NEGOTIATING WITHOUT A FLOOR

UNIONIZED WORKER EXCLUSION FROM BC EMPLOYMENT STANDARDS

By David Fairey
with Simone McCallum

JULY 2007

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By David Fairey with Simone McCallum

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Summary

Employment standards are meant to provide a minimum floor below which employers cannot go, and establish a starting point for negotiations for improved working conditions when employees negotiate a collective agreement. They also establish a fair playing field for employers, reducing unfair competition.

In essence, employment standards govern the conditions in which people do paid work. They deal with issues such as the minimum wage, minimum and maximum hours of work, overtime pay, parental leave and statutory holidays. They are supposed to offer a basic level of protection for all workers – providing assurance that they can earn a decent living under reasonable conditions, protect their personal safety, and balance work and family life. Historically, employment standards have been important even to unionized workers because they have allowed collective bargaining to concentrate on winning improvements above and beyond minimum standards.

In May of 2002 the British Columbia government made a large number of changes to the Employment Standards Act, allegedly to make it more "flexible" and thus more beneficial to both employers and employees. One of the more significant changes was the exclusion of all employees covered by a collective agreement from core provisions of the Act (if their collective agreement contains any language regarding those provisions).

Unionized workers in BC were first excluded from the core protections of the Employment Standards Act in 1983. After a review in the early 1990s, this provision was removed on the grounds that collective agreements should not exempt parties from fundamental protections of the law. However, it was agreed that some flexibility would be provided as long as a collective agreement, on the whole, would "meet or exceed" the minimum employment standards set out by the Act.

The 2002 changes to the Act re-established the 1983 collective agreement exclusion provision in broader terms, and thereby encourages parties to a collective agreement to "opt out" of the law. This misleads unionized workers into believing they have all the rights the Act provides, when in fact they may not.

One important consequence of the 2002 changes was to allow overly collaborative or "employer-accommodating" unions to negotiate agreements with provisions below the minimum standards of the Act. BC has historically had a small number of "alternative" non-confrontational unions that have appeared on the scene when employers were resisting the organizing efforts of other unions, and these unions have frequently signed voluntary recognition agreements with employers that were substandard in the industry.

This paper reviews, in particular, collective agreements signed by the Christian Labour Association of Canada (CLAC), the largest of these alternative employer-accommodating unions in BC. CLAC has frequently conceded to employers collective agreements with provisions below the standards of the Employment Standards Act, both before and after the 2002 changes. In many instances, this has resulted in a lowering of wages and working conditions below the (new and lower) minimum protections of the Act, and/or denying sections of their membership the core protections of the Act. A key difference is that, under the 1994–2002 Act, an employee working under a substandard agreement would have recourse, through the filing of a grievance or a complaint to the Employment Standards Branch or Labour Relations Board, and was entitled to the minimum protections of the Act, regardless of substandard agreement language.

CLAC has seen an increase in its membership in BC since 2002, and is particularly active in the construction sector, although it has expanded its certifications in other fields as well, such as transportation and health care.

Employees covered by the substandard CLAC collective agreements examined have lost their legal rights to several of the basic wage and benefit provisions of the Employment Standards Act.

The evidence from our research supports a conclusion that the introduction of legislation that permits parties to a collective agreement to opt out of employment standards protections has resulted, in the case of several CLAC collective agreements analyzed, in the unjust denial of unionized workers the minimum rights and benefits the statute was designed to provide to all workers. For example, we find CLAC agreements with clauses regarding overtime pay, annual vacations with pay, and termination pay that are below the Employment Standards Act floor.

This paper also reviews recent cases where traditional unions have been victim to the loss of Employment Standards Act coverage for large sections of their members – through legislative decree, in the wake of changes to the Act. Under the previous Act, unions were aware that if their collective agreements did not contain rights and benefits at least equal to the Act, the superior provisions of the Act were deemed to form part of their collective agreement. However, since 2002, under the new Act, large groups of union members have potentially lost these employment rights without legal recourse. The new Act has left gaping holes in many collective agreements, and the government has not given unions the opportunity to re-open their collective agreements to ensure their members are not exposed.

The severe consequences of the exclusion of unionized workers from the new Act is exemplified in the case of employees of Securitas Canada, who were denied overtime premium pay after working 40 hours per week when working 12 hour shifts, and in the case of laid-off employees of Canadian Woodworks, who were denied severance pay in lieu of termination notice – rights they could not have been denied under the old Act.

We recommend that Section 3(2) of the Act – the section excluding employees covered by a collective agreement from the core protections of the Act – be restored, and the "meet or exceed" provisions contained in the 1994–2002 Act returned, along with Employment Standards Branch scrutiny of collective agreements to ensure effective enforcement. Repeal of Section 3(2) is more than justified by the principle that all British Columbians enjoy basic employment standards as a matter of right, not subject to loss through the actions of an employer-accommodating bargaining agent.

Introduction

The Employment Standards Act is about ensuring that employees in the province enjoy basic standards of pay and conditions of employment in their workplaces. It is part of a broader system of labour standards that govern the conditions in which people do paid work. "Employment Standards" deal with issues such as minimum wage, minimum and maximum hours of work, overtime pay, parental leave, vacations and statutory holidays. Employment standards establish a minimum floor below which employers cannot go, and provide a starting point for negotiations for improved working conditions when employees with a union negotiate a collective agreement. They also establish a fair playing field for employers, reducing unfair competition.

In May 2002 the British Columbia government made a large number of changes to the Employment Standards Act, allegedly to make it more "flexible" and thus more beneficial to both employers and employees. One of the more significant changes made to the Act by passage of Bill 48[1] was the exclusion of all employees covered by a collective agreement from core provisions of the Act (if their collective agreement contains any language regarding those provisions.)[2] This new feature of employment standards law is unique in Canada, although it has an earlier history in British Columbia. It enables parties to a collective agreement to "opt out" of the law, and misleads unionized workers into believing they have all the rights the Act provides, when in fact they may not, either because their bargaining agents agreed to contract language that gave some of those basic rights away, or because their union failed to ensure that all provisions of the Act were minimally contained in their collective agreement.

This paper reviews the unique history of unionized worker exclusion from core protections of the BC Employment Standards Act, explains how such exclusion leads to substandard working conditions, and identifies unions that might be considered overly cooperative or accommodating with employers and thus the most susceptible to entering into substandard agreements. The paper then examines a sample of collective agreements negotiated by one such union, the Christian Labour Association of Canada, before and after collective agreement exclusion was reintroduced in 2002, to determine whether substandard provisions have been negotiated. The paper also examines the equally serious loss of rights under the law for unionized workers where mainstream adversarial unions have found themselves with old collective agreement language that, under the new Act, nullifies previous rights protected under the old law.

History of Employment Standards Exclusion for Unionized Workers

It is very rare, and possibly unconstitutional, for government statutes to permit certain groups in society to remove themselves from ("opt out of") coverage of a law specifically designed to regulate an activity without prior government sanction or oversight on a case by case basis. According to industrial relations experts, employment standards legislation that permits the "opting out" (also referred to as "contracting out") of basic employee protections by employers and their unions invites unwelcome levels of collaboration.

Dr. Mark Thompson of the University of British Columbia, in comments on proposals to change the law in this way in 2001, expressed the view that: "This policy is unwise because it opens the door for corrupt arrangements between employers and pseudo unions."[3] Dave Ages, former manager of the Lower Mainland region of the BC Employment Standards Branch, expressed the view that this change in the law allows "… employers to collaborate with 'alternative', employer-dominated unions to undercut minimum standards."[4]

It therefore follows that, in the absence of the absolute protection of the Employment Standards Act, overly collaborative opting out of the law could lead to collective agreement provisions that

provide lower minimum benefits and protections than prescribed by the Act for significant numbers of workers.

Whether these new exclusionary features of Bill 48 in fact lead to a lowering of basic benefits and protections for unionized workers below what the Act provides can only be determined by an examination of the collective agreements negotiated by employer accommodating unions. This is because of many enforcement deficiencies associated with the new Act, including a lack of government oversight of new employer-employee "hours averaging agreements," complaint resolution "settlement agreements," substandard collective agreement provisions, and the absence of any requirement that employers register such agreements with either the Employment Standards Branch or the Labour Relations Board.[5]

One of the controversial amendments to the BC Employment Standards Act by the Social Credit government of Premier Bill Bennett in 1983 was the introduction of Section 2(2):

> *Where a collective agreement contains any provision respecting a matter set out in Column 1 of the following table, the Part of this Act set out opposite that matter in Column 2 does not apply in respect of employment pursuant to that collective agreement:*

Column 1 Matter	***Column 2 Part***
Hours of work or overtime	*Part 3*
Annual vacation or vacation pay	*Part 4*
Termination of employment or layoff	*Part 5*
Maternity and parental leave	*Part 7*

At the time of introduction of Section 2(2) into the BC Employment Standards Act no other jurisdiction in Canada had a comparable law to permit the parties to a collective agreement to "contract out of" minimum employment standards legislation in this way.

Immediately following the election of an NDP government in 1991, new Minister of Labour Moe Sihota appointed a committee to review the Industrial Relations Act of the previous Social Credit government. During that review stakeholders were asked for their views on the linkages between the Industrial Relations Act and the Employment Standards Act, with specific reference to the collective agreement exclusion provision in Section 2(2). Representatives of employers submitted that Section 2(2) should be retained in the Employment Standards Act, while unions submitted that Section 2(2) should be repealed. Similar opposing views were submitted to the Employment Standards Review Commissioner in 1993.

According to Employment Standards Review Commissioner Mark Thompson, the essence of the employers' argument in support of retention of Section 2(2) was that the parties in collective bargaining should have the right to fashion their own solutions to the issues covered by the Employment Standards Act (i.e. negotiate sub-standard contracts), unencumbered by legal minima or the need to apply for variances. Employers acknowledged that some employers and unions consistently negotiated collective agreements containing provisions inferior to the Act. However, they argued that the number of such instances was small and should be dealt with in another way. Unions, on the other hand, argued that permitting collective agreement provisions below the standards of the Act placed other employers at a competitive disadvantage, and that exceptions to the Act should be dealt with through the 'variance' process, which had worked for many years prior to Section 2(2).[6]

As a result of the NDP government's commitment to repeal Section 2(2) in 1992, Employment Standards Review Commissioner Thompson's instructions were to prepare recommendations on an expedited basis for amendments to the Act that would enable the repeal.

In his Interim Report of June 2, 1993 Commissioner Thompson recommended the adoption of two principles to address the issue:

1. Collective agreements cannot exempt parties from the fundamental protections of the law, although the parties are free to agree to alternative arrangements that accomplish the same objective.
2. Statutory minimum standards must be respected in each section of the law, i.e. the parties are not free to trade off superior conditions in one section of the Act for inferior conditions elsewhere.

Thompson adopted these principles from Bill C-101 (1993), an act that had multi-party support in the federal parliament to amend the Canada Labour Code. Bill C-101 came out of an extensive process of consultation at the federal level by Labour Canada.

In response to those who made the "flexibility" argument – that employers and unions should be free to trade off superior conditions in one section of the law for inferior conditions elsewhere – Thompson stated that while such a practice may be appealing in theory, it contradicts the principle that all citizens enjoy certain basic standards as a matter of right, not subject to negotiation.[7]

> In the absence of the absolute protection of the Employment Standards Act, overly collaborative opting out of the law could lead to collective agreement provisions that provide lower minimum benefits and protections than prescribed by the Act for significant numbers of workers.

Thompson did recommend that in conjunction with repeal of Section 2(2) of the BC Act, Part 3 (Hours of work and overtime), Part 4 (Annual vacation pay), Part 5 (Termination or layoff), and regulations 4 and 5(a) (General holidays) not apply to employees covered by a collective agreement where the collective agreement provides rights and benefits "at least as favourable" as those contained in the Act and the Regulation. This was consistent with Bill C-101 changes to the Canada Labour Code, and a partial concession to employer pressure to retain the collective agreement "flexibility" provided in the 1983 BC Act. This was then translated into the "meet or exceed" exemption criteria provided in the Employment Standards Amendment Act, 1993 (Bill 65), which became effective January 1, 1994.

Commissioner Thompson clarified the intent of the "meet or exceed" conditional exemption of collective agreements with respect to the above four sections of the Act and the Regulation in the following statement:

> *The intent of this system is that the parties may negotiate arrangements concerning the subjects in each part, some elements of which may fall below the statutory minimum, but in their totality confer benefits at least as favourable as those required by the Act. Thus, the parties in collective bargaining may choose to forgo overtime pay after eight hours in exchange for greater leisure taken as part of work schedules, but not annual vacation.*[8]

Significantly, Thompson recommended that this conditional exemption from core provisions of the Act not apply to Part 7 (Maternity and parental benefits), which the 1983 Section 2(2) blanket exemption had also applied to, with the reasoning that "a majority should not be permitted to impose its preferences on a minority in a matter as sensitive as maternity leave."[9]

The Thompson Commission completed its full review of employment standards in British Columbia and submitted its second report to the Minister of Labour on February 3, 1994.[10] Based on the Thompson report recommendations, the NDP government introduced a substantially rewritten Employment Standards Act in 1995 that incorporated the 1994 collective agreement "meet or exceed" exclusion amendments with respect to hours of work, overtime, special clothing, statutory holiday pay, annual vacation, and termination. The new wording in the Act with respect to hours of work, overtime and special clothing was as follows:

> *Standards for those covered by Collective Agreement*
>
> *(1) If the hours of work, overtime or special clothing provisions of a collective agreement, when considered together, meet or exceed the requirements of this Part and section 25 when considered together, those provisions replace the requirements of this Part and section 25 [Special Clothing] for the employees covered by the collective agreement.*
>
> *(2) If the hours of work, overtime or special clothing provisions of a collective agreement, when considered together, do not meet or exceed the requirements of this Part and section 25 when considered together, (a) the requirements of this Part and section 25 are deemed to form part of the collective agreement and to replace those provisions, and (b) the grievance provisions of the collective agreement apply for resolving any dispute about the application or interpretation of those requirements.*

Similar "meet or exceed" language also applied to the statutory holiday pay, annual vacation and termination provisions in the Act.

The issue of collective agreement exclusion from employment standards law next resurfaced in Ontario following the 1995 election of the "Common Sense Revolution" Progressive Conservative government of Premier Mike Harris. On May 13, 1996, Ontario Labour Minister Elizabeth Witmer announced in the legislature that the government would be tabling legislation later in the year to amend the Employment Standards Act – the first installment in the Harris government's policy to introduce labour market "flexibility".[11] Reminiscent of Section 2(2) in the 1983 BC Employment Standards Act, Ontario's Bill 49, the Act to Improve the Employment Standards Act, according to the press release accompanying it, represented "the first of a two-phase reform of the Act that will cut through years of accumulated red tape, encourage the workplace parties to be more self-reliant in resolving disputes and make the Act more relevant to the needs of today's workplace."[12]

However, the Ontario government subsequently withdrew those Bill 49 amendments that would have permitted unions and employers to negotiate their own employment standards after the Employment Standards Working Group – a broad coalition of legal clinics, unions, and advocates for workers' rights – managed to attract province-wide attention and opposition to the government's proposed amendments.[13] Ultimately, when the new Employment Standards Act, 2000 came into effect on September 4, 2001, employees covered by a collective agreement were provided with the following "no contracting out" and "meet or exceed" protections:

No Contracting Out

Sec. 5. (1) Subject to subsection (2), no employer or agent of an employer and no employee or agent of an employee shall contract out of or waive an employment standard and any such contracting out or waiver is void.

(2) If one or more provisions in an employment contract or in another Act that directly relate to the same subject matter as an employment standard provide a greater benefit to an employee than the employment standard*, the provision or provisions in the contract or Act apply and the employment standard does not apply.* (emphasis added)

In British Columbia the issue of collective agreement exclusion emerged again as an issue for 27 business organizations in 1997. A new Coalition of BC Businesses, formed in 1992 in response to the election of an NDP government to be an advocate and voice for small- and medium-sized businesses on labour and employment issues, made an 18-page submission to the Minister of Labour regarding the new Employment Standards Act. Among many recommendations for change "to provide employers and employees with the ability to tailor workplace flexible arrangements" the Coalition of BC Businesses recommended that:

> *The variance procedure of the Act should be amended so that employers and employees can institute mutually agreeable working conditions that protect the employees from "bad" employers while providing the freedom to develop arrangements which are specifically tailored to the needs of the employees and the particular workplace.*[14]

The above recommendations, of course, went beyond workplaces covered by a collective agreement, and in essence would permit "contracting out" of the Act generally.

In Ontario, the government withdrew amendments that would have permitted unions and employers to negotiate their own employment standards after a broad coalition of legal clinics, unions, and advocates for workers' rights managed to attract province-wide attention and opposition to the proposed changes.

Over the next four years the Coalition of BC Businesses and its closely allied Business Council of British Columbia (representing large- to medium-sized business) persisted in bringing pressure to bear on successive provincial governments to make radical changes to the Employment Standards Act and the Labour Relations Code. In an extensive policy document, *Labour Policies that Work: A New Vision for BC*,[15] the Coalition of BC Businesses reiterated that while the government has a legitimate role in establishing basic standards for the workplace for the purpose of protecting employees, "[t]he establishment of such standards should not, however, preclude employees and employers from agreeing to variations on those standards to meet their mutual interests." It stated that the Employment Standards Act passed by the NDP in 1995 "represented a step backwards in respect of allowing for greater give-and-take between employers and employees in setting 'win-win' workplace rules." It argued that Section 2(2) of the 1983 Act had "offered considerable flexibility to unionized businesses and their employees but none to the non-union sector." And that "… a collective agreement should be basic evidence that the package of benefits is reasonable and agreed to by a majority of employees."[16]

In its December 2001 submission on employment standards to the new Liberal government of Premier Gordon Campbell, the Business Council of British Columbia also called for reinstatement of exclusion of employees covered by a collective agreement:

> *In workplaces where employees are represented by a trade union, the trade union and employer freely negotiate terms and conditions of employment that reflect the realities of those workplaces. The delicate series of trade-offs at which the parties invariably arrive in the course of negotiating an acceptable settlement should not be upset. Employment standards should not interfere with the daily operations of unionized work sites.*[17]

Beginning in November 2001, the new provincial government embarked upon a series of substantive changes to the Employment Standards Act, regulations under the Act, and the system of administration and enforcement of the Act.[18] A sham consultation process was launched by the Minister of Skills Development and Labour, on November 14, 2001, with release of the discussion paper *Fair and Effective: A Review of Employment Standards in British Columbia*. The review was to be conducted by senior staff of the Ministry by December 31, with a short 28-day deadline just before Christmas for submissions by interested parties.

All BC employer organizations responding to the 2001 *Fair and Effective* discussion paper supported some form of exclusion of workers covered by a collective agreement, whereas all unions and workers advocacy groups opposed it.

The Ministry's review discussion paper focused almost exclusively on changes to the Act previously submitted by employers. Prior to announcement of the review the Ministry had compiled a list of 207 suggested changes received from employer groups and Employment Standards Branch staff over the previous four years.[19]

In *Fair and Effective*, one of the questions posed to interested parties was in relation to the 1995 Act's "meet or exceed" provisions for collective agreements: "Should workers with a collective agreement under the Labour Relations Code be covered by the Act?" the discussion paper asked. The options then identified were only those that had been advanced by business associations: 1) totally exclude from the Act those employees covered by a collective agreement; 2) exclude from the Act those employees covered by a collective agreement with some exceptions, e.g. pregnancy, parental leave, payment of wages, or other; or 3) where a collective agreement is silent on a provision in the Act, deem the Employment Standards Act to apply to workers under that collective agreement. Significantly, the Ministry's discussion paper noted that there was then (as now) no other Canadian jurisdiction with collective agreement exclusion provisions in employment standards law.

All BC employer organizations responding to the 2001 *Fair and Effective* discussion paper supported some form of exclusion of workers covered by a collective agreement, whereas all unions and workers advocacy groups opposed it. Also opposed to the exclusion was Professor Mark Thompson, the 1993 Employment Standards Review Commissioner. In a letter (previously referenced) to the Assistant Deputy Minister of Skills Development and Labour, Professor Thompson advised that such a policy "... is unwise because it opens the door to corrupt arrangements between employers and pseudo unions. Such unions now exist in British Columbia." He went on to argue that "No law should invite parties to engage in corrupt acts, as this provision would do; I would be concerned that such unions might also negotiate away rights for minorities, such as women, in exchange for benefits to the

majority, resulting in the minority working under conditions inferior to the Act."[20] As it turned out, the Ministry ignored the wisdom in Professor Thompson's advice.

In May 2002, following the short Ministry staff review of employment standards the previous winter, Bill 48, the Employment Standards Amendment Act, 2002, was introduced and passed in the BC legislature.

Under Bill 48, Section 3, Scope of the Act, subsection 2, language similar to the 1983 Section 2(2) was reintroduced (see Appendix). However, in comparison to the first collective agreement exclusion language of the 1983 Act, the collective agreement exclusion language in the new 2002 Act expands considerably on the scope of potential collective agreement exclusions. The only provision the 2002 Act did not copy from the 1983 Act was the permitted exclusion of maternity and parental leave provisions.

Under the new Act parties to a collective agreement can negotiate provisions with respect to hours of work and overtime, statutory holidays, annual vacations or vacation pay, termination of employment or layoff, paydays, termination pay, special clothing, payroll records, and several other significant issues, that are below or completely contrary to the employment rights specified in the Act. Equally odious, unjust, and of potentially broad application is the sweeping provision in the Act that if a collective agreement contains "any provision" with respect to the excludable basic rights listed, the workers covered by such a collective agreement no longer have access to those basic rights.

In addition, workers and their unions no longer have access to the wage recovery mechanisms of the Act, or the protections and powers of enforcement of the Employment Standards Branch with respect to such serious issues as the employment of children, the payment of minimum wages, jury duty and other statutory leaves, group terminations and termination notices. This dumping of enforcement of basic rights under the Act from the Employment Standards Branch (the government) to unions through collective agreement grievance procedures is unprecedented, denying as it does to all unionized employees the protections of government enforcement of the law.[21]

Labour Relations Legal Framework

Labour relations statutes across Canada typically define a union as an organization engaged in regulating employer-employee relations and requiring several essential elements, such as a constitution approved by members, and not being employer dominated or influenced.[22] Under a number of provincial statutes, including the BC Labour Relations Code, the definitions of "trade union" and sections dealing with the granting of bargaining agency certificates to unions specifically exclude organizations or associations of employees that are "dominated or influenced by an employer." The BC Labour Relations Code also prohibits an employer from interfering with the formation or administration of a trade union, or contributing financial or other support to it.

Under these legal standards, a union applying for a certificate of representation, when challenged, must be able to demonstrate that it has the capacity to represent and conduct meaningful collective bargaining and advocacy on behalf of worker/employee interests, even if this requires an adversarial relationship with the employer.

However, a union does not have to prove its status in every proceeding before a labour relations board, once the board has found that an organization is a trade union pursuant to the definition in the statute.[23] Consequently, a review of labour relations board decisions dealing with the certification of

unions from across the country reveals that the same union can be found to be employer influenced or dominated and denied employee representation rights in the case of one employer, yet granted representation rights with another employer.

Once a union has been granted certification rights for a bargaining unit, the relationship between the union and the employer is never again put to the legal test of employer domination or influence unless an application is brought before a labour relations board for decertification, transfer of certification to another union, or failure to represent a member.

In the case where an employer voluntarily agrees to enter into a collective agreement with a union without formal certification or challenge to the labour relations board, that relationship is never put to the legal test of employer domination or influence unless subsequent representation applications by members or other unions are brought before a labour relations board. Therefore, whether in fact a union is employer dominated or influenced is not independently determined in every case, and only occurs in exceptional cases where there is a challenge based on such a claim before a labour relations board.

Under these legal standards, a union applying for a certificate of representation, when challenged, must be able to demonstrate that it has the capacity to represent and conduct meaningful collective bargaining and advocacy on behalf of worker/employee interests, even if this requires an adversarial relationship with the employer.

In BC's competitive labour relations environment, where employers tend to strenuously resist unionization,[24] or try to minimize the cost impact of unionization, and where unions compete for employee representation rights, the opportunity to contract out of legislated employment standards provides employers with a strong incentive to lend support to weak, obliging or accommodating unions, and to apply pressure during collective bargaining to obtain such cost cutting concessions. When the Employment Standards Act did not permit contracting out of its provisions, it would have been an unfair labour practice for an employer to force a union to strike, or to lock out its workers, over employer demands for substandard collective agreement provisions.

Collective Agreements Considered for Analysis

To determine whether employers and their unions have utilized the opportunities provided under the new Employment Standards Act to escape its core standards, and establish for their workers terms and conditions of employment that are inferior to the legislated minimums, it is necessary to identify unions that are predisposed to acceding to employer pressures for such concessions, and to then examine the collective agreements they have entered into since the passage of Bill 48. Such concessions can occur because of the influence or dominance of employers in collective bargaining relationships, the absence of an adversarial relationship, the opportunities for unions to obtain voluntary recognition by employers, or the opportunities offered to unions to trade off legislated minimum standards for other gains for their members.

The Canadian Iron, Steel and Industrial Workers Union (CISIWU) was a potential subject for investigation for the purpose of this research project because of its reputation as an "alternative" outlier union.[25] However, its small size, and the difficulty of obtaining a good sample of recently negotiated collective agreements, made it a poor subject for research. However, it is important to note that CISIWU was the subject of a similar investigation by the fair wage compliance team of the Employment Standards Branch in 1999.[26]

The Christian Labour Association of Canada (CLAC) is the largest and most important of the alternative outlier unions identified for examination, with a national membership of approximately 40,000 in 2006[27] and, according to staff at CLAC's Surrey BC office, a membership of approximately 11,600 in British Columbia.[28]

Table 1 contains BC Labour Relations Board statistics on certification applications filed and granted in the 13 years from 1994 to 2006. Broken out of the certification applications of all unions are the number of applications filed by CLAC to show its relative importance and success rates.

Table 1 shows that CLAC applications for certification to the BC Labour Relations Board constituted between 3.3 per cent and 6.5 per cent of total applications from all unions in the period 1994 to 2002, and with a relatively high success rate. However, BCLRB certification applications data considerably understate the success CLAC has had in expanding its bargaining unit base because, by the estimation of one of its representatives in 1999, about 25 per cent of its collective agreements were obtained through voluntary recognition by employers, and voluntary recognition agreements do not have to be registered with the BCLRB.[29]

It is well known that CLAC has been very successful in obtaining representation rights for construction workers in recent years, although this is not reflected in the Table 1 data for the period 2003 to 2006, again probably due to the high incidence of voluntary recognition by construction employers, and many of those employers agreeing to give CLAC province-wide recognition for all their employees as opposed to project by project recognition.

The BC Federation of Labour maintains an inventory of collective bargaining certifications in BC known or believed to be held in recent years by CLAC. According to this listing, CLAC represents

Table 1: BC Labour Relations Board – Certification Applications Filed & Granted

Year	Certification Applications			Applications Granted			% Applications* Granted to Filed	
	Number		CLAC %	Number		CLAC %		
	Total	CLAC	of Total	Total	CLAC	of Total	Total	CLAC
1994	648	27	4.2%	437	24	5.5%	67.4%	88.9%
1995	607	35	5.8%	393	20	5.1%	64.7%	57.1%
1996	624	31	5.0%	430	25	5.8%	68.9%	80.6%
1997	598	20	3.3%	409	15	3.7%	68.4%	75.0%
1998	548	22	4.0%	348	11	3.2%	63.5%	50.0%
1999	528	18	3.4%	368	17	4.6%	69.7%	94.4%
2000	376	20	5.3%	263	12	4.6%	69.9%	60.0%
2001	323	13	4.0%	184	8	4.3%	57.0%	61.5%
2002	155	10	6.5%	88	6	6.8%	56.8%	60.0%
2003	165	3	1.8%	75	0	0.0%	45.5%	0.0%
2004	374	3	0.8%	88	3	3.4%	23.5%	100.0%
2005	226	1	0.4%	266	2	0.8%	117.7%	200.0%
2006	187	7	0.4%	55	3	0.6%	29.4%	42.9%

Source: BC Labour Relations Board annual reports, 1994 to 2006, Table 1B – Certification Applications Filed and Granted, Analyzed by Union.
*The percentage ratios of applications granted to applications filed shown are approximations to "success rates" for the reason there is usually a carryover of applications from one year to the next before being granted or denied. Consequently "success ratios" of 100 per cent or more are shown based on calendar year statistics.

the employees of more than 300 employers and/or workplaces. In Table 2 CLAC's certifications in BC as of mid-2006 are summarized and subdivided by sector, showing that while it has collective agreements in several industries, its certifications in construction are by far the most numerous, covering approximately 154 bargaining units. The other main sectors of CLAC representation in BC are transportation, health services and manufacturing. According to the March/April 2006 edition of The Guide, CLAC's magazine, CLAC has experienced incredible growth in the construction industry in BC, having doubled its membership in just two years to reach 6,700 in 2005.

Table 2: Collective Bargaining Certifications in BC held by CLAC

Sector	CLAC Certificates by Sector	
	Number	Per cent of Total
Construction	154	49.2%
Transportation	41	13.1%
Health	30	9.6%
Manufacturing	19	6.1%
Hospitality	8	2.6%
Retail – Wholesale	7	2.2%
Waste Disposal	6	1.9%
Mining	3	1.0%
Education	1	0.3%
Misc. & Other	44	14.1%
Total	313	100.0%

Source: BC Federation of Labour

Why CLAC Collective Agreements Were Chosen for Analysis

This study sought to analyze an employee organization susceptible to undue employer influence or willingness to be accommodating in the negotiation of collective agreements. The Christian Labour Association of Canada was selected for a number of reasons.

As early as 1978, labour relations literature has characterized CLAC as "a trade union that has some unusual ideas about the manner in which labour relations should be conducted."[30] CLAC's constitution, principles, practices and publications clearly distinguish it from traditional Canadian unions.[31]

According to former CLAC Executive Director Ed Grootenboer, author of a recently published history of the union: "As a labour union inspired by Christian principles, CLAC is unique in present-day Canada … the establishment and operation of CLAC stand in stark contrast with similar organizations, which base themselves on different world and life views."[32] Grootenboer goes on to state that "CLAC is not an ordinary trade union, given its overt adherence to the Christian world and life view and its consequent aversion to some key practices widely accepted as standard by the trade union establishment."[33]

CLAC was established in Ontario in 1952 by Reformed Protestant Christian immigrants from the Netherlands. It deliberately distinguished itself from other traditional labour organizations as an

alternative employee organization by its open adoption of Christian principles based on the Bible as a guide to organization and action, and by its objective of creating a European-style multi-union pluralistic system of worker representation in every workplace.[34]

In Ontario CLAC was refused the right to be certified as a union to represent groups of employees (on grounds that it discriminated on the basis of creed) until 1963, when the Supreme Court of Ontario overturned a Labour Relations Board decision denying it certification rights to represent construction workers employed by Tange Company Limited.[35] Grootenboer portrays CLAC's first 11 years of struggle for representational rights in competition with traditional unions as one founded on "a clash of world views: Christian versus Marxist/socialist, or a purely secular world view."[36]

With the possible exception of Ontario, wherever CLAC has established a significant presence it has been based primarily on representation of workers in the construction industry. In contrast to the traditional "skilled trades" basis of union representation in construction (i.e. carpenters represented by the Carpenters' Union, plumbers represented by the Plumbers' Union), CLAC offers to represent all construction workers employed by each company, regardless of trade, in so-called "all employee" bargaining units. In addition, CLAC does not require that all employees in the bargaining unit be union members in so-called "closed shops," or dispatched to construction projects through a union "hiring hall," as traditional construction unions do. In offering employers "all employee" bargaining units, "open shops," and direct employee hiring, CLAC has made itself the preferred union of many large construction companies who have offered it voluntary recognition agreements and employer-wide or province-wide employee representation.[37]

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Currently, CLAC is unable to obtain certification rights to represent construction workers in Nova Scotia as a result of a Labour Relations Board decision in 2000 that found CLAC did not constitute a 'trade' union in the construction industry as defined by the Act.[38] A similar legislative bar to certification for construction workers also exists in Saskatchewan.[39] Consequently, CLAC has little or no presence in either province, and no presence in Quebec or Newfoundland and Labrador. CLAC's membership is therefore concentrated in Ontario, Alberta and British Columbia (2005 membership of 10,553, 15,295 and 11,608 respectively). It also has about 590 members and an office in Manitoba, and in recent years has been very active in seeking to represent miners in the Northwest Territories.[40]

According to former CLAC leader Grootenboer, "A practice flowing from the union's Christian basis is the striving for cooperative, as opposed to adversarial, relations with employers."[41] A consequence of this practice is that CLAC never undertakes strike action[42] to obtain a collective agreement without first offering employers the avenues of mediation and voluntary binding arbitration.[43] Consistent with this non-adversarial approach to labour relations, CLAC advocates that the provincial and federal governments abolish strikes and lockouts and impose mandatory arbitration to resolve collective agreement disputes.[44]

In its first 26 years, CLAC did not conduct any strike activity. Over the next 24 years CLAC conducted only three strikes. In his 50th anniversary history of CLAC Ed Grootenboer was able to observe that CLAC strikes "have been few and far between."[45]

A search of labour arbitration case law also reveals that CLAC's pursuit of grievances to arbitration has also been "few and far between."

CLAC continues to promote itself as spearheading an alternative labour movement that practices cooperation with employers on the basis of social justice and love as taught in the Bible, and that opposes class conflict in seeking the removal of injustice.[46] CLAC is also distinguishable from other traditional Canadian unions by its unusual top-down decision-making structure, the wide-ranging directive power and authority of its appointed staff representatives and their staff council (which has constitutional status), and by the limited power and resources of its locals. While there are other unions that have top-down structures, what makes CLAC unique in this regard is the power conferred on appointed staff representatives to dictate how local unions conduct themselves.[47]

Although generally held to be "employer-friendly or dominated" by the traditional union movement across Canada, CLAC has vigorously denied such accusations, to the extent of taking several defamation and slander suits to court against unions and individuals that have publicly made such claims.[48] In a 1993 BC Supreme Court decision involving the United Food and Commercial Workers (UFCW), the court found that UFCW had falsely and maliciously defamed CLAC. The judgment observed "that the plaintiff [CLAC] has adopted a more conciliatory approach to labour union negotiations does not mean that the plaintiff operates in collusion with employers."[49]

However, in the previously referenced Nova Scotia Labour Relations Board decision in 2000 on a CLAC certification application, the board found that there was no evidence that CLAC had made use of the strike option in its bargaining anywhere in the construction industry, and that a CLAC booklet used to promote the "advantages" of CLAC with designers and engineers of construction projects contained "… a significant number of CLAC 'advantages' [that] are antithetical to or, at least, different from the positions of the traditional unions that, since 1976, have represented all unionized construction workers in all sectors of the province."[50]

Earlier, in 1996, the Manitoba Labour Board found that a CLAC representative's undemocratic actions in entering into an agreement with the employer without the participation of any local members, the method of recruiting members, and ratifying the agreement "while having total disregard to the existing membership" raised "some serious concerns as to the status of this organization as a union pursuant to The Labour Relations Act."[51]

While no labour tribunal has found that CLAC generally and in all instances is employer dominated or influenced, or seeks to accommodate or practice collusion with employers, the real problem with this organization is that it does not appear to see the necessity of maintaining an arm's length relationship with employers. As indicated in the following actions or determinations recorded in labour relations board decisions, collective agreements, other documents and reports surveyed, CLAC has:

- accepted invitations by employers to enter into voluntary recognition agreements to thwart the organizing efforts of traditional unions;[52]

- entered into a voluntary agreement with an employer before any employees have been hired, or before the bulk of employees have been hired;[53]
- entered into a voluntary agreement with an employer without obtaining legitimate support from the workers it represents;[54]
- entered into inferior collective agreements compared to those of other unions that represent the majority of workers in the same industry or with the same employer;[55]
- proposed wage rates in a first collective agreement that were $1.25 per hour less than any employee in the bargaining unit was currently earning;[56]
- conducted a collective agreement ratification vote among workers before a wage schedule was negotiated into the collective agreement;[57]
- permitted management representatives to participate in union meetings to discuss and vote on voluntary recognitions agreements;[58]
- signed collective agreements in the construction industry that enable employers during the term of those agreements to renegotiate wage rates, hours of work and other conditions for any new construction project to facilitate employer competitive bidding on such projects;[59]
- had no constitutional requirement that a membership ratification vote be held to approve negotiated collective agreements;[60]
- offered employers "open shop" or "open site" collective agreements;[61]
- enticed employees with interest-free payday loan advances if they signed up with CLAC when other unions were attempting to organize them;[62] and
- been the only union promoted to construction workers by the Progressive Contractors Association of Canada on the "recruitment" page of the PCAC website.[63]

In short, CLAC is a union that many employers clearly prefer to deal with because it promotes itself as a "flexible" organization that is attentive to employer interests.

CLAC Collective Agreements Analysis

Our review of CLAC collective agreements negotiated both before and after passage of the Bill 48 amendments to the Employment Standards Act in May 2002 covered CLAC's relationship with a total of 37 BC employers in several sectors (see Table 3 on page 26).

Of the 56 collective agreements analyzed covering 37 separate bargaining units, 24 were negotiated before passage of Bill 48, and 32 were negotiated after passage of Bill 48. Also, of the total 56 agreements analyzed, 38 were for 19 bargaining units where two agreements were reviewed: one negotiated in the period immediately prior to Bill 48, and one negotiated after Bill 48.

Given that CLAC represents a total of approximately 313 bargaining units, the 37 bargaining units for which collective agreements were analyzed constitute a significant sample – approximately 12 per cent of all CLAC bargaining units in BC. In addition, this sample is fairly representative of CLAC's presence in each of the five sectors covered above (see Table 2 on page 20).

Of the 24 CLAC agreements analyzed that were negotiated prior to Bill 48, 23 were found to contain at least one substandard condition relative to core provisions of the Employment Standards Act in effect from 1994 to 2001. Out of a total of about 12 kinds of substandard provisions found, the most common deficiency found in the pre Bill 48 CLAC agreements related to entitlement to statutory holidays (where, in one case, casual workers were completely excluded), entitlement to annual vacation with pay, premium or overtime pay and/or a day off in lieu of work on a statutory holiday, other overtime pay, and provision for a meal break after five hours of work. In most instances,

the collective agreements contained more than one substandard provision and as many as eight substandard provisions.

These findings demonstrate that prior to the collective agreement exclusion provisions of the new Act under Bill 48, CLAC regularly negotiated collective agreements that did not meet all the minimum standards of the Employment Standards Act. However, under the 1994–2002 Act an employee working under a substandard agreement would have, through the filing of a grievance or a complaint to the Employment Standards Branch or Labour Relations Board, been entitled to the minimum protections of the Act. [64]

Of the 32 CLAC agreements analyzed that were negotiated after passage of Bill 48, 28 were found to contain at least one substandard condition relative to the core provisions of the new Act (which itself provides inferior protections compared to the old Act). The most common deficiency found in the post Bill 48 agreements related to annual vacations with pay (20 cases), overtime pay (9), meals breaks (7), notice of termination or severance pay in lieu of notice (7), entitlement to statutory holidays and/or pay for work on a statutory holiday (5), and maximum hours of work (5).

In a small number of these agreements overtime rates of pay were actually reduced from their pre Bill 48 provisions. In one alarming case (JJM Construction Ltd. and CLAC Local 67, May 9, 2003 Letter of Understanding) employees' regular rates of pay were reduced by 20 per cent for work in excess of eight hours per day or 40 hours per week, on Saturdays, Sundays, and statutory holidays, before overtime rates apply. These provisions are clearly at variance with the overtime requirements of the Act, were it not for the new Section 3(2) collective agreement exclusion exceptions, and in addition, at variance with labour relations law. The Employment Standards Act provisions relating to overtime wages and statutory holidays require that the premium pay to be paid (time and one half or double time) be based on employees' regular rates of pay. This JJM agreement violates the Act as the effective overtime rates of pay are 20 per cent less than they would be under the minimum standards of the Act.

In another notable collective agreement (Northwest Waste Systems Inc. and CLAC Local 66) probationary employees (those with 1,000 hours or less of employment) were excluded from most of the collective agreement provisions reserved for regular employees, and provided with pay and benefits significantly below the Act. The post 2002 substandard provisions read in part as follows:

> *New employees will be hired on a one thousand (1000) hours worked probationary period, and thereafter shall attain regular employment status. …The Employer may terminate the*

Table 3: CLAC Collective Agreements Analyzed by Sector

Negotiation Date	Construction	Transportation	Manufacturing	Mining	Health	Totals
Pre Bill 48	10	6	4	1	3	24
Post Bill 48	17	6	3	2	4	32
Sector Totals	27	12	7	3	7	56
Per cent of Overall Total	48.2%	21.4%	12.5%	5.4%	12.5%	100%

employment of a probationary employee provided that such termination is not arbitrary, discriminatory or in bad faith, and provided that the employee has been properly notified of the reasonable standards (s)he is expected to meet.

…Probationary employees will not be covered by the articles of this agreement meant for seniority employees. Probationary employees will be paid for hours worked only (no minimum). Probationary employees will be paid overtime after twelve (12) hours daily or after forty-eight (48) hours weekly at one and one-half (1 1/2) times the regular rate of pay.

In this case a probationary employee must work for at least one half of a year if full time, or longer if part time, without the benefit of any of the termination provisions of the Employment Standards Act (Section 63 – one week's wages as compensation for length of service after three months if no notice given), and without the benefit of any of the minimum conditions and protections of all of Part 4 of the Act dealing with hours of work and overtime wages.

The latter two cases clearly demonstrate that the new collective agreement exclusion provisions of Bill 48 have enabled employers to obtain from cooperative and obliging unions such as CLAC collective agreement provisions significantly below those mandated under the Act.

Our analysis clearly demonstrates that the new collective agreement exclusion provisions of Bill 48 have enabled employers to obtain from cooperative and obliging unions such as CLAC collective agreement provisions significantly below those mandated under the Act.

In 13 of the post Bill 48 CLAC agreements analyzed, the excludable Parts 3, 4, 5, 7 and 8 of the new Act have been newly written into the collective agreement with the following wording:

> *The parties agree that Parts 3, 4, 5, 7 and 8 of the Employment Standards Act form part of this collective agreement, except those provisions specifically modified by this collective agreement.*[65]

This direct reference to the new excludable parts of the Act creates confusion and uncertainty, especially where the collective agreement also contains vague or limited language on any of the conditions covered by those parts of the Act. For example, it is unclear as to whether a collective agreement with no termination with pay provision but with some language respecting layoff notice would be deemed to contain all or none of Part 8 of the Act (Termination of Employment). Or in the case of a collective agreement that contains no overtime pay provision except for employees who work on afternoon shift (who might only get pay at time and one half after 10 hours worked per day), it is unclear whether all employees would be covered under Part 4 of the Act (Hours of Work or Overtime), or those on other shifts would be excluded from Part 4. There is potential for loss of employee protection from the excludable parts of the Act in all such cases because their collective agreements contain "any provision respecting a matter" within the relevant part of the Act.

As a result of Bill 48, employees covered by the above-referenced CLAC collective agreements have lost their legal rights to several of the minimum wage and benefit provisions of the Employment Standards Act, placing them in inferior employment relationships compared to employees not represented by a union, or even employees represented by a union that has not negotiated any provision respecting hours of work and overtime, statutory holidays, annual vacations or vacation pay, seniority retention, recall, termination of employment, or layoff, etc.

In the lead-up to Bill 48 business organizations argued in support of these collective agreement exclusions on the basis that they would enable parties to collective bargaining to reach mutually beneficial trade-offs, in other words, employers would be willing to give improved conditions in one part of an agreement if unions would agree to sign away their members' statutory rights in other parts, where the Act permitted such concessions. While an examination of collective agreement provisions resulting from such trade-off bargaining alone would not normally reveal whether or how such deliberate trade-offs were actually made (trade-offs are not recorded as such in agreements), the CLAC collective agreements analyzed in this study did not indicate any obvious improvements in return for the substandard concessions made by the union.[66]

Legislated Exclusion of Unionized Workers Has Broad General Impacts

The collective agreement exclusion provisions of the May 2002 Employment Standards Act exposed unionized workers in general to the possible loss of workplace rights, due to the fact that in the previous eight and one half years all collective agreements were deemed to contain rights and benefits at least equal to those in the Act, regardless of the scope and content of their collective agreement language.

The "meet or exceed" provisions of the Employment Standards Act in effect before the Bill 48 amendments were in effect from 1994 to 2001. Under that statute, unions were aware that if their collective agreements did not contain rights and benefits at least equal to the Act, the provisions of the Act were deemed to form part of their collective agreement. Consequently, unions had no need to pay particular attention to their collective agreement language in relation to rights and benefits covered in the Act, unless they were negotiating a completely new agreement or adding special or superior benefits to a previously negotiated agreement. Even if their agreement only addressed the special application of a right or benefit under the Act to a particular sub-group of employees within a larger bargaining unit, the rest of the bargaining unit were deemed entitled to the rights and benefits of the Act.

Bill 48's new collective agreement exclusion provisions turned the previous status of collective agreement language on its head, and no transitional provision was made to permit a period of adjustment or relief so that those agreements in effect could be changed to reflect the previous intent of parties that the employees covered retained their basic rights under the Act. Any collective agreement in effect as of May 2002 that contained "any provision" whatsoever, no matter how limited or substandard with respect to the new excludable parts of the Act was, by Bill 48, legislated into an exclusion status without recourse.

In addition, any collective bargaining to renew an agreement after May 2002 that did not consider the reversed status of previously negotiated collective agreement language in relation to the new excludable areas of the Act could result in what might be termed an "inadvertent loss" of rights for workers covered by such an agreement.

This "inadvertent loss" of Employment Standards Act rights for employees under collective agreements was harshly revealed in a number of collective agreement grievance arbitration decisions issued since May 2002. In an April 2004 decision arbitrator David McPhillips denied a grievance brought by National Automobile, Aerospace, Transportation and General Workers of Canada (CAW), Local 3000, against Securitas Canada Ltd. that it was in breach of the collective agreement and the Employment Standards Act Part 4 (Hours of Work or Overtime) in not paying overtime payments to employees working 12 hour shifts when they worked in excess of 40 hours in any week. The arbitrator ruled that because the collective agreement contained provisions regarding hours of work and overtime, the Employment Standards Act did not apply, even though the collective agreement also made reference to complying with provisions of the Act, because the parties were "… free to arrive at a bargain which does not accord with the provisions of Part 4 of the Act."[67]

Any collective agreement in effect as of May 2002 that contained "any provision" whatsoever, no matter how limited or substandard with respect to the new excludable parts of the Act was, by Bill 48, legislated into an exclusion status without recourse.

In a 2005 decision, arbitrator Rick Coleman similarly denied a grievance by Retail Wholesale Union, Local 580, against Choice Warehouse and Distribution that the employer had violated Section 63, Part 8, of the Employment Standards Act respecting severance pay in lieu of termination notice. The arbitrator ruled that Section 63 had no bearing on the issue because the collective agreement contained its own language on the issue, and this language stood on its own.[68]

In an October 2005 decision, arbitrator R. K. McDonald denied a grievance by United Steelworkers of America, Local 1-424, against Canadian Woodworks Ltd. for not providing a laid-off employee eight weeks' wages in lieu of notice of termination pursuant to Section 63, Part 8, of the Employment Standards Act. The arbitrator ruled that the individual employee was not entitled to the severance pay provisions of the Employment Standards Act because the collective agreement contained a clause that stated that only in the event of a permanent plant closure would the severance pay provisions of the Act apply. The collective agreement was silent with respect to severance pay in the event of layoff without plant closure. The arbitrator found that because the collective agreement contained specific language for the payment of severance, limited as it was to permanent plant closure, the new collective agreement exclusions provisions of the Act automatically exclude all employees under that collective agreement from the Act's minimum seniority retention, recall, termination of employment or layoff

in any other circumstance.[69] This decision was appealed to the BC Labour Relations Board. After reviewing the arbitrator's decision in this case the BCLRB agreed with the arbitrator's interpretation of the collective agreement and the Employment Standards Act.[70]

In view of the potentially harsh and sweeping impact of Bill 48 to completely deny thousands of unionized employees the core protections of the Employment Standards Act if their collective agreements have historically contained any language with respect to those core provisions – whether narrowly focused on a sub-group of employees, or less than as provided in the Act for all employees – it was patently irresponsible that, in introducing Bill 48, the provincial government did not give adequate warning of the potential loss of many rights assumed to exist in collective agreements under the previous Employment Standards Act. Indeed, parties to collective agreements then in effect should have been given the right to immediately re-open their collective agreements, to negotiate equal rights for all employees in relation to the new collective agreement exclusion provisions where previously it was a fact that the 1992–2001 Act protected all employees – regardless of agreement provisions.

Conclusion

By reintroducing and expanding upon collective agreement exclusion provisions in the Employment Standards Act through Bill 48, the BC government in 2002 cast aside a fundamental principle established for employment standards law by the government of Canada in 1993[71] – a principle endorsed by BC's only independent employment standards review commissioner, Professor Mark Thompson, and by every other legislature in Canada – and turned back the clock on equal rights under the law for employees represented by a union.

This research has revealed that the Christian Labour Association of Canada – the largest employer-accommodating union in BC – with respect to the collective agreements reviewed – commonly conceded to employers substandard provisions relative to core parts of the Employment Standards Act prior to the passage of Bill 48, and has continued this practice after Bill 48, which in many instances has resulted in a lowering of wages and working conditions below the new lower minimum protections of the Act, and/or denying sections of their membership the core protections of the Act.

This research has also revealed how, in real life cases, traditional unions that have consistently pursued adversarial relationships with employers have been victim to the loss of Employment Standards Act coverage for large sections of their members, through legislative decree, in light of changes to the Act brought about by the new exclusion provisions in Bill 48. As a result, large groups of union members have potentially lost employment rights without legal recourse.

We recommend that Section 3(2) of the Act be repealed, and the "meet or exceed" provisions contained in the 1994–2001 Act returned, along with Employment Standards Branch scrutiny of collective agreements to ensure effective enforcement. Repeal of Section 3(2) is more than justified by the principle that all citizens enjoy basic employment standards as a matter of right, not subject to loss through the actions of an employer-accommodating collective bargaining agent.

Appendix

Bill 48 Changes to Employment Standards Act, Section 3, Scope of Act, Subsection 2

(2) If a collective agreement contains any provision respecting a matter set out in Column 1 of the following table, the Part or provision of this Act specified opposite that matter in Column 2 does not apply in respect of employees covered by the collective agreement:

Column 1 Matter	***Column 2 Part or provision***
Hours of work or overtime	*Part 4*
Statutory holidays	*Part 5*
Annual vacation or vacation pay	*Part 7*
Seniority retention, recall, termination of employees or layoff	*Section 63*

(3) If a collective agreement contains no provision respecting a matter set out in Column 1 of the following table, the Part or provision of this Act specified opposite that matter in Column 2 is deemed incorporated in the collective agreement as part of its terms:

Column 1 Matter	***Column 2 Part or provision***
Hours of work or overtime	*Part 4*
Statutory holidays	*Part 5*
Annual vacation or vacation pay	*Part 7*
Seniority retention, recall, termination of employees or layoff	*Section 63*

(4) If a collective agreement contains any provision respecting a matter set out in one of the following specified provisions of this Act, that specified provision of this Act does not apply in respect of employees covered by the collective agreement: section 17 [paydays]; section 18(1) [payment of wages when employer terminates]; section 18(2) [payment of wages when employee terminates]; section 20 [how wages are paid]; section 22 [assignment of wages]; section 23 [employer's duty to make assigned payments]; section 24 [how an assignment is cancelled]; section 25(1) or (2) [special clothing]; section 26 [payments by employer to funds, insurers or others]; section 27 [wage statements]; section 28(1) [content of payroll records]; section 28(2) [payroll record requirements].

(5) If a collective agreement contains no provision respecting a matter set out in a provision specified in subsection (4), the specified provision of this Act is deemed to be incorporated into the collective agreement as part of its terms.

(6) Parts 10, 11 and 13 of this Act do not apply in relation to the enforcement of the following provisions of this Act in respect of an employee covered by a collective agreement: section 9 [employment of children]; section 10 [no charge for hiring or providing information]; section 16 [employers required to pay minimum wage]; section 21 [deductions]; Part 6

[leaves and jury duty]; section 64 [group terminations]; section 65 [exceptions to section 64]; section 67 [rules about notice of termination].

(7) If a dispute arises respecting the application, interpretation or operation of (a) a Part or provision of this Act deemed by subsection (3) or (5) to be incorporated in a collective agreement, or (b) a provision specified in subsection (6), the grievance procedure contained in the collective agreement or, if applicable, deemed to be contained in the collective agreement under section 84(3) of the Labour Relations Code, applies for the purpose of resolving the dispute.

Notes

1 Bill 48 – Employment Standards Amendment Act, 2002, Ch. 42.

2 Fairey, 2005: 17-19.

3 Thompson, 2001.

4 Ages, 2002.

5 A review of the many Employment Standards Act and Regulation enforcement deficiencies associated with the new employment standards regime ushered in by the provincial government since 2001 can be found in *Eroding Worker Protections: British Columbia's New 'Flexible' Employment Standards* (Fairey, 2005).

6 Thompson, 1993.

7 Thompson, 1993:6.

8 Thompson, 1993:7. Two boards of arbitration under the Labour Relations Code subsequently interpreted more clearly the intent of the "meet or exceed" provisions of the Employment Standards Act, and established a method by which collective agreement provisions should be compared to the minimum provisions of the Act: *Crestbrook Forest Industries and IWA-Canada, Local 1-405* (BCCAAA No. 127, Award No. A-121/95, April 1995); and *Vancouver Island Haven Society and Health Sciences Association of BC* (BCLRB No. B359/97, July 1997).

9 Thompson, 1993.

10 Thompson, 1994.

11 Fudge, 2001.

12 CCH Canadian, 1996; The Employment Standards Working Group, 1996.

13 Fudge, 2001.

14 Coalition of BC Businesses, 1997.

15 Coalition of BC Businesses, 2000.

16 Coalition of BC Businesses, 2000.

17 Business Council of British Columbia, 2001.

18 The first change to employment standards instituted by the new Liberal government actually occurred in July 2001 when, by British Columbia Regulation 177, variances and exclusions for oil and gas field first aid attendants and camp catering workers was approved by Order in Council.

19 This list was contained in an Employment Standards Branch May 12, 2001 document titled "List of Suggested Changes to ESA – Confidential Draft." This document was sent to the author anonymously.

20 Thompson, 2001. It is to be noted that Professor Thompson did not identify any of the "pseudo unions" he considered to exist in BC. It should also be noted that this paper does not allege that any of the unions named have engaged in corrupt practices.

21 See Appendix for the Act's collective agreement exclusion wording.

22 McNeil, et al., 2005:1-20.

23 McNeil, et al., 2005:1-21.

24 In *Labour Left Out* professor Roy Adams cites a number of authoritative sources to establish the fact that in Canada generally "… employer opposition to unionization is widespread" (Adams, 2006: 18-25).

25 CISIWU has never been affiliated with the Canadian Labour Congress, the provincial federations of labour, or the provincial councils of building trades unions. It is frequently in competition with the latter, offering employers a more collaborative relationship.

26 Responding to complaints by construction companies in competition with companies under CISIWU collective agreements, which they claimed did not meet the minimum standards of the Act, the Director of Employment Standards ordered an analysis of 20 CISIWU collective agreements to determine whether they met or exceeded the Act with regard to Parts 4, 5, 7 and 8. The Fair Wage Compliance Team provided the Director with the results of that analysis in the report *Analysis of the Canadian Iron, Steel and Industrial Workers Union, Local 1 – Various Collective Agreements and the Employment Standards Act, Sections 43, 49 and 61*. In that report the Director was advised that all 20 of the CISIWU collective agreements studied did not meet or exceed two or more of the three respective parts of the Act required by Sections 43, 49 and 61, and that these substandard agreements were having a direct impact on the ability of other union and non-union employers to compete with these companies. As a consequence the Director took corrective action and ordered the Rand Reinforcing Ltd.–CISIWU collective agreement to contain the minimum standards of the Act, replacing those sections found to not meet the requirements of the Act. Rand Reinforcing successfully appealed the Director's determination in this case to the Employment Standards Tribunal, where the Tribunal found that the Director did not have the authority to decide whether the provisions of the collective agreement meet or exceed the statutory minimums in the relevant corresponding part of the Act (see BC Employment Standards Tribunal #D123/01).

27 de Zoete, 2006.

28 Another small "alternative" outlier union in BC has been the General Workers Union (GWU). In 2000 GWU merged with CLAC when GWU's President Rocco Solituro and Business Manager Brook Magson negotiated a business deal for CLAC to take over the GWU membership and collective agreements. This merger was the subject of review by the BC Labour Relations Board (see BC Labour Relations Board No. B356/2000; Hobgen, 2001).

29 Jay, 1999.

30 Pellettier, 1978:264.

31 Christian Labour Association of Canada, 2004.

32 Grootenboer, 2005:ix.

33 Ibid:45.

34 Pellettier, 1978; Grootenboer, 2005.

35 Pellettier, 1978:265; Grootenboer, 2005:31-42.

36 Grootenboer, 2005:12.

37 "All employee" bargaining units of unionized employees include all employees engaged in different types of occupation. A "closed shop" (also referred to as "union shop") involves an agreement between an employer and a union whereby, as a condition of employment, all employees are required to be members of the union. An "open shop" is a place of

employment where a union is certified to represent the employees but membership in the union is voluntary. A construction craft union "hiring hall" relates to the requirement for construction employers to hire all their tradespersons through the craft union; the union in turn undertakes to provide employers with qualified tradespersons who are union members.

Evidence of employer preference for CLAC over other unions is found in the "recruitment" page of the website of the Progressive Contractors Association of Canada where CLAC is the only construction union link provided.

38 Reported at 65 CLRBR (2nd) 1.

39 *The Construction Industry Labour Relations Act.* Chapter C-29.11, Statutes of Saskatchewan, 1992.

40 2005 membership statistics provided by staff at CLAC's Surrey office in May 2006.

41 Grootenboer, 2005:17.

42 No strike is allowed to be taken by a CLAC bargaining unit or local without authorization from the CLAC National Board (CLAC Constitution, 2004, Article 9.14; Grootenboer, 2005:119), and any member who promotes, organizes or participates in any unauthorized job action is subject to suspension and/or expulsion from membership in CLAC (CLAC Constitution, 2004, Article 6.04(f)).

43 Grootenboer, 2005:119.

44 Grootenboer, 2005:116.

45 Livesay, 1998:28; Grootenboer, 2005:118.

46 See CLAC Constitution, 2004, Supplement B:49. It is also to be noted that one of the primary principles CLAC is committed to promoting is "The interdependence of employers and employees, their many common interests, their obligations and responsibilities toward each other, … *and given fulfillment in obedience of the law of love demand that there be cooperation between them* …" (emphasis added), CLAC Constitution, Supplement A:47.

47 See CLAC Constitution, 2004, Articles 11.11 through 11.14.

48 Grootenboer, 2005:144.

49 Decision of Mr. Justice Blair, Supreme Court of British Columbia, January 26, 1993, Ref. No. C916778, Vancouver Registry. Quoted in Grootenboer, 2005.

50 (2000) Nova Scotia LRBD No.2. [Also reported at 65 CLRBR (2nd) 1].

51 Manitoba LBD No. 16, Case No. 154/96/LRA.

52 Alberta LRBR 183, March 16/99, Vertex Construction Services & CLAC & IUOE; BCLRB No. B196/1994, G.B. Mechanique Ltee. & CLAC & Ironworkers Local 97.

53 Manitoba LBD No 16, Case No. 154/96/LRA; BCLRB No.B196/1994; BCLRB No. B168/2005; BCLRB No. B170/2005.

It is not unusual in the construction industry for traditional unions to approach an employer as a preliminary measure to see if there is any willingness for that employer to voluntarily recognize the union, especially when the collective agreement being offered is an industry standard agreement already voted on by union members. And the BC Labour Relations Code does not preclude an arm's length cooperative relationship that leads to voluntary recognition, provided such an arm's length relationship is legitimate. It is therefore the context that is determinative, and the sufficiency of the arm's length relationship to permit meaningful collective bargaining to take place (Harbour Electric Ltd., BCLRB No. B96/99). In the CLAC cases cited this was not demonstrated.

54 BCLRB No.B196/1994; BCLRB No.B344/2000; Albert Court of Queen's Bench, United Brotherhood of Carpenters, Local 1325 v. J.V. Driver Installations Ltd., Dec.10/04; BCLRB No. B5/2007.

55 See for example the report of ACTRA National Organizer Don Dudar in the Spring 2002 edition of InterActra in which he discusses the 1999 collective agreement between CLAC and Chinook Animation in Calgary, which contained fees and conditions inferior to the ACTRA Master Production and Animation agreements, which an owner of Chinook had signed in British Columbia. These agreements have been acquired and compared to verify the accuracy of ACTRA's CLAC agreement inferiority claim.

56 Livesay, 1998:29.

57 Manitoba L.B.D. No. 16, Case No. 154/96/LRA.

58 Alberta LRBR March 16/99.

59 See for example CLAC collective agreements with the following companies: Celtic Contractors Ltd., MCA Construction Ltd., Cambie Construction Ltd., Yellowhead Crane Ltd., Procon Miners Inc., JJM Construction Ltd., and Ledcor Construction Ltd.

60 (2000) Alberta LRBR 86 (Re) Midwest General Contractors v. CLAC Locals 63 and 65.

61 "Open shop" or "open site" collective agreements are preferred and promoted by various "Merit" contractors' associations across Canada, and by the Progressive Contractors Association of Canada because, among other things, they do not require union membership as a condition of employment, they enable employers to "name" who they want to hire through union hiring halls for particular projects, they enable employers to use one trade group to perform the work of another trade group, and they enable employers to sub-contract to non-union contractors.

62 Copies of such CLAC loan repayment agreements have been obtained from employees of construction company Bilfinger Berger.

63 The Progressive Contractors Association of Canada is made up of a number of major multi-national construction companies in Canada, such as Ledcor and Peter Kiewit, and is a powerful anti-traditional union lobby group advocating for "open site" enabling labour legislation. See http://www.pcac.ca/recruitment.php.

64 This examination of collective agreements provisions to determine conformance with the minimum provisions of the Act is not without precedent. As previously noted, in 1999 the Employment Standards Branch – in response to complaints from construction companies that CISIWU and a number of employers were signing substandard agreements, and thereby engaging in unfair competition – conducted such a study and found the allegations to be true.

65 From CLAC Local 66 collective agreement with Northwest Waste Systems Inc., signed May 20, 2004.

66 The reference here is to the analysis of CLAC collective agreements negotiated with the same employer both immediately prior to and after Bill 48.

67 BCAAA No. 80, Award No. A-050/04, p.14.

68 BCCAAA No. 127, Award No. X-015/05.

69 BCCAAA No. 236, Award No. A-165/05.

70 See BCLRB No.B26/2006.

71 Bill C-101 (collective agreements cannot exempt parties from the protections of the law), see page 11 of this report.

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