CLC Response to "Fairness at Work: Labour Standards for the 21st Century"

(Commissioner Arthurs Report on changes to Part III of the *Canada Labour Code*)

General principles

The CLC sought a model Labour Code at the federal level taking full account of today's realities in the workplace, and in the wider society, especially the growing imbalance of power between workers and employers; increased competitive pressures which exert downward pressures on labour rights and standards in the absence of countervailing public regulation; the growth of more precarious forms of employment; growing difficulties reconciling paid work with caring responsibilities, especially for women; and a more racially diverse workforce.

We argued that there should be effective access to minimum rights and standards for all workers in the federal jurisdiction at least equal to the best standards at the provincial level, and also reflecting norms which have been clearly established in collective agreements and in international labour standards. The current federal Code falls well short of best provincial practice in a number of key areas, including enforcement, leave provisions, and protection of human rights.

Labour rights and standards at the federal level and in Canada also fall well short of the norm in other advanced industrial countries (e.g., paid leave, maximum hours, minimum pay standards, and protection of part-time and contract workers). A floor of widely observed labour rights and standards is an important part of creating a more productive economy, as well as a fairer society, as demonstrated by the good economic performance of many jurisdictions with high labour standards.

The major responsibility for promoting and ensuring compliance with labour standards rests with the government. However, we support an expanded role for community organizations in terms of education and facilitating access.

We welcome the fact that the Arthurs Report embraced most of these key principles. The Report advances a compelling and well-argued case for the continued relevance and importance of decent labour standards. We commend Commissioner Arthurs for his strong philosophical commitment to the fundamental principles underlying labour standards, and wholeheartedly endorse the key guiding principle of the Report, Principle 1: Decency at work.

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

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

We note and welcome the fact that Professor Arthurs argues that this fundamental principle should prevail if it comes into conflict with others; that it requires special attention to the needs of precarious employed workers, and that it limits and

provides context for his recommendations for flexibility in the application of standards.

The Report also rightly emphasizes the important link between decent wages and working conditions, and building a highly productive economy.

We welcome the fact that the Report places a very major focus on the need for compliance and effective enforcement. Substantive reform of the Code is of no use to workers if its provisions are not reflected in workplace realities. Compliance is also essential if employers who adhere to Part III are not to be undercut by those who do not. The CLC welcomes the fact that there was general agreement between employer and labour representations on the need to achieve greater compliance, and we are in strong support of the recommendations in this area.

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

However, we have some significant concerns with the degree of "flexibility" of standards which is advocated, particularly at the level of the individual workplace and the

individual worker. These concerns exist with respect to both union and non-union workers.

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

The Report sets out Principle 5: The workplace bargain.

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

We support this principle and also recognize that statutory work time and work schedule standards do have to be modified in some operations and for some groups of workers. However, we would add that flexibility should not be at the expense of statutory minimums, and that the focus is on a slightly differing rule rather than a lower standard. We raise some concerns below with respect to possible negative impacts of flexibility on basic labour standards for unionized as well as non-union workers.

In summary, the Arthurs Report represents a very significant step forwards, and we are generally very supportive of its recommendations. However, care must be taken that the fundamental principles endorsed by Professor Arthurs will not be undermined by the "operationalization" of provisions for flexibility of standards, especially with respect to working time.

In this context, it may be appropriate for many of the recommendations on compliance and enforcement which do not require statutory change, including the provision of greater resources to Labour Canada, to be implemented at an early stage. This would give us greater comfort that adaptability of statutory provisions to very specific circumstances would not be at the expense of workers.

Make the Code effective: compliance and enforcement

The central purpose of the Code is to provide a basic floor of rights and standards for all workers. This purpose is more relevant than ever at a time when there is a growing imbalance of power in the employment relationship. Weak enforcement of standards results in pervasive low compliance and lack of effective protection for many workers. It also rewards bad employers, and undercuts collective agreements.

We strongly endorse Principle 9: High levels of compliance.

"Labour standards ultimately succeed or fail on the issue of compliance. Widespread non-compliance destroys the rights of workers, destabilizes the labour market, creates disincentives for law-abiding employers who are undercut by law-breaking competitors, and weakens public respect for the law."

The CLC has argued that greater resources should be given to Labour Canada so that inspectors can educate employers and workers; that the Code should be actively promoted through popular educational materials, workplace visits, etc.; that government support should be given to community-based organizations to publicize and to help provide access to labour

rights, including through expert representation before tribunals; that third-party complaints should be investigated by inspectors, and that Labour Canada inspectors should undertake proactive enforcement, including general audits of problem employers, and of sectors with low levels of compliance followed, if necessary, by issuance of orders. The Code and administrative practices should be changed as necessary to support these kinds of proactive activities, and to increase their importance relative to the investigation of individual complaints. Labour Canada should develop strategic plans including targets for inspections and for levels of compliance established through inspections.

Inspectors should be given greater powers to issue orders to recover unpaid wages, and to establish if there are grounds for a complaint of unjust dismissal. There should be a system of progressively rising fines for employers who do not live by the rules, plus administrative penalties when payment orders are not complied with.

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

Effective protection for workers in precarious forms of employment

Employment standards are supposed to provide a basic level of protection for all workers, but many economically dependent contract and temporary workers, as well as short-term workers, are effectively excluded. The Code must take full account of changing forms of employment and disguised employment relationships.

Part III should — as Arthurs recommends — include a broad definition of who is an employee, and coverage and the substance of rights under the Code should be clearly communicated to workers.

Arthurs proposes that a clear definition of employee be included in the regulations of the Code, and that anyone hired be given clear notification of their status with a default status of employee. (See Recommendations 4.1 to 4.10 with which the CLC is in general agreement.) Importantly, he also recommends (5.1; 5.2) that employees get a written notice of their employment terms and notice of their coverage under Part III.

However, a key recommendation is that dependent contractors **could** be covered by some but not all provisions of the Code through a new definition covering "autonomous workers" (4.2), implemented via regulations or a sectoral conference. Yet, such persons — those working under contract for a single employer on a continuing basis, and under the direction and control of the employer — would likely be considered to be employees under the current law, and are considered to be employees for collective bargaining purposes under Part I. Thus the recommendations on autonomous workers could be considered to be ones which dilute current coverage of dependent contractors, potentially undercutting the

position of workers in sectors (like trucking) where many dependent contractors are employed. This is an issue of serious concern. It would be our preference to explicitly cover dependent contractors for Part III purposes, with any exclusion clearly specified and justified.

The CLC called for a major focus on coverage of precarious workers, including part-time and temporary or contract workers. Overall, the recommendations in this area are positive. We called for equal pay for part-time and contract workers performing the same work as full-time employees. Arthurs (10.4 - 10.6) recommends equal pay for equal work (for part-timers and after one year for temporary workers), and equal access to rights under Part III for temporary workers after one year (which can be attained via cumulative and not necessarily sequential contracts). This would provide for access to leaves and to provisions regarding unjust dismissal.

We called for better access to benefits for temporary and contract workers. Arthurs suggests consideration be given to a special benefit bank for nonstandard workers (10.7). This would be a useful initiative, building on some union initiatives to extend benefit coverage to workers who frequently move from employer to employer in the same sector.

Arthurs supports our call for employer/agency joint and several responsibility for ensuring minimum standards for agency workers (10.2). However, (10.1) he calls only for development of a voluntary code of conduct to deal with other key issues for temporary agency workers, such as their exclusion from consideration for permanent jobs.

Arthurs supports continuity of pay, rights, and benefits for workers in contract-for-services sectors through deemed successorship and continuity of service provisions (5.8), and 5.9 provides for a declaration that a common employer exists for Part

III coverage purposes. These are important steps forward in terms of providing coverage for workers despite superficial changes in the form of the employment relationship.

We called for advance notice of work schedules to part-time and shift workers, and at least four hours of work per shift. 7.48 calls for 24-hour advance notice of work schedules which is reasonable.

Arthurs did not support our call for access to full-time permanent jobs for part-time workers through an available hours provision (on the proposed Saskatchewan model), or for a registry of home workers to facilitate compliance.

Work schedules and "regulated flexibility"

Part III currently specifies a normal work schedule of eight hours in a day and 40 hours in a week. These numbers act as triggers for overtime pay at the premium rate. Part III also specifies a maximum 48-hour work week. Arthurs recommends no change to the statutory norm, but does propose more "flexibility" around the norm.

Currently, work schedules can be varied from the norm through a Ministerial permit — mainly issued to cover continuous operations — which allows averaging of hours for overtime purposes and higher maximum hours. Work schedules can also be varied through modified work schedules with the agreement of the union if there is a collective agreement, or with the agreement of 70% of workers in a non-union workplace.

Arthurs recognizes — in Principle 4: The level playing field — that variations should not be approved in such a way as to give an employer an unfair competitive advantage over others:

> *"Labour standards should ensure that competition is not based on differential interpretation or application of the decency principle. While variability in labour conditions among competing firms is to be expected, it should reflect the circumstances prevailing in particular labour markets or sectors of the economy and genuine differences in firm strategy, not degrees of compliance with statutory labour standards."*

However, in Principle 10: Regulated flexibility, he argues that standards will need to be modified or made more flexible to reflect specific circumstances, and that this is acceptable within certain limits.

> *"Labour standards that do not respond to the realities of employment in diverse circumstances are unlikely to attract the willing compliance of employers and, sometimes, of workers or to serve their mutual interests in the success of the enterprise. Labour standards legislation should therefore permit some degree of flexibility in the initial establishment or subsequent adjustment of standards, so long as employers do not gain advantages that contravene the level playing field principle, workers are not deprived of the protection of the decency principle and both sides continue to enjoy the benefits of their bargain."*

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

We argued that permits to work long work schedules and similar variations of standard provisions may be needed to take account of very specific circumstances, but should be subject to approval by inspectors, regular and transparent review, and approval by affected workers.

In recommendations 7.1 to 7.10, Commissioner Arthurs basically accepts these arguments and calls for much greater precision, transparency, oversight, and limits around the current process for Ministerial permits to vary work schedules. We support these recommendations, which reflect the principles set out above.

However, Commissioner Arthurs also proposes a lot of "regulated flexibility" around hours of work and scheduling issues through new mechanisms — sectoral conferences and Workplace Consultative Committees. These recommendations have to be very carefully examined to see if they properly balance off very specific and justifiable needs to vary standards, with basic standards.

With respect to the extent to which collective agreements should be allowed to modify standards, the approach of Mr. Arthurs is to broadly endorse a modified *status quo* and to allow variations of work schedules through collective agreements, subject to regulatory oversight (see 7.5).

It is our view, based on experience, that employers can and do force unions to accept working hours which deviate from and undercut basic standards, both in the workplace and in the wider sector. The mere fact that a less-than-Code provision exists in a collective agreement does not indicate the consent of the workforce, or a conscious trade off of a lowered standard for some other gains, as Mr. Arthurs believes to be the case (see p.74). In recent years, some of these provisions were "negotiated" when employers faced bankruptcy and workers in non-union

competitors were already working under sub-Code standards forcing a process of downward harmonization.

In our view, the degree of regulatory oversight of modified work schedules achieved through collective bargaining should be significant, and variations from statutory work schedules and maximum hours should be allowed by inspectors only as clearly justified by special circumstances, and only if substantially the same benefit and protection are provided to workers by a different work schedule.

It has to be made clear that employers should not be able to initiate changes during the duration of a collective agreement.

Commissioner Arthurs further proposes sectoral standard setting as an alternative to the current system of special exemptions and permits (7.12). As he lays it out, sectoral conferences would be convened, and recommendations would be drawn up by an independent chair and given to the Minister for consideration.

One concern here is that the scope for variation of standards via a sectoral conference appears to be not limited to work schedule issues, but could extend to new areas. We would be opposed to this. Any scope for variation of standards must be very clearly defined in the statute and limited to work schedules, and some reasonable provisions for variation of paid holidays.

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

Labour's past experience of sectoral standard-setting processes has been that they can start a process whereby non-union employers, with the manipulated consent of non-union workers, undermine standards to the detriment of unionized and indeed all workers. Moreover, sectoral standard setting is problematic in that the conditions of workers in a "sector" such as airlines or banking vary a great deal from occupation to occupation (e.g., attendants and mechanics in airlines). While flight attendants' schedules may indeed have to be modified by the realities of long flight times, the same is not true of other airline occupations. Finally, the consequences of sectoral standard setting for collective bargaining have to be thought through in much greater detail. A sectoral standard could clearly undermine negotiated provisions on work schedules and overtime pay which work for both employers and workers in a specific company within a sector, and could lead to some trading off of one standard for another.

Even more problematic are recommendations (from 7.20 to 7.30) for flexibility of work schedules in non-union workplaces, to be determined through Workplace Consultative Committees. These add to the dangers of sectoral conferences in that there would be no independent worker voice in the process. We recognize that Professor Arthurs has put forward a number of safeguards. However, variation through a reformed permit process would be much less open to employer manipulation, much less likely to undermine the collective bargaining process in other firms, and much more in the interests of non-union workers who would lack a real voice in the process. The experience of health and safety committees has been that they are generally ineffectual, and ineffective in non-union workplaces.

Also problematic are recommendations 7.39 and 7.40 which contemplate work schedule flexibility for individuals via individual/employer agreement. Such arrangements can have repercussions for the treatment of other workers, and there is

potential for employer favouritism and abuse. Further, there is no recognition in the Report that individual work times in unionized workplaces should be determined through the provisions of the collective agreement.

We urge great caution in implementing the recommendations for greater sectoral, workplace, and individual worker flexibility relative to the statutory norms for work schedules. At a minimum, there should be a clear sequence. The first and immediate step should be to increase regulatory oversight of permits and modified work schedules, and to increase the capacity and resources of Labour Canada to make this oversight meaningful. Further "flexibilization" should be undertaken only if there remain major problems in a reformed system, and only after worker confidence in a new regulatory regime has been fully established.

Work/life balance

Changes to the Code must deal with the realities of high rates of employment among both women and men, and the fact that workers have important parental and caring responsibilities.

Currently, some specified professionals and senior managers are excluded from some provisions of the Code relating to work schedules. In principle, many are covered, but the terms with respect to hours of work of many salaried professional workers are routinely ignored. Arthurs recommends maintaining the current exclusions (4.8; 4.9), and makes only vague reference to monitoring the work hours of salaried professionals and managers. It would have been better to clearly specify that salaried professionals are covered by the working-time provisions of the Code.

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

We support the ability to take overtime pay as time off at the premium rate (7.40).

We argued that all workers should have the right to a time bank allowing them to take up to 10 paid days with pay per year to deal with personal and family responsibilities. In an important recommendation (7.50), Arthurs supports up to 10 **unpaid** days to deal with family responsibilities. We commend this important

step to proper recognition of the need for workers to take leave time as of right to deal with pressing family concerns.

Arthurs makes positive recommendations to expand rights to unpaid leave for bereavement leave (to seven days); court appearances; to deal with pandemics; and to attend medical appointments (7.56; 7.57; 7.60). These are welcome, and it is appropriate that these remain a separate right to leave.

We called for paid breaks during the working day, including a half-hour meal break after five hours (accepted in 7.58). Arthurs also calls for nursing breaks, and a minimum rest period in the week.

We said that paid vacation should be increased from just two weeks to at least three weeks after one year, and four weeks after 10 years. Arthurs calls for three weeks after five years (and a third unpaid week on request for those workers with less than five years) and four weeks after 10 years (7.61; 7.62). These are positive steps forward.

Arthurs did not accept our call for a 10th paid holiday per year, and favours much greater flexibility in substituting other days for designated general holiday days (7.67; 7.68).

With respect to paid sick leave, maternity/parental, and compassionate care leave, Arthurs (7.52) calls for Part III unpaid leave provisions to match entitlements under the EI program, and suggests expanded access to compassionate leave (7.55). His recommendations will improve access to unpaid sick leave, and to maternity/parental leave for federal jurisdiction workers in Quebec. He did not, however, respond to our calls for increased access to paid sick leave.

A living wage

Labour argued that the federal government should create a national minimum wage by reintroducing a federal minimum wage in its own jurisdiction set at what is needed to bring a single, full-time, full-year earner to the poverty line (approximately $10 per hour), and should be indexed to average hourly wages. Arthurs broadly supports this recommendation (10.14), and accepts the key principle that the minimum hourly wage should match a poverty-line standard. This is an important recommendation which will have an important influence on provincial minimum wages, and will directly benefit some federal sector workers.

Human rights

It is welcome that in Principle 6 — Inclusion and integration — Arthurs builds on his argument that labour rights are human rights, to argue that human rights must be respected in the workplace.

> *"The decency principle requires that labour standards be inclusive, in the sense that all workers should enjoy in the workplace the full benefits accorded them by human rights legislation."*

While accepting substantive concerns concerning lack of respect for human rights in the workplace, Arthurs draws attention to the current unresolved division of responsibility between Labour Canada and the Canadian Human Rights Commission and Tribunal. As he notes, complaints regarding unfair dismissal can now be filed under two sets of procedures, and human rights protections exist under Part III with respect to protection from sexual harassment, but not with respect to racial

harassment. Given this division of labour and evidence of lack of compliance on the part of employers with current human rights provisions, he is uncomfortable with solely extending human right protections through Part III, and basically calls for a formal process which would lead to an understanding and co-operative strategies on the part of Labour Canada and the Canadian Human Rights Commission and Tribunal.

For the labour movement, the important point is that effective mechanisms must exist in the workplace to deal with and speedily resolve complaints of harassment and violations of human rights. The discussions Arthurs calls for should not be taken as an excuse to defer the issue, but rather as a genuine process to find the most effective mechanisms.

We argued that legislation should require employers to establish formal procedures to deal with complaints of psychological and racial harassment (based on the Quebec model), and to establish joint workplace human rights committees to ensure compliance with human rights legislation, and to promote a workplace free of discrimination and harassment.

Arthurs calls for bullying and harassment to be dealt with under Part II of the *Canada Labour Code*.

Training

We called for a worker right to take unpaid training leaves, and a Code provision to require the establishment of joint workplace training committees.

While reluctant to make Part III the centrepiece of a training strategy, Arthurs speaks at some length to the

importance of workplace training as a public policy issue, and calls for a right to unpaid training leave of up to five days per year (11.7). This is an important first step, which at least recognizes the need for employer accommodation of individual learning needs. As noted, he also recognizes the need for employers to respond to individuals' education and training schedules.

Arthurs (11.5) would require employers to pay for required training (which does not always happen), but would also allow employers to require that employees forfeit a bond if they quit after paid training.

Job security

We called for increased notice of termination based on length of service, with rising rates of entitlements from one week after three months, to two weeks after one year, to three weeks plus one week for each year of service after three years, to a maximum of eight weeks; full compliance with group termination provisions; and 16 weeks notice of group terminations to workers and union. We also called for severance pay not to be reduced by access to retirement benefits, and at least five days of severance pay per year of service with a 10-day minimum.

Arthurs (11.2) essentially calls for little change to group termination provisions, though with administrative improvements. He calls (8.3) for a small improvement in severance pay (from two to three days per year of service after 10 years), and (8.5) accepts broadly that severance pay should not be reduced by a pension entitlement. This is an important point which should be clarified in legislation. In recommendations 8.6 to 8.12, he calls for an expedited and fairer adjudication process

with respect to unjust dismissal (which mainly applies to non-union workers).

Foreign workers

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

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

We believe that there is an important potential role for Labour Canada in the labour market opinion process which leads to the issuance of work permits for temporary foreign workers. Currently, the impact of hiring international temporary workers on labour relations and working conditions is confined to a very narrow requirement that such workers not be allowed into Canada if there is a legal strike in progress. This excludes consideration of the fact that temporary, international workers are being hired under terms and conditions which undercut

established collective bargaining relationships and established compensation packages (which reflect not just the “prevailing wage” but also benefits and premium pay provisions for long hours and unsocial work schedules). Labour Canada officers could be asked to provide advice to Service Canada in the drafting of labour market opinions given their expertise in these areas.

The role of Labour Canada

We strongly support Arthurs’ call for Labour Canada to play a more central policy research and advocacy role in the federal government with respect to workplace issues, including work time, and good workplace practices (7.69 to 7.72; 11.7, and 11.8).

Conclusion

Overall, we judge the Report to be an important and progressive document which responds in a very positive way to the issues and concerns raised by labour and community groups. Its strengths are its clear and compelling basic principles, and the substantive recommendations made with respect to compliance and enforcement, greater protection for workers in precarious employment relationships, and clear recognition of the need to allow workers to balance paid work with other responsibilities. Our major concern is with the degree of “regulated flexibility” which is called for in the Report, which, we would argue, would potentially come into conflict with the fundamental principles which are advanced, particularly if the compliance and enforcement recommendations were not closely heeded.

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