THE CANADIAN
BAR ASSOCIATION
British Columbia Branch

August 31, 2018

British Columbia Law Institute
1822 East Mall
University of British Columbia
Vancouver, BC
V6T 1Z1

Attention: Greg Blue, Q.C.

Dear Sirs/Mesdames:

Re: Response to the Consultation Paper on *the Employment Standards Act*

I write to you on behalf of the 2017-2018 CBABC Employment Law Section Executive of which I am a Co-Chair. We have prepared brief submissions in response to the Call for Responses included in the Consultation Paper on the *Employment Standards Act* (ESA) released in June of this year.

The CBABC Employment Law Section's submissions reflect the views of members of the Section only and do not necessarily reflect the views of the CBABC as a whole.

The positions expressed herein are as enunciated and supported by a majority of the 2017-2018 Section executive.

Our positions may not reflect the individual views of any member of the Section or its executive, nor even the author. We sincerely hope that our comments, views and support will be valuable to the discussion going forward.

We expect that you will receive a variety of detailed submissions from interested parties.

We intend to keep our submissions brief and to raise issues only for particular topics for which we had a view that we felt surpassed indifference or mild agreement/disagreement.

Given our intended brevity, we have not included a preface, executive summary or table of contents and will instead address individual issues in this correspondence in the order they appear in the consultation paper (omitting those for which we offer no view).

Our submissions are:

Chapter 3

Nos. 1 – 2: We were of the view that it is worth addressing the risks of misclassification of employees and contractors in the ESA. Presently, given the lack of a requirement for any notice in the context of a true independent contractor and the effects of violating the minimum notice required for employees in the ESA, it is very difficult to draft an independent contracting agreement where a risk exists that the person will be found to be an employee (this risk is often present). Our view was that this ought to be addressed in the ESA and that this could be done by including a term that allowed for contracting entities to provide for notice in the event an individual was deemed an employee without that clause being seen as indicia of an employment relationship.

No. 4: We support the view of the majority with respect to this issue. We believe that the complications of implementing an administrative scheme and addressing wrongful dismissal in the ESA outweigh any potential benefit. We also question whether the Employment Standards Branch has the resources it would need to deal with these issues.

Nos. 5 – 6: We are of the view that review of the exclusions is important. We support the tentative recommendation of the Project Committee.

Chapter 5

No. 8: We support the tentative recommendation of the Project Committee.

No. 9: We strongly disagree with the Project Committee's tentative recommendation that sections 42 and 17(2)(a) of the ESA should be repealed. In our view, time banks are commonplace and not difficult to administer. We expect that time-banking will remain a common practice even in the event of an amendment and are concerned about the additional liability that will be imposed on employers who continue to use this mechanism unwittingly. We were, however, concerned with respect to the ability for employees to claim payment for time in an improperly administered or old bank. We would be supportive of amendments to this section to provide additional protections limiting the amount of time that can be banked and/or requiring pay out of the time bank at particular intervals to avoid limitation issues in ensuring that employees are paid for their time working.

Chapter 5

Nos. 10 – 14: We are of the view that individual averaging agreements are important to both employees and employers. While the section does not disagree with the potential for workplace-wide averaging agreements, we are strongly of the view that individual averaging agreements should remain available in British Columbian workplaces.

Nos. 15 – 16: We disagree with the tentative recommendation of the Project Committee and are of the view that no additional language is necessary in the ESA. There are sufficient remedies available, in our view, to employees who refuse overtime and suffer adverse consequences as a result. We feel an additional term to the ESA is unwarranted. If language were to be added, we believe that clarification needs to be made to what is proposed.

No. 18: We are of the view that providing a specific framework for these kinds of requests and responses in the ESA is not merited. We do not see the issue of requesting flexible arrangements as a significant one, and we expect issues of conflict and enforcement in the event that such a term was introduced.

No. 19: We strongly support a provision expressly allowing employers and employees to agree to make up time arrangements.

No. 20: We are of the view that the term tentatively recommended by the Project Committee is redundant and unnecessary. We oppose the recommendation.

Chapter 6

No. 25: We strongly support that tentative recommendation of the Project Committee that would allow for irrevocable written assignments of wages for the purpose of repaying advances.

No. 27: We support the tentative recommendation of the Project Committee to adopt that provisions of Ontario's *Employment Standards Act, 2000* into the ESA.

Nos. 28 – 29: Although not contemplated by the Project Committee, we were of the view that the ability for employers to include vacation pay in commissions ought to be considered (i.e. allowing employers to pay a commission rate of x% which is expressly "inclusive of vacation pay", as opposed to being required to pay a commission rate of x% "plus vacation pay"). In our view, this is a common mistake made by employers that can lead to large amounts of liability in the context of employees who are not, as a general rule, vulnerable or poorly paid. We believe that this is an idea worthy of consideration.

Chapter 6

No. 30: While we agree with the majority's view that some formula or plan for increases to the minimum wage is important, we think that the potential for regional modifications to the minimum wage ought to be explored. British Columbia has many different urban and rural environments in which a dollar has a drastically different meaning. It may not make sense, in our view, to pay the same minimum rates in the Lower Mainland as it does in McBride, as examples.

Chapter 7

No. 34: We are of the view that the potential for a provision allowing employees to waive their right to periods of annual vacation time ought to be considered. Such a provision could be very limited in scope (requiring time to be deferred or allowing a waiver only once every five years, as examples).

No. 37: We are of the view that an expansion to the definition of "immediate family" is warranted on the language suggested by the majority.

Chapter 8

No. 44: We agree with the majority in increasing flexibility in working past the end of a notice period, but we think that rigorous regulatory parameters should be placed on when notice will not be rendered invalid (e.g. based on employer size, role of employee in organization, other relevant circumstances to be expanded on through regulation).

No. 45: We agree with the majority with the caveat that we think the removal of the word "full" from the proposed (b) would make it more clear.

Chapter 9

Nos – 48 – 51(a): We are supportive of the tentative recommendation of the Project Committee listed as recommendation number 48 with the caveat that we think it's important to set parameters by regulation as "injurious to health, safety, or morals" is vague and can be broadly/subjectively interpreted. The associated recommendation of the majority at 51 is unnecessary in our view given our position on recommendation 48. With respect to 51, if the recommendation was to be implemented, we think further details would be necessary for determining how parental consent is given (e.g. is specific written consent required to be given to the Director?).

Chapter 9

Page 228: We see no need for neutral adjudication for migrant workers. Furthermore, we see logistical issues with administrating such "neutral adjudication". The discussion referenced appears to suggest a system even more onerous than the unjust dismissal process under the *Canada Labour Code*, which we do not think should be implemented for migrant workers or at all. We agree with not interfering with the principle allowing for dismissal without cause upon provision of notice.

No. 54: We support the tentative recommendation of the Project Committee.

No. 55: We support the tentative recommendation of the Project Committee.

No. 57: We support the tentative recommendation of the Project Committee in principle but feel the drafting could be more clear.

Chapter 10

No. 59: We support the tentative recommendation of the Project Committee: use of the Self-Help Kit ought not be mandatory.

Nos. 60 - 63: We disagree with the tentative recommendation of the Project Committee with respect to the need for a threshold investigation of complaints. In our view, such a process is likely to cause administrative delays and increase costs for the Branch in a manner that may not be sustainable. In our combined experience we did not feel there was an issue of vexatious complaints to the Branch such that it needed to be addressed in this manner. We feel that any recommendation in this regard ought to be supported by statistics to justify what would undoubtedly be a burdensome process for the Branch. We are of the view that the process taken by the Branch in the course of the investigation, management, adjudication and other disposition of complaints could be made more clear in the ESA. As presently drafted, the process actually taken is not set out with clarity in the statutory language.

Nos. 65 – 66: We strongly support the provisions supported by the majority. We believe that an extension of the time for persons to file a complaint pursuant to sections 8, 10 or 11, as applicable, will assist in the protection of vulnerable classes of workers including foreign workers.

No. 68: We strongly support the provision tentatively supported by the majority.

Conclusion
Thank you for the opportunity to provide this response.

We would be pleased to discuss our submissions further with you, either in person or in writing, in order to provide any clarification or additional information that may be of assistance to the British Columbia Law Institute.

Yours truly,

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