

A
REPORT TO
THE HONOURABLE
HARRY BAINS
MINISTER OF LABOUR

**A REVIEW OF THE
UNIONIZED HOTEL SECTOR
IN RELATION TO THE
IMPACTS OF COVID-19**

Submitted by Sandra I. Banister, Q.C.

August 24, 2020

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The Honourable Harry Bains
Minister of Labour
Legislative Buildings
Victoria B.C. V8V 1X4

Dear Minister Bains,

On August 4, 2020, I was appointed to conduct a review of the unionized hotel sector in regard to the prolonged impacts of the COVID-19 emergency.

I appreciate the opportunity to consider this important issue. I apologize for the delay but the time limit was difficult to meet due to the enormity of the task. My report is respectfully submitted for your consideration.

Yours truly,

A handwritten signature in cursive script, reading "Sandra I. Banister". The signature is written in dark ink and features a large, elegant loop at the end of the last name.

Sandra I. Banister, Q.C.

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Report of Sandra I. Banister, Q.C.

Introduction

On August 4, 2020, I was appointed by the Minister of Labour as an expert advisor to conduct a review of the unionized hotel sector given the devastating impacts of the COVID-19 pandemic on employers and employees in the industry. I was retained to:

- a) conduct an expedited review to determine what steps are being taken by employers and unions in the B.C. hotel sector to confront the issues raised by recall in the face of the prolonged business impacts of the COVID-19 emergency; and
- b) to consult with unions, employers and the relevant sectoral organizations to gauge their reactions to an amendment to the *Employment Standards Act* (“ESA”) regulations proposed by Unite Here to respond to the impact of COVID-19 on recall rights.

My mandate is limited to a report without recommendations.

I undertook a consultation process by inviting written submissions from and/or oral discussions with the relevant employer and labour organizations, hotels, and trade unions.

I received 14 written submissions and 1 email and conducted extensive oral consultations (by Zoom and telephone conference) with 11 stakeholders. Following those discussions I received numerous follow-up emails, articles, attachments, and phone calls providing information and responding to various questions I posed. I am indebted to those who participated as their input was essential to this review.

Background

The Hotel Sector

The hotel sector is critical to the provincial tourism industry which, in 2018, generated \$20.5 billion annual revenue¹. In 2018 the BC hotel sector alone contributed \$3.2 billion to the provincial economy². Communities with hotel accommodations enjoy greater economic stability³. During the five years preceding the pandemic business and growth in the sector was phenomenal and the BC hotel industry lead the country in occupancy and room rates.

The industry employs well over 60,000 employees at approximately 1,250 properties⁴. The majority of hotels and hotel rooms are located in the Greater Vancouver Regional District, particularly in Vancouver. There are over 72 hotels in Vancouver with over 12,000 hotel

rooms⁵. In BC, union density in the sector is low, estimated between 7 and 10%, as compared to 15.5% in the private sector generally.⁶

The BC hotel sector encompasses extremely diverse properties ranging from small independent family operated room-only motels to luxury brand full service facilities and resorts with everything in between.

The hotel business is inherently seasonal with regular associated layoffs. January to April have the lowest occupancy rates and are the lowest employment months. The recall of housekeepers generally commences in the spring, in anticipation of the busy summer season, and tapers off in the fall. The banquet seasons are fueled by Christmas events in December and conventions and weddings, primarily from February to June.

The majority of workers in the sector are women, immigrants, and/or people of colour. Precarity is a common feature of the industry with many part time, casual, and seasonal workers.

The hotel sector was one of the industries hardest hit by the pandemic; it was one of the first impacted and will likely be one of the last to recover. Travel came to an abrupt halt due to a combination of government initiatives, such as the border closure and the ban on cruise ships from Canadian ports, airlines cancelling flights and the discomfort of the travelling public.

Many hotels closed from mid-March until early June. Five luxury hotels, the Rosewood Hotel Georgia, Shangri-La, Trump Tower, JW Marriott Parc and Opus, remain closed and are not expected to reopen until 2021. The St. Regis remains closed but may reopen in September 2020.

The devastation caused by the pandemic and the ability of the business to recover has varied depending on the nature of the property, size, location, quality, and range of services. Generally speaking, airport and resort properties are managing better. Some facilities have pivoted to quarantine hotels or social housing. The banquet and convention business has been virtually eliminated due to Public Health Orders (“PHOs”) and the decline in business travel. The restaurant portion of the business has been significantly reduced or, in some cases, eliminated. Occupancy rates are generally dismal across the sector, with many ranging from virtually non-existent to 20%.

A view of several major downtown Vancouver hotels on Sunday, August 16, 2020, at check-out time confirmed few guests and no restaurant business.

Overall the sector’s economic outlook is dire. One major Vancouver full service convention hotel reports a 98% drop in revenue and layoffs of 97% of staff.

Significant layoffs have occurred at many properties, some are maintaining skeletal staff while layoffs at other properties range from 30% to 98%. Unite Here estimates 85% of its members are currently laid off and that up to 50,000 union and non-union hotel workers risk losing their jobs. Many managers are either working reduced scheduled, are laid off or have been permanently severed. Laid off hotel workers have been participating in a hunger strike outside the BC legislature since August 10, 2020, imploring the government to act.

It is anticipated up to one third of the properties particularly, but not exclusively, small-business hotels will not survive without government assistance or relief from property taxes⁷. The Tourism Industry Association of BC recently applied for government assistance as follows:

for an initial investment support of \$680 million for (short and medium term) and additional stimulus funding (medium/long term) to help mitigate the unprecedented impacts of COVID-19 on the BC tourism and hospitality industry and its workforce⁸.

Recovery is not anticipated until the border reopens, a vaccine is widely available and travelers and businesses feel comfortable travelling. Many believe the sector will not fully recover until 2022 or even 2023.

The Unionized Hotel Sector

Five unions represent approximately 7,800 workers at about 80 hotels. In roughly descending order of membership those unions are: Unite Here, Unifor (Locals 3000, 4275, 4276, 114, and 433), BC Government and Service Employees' Union ("BCGEU"), Christian Labour Association of Canada ("CLAC"), and United Steelworkers ("USW") (Locals 1-405, 1-417, and 9705). Unite Here and Unifor represent the vast majority of employees in the sector. Their wall-to-wall certifications cover a range of occupations and skills including housekeeping, front desk, restaurant, banquets, and trades.

In addition to 3 free standing hotels, the BCGEU represents workers at 2 hotels attached to casinos, the River Rock and St. Eugene. The River Rock employs 103 individuals in the hotel and 570 in the casino. At St. Eugene there are 10 hotel employees and 55 casino employees.

Bargaining in the sector is fragmented between several employers' associations. Hospitality Industrial Relations ("HIR") represents the majority of the unionized hospitality properties bargaining for 52 hotel employers throughout the province, with workforces ranging in size from 10 to over 300. HIR negotiates a combination of master agreements and agreements for individual hotels with Unite Here, Unifor, BCGEU, and USW. The Greater Vancouver Hotel Employers' Association ("GVHEA") represents three major Vancouver hotels (the Westin Bayshore, Hyatt, and Pinnacle), in collective bargaining which together employ some 1,100 unionized workers. In addition, many properties negotiate their own collective agreements either individually or in concert with associated properties.

Collective Agreements

Conducting a review of the relevant collective agreement clauses was complicated by the fact many unions and employers fail to file their collective agreements with the Labour Board despite the requirement of Section 51 of the Labour Relations Code. Nonetheless, with the cooperation

of unions and employers a significant number of collective agreements and relevant provisions were ultimately obtained.

Virtually all collective agreements in the sector contain recall rights ranging from a low, in one collective agreement, of 13 weeks to a maximum of 24 months. The majority provide recall rights in the 6 to 12 month range and several provide for the extension of recall rights through periods of renovation:

- a) The vast majority of Unite Here's collective agreements, applicable to 35 hotels, have 6 month recall rights while 10 properties have recall for 9 or 12 months. The only Unite Here collective agreement with 24 months of recall is with the Hotel Georgia. Consequently, Unite Here anticipates 2000 workers will lose their right to return to their job in September 2020.
- b) Recall rights in Unifor's collective agreements range from 3 to 24 months, with the majority providing 12 months. Some Unifor agreements determine recall rights based on length of service; some of those agreements establish no minimum length of recall for junior employees while others provide employees with less than 1 year of service with a minimum of 3 or 6 months recall to a maximums of 12 or 24 months for senior employees.
- c) In most BCGEU collective agreements seniority is lost following layoffs in excess of 9 to 12 months.
- d) CLAC advise they recently negotiated a memorandum of understanding with the Executive Inns to increase recall from 6 to 12 months.
- e) Recall rights in most USW agreements range from 6 to 24 months with 1 containing no reference to recall.

Given the current length of recall rights in the collective agreements in the sector and the near certainty of a prolonged downturn with a slow economic recovery, thousands of hotel workers will lose their right to recall, between September 2020 and March 2021. If they are subsequently rehired, regardless of their length of service, they will start as new employees with no seniority for the purpose of vacation entitlement, job postings, severance pay or any of the other benefits flowing from seniority.

Most agreements in the sector provide severance pay for termination due to the expiry of recall rights. Compared to other sectors, these payments are relatively modest. The most common severance entitlement is 12 hours per year of service, although a few BCGEU agreements provide for one week per year of service to a maximum of 3 weeks and one Unifor collective agreement gives 1.5 weeks per year of service to a maximum of 34 weeks.

The majority of Unite Here's collective agreements have expired and negotiations are currently underway at 6 bargaining tables, including the HIR Master Agreement which covers 33 hotels.

Several Unite Here collective agreements were concluded in 2019 or 2020, just prior to the pandemic. The GVHEA, representing Westin Bayshore, Hyatt, and Pinnacle, and Unite Here reached a new collective agreement, after a four-week strike, in October 2019, which expires June 30, 2022. Unite Here and the Rosewood Hotel Georgia concluded collective bargaining in the fall of 2019, following a particularly acrimonious dispute. Several extremely contentious issues which remained outstanding were referred to mediation and a further agreement was recently concluded. The extension of recall rights to 24 months in that agreement was the product of considerable mediation and some concessions.

The majority of collective agreements with the other unions representing hotel workers were either recently negotiated or are mid-contract:

- a) The collective agreement between Unifor and the Fairmont Empress was concluded March 6, 2020. Unifor concluded agreements with Residence Inn by Marriott, Fairmont Vancouver Hotel, Hilton Whistler and Westin Whistler during the pandemic. Negotiations have not yet commenced for the Hotel Grand Pacific. The numerous remaining Unifor collective agreements have expiry dates ranging from January 2021 to November 2022.
- b) BCGEU has no expired hotel agreements. The collective agreement with St. Eugene expires October 31, 2020. The River Rock agreement expires in September 2021 and their collective agreements covering 3 other hotels do not expire until June 2023.
- c) USW (Local 9705) has not yet commenced negotiations to renew their collective agreement which expired in June 2020. USW, Local 1-405 has 1 agreement with a small motel that expires in September. The other 3 USW collective agreements expire June 30, 2021, September 30, 2022, and October 31, 2022.
- d) The CLAC/Executive Inns agreement expires in June 2022.

Government Responses to COVID-19

The first COVID-19 case was confirmed in Canada on January 25, 2020 and within days BC's first case was reported. By mid-March 2020, the crisis presented by the worldwide pandemic had irrevocably changed the lives of Canadians. The Federal and Provincial governments and health officers in all jurisdictions responded with legislation and PHOs to protect the lives of Canadians and to ameliorate the devastating economic impacts of the crisis.

March 12, 2020, the Government of BC warned against all but essential travel. BC then declared a state of emergency March 18, 2020, under the *Emergency Program Act*, RSBC 1996, c 111, which has been renewed at two-week intervals, most recently to September 1, 2020.

The Federal Government responded to the pleas of the provinces on March 20, 2020, by closing the Canada-US border to all but essential travel. The Canada-US Border Agreement has been extended to September 21, 2020, and further extensions, at least to the end of 2020, are probable.

On March 25, 2020, the *Quarantine Act* was invoked, mandating all travelers entering Canada self-isolate for 14 days.

These initiatives have had a disproportionate impact on different sectors of the economy; while some, such as healthcare, construction and trucking have continued virtually unimpeded, other sectors, in particular tourism, entertainment and restaurants, have been profoundly impaired.

Governments around the world have responded to the crisis with extraordinary spending resulting in debts of unprecedented magnitude. The Government of Canada implemented various economic measures to assist businesses and individuals to withstand the economic crisis: the Canada Emergency Wage Subsidy (“CEWS”), Canada Emergency Response Benefit (“CERB”), and Canada Emergency Business Account, to name a few. Initiatives of the BC Government include earmarking \$1.5 billion to address economic issues related to COVID, providing workers \$1,000.00 through B.C. Emergency Benefit for Workers and imposing a ban on evictions for unpaid rent or utilities.

Legislative Responses to COVID-Related Lay-offs

Governments throughout Canada and around the world have responded to the prolonged layoffs caused by the pandemic by enacting labour standards legislation to address the issue. The Government of Canada amended the *Canada Labour Standards Regulation* to extend temporary layoffs and temporary fixed layoffs by six months or to December 30, 2020, depending on when the layoff was implemented.⁹ The Ontario government amended its *Employment Standards Act* by creating exemptions from the limits on temporary layoffs during its declared emergency. At the time of writing those exemptions are set to last until September 4, 2020.¹⁰ Alberta’s Bill 24, *COVID-19 Pandemic Response Statutes Amendment Act, 2020* extended temporary layoffs for reasons related to COVID-19 to a maximum of 180 consecutive days.¹¹

The B.C. Government has twice extended the maximum temporary layoff period in the ESA where the COVID-19 emergency is a cause of all or part of the layoff. The latest extension allows for a maximum layoff of up to 24 weeks in any period of 28 consecutive weeks, ending on or before August 30, 2020.¹² The B.C. Government has also introduced a web portal to facilitate joint applications by employers and workers for variances to extend a temporary layoff pursuant to Section 72(a) of the ESA.

Unionized workers with collective agreement recall rights have been excluded from the forgoing Canadian legislative responses explicitly or by virtue of the impacted labour standards statutes.¹³

In the United States a number of major cities, including Los Angeles, Miami and San Francisco, have enacted ordinances invoking recall requirements for workers in specified sectors severely impacted by the stay-at-home orders. The Los Angeles enactment captures hotel employers with over 50 guestrooms or gross receipts exceeding \$5 million¹⁴. Orlando, Las Vegas, Boston and Baltimore are considering similar initiatives.

The Proposed Regulation Amendment

Unite Here proposes amending *Employment Standards Regulation* 356/95 45.01 by adding the following subsection:

If an employee in the hotel sector is laid off and the COVID-19 emergency is a cause of all or part of the layoff and notifies their employer that they decline payment or notice under section 63 of the Act, and decline notice or payment under a contract of employment or collective agreement, they will have a right of recall until they are recalled or 12 months after the expiration of the COVID-19 emergency, whichever is earlier.

- (i) In this subsection, “a right of recall” means a right of first refusal to an available position with their employer that is substantially similar to the work they performed prior to their layoff and which they are able and qualified to perform.
- (ii) If 2 or more employees have a right of first refusal to a position, their right to be recalled to the position shall be based on their length of service.
- (iii) “hotel sector” includes accommodation, food and beverage, retail and other related services provided by or on the premises of an inn as defined in the Hotel Keepers Act.

Unite Here provides the following explanatory note:

The proposed amendment would provide an employee only in the hotel sector (which will need further refinement to ensure it captures all employees in the sector) who is laid off because of COVID-19 to waive their severance or notice entitlements, whether under the Act, an employment contract or collective agreement, and instead obtain recall rights that would continue for a duration expressed as a specified number of 12 months after the end of the emergency (which is defined in subsection (1)).

Recall rights are defined as a right of first refusal to what is essentially the job the person was laid off from. Competing recall rights of employees would be resolved according to their length of service (the phrase used under the Act to determine the amount of severance entitlement).

The impact is to give employees the option of relying on a statutory recall right instead of notice/severance.

The impact on employers is that if employees opt for recall rights they forfeit any entitlement to termination pay.

The triggering event for the commencement of the effluxion of recall rights is described in the proposal as “the expiration of the COVID-19 emergency.” Unite Here advises that is intended to refer to the conclusion of BC’s declared state of emergency.

Although the mandate of this report is limited to the unionized hotel sector it is important to note the proposal addresses all workers in the hotel sector, both union and non-union. Currently, under the ESA non-union workers are only entitled to severance pay when their temporary layoff exceeds the threshold. They do not currently have any right of recall. It is beyond the mandate of this review to determine the consequences this proposed change would have with respect to the non-union sector.

Employment Standards Act

In order to put the proposal in context and to understand the opposing positions of the hotel industry and the hotel unions, it is necessary to understand the history of the ESA and its predecessors (the “Act”).

Labour standards legislation has been enacted in every province in Canada to establish minimum standards for wages and working conditions. In BC, the Act originated in the 1979 revision and consolidation of BC statutes, as an amalgamation of several acts which dealt with discrete employment related subjects.¹⁵

Historically, the Act was regarded as basic social legislation designed to provide minimum thresholds for most workers, both union and non-union. For example, in 1980, an agreement to waive a requirement of the Act was void without exceptions for unionized workers.¹⁶ Gaps in the collective agreement were often augmented by reference to provisions in the Act rather than by addressing certain issues in bargaining.

In 1983, the Act underwent significant amendments which limited or removed the applicability of certain protections for unionized workers covered by collective agreements, even if the collective agreement failed to meet the minimum standards. For example, where a collective agreement contained any provision respecting termination of employment or layoffs, the entirety of the corresponding part of the Act did not apply.¹⁷ Other provisions remained intact for all workers.

The exceptions to certain provisions of the Act for unionized workers were revised in 1993, when Bill 65 introduced the “meet or exceed” concept, whereby, if particular items in a collective agreement together met or exceeded the statutory requirements, certain provisions of the Act were inapplicable. For example, s.69 provided that if individual termination including layoff and recall met or exceeded the employment standards threshold the severance pay provision of the Act did not apply.

On May 30, 2002, the Act was again amended to mirror the 1983 language, excluding workers covered by collective agreements from the minimum standards relating to hours of work, overtime, statutory holidays, annual vacation, vacation pay, seniority retention, termination of employment and layoff.

On May 30, 2019, the current government amended the ESA to reintroduce the meet or exceed concept for various provisions in Collective Agreements entered into after that date.

The history of the Act reveals that from its inception, it was intended as a minimum threshold of employment rights for both non-union and unionized workers. Over the decades, there have been changes to limit the applicability of various provisions to unionized workers to varying degrees. Regardless of historical fluctuations, certain established minimum thresholds have always applied to unionized workers. Currently, the “meet or exceed” concept is applicable to some rights while parties are prohibited from contracting out of other minimum standards in the ESA.

The fundamental tension evident in these policy shifts is the extent to which employment standards legislation should set basic standards applicable to all workers. Labour starts from the premise that government should establish minimum protections for all workers, thereby creating a starting point for collective bargaining, whereas the business community advocates limiting or eliminating those protections for workers covered by collective agreements.

Report

As previously noted, I was retained to:

- a) conduct an expedited review to determine what steps are being taken by employers and unions in the B.C. hotel sector to confront the issues raised by recall in the face of the prolonged business impacts of the COVID-19 emergency; and
- b) to consult with unions, employers and the relevant sectoral organizations to gauge their reactions to an amendment to the *Employment Standards Act* (“ESA”) regulations proposed by Unite Here to respond to the impact of COVID-19 on recall rights.

a. Actions by Employers and Unions to Address COVID-Related Recall

Unions have tabled COVID related recall proposals both during bargaining for the renewal of expired agreements and mid-term during the currency of collective agreements.

Unite Here began approaching all their hotel employers in late March to discuss extending recall rights. Unite Here has tabled several proposals to extend recall rights for layoffs during the current collective bargaining with HIR to renew the collective agreements applicable to 39 hotel employers. Their COVID specific proposal regarding layoffs seeks 24 months seniority retention beginning July 1, 2020 or the date of layoff, whichever is later. Their other proposal would expand recall from layoffs due to extraordinary circumstances, including pandemics and other similar unforeseen circumstances, to 24 months.

This COVID proposal has also been tabled with those employers currently in bargaining who are not represented by HIR.

To date, none of those proposals have been accepted. Unite Here advises the employers responded by demanding permanent changes to the collective agreement to roll the contract back to non-union Employment Standards levels, particularly with respect to: hours of work, work load protections, scheduling, statutory holidays, vacations, severance pay, and the ability of managers to perform bargaining unit work. Unite Here's Chief Negotiator, Robert Demand, commented, "I have never seen anything like the concessions the employers have brought to the table." He described the employers' responses to these COVID proposals as "extortion, not bargaining". HIR's Chief Negotiator, Kevin Woolliams, maintained their proposals "seek to level the playing field with comparable non-union competitors" and are responsive to the poor state of the economy. His objectives are to address anomalies in the collective agreement, such as the requirement to pay severance pay if somebody quits, and reduce expenses, such as the requirement to pay double time after 8 hours or for missed breaks.

As noted earlier, August 3, 2020, during the term of the agreement, Unite Here and the Rosewood Georgia agreed to extend recall rights to July 2022. That success may be attributed to the efforts of Mediators Vince Ready and Amanda Rogers and the circumstances unique to those parties which provided significant leverage.

From mid-March through July, Unite Here approached the other employers covered by ongoing collective agreements to attempt to negotiate ancillary agreements to extend recall rights for COVID related layoffs. To date no agreements have been reached to extend recall.

Unite Here has also advanced two virtually identical grievances to arbitration against 2 hotels. An excerpt from one of those grievances states:

the union grieves that the COVID pandemic was not contemplated during collective bargaining between the parties, and if it had been, the parties would have considered pandemic "related layoffs indefinite, similar to those related to hotel renovations"¹⁸.

Those two grievances appear to be the only grievances filed by any of the hotel unions in an attempt to address COVID concerns.

The collective agreement between Unifor and the Fairmont Hotel Vancouver, which was concluded July 20, 2020, included a Letter of Understanding, which expires July 31, 2023, on recall extension for COVID. It provides:

For layoffs which occurred in 2020 as a result of COVID, recall rights under 6.12(e) will be extended to a maximum of eighteen (18) months. This applies to recall rights only and not to the accumulation of seniority.

However, since recall rights under the referenced article are calculated on length of service, this extension only applies to long-term employees. The minimum amount of recall remains three months for junior employees increasing with service to the maximum of 18 months.

The recently concluded collective agreement between Unifor and Residence Inn by Marriott extended the length of recall generally from 18 to 24 months.

As noted previously, the collective agreement between Unifor and the Fairmont Empress was concluded the first week of March 2020, before COVID related layoffs occurred. The parties to that agreement are currently attempting to negotiate an ancillary agreement to deal with rights of recall for layoffs resulting from COVID. Due to the critical stage of those negotiations the parties were not willing to share either the substance of the proposal or the state of those negotiations. No other mid contract discussions are underway to address this issue between Unifor and any of the other hotels covered by ongoing Unifor collective agreements.

CLAC advises that although its collective agreement with 4 Executive Inns is mid-contract, they recently negotiated a memorandum extending the temporary layoff period from 6 to 12 months in return for forgoing scheduled pay increases. Employees retain the option to elect severance pay before the expiry of the period.

Unite Here, Unifor and the BCGEU have had varying degrees of success negotiating mid-contract extensions for coverage of certain benefits during COVID related layoffs.

No employers have tabled proposals or counter proposals during bargaining to address COVID related recall layoffs, and no employers have offered to re-open collective agreements or proposed ancillary agreements to deal with this issue.

b. Reaction to the Proposed Regulation Amendment

Submissions from the employer associations, individual hotels, and the BC Business Council uniformly strongly oppose any regulatory change to recall provisions as unnecessary government interference in the collective bargaining process. Conversely, all trade unions in the sector unanimously support the proposed change to the ESA regulation.

Employer Response

As most employers had not seen the proposed amendment to the regulation their submissions reflected considerable confusion regarding its scope and intent; most believed it provides 24 months of recall rights. Their opinion of the proposal did not change after being fully appraised of its content.

All employer submissions view the proposal as unwarranted interference in the collective bargaining process.

The BC Hotel Association (“BCHA”), which represents over 800 hotels employing over 60,000 employees, summarized the objection as follows:

Interfering in the substance of our collective bargaining is disruptive and it will complicate an already challenging environment to achieve collective agreements.

For decades our members have been required to function in a regime of free collective bargaining that the government has mandated in various regulatory ways such as the Labour Code...If the union wants to extend the recall period, let them bargain it.

HIR, which represents the majority of unionized hospitality properties, covering the majority of unionized hospitality workers in the province, echoes the sentiment of the BCHA. Their submission emphasized free collective bargaining is at the core of labour relations in British Columbia. While noting the Labour Code mandates some collective agreement terms (including no strikes or lockouts during the term, just cause required for termination and discipline, finality of arbitration, and a joint labour management consultation committee), and acknowledging the role of the ESA in establishing minimum floors, they submit both acts leave most provisions to collective bargaining. In their view, recall provisions are best left to the collective bargaining process, not government intervention.

The GVHEA submits the collective bargaining system is:

...flexible enough to accommodate most every employment related issue. The government should demonstrate some faith in the system by respecting the bargain as agreed between the parties. The unilateral extension of recall rights upsets the balance that we have achieved after a four week strike.¹⁹

From their perspective, government intervention would amount to temporary expediency which would cause substantial damage and compromise the equilibrium achieved in their bargaining relationship after a four week strike.

The Fairmont Hotel Vancouver and Fairmont Empress are opposed to government interference stating, "Government intervention modifying recall provisions not only flies in the face of free and balanced collective bargaining, but it could do damage to the carefully crafted and balanced provisions set out in each agreement."²⁰

The HIR submission notes government's history of restraint from interference in specific labour disputes and documents the labour movement's consistent opposition to intervention by government in collective bargaining.

HIR maintains collective bargaining can successfully address this issue notwithstanding the economic imperatives of strike or lockout are less effective due to the diminished state of business and substantial layoffs. HIR notes that collective agreements are not only achieved through the exercise of economic weapons, and parties seldom resort to strikes or lockouts. They say collective bargaining is about "the free flow of information and working together to find solutions". They observe deals have been made at the bargaining table through good and bad times. HIR cites the successful negotiation of the aforementioned COVID Letter of Understanding with Fairmont Hotel Vancouver as evidence that collective bargaining can address the issue. Further, they maintain a strike remains an incentive to bargain because the threat of strike and its continuation after the end of the COVID economic downturn could be devastating to the ability of the business to ever recover.

Employers caution government labour policy needs to be consistent and that pendulum swings, particularly those which appear to serve the particular interests of specific parties, create instability in labour relations.

Several employers and employer bargaining representatives took exception to the suggestion they were rushing to rely on the expiry of recall rights to get rid of employees. On the contrary, several employers recognized the necessity of an experienced workforce and stated their intention is to recall remaining employees when COVID restrictions ceased. As stated by Pacific Reach Properties:

What makes this business strong in the province is the ability to recall the same persons with the professional experience and training provided by our hotels, and we count on this for a sustainable business model.

...

To be a successful hotel, we require a stable workforce consisting of fairly irreplaceable employees with a lot of irreplaceable experience and qualifications which is commensurate with guest expectations of a 4 Diamond hotel experience.²¹

Although HIR agreed that prolonging recall could assist in retaining an experienced workforce, who will be available to return to work at the conclusion of the pandemic, in their view that value decreases the longer the layoff lasts as the connection with the employer becomes tenuous and some skills may be lost during a prolonged layoff. That opinion was not universally shared by employers, particularly with respect to jobs such as housekeeping and cooking. HIR noted some workers have already been severed and queried whether they would be impacted by the amendment.

Business representative highlighted the devastating economic impacts caused by the virus and suggested government's focus should be to assist business recovery, to increase employment and to prevent business failures. Recommendations for government initiatives that could assist the sector included: relief from or assistance with paying property taxes, one of the major fixed costs; legislation such as the HOPE ACT currently before US Congress; retraining those workers whose prospects of employment appear dismal in the near future; and permitting cohort tour groups.

HIR questioned singling out the hotel sector when other industries, such as gaming, tourism, skiing, and restaurants, have also been devastated by COVID.

The quid pro quo of the proposal, which requires giving up severance pay in exchange for extended recall rights does not change the employers' view of the proposal, although some employers acknowledged that avoiding the requirement to pay severance pay would provide some benefit to employers.

Labour's Response

The proposal to extend recall rights due to COVID has the unanimous support of all major hotel unions and considerable support from the affiliates of the BC Federation of Labour. Labour believes the government must act to ensure workers do not lose their jobs due to layoffs resulting from the global COVID pandemic.

In their view, the proposal, which seeks to ensure all hotel workers who are laid off due to COVID-19 get back to work, is consistent with the other extraordinary measures implemented by governments during this crisis. It is "designed to maintain the employment relationship during the pandemic so that businesses will have a ready and trained workforce when they reopen and unemployed workers will get back to work seamlessly²²."

The hotel sector unions strongly support the proposed regulation change as essential to protect this vulnerable workforce from massive terminations from employment caused by the unprecedented COVID crisis.

Labour emphasizes this emergency is without precedent in its impact on hotel employers and workers. Accordingly, the recall provisions negotiated in collective agreements were never intended to address the unimagined devastation which is impacting hotel workers.

Unite Here submits:

Our proposal assures the maintenance of the employment relationship and achieves this important public policy objective. Employers have failed to do the right thing. The measure we have proposed is modest, proportionate, time-limited and protects workers.²³

Our proposal recognizes that we are in the midst of an extraordinary crisis due to COVID-19, and it requires a government response. Our proposal offers solutions to pandemic threats that would benefit employers (by delaying immediate severance payments and creating real opportunity to eliminate them altogether) and workers (the assurance that they will have a right to return to their jobs).²⁴

Unifor:

...believes that any legislative, regulatory, or policy changes regarding worker retention and recall rights in the face of the COVID-19 crisis should be based on the fundamental principle that no hospitality worker should lose their job due to the pandemic...

It is Unifor's position that, as the hospitality sector slowly recovers and returns to business as usual, every worker in the sector should be able to return to their pre-COVID job with their working conditions (including things like collective agreements, wages, benefits, seniority, etc.) intact.²⁵

BCGEU fully supports the proposed amendment noting it will:

...provide much-needed certainty to these vulnerable workers. Hotel sector workers will be able to ensure that they will not lose their long-term livelihood because of circumstances that are not remotely within their control.²⁶

CLAC supports the amendment but does not support employees being required to forego severance to access extended recall rights. Similarly, Unifor notes severance pay is an earned benefit which workers should not be required to give up.

Speaking on behalf of the BC Federation of Labour, President Laird Cronk, stated:

Ensuring that workers laid off due to Covid-19 are recalled to their former work positions, once available, whether covered by a union collective agreement, an employment contract, or solely by the statute employment standards provisions, is paramount to a successful economic recovery in British Columbia.²⁷

He confirmed there is “universal support for BC Fed affiliates for ensuring that workers within this sector (and other affected sectors) are reconnected with their jobs, once those jobs return.”

Labour emphasizes the proposal is consistent with the policy imperatives of the ESA which create minimum thresholds. They advocate a basic threshold of retention rights for layoffs due to the negative effects of the COVID crisis applicable to all workers. Unite Here emphasizes their proposal is not intended to apply to other layoffs and is not intended for inclusion in collective agreements.

Laird Cronk confirmed this specific proposal has considerable support from the BC Federation of Labour affiliates “but there is also some concern with respect to the political effect if government is viewed as interfering in the collective bargaining process”.

The unions who provided submissions reject the notion the proposed amendment interferes with collective bargaining noting it is a limited response to deal with an extraordinary once in a lifetime catastrophe. Moreover, as one union observed, the purpose of free collective bargaining is to “preserve collective employee autonomy against the superior power of management and to maintain equilibrium between the parties”: *Mounted Police Association of Ontario v. Canada (Attorney General)*, 2015 SCC 1, at paragraph 82.

The unions respond to the employers’ suggestion the issue can be adequately dealt with at the bargaining table by reviewing the realities of what has transpired. Unite Here points out that since the early days of the crisis, they have tried to negotiate COVID recall protections, both before and during collective bargaining and through side agreements to unexpired collective agreements. Employers have rejected their proposals and failed to respond to their efforts in any meaningful way; instead they have used the issue to attempt to extract major concessions.

Unions note the normal economic leverage of strikes and lockouts are unrealistic options in the face of this pandemic which has caused the sector to suffer dramatic business declines and enormous layoffs.

Moreover, since many collective agreements in the sector are mid-contract they are not open for bargaining. The law does not require employers to bargain mid-contract and employers have limited incentive to do so.

Although Unifor has succeeded in negotiating some collective agreements with extended recall rights they note:

...it is by no means a given that we will win enhanced and extended worker retention language and recall rights in all of our collective agreements. In some instances, it is very possible our members will have to engage in a labour disruption to win these critical protections. To us, this possibility is unnecessary and unethical – workers should not have to go on strike to avoid being terminated in the midst of a global pandemic. By enshrining rules governing worker retention and recall rights in provincial employment and labour law, we set a minimum standard that will help all hospitality workers, whether they are members of a union or not.²⁸

The BCGEU submits the amendment should be expanded to include gaming facilities as defined by the *Gaming Control Act*. They note thousands of workers in the gaming industry have suffered similar, if not worse, layoffs due to PHOs which closed casinos for the foreseeable future. It would be anomalous for hotel workers at a casino hotel to enjoy expanded recall rights while their co-workers in the adjacent casino are deprived of that protection.

Unite Here originally proposed the amendment apply to all workers across the whole economy regardless of sector.

The unions advocate the proposal apply to all workers in the sector, union and non-union. Non-union hotel workers (who account for approximately 90% of the hotel sector) rely on the minimum protections of the ESA which the unions view as inadequate to deal with COVID layoffs. Further, they note the variance process fails to recognize the power imbalance between non-union workers and their employers. They say their precarity and vulnerability puts them at the mercy of their employers and may prevent them from advocating for variances. Accordingly, submissions from all hotel unions strongly support the proposal to enhance job security protections for all workers in the face of the pandemic.

The BC Federation of Labour and Unite Here point out the inconsistency between the positions taken by employer organizations with respect to this proposal versus businesses' comments made when advocating to extend the 13 week temporary layoff provisions in the ESA. At that time, they claimed the enactment was "never intended to apply during a pandemic and would force the severance of employment." During those lobbying efforts, when the objective was to avoid the severance obligations of *Employments Standards Act*, s. 63, Mr. Cronk notes:

...employer organizations steadfastly maintained that providing an extension would ensure business viability and therefore allow employers to continue to employ as many workers as possible and to eventually bring back their temporary

laid off workers with their full length of service in tact [sic] for calculating employment standards provisions such as vacation pay, etc.²⁹

Now businesses are unmoved by the proposal to enable employees to waive their severance pay entitlements and are largely silent regarding the benefit of retaining employees' service.

The BC Federation of Labour notes that governments throughout Canada and the US have attached conditions to economic and regulatory bail-outs and suggests the stimulus package requested by the Tourism Association of BC should be tied to an obligation to rehire laid off workers.

Summary

There is little common ground between the affected parties other than a shared concern for the economic catastrophe wreaking havoc on the hotel sector caused by the pandemic and an appreciation for the contribution of an experienced workforce to the success of the hotel business.

Confronted by devastating layoffs caused by the unimaginable exceptional circumstance of a worldwide pandemic, hotel unions support government intervention to ensure unionized workers will be returned to their jobs with their seniority intact when the sector recovers and that non-union workers in the sector share that protection.

Employers maintain the process of collective bargaining should be respected and any extension of recall rights must be bargained. They view this proposal as an unwarranted interference with bargaining and suggest it creates a dangerous precedent for future bargaining disputes.

Ultimately, the government must make difficult policy decisions considering the following questions:

1. Does the prolonged economic crisis caused by the COVID pandemic and the resulting layoffs, require government intervention to protect workers' recall rights?
2. If so, should those minimum thresholds protect all workers, union and non-union?
3. Should unionized workers be required to bargain those rights in the midst of a worldwide pandemic and regardless of whether their collective agreements are open for renewal?
4. Would government intervention interfere with free collective bargaining and provide incentives to future pendulum swings in labour policy?
5. Do covid-related layoffs in the hotel sector warrant singling out that sector or should workers in other sectors suffering significant adverse effects from the pandemic also be protected? If so, which sectors?

6. What assistance should government provide businesses in the hotel sector, or other sectors, to enable them to operate, to minimize layoffs and to prevent business failures?
7. Should COVID- related government assistance to businesses attach public policy conditions such as employment protection?

¹ Tourism Industry Recovery Stimulus Package for BC's Tourism and Hospitality Sector July 2020, page 2.

² This figure does not consider the multiplier effect or other economic spin offs.

³ Ingrid Jarrett, BCHA

⁴ BCHA August 11, 2020 submission

⁵ Hotel Association of Vancouver, August 13, 2020 submission

⁶ Stats Canada 14-10 0070-01

⁷ Recovery Stimulus Package for British Columbia's Tourism & Hospitality Sector, July 2020

⁸ Report: Hotel Industry Facing Historic Wave of Foreclosures, Hotel Business, August 19, 2020.

⁹ CRC, c 986, 30 (1.1), (1.2); fixed notices may provide a recall date later than December 30, 2020.

¹⁰ O Reg 228/20.

¹¹ Bill Amended RSA 2000 cE-9.

¹² BC Reg 396/95, 45.01.

¹³ SOR/2020-138; *supra* note 9 at 1 (recall rights not required); *supra* note 10 at 63(1)(b); *supra* note 11.

¹⁴ Ordinance adding to Article A-72J-A to chapter XX of the Los Angeles Municipal Code

¹⁵ *Control of Employment of Children Act*, RSBC 1960, c 75; *Minimum Wage Act*, RSBC 1960, c 230; *Hours of Work Act*, RSBC 1960, c 182; *Payment of Wages Act*, SBC 1962, c 45; *Annual and General Holidays Act*, RSBC 1960, c 11; *Master and Servant Act*, RSBC 1960, c 234; *Deceived Workmen Act*, RSBC 1960, c 96; *Truck Act*, RSBC 1960, c 388; *Maternity Protection Act*, 1966, SBC 1966, c 25.

¹⁶ 1980 SBC 47, 2

¹⁷ 1983 SBC 79, 2

¹⁸ HIR's submission, August 10

¹⁹ GVHEA's submission, page 1, point 3

²⁰ August 13, 2020, submission from Harris & Company, page 1, 2nd paragraph

²¹ Pacific Reach Properties August 11, 2020 submission

²² Unite Here submission, August 10, page 3

²³ Unite Here submission, August 10, page 4

²⁴ Unite Here submission, August 10, 2020, page 7

²⁵ Unifor submission, August 10, 2020, page 1

²⁶ BCGEU submission, August 10, 2020, page 1

²⁷ BC Federation of Labour submission, August 6, 2020

²⁸ Unifor submission, August 10, 2020, page 2

²⁹ BC Federation of Labour submission, August 6, 2020



Ref: 60112

August 4, 2020

Sandy Banister, QC
Banister & Company
670-355 Burrard Street
Vancouver, BC V6C 2G8
Email: banister@banisterlaw.com

Dear Sandy Banister:

As you know, the current COVID-19 pandemic is having a devastating impact across the economy. Nowhere is the impact more severe than in the tourism and hospitality sectors of the province with reliance on cross-Canada or international travelers. There are countless stories of the impacts of revenue loss, decline in tourism, layoffs, and businesses on the verge of permanent closure. Government is doing all it can to ensure the survival of these sectors, the revenue for the employers, and, no less importantly, the jobs of the workers who helped to build the success of these sectors.

The hotel industry is made up of unionized and non-unionized hotels. For those that are non-union, a process has been recently established in the Ministry of Labour (Ministry) by the Employment Standards Branch (ESB) to enable employers with their workforce to jointly apply for a variance to extend temporary layoffs beyond August 30, 2020. However, for unionized hotels, this process does not apply; rather, unions and employers must come together to sort out solutions for unionized workers which may involve reviewing existing provisions in collective agreements related to layoff and recall rights. It is not clear how this process is unfolding and how the interests of so many unionized workers will be addressed while their non-unionized counterparts have the certainty of the ESB variance process. UNITE HERE Local 40 has engaged in a public campaign to draw attention to the issue and has pressed Government to find a solution, including ensuring recall rights for up to two years for laid off hotel industry workers by way of regulation. However, other labour organizations say while the regulatory approach has significant appeal, there may be significant risks involved.

I am in receipt of a letter dated July 29, 2020, from the British Columbia Hotel Association that outlines that collective bargaining is currently underway for a master collective agreement along with individual collective agreements which, in the view of the Association, provides a forum to address the issues of concern. The Association has warned that moving responsibility for this issue from the bargaining table to Government oversight is not a route they would favour.

.../2

As a result, I would appreciate your assistance on an expedited basis in accepting an appointment by me to conduct a review as follows:

- determine what steps are being taken by employers and unions in the hotel sector to confront the issues raised by recall in the face of prolonged business impacts of COVID-19;
- consult with unions and employers and the relevant sectoral organizations to gauge their reactions to proposed regulation advanced by one union to respond to the impact of COVID-19 on recall rights; and,
- summarize the findings in a report (without recommendations) to me by August 20, 2020.

The Ministry will prepare a contract of services with you for the purposes of this appointment.

Thank you in advance for agreeing to this appointment.

Sincerely,



Harry Bains
Minister

pc: Geoff Meggs
Chief of Staff
Premier's Office

Trevor Hughes
Deputy Minister
Ministry of Labour

Robert Demand
Executive Director
UNITE HERE Local 40

Ingrid Jarrett
President and Chief Executive Officer
BC Hotel Association

APPENDIX B

 B.C. has declared a state of emergency. Learn about [COVID-19 health issues](#). | [B.C.'s Response to COVID-19](#).

British Columbia News

Review of recall rights in B.C.'s hotel sector

<https://news.gov.bc.ca/22814>

Wednesday, August 5, 2020 3:35 PM

Victoria - Harry Bains, Minister of Labour, has appointed Sandra Banister, QC, to conduct a review of layoff and recall rights of unionized workers in British Columbia's hotel sector as a result of COVID-19.

B.C.'s tourism and hospitality industry has been one of the hardest hit by COVID-19, due to decline in revenues that have come from restrictions on travel and gathering sizes. Workers in the sector are concerned about the impacts of COVID-19 on their long-term employment.

With this appointment, Banister will use her expertise of the Labour Relations Code and work with employers and unions and other relevant organizations to determine what steps are being taken to address issues around layoff and recall in the hotel sector.

Banister has practised labour law and civil litigation for more than 35 years. She regularly appears at all levels of court in British Columbia, labour arbitrations, the British Columbia Labour Relations Board and the B.C. Human Rights Tribunal.

The goal of the review is to support employers and hotel unions to come together and find solutions to issues around layoff and recall rights due to COVID-19. Banister will provide a report which summarizes her findings to the minister of labour by Aug. 20, 2020.

In B.C., the hotel sector is made up of both unionized and non-unionized workers. Government has provided non-unionized workers and employers a way to extend temporary layoffs through an Employment Standards Act Section 72 variance, a process that government has streamlined and made easier to use. This process does not apply to the unionized side of the hotel sector, as they are governed by collective agreements.

The B.C. government is making sure people and businesses have the support they need, while working together to restart and rebuild the economy.

Learn More:

Learn more about temporary layoff variance applications for non-unionized workers and employers: www.gov.bc.ca/covidlayoffs

Learn more about B.C.'s economic recovery planning: <http://gov.bc.ca/recoveryideas>

For information about BC's Restart Plan, visit: <http://gov.bc.ca/restartbc>

Media Contacts

Ministry of Labour

Media Relations

Government Communications and Public Engagement

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APPENDIX C

Written Submissions Received

1. BC Federation of Labour, August 6, 2020
2. B.C. Government and Service Employers' Union, August 10, 2020
3. British Columbia Hotel Association, August 11, 2020
4. British Columbia Lodging and Campgrounds Association, August 13, 2020
5. Business Council of British Columbia, August 11, 2020
6. Fairmont Hotel Vancouver and Fairmont Empress, August 13, 2020
7. Greater Vancouver Hotel Employers Association
8. Hospitality Industrial Relations, August 10, 2020
9. Hotel Association of Vancouver, August 13, 2020
10. Pacific Reach Properties, August 11, 2020
11. Revelstoke Accommodation Association, August 13, 2020
12. St. Eugene Golf Resort Casino, August 12, 2020
13. Unifor, August 10, 2020
14. Unite Here, August 10