

REPORT AND RECOMMENDATIONS

OF THE

INDUSTRIAL INQUIRY COMMISSION

Established by the Honourable Harry Bains
Minister of Labour,
Province of British Columbia

Pursuant to Sections 35(0.1)(f) and 159(2)(f)

of the

British Columbia *Labour Relations Code*

regarding

Forest Industry Successorship

Submitted by
Vincent L. Ready and
Amanda Rogers
Industrial Inquiry Commissioners

on

February 10, 2022

On November 9, 2021, we were appointed as Industrial Inquiry Commissioners to inquire into matters set out in our Terms of Reference as follows:

WHEREAS Section 79 of the *Labour Relations Code* (the “Code”) provides that the Minister of Labour may cause to be made such inquiries as the Minister considers advisable respecting labour relations matters and may do the things the Minister considers necessary to maintain or secure labour relations stability and promote conditions favourable to the settlement of disputes;

AND WHEREAS the Code Review Panel established by the Minister of Labour in 2018 issued a report in which they identified a concern from some stakeholders in the forest industry about successorship and common employer leading them to recommend the establishment of an Industrial Inquiry Commission to engage in “further consultation, study and analysis” of the issues;

AND WHEREAS in Bill 30-2019, government extended successor rights and obligations where contracts for certain services in certain sectors are retendered and left open the ability to add more services by regulation in the future;

AND WHEREAS on Jun 1, 2021, the Ministry of Forests, Lands, Natural Resources Operations and Rural Development issued an intentions paper with a new vision for BC’s forests which included a commitment to protecting good jobs and supporting workers by considering labour in tenure transfers, continuing to ensure the sustainability of contractors and advancing the need for an Industrial Inquiry Commission;

NOW THEREFORE, pursuant to Section 79 of the Code and in the public interest, I hereby appoint Vince Ready and Amanda Rogers as an Industrial Inquiry Commission:

1. On or before February 10, 2022, the Industrial Inquiry Commission (“IIC”) will prepare a non-binding report for the Minister of Labour that provides options for the province with respect to the issues related to tenure transfers in the BC’s forest industry. Starting from the context identified in the Code Review Panel report of 2018 (pages 21 and 22), the IIC is to inquire into the issues identified and assess the options as they relate to labour relations. The assessment of contract tendering is to be made in the context of Section 35

(“Successor rights and obligations”) of the Code, including identifying which scenarios (or services) could be covered by a regulatory change under Section 35(0.1)(f). Further, the IIC should identify any scenarios regarding contract tendering/retendering and the transfer of cutting/timber harvesting rights are not currently captured by Section 35 and what mechanisms may exist, including via legislative change, to address the protection of collective bargaining rights in those scenarios. The scenarios involving tenure transfers are:

- a. Tenure taking to establish a park;
 - b. The taking of park/protected area tenure for the protection of eco-systems;
 - c. Taking back harvesting volume for reconciliation;
 - d. Taking back harvesting volume for the purpose of treaty settlement;
 - e. Taking back harvesting volume for the purpose of providing volume for BC Timber Sales;
 - f. Taking back tenure for the purposes of redistribution and diversification; and
 - g. Business led tenure transfer or change of control; and
 - h. Any other scenario identified by stakeholders or the IIC during the term of the inquiry.
2. The IIC should engage with all interested stakeholders in the forest industry with an interest, role, or perspective on contract tendering in the industry, including but not limited to companies, contractors, associations, trade unions, federations, communities, and First Nations. The consultation process should not last more than 45 days.
 3. The IIC must issue an interim report to the Minister within 45 to 60 days of appointment.
 4. The IIC shall determine its own procedure as it deems necessary and advisable for the proper and efficient carrying out of its mandate subject to the powers and protection provided in Sections 145.1 to 145.4 of the Code.

BACKGROUND

The forestry industry is a central part of British Columbia's economy, providing well-paying jobs, supporting local economies, and generating revenue for the Province by way of stumpage fees and taxes. Although its relative contribution to the overall economy of BC has decreased over recent years, many communities – including an increasing number of Indigenous communities – rely heavily on forestry jobs and on revenue generated by the industry.

To put it in perspective, in 2019, BC's total forest sector manufacturing sales were \$14.3 billion. The sector generated approximately \$988 million in Government revenue.¹ At the same time, the sector employed approximately 51,800 people directly, about 5,300 of whom are Indigenous, and paid out approximately \$8 billion in wages, salaries, and benefits.² The sector accounted for 27% of the provincial manufacturing sales and 27% of BC's export value, as a large amount of the wood produced is exported to international customers.³

Harvesting Rights for Crown Lands

Approximately 95% of the Province's timber is publicly owned. Harvesting rights for Crown timber are authorized by the Government through forest tenures – agreements between a company, a community or an individual and the Government that sets out the rights and conditions applicable to

¹ Statistics Canada. (2022, January). *Table 16-10-0048-01: Manufacturing sales by industry and province, monthly (dollars unless otherwise noted) (x 1,000)*.

² B.C. Council of Forest Industries. (2019). *Contributing to a Better B.C.: 2019 Forest Industry Economic Impact Study*.

³ B.C. Ministry of Forests, Lands, Natural Resource Operations and Rural Development. (2019). *2019 Economic State of British Columbia's Forest Sector*.

https://www2.gov.bc.ca/assets/gov/farming-natural-resources-and-industry/forestry/forest-industry-economics/economic-state/2019_economic_state_of_the_bc_forest_sector.pdf

harvesting of timber on provincial land.⁴ A forest tenure can take the form of an agreement, licence or permit. Each is a legally binding contract providing the contract holder with specific rights to use public forests over a specific period of time, so long as Government objectives are met including forest management obligations and payment of fees including stumpage.⁵

Over a dozen forms of tenure reflect forest uses from timber harvesting and road building to ranching. This diversity in tenures also reflects the needs and interests of tenure holders, whether large or small operators, First Nations, communities or individuals.⁶ The majority of Crown timber harvesting rights are currently held by forest companies, market loggers and First Nations. Under the tree farm license (TFL) system, an area-based tenure is granted providing exclusive rights to harvest timber and manage and conserve forests, recreation and cultural heritage resources on a specified area of land.⁷

Collective Bargaining in the Forest Industry

Forest workers in BC were first organized by the International Woodworkers of America (the “IWA”) in 1937. Shortly following certification, collective bargaining took place for the most part between the major forest companies represented by employer associations and the IWA, now the United Steelworkers, in the northern interior, the central interior, and on the coast. The result was master collective agreements in each of these geographic areas.

⁴ Government of British Columbia. (undated). *Forest Tenures*.

<https://www2.gov.bc.ca/gov/content/industry/forestry/forest-tenures>

⁵ Government of British Columbia. (undated). *Timber Harvesting Rights*.

<https://www2.gov.bc.ca/gov/content/industry/forestry/forest-tenures/timber-harvesting-rights>

⁶ *Ibid*

⁷ Government of British Columbia. (undated). *Tree Farm Licences*.

<https://www2.gov.bc.ca/gov/content/industry/forestry/forest-tenures/timber-harvesting-rights/tfl>

At present approximately than 12,000 forest workers in British Columbia are represented by the United Steelworkers union.⁸ Public and Private Workers Canada (PPWC – formerly the Pulp, Paper and Woodworkers of Canada) represents workers in pulp, paper and wood product operations across British Columbia, as does Unifor, which represents approximately 3,200 workers predominantly in pulp and paper.

After a lengthy strike in 1986 between IWA-Canada and Forest Industrial Relations (FIR) in all coastal logging and milling operations, the parties negotiated a prohibition on contracting out positions in the bargaining unit absent special circumstances. Those provisions are set out in Article XXV of the collective agreement which reads, in part, as follows:

- (a) As of the date of the signing of the Memorandum of Agreement the Industry agrees that as of the 5th day of December, 1986, the introduction of a Contractor or Sub-contractor into an operation will not result in the loss of full-time positions held by regular employees in the operation, except where justified by special circumstances.

The primary purpose of Article XXV is to protect bargaining unit positions as of December 5, 1986, commonly referred to as the “1986 snapshot”. The fundamental principle underlying it is to provide protection not only to individual union members but to also protect the actual number of positions within a bargaining unit of a specific employer.⁹ Similar contracting out provisions were negotiated between the union in both the central and northern interior collective agreements.

⁸ <https://www.usw.ca/news/media-centre/releases/2021/bc-forestry-decision-will-cost-thousands-of-jobs-and-devastate-communities#:~:text=The%20USW%20Wood%20Council%20represents,solutions%20for%20this%20untenable%20situation.>

⁹ This conclusion has been stated in numerous awards by Umpire Ready, see for example, *Re: Canadian Pacific Forest Products Limited (Tahsis Sawmill Division) and IWA-Canada, Local 1-85*, unreported, June 23, 1989.

Following lengthy negotiations in 2003 between the coastal industry and the union, Donald R. Munroe, Q.C., was appointed as an Industrial Inquiry Commissioner pursuant to the *Coastal Forest Industry Dispute Settlement Act*¹⁰ to assist the parties in concluding a collective agreement. At the conclusion of Commissioner Munroe's inquiry, he issued a binding report (the Munroe Report) which settled the terms of the collective agreement.

A major feature in the Munroe Report was the introduction of the Woodlands Letter of Understanding (WLOU) which created an additional exception to the prohibition against contracting out to allow employers to contract out Woodlands Operation on a "stump-to-dump" basis (as opposed to contracting out of "phases" of an operation). The WLOU stipulates that the initial contractor, and all succeeding contractors, are deemed to be successor employers, and that all such stump-to-dump contracts must be for a period of five years.

Arbitrator Munroe explained the rationale behind the WLOU, and the need to balance preservation of bargaining rights with flexibility in the forestry industry as follows:

The discussion of the contracting out of a woodlands operation on a stump-to-dump basis arises in the context of Article XXV of the collective agreement. In the course of negotiations, the IWA offered the industry the right to contract out a woodlands operation on a stump-to-dump basis (as distinct from a phase), as an exception to Article XXV, provided the contractors are IWA certified; and provided further that the "1986 snapshot" is not undermined and that the initial and succeeding contractors are deemed to be successor employers. The IWA also said that such contracting out must be on a "long term" basis, to provide reasonable stability to the affected employees.

¹⁰ SBC 2003, c. 103.

The industry welcomed the union's offer to allow stump-to-dump contracting out as an exception to Article XXV, but sought certain things which the IWA finds unacceptable. The industry agrees that the initial and succeeding contractors must be IWA certified, but would seek by its proposed conditions to effectively undermine the "1986 snapshot" and to avoid automatic successorships for the second generation, etc., of contractors. There is also some disagreement between the parties about what ought to be the minimum duration of a stump-to-dump contract: the IWA arguing for ten years; the industry suggesting five years (and then only for the first generation of contractors).

Here again, the benefit of being able to contract out woodlands operations on a stump-to-dump basis will be unevenly felt as between companies. But from an industry perspective, the benefit can be significant. In my view, an acceptance of the major conditions that the industry wants to attach to the union's willingness to go down the stump-to-dump path are unjustified in the balance of considerations under Section 7 of the *Act*. Whatever might be the long term advantages to the industry of its proposed conditions concerning the "1986 snapshot" and no successorship, they are overwhelmed by the negative impact on the affected employees' interests and by the dilution of the union's ability to maintain cohesive woodlands bargaining units. As will be seen, I have prepared a Woodlands Letter of Understanding, which shall be appended to the new or revised collective agreement, and which I regard as the proper outcome to this issue.

The Proliferation of Contractors

Since the Munroe Report in 2004, there has been an expansion in the use of contractors in the forestry industry and a correlating reduction in industry-wide bargaining in coastal operations. This trend was accelerated following a decision of Arbitrator Stan Lanyon in 2017 in *Taan Forest Limited Partnership v. USW, Local 1-1937*¹¹ ("*Taan*") in which he deleted the "stump-to-dump" requirement on the basis that it was discriminatory under the *Human*

¹¹ [2017] BCCAAA No. 3.

*Rights Code*¹² because it effectively barred First Nations contractors from securing this work.

The majority of forestry workers now work for contractors as opposed to big forestry companies. With these changes, bargaining is now conducted on a mostly company-by-company basis with many unionized contractors on the Coast signing “me-too” agreements. Most employees in the central and northern interior who work for contractors, however, are not represented by a union and thus not covered by collective agreement protections for the most part.

Evolution of Forestry Regulation in the Province 1991-Present

Changes in industry and social policy has resulted in numerous changes to forestry legislation and Government’s approach to tenure allocation over the years.

In 1991, in response to forestry contractors in the Province being pushed to their financial limits and in some cases being pushed into bankruptcy due to softwood lumber pressures and resulting cost-cutting measures, the Government introduced timber harvesting and contractor Rights under the *Forest Act*, commonly referred to as Bill 13. Bill 13 established term contracts for contractors and subcontractors for a period of five year terms, as well as a proper forum for contractors to negotiate terms and conditions for replaceable contracts complete with a dispute resolution process requiring mediation followed by binding arbitration to settle terms and conditions of replaceable five year contracts.

¹² RSBC, c 210

In 2003, Bill 13 was amended by the *Forest Revitalization Amendment Act*,¹³ providing an avenue for Government to reduce volumes on existing licenses by transferring volume at its discretion. Specifically, section 69 reduced the Annual Allowable Cut (“AAC”) in all Tree Farm Licences by 20% for the creation of B.C. Timber Sales (“BCTS”)¹⁴, Community Forest Licences and the resolution of First Nations' Claims. The licencees were compensated for the loss of tenure and permitted to determine which areas would suffer reductions, disproportionately impacting unionized operations and contractors. Allowable cut removed from TFLs was then put to bid and awarded to mostly non-union contractors by BCTS. In many cases, the timber was ultimately acquired by licencees who either utilized it in their mills or exported it.

Compensation for the tree licence reductions was to be made through the *Forest Revitalization Amendment Act*, which authorized Government to pay up to \$200 million for compensation to license holders affected by the take back of tenure from major licensees. This was to be done through establishment of the BC Forestry Revitalization Trust (BCFRT), which was established to provide mitigation to workers and contractors negatively affected by these changes.¹⁵

Another change resulting from the *Forest Revitalization Amendment Act* in 2003 was that contractors were now required to accept the terms and

¹³ [SBC 2003] c. 17.

¹⁴ BCTS is a self-financing operation within the Ministry of Forests, Lands, Natural Resource Operations and Rural Development which currently manages about 20 per cent of the Province’s allowable annual cut for Crown timber. BCTS operates in 33 communities and supports over 8,000 jobs across BC (see <https://www.bcftr.com>)

¹⁵ The BCFRT is overseen by a trustee guided by a seven-member advisory board nominated by the major stakeholders in the industry. The Advisory Board of BCFRT developed draft forest worker and contractor mitigation guidelines. In order to develop an estimate of the cost of those guidelines, the Trustee polled all the major licensees that were to lose some of their allowable annual cut. They were asked to provide their best estimate of the effect of the timber reallocation on their workers, their contractors, and their contractors’ workers (see <https://www2.gov.bc.ca/gov/content/industry/forestry/bc-timber-sales>)

conditions of replaceable contracts offered by the license holders. In the event a contractor disagreed with the terms and conditions offered by the license holders, it could have the dispute arbitrated. By all accounts, this made it extremely difficult for contractors to survive economically between the years 2003 to 2016 due, in part, to what some termed as favouritism towards certain contractors and a resultant loss of work to contractors out of favour with license holders, challenging the survival of a number of contractors during that time.

These circumstances led to an extensive Contractor Sustainability Review, initiated in 2017 and completed in 2020 which included extensive participation and consultation with stakeholders and resulted in amendments to the *Timber Harvesting Contract and Subcontract Regulations* which took effect June 10, 2021. These June 2021 amendments have drawn almost universal praise from a wide variety of stakeholders in the industry.

These amendments to the *Timber Harvesting Contract and Subcontract Regulation* create transparency in contract negotiations and improve the dispute resolution process between forest tenure holders and the contractors they hire, including log harvesters, log haulers and road builders, who hold replaceable contracts. One change to the regulation requires licence holders to provide contractors with clearer work specifications to understand the full scope of work to negotiate their rates.

Successorship Under the BC Labour Relations Code and the Historical Evolution of Successorship Provisions in Canada

Successor rights are labour code provisions which allow a bargaining agent to continue to represent employees in a bargaining unit and for the continuation of collective agreements when a cohesive business or function is sold, transferred or otherwise divested. Under successorship, a successor employer becomes responsible for its predecessor's rights, privileges and duties towards the employees under the collective agreement. Absent successorship provisions, of course, a collective agreement would bind only the parties who negotiated it, and would therefore would not bind a future employer unless it was a condition of sale.

Traditionally the concept of successorship has been applied primarily where a unionized business was sold, leased, or transferred from one private sector employer to another.

Over time, however, the situations to which successorship has been applied has expanded, both through broad and liberal interpretation of successorship provisions by labour boards across Canada, and resulting from legislative amendments explicitly extending successorship provisions to scenarios beyond the traditional sale or transfer of a business including recent changes to the BC *Code* in 2019 which followed a recommendation of the Labour Relations Code Review Panel.

One example of a broad and purposive application of successorship is in the construction industry, where labour boards have recognized that the skills and reputation of the "key man" are the primary component of a business, and thus have found successorship to apply in situations where there has been a transfer of a key individual. As noted by the BC Labour Relations Board, in the

construction industry “the principals are in fact the business”.¹⁶ In that case, the Board explained

The Board’s emphasis on the skills, reputation and expertise of the principal(s) of a small construction company which requires little else in the way of assets to carry on business is reflective of the nature of such a Company’s business. To accept the argument of counsel for the Applicants would be to deny their importance. To further accept the proposition that once a union company goes out of business, the principal(s) may start up a new company free of union obligations would be inconsistent with the protective purpose behind Section 53 of the Labour Code.

The Ontario Board has also applied the “key man” principle in construction, recognizing the need for successorship analyses to focus on different assets or aspects of the business depending on the context:

Factors which may be sufficient to support a “sale of business” finding in one sector of the economy may be insufficient in another. In some industries, particular configuration of assets – physical plant machinery and equipment – may be of paramount importance; while in others it may be patents, “know-how”, technological expertise or managerial skills which will be significant. Some businesses will rely heavily on the goodwill associated with a particular location, company name, product name or logo; while for other businesses, these factors will be insignificant. *The Labour Relations Act* applies equally to primary resource industries, manufacturing, the retail and service sector, the construction industry and certain public services provided by municipalities and local authorities. In each of these sectors the nature of the business organization is different, yet in each case section 55 must be applied in a manner which is sensitive to both the business context and the purpose which the section is intended to accomplish.¹⁷

¹⁶ See *Concerned Contractors Action Group*, BCLRB No 32/86.

¹⁷ *Tatham Company Limited*, [1980] OLRB Rep. Mar. 366.

While most boards, including BC's, have tailored their tests for successorship around the continuity of the business as a going concern, some boards (namely the Quebec board and the Canada board) have at times used a broader test to find a successorship where there is a continuity of "work functions".¹⁸

In Quebec, the more traditional test and the less stringent "continuity of work functions test" were both applied for a period of time, in competing cases, before the legislation was ultimately amended in favour of the more traditional "sale of a business" approach.¹⁹

The Canada board, similarly, for a period of time applied a "continuity of work functions" test. A successorship would exist if there was continuity in the work of the employees and the new business was operated for the same purpose.²⁰ In later cases, the Canada board moved to a more stringent test requiring a greater nexus between the predecessor and successor employers. This stricter test excluded situations such as subcontracting.

Labour Relations Code Review Panel

In 2018, the British Columbia Government appointed a panel of special advisors to undertake a review of the *Labour Relations Code* ("Code") to ensure BC's unionized workplaces are supported by laws consistent with the rights and protections enjoyed by other Canadians.

¹⁸ Adams, G.W., Q.C. (2021). *Canadian Labour Law* (2nd ed.). Thompson Reuters. at s. 8.

¹⁹ See *Ivanhoe Inc. v. United Food & Commercial Workers Union, Local 500*, 2001 SCC 47, in which the Supreme Court found it was not patently unreasonable for the Labour Court to find that a successorship had occurred in respect to the transfer of janitorial employees to a new contractor, stating at para. 74 that "the transfer of a limited number of components, such as the employees and their functions, may be sufficient, pursuant to an organic definition of an undertaking, where those components are significant in comparison with the others."

²⁰ *Newfoundland and Labrador Steamships Ltd.* (1981), 2 Can LRBR (N.S.) 40.

The Panel made 29 recommendations covering a wide range of topics in their October 25, 2018 report, including a recommendation that Section 35 of the *Code* be amended to extend successorship protection to re-tendering of contracts for services in (a) building cleaning, security or bus transportation and (b) the health sector, including food, housekeeping, security, care aides, long-term or seniors care.

The Panel specifically addressed successorship in the forestry industry in their report as follows:

Since the last *Code* review there have been massive changes in the BC coastal forest industry, due to provincial legislation and collective agreement amendments, which have significantly impacted forestry workers. Historically, the industry was characterized by large companies which controlled the entire production chain from harvesting the forests to finishing lumber in mills. Now, the industry is fractured with most logging employees working for contractors, rather than for the licence holders. The changes are a result of a number factors. The provincial government enacted significant tenure reform and enabled forest tenure transfers. Private lands were removed from tree farm licences. Contractors lost their replaceable contracts (Bill 13) when legislation enabled those rights to be extinguished by the licence holders. Annual Allowable Cuts on tree farm licences were reduced to create BC Timber Sales and community forest licences, and to resolve First Nations' claims.

Another significant change is the increase in contracting out. This is largely due to the Woodlands Letter of Understanding, imposed pursuant to the *Coastal Forest Industry Dispute Settlement Act*, SBC, 2003, c. 103, which permits entire operations to be contracted out. The vast majority of logging is now performed by contractors who provide services to the licencees or land owners. These contractors have little control over their costs or working conditions. Even when those contractors have long term secure contracts (through Bill 13 or the Woodlands Letter of Understanding) they are required to bid on each block of timber as it becomes available. This competition results in what many consider a race to the bottom. We were told contractors have gone bankrupt or simply walked away from contracts.

We heard a number of concerns from union presenters regarding these changes, particularly with respect to the successorship and common employer provisions of the *Code*. We were told that as bargaining units become smaller they become more difficult to organize. Once organized, collective agreements are more difficult to negotiate, enforce, and administer. Since successorship only applies to the sale of the business, the transfer of cutting rights is not captured by Section 35 and the employees' collective bargaining rights are not protected. However, cutting rights are the primary asset of a logging business. Forestry has become a precarious industry, much like parts of health care, where logging contracts are re-tendered with adverse impacts on the workforce. The workers continue to log the same land, often with the same equipment, but without their collective agreement rights.

Collective bargaining and labour relations have also changed significantly in the forest industry. For many years Forest Industrial Relations ("FIR") represented all the major employers and many contractors. All of the major companies de-accredited from FIR resulting in fragmented collective bargaining with obvious inherent problems.

Unfortunately, we did not have the benefit of hearing from any forestry companies or experts. Accordingly, it is clear further consultation, study and analysis is required. This should be accomplished through an industrial inquiry commission. Recommendation No. 13 An industrial inquiry commission should be appointed pursuant to Section 79 of the *Code* to review the forest industry.

One Panelist offered a partial dissent, agreeing that an industrial inquiry commission is required, but indicating that in her view the Panel ought to recommend successorship protection be extended to the retendering of contracts in the logging sector.

Legislative Expansion of Successorship Provisions

As noted in the Terms of Reference, the *Code* was amended in 2019 following the Panel's report to, *inter alia*, extend the successorship provisions

to apply to contracts retendered in certain industries as recommended by the Panel.

Other provinces have also amended their successorship provisions so that they apply in some situations of contract re-tendering.²¹

In Ontario, for example, the successorship provisions of the *Labour Relations Act*²², were amended in 1992 to apply to the subcontracting and retendering of building services such as cleaning, food and security services where the initial employer ceased to provide the service and a new employer provided substantially the same services. These 1992 amendments were later repealed, re-enacted again in 2018, and then repealed again by another provincial government.

Saskatchewan enacted a similar provision in 1994, applying successorship provisions of the *Trade Union Act*, RSS 1978, c. T-17 to contract retendering of food services, janitorial, or security services, at public buildings, where employees perform services at a building or site which is their primary place of work, their employer ceases to provide the services, and substantially similar services are subsequently provided by a different employer. Saskatchewan's provision was repealed by a different government in 2013.

The *Canada Labour Code*,²³ while not extending full successorship in contract re-tendering situations, also contains a provision requiring an employer who succeeds a unionized contractor as a provider of services to pay the same or better remuneration as provided for in the collective agreement that bound the previous employer.

²¹ Adams, G.W., Q.C. (2021). *Canadian Labour Law* (2nd ed.). Thompson Reuters. at s. 8.4.

²² 1995, SO 1995, c. 1, Sched. A.

²³ RSC 1985, c. L-2

UNDRIP and Truth and Reconciliation

In fulfilling the Terms of for this IIC, it is imperative to understand the extensive rights of Indigenous people in the Province.

In 2010 Canada included its signature on the United Nations Declaration on the Rights of Indigenous People (“UNDRIP”). UNDRIP has become the “framework for reconciliation at all levels and across all sectors of Canadian society”.²⁴

In 2019, the Government in BC passed the *Declaration on the Rights of Indigenous Peoples Act (Declaration Act)*, which affirms the application of UNDRIP to the laws of BC and sets out the Province’s framework for reconciliation and its process to align BC’s laws with UNDRIP.

UNDRIP provisions particularly relevant to the issue at hand are as follows:

Article 17

1. Indigenous individuals and peoples have the right to enjoy fully all rights established under applicable international and domestic labour law.
- ...
3. Indigenous individuals have the right not to be subjected to any discriminatory conditions of labour and, inter alia, employment or salary.

Article 18

Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives

²⁴ Truth and Reconciliation Commission of Canada. (2015). *What we have learned: principles of truth and reconciliation*. https://publications.gc.ca/collections/collection_2015/trc/IR4-6-2015-eng.pdf

chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.

Article 19

States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

Article 20

1. Indigenous peoples have the right to maintain and develop their political, economic and social systems or institutions, to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities.

...

Article 21

1. Indigenous peoples have the right, without discrimination, to the improvement of their economic and social conditions, including, inter alia, in the areas of education, employment, vocational training and retraining, housing, sanitation, health and social security.
2. States shall take effective measures and, where appropriate, special measures to ensure continuing improvement of their economic and social conditions. Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities.

...

Article 26

1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.
2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess

by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.

3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.

Article 27

States shall establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples' laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process.

...

Article 32

1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.

...

Modernizing Forest Policy in BC: Setting the Intention and Leading the Forest Sector Transition

In June 2021, the Ministry of Forests, Lands, Natural Resources Operations and Rural Development released the intentions paper *Modernizing Forest Policy in BC: Setting the Intention and Leading the Forest Sector Transition* (“Modernizing Forest Policy”). In it, Government recognizes the “monumental challenges” faced by the forest industry and sets out Government’s “vision for a forest sector that is diverse, competitive and focused

on sustainability” as well as recognizing the “crucial necessity of working with Indigenous peoples.”²⁵

The fact that Indigenous peoples seek “greater access to forest tenure in their traditional territories to create economic opportunities for their communities” and “greater say over forest activities in their region” is noted in the report, as is Government’s commitment to enhancing Indigenous participation in the industry by strengthening the annual allowable cut (AAC) assigned to BC Timber Sales (BCTS) and “through government-to-government discussions that consider the inherent rights, range of interests and values expressed by Indigenous peoples.”²⁶ On that point, Government revealed its goal:

...is to increase the amount of replaceable forest tenure held by Indigenous peoples to 20% from the current level of approximately 10%. We are mindful of separate efforts occurring within the formal treaty process, and through business partnerships and sales of tenure between Indigenous Nations and forestry companies.

In respect of its policy intentions, Government commits to enhancing the “legal mechanisms to allow tenure to be redistributed for harvesting purposes” including as “a component of an Indigenous Nation treaty or negotiated agreement” as well as establishing “a clear framework laying out where and under what circumstances compensation for lost harvesting rights will apply”.²⁷ Government also expressed its intention to create flexibility around the process for reducing forest licenses when timber supplies decrease,

²⁵ British Columbia Ministry of Forests, Lands, Natural Resources Operations and Rural Development. (2021). *Modernizing Forest Policy in BC: Setting the Intention and Leading the Forest Sector Transition*. https://www2.gov.bc.ca/assets/gov/farming-natural-resources-and-industry/forestry/competitive-forest-industry/modernizing_forestry_in_bc_report.pdf at p. 5.

²⁶ *Ibid* at p. 10.

²⁷ *Ibid* at p. 14.

enhancing revenue oversight for log exports, and revising tenure disposition considerations amongst others.²⁸

With respect to employment in the forestry sector, the Government stated:

Forestry is not just about high-level, abstract concepts like tenure and timber harvesting rights. It is fundamentally about the workers and communities the sector supports. Due to the nature of the forest industry, tenure conditions can span many decades, but many of the people they employ are smaller contractors, truckers, and logging companies. Our government intends to complete the Contractor Sustainability Review with amendments to the Timber Harvesting Contract and Subcontract Regulation. These amendments will conclude the work done in collaboration with representatives of the forest contracting and large tenure-holder communities. It is important that hard-fought rights to wages and working conditions endure through time. We will also support the Ministry of Labour in advancing their Industrial Inquiry Commission as previously announced to review contract retendering in the forest sector, within the context of Indigenous interests reflected in this paper.²⁹

THE INDUSTRIAL INQUIRY COMMISSION PROCESS

Immediately following our appointment as an Industrial Inquiry Commission, we requested stakeholders provide us with submissions addressing the Terms of Reference of the Commission. We received a broad reply to our request which included submissions from major forest companies and contractors, First Nations' groups, and trade unions and affiliated groups.

We pause to thank stakeholders for their thoughtful and well-organized submissions, all of which provided unique perspectives on this complex issue.

²⁸ *Ibid* at p. 14.

²⁹ *Ibid* at p. 21.

Suffice it to say, the submissions received from stakeholders expressed very different views about whether successorship protections should be expanded in the forest industry in BC in the circumstances outlined in the IIC Terms of Reference. Submissions were received from three broad groups, each of which expresses a distinct point of view on the matters at hand: unions, employers and First Nations.

SUMMARY OF SUBMISSIONS

Unions

The submissions of unions and labour groups universally advocate for changes to the successorship provisions of the *Code* so that successorship would apply to most of the scenarios identified in the Terms of Reference.

The BC Federation of Labour (“BC Fed”), the United Steel, Paper, Forestry, Runner, Manufacturing, Energy, Allied Industrial and Service Workers International Union otherwise known as the Wood Council (“USW”), and Unifor all take the position that forestry workers’ rights should flow through successorship any time their work is transferred to another party. As articulated by the BC Fed, “successorship should be the rule, not the exception.”

United Steelworkers, Local 1-1937 (“Local 1-1937”) explains why, in its view, these changes are necessary. In Local 1-1937’s view, the current successorship legislation is insufficient to address the realities of the forest industry. This is because timber harvesting rights are the primary asset of any logging business, but the transfer of harvesting rights does not result in successorship. While the current Section 35 of the *Code* applies successorship to the sale or transfer of a business, it does not apply to transfers of harvesting

rights, even though, according to Local 1-1937, in the forestry industry, the harvesting rights essentially “are” the business.

The USW and Local 1-1937 explain that when tenure transfer or claw-back of cutting rights occur, unionized positions are at risk of being replaced by non-union employees. According to Local 1-1937, government action in the last 20 years has resulted in the reduction of cutting rights for unionized operations and, by extension, of work for USW members. This loss of work has happened as a result of the types of scenarios contemplated by the Terms of Reference: for example, the creation of BCTS and the taking of tenures to transfer them to First Nations under treaty settlements.

With respect to the scenarios relating to transfer of tenure and cutting rights to First Nations (Terms of Reference scenarios “c” and “d”), all of the union submissions express strong support for the UNDRIP, and argue that in *most* cases, there is no conflict between the rights of Indigenous peoples and the rights of workers to carry over their union certification and collective agreement under expanded successorship provisions.

The BC Fed explains its view that if control of the formerly-logged land goes to a First Nation, the First Nation is entitled to decide if logging will continue. If logging is going to continue, the First Nation will need workers and will contract with an existing forestry company. Successorship should apply, even if the First Nation ceases logging for a time and then restarts it. According to the BC Fed, if the First Nation decides not to engage in logging, the government should negotiate with unions to compensate the workers who have lost employment.

Local 1-1937 expands on the idea of the compatibility of workers’ rights and Indigenous rights, providing specific examples of successful relationships it has established with First Nations employers. Local 1-1937 points to its

certification of the mostly Haida contractors who work for Taan Forest Limited Partnership, a subsidiary of Haico, which is owned by the Haida Nation. This relationship was the subject of litigation, which is described in more detail in some of the other submissions discussed below. Local 1-1937 also has a certification for the workers on Tree Farm License #44 (“TFL 44”), operated by Tsawak-quin Forestry Limited Partnership, a limited partnership between Western Forest Products and the Huu-ay-aht First Nation.

Local 1-1937 articulates that the above-detailed relationships are a result of traditional successorship and application of the WLOU Local 1-1937 and the USW point out that these types of relationships between unions and First Nations can result in enhanced training and employment opportunities for First Nations members, as well as protecting those First Nations members’ rights, including their *Charter* right to freedom of association.

While Local 1-1937 acknowledges it is possible that in rare situations First Nations’ rights might conflict with union rights (illustrated by the example of the litigation involving Local 1-1937 and Taan Forest Limited Partnership), none of the union submissions provide suggestions for how those potential conflicts could be reconciled if successorship legislation is amended.

Turning to the other scenarios in the Terms of Reference, all the trade unions and their affiliates expressed the view in their submissions that where the government takes back forest tenure for environmental conservation or to create a park (Terms of Reference scenarios “a” and “b”), successorship would usually not apply, as there would not likely be any harvesting. Local 1-1937 adds that in these situations, workers should be protected through replacement volume, or through severance and retraining. If there are small amounts of harvesting, for example, to create roads, Local 1-1937 submits this work should be done by union members under the relevant collective agreement.

Local 1-1937 acknowledges that in the case of the government taking harvesting volume for BC Timber Sales (Terms of Reference scenario “e”), applying successorship would be much more complicated; however Local 1-1937 suggests this should be done by amending the *Code* as well as the *BC Timber Sales Regulation*, so that only USW-certified contractors are allowed to bid on harvesting volumes taken from unionized operations.

Local 1-1937 advocates for successorship applying when the government takes back volume for diversification (Terms of Reference scenario “f”) and for business-led tenure transfer (Terms of Reference scenario “g”). Aside from the specific scenarios named in the Terms of Reference, Local 1-1937 adds that successorship should also apply to the taking back of Allowable Annual Cut undercut volume under the *Forest Act* and to the extinguishment of Bill 13 rights under the *Timber Harvesting Contract and Subcontract Regulation*.

Local 1-1937 provides specific suggestions for the amendment of Section 35 of the *Code* as well as amendments to the above-noted forestry legislation and regulation, maintaining that these changes are a natural evolution of the law of successorship.

Overall, despite acknowledging some complications that could arise, the trade unions and BC Fed submissions are resolute that the successorship provisions in the *Code* should be broadly expanded to apply to all transfers of work in the forestry industry.

Employers

In contrast to the union submissions, the submissions of employers, including forestry companies and forestry contractor associations, are, with some exceptions, strongly opposed to any changes to the *Code*’s successorship provisions in the forestry industry.

The Independent Woodlands Society (“IWS”), a group of small independent logging contractors, is the only employer group to explicitly agree with the unions that successorship should apply any time the government takes volume away and redistributes it. The IWS points out that successorship could help in avoiding lengthy severance disputes that have occurred when unionized workers have lost work due to reductions in harvesting volume to, for example, First Nations under treaty agreements. The Interior Logging Association, another group of contractors, seems to echo the IWS’ sentiments, pointing out that the current legislation does not offer security to Bill 13 contractors or their employees.

Aside from these two groups, the other employer submissions advocate for leaving the *Code* as is and not making changes to the successorship provisions in any of the scenarios named in the Terms of Reference.

Western Forest Products Inc. (“WFP”), a large forestry company engaged in logging on BC’s coast, and the Truck Loggers Association (“TLA”), a group of independent timber harvesting contractors, both argue strenuously that successorship is only intended to apply to the transfer of a business. Both make extensive submissions on the Labour Relations Board’s case law, to the effect that union certification rights do not attach to work, locations, assets, or the right to harvest trees.

While the employer submissions acknowledge that the *Code*’s successorship protections have recently been amended to apply to additional situations such as contract re-tendering of food and cleaning services in the health sector, they maintain that those amendments were intended to assist low-wage, precarious workers, while the forest industry does not have these same problems. The TLA points out that both union and non-union work in the forest industry is highly paid, and that unlike food-service and janitorial

contractors in the health sector, logging contractors have significant investment in their equipment and their employees.

WFP and TLA also argue that changing the successorship provisions would upset a delicate balance in favour of one side, and that the Labour Relations Board supports “private ordering” that balances employer and union interests. They point to the WLOU as an example of this. The WLOU was recommended by Commissioner Don Munroe and established successorship for contractors where the licensee had previously performed the work, and for subsequent contractors. This change, which benefited the union, was balanced out by other changes that assisted employers.

WFP and TLA point out further that Commissioner Munroe did *not* recommend successorship for the transfer of tenure rights held by the companies. To do this, according to WFP and TLA, would risk tipping the balance too much in favour of unions. The TLA further expresses concerns that attaching union certification and collective agreements to harvesting rights would hamper competition and increase costs in the industry, which are already high in Coastal BC.

The Interior Forest Labour Relations Association (“IFLRA”) and the Council on Northern Interior Forest Employment Relations (“CONIFER”) echo the TLA’s concerns about cost increases if successorship protection is expanded. They advise that logging is already expensive in the interior compared to other North American jurisdictions. IFLRA and CONIFER point out that most contractor relationships in the interior are non-union, long-term, and stable. Imposing successorship would disrupt these stable relationships.

Several employer submissions expressed concerns with certifications, collective agreements, and especially workers, being foisted on contractors through successorship, with the result that the contractors would have to let

go of some of their own employees. As articulated by the TLA, “Regardless of the capitalization the contractor has in its own equipment, or wishes of the employees it employs, its business would become certified and its employees covered by an existing collective agreement, without an immediate opportunity to negotiate.”

WFP extends this concern about taking on the previous contractor’s workers to the specific scenario of tenure transfers to First Nations (Terms of Reference scenarios “c” and “d”), arguing that this will prevent First Nations from taking on Indigenous workers.

At the same time, WFP describes its many partnerships with First Nations, citing its agreement with the Huu-ay-aht First Nation for the ownership of TFL 44 as an example. According to WFP, these partnerships lead to significant benefits to First Nations people, including increased employment and training opportunities. As noted above, Local 1-1937 is certified to represent the workers of TFL 44, and similarly endorsed the increased opportunities such ventures offer to Indigenous workers.

With respect to taking tenure for redistribution and diversification, as well as business-led tenure transfer (Terms of Reference scenarios “f” and “g”), WFP maintains that changes to the *Code* are not necessary as successorship would already apply. WFP again uses the example of TFL 44, in which successorship already applied, because the situation fit the traditional definition of successorship in Section 35 of the *Code*. WFP cites other situations in which successorship applies because of the WLOU, described above. WFP describes these transitions as “seamless”.

Turning to the scenarios involving the government taking tenure for environmental conservation or parks (Terms of Reference scenarios “a” and “b”), the employer submissions are consistent with the union submissions in

taking the position that successorship would generally not apply, as there would be no harvesting occurring after the change. WFP's submission dovetails with Local 1-1937's in advocating for compensation for both workers and licensees in such situations.

With respect to taking back harvesting volume to provide to BCTS (Terms of Reference scenario "e"), the employer submissions echo the union submissions' acknowledgment that applying successorship here would be complex. Both WFP and the TLA describe applying successorship to this situation as "impractical". They point out that there can be years between when BCTS takes tenure and when there is a winning contractor that starts logging, raising concerns about workers' situations in the interim. They also argue it would be difficult to determine how much volume take-back would trigger successorship and which employees would transfer in a partial take-back.

Overall, despite acknowledging that some situations involving successorship in the forest industry, including those involving First Nations employers, can be positive for all parties, the employer submissions are adamant that there should be no expansion of the *Code's* successorship provisions in the forestry industry.

First Nations

The submissions received from First Nations groups echo many of the concerns expressed in the employer submissions, while adding enhanced concerns about the IIC process and about applying successorship in the First Nations context. At the same time, the First Nations' submissions acknowledge the positive opportunities that have arisen in some contexts due to successorship and union certification of their endeavors.

The BC Assembly of First Nations, First Nations Summit, and Union of BC Indian Chiefs (Collectively, First Nations Leadership Council or “FNLC”) express significant concerns that the IIC process is inconsistent with the *Declaration on the Rights of Indigenous Peoples Act*, SBC 2019, c. 44, which implements UNDRIP in BC. The FNLC explains that UNDRIP requires the provincial government to engage meaningfully in consultations with First Nations on matters that could affect their rights, and to obtain First Nations’ free, prior, and informed consent before making changes that affect those rights. The FNLC alleges that the government’s treatment of First Nations as “just another stakeholder” in the IIC, as well as the fact that First Nations were only given 23 days’ notice to participate in the IIC, go against the government’s obligations to meaningfully consult and obtain free, prior, and informed consent.

With respect to the scenarios in the Terms of Reference, the FLNC takes a similar position to the employers in maintaining that successorship should not be broadened beyond its current application in the forest industry. Similarly to the WFP and TLA submissions, the FNLC describes the Labour Relations Board’s jurisprudence on Section 35 of the *Code* to the effect that it is only intended to apply to the transfer of a business, not the mere transfer of assets, a location, or work.

The FNLC further takes the position that to impose successorship when tenure is transferred to First Nations would go against First Nations’ right to self-determination and self-government, and that First Nations themselves should get to decide whether to hire unionized workers or contract work out, rather than having those decisions imposed by government.

Despite the FNLC’s strenuous opposition to the expansion of successorship, both the FNLC and the Huu-ay-aht First Nation describe in their submissions positive results for First Nations communities in situations

where successorship did apply and the union was certified after work was transferred to First Nations employers.

The Huu-ay-aht First Nation, much like WFP and Local 1-1937, cites their operation of TFL 44, which is certified to Local 1-1937, as a positive situation resulting in well-paying forestry jobs, training opportunities, and preferential hiring programs for First Nations communities. As part of asking the IIC to respect the sacred principles of “respect,” “taking care,” and “everything is one,” the Huu-ay-aht First Nation asks the IIC to consider making recommendations on successorship that would ensure there is “fully funded, meaningful advancement of employment and training for Indigenous people.” The Huu-ay-aht First Nation mentions funded early retirement programs as a way of making space for Indigenous employment and training in the context of successorship.

The importance of First Nations forestry operations’ ability to hire and train Indigenous workers is also emphasized by the FNLC as an argument against broadening successorship protections. The FNLC uses *Taan* to illustrate the problem with applying existing collective agreements to First Nations; specifically, the application of the 1986 snapshot and the WLOU. The FNLC warns that if successorship is broadened to all tenure transfers, First Nations will be forced to engage in costly legal disputes, like the one in *Taan*, in order to stop these collective agreement provisions from applying. Despite the undesirable and costly litigation process, however, the FNLC ultimately describes the result in *Taan* as being a “success story”.

Overall, the First Nations submissions, like the union and employer submissions, acknowledge that some situations in which successorship applies can be successful and positive, but also raise important concerns about the implications of a blanket expansion of successorship rights in the First Nations context without further consultation.

ANALYSIS AND RECOMMENDATIONS

It is beyond dispute that major changes have taken place in the forest industry over the past several decades. These include a move away from sectoral bargaining, the increasing presence of contractors and, more recently, the take-back of harvesting volume for the purposes of reconciliation and treaty settlement, as well as conservation initiatives.

Given the lengthy history of collective bargaining centring around job security issues over the last several decades it is not surprising that unions seek protections against the further erosion of bargaining rights and job security in the industry. These changes to the industry have resulted in a loss of work for unionized operations and a corresponding reduction of unionized employees in the forestry sector. As Government continues with the guiding principles set out in its Modernizing Forest Policy in BC paper, it is foreseeable that the erosion of good-paying unionized jobs in the forestry industry will continue unless changes to the *status quo* are made.

Collective agreements in the forestry industry enshrine long-standing employee rights and set a baseline for decent wages and benefits and ensure jobs in the industry can support families. These long-standing bargained rights ought to be preserved in situations that fit within the purpose and evolution of successorship and to the extent these rights can be preserved in a manner that does not conflict with the Province's commitments to Indigenous people. In so stating, we observe that the right to meaningful collective bargaining and the right to strike are protected by both the *Charter* and by international law.³⁰

³⁰ *Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27 at para. 71; *Saskatchewan Federation of Labour v. Saskatchewan*, 2015 SCC4.

Existing Successorship Provisions in the Code Applied to Scenarios Identified in the Terms of Reference.

The criteria for successorship under the current provisions of the *Code* would not be met in all of the scenarios set out in the Terms of Reference except for (g): a business led tenure transfer or change of control. In that scenario, disposition of a harvesting permit or license by a forestry company could be an indication of successorship – especially if coupled with the movement of employees or assets. However, we note that subject to existing collective agreement terms, employees of independent contractors enjoy the same protection as employees of the primary employer.³¹

In all of the scenarios where traditional indicia of successorship is lacking, successorship would need to be mandated through Government action.

The Purpose and Evolution of Successorship Provisions

Laws and policies evolve over time to reflect changes in society and industrial organization.

In determining whether a legislative amendment is necessary to address a new or emerging reality that may not have existed or been prevalent at the time legislation was drafted, one must look to the *purpose* behind a particular provision to determine whether this new factual scenario fits that purpose.

The purpose of successorship is to preserve long-standing bargaining and collective agreement rights and to promote industrial stability. This important purpose was discussed by the BC Labour Relations Board in the

³¹ *Re: Canadian Forest Products (Tahsis Pacific Region) and IWA-Canada, Local 1-85 and Seven Independent Logging Contractors given intervenor status*, unreported, May 2, 1990 (Ready).

1974 decision *Kelly Douglas & Company Ltd.* in which it recognized the precarity of workers affected by changes in ownership or control of an operation as follows:

When an employer exercises this legal freedom to dispose of its business, this can have serious consequences for the situation of its employees. They may have struggled to become organized and achieve collective bargaining and then to arrive at a collective agreement. Once that agreement is finally settled, the employees naturally expect that its terms will be fulfilled in the conduct of the enterprise. The trouble is that these expectations could be set at naught by a simple change in corporate ownership. The employees may find themselves still working at the same plant, at the same machine, under the same working conditions, under the same supervision, doing exactly the same job as before, but for a different employer. The result of the sale of a business of which the employees may not even be aware is that the collective bargaining rights of the employees may have disappeared.

Realistically, one cannot expect these interests of the employees and their union to be at the forefront of the business negotiations which employers are free to engage in. Accordingly, the legislature adopted a very straightforward protection. Certification and other orders under the Code follow the business into the hands of the transferee. The legislature went even further to impose the collective agreement on a person who didn't sign it. It is up to the prospective purchaser to investigate the terms of the bargain which its predecessor has made with the trade union and see that this is taken account of in the purchase price of the takeover before it steps into the shoes of the old employer.³²

...

The Board went on to advocate for a broad and liberal interpretation to the successorship provisions in the *Code*, noting “the current language should comfortably embrace just about any means by which a new employer takes

³² *Kelly Douglas & Company Ltd.*, BCLRB No 8/74.

over an enterprise that is left in a form in which earlier collective bargaining rights of the employees should be preserved.³³

As previously noted, the existing language in the *Code* does not give rise to a successorship in cases where Government transfers a forestry tenure and no other indicia of successorship exist. In other words, even with a broad and liberal interpretation, there is simply no way the transfer of cutting rights by Government alone meets the current statutory definition.

However, much like the case with contract retendering, Government-initiated land tenure transfers for conservation purposes and to meet public obligations and commitments to Indigenous peoples in the Province are becoming increasingly prevalent. This change over which entity controls forestry work has the potential to detrimentally impact the rights of unionized workers in the forestry sector if successorship rights are not extended.

In the retendering context, the *Labour Relations Code* Review Panel made the following comments in support of its recommendation to extend successorship to those situations:

When successorship legislation was originally enacted in BC, contract re-tendering was not as prevalent as it is today. When contracts are re-tendered, often the same workforce continues to provide the same services to the same customers or clients, with the same working conditions, at the same location, using the same equipment. The existing collective agreement ends, the employees are required to re-apply for their jobs, the union is required to organize the workforce and a new collective agreement must be negotiated.

...

One care aide related that although she had been employed under a collective agreement for many years, when the contract for

³³ *Ibid.*

services was re-tendered, she had to reapply for employment. She was then re-hired by the new contractor with a 50% reduction in wages and only her service with the new contractor was considered for seniority purposes.

It is evident contract re-tendering has caused a significant erosion of earnings, benefits and job security. This has resulted in employment precarity with negative impacts on long term and seniors' care. The Panel was advised of one seniors' facility that changed contractors six times. This disruption of services and continuity has profound implications for patient and seniors' care and their families.

...

We heard similar stories of the effects of re-tendering on workers in other contracted services including building cleaning, security, food, and bus services. In many cities and municipalities, bus services are provided by contractors through a Request for Proposal (RFP). When the contracts are re-tendered, the collective agreement ends, employees are invited to a job fair to re-apply for their jobs and are often hired at lower wages. The Union is required to re-organize and attempt to negotiate a new collective agreement.

Successorship in the Forest Industry

Much like contract retendering, the reallocation of forest tenures by Government to entities that continue or resume logging activity on the land means there is a continuity of work that could potentially be performed by some or all of the same individuals. In both scenarios, the relationship between the previous and successor employers may simply be that one used to perform the work and that the other now does. However, given retendering allows for cost cutting at the expense of employee salaries and benefits, it can render collective bargaining rights meaningless if an entity chooses to retender a contract for the same work and collective bargaining rights do not follow the work.

In our view, extending successorship to include Government-initiated tenure transfers in the forestry industry is consistent with its purpose, and akin to expanding the successorship provisions of the *Code* to include contract retendering given its deleterious effect on unionized workers and their collective bargaining rights. The extension of successorship to address the realities of modern logging and Government's stated intentions in respect of the forestry industry will ensure these long-standing bargaining rights are not eroded or avoided in cases where logging operations continue under a different employer.

While some parties argued in their submissions that the issue of successorship in the forestry industry is addressed in the WLOU, and that any expansion of successorship to include harvesting rights would risk tipping the balance too much in favour of unions, we disagree. Such an approach, in our view, is consistent with the evolution of successorship in the forestry industry and with the rationale and purpose behind the WLOU. In that document, Commissioner Munroe attempted to balance the flexibility sought by employers, who wanted to use contractors to fulfil harvesting rights, with preservation of unions' representation rights and the hard-fought wages and benefits that resulted. He did so by modifying Article XXV so as to allow limited use of contractors, but to make explicit that when an employer contracts another entity to do its harvesting, that entity was bound by the collective agreement applicable to the tenure holder. In so doing, Commissioner Munroe imposed successorship rights that went well beyond those set out in the *Code*. The extent of successorship under the WLOU was aptly explained by the BC Labour Relations Board in *Timberwest Forest Corp.*³⁴ wherein it was stated:

23 The Commissioner identified the quid pro quo underlying the LOU as a balance between two competing interests. In the one hand, the Employer had a good business case to improve its

³⁴ BCLRB No. B233/2007 (Saunders)

competitiveness by contracting out. On the other hand, the Commissioner saw the potential negative impact of contracting out “on the affected employees’ interests and by the dilution of the union’s ability to maintain cohesive woodlands bargaining units”: Report, p. 25.

24 As noted above, the LOU reconciles those interests by melding provisions that do not ordinarily coexist when work is contracted out. Specifically, the LOU confers the right to contract out a woodlands operation. However, that right goes with significant, ongoing obligations to the Woodlands Employees whose jobs have been contracted out. For instance, the woodlands operation must be contracted out to Union certified companies on a stump-to-dump basis, as opposed to phases and for minimum five-year terms. Under Article 10, the Employer is required to assume full successorship obligations if it resumes operational responsibility, regardless of whether those obligations arise under the Code.

The WLOU extended successorship to protect collective agreement rights when a tenure holder contracts out its harvesting rights to another entity. That was the threat to the integrity of bargaining unit positions at the time, and successorship was extended to protect bargaining rights in that context. Similarly, we are now recommending expansion of successorship to apply to address the new threat to collective bargaining rights in the forestry industry: the fact that without intervention, they can be extinguished by Government’s reallocation of land tenures even though similar logging operations may continue under a new entity on the land.

With respect to the TLA’s concern that attaching union certification and collective agreements to harvesting rights would hamper competition and increase costs in the industry, we note and adopt the *Labour Relations Code* Review Panel’s comments on this argument. Indeed, the Panel was quick to dismiss industry’s claim that applying successorship to retendering would inhibit the cost savings associated with these kinds of arrangements, commenting:

The cost of labour is one of the most important competitive factors in all of these circumstances. The contract re-tendering issue is most pronounced in sectors with the greatest precarity. In our view it is no more socially desirable to allow cost savings through reducing labour costs and eliminating established collective bargaining rights by the re-tendering of contracts than it is in the sale or transfer of a business. Both require the protection of the successorship protections of the Code.

These words resonate and apply with the same force in the forestry context. Forestry operations ought not to generate profit at the expense of the wages and benefits of workers who perform this difficult and skilled work. There is much greater societal value in protecting and preserving representation rights than extinguishing them in the name of greater profit and operational flexibility. In our view, the appropriate balance is struck by extending successorship to land tenure transfers where logging activities continue. To the extent changes to existing collective agreement terms are necessary for competitiveness or operational efficiency, these changes may be sought at the bargaining table through the normal quid pro quo process of collective bargaining.

Tenure Transfers Involving First Nations

The Terms of Reference ask us to address successorship in the context of harvesting rights transferred to First Nations for reconciliation or treaty settlements. This situation merits particular attention given the important rights recognized in the UNDRIP and adopted in the Province in the *Declaration on the Rights of Indigenous Peoples Act (DRIPA)*³⁵ including First Nations' right to self-determination. In so stating, we are cognizant of the fact that any recommendation to extend the successorship provisions of the *Code* to apply to

³⁵ [SBC 2019] c. 44.

Government-initiated land transfers to First Nations must be consistent with the Province's commitments to Indigenous peoples.

The important rights recognized in UNDRIP applicable to the issue of successorship can be summarized as follows:

- Indigenous people have the right to determine how to use their own lands and resources (Articles 20, 26 and 32).
- Indigenous people have the right to economic, employment, and educational opportunities and, crucially, should enjoy all the same rights as other workers under domestic and international labour law (Articles 17 and 21); and
- Indigenous people have the right to be included and consulted on any government decision-making that could affect their rights (Articles 18 and 19).

As stated, we acknowledge and accept that any recommendations resulting from this IIC must incorporate and be consistent with the terms of *DRIPA*.

Does Extending Successorship Under the Code to First Nations that Continue Harvesting Conflict with the Principles of UNDRIP?

Provincial laws of general application have been held to apply to Indigenous people through referential incorporation under s. 88 of the *Indian Act*, RSC 1985, c. I-5, as amended ("*Indian Act*") unless excluded by one of a handful of exemptions.³⁶ Indeed, there is long-standing recognition in case law that provincial labour and employment statutes apply to First Nations' employers, and that the freedom to dictate employment conditions that conflict

³⁶ Peter W. Hogg. (2008). *Constitutional Law of Canada* (5th ed.). Carswell. at p. 28.2(c)

with legislation has been found not to constitute an “Aboriginal right” within the meaning of Section 35 of the *Constitution Act*, 1982.³⁷

Despite this being the case, some of the submissions received in this IIC appear to argue in favour of complete non-application of provincial labour law to First Nations forestry operations. For instance, the FNLC argues First Nations should have “autonomy of choice regarding whether to hire unionized workers.” Such a statement is at odds with the fact that under existing law, it is employees who choose whether to be represented by a union, not employers. First Nation employees have the same right to join a union as all other employees in the Province and unions can be certified to represent employees

of First Nations through the normal certification process set out in legislation.³⁸ Similarly, successorship provisions apply to First Nation employers if the requisite criteria for successorship under legislation is met. That is the current state of the law.

³⁷ See for e.g. *Mississaugas of Scugog Island First Nation v. National Automobile, Aerospace, Transportation and General Workers Union of Canada, Local 444* (2007), 88 OR 3d 58 (CA).

³⁸ Under the current legal framework, most Indigenous employers are governed by provincial labour law, under the “property and civil rights” provincial head of power. Labour relations is presumptively a provincial power, with a narrowly construed exception for federally regulated labour relations if the entity is a “federal work, undertaking or business.” See: *NIL/TU,O Child and Family Services Society v. BC Government and Service Employees’ Union*, 2010 SCC 45.

Whether an entity is federal for the purposes of labour relations is determined by looking at the “normal or habitual activities” of the entity. If the normal or habitual activities are provincial – as they normally would be in forestry – courts then look to see if the entity’s labour relations would impair the “core” of a federal head of power – in this case the federal head of power in Section 91(24) of the Constitution, the power over “Indians and Lands reserved for Indians.” See: *NIL/TU,O*, supra at para 20.

Both the *BC Code* and the *Canada Labour Code* have provisions to address successorships involving a change from a federally-regulated industry to a provincial one and vice versa (see s. 36 of the *BC Code* and s. 44(3) of the federal *Code* respectively)

The change to the successorship provisions of the *Code* contemplated in this IIC would merely extend already-applicable successorship protection to a new scenario threatening the integrity of collective bargaining rights in the forestry industry: when land tenures held by unionized forestry companies are transferred to different entities that continue or resume commercial logging activities.

While we acknowledge and endorse that UNDRIP legislation “supports a robust interpretation of Aboriginal rights”³⁹ and that the recent passage of *DRIPA* may impact the legal landscape in respect of Indigenous rights in the Province, we do not believe our below recommendations conflict with the important principles set out in UNDRIP and enacted provincially in *DRIPA*. We have carefully considered and incorporated the principles of UNDRIP into our recommendations and believe we have found a balanced and tailored way to balance the rights of unionized workers in the forestry sector with the rights of Indigenous peoples. We are certainly mindful that any recommendation to broaden the successorship provisions in the *Code* to apply to Government-initiated reallocation of forest tenures to First Nations must not undermine or conflict with the Province’s commitments to Indigenous peoples.

Indigenous Control Over Lands and Resources

Application of successorship in no way interferes with a First Nation’s autonomy to make decisions about how to use forest tenures. This is as it should be. Whether to engage in logging or use the land in other ways should be fully within the decision-making power of the First Nation taking over the tenure.

³⁹ *Thomas and Saik’uz First Nation v. Rio Tinto Alcan Inc. (Saik’uz First Nation)*, 2022 BCSC 15.

Should successorship under the *Code* be extended to follow logging operations that continue under different entities following Government-initiated tenure transfer, it would only be triggered where a First Nation has decided to continue forestry operations. If a First Nation has made that decision, they have decided to continue, in some sense, the business of a unionized employer, using the primary asset – the cutting rights – of that employer. Given the expertise of forestry workers, and the expense and specialization of equipment utilized in the industry, this situation could involve more overlap than simply the Government’s transfer of tenure. Certainly, where work continues, it is our view that it ought to continue being performed by union members who were performing this work for the former tenure holder to the greatest extent allowable while faithfully adhering to UNDRIP principles.

In our view, application of successorship when Government transfers a land tenure and logging enterprise continues under new First Nations management or direction does not conflict with this UNDRIP principle given that the First Nation will retain complete autonomy over how the land is utilized. For this reason, it is our view that modifying the successorship provisions of the *Code* is not inconsistent with the right of Indigenous people to determine how to use their own lands and resources. To the extent unionization would have *any* impact of a First Nation’s decisions about how to utilize land, we suggest this would be minimally impairing, and overshadowed by the social good of protecting union jobs.

Reopening Collective Agreements for Consistency with UNDRIP

While enhancing successorship provisions does not interfere with the autonomy of Indigenous people’s control and decision-making in respect of land, no doubt, there will be some situations where collectively bargained rights and Indigenous rights – both protected under the *Constitution* and international law – will conflict. Given this reality, it is imperative that

application of successorship to First Nation employers allows an opportunity to address potential conflicts that may exist within the provisions of the inherited collective agreement. Conflicts include, but are not limited to, the concerns described previously about preferential hiring and training for Indigenous workers and concerns about engaging Indigenous logging contractors.

Government's transfer of harvesting rights from a unionized forestry employer to a First Nation who continues or resumes logging operations should, in our view trigger mandatory negotiation between the union and the First Nation to allow for any modifications to the collective agreement necessary to ensure its terms fully accord with the principles set out in UNDRIP. If this negotiation is unsuccessful, this limited reopener for the purposes of ensuring the collective agreement does not undermine or conflict with UNDRIP principles must also include an economically viable dispute resolution mechanism to break any impasse in negotiations so as to avoid costly and potentially lengthy litigation as has played out historically in the absence of statutory protections. Such a mechanism is imperative to ensure that application of successorship is compatible with the Government's commitments in *DRIPA* and in full compliance with UNDRIP principles.

We are optimistic, though, that unions and First Nations can work together to see their way through the thorny path towards reconciliation. There is much work to be done, and it requires cooperation, creativity and flexibility from all parties. We note all the unions and their affiliates who provided us submissions indicated their support for *DRIPA* and greater participation of First Nations in the management of forest resources in the Province. We point to the agreement reached between Local 1-1937 and the Huu-ay-aht First Nations as an example where successorship applied and the parties were able to negotiate a result that created preferential training and employment opportunities for Indigenous workers in TFL 44. We note this outcome was

cited as positive by unions and their affiliates, employers, and First Nations alike.

Indigenous peoples' right to economic and employment opportunities is also reflected in the relationship that now exists between Local 1-1937, the Taan Forest Limited Partnership, and the small Haida contractors engaged by Taan. Although this relationship resulted from costly litigation – which is not preferable, and which underscores the need for a dispute resolution mechanism being incorporated into any successorship language created – the end product is evidence that the parties can work together through these issues. Much like the situation in TFL 44, the result in *Taan* is cited by employer, union, and First Nations submissions as positive.

RECOMMENDATIONS

Consistent with our Terms of Reference and the foregoing analysis, we respectfully make the following recommendations for your consideration.

RECOMMENDATION #1: Successorship ought not to apply when forestry operations are not continued or resumed within a specified period of time

We do not recommend that successorship provisions be expanded to include scenarios in the Terms of Reference involving a cessation of logging such as the taking back of tenure for a park or for environmental conservation. In our view, it would stretch the concept of successorship to unreasonable lengths to find a successorship in these scenarios, given the very different uses and types of work being performed in those cases. While we acknowledge that there may be *some* harvesting which takes place in these scenarios – such as clearing trails or removing damaged or pest-infested trees – we do not believe it

practical to require that these limited tree removal functions be performed under the terms of industrial logging collective agreements.

However, given concerns that a recipient of a land tenure may not immediately decide to engage in logging, but may later decide to resume forestry operations on the land, we believe it important to include a provision specifying that successorship rights in the forestry sector continue to apply for a set period of time. This would allow for industrial certainty and avoid costly and potentially lengthy litigation about whether a successorship in forestry has been extinguished with the passage of time.

In so stating, we note that under the existing successorship provisions of Section 35 of the *Code*, a successorship may be found when there is a time gap between operations provided the indicia of a continuation of the business are present. There is no bright line as to when successorship rights “expire” under the present provisions of the *Code*; however, the BC Labour Relations Board has said that the longer the gap, the less likely a successorship will be found. A gap of 14 months, for example, was found to be strong indicia that the original business had died out rather than continued with the new entity.⁴⁰

Consistent with important policy purpose behind extending successorship to tenure transfers in the forest industry, we recommend the time period during which successorship is preserved ought to be long enough to deter de-unionization simply by “waiting out the clock”. In our view, preserving representation rights for a period of five years strikes the appropriate balance between protecting established collective bargaining rights in this context while recognizing the purpose of successorship is to protect collective bargaining rights when there is a *continuation* of work. In our view,

⁴⁰ See for e.g. *Lyric Theatre Ltd. v. IATSE*, BCLRB No 38/80.

importing a time period for successorship will ensure transparency and clarity around these rights.

Local 1-1937 has argued in favour of providing replacement volume equal to the volume removed so long as the Chief Forester determines maintaining the harvest is sustainable – either through increasing the allowable cut in the TFL or an adjacent TFL. While we endorse the sentiment that Government ought to protect jobs in the forestry industry to the greatest extent possible we note to mandate this would be unduly restrictive for Government and may actually conflict with its intentions for forestry as set out in its Modernizing Forestry paper. Further, adoption of our recommendation to expand successorship to tenure recipients that run forestry operations will protect these union jobs to the extent that logging continues.

RECOMMENDATION #2: Successorship should extend to forestry operations continued by new tenure holders but should allow for limited collective agreement negotiations in the First Nations' context to address any inconsistencies between UNDRIP and the applicable collective agreement

Having found the extension of successorship rights to Government-initiated land tenure transfers when the tenure recipient continues logging operations is consistent with and necessary to meet the objectives of successorship, and that extension of successorship to tenure transfers involving First Nations is not inconsistent with the principles of UNDRIP, we recommend successorship be extended to these scenarios – regardless of the entity to which the tenure is transferred. On this point, we note that a recommendation to extend successorship to Government-initiated transfers when forestry operations continue except those involving First Nations would have the effect of disadvantaging employees of First Nations forestry ventures, including Indigenous workers, and is not a requirement of UNDRIP.

That being said, however, we note the terms of any collective agreement imposed under successorship must not undermine important UNDRIP principles such as prioritized employment and training opportunities for Indigenous people, which could foreseeably conflict with seniority provisions of a collective agreement. Thus, we recommend a mechanism for reopening a collective agreement imposed on a First Nation in this context be created for the limited purpose of addressing any incompatibilities with UNDRIP. This mechanism would need to include a dispute resolution process to break impasse arising in this bargaining context that places appropriate weight on compliance with UNDRIP.

This recommendation is, in our view, consistent with Arbitrator Lanyon's decision in *Taan, supra*, in which he deleted the "stump-to-dump" requirement in the WLOU – finding it was discriminatory on the basis of race and ancestry under the *Human Rights Code* due to the historical disadvantage of Indigenous peoples due to colonialism, and the fact they accordingly would have significant difficulty setting up a "stump-to-dump" operation. However, Arbitrator Lanyon held the successor rights set out in the WLOU would still apply so that the union would be certified to represent the employees of the smaller contractors. In other words, successorship applied, but with the terms of the collective agreement amended to address the needs of a First Nations' forestry operation.

The Process for Expanding Successorship to Land Tenure Transfers

There are various ways the Government could expand successorship to apply in the context of Government-initiated forestry tenure transfers when the new tenure holder decides to continue logging operations in that geographic area.

Legislative Amendment

The most transparent and formulaic way is to amend Section 35 of the *Code* by adding a clause recognizing timber harvesting rights are a “business” for the purposes of s. 35(1), and that s. 35(1) applies to the transfer of those rights, whether initiated directly by a tenure holder or by Government. As stated, we recommend this provision stipulate the time period within which these rights continue even if the new tenure holder does not immediately continue forestry operations. In our view, to ensure the important objective of successorship is protected, we suggest successorship continue despite a hiatus in harvesting for a period of up to five years.

Further, we recommend an additional clause be added to Section 35 of the *Code* stipulating that where the recipient of a transfer is a First Nation, and the First Nation continues foresting operations or commences forestry operations within five years following the transfer of timber harvesting rights, the First Nation and the union shall meet within a reasonable time to collectively bargain any amendments to the collective agreement required to ensure consistency with *DRIPA*.

Finally, as noted, we recommend Section 35 of the *Code* be amended to include a provision that in cases where a successorship applies to a First Nation in the forestry sector, and the parties are unable to agree on what amendments, if any, are required to fully reconcile the principles of UNDRIP with the collective agreement, either party may submit the disagreement to the Labour Relations Board for resolution. The Board may opt to appoint a Special Officer under Section 106 of the *Code* or an adjudication panel for final and binding interest arbitration consisting of a Chair appointed by the Board (preferably an arbitrator), and two members each appointed respectively by the parties. This process ought to take place in an expedited fashion.

We recommend Government engage in further consultation with First Nations' groups to determine how this limited collective agreement reopening and related dispute resolution mechanism should work under this expanded successorship provision.

RECOMMENDATION #3: Successorship should not be extended to work allocated to contractors through BCTS and Government should further review unionization in this context

BCTS manages about 20 per cent of the Province's allowable annual cut for Crown timber and this number is growing according to Government policy. Although BCTS holds land tenures previously held in large part by unionized commercial forest companies, BCTS operates non-union, predominantly acting as an agent tendering bids on a block-by-block basis from mostly smaller contractors.

As pointed out by both unions and employers, application of successorship to work previously performed by unionized contractors now contracted through BCTS poses distinct challenges given the manner by which BCTS distributes harvesting work. Indeed, application of successorship in this context was not sought by Local 1-1937 due to recognition that contractors awarded work under this process may only be able to provide unreliable and short-term work for employees. Rather, Local 1-1937 suggests workers affected by the Government's transfer of tenures previously held by unionized forestry companies to BCTS ought to have a right to that work on a preferential hiring basis and that a policy similar to Government's exclusive use of certified contractors for public infrastructure projects be implemented in respect of BCTS.

We recognize and accept that application of successorship in this context would raise additional challenges and that determining continuity of work

would be far more difficult under this model and that workers may not be well served by successorship in this scenario given the small, precarious, and short-term nature of work allocated by BCTS. We therefore recommend BCTS be carved out as an explicit exemption to expanded successorship under the *Code* and that Government undertake further review to consider alternate methods for ameliorating the elimination of union jobs resulting from tenures tendered through BCTS.

RECOMMENDATION #4: Government should expand programs for compensation and re-training opportunities for both unionized and non-unionized employees displaced by Government's reallocation of forest tenures

In this IIC, we heard forceful submissions from several parties that Government ought to continue assisting and compensating forestry workers – both union and non-union – who are negatively impacted by the Government's new approach to managing forests in the Province.

While perhaps somewhat outside the mandate in this IIC, we agree it is a matter of public importance that Government extend resources to workers who lose their jobs and who are forced to look for work in other industries including compensation, retraining and job placement. On this point, we note Government established the BCFRT specifically for this purpose and set out in its Modernizing Forest Policy Paper to provide clarity around compensation and to “[e]stablish a clear framework laying out where and under what circumstances compensation for lost harvesting rights will apply.” We endorse Government's intention to complete this task and to ensure appropriate supports exist for forestry workers displaced by modernization of forest policy.

CONCLUSION

Expanding the definition of successorship to the realities of the changing forestry industry as set out above is, in our view, consistent with the evolution of the successorship provisions under the *Code* and is necessary to ensure BC's forest industry continues to provide opportunities and benefits for British Columbians in future.

In the foregoing, we have laid out a path to enhancing protections for forestry workers impacted by changes to the industry that honours long-standing bargaining rights while incorporating and respecting the legal rights of Indigenous people in the Province.

We trust this report is satisfactory and discharges the terms of reference for this IIC.

All of which is respectfully submitted this 10th day of February, 2022.



Amanda Rogers



Vincent L. Ready