an acceptable level of decency of work as pursued by Professor Arthur and within Canadian society. The right to refuse long hours and this weekly 48 hours of rest could, however, be extended by permits and collective agreement provisions (7.37; 7.38).

### **3. Shift Work**

#### **Commission recommendations:**

Except in cases of unforeseeable circumstances beyond the control of the employer, employees should be entitled to advance notice of

shift changes of at least 24 hours (or such other period as may be specified in a collective agreement or in a proposal approved through the workplace-level consultations discussed on pp. 27-30). An employer should be prohibited from firing or otherwise penalizing an employee who, as a result of the lack of notice, cannot perform work for all or part of the shift hours, including overtime hours added to a previously scheduled shift (R. 7.48).

**CLC:**

We called for advance notice of work schedules to part-time and shift workers, and at least four hours of work per shift. 7.48 calls for 24-hour advance notice of work schedules, which is reasonable. Overtime provisions could be re-enforced to cover periods of work without a sufficient advanced notice or when a minimum period of rest, daily or weekly, can't be respected due to circumstances beyond the control of the employer.

**4. Exclusion of Managers, Superintendents, and Professionals from Hours of Work Rules**

**Commission Recommendations:**

Existing provisions of Part III, which exclude managers, superintendents, employees exercising management functions, and professionals from hours of work regulations, should remain unchanged at present (R. 4.8).

**CLC:**

Currently, some specified professionals and senior managers are excluded from some provisions of the Code relating to work schedules. In principle, many are covered, but the terms with respect to hours of work of many salaried professional workers are routinely ignored. Arthurs recommends maintaining the current exclusions (4.8; 4.9), and makes only vague reference to

monitoring the work hours of salaried professionals and managers. It would have been better to clearly specify that salaried professionals are covered by the working-time provisions of the Code.

## **5. Mechanisms to Adjust Working Hours**

### **a) Ministerial Permits**

#### **Commission Recommendations:**

When determining whether to grant or deny a permit, the Minister should provide interested parties with the opportunity to make their views known. The Minister should weigh the competing considerations and allow variations or adjustments only if, on balance, a reasonable case has been put forward for doing so. Permits should be limited to one year's duration. Any permits currently in force would remain valid until their expiration date. When the employer seeks the renewal of a permit, the Minister (or another delegated official) should presume that renewal is appropriate unless he has reason to believe that conditions have changed since the permit was originally issued; the employer has exceeded the hours authorized by the permit; or the employer has been guilty of an unfair employment practice under Part III (R. 7.4, 7.7 and 7.8).

#### **CLC:**

In the review process, the CLC opposed proposals for "flexibility" which would remove or dilute protection and access to Code enforcement provisions for workers, and raised concerns over the current widespread use of non-transparent Ministerial permits to vary standards. Often, workers are not aware that a permit has been applied for by an employer or renewed, and some permits have been in place for many years without review. We argued that permits to work long work schedules and similar variations of

standard provisions may be needed to take account of very specific circumstances, but should be subject to approval by Inspectors, regular and transparent reviews, and approval by affected workers. In recommendations 7.1 to 7.11, Commissioner Arthurs basically accepts these arguments and calls for much greater precision, transparency, oversight, and limits around the current process for Ministerial permits to vary work schedules. We support these recommendations, as long as the Ministerial permits includes the needs of employees and public safety, such as health and safety of workers and the public, work/life balance of employees and overall respect of decency in working time arrangements.

### **c) Averaging Arrangements and Modified Work Schedules**

#### **Commission Recommendations:**

The grounds for using an averaging arrangement or modified work schedule should be set out with greater precision in Part III. Prior to initiating an averaging scheme or modified work schedule, the employer should be required to provide the Labour Program with the following: a notice setting out the terms and proposed duration of the scheme; a statement disclosing the grounds on which the scheme has been instituted, and the procedures, if any, adopted by the employer to ascertain employee support; and an undertaking to discontinue the scheme if the conditions justifying it expire.

An averaging arrangement or modified work schedule should only be valid for one year, unless otherwise provided in a collective agreement or in a proposal approved through the workplace-level consultations discussed on pp. 27-30. Non-compliance should be treated as a violation of Part III, should result in cancellation of the scheme and should disqualify the employer for up to six months from applying to initiate a new scheme. Part III should be amended

to ensure that employers may accommodate genuine requests by individual employees for a modified work schedule (R. 7.3; 7.6; 7.7; and 7.39).

**CLC:**

In the review process, the CLC opposed proposals for “flexibility” which would remove or dilute protection and access to Code enforcement provisions for workers, including amendment to Part III that would accommodate requests by individual employees for a modified work schedule that might not be as voluntary as one would believe. We raised concerns over the current widespread use of non-transparent Ministerial permits to vary standards. We argued that permits to work long work schedules and similar variations of standard provisions may be needed to take account of very specific circumstances, but should be subject to approval by Inspectors, regular and transparent reviews, and approval by affected workers.

In recommendations 7.1 to 7.10, Commissioner Arthurs basically accepts these arguments and calls for much greater precision, transparency, oversight, and limits around the current process for Ministerial permits to vary work schedules. We support these recommendations, but we believe that non-compliance should be treated as a violation of Part III, should result not only in cancellation of the scheme but should disqualify the employer from applying to initiate a new scheme, and financial penalties should be imposed on the employers.

**d) Workplace-level Consultations**

**Commission Recommendations:**

Part III should be amended to facilitate consultation between employers and workers concerning any statutorily permitted

variation from working time standards. The new workplace consultative process should be available as an alternative to existing statutory procedures of Part III in order to vary working hours. It could also be used to provide variations in other standards, such as the timing of rest periods, rules on using or paying out banked overtime, and the fractioning of vacation leave over a year.

In a workplace with fewer than 20 workers, the employer could elect to conduct consultation through an open meeting with all employees. Otherwise, the employer would initiate consultations by forming a Workplace Consultative Committee (WCC). The WCC should be broadly representative of the workers affected by the matters under discussion. It could be formed in any manner (e.g., nomination, election, or lottery), provided the employer does not attempt to control the outcome of the consultation through the selection of WCC members. Members of the WCC should have the right to paid time off to participate in its activities, and would be protected from reprisals by the employer.

The employer should establish a timetable for discussion, allowing adequate time for various steps, and be allowed to terminate the process if it does not conclude within a reasonable period. The WCC should hear and consider all of the employer's proposals, and be entitled to request and receive relevant information concerning the need for and consequences of the proposals. It should be allowed to offer its own suggestions by way of amendments to the employer's proposals.

Upon conclusion of the consultative process, or the expiry of the time allotted to it, the WCC should prepare and submit the proposals to a secret ballot vote of the affected employees. In advance of the ballot, each employee should receive a brief written

statement of the issues and of the proposals to be voted on. If a proposal receives 50% +1 of the votes cast, notice of approval should be filed with the Regional Director of the Labour Program. The proposal would then take effect. It would be in force for the duration specified by the parties or, in the absence of this, three years. The proposal would have no effect if it is not approved by the necessary majority, if the process is terminated because of time delays, or if the employer withdraws the proposal from consideration rather than allowing amendments proposed by the WCC. If a union represents affected workers, the employer should only conduct workplace-level consultations with the union. The scope and manner of workplace consultation should be determined by the law of collective bargaining. The union should follow its normal process for consideration and approval of a proposal (R. 7.18-7.25; 7.27; 7.29; and 7.30).

**CLC:**

The CLC finds recommendations 7.18 to 7.30 for flexibility of work schedules in non-union workplaces to be determined through Workplace Consultative Committees very problematic. These add to the dangers of sectoral conferences to be discussed below in that there would be no independent worker voice in the process.

We recognize that Professor Arthurs has put forward a number of safeguards. However, variation through a reformed permit process would be much less open to employer manipulation, much less likely to undermine the collective bargaining process in other firms, and much more in the interests of non-union workers who would lack a real voice in the process. Also, the flexibility accomplished through these committees could jeopardize the capacity of employers that respect the well-known set floor of minimum standards to remain competitive with employers abusing the use of these committees to create an unfair advantage while

attacking the minimum level of decency at work. And after all, the experience of health and safety committees outside unionized environment has been that they are generally ineffectual, and ineffective in the non-union workplaces.

### **e) Sectoral Conferences**

#### **Commission Recommendations:**

The Minister should be authorized to convene, on his own initiative, or at the request of interested parties, a sectoral conference to consider adjustments to the regulation of working time or to any other provisions of Part III that could be adjusted on a sector-specific basis through regulation. The Minister should also be required to convene a sectoral conference before implementing any future regulatory provisions directed at “classes of employees” or sectorally based categories of employers.

In convening a sectoral conference, the Minister should have the discretion to define the boundaries of the sector, to set the agenda for the conference, and to determine who is an interested party. The Minister would appoint a Chair for each sectoral conference who would hold the title and exercise the powers of a Commissioner under Part III. The Chair would prepare a report advising the Minister as to whether proposed adjustments to labour standards should be implemented, or whether some other approach should be proposed with regard to the issues giving rise to the conference. The Minister would have the discretion to accept or reject the recommendations of the Chair, in whole or in part. Recommendations that are accepted by the Minister should be implemented by a regulation that would have the force of law. The process to establish new exemptions or special rules regarding hours of work or other labour standards should be based on the sectoral conference model. This model should also be used to

review existing exemptions and special rules. Regulations authorizing a departure from the statutory standard should be reviewed every five years, with an opportunity for all interested parties to comment. Repeal of, or changes to, existing regulations should be implemented gradually, bearing in mind the impact on both employers and employees (R. 7.12-7.16 and 7.34).

**CLC:**

Commissioner Arthurs proposes a sectoral standard setting as an alternative to the current system of special exemptions and permits (7.12). As he lays it out, sectoral conferences would be convened, and recommendations would be drawn up by an independent chair and given to the Minister for consideration. One concern here is that the scope for variation of standards via a sectoral conference appears to be not limited to work schedule issues, but could extend to new areas. We would be opposed to this. Any scope for variation of standards must be very clearly defined in the statute, and limited to work schedules and some reasonable provisions for variation of paid holidays.

Our preference would be for a reformed system for issuance of permits which is transparent and subject to close regulatory oversight. The sectoral standard-setting process which is proposed is problematic in that it would almost certainly be tilted toward flexibility as defined by and in the interests of employers. There would be no meaningful voice in the process for non-union workers, and the union voice would likely be, at best, a minority one.

Labour's past experience of sectoral standard-setting processes has been that they can start a process whereby non-union employers, with the manipulated consent of non-union workers, undermine standards to the detriment of unionized, and indeed all,

workers. Moreover, sectoral standard setting is problematic in that the conditions of workers in a “sector” such as airlines or banking vary a great deal from occupation to occupation (e.g., attendants and mechanics in airlines). While flight attendants’ schedules may indeed have to be modified by the realities of long flight times, the same is not true of other airline occupations.

Finally, the consequences of sectoral standard setting for collective bargaining have to be thought through in much greater detail. A sectoral standard could clearly undermine negotiated provisions on work schedules and overtime pay which work for both employers and workers in a specific company within a sector, and could lead to some trading off of one standard for another.

## **B. ANNUAL VACATIONS**

### **1. Length of Vacation Leave**

#### **Commission Recommendations:**

Annual vacations should be increased to three weeks after five years of service, and to four weeks after 10 years of service. Vacation pay should be correspondingly increased.

Employees with less than five years service should be entitled to a third *unpaid* week of vacation upon written request. Employees should only be allowed to take the third week at a time agreed to by the employer, and only in the year in which the leave is requested (R. 7.61; 7.62).

#### **CLC:**

We said that paid vacation should be increased from just two weeks to at least three weeks after one year, and four weeks after ten years. Arthurs calls for three weeks after five years (and a third unpaid week on request for those workers with less than five

years), and four weeks after ten years (7.61; 7.62). These are positive steps forward.

## **2. Waiver of Vacation Leave**

### **Commission Recommendations:**

Employees' vacations should be waived only upon their written request. They should have sole discretion to withdraw the waiver (R. 7.65).

### **CLC:**

No waiver should be allowed into the legislation for health and safety/work-life balance reasons. The current regulations allow waivers. A waiver should only be requested by an employee, and it should be approved by both the employer and Labour Canada.

## **3. Division of Vacation Leave**

### **Commission Recommendations:**

Part III should specify that annual vacations must be provided in one unbroken period, unless the employee requests in writing that the vacation be divided into two or more segments and the employer agrees. More detailed rules could be set out in a collective agreement or in a proposal approved through the workplace-level consultations discussed on pp. 27-30 (R. 7.63).

### **CLC:**

If employees have to divide up their vacation throughout the year, they may not fully benefit from having annual holidays. Division should be at the employee's digression and could be more acceptable if annual holidays were increased to three and four weeks as we recommended. Even then, employees should be

entitled to at least two continuous weeks per year, unless they request otherwise.

#### **4. Postponement of Vacation Leave**

##### **Commission Recommendations:**

An employee on a leave recognized under Part III (such as sick leave, maternity leave, parental leave, compassionate care leave, bereavement leave, or reservists' leave), at a time when vacation leave must be provided under Part III, should have the right to postpone his or her vacation until the end of the leave, or to another time with the employer's consent. Likewise, an employee should be allowed to interrupt a vacation and postpone unused vacation days to a later date, to be agreed with the employer, when another leave recognized under Part III coincides with the vacation period. Alternately, the employee could decide to waive that portion of the annual vacation which coincides with the other leave (R. T7.3).

##### **CLC:**

An employee should have the right to postpone or interrupt their vacation when on leave recognized under Part III. No other conditions than those already in the Code, like conditions under Compassionate Care Leave, should be required.

#### **C. GENERAL HOLIDAYS**

##### **1. Substitution of General Holidays**

##### **Commission recommendation:**

Part III should allow the employer, on the written request of an individual employee, to substitute one or more cultural or religious holidays for any general holiday under Part III (R. 7.68).

**CLC:**

Arthurs did not accept our call for a tenth paid holiday per year, and favours much greater flexibility in substituting other days for designated general holiday days (7.67; 7.68). It is important to note that employers have a duty to accommodate requests with respect to religious holidays in accordance with human rights legislation, over and above any provisions regarding holidays under Part III. In a workplace operation which operates 365 days per year, we agree that substitution of holidays and scheduling changes are appropriate ways to address the accommodation of religious and cultural requirements. In workplaces that are generally closed on statutory holidays, however, employers must develop ways to accommodate which may not necessarily involve substitution but could involve the use of other available leaves or other arrangements which do not deprive the worker of pay.

## **2. Simplifying the Calculation of General Holiday Pay**

**Commission Recommendations:**

While the length of service requirement to qualify for general holiday pay should be maintained, the obligation to work a minimum number of days in a given period should be repealed.

A single formula should be used to calculate general holiday pay. Employees should be entitled to an amount equal to their regular wages earned in the four complete work weeks preceding the week in which the holiday occurs, divided by 20.

For those employees who are paid at least in part by commission, general holiday pay should be equal to wages earned in 12 weeks preceding the week on which the holiday occurs, divided by 60. If the employee has less than 12 weeks of service, general holiday pay should be calculated in the same way as for non-commission employees. (R. T7.4, T7.5)

**CLC:**

These recommendations would clearly simplify the calculation of general holiday pay, but it would also confirm the non-recognition of real hours and overtime normally worked in the calculation of the holiday paid. For example, a part-time employee normally working 16 hours per week for 160\$/week, and 8 of those 16 hours are worked on Monday, when a designated holiday falls on a Monday, that employee gets 1/20 of 4 times 160\$, or 32\$, instead of his or her normal pay for that day, which is 80\$. It represents a serious reduction in pay for some part-time workers. In this scenario, we can't say that they get their general holiday fully paid. Also, for employees required to work extra hours on a regular basis, the formula proposed also prevents them from getting their general holidays fully paid, since the formula proposed does not include overtime.

### **3. Simplifying the Calculation of General Holiday Pay**

**Commission Recommendations:**

Employees required by their employer to work on a general holiday should have the right to determine the manner in which they are compensated. They could choose to receive either: (a) time-and-a-half for hours worked, plus general holiday pay; or (b) time-and-a-half for hours worked, plus another day off with pay, to be taken within a specified period (R. T7.6).

**CLC:**

The employee should have the right to decide between Option A or Option B. In the case of Option B, the leave should be taken within a specified period of time, for example within three months, unless the parties, or the collective agreement specify otherwise.

## **D. MINIMUM WAGES**

### **Commission Recommendations:**

The federal government should re-institute a national minimum wage and should cease to set the minimum wage by reference to provincial standards. However, variations should be permitted based on documented differentials in the cost of living in different population centres.

The new national minimum wage should be benchmarked to the Low Income Cut-Off (LICO) index or some similar standard, and should be adjusted automatically at intervals of one or two years. The formula for fixing and adjusting the national minimum should be set out in Part III itself, rather than in regulations.

In order to minimize dislocation in local labour markets, the new national minimum wage should be introduced in two phases. In the first phase, lasting two or three years, a national minimum should be established by gradually disengaging it from the lower province-based variants. In the second phase, lasting a similar period of time, the national minimum should be increased until it conforms to the benchmark proposed above. During both phases, adjustments should take into account cost-of-living increases (R. 10.14).

### **CLC:**

Labour supports the proposal that the federal government should create a national minimum wage by reintroducing a federal minimum wage in its own jurisdiction set at what is needed to bring a single, full-time, full-year earner to the poverty line, and should be indexed to average hourly wages. Arthurs broadly supports this recommendation (10.14), and accepts the key principle that the minimum hourly wage should match a poverty-

line standard, such as the Low Income Cut-Off (LICO). Despite the fact that LICO proposes variations between region and family size, we believe there should be only one minimum wage level that applies to all, from coast to coast to coast, and set above poverty level in a large urban area.

## **E. TERMINATION OF EMPLOYMENT**

### **1. Employee Notice of Termination**

#### **Commission Recommendations:**

Employees should be required to give their employer two weeks notice of their intention to quit. This requirement should apply only if:

- the employee has been employed for at least three months;
- the employee has not first been given notice of termination by the employer; and
- the employer has provided the employee with a written statement of employment terms that stipulates that notice to quit must be given, and that failure to give it will result in a monetary penalty.

If an employee quits without giving notice, and the employer suffers actual loss as a result, the employer should be able to withhold one day's pay from any monies owing to the employee for each week of the notice period that the employee has failed to complete. If an employer wrongfully withholds pay from an employee, an Inspector may order the employer to repay any such sum, together with interest (R. 8.1; 8.2).

#### **CLC:**

Employees should not have to give notice to the employer of their intention to quit, nor should employers be entitled to any financial

compensation when an employee leaves. The consequence of resignations are such that employees taking such radical actions have reasons that don't need to be justified and penalized. And the proposed notice and penalty could significantly reduce mobility in the labour force by creating limits in the mobility of employees between workplaces.

## **2. Severance Pay for Long-serving Employees**

### **Commission Recommendation:**

Entitlement to severance pay should accumulate at the rate of three days wages per year for workers with over 10 years continuous service (R. 8.3).

### **CLC:**

Arthurs calls (8.3) for a small improvement in severance pay (from two to three days per year of service after 10 years), and (8.5) accepts broadly that severance pay should not be reduced by a pension entitlement. This is an important point which should be clarified in legislation, but the severance pay as proposed by the commission recommendation is below some of the provincial standards, such as in Ontario. As stipulated in our general principles, we believe that part III of the Code should provide standards that are at least equal to standards offered in any province.

## **3. Employees who Resign after Receiving Notice**

### **Commission Recommendations:**

Workers who quit after being given notice of termination or layoff by their employer, but prior to the expiration of such notice, should forfeit any unpaid termination pay, but retain the right to severance pay. However, if they are discharged for just cause, they

should forfeit their right to both termination pay and severance pay (R. 8.4).

**CLC:**

The current proposal is a step in the right direction, and it should never be taken away from employees.

#### **4. Pensions and Severance Pay**

**Commission Recommendations:**

The provisions of Part III that disentitle workers to severance pay if they are entitled to pensions should be reviewed in light of changes to the law, and practice governing the age of retirement and the shift from defined benefit to defined contribution plans. The purpose of the review should be to ensure that Part III does not prematurely, unfairly, or unnecessarily deprive older workers of severance pay (R. 8.5).

**CLC:**

Pension and severance pay are different forms of rights and benefits that should never be taken away from employees.

#### **5. Group Termination of Employment**

**Commission Recommendations:**

The current provisions of Part III dealing with group terminations should be retained, subject to the following modifications designed to make the procedures more fair, consistent, and expeditious:

- The Minister's power to waive the required procedures should be delegated to Regional Directors of the Labour Program; and
- The criteria for exercising this power should be more clearly defined at present (R. 11.2).

**CLC:**

The history of this provision dealing with the group termination of employment is not well understood by employers, employees, unions or even HRSDC staff. In fact, Division IX of Part III of the Code has only been used seven times since its introduction to the Code, most recently with the closure of the Cape Breton DEVCO mines in 2000 and 2001 and the closure of the Air Canada flight attendant bases in Halifax and Winnipeg in the summer of 2008.

When originally introduced into law as the Labour Adjustment Benefits Act, SC 1980-81-82, c. 89, the Minister of Labour at the time, the Honourable Charles Caccia, spoke of the need to develop fair legislation that would end the need for “desperate measures of industrial action” (such as unlawful strikes and plant occupations) when firms closed leaving their employees without severance pay, pension rights and buy-out of equity in their jobs. This search for “justice” to persons caught up in mass terminations caused by economic and technological change was to be found in the voluntary negotiation of a “fair termination settlement package” and, in the absence of an agreement, reference to a government-appointed arbitrator for a final and binding decision under Division IX.

Given the recent examples of the use of Division IX, the CLC does not support the recommendations of the Commission to delegate the Minister’s power to waive the application of Division IX to Regional Directors nor is there a need for greater clarity in the criteria for exercising this power. In the last three cases, the current system worked appropriately. Further, the CLC does not support the Discussion Paper’s attempt to introduce greater “flexibility” or “efficiency” for employers in these circumstances of group termination of employment.

If improvements are required, the application of Division IX needs to be reviewed to make those requirements less restrictive, particularly section 30 of the Regulations which defines what are appropriate terminations for the purposes of this Division.

## **6. Outsourcing and Offshoring**

### **Commission Recommendations:**

There are no provisions in Part III that deals with the termination of employment for outsourcing or offshoring purposes. The Arthurs Report is also mute on this topic.

### **CLC:**

The existence of outsourcing and offshoring should be acknowledged in Part III, and differential treatment should be given to termination of employment for outsourcing or offshoring, a treatment that aims at taking away the currently strong incentive to outsource due to the lack of any legislation.

In a first step, outsourcing (the process of transferring a function or an operation to an external service provider, which would otherwise be an in-house function or operation) and offshoring (an outsourcing process by which the external service provider operates from outside Canada) should be defined at the beginning of Division XI. In addition, a new level of severance pay should be devised for the victims of group employment termination caused by the recourse to outsourcing or offshoring.

Four weeks pay per year of employment, up to a maximum of 78 weeks pay is the current standard at Global Communications Corp. and the formula we prefer.

### **Other Recommendations: Continuity of Employment**

An important recommendation of the Arthurs Committee, apparently not addressed in the discussion paper circulated by the Labour Program, was Arthurs' recommendation 5.8 "Continuity of Service." Arthurs recommended that Part III should provide that the continuity of service of employees is not interrupted for labour standards purposes if the functions they are performing are transferred from one business to another, as long as they continue to work for the new owners or in the new business. Part III should also be amended so as to preserve the continuity of service of employees of a provincially regulated work, undertaking or

business transferred to a federally regulated employer.

**CLC:**

We support the orientation of this approach. Section 189 of the Code currently preserves the continuity of service for employees whose employer sells the business to a third party, or transfers it to a new corporation owned by the same beneficial owners. However, as Arthurs noted, these successorship provisions do not operate in two situations: (1) the contract for services sector, where one employer loses a contract and a second employer assumes the contract, retaining the same workforce, and (2) where a provincially regulated business is sold or transferred into the federal jurisdiction.

Parliament recognized some aspects of the problems with contract-for-services arrangements when it amended the Code in 1996 to provide limited protections for some pre-board security screeners in the event of a change of contractor. Section 47.3 of the Code provides that a successor contractor must pay remuneration to organized pre-board security screeners that is not less than the remuneration paid to the employees by the previous contractor. However Section 47.3 provides protection only in respect of remuneration and not other benefits or statutory entitlements. It only provides that protection to organized workers. And it only applies to workers in a single industry, pre-board security screening.

The limited protections offered by section 47.3 are not justifiable on any logical or public-policy ground. There is no reason why some workers, who remain on the job providing the same service, should be granted limited protections under the Code, while other workers, who also remain on the job providing the same service, lose benefits and entitlements that they may have worked many years to achieve. The Code perpetuates an inequality that only serves to subsidize employers and transfers costs to workers.

Arthurs' approach would represent a step forward in providing that the continuity of service of employees is not interrupted for labour standards purposes if the functions they are performing are

transferred from one business to another, as long as they continue to work for the new owners or in the new business. We believe that amendments to Part III on this point should go further, in keeping with our desire for a model Labour Code. We propose that the amendments to the Code should be modelled on the provisions of the *Ontario Employment Standards Act* in effect between 1993 and 1995. In the event of a change in contractor, the successor contractor should be required by law to make job offers to employees, in order of seniority, for similar work and with substantially the same terms and conditions of employment, including wages and benefits. Employment would be deemed to be continuous for all employment standards entitlement purposes, including termination and severance pay. A successor contractor who did not make an offer of employment to an employee would be responsible for termination and severance pay. Such an amendment to the Code would help put an end to the race to the bottom characterizing contract-for-services arrangements and protect the economic and personal well-being of workers in those sectors.

## **F. HUMAN RIGHTS IN THE WORKPLACE**

### **1. Preventing Bullying and Abuse**

#### **Commission Recommendations:**

The federal government should modify its language in pending regulations on actual or apprehended workplace violence to include serious harassment, bullying, and abuse. Part II of the *Canada Labour Code* should be amended to define abuse, bullying, or harassment in the workplace as an occupational hazard, and to establish appropriate procedures for forestalling and responding to such conduct (R. 6.10-6.11).

#### **CLC:**

Part XX of the *Canada Occupational Health and Safety (COHS) Regulations*, Violence Prevention in the Workplace, pursuant to

Part II of the *Canada Labour Code*, came into effect on May 8, 2008.

One of the duties of the employer, as outlined in Section 125.(1) (z.16), mandate the employer to “take the prescribed steps to prevent and protect against violence in the workplace”.

And under Part XX of the COHS Regulations, “violence” is defined as any action, conduct, threat or gesture of a person towards an employee in their workplace that can reasonably be expected to cause harm, injury or illness to that employee. In other words the concept of violence is not limited to physical acts of violence, but also includes harassment, including psychological harassment, discrimination and bullying.

And an employer must develop and post in the workplace a Violence Prevention Policy that spells out their obligations to provide a safe, health and violence-free workplace, the development of a program that provides sufficient attention, resources and time to address factors that contribute to workplace violence including bullying, teasing and other abusive or aggressive behaviours, and to prevent and protect employees from such actions, and implementation of measures to assist employees who have been exposed to workplace violence.

It is our position that there is not a requirement to amend Part II of the *Canada Labour Code* or the COHS Regulations further as the issues of serious or psychological harassment, bullying and abuse have been covered by Part XX of the COHS Regulations, and there is a clear duty on employers in the Federal jurisdiction to both protect against and prevent incidents of violence in the workplace in all their different forms.

## **2. Workplace Human Rights Committees**

### **Commission Recommendations:**

The Labour Program, the Canadian Human Rights Commission, and the Ministers responsible for both, should discuss whether to leave in place the present Part III provisions dealing with sexual harassment, to expand these provisions to include harassment on other grounds forbidden by the *Canadian Human Rights Act* (CHRA) and/or other discriminatory employment practices, or to consolidate and administer all such provisions under the CHRA. They should also address a long-standing proposal for workplace human rights committees, either under Part III or under the CHRA. Appropriate legislative or administrative action should follow (R. 6.5).

### **CLC:**

For the labour movement, the important point is that effective mechanisms must exist in the workplace to deal with and speedily resolve complaints of harassment and violations of human rights.

Employers are already obligated under the *Canadian Human Rights Act* to ensure that the workplace is free from sexual harassment. Redress for sexual harassment complaints is available through the grievance procedure and/or the Canadian Human Rights Commission. Harassment may also be dealt with under health and safety and through the current Workplace Violence Regulations under Part II of the Code. In addition, under the *Employment Equity Act*, which covers most federally-regulated workplaces, employers address such policies within the framework of their employment systems review and employment equity plans. Also under the *Employment Equity Act*, employers must consult with unions or employee representatives. Human rights committees, consisting of equal numbers of employee and

management representatives and funded by employers, could provide a valuable addition to this existing framework. These committees would monitor compliance with human rights statutes and provide education and training on human rights and diversity issues for both employees and management. They would attempt to resolve discrimination and harassment complaints at the workplace level. In the event an issue could not be resolved, the committees would provide information on how formal complaints by employees could be made under existing human rights statutes or through the grievance procedure. In implementing this proposal, the Labour Program should also consider how to best integrate these different structures in order to avoid confusion or overlapping responsibilities. Legislation should also address the weaknesses of the existing provisions which, as Arthurs pointed out, are largely not complied with by employers. As with the enforcement of minimum standards generally, non-unionized workplaces must be scrutinized and monitored to ensure that workplace human rights committees are established and functional. The CLC would also support a pro-active and ongoing educational campaign for workers and employers so that all affected parties know their rights and obligations.

### **Other Recommendations with Respect to Human Rights**

#### **Commission Recommendations:**

The Labour Program, on the one hand, and the Canadian Human Rights Commission and the Canadian Human Rights Tribunal on the other, should enter into a memorandum of understanding (MOU) to deal with complaints that may involve concurrent or consecutive proceedings under Part III and the CHR Act. The MOU would define a common approach to such proceedings, and would:

- (a) provide simple, clearly written advice to complainants concerning the limits and possibilities of each type of proceeding;
- (b) require that complainants make an election in writing to proceed either under Part III or under the CRH Act, and be advised of the consequences of doing so;
- (c) confer discretion on decision-makers in all three agencies to transfer evidence and documents from one to the other, and confer the power to use such evidence and documents in a subsequent proceeding;
- (d) confer power on each agency to deny complainants access to the others if it finds that no reasonable grounds of complaint exist or that the complaint is frivolous or vexatious; and
- (e) confer power on each agency to transfer the case to the other if it finds that reasonable grounds of complaint do exist that lie within the jurisdiction of the agency to which the case is transferred.

If necessary, power to enter into such an MOU should be conferred on the Minister responsible for Part III and the Minister responsible for the CHR Act, and appropriate amendments should be made in Part III and in the CHR Act to enable an MOU to be given effect.

The Labour Program and the Canadian Human Rights Commission should discuss possible cooperative strategies to advance the cause of human rights in the workplace. Their discussions should address: (1) the need to respect the prime mandates of both agencies, (2) the importance for any joint initiative of personnel with expertise in both workplace relations and human rights, and (3) the need to ensure that all cooperative strategies are supported by adequate resources.

The Labour Program should ensure that Part III is drafted, interpreted and administered in such a way as to advance the principles embodied in the Canadian Human Rights Act as well as to comply with its specific requirements.

Employers and workers should respect the principles of the Canadian Human Rights Act and adjust their workplace agreements and practices accordingly. (R.6.3 to 6.7)

**CLC:**

We welcome Arthurs' recommendations to improve the existing compliance with human rights legislation and to further advance the cause of human rights in the workplace.

Although these recommendations do not specifically address legislative amendments, they are nevertheless very important issues to address. The CLC and its affiliates would welcome an opportunity to explore the extent to which the government has adopted any of these recommendations and any opportunity for consultation on how best to implement these "administrative" recommendations.

## **G. EDUCATION AND TRAINING**

### **1. Pay for Required Training**

**Commission Recommendations:**

Employers who require their employees to attend training sessions should pay during their participation (R. 11.5).

**CLC:**

We agree with the current recommendation. This recommendation is also in line with the definition of working time used by the ILO,

which also includes as working time, time spend on training required by employers.

## **2. Training Bonds**

### **Commission Recommendations:**

Employers should be permitted to require employees to post training bonds so as to ensure that they do not resign for an agreed period following completion of a training program for which the employer has paid. The terms of training bonds should be established by regulations under Part III (R. 11.6).

### **CLC:**

Arthurs (11.5) would require employers to pay for required training (which does not always happen), but would also allow employers to require that employees forfeit a bond if they quit after paid training. Investing is a risk and we should not let employers get a guaranty of return on their investment by putting employees in a financial prison. Like a financial penalty if no notice is given, this kind of measure would limit mobility in the labour market.

## **3. Education Leave**

### **Commission Recommendation:**

Employees should be entitled to take unpaid education leave of up to five days per year at a time mutually agreed with their employer (R. 11.7).

### **CLC:**

Arthurs calls for a right to unpaid education leave of up to five days per year (11.7). Five days is not enough, but it is an important first step, which at least recognizes the need for

employer accommodation of individual learning needs outside work.

## **H. COMMUNICATING WITH EMPLOYEES**

### **1. Written Notice of Employment Terms**

#### **Commission Recommendations:**

Employers should be required by regulation to provide employees who are not covered by a collective agreement with a written notice setting out their rates of pay, hours of work, general holidays, annual vacations, and conditions of employment. The written notice should be provided at the time of hiring and updated each time material changes occur or at periodic intervals.

The notice should also briefly advise employees of the existence of the *Canada Labour Code* and direct their attention to a toll-free number and a website where they can obtain further information. The Labour Program should provide a sample or standard form notice that can be used or adapted to meet employers' requirements.

The notice should not be considered a contract of employment, but treated as *prima facie* evidence of the agreement between the parties. For the purposes of compliance proceedings under Part III, if the employer fails to produce initially, or cannot produce, a copy of the written notice of the terms of employment, the employee's recollection of the terms should be presumed accurate, unless the employer adduces persuasive evidence to the contrary (R. 5.1-5.4).

#### **CLC:**

The CLC is in general agreement that a clear definition of employee be included in the regulations of the Code, and that

anyone hired be given clear notification of their status, with a default status of employee.

## **2. Deductions from Pay**

### **Commission Recommendations:**

Employers should be entitled to deduct from an employee's wages reimbursement for personal charges or fines incurred by the employer provided that:

- (a) the amount does not exceed one day's wages for each pay period;
- (b) the rules governing personal use of company property or liability for fines have been announced and agreed to in advance;
- (c) the sums owing are clearly specified in an account, legal notice, traffic ticket, or similar document, which the employer provides to the employee;
- (d) the employer has suffered actual financial loss; and
- (e) the employee does not deny incurring the charge or fine.

The employee should have the right to appeal against a deduction to an Inspector, and if the appeal succeeds, the employer should immediately return the money to the employee, together with interest (R. 5.7).

### **CLC:**

Money deduction should never be used for disciplinary measure for any reasons. There are just too many possibilities where employers would use it as a measure of extortion or reduction of labour cost.

### **3. Easier Calculation of Statutory Benefits**

**Commission Recommendation:**

The Minister should enact regulations that will permit easy calculation of benefits and other entitlements accruing to employees who are paid on any basis other than time (R 5.6).

**CLC:**

We support this approach. A percentage would be easy to apply, like many collective agreements do for non-full-time or permanent employees.

## **II. COVERAGE UNDER PART III**

### **1. Definition of "Employee" and "Employer"**

#### **Commission Recommendations:**

Part III should be amended to permit the Minister to enact regulations on a general or sectoral basis, defining "employees," "employers" and "employment." These definitions should initially codify the current policies and jurisprudence under Part III. However, they should be reviewed from time to time to ensure that other workers who ordinarily perform substantially similar functions under substantially similar conditions to "employees" are covered by Part III (R. 4.1). The Minister should be permitted to enact such regulations on either a general or a sectoral basis.

#### **CLC:**

Arthurs proposes that clear definitions of employee, employers and employment be included in the regulations of the Code, a recommendation with which the CLC is in general agreement. However, we do not agree with the possibility for the Minister to adopt different definitions for different sectors. The coverage of labour standards based on clear and standards definition should be as wide as possible, otherwise the whole statutory scheme for federal labour standards is likely to be destabilized.

### **2. Autonomous Workers and Independent Contractors**

#### **Commission Recommendations:**

A new category of "autonomous worker" should be established under Part III. "Autonomous workers" should be defined by Ministerial regulation as including persons who perform services

comparable to those provided by employees under similar conditions, but whose contractual arrangements distinguish them from “employees.” Persons who provide services to or on behalf of employers, but who are neither “employees” nor “autonomous workers,” should be clearly identified as “independent contractors” and expressly excluded from coverage under Part III. A definition of “independent contractor” should be provided by Ministerial regulation.

To the extent necessary to protect their basic right to decent working conditions, and to protect the interests of employees from unfair competition, “autonomous workers” should be eligible for limited coverage under Part III. The Minister should have the power to enact regulations, based on sectoral input, specifying sector-specific criteria for “autonomous worker” status, and determining on a sector-specific basis which protections are to be extended to these workers.

Employers should be required to provide employees, autonomous workers, and independent contractors with a simple notice advising them of their status under Part III. This notice would be of no effect if the person so described meets the relevant statutory definition. If an employer fails to provide the notice, subject to written evidence to the contrary, the worker should be presumed to be an employee under Part III. Furthermore, the use of coercion, undue influence or misrepresentation to cause a worker to accept the status of an independent contractor or autonomous worker should be considered a violation of Part III, and the worker’s consent should be of no effect (R. 4.2-4.7).

**CLC:**

In essence, Arthurs proposed to include definition and clarify status of two specific classes of work: 1) autonomous workers, a concept close to the concept of dependent contractor used in CLC part I, and II independent contractors, a concept close to the notion of employer. He also proposes that power be given to the Minister to make those definitions in the regulations of the Code with variations by sectors, and variations on labour standards that would be applicable to each classes of work.

The CLC is in general agreement that the regulations of the Code should include clear definitions of autonomous contractors and independent contractors. However, we do not agree with the possibility of the Minister adopting different definitions for different sectors, or applying different standards between workers falling under Part III of the CLC. The coverage of labour standards has to be based on clear and standard definitions that apply to all, otherwise the whole statutory scheme for federal labour standards is likely to be destabilized.

We believe that the Code should prevent unfair competition between workers doing similar work in the same workplace, but being protected differently because of their legal status. The most effective solution to prevent such unfair competition is to give all workers covered under Part III the same rights.

### **3. Agency Workers**

**Commission Recommendation:**

The Labour Program, or some other branch of the federal government, should undertake a study of employment practices in the temporary placement industry, in cooperation with the

industry, if possible. The study should attempt to determine (a) the extent of compliance with existing federal and provincial labour standards, and (b) whether inappropriate practices exist within the industry that ought to be regulated under Part III, so far as that is constitutionally feasible.

The federal government, in consultation with other interested parties, should encourage placement industry associations to draw up a code of conduct that requires agencies to comply with all relevant legislation, and prohibits practices or contractual terms that (a) deprive agency workers of access to proper pay and benefits, (b) interrupt their tenure of service after each assignment, or (c) prevent them from taking permanent jobs with client firms after a defined interval. The code should also stipulate that agency workers must be made fully aware of their rights before being dispatched to client firms, and it should contain a mechanism for identifying and rectifying violations.

The federal government should require all corporations, institutions or agencies receiving federal grants or contracts to certify that they neither do business with temporary placement agencies nor utilize agency workers in violation of the provisions of the proposed code of conduct. The government should adopt a similar policy in its own direct dealings with such agencies (R. 10.1).

Part III should make federally regulated enterprises jointly and severally liable, with temporary employment agencies for non-payment of wages or benefits owing to agency employees who work in those enterprises (R. 10.2).

**CLC:**

Arthurs supports our call for employer/agency joint and several responsibility for ensuring minimum standards for agency workers (10.2). And in recommendation 10.1, Arthurs calls only for development of a voluntary code of conduct to deal with other key

issues for temporary agency workers, such as their exclusion from consideration for permanent jobs. We believe that Part III of the Code should go further and treat agency workers the same way as other employees in the workplaces where they work, with access to the comparable wages and benefits, otherwise the whole statutory scheme for federal labour standards will continue to be destabilized, and the development on lower classes of work, such as agency workers, will continue to jeopardize the existence and the fundamental goals of Part III of the Code.

As stipulated by Arthurs when he talks about basic principles of labour standards, the general principles of fairness require that people with similar characteristics ought to be treated in the same way. Also, according to Arthurs, the prime principle underlying Part III is that no one should be permitted to work in conditions that cannot be described as “decent.” If coverage under Part III were to produce some other outcome, this would be a strong argument for changing it. It would be very unfortunate if the coverage provisions of Part III were worded so as to exclude some workers, such as agency workers, from the protection of the decency principle, introduced in his report.

Today, agency workers are treated differently than other employees in the workplaces where they work, despite the fact that they have similar characteristics to other employees doing similar work. In most cases, they do not get wages and benefits that other employees doing similar work get in that workplace. Also, their legal status often prevents them from getting access to essential rights and working conditions that can be classified as decent, such as access to permanent employment.

Worse, when we compare the protection given to temporary foreign workers in Canada, as administered by HRSDC and other federal

departments, to the protection given to Canadian born and permanent resident agency workers, we find out that temporary foreign workers enjoy more protection than agency workers. For instance, in order to get the authorization to hire temporary foreign workers, an employer must provide the prevailing wage and access to all benefits to those temporary foreign workers. Agency workers do not necessarily get the prevailing wage for their occupation and they clearly do not get access to the benefits provided by the employers where they work.

For the CLC, agency workers and temporary foreign workers are similar. They are hired on a temporary basis to meet employers demand. In the case of temporary foreign workers, they enjoy all the rights provided under labour standards, plus the prevailing wage in their occupation and access to all the benefits offered in their workplace like any other employee. To comply with the principle of fairness and decency as described by Arthurs, we believe that agency workers should be entitled to the same treatment as temporary foreign workers. We believe that Part III of the Code should recognize that agency workers should be defined and treated as employees in the workplace where they work, that these agency workers should be entitled to the prevailing wage for their occupation where they work and that they should be entitled to access to, or be financially compensated for, all benefits they would be entitled to if they were employees in workplaces where they work.

#### **4. Temporary and Part-time Workers**

##### **a) Temporary Workers—Consideration for Permanent Employment**

**Commission Recommendations:**

Employers should be required to provide temporary employees with a statement setting out the nature of the relationship, its anticipated duration, and the conditions—if any—under which the employee may be considered for permanent employment.

Temporary employees who have worked for an employer for continuous or non-continuous periods that cumulatively total one year—or longer if that is the normal probation period fixed by the employer for permanent employment in similar work—should be deemed to have completed the probation period and should be entitled to be considered for permanent employment on the same basis as probationers. The burden of proof of compliance with these requirements should rest on the employer (R. 10.3; 10.4).

**b) Temporary Workers—Coverage under Part III**

**Commission Recommendation:**

Temporary employees who have worked for the same employer for periods that cumulatively total at least one year should be deemed to have completed the period of service required for statutory rights under Part III as if their service had been “consecutive,” provided that the interval between successive periods of service does not exceed sixty days (R. 10.5).

**c) Equal Pay for Temporary and Part-time Workers**

**Commission Recommendations:**

Part-time workers should receive the same pay as full-time workers with equivalent jobs.

Temporary employees who have worked for the same employer for periods that cumulatively total at least one year should have

access to the same pay that the employer provides to other employees with equivalent jobs, length of service, and abilities (R.10.5; 10.6).

**CLC:**

The CLC called for a major focus on coverage of precarious workers, including part-time and temporary or contract workers. Overall, the recommendations in this area are positive, but do not go far enough. We called for equal pay for part-time, temporary and contract workers performing the same work as full-time employees. Arthurs (10.4-10.6) only recommends equal pay for equal work for part-timers and after one year for temporary workers, and equal access to rights under Part III for temporary workers after one year (which can be attained via cumulative and not necessarily sequential contracts). Calling on the principles of fairness and decency, we believe that waiting for one year for temporary workers to get access to equal pay and benefits under the Code is unacceptable. As demonstrated with agency workers, temporary foreign workers do not have to wait to get equal pay and access to the full benefits as provided by the employers, so Canadian born and permanent resident temporary workers should not have to wait for a year to get equal pay and access to all protections provided by the Code and benefits provided in the workplace.

**Other Recommendations: Foreign Agricultural and Domestic Workers in Canada**

**Commission Recommendations:**

Whether or not they are protected under provincial statutes, foreign agricultural and domestic workers in Canada on work permits should be protected by mandatory employment agreements with their employer. The terms of such agreements should be established by the federal government, after

consultation with provincial authorities, with a view to ensuring that workers receive basic labour standards protections.

Agreements should specify that foreign workers will receive:

- (i) wages equal to those of locally recruited workers;
- (ii) rest and meal breaks, and weekly rest periods;
- (iii) protection against unauthorized deductions from pay; and
- (iv) in the event that they are dismissed and liable to repatriation, access to an informal and expedited hearing by a Labour inspector, during which they will be permitted to remain in Canada; if found to have been unjustly dismissed, they will be reassigned to another employer if one is available.

Foreign agricultural and domestic workers should receive information in their own language concerning the protections available under provincial legislation, and under their employment agreements. They should be provided with access to a toll-free number where they can seek advice, report violations and request assistance, and Labour inspectors should ensure that they have access to the use of a telephone.

The federal government should enter into agreements or arrangements with provincial authorities to ensure that provincial Labour inspectors will inspect workplaces to which foreign workers are assigned, and report to Human Resources and Social Development Canada any employer who violates either the terms of the employment agreement or provincial labour standards legislation. Where provinces decline to enter into such an agreement or arrangement or to provide inspection services, Labour Program inspectors should be authorized, under the terms of the relevant federal foreign worker program, to carry out the necessary inspections.

Employers who repeatedly or systematically violate provincial labour standards or the terms of employment agreements should be denied future access to workers under the relevant foreign worker program for a period of not less than one year. (R. 10.10 to 10.13)

**CLC:**

The CLC supports these recommendations. Arthurs makes important recommendations with respect to foreign agricultural and domestic workers (10.10 to 10.13) essentially arguing that the federal government has a responsibility to ensure effective coverage under provincial employment standards. This is a minimum requirement given evidence of abuse of basic labour rights which Canada has agreed internationally to protect, and given that some provinces do not cover temporary foreign workers under their employment standards because of exclusions for agricultural and domestic workers.

10.12 is even broader, and requires Labour Canada to ensure that employers of foreign temporary workers live up to the terms of employment agreements. This is very relevant given recent revelations that permits have been awarded to employers who have failed to live up to promises made to foreign temporary workers, and given that there is no effective federal government monitoring/compliance program in place to ensure that wages are paid as specified in the original application for a permit.

We believe that there is an important potential role for Labour Canada in the labour market opinion process which leads to the issuance of work permits for temporary foreign workers.

## **5. Benefits Bank**

### **Commission Recommendations:**

The federal government ought to investigate a range of possibilities for providing benefits coverage to temporary workers, agency workers, self-employed persons, and others presently without coverage. It ought specifically to consider establishing a “benefits bank” through which employment-related benefits coverage could be purchased by workers themselves or by their employers, as well as by other persons seeking coverage. This “bank” might be established by private insurance companies or organized by a public agency.

If coverage can be provided in a practical fashion, the Labour Program ought to revisit the issue of whether non-standard workers must be provided with benefits on the same basis as other workers employed by the same firm (R. 10.7).

### **CLC:**

We called for better access to benefits for temporary and contract workers. Arthurs suggests consideration be given to a special benefit bank for nonstandard workers (10.7). This would be a useful initiative, building on some union initiatives to extend benefit coverage to workers who frequently move from employer to employer in the same sector. The payment into such benefits should be made by hiring employers at a level equal to the cost of benefits provided to their own employees.

## **6. Employment of Children**

### **Commission Recommendations:**

The Minister’s regulation-making power should be amended to enable the Minister to adopt regulations dealing with the

employment of persons under the age of 16, or between the ages of 16 and 18. Part III should ban dangerous work for workers under the age of 18 (R. 10.8; 10.9).

**CLC:**

Part III of the Code should ban dangerous work for workers under the age of 18, and provide other protections for workers under the age of 18 in accordance with convention 138 and 182 of the ILO.

### **III. SUPPORTING WORKING FAMILIES**

#### **1. Short-term Family Responsibility Leave**

**Commission Recommendations:**

Employees should be entitled to take up to 10 unpaid days of leave per year to meet responsibilities regarding the care or education of a child, or the health of a family member. Unused leave should not be carried forward from year to year. At the request of the employee, and with the consent of the employer, leave could be divided into periods shorter than one day (R. 7.50).

**CLC:**

We argued that all workers should have the right to a time bank allowing them to take up to 10 paid days with pay per year to deal with personal and family responsibilities.

#### **2. Long-term Family Responsibility Leave (Compassionate Care Leave)**

**Commission Recommendations:**

Employees should be entitled to take compassionate care leave to provide care or support to a family member who is seriously ill or who has had a serious accident, regardless of whether the illness or accident is likely to be fatal in a given period.

The requirement that compassionate care leave be shared where two or more employees provide care to the same family member should be removed. Each employee should be entitled to the full period of leave (R. 7.55).

**CLC:**

We welcome these recommendations.

### **3. Length of Service Requirements for Maternity, Parental, and Sick Leave**

#### **Commission Recommendations:**

Employees who do not meet the current length of service requirement under Part III, but who qualify for maternity, parental, or sickness benefits under the Employment Insurance (EI) program should be entitled to maternity, parental, or sick leave, as applicable.

An additional period of leave without pay should be provided under Part III to cover any period during which the employee is receiving, or is serving a waiting period before receiving, sickness benefits under the EI program (R. 7.52).

#### **CLC:**

We welcome these recommendations. It is important to align the provisions under Part III with Employment Insurance benefits. Given the EI provisions are constantly changing, the provisions under Part III should not have to “catch up” to the *EI Act*, but rather, the Code should allow for changes based on EI changes (for example, the power to make regulations to align the Code with changes in EI legislation). Employees who are entitled to EI benefits should be entitled to unpaid leave of absence to allow them to access these benefits.

### **4. Flexibility for Parental and Maternity Leave**

#### **Commission Recommendations:**

Each parent of a child should be entitled to take the full duration of parental leave.

Employees should be entitled to divide parental leave into two periods, provided that they give the employer sufficient notice.

Employees should be allowed to suspend their parental or maternity leave once, and postpone the remaining weeks of leave, if the child is hospitalized for a period likely to exceed two weeks. If, for any valid reason, the employer cannot reinstate the employee during the period of suspension, the employee should be entitled to an extension of leave that is equal to the period of the child's hospitalization (R. 7.53; 7.54; and T7.7).

**CLC:**

We welcome these recommendations .

### **5. Time Off for Nursing Mothers and Employees with Medical Needs**

**Commission Recommendations:**

Part III should provide for short breaks during working hours to afford nursing employees reasonable time off, without pay, to breastfeed a child and/or express milk on the work site. Similar breaks should also be available to employees who need them, to inject medications or for similar medical purposes. Such breaks should be subject to operational considerations, but should not be unreasonably denied.

Employees should be entitled to time without pay for personal medical appointments. Employees should give reasonable notice to the employer and take reasonable steps to minimize the duration of their absence (R. 7.59; 7.60).

**CLC:**

We welcome these recommendations. Arthurs makes positive recommendations to expand rights to unpaid leave for bereavement leave (to seven days); court appearances; to deal with pandemics;

and to attend medical appointments (7.56; 7.57; 7.60). These are welcome, and it is appropriate that these remain a separate right to leave.

The questions in the Discussion Paper also make reference to Arthurs' recommendation regarding income support for pregnant or nursing women who require re-assignment. Currently, a worker who is pregnant or nursing can stop work for a very short period with pay and benefits if she believes that continuing to do her job could pose a risk to her health or the health of her child. If a risk is established, her employer can reassign her. However, where that worker is not reassigned, only leave without pay is available. This puts pregnant and nursing workers in an untenable situation. Workers should not be required to choose between economic stability and the health of their children.

Part III should provide for leave with pay in these situations, which is consistent with the obligations on employers, affirmed by the Supreme Court of Canada, to accommodate workers to the point of undue hardship. Although Arthurs did not accept this recommendation, Recommendation 6.8 proposed that the government review income support programs.

Where possible, re-assignment must be made and there should be some incentive for employers to re-assign pregnant or nursing workers rather than provide them with leave. Therefore, we would prefer the initial proposal that leave with pay be provided under Part III, rather than income supports under EI or another framework. However, such income support programs would at least be an improvement to the current situation and provide some income stability for pregnant or nursing women who have not been re-assigned to alternative safe work.

## **6. Right to Request Flexible Work and the Duty to Consider**

### **Commission Recommendations:**

Employees should be provided a right to request, in writing, that their employer decrease or increase their hours of work, give them a more flexible schedule, or alter the location of their work. The employer should be required to give the employee an opportunity to discuss the issue and provide reasons in writing if the request is refused in whole or in part. There should be no appeal of an employer's decision on the merits, although an employee could file a complaint if the employer has failed to adhere to the procedure.

The employer's obligation to respond to a request should be limited to one request per calendar year per employee. Employees should be entitled to invoke these provisions after completing one year of service with the employer (R. 7.44; 7.45).

### **CLC:**

We welcome the goals of these recommendations, but we doubt they have enough strength to have any significant impact on work-life balance of non-unionized employees.

## **7. Bereavement Leave**

### **Commission Recommendations:**

The duration of bereavement leave should be increased from three to seven days. Employees who meet the current three-month length of service requirement should be entitled to pay during the leave for the first three regular working days that occur during the leave period. The balance of the leave would be unpaid.

Employees should be entitled to start bereavement leave on any day, provided that the leave accommodates the day of death or the funeral. Employees should also have the discretion to postpone some part of bereavement leave, for the purpose of organizing or attending a funeral at a later date (R. 7.51).

**CLC:**

Arthurs makes positive recommendations to expand the right to unpaid leave for bereavement leave (to seven days).

### **8. Leave for Family Victims of Crime**

**CLC:**

We welcome these recommendations. Employees should be given time off in the event that they or a family member is a victim of a violent crime. The right to leave should also apply to a case where a spouse or child commits suicide, as it does in Quebec.

Employees have the right to work on a part-time or intermittent basis during a period of leave. No reasons, apart from being judged guilty of the violent crime should be used to deny access to the leave.

### **9. Court Leave**

**Commission Recommendations:**

Employees should be entitled to take unpaid leave while they attend court proceedings as a party, witness, or juror. The employer should be provided with reasonable advance notice of the leave (R. 7.56).

**CLC:**

We welcome this recommendation.

## **10. Public Emergency Leave**

### **Commission Recommendation:**

Part III should be amended to provide the Governor in Council with the authority to make regulations that allow defined classes of workers to take job-protected, unpaid leave in the event of a public emergency such as a natural disaster or pandemic (R. 7.57).

### **CLC:**

We welcome this recommendation.

## **IV. SMART COMPLIANCE**

We are pleased that compliance and enforcement are a major focus of Arthurs Report (Chapter 9). Arthurs proposes that all non-union employees be given a written notice of their rights under the Code, and information on how to contact Labour Canada; establishment of easy worker access to Inspectors through toll-free lines and websites; better and more effective procedures for wage recovery and to appeal unjust dismissal; support for worker rights education programs, including those by unions and community groups; greater resources for Labour Canada to hire Inspectors, and to undertake education and proactive auditing of employers with respect to compliance; swifter resolution of complaints; and more active and aggressive enforcement of the Code through fines and, ultimately, criminal prosecutions. Overall, we are very satisfied with these recommendations. Many can and should be quickly implemented with no legislative change.

### **1. Voluntary Compliance**

#### **Commission Recommendations:**

There should be a greater focus on proactive techniques for promoting voluntary compliance, including:

- (1) Increasing the resources available for education and information;
- (2) Providing stakeholders with materials, training and advice on Part III and labour standards;
- (3) Inviting sectoral organizations and individual firms to voluntarily commit themselves to comply with Part III and other labour standards by drawing up appropriate codes;
- (4) Broadening the membership of the Labour Program's Labour Standards Client Consultation Committee to

- include other stakeholders, including organizations that advise non-unionized workers; and
- (5) Creating a small audit unit to design convenient systems for keeping employment-related records, and to conduct audits randomly or in response to complaints (R. 9.1; 9.2; 9.3; 9.4; 9.6; 9.7; 9.10; and 9.18).

**CLC:**

The CLC has argued that greater resources should be given to Labour Canada so that Inspectors can educate employers and workers; that the Code should be actively promoted through popular educational materials, workplace visits, etc.; that government support should be given to community-based organizations to publicize and to help provide access to labour rights, including through expert representation before tribunals; and that third-party complaints should be investigated by Inspectors, and that Labour Canada Inspectors should undertake proactive enforcement, including general audits of problem employers, and of sectors with low levels of compliance followed, if necessary, by issuance of orders. The Code and administrative practices should be changed as necessary to support these kinds of proactive activities, and to increase their importance relative to the investigation of individual complaints. Labour Canada should develop strategic plans including targets for inspections and for levels of compliance established through inspections.

## **2. A New Compliance Structure**

**Commission Recommendations:**

A Chief Compliance Officer should be appointed with the authority to deploy Inspectors and other field staff, obtain legal advice and representation as required, order audits and investigations, secure

statistical and other analyses of issues related to compliance, and conduct educational and informational campaigns. The Labour Program Inspectorate should be expanded, its procedures modernized, and its powers enlarged. The Inspectorate should be strategically deployed under the overall direction of a Chief Compliance Officer.

The Labour Program should develop a strong in-house statistical and analytical capacity that will assist the Chief Compliance Officer in strategic planning as well as operational decision-making.

A small audit unit should be established under the direction of the Chief Compliance Officer to design convenient systems for keeping employment-related records and conduct audits randomly, as part of a proactive enforcement strategy, or in response to complaints.

The Labour Program should assemble a small legal staff mandated to perform the advocacy, negotiating, and advice-giving functions required under the compliance strategy (R. 9.8; 9.9; 9.10; 9.11; 9.12; and 9.19).

**CLC:**

For the labour movement, the important point is that effective mechanisms must exist in the workplace to deal with complaints of harassment and violations of the Code. The current never ending discussions about internal structures should not be taken as an excuse to defer the issue, but rather as a genuine process to find the most effective mechanisms. A new compliance structure, including a Chief Compliance Officer may not achieve the goal of more effective and efficient enforcement of the Canada Labour Code. The end result may be the creation of a new layer of bureaucracy that is out of touch with the realities of the work

being done on the front line. Many of the technical resources suggested already exist, although more financial support for these activities would no doubt help.

### **3. A New Adjudicative Structure**

#### **a) Director of Adjudication Services**

##### **Commission Recommendations:**

A new adjudication system should be established under a Director of Adjudication Services (DAS). The DAS should report not to the Chief Compliance Officer, but to a more senior official at the Labour Program. The DAS should have the authority to:

- (1) Provide information to workers and employers concerning their procedural and substantive rights and responsibilities;
- (2) Receive and process complaints concerning unjust dismissal;
- (3) Assist the parties to such complaints to resolve their differences;
- (4) Dismiss claims that are patently frivolous or vexatious or belong elsewhere;
- (5) Assign cases for adjudication; and
- (6) Take all necessary steps to ensure the proper operation of the adjudication system.

Separate reporting lines and a clear division of responsibilities should be established between the Chief Compliance Officer and the Director of Adjudication Services, in order to ensure the adjudicative independence of Hearing Officers.

Staff of the Director of Adjudication Services should process incoming unjust dismissal complaints and appeals from Inspectors' decisions; ensure that those that are eligible for

adjudication are dismissed or diverted elsewhere; and assist the parties to resolve their differences if possible, and if not, bring matters forward to a hearing promptly and with the issues clearly defined. The Director of Adjudication Services should develop strategies for assisting unrepresented workers and employers to secure representation or to represent themselves at hearings (R. 8.6; 8.7; 9.13; 9.15; 9.16; 9.17; and 9.18).

**CLC:**

For the labour movement, the important point is that effective mechanisms must exist in the workplace to deal with complaints. The current never ending discussions about internal structures should not be taken as an excuse to defer the issue, but rather as a genuine process to find the most effective mechanisms. We believe introducing a new adjudicative structure will not necessarily improve compliance. The current practice of having the Federal Mediation and Conciliation Service appoint adjudicators has the benefit of ensuring that adjudicators have some independence from the program. By having staff reporting to a Director of Adjudication Services determining which complaints go forward (i.e. to internal staff acting as Hearing Officers), this independence is sacrificed. We believe that the Director of Adjudication and Hearing Officers should not have the discretion to determine if complaints are frivolous or vexatious, and if he/she did, his or her decision should be open to appeal to the CCRI.

**b) Hearing Officers**

**Commission Recommendations:**

A permanent roster of full- and part-time Hearing Officers should be appointed to hear appeals from the decisions of Inspectors in certain cases and to perform adjudicative functions now undertaken by Referees and Adjudicators. Hearing Officers should

possess knowledge of and experience in labour standards issues, labour law, industrial relations, or related disciplines. Senior departmental field staff should be eligible for appointment, as well as arbitrators, tribunal members, and persons who previously represented workers or employers.

Hearing Officers should be paid at a level commensurate with their responsibilities; they should be well trained; they should be hired in sufficient numbers to enable them to perform their functions efficiently; and they should be deployed in accordance with a well-designed and carefully monitored strategy (R. 5.10; 8.8; and 9.14).

**CLC:**

For the labour movement, the important point is that effective mechanisms must exist in the workplace to deal with complaints and violations of the Code. The current never ending discussions about internal structures should not be taken as an excuse to defer the issue, but rather as a genuine process to find the most effective mechanisms. As previously mentioned, we do not believe that a new structure which includes Hearing Officers will improve compliance. This change may speed up the hearing process, and may result in some administrative efficiencies, but at a cost to the integrity of the process. The same result may be achieved by allocating additional resources where they are most needed in the current system.

We feel too much power may be concentrated in the hands of Hearing Officers. This sounds similar to the process utilized under Part II of the Code, which has frequently been criticized for issuing bad decisions. Hearing Officers also will not have the independence currently enjoyed by referees appointed by FMCS.

## **4. Targeting Unfair Employment Practices**

### **a) General Approach**

#### **Commission Recommendations:**

Enforcement procedures under Part III should be redesigned in order to secure higher overall levels of compliance, to achieve more efficient and effective remedies for workers whose rights have been violated, to ensure fairness in the enforcement process, and to protect employers against frivolous and vexatious claims.

However, prosecutions should remain a practical and effective option for dealing with the most serious unfair employment practices. Maximum monetary penalties should be raised from \$5,000 to \$50,000 for a first offence; to a maximum of \$100,000 for a second offence; and to a maximum of \$250,000 for a third or subsequent offence. Each day that an offence continues should be deemed to be a separate offence. Individual employers and corporate officers should, in extreme cases involving deliberate, fraudulent conduct or the use of threats or coercion, be liable to prosecution and imprisonment (R. 9.20; 9.22; and 9.23).

#### **CLC:**

We support Arthurs' recommendation for more active and aggressive enforcement of the Code through increased fines, penalties, and ultimately, recourse to criminal prosecution where necessary. The Labour Program should ensure it is provided with sufficient resources to fulfill its mandate for increased enforcement.

## **b) Pre-emptive Remedies**

### **Commission Recommendations:**

In addition to any other remedies or penalties imposed by the Canada Industrial Relations Board or by a criminal court, employers found to have committed unfair employment practices should be subject in appropriate cases to pre-emptive remedies designed to prevent future violations.

Pre-emptive remedies should include a requirement that offenders: file periodic reports; post bonds to be available to reimburse employees in the event of future violations; be subject to regular audits at their own expense; be disqualified for specified periods from receiving government contracts; or, in extreme cases, lose their right to engage in businesses requiring government approvals or permits (R. 9.30, 9.31).

### **CLC:**

We support Arthurs' recommendation to afford additional preemptive remedies against employers who are found to be violators, so as to prevent future violations of the Code. The Labour Program should ensure that it is provided with sufficient resources to fulfill its mandate for increased enforcement, including pursuing these additional remedies. In addition to the remedies proposed by Arthurs, thought could also be given to other deterrents, such as posting violators and violations on the departmental website. An aggressive approach should also be taken to pursue employers that may seek to escape compliance by engaging more in the "underground economy." All workers who are covered by the Code deserve to actually benefit from the protection that the Code offers.

### **c) Points System**

#### **Commission Recommendations:**

The Labour Program should institute a “points” system similar to that used in many jurisdictions for repeated and serious driving offences. Points should be awarded according to the severity of the offence, and should remain on the employer’s record for three years.

Employers who exceed a given number of points should be regarded as systemic offenders, and automatically referred for unfair employment practice proceedings (R. 9.29).

#### **CLC:**

A point system would only encourage bad employers to maximize the use of their points without taking the proper action. Such a system would penalize better employers and minimize the application of the Code.

## **5. Dealing with Other Part III Infractions**

### **a) Limitation Periods**

#### **Commission recommendations:**

Part III should be amended to establish a six-month limitation period within which complaints concerning unpaid wages or benefits must be initiated. The limitation period should run from the date on which the complainant discovers non-payment. The amendment should allow for the possible extension of the limitation period on defined grounds, including fraud or coercion.

Part III should be amended so as to set a 36-month limit on the period in respect of which the Labour Program collects unpaid wages (R. T.5.3; T.5.4).

**CLC:**

A six-month limit seems to be below what citizens would be entitled to under the Civil Code in Quebec and Common Law in the rest of Canada. No limits should be applied in respect to collection of unpaid wages and pensions.

**b) Administrative Penalties and Surcharges**

**Commission Recommendations:**

Inspectors and Hearing Officers should have the power to levy penalties of fixed but significant amounts for first offences, escalating for second or subsequent offences.

Before bringing an appeal from any order of an Inspector, an employer must deposit an administrative surcharge equal to 10% of the amount owing, or \$100, whichever is the greater. If the appeal is successful, both amounts should be returned to the employer (R. 9.21; 9.28).

**CLC:**

The CLC supports the orientation of these recommendations.

**c) "Cease and Desist" Orders**

**Commission Recommendation:**

Inspectors and Hearing Officers should have the power to order offending employers to cease and desist from future violations (R. 9.26).

**CLC:**

The CLC supports the orientation of this recommendation.

## **d) Orders for Costs**

### **Commission Recommendations:**

Inspectors and Hearing Officers should have the right to order full compensation for employees whose Part III rights have been violated, including some compensation for advocacy and other costs incurred in seeking redress.

Inspectors and Hearing Officers should have the power to order the employer to pay the Labour Program's cost of investigations and hearings, according to a fixed tariff (R. 9.25; 9.27).

### **CLC:**

The CLC supports the orientation of these recommendations. Inspectors should be given greater powers to issue orders to recover unpaid wages, including some compensation for advocacy, and to establish if there are grounds for a complaint of unjust dismissal. There should be a system of progressively rising fines for employers who do not play by the rules, plus administrative penalties when payment orders are not complied with. But we do not believe that anyone should be paying for the Labour Program's cost of investigations and hearings, according to a fixed tariff. The enforcement of Part III of the Code is an essential public service and the cost of it should be shared by all, based on government's general revenues.

## **6. Inspectors' Access to Records**

### **Commission Recommendations:**

Part III should be amended to provide Inspectors with the authority to obtain records in the hands of third parties where such records are relevant to determining any matter arising under the Code.

Part III should be amended to give Inspectors the ability to obtain a

court subpoena ordering production of employment records or other documents relevant to proceedings under Part III.

Failure to keep records or to produce records on request should give rise to a presumption that the employee's claim is valid (R. T.9.1; T.9.2).

**CLC:**

The CLC supports the orientation of these recommendations.

## **7. Reporting Work-related Violations**

**Commission Recommendation:**

Part III should be amended to provide that Inspectors who have reasonable grounds to believe that an employer is violating the *Canadian Human Rights Act* or other work-related federal legislation be given discretion to notify the relevant authorities (R. 6.9).

**CLC:**

The CLC fully supports the orientation of these recommendations.

## **8. Collection and Recovery Measures**

**Commission Recommendations:**

The Labour Program should accept responsibility for securing recovery of wages found owing. This might involve arrangements with either a public or a private collection agency, or establishing a new wage collection unit within the Labour Program itself. The costs of proceedings to effect such recovery should be offset, so far as possible, by a surcharge added to the wages and costs in the original order, to be paid by the delinquent employer.

Part III should be amended to give Inspectors the power to order production of an agreement of sale or transfer so as to determine which party to the agreement is liable to employees for wages or other entitlements under Part III.

Inspectors, Referees (or Hearing Officers), and Regional Directors should be given the power to require employers to testify under oath as to the identity of persons indebted to them and the whereabouts of all their assets.

Regional Directors should be given the power to attach not only debts owing to the employer, but any other unregistered assets of the employer with a fixed or ascertainable value, such as stocks and bonds. They should also be empowered to place a “notice of wages owing” against any registered real or personal property owned by the employer. However, where recovery of unpaid wages requires the seizure and sale of real or personal property that does not have a fixed or ascertainable value, this should continue to be undertaken by and under the order of the Federal Court.

Any shares, licences, contracts, or assets held by the director(s) of a delinquent corporation, or held by third persons on their behalf, should be regarded as assets that can be attached in order to satisfy an order for the payment of wages that have not been paid by the delinquent corporation.

If the assets of the delinquent corporation or its directors are transferred to another person or corporation subsequent to the registration of an order for payment of wages in court, the transferee shall be deemed to have acquired as well the obligation to pay the unpaid worker, unless the transferee is a purchaser at arm’s length with no knowledge of the order. The onus of demonstrating the lack of knowledge should fall on the transferee.

Part III should be amended so as to prevent a corporate director from avoiding liability for unpaid wages, benefits, or severance pay by resigning at a time when she or he knows or ought reasonably to know that the employer is likely to become insolvent (R. 5.11; 5.12; 5.13; T5.2; and T5.5).

**CLC:**

We support the orientation of these recommendations. The Labour Program should have access to these additional tools to collect from recalcitrant employers and ensure that employees, who have been deprived of their entitlements under the Code, are able to actually receive what they are owed. The Labour Program should ensure it is provided with sufficient resources to fulfill its mandate for increased enforcement and collection.

## **9. Complaints from Unionized Employees**

**Commission Recommendation:**

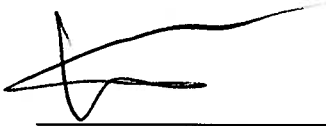
Violations of Part III in unionized workplaces ought, in general, to be dealt with through the grievance procedure and arbitration. However, this general approach should be subject to two exceptions: (a) when the employer's violation amounts to an unfair employment practice under Part III; and (b) when the union refuses to process the employee's complaint under Part III to arbitration (R. 9.32).

**CLC:**

We believe that employees should be given the choice between the grievance procedure and a complaint under Part III of the Code. In unionized workplaces, the union will be in a position to assist members with the proper procedure depending on the issue. In some cases, such as a case of psychological harassment between

two employees, the union might decide not to represent an employee. Our proposal would leave that that unrepresented employees with at least the option to to use the procedural rights under the Code.

This document is respectfully submitted on behalf of the Canadian Labour Congress:



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Kenneth V. Georgetti,  
President

**Appendix A:**

**Summary of the CLC's Response to Arthurs Recommendations**

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- 4.1 CLC agrees
- 4.2, 4.3 CLC disagrees, no variations by sector
- 4.4 to 4.10 CLC agrees
- 4.11 CLC disagrees, no variations by sector
- 4.12 to 4.14 CLC agrees
- 5.1 to 5.6 CLC agrees
- 5.7 CLC disagrees
- 5.8 CLC agrees, but recommendations could go further
- 5.9 CLC agrees
- 5.10 CLC disagrees
- 5.11 to 5.14 CLC agrees
- T5.1 CLC agrees
- T5.2 CLC agrees
- T5.3 CLC has concerns (see p. 47)
- T5.4 CLC opposes (p. 47)
- T5.5 CLC agrees
- 6.1, 6.2 CLC agrees
- 6.3 to 6.6 CLC has concerns
- 6.7 to 6.9 CLC agrees
- 6.8, 6.9 CLC agrees
- 6.10 CLC has concerns
- 6.11 CLC has concerns
- T6.1 CLC has no comments
- 7.1 to 7.11 CLC agrees with reservation
- 7.12 to 7.16 CLC disagrees, no variations by sector
- 7.18 to 7.30 CLC disagrees
- 7.31 to 7.33 CLC agrees
- 7.34, 7.35 CLC disagrees, no variations by sector
- 7.36 CLC doesn't agree to include property damages unless there is a state of emergency

- 7.37 CLC agrees
- 7.38 CLC agrees
- 7.39 CLC opposed
- 7.40 CLC agrees
- 7.41 CLC agrees
- 7.42 CLC agrees
- 7.43 CLC has concerns
- 7.44 to 7.47 CLC supports 7.44 & 7.45 but doubts it will have much effect
- 7.48 to 7.64 CLC agrees
- 7.65 to 7.68 CLC opposed
- 7.69 to 7.72 CLC agrees
- T7.1 CLC opposed
- T7.2 CLC opposed
- T7.3 CLC partly agrees
- T7.4 CLC partly agrees
- T7.5 CLC partly agrees
- T7.6 CLC agrees
- T7.7 CLC agrees
- T7.8 CLC agrees
- 8.1 CLC opposed
- 8.2 CLC opposed
- 8.3 CLC agrees
- 8.4 CLC agrees
- 8.5 CLC agrees
- 8.6 CLC agrees
- 8.7 CLC partly disagrees
- 8.8 CLC disagrees
- 8.9 CLC has no comments
- 8.10 CLC has no comments
- 8.11 CLC agrees
- 8.12 CLC agrees
- T8.1 CLC opposed

- T8.2 CLC has no comments
- T8.3 CLC has no comments
- T8.4 CLC partly agrees
- 9.1 to 9.28 CLC generally agrees, but has some concerns
- 9.29 CLC opposes
- 9.30 and 9.31 CLC agrees
- 9.32 CLC opposed
- T9.1 CLC agrees
- T9.2 CLC agrees
- 10.1 CLC opposed
- 10.2 to 10.7 CLC agrees
- 10.8 CLC says protect them as per ILO conventions (p. 34)
- 10.9 to 10.14 CLC agrees
- 11.1 CLC has no comments
- 11.2 CLC has no comments
- 11.3 & 11.4 CLC agrees
- 11.5 CLC agrees
- 11.6 CLC opposed
- 11.7 CLC agrees
- 11.8 CLC agrees

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