

Unstacking the Deck:

Reforming Alberta's Anti-worker Labour Code



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Introduction

This paper outlines the concerns regarding current labour legislation in Alberta from the perspective of trade unions and workers. Its purpose is to identify to Alberta's government the main areas of the *Labour Relations Code* for which change is required.

When Alberta's *Labour Relations Code* (the "Code") was enacted by the Getty PC government in 1988 it was, quite properly, viewed as a devastating, regressive step for the rights of labour. Since then, such changes as have been made by successive PC governments, often in response to relentless anti-union lobbying, have been aimed at further diminishing the position of labour.

The current *Code* fails to meet any reasonable standard for modern Canadian labour legislation. Even its preamble is overtly hostile to organized labour, making no reference to trade unions. With its scheme of mandatory representation votes coupled with a permissive approach to employer campaigning during organizing drives the *Code* virtually invites expensive and destructive anti-union campaigns. It is regressive legislation that fails to achieve an appropriate balance. It contains restrictions on collective bargaining rights, and in particular the right to strike, which are unconstitutional. The case for reform is strong.

It should be noted that other specialized legislation exists in Alberta which diminishes the rights of labour, such as the *Public Service Employees Relations Act* ("PSEERA"), which affects not only direct employees of the government but also employees of various governmentally sponsored entities. Labour law reform should at a minimum seek to bring parallel schemes into harmony with a revised and reasonable *Code*. Where possible the goal should be to bring all Alberta employees and their chosen trade unions under the *Code*.

Role of Trade Unions

Trade unions are an integral and positive institution within Canadian society. They represent a means by which individual worker can use their constitution rights of association to empower workers. In the *Alberta Reference*, Dickson C.J. observed that "[t]he role of association has always been vital as a means of protecting the essential needs and interests of working people. Throughout history, workers have associated to overcome their vulnerability as individuals to the strength of their employers." (p. 368)

Strong trade unions promote healthy, safe and productive workplaces, not just for themselves but for their communities by pressing for stronger social, economic and environmental policies. Simply put, unions believe in lifting everyone up. The direct benefits of being part of a union are easy to see: higher wages, stronger benefits and a more involved role within the workplace. But the impact of organized labour has led to significant spillover effects outside of unionized workplaces. Non-unionized employers have been forced to respond to the gains of unionized workers, resulting in the application of better working standards throughout all workplaces.

Attitude towards trade unions

While it is hoped that the change in government in Alberta will herald a change in attitude, over the

last 25 years, trade unions have been vilified by the business community and the government and its laws have done nothing to address that. Instead, the few changes to labour laws that have occurred since 1988 have, without fail, further diminished the ability of trade unions to represent their members effectively.

Running parallel to the increasing disrespect of trade unions in Alberta has been the increasing recognition of the rights of labour under the *Canadian Charter of Rights and Freedoms* (the “Charter”) by lower Courts, legal scholars, and ultimately the Supreme Court of Canada. In 2001, in *Dunmore* [2001] S.C.J. No. 87 the SCC recognized that the right of agricultural workers to organize into trade unions was included in the *Charter’s* protection of freedom of association in Section 2(d).

By 2007, the SCC recognized that freedom of association included the right to collectively bargain through a trade union of the workers’ choice in *B.C. Health Services* [2007] S.C.J. No. 27 and the trilogy of cases including the *Alberta Reference* from 1987 [1987] 1 S.C.R. 313, which had said the opposite, were clearly overruled. There were several other important judicial developments over the period from 2001 to present in regard to the rights of trade unions and workers, all of which culminated with the SCC’s decision in 2014 in the *Saskatchewan Federation of Labour* decision [2015] No. 4. In *SFL*, the SCC held that the right to strike was also part of freedom of association under the *Charter*. That decision has made it abundantly clear that collective bargaining rights are of profound importance, and that laws that diminish these rights will be struck down by the Courts. In *SFL*, the Supreme Court of Canada said:

51 The preceding historical account reveals that while strike action has variously been the subject of legal protections and prohibitions, the ability of employees to withdraw their labour in concert has long been essential to meaningful collective bargaining. Protection under s. 2(d), however, does not depend solely or primarily on the historical/legal pedigree of the right to strike. Rather, the right to strike is constitutionally protected because of its crucial role in a meaningful process of collective bargaining.

52 Within this context and for this purpose, the strike is unique and fundamental. In *Re Service Employees’ International Union, Local 204 and Broadway Manor Nursing Home* (1983), 4 D.L.R. (4th) 231 (Ont. H.C.J.), Galligan J. emphasized the importance of strikes to the process of collective bargaining:

... freedom of association contains a sanction that can convince an employer to recognize the workers’ representatives and bargain effectively with them. That sanction is the freedom to strike. By the exercise of that freedom the workers, through their union, have the power to convince an employer to recognize the union and to bargain with it.

... If that sanction is removed the freedom is valueless because there is no effective means to force an employer to recognize the workers’ representatives and bargain with them. When that happens the *raison d’être* for workers to organize themselves into a union is gone. Thus I think that *the removal of the freedom to strike renders the freedom to organize a hollow thing*. [Emphasis added; p.

53 In *Health Services*, this Court recognized that the *Charter* values of "[h]uman dignity, equality, liberty, respect for the autonomy of the person and the enhancement of democracy" supported protecting the right to a meaningful process of collective bargaining within the scope of s. 2(d) (para. 81). And, most recently, drawing on these same values, in *Mounted Police* it confirmed that protection for a meaningful process of collective bargaining requires that employees have the ability to pursue their goals and that, at its core, s. 2(d) aims

to protect the individual from "state-enforced isolation in the pursuit of his or her ends" The guarantee functions to protect individuals against more powerful entities. By banding together in the pursuit of common goals, individuals are able to prevent more powerful entities from thwarting their legitimate goals and desires. In this way, the guarantee of freedom of association empowers vulnerable groups and helps them work to right imbalances in society. It protects marginalized groups and makes possible a more equal society. [para. 58]

54 The right to strike is essential to realizing these values and objectives through a collective bargaining process because it permits workers to withdraw their labour in concert when collective bargaining reaches an impasse. Through a strike, workers come [page281] together to participate directly in the process of determining their wages, working conditions and the rules that will govern their working lives (Fudge and Tucker, at p. 334). The ability to strike thereby allows workers, through collective action, to refuse to work under imposed terms and conditions. This collective action at the moment of impasse is an affirmation of the dignity and autonomy of employees in their working lives.

The *Alberta Reference* trilogy in 1987 – together with hard economic times and a hostile government – set the stage for the regressive 1988 *Code* in Alberta. While the rest of the country started recovering from that low water mark as early as 2001, in Alberta Labour has not enjoyed any improvement in either the legal regime or the general business and political attitude. Organized Labour has simply not received an appropriate level of respect.

Attitude toward the labour law in Alberta

Hand in hand with an oppressive legal regime has been the attitude of far too many employers in Alberta that violations of the *Code* and related labour laws should have no consequences. Employers do not seem to be deterred by the fact that they are breaking the law each time they fail to recognize the rights of trade unions and workers under these laws. Instead, they ignore labour laws, and commit unfair labour practices with abandon, understanding that trade unions have to take on what are often significant and costly legal proceedings to hold Employers accountable. The remedies under the *Code* have been modest at best, with no damages, no penalties and no costs awarded. Effectively, the law has no deterrent effect.

The Labour Relations Board, which administers most of the labour laws in Alberta, does not treat unfair labour practices with an appropriate degree of urgency. Rogue employers routinely profit from delay. For example, votes in certification proceedings are held weeks after the application has been filed, giving Employers plenty of time to commit unfair labour practices, but unfair labour practice complaints are not adjudicated in time to restore any hope of a fair vote. The Labour Relations Board always encourages settlement over litigation – this makes sense in theory, but in a world where settlements are achieved because delay has rendered the litigation futile from a union perspective the system is failing. Sadly, this has become the norm. Certification and unfair labour practice decisions routinely take months and even years to adjudicate. In such a system, collective bargaining rights are inevitably defeated.

A good example is found in the Board's decision in *Firestone* [2009] Alta. L.R.B.R. 134. It describes a long history of the Christian Labour Association of Canada ("CLAC") being used to bar the ability of workers to organize with other trade unions. That decision finally put an end to the notion that Employers and Unions could bargain to repeatedly eliminate the open periods in collective agreements and thus effectively eliminate the ability of trade unions to organize at all. However, it took years of litigation to achieve that result, and in the interim Employers and CLAC were able to continue to use that strategy effectively. Significantly, the Employer community spent the last several years lobbying the Alberta government to again change the *Code* to overturn the impact of the *Firestone* decision.

It is important to note that although *Firestone* ended 30 years of abusive practice, there were virtually no negative consequences to Employers for their unlawful actions over that period of time. In *Firestone*, the Board's decision came fully four years after the organizing drive that started it all.

Another example of the dismissive attitude of the government and Employers to the rights of workers and their trade unions has been the approach of the labour laws to the reorganization of the delivery of health services in Alberta. In addition to the draconian approach taken in 2003 under "Bill 27", which undermined the ability of workers to be represented by their chosen their bargaining agents, the government, the Labour Relations Board and the Employer community saw nothing wrong with the fact that a Vice Chair of the Board wrote Bill 27 and the regulations thereto and then was assigned the file to adjudicate on the meaning of those statutory provisions in the series of challenges brought by the affected trade unions, who were not advised of the Board's involvement in drafting the legislation.

The labour movement, through the AFL, worked diligently to uncover the hidden evidence of the Board's involvement – none of which had been revealed by the government, the Board or the Employers – and significantly, just two weeks before the Court of Appeal hearing which would have addressed that evidence began, a resolution was brokered between the trade unions and the Board. Again, there were no actual negative consequences to Employers or the Board for those events.

There are countless examples of unfair labour practices in the private sector that have effectively ruined organizing drives and first collective agreement negotiations for trade unions without meaningful consequences to Employers. Employers have also effectively ignored successorship obligations in many cases without penalty and with devastating consequences for the unions and the workers involved (see, for example *Finning* [2011] A.L.R.B.D. No. 1 and the decisions leading up to it, all of which are described in the Board's decision).

The difficulties unions have faced obtaining first collective agreements, again without significant penalty to the Employers are a matter of public record. Examples from recent history include the organizing drives at the Calgary Herald, the Shaw Conference Center, Lakeside Packers and Palace Casino.

Add to all of that the decimation of the bargaining rights in the construction sector since 1988. Besides the effective practical elimination of the right of construction unions to strike, the *Code* has been interpreted without challenge to mean that construction companies can operate parallel union, non-union and/or CLAC operations without the impact of the common employer provisions of the *Code*. If those provisions were not sufficient, the Stelmach PC government added further draconian restrictions on the ability of building trades unions to organize and eliminated the ability of the trade unions and their Employer organizations to reduce the financial consequences of mid-collective agreement organizing through the use of MERF funds. The result has been the substantial elimination of unionization in almost all construction carried out in cities either residentially or commercially and a substantial reduction of the impact of building trades unions in industrial construction.

Basically, the rights of trade unions and workers have been systematically attacked and even when Employers are successfully challenged under the *Code*, there have been no significant penalties placed on Employers. The attitude appears to be that Employers can do what they like and if they are caught and if the trade union can prove it – often only after long and expensive Board hearings – the consequences will be a minor slap on the wrist with no apparent deterrent impact on that or any other Employer.

The attitude of government to trade unions and their members has been no better. Aside from the health care example mentioned above, workers in the public sector, including all health-care workers, and employees of public universities and colleges, have not enjoyed the ability to strike since before 1988. The rest of Canada has recognized this right for the public sector subject to the ability to bargain a core of essential service workers, but Alberta has not. Although the government, post *SFL*, has entered into a consent judgment that the *Code* and *PSERA* are unconstitutional, there is no other consequence to the denial of this constitutional right to thousands of workers for more than 30 years. The impact of the consent judgment was suspended until March of 2016, extended to June 2016, with the result that the affront to constitutional rights continued until just recently.

The right to strike in the broader public sector and the requirement to address essential services has been addressed by the current NDP government with changes to the *Code* effective May 27, 2016, but there is still a lot of work to do to bring the *Code* in line with the Canadian mainstream labour laws.

The actual rights of trade unions and their members in Alberta

In Canada, the rights of workers to join together to be represented by a trade union of their choice, the right of that trade union to bargain collectively on their behalf, and the right of the workers and their trade union to strike if necessary are constitutional rights under section 2(d) of the *Charter*. These rights are part of the fabric of our democracy and deserving of the utmost respect. It is time that the laws in Alberta reflect these rights.

The following is an overview of the problems with the Alberta labour laws and some suggested areas

for reform. At the very least, working people in Alberta should have the same rights and protections when it comes to exercising their constitutional right to organize and bargain collectively as other Canadians. And, where appropriate, the government should consider going further than the Canadian mainstream – because the changing nature of the economy and the labour market necessitate ongoing reform; and because leadership from one province or another is how, historically, incremental progress has been made in Canada. Someone has to be the leader. That is the role that the current government has embraced on climate change. Where appropriate, we think they should embrace a similar role when it comes to the rules that govern our province’s workplaces.

To the Canadian Mainstream, or beyond:

Certification

1. Certification Votes

- **Issue:** Requiring a vote for certification applications that have significant employee support when filed has often defeated the certifications.
- **Alberta Solution:** Allow for automatic certification if the Union applies for certification with proof of support by more than 50 per cent of the bargaining unit employees. Continue the process of certification votes for those situations where the Union files an application for certification with at least 40 per cent support and less than majority support.
- **Canadian Mainstream:** Manitoba allows for certification without a vote with 65 per cent employee support for the Union (s. 40(1)). New Brunswick allows for certification without a vote with 60 per cent support for the Union (s. 14(3)) and gives the Board discretion to certify without a vote if there is over 50 per cent support (s. 14(5)). Ontario (s. 128.1) and Nova Scotia (s. 95(3)) allow for certification without a vote in the construction industry. Ontario, Canada, BC, Newfoundland, and Saskatchewan require a vote in all cases with a minimum of 40 per cent or 45 per cent employee support. Both card check and vote based certification are accepted in the Canadian mainstream.
- **Explanation:** While on first glance, it might seem reasonable that employees should be given a “free and democratic” secret ballot vote on the question of certification in their workplace, the reality is that the imposition of this vote significantly impairs the ability of workers to freely exercise their choice.

The certification process involves employees first being members of the Union or signing a petition or a membership application in favour of the Union. This is a decision that employees make while off duty, and after all the time and thought that they personally need. After the application is filed, and after several days and/or weeks pass, employees must then vote again on their choice at a formal vote that is usually held on

the Employer's worksite with a manager and union representative as scrutineers.

The employee's original decision is made in total secrecy from the Employer and if the Union's organizing campaign has been kept secret it can be done without the Employer's pressure tactics influencing the employee's choice. It must be stressed that the Union has no power over the employees, it cannot negatively impact them in their workplace or in any other way, so is in no position to inappropriately influence employee choice.

The requirement to hold the vote in all cases provides a built-in time frame between being notified of the application for certification and the date that the vote is actually held, for the Employer to use its undisputed power over the employee to pressure, intimidate, coerce, scare, and otherwise inappropriately influence the employee to vote against the Union. It takes very little actual Employer comment or action in the time leading up to the vote to be perceived by employees as a significant threat to their job security. Alberta history reveals many situations with subtle, and overt Employer comments and action against certification, and often we see significant and overt unfair labour practices.

Employees who have taken their time to consider and decide to support a Union's application for certification should not be required to restate their views. They should not be subjected to a period of fear and turmoil in their workplace waiting for the vote, which is often delayed by Employer objections and procedural issues, in addition to unfair labour practices. When a sufficient majority of the employees decide to support the Union before the application is filed, the only reason for requiring a vote is to provide the Employer with this opportunity to influence the choice should be that of the workers alone.

2. *Delay of Certification Votes*

- **Issue:** There is no statutorily imposed time frame for the completion of a certification vote.
- **Alberta Solution:** For any certification vote, add a statutory maximum time frame of seven days for commencement of the vote and 10 days for completion of the vote. In those situations where both parties agree to a mail-in ballot, provide that the ballots must be sent out no later than seven days from the date the certification application was filed and that the counting of the ballots will occur no later than 21 days from the date that the certification application was filed.
- **Canadian Mainstream:** Many jurisdictions set a maximum number of days between the filing of the application for certification and the date of the vote. In B.C., the maximum number of days is 10 (s. 24), In Ontario it is five days (s. 8), in Manitoba it is seven days (s. 48), and in Newfoundland it is five days (s. 47). The statutes state that holidays and weekends are not counted. Alberta is not in the Canadian Mainstream.
- **Explanation:** In those cases where a certification vote would still occur – ie, for those

certification applications with between 40 per cent and 50 per cent employee support – the impact of the delay between the date that the application for certification is filed and the date of the vote continue to exist. A statutorily imposed maximum time limit for the holding and completion of the vote would go some distance to reduce the negative impacts.

A statutorily imposed time limit for the vote will also force the Labour Relations Board to develop timely processes for quick votes that would not be subject to manipulation by skilled parties and their lawyers.

As described in the earlier section, the certification process involves employees first being members of the Union or signing a petition or a membership application in favour of the Union. This is a decision that employees make while off duty and after all the time and thought that they personally need. After the application is filed, and after several days and/or weeks pass, employees must then vote again on their choice at a formal vote that is usually held on the Employer's worksite with a manager and union representative as scrutineers.

Generally, a Union in a jurisdiction where a mandatory vote is not required will wait until it has at least the minimum 50 per cent employee support before it files its application for certification, thus avoiding the requirement for a vote. The main reason for filing an application without the minimum support to avoid a vote would be that the Union perceived that the Employer both knew about the organizing campaign and was engaging in inappropriate conduct such that speed in bringing the matter to a conclusion was seen as the best strategy.

The delay between the application for certification and the time of the vote provides a built-in time frame for the Employer to use to use its undisputed power over the employee to pressure, intimidate, coerce, scare, and otherwise inappropriately influence the employee to vote against the Union. It takes very little actual Employer comment or action in the time leading up to the vote to be perceived by employees as a significant threat to their job security. Alberta history reveals many situations with subtle, and overt Employer comment and action against certification, and often we see significant and overt unfair labour practices.

The shorter that this delay to the vote is, the less time employees have to deal with intimidation and fears, often for their own job security, that Employer conduct can cause. There is no prejudice to reasonable Employers in having a quick vote as it also reduces the time of uncertainty in the workplace.

3. *Remote or inaccessible site access*

- **Issue:** There is no provision allowing the ALRB to order remote or private site access for Union organizers.
- **Alberta Solution:** Add a provision granting the ALRB the right to make orders

requiring Employers and/or private entities to allow Union organizers access to such remote sites on terms as set by the ALRB. Mandate that such applications will be dealt with expeditiously.

- **Canadian Mainstream:** The Ontario (s. 13), Manitoba (s. 21), New Brunswick (s. 4), and Canada (s. 109 and s. 109.1) statutes all provide for union access to sites where employees reside on land owned or controlled by employers. The Canada Code provides for possible disclosure of employee information as well. Newfoundland has provisions regarding offshore oil platforms (s. 38.1). Alberta is not in the Canadian mainstream.
- **Explanation:** Workers may be employed in remote locations or on private property where they are housed in camps or other Employer controlled housing. These workers, particularly those who live for all or much of their time (eg. 21 days in camp and then seven days at home each month) on the Employer's property, have a difficult time meeting with Union organizers. Given that the workers are housed on or near their remote or private work site, often without the ability to leave it via their own vehicle, the Union organizers cannot meet them privately at their homes after working hours. These workers often live long distances from their remote worksites, across all of Canada, and fly in and out so the Union organizers cannot even meet with them during their time off out of camp.

This is a particular problem in Alberta where there are a great number of remote worksites in the oil patch, for example. The worksites and the camps where workers are housed are often hundreds of kilometers from a public coffee shop or other possible meeting location. Furthermore, workers are not allowed to bring their own private vehicles to camp so they have no way of leaving for a private meeting after working hours.

The inability of workers to meet privately with Union organizers is highly detrimental to their ability to exercise their right to join Unions.

4. *Membership evidence*

- **Issue:** In Alberta, when support for a certification application is given by way of application for membership, the employee must also pay at least \$2.00 of their own money to the organizer. (s. 33 (a)(ii))
- **Alberta Solution:** Remove the requirement for the payment of any money for applications for membership filed to support a certification application.
- **Canadian Mainstream:** Most other jurisdictions do not require the payment of a set sum of money but some require the payment of whatever the Union's constitution/bylaws require or payments in accordance with the Union's general practice. Alberta is not in the Canadian mainstream.
- **Explanation:** The payment of \$2.00 is a meaningless formality with no connection to

actual application for membership requirements of the Union who is organizing. When applications for membership are used, technicalities often defeat the application for certification because there are detailed rules regarding the source of and the handling of the money. Given that support for the Union is also allowed by signature on a petition without payment of funds, many Union organizers choose this option to avoid the danger of a technical mistake causing the certification application to be dismissed.

Thus, the \$2.00 requirement leads to an approach to organizing that favours Employers and prejudices Unions in that applications for membership do not occur. Thus, the worker's connection to the Union that such an application for membership creates is not made in the process. Since petition-based evidence is accepted without monetary payment, there is no policy requirement for the payment of money by a worker. There is no rationale for this requirement.

5. *Definition of employee*

- **Issue:** Many workers are still not able to join Unions in Alberta. (s. 1 (l), s. 4)
- **Alberta Solution:** Expand the notion of employee to ensure that precarious workers (contract workers, “independent” contractors, casual workers, on-call workers, etc.) can be part of bargaining units. Also remove more of the specific exclusions set out in the Code for domestic workers, professionals (doctors, dentists, architects, engineers, lawyers), and nurse practitioners.
- **Canadian Mainstream:** Canada, Ontario, Manitoba and Newfoundland all allow professional employees to be certified, but allow for them to be separated into a separate bargaining unit. Ontario excludes domestic employees working in a private home, persons employed in hunting and trapping, silviculture, and agricultural workers covered by the Agricultural Employees Protection Act. Manitoba, Newfoundland, Saskatchewan, and Canada have no exclusion for domestic or agricultural workers. New Brunswick excludes domestic workers in a private home and allows professional workers to be certified in separate units or in larger units if the professional workers wish that. Many of the jurisdictions provide for an expansive definition of contract workers. Alberta is not in the Canadian mainstream.
- **Explanation:** The rights to join a trade union of one's choice, collectively bargain, and strike have been given clear recognition by the Supreme Court of Canada as constitutional rights and freedoms in Canada. Employees from all walks of life and in every kind of employment relationship should have these fundamental rights. History has shown that Canadian Unions and Employers are fully equipped to bargain terms and conditions of employment that reflect the specific needs of any industry and any kind of employment. Restrictions on which employees can unionize should be a thing of the past, otherwise successful charter challenges, with their excessive costs and delays, will occur.

Any historical concerns regarding the inclusion of professionals in a bargaining unit

(conflicts between their union obligations and their professional obligations) are antiquated. A simple comparison to nurses represented by the United Nurses of Alberta and the many different professionals contained in the Health Sciences Association of Alberta reveals that professionals with the highest degree of professional obligations can easily work with bargaining units. Professionals often work for larger organizations such as universities, municipalities, oil companies, manufacturing companies, etc. Those professionals who are truly management in any workplace would be excluded on that basis. There is no reason why the five enumerated professions and nurse practitioners should be excluded from bargaining units and unable to join a union unless they are truly managers.

Unfair labour practice complaints

6. *Discretion to grant an application certification without at least 40 per cent employee support when unfair labour practices are proven to have prematurely shut down a Union organizing drive.*

- **Issue:** The ALRB has no discretion to grant certification in those cases where significant Employer unfair labour practices are proven such that the Employer's actions have also effectively removed the ability of employees to exercise free choice of whether or not to support the Union's organizing campaign and prematurely shut down a Union's organizing campaign.
- **Alberta Solution:** State clearly that the ALRB has the discretion to award a certification, regardless of the level of proven employee support, in appropriate cases where unfair labour practices have been found to have effectively removed employee free choice and to have prematurely ended a Union's organizing campaign.
- **Canadian Mainstream:** B.C. (s. 14.4), Ontario (s. 11), Saskatchewan (s. 6-12), Nova Scotia (s. 25(9)) and Manitoba (s. 41) allow for certification without a vote and without the minimum employee support where there has been significant interference with employee free choice. Alberta is outside of the Canadian mainstream.
- **Explanation:** There can be significant employer interference and pressure on employees when an Employer learns of a Union organizing campaign before the application for certification is filed. In some cases, the Employer's actions are so egregious that employees become so fearful and intimidated that they are no longer able to exercise free choice in the decision regarding Union support. These kinds of situations often involve the discipline or dismissal of known Union supporters and organizers, significant and ongoing harassment of Union supporters and organizers, threats of business closure, or threats of unwanted organizational change in the event that a Union is successful in organizing the workplace, all of which are illegal activities by the Employer.

Real concern that their conduct might lead to a certification being imposed by the ALRB

has a significant deterrent effect on Employers and their behaviour. The lack of this remedy has the opposite impact on Employers, who commit unfair labour practices in Alberta without fear of any significant penalty should they be found guilty of such behavior by the ALRB.

Those Employers who do not commit unfair labour practices have nothing to fear from such a provision as it only applies to those Employers who flaunt the law.

7. Reverse onus of proof at labour board hearings for unfair labour practice complaints regarding discipline and dismissal of employees for anti-union animus/motives.

- **Issue:** The onus to prove an employee has been disciplined or dismissed as part of an unfair labour practice – that is, due to anti-union animus – currently lies with the Union/complainant because generally the entity that makes a complaint to the ALRB bears the burden of proving the facts raised in the complaint.
- **Alberta Solution:** Add a provision placing the onus of proof on the Employer for unfair labour practice complaints where an employee was disciplined or dismissed.
- **Canadian Mainstream:** A reverse onus for unfair labour practices exists in the Canada (s. 98(4)), Ontario (s. 96(5)), Saskatchewan (s. 6-63), Nova Scotia (s.56(3)) and B.C. (s. 14(7)) for complaints of unfair labour practices which impact an employee's employment. Ontario reverses the onus for an alleged impact on working conditions, not just dismissal and discipline. Alberta is outside of the Canadian mainstream.
- **Explanation:** The Employer has all or most of the information regarding why an employee has been disciplined or dismissed. In overall labour relations, it is widely accepted that the Employer bears the onus of proving the legitimacy of a decision to discipline or dismiss an employee and this is the case for collective agreement grievance arbitration and in employment law.

It is very hard for anyone to prove another's motives or reasons for acting. It is totally unfair to require the Union to prove the Employer's anti-union animus or motive in an unfair labour practice complaint. The effect of this requirement is that complaints are often lost or not pursued in the first place and breaches of the law are therefore unchecked.

There is no reasonable justification for making it harder for Unions to pursue a complaint that discipline or dismissal due an unfair labour practice occurred – which is a breach of the law – than for a Union to pursue a grievance that discipline or dismissal without just cause occurred – which is just a breach of contract.

The current law favours Employers. When there is little chance of being found guilty of breaking the law, Employers are not deterred from using discipline and/or dismissal of key Union supporters to stop a Union organizing drive or to stop the actions of a key

Union activist or union executive member once certification has been granted. One of the largest fears of workers is that supporting a Union will lead to being fired and when a Union supporter is fired, the chilling impact on the entire bargaining unit is huge. There is no reason to make it easier for Employers to get away with such conduct.

8. *Holding everyone accountable for their unfair labour practices.*

- **Issue:** The Code prohibits the actions of Employers and persons acting on behalf of Employers from committing the enumerated unfair labour practices. Unfair labour practices committed by managers or others that the Employer did not direct are not against the law. (s. 148 – 149)
- **Alberta Solution:** Make persons and entities also responsible for unfair labour practices.
- **Canadian Mainstream:** Ontario (s. 76), B.C. (s. 5), New Brunswick (s. 3(3)), Saskatchewan (s. 6-6), Nova Scotia (s. 58), Manitoba (s. 5(3)), and Canada provides protection against any person’s actions of intimidation, coercion, etc., not just the actions of the Employer or persons acting on behalf of the Employer. Alberta is outside the Canadian mainstream.
- **Explanation:** Managers and others who commit unfair labour practices are not held responsible for them. In the event that a manager decides on their own, without proven Employer guidance or direction to intimidate, threaten, coerce, threaten discipline or dismissal, discriminate against, etc. an employee because that employee is supporting or participating in a Union or involved in lawful activity under the Code, the ALRB has found that this is not a violation of the Code.

The unfair labour practice provisions specifically require that the actions are by the Employer or a “person acting on its behalf” and the latter requires an actual direction from the Employer. There is simply no basis for this protection of alleged “rogue” managers as the impact on the Union, its members and the Union’s activities is the same. Further, an Employer that does not want to be responsible for the conduct of its managers and other persons can address that by simply properly directing and supervising such staff to behave in accordance with the law. It’s naïve to suggest that Employers who don’t step in to curtail the activities of others are innocent of the impact of their acts on the employees and the workplace of the Employer.

9. *Much more significant penalties for unfair labour practices.*

- **Issue:** The current remedial approach to the remedies granted for unfair labour practices has not deterred Employers in Alberta due to a culture of acceptance of such practices. (s. 17).
- **Alberta Solution:** Amend the Code to allow the Board to impose fines and payment of legal and out of pocket costs on the wrongdoer when an unfair labour practice is found to have occurred. While there are prosecution provisions which are matters brought

before the Courts in the Code, it is the powers of the ALRB that need to be specifically enhanced when unfair labour practices are found.

- **Canadian Mainstream:** These types of fines and costs are not found in other jurisdictions. However, the situation in Alberta is unique given the historic vilification of trade unions, which is outside the Canadian mainstream. To change the anti-union culture embedded within Alberta, more extraordinary tools are required.
- **Explanation:** Lack of respect for the requirements of the Code, particularly with respect to unfair labour practices, has permeated Alberta labour relations. Hearings into alleged ULPs often occur months after the fact and the remedies are often shallow declarations of misconduct and cease and desist orders. With little or no actual negative consequences, Employers are not deterred from breaking the law to undermine Union organizing campaigns or other Union initiatives or Union officers once a Union represents the employees in a workplace.

The ALRB does not have the power to impose fines on Employers and persons who commit unfair labour practices. The available remedies all focus on putting impacted workers back into the position that they would have been but for the breach of the law. However, there is no ability to impose a punishment for breaking the law. Furthermore, while the ALRB can order the payment of legal and out of pocket expenses, the ALRB never does so. Without the deterrent impact of these penalties, Employers are not sufficiently deterred from breaking the law. Imagine if the players in a hockey game were assessed penalties by referees, but never had to spend time in the penalty box. In such a scenario, penalties become meaningless and the game descends into chaos. We would never permit such a scenario in our hockey games, but we live this scenario in labour relations every day.

Moreover, without the possibility of actual punishments, Unions are often compelled to settle unfair labour practice complaints before hearing. When, due to the delay in getting to hearing or the poisoning impact of the Employer's actions, the affected employees have found alternative work and do not wish to return to the workplace, there is little point in litigating the unfair labour practice complaint if there is no possibility of a remedy that punishes the unlawful action.

A culture of anti-union intimidation, coercion and interference is ingrained in Alberta labour relations. Granting the power to the ALRB to fine and award legal costs is the type of strong incentive needed for actual change.

Collective bargaining

10. First contract arbitration

- **Issue:** The ALRB has no ability to impose interest arbitration to settle the terms of the first collective agreement between a newly certified Employer and a Union when the

parties cannot come to agreement.

- **Alberta Solution:** Give the ALRB the power to impose first contract arbitration in appropriate circumstances regarding all first collective agreements, including in construction.
- **Canadian Mainstream:** B.C. (s. 55), Canada (s. 80), Ontario (s. 43), Newfoundland (s. 80, 80.1), Saskatchewan (s. 6-25), and Manitoba (s. 87) have provisions which allow for the settlement of the first collective agreement by arbitration or by their Labour Relations Board. In some jurisdictions it is mandatory after a period of time has passed from the notice to bargain. Alberta is not in the Canadian Mainstream.
- **Explanation:** We have seen many, many situations in Alberta, especially in the private sector, where after a hotly contested application for certification is actually won by the trade union, downright war breaks out over the negotiation of the first collective agreement.

Employers use illegal bargaining tactics, often through a chief spokesperson who is an experienced labour lawyer or consultant. Employers push for collective agreement terms designed to erode the rights and ability of the trade union to represent the members of the bargaining unit effectively. Employers insist on rollbacks that are not economically warranted. Lastly, the Employer will delay and stall collective bargaining in the hopes that the confidence of the workers in the union they have selected will be destroyed and they will decertify. Often these situations break down into a strike or lockout, putting workers out of their jobs before they have even had a chance to enjoy the benefits of working under a collective agreement. There are several notable examples of such activities in the decisions of the ALRB. Under the current provisions, employers who do not bargain in good faith during the first contract negotiations are rewarded for their illegal behaviour.

Allowing the Union to apply for first contract interest arbitration to have an independent third party settle the outstanding terms of the first collective agreement provides a meaningful incentive for parties to reach an agreement. It would create a significantly higher level of workplace stability after a certification has been granted and prevent potentially volatile confrontations with employers who have no intention of bargaining fairly. And, it has no impact at all on those Employers who are not anti-union and who bargain fairly.

11. Greater penalties for bargaining in bad faith

- **Issue:** The ALRB has little remedial power when a bargaining in bad faith complaint has been made. (s. 17)
- **Alberta Solution:** Provide the Board with a host of remedies that can be awarded when bargaining in bad faith is found. While there are prosecution provisions which are matters brought before the Courts in the Code, it is the powers of the ALRB that need

to be specifically enhanced when unfair labour practices are found.

- **Canadian Mainstream:** These types of fines and costs are not found in other jurisdictions. However the situation in Alberta is unique given the historic vilification of trade unions and the use of particularly egregious bargaining approaches, all of which are reflected in the ALRB's jurisprudence. Imposing meaningful remedial powers is necessary to break a culture in Alberta that is characterized by a deeply ingrained disrespect for working people and unions.
- **Explanation:** In addition to fines and legal costs and out of pocket expenses, specific powers to alter bargaining positions, impose meeting dates, alter bargaining protocols, require change in the composition of a bargaining team, etc. should be set out as possible remedies for bargaining in bad faith. The mere statement of these kinds of remedies in the Code would create a significant deterrent for the parties at the bargaining table who are inclined to act outside of the boundaries of good faith. Such provisions would have no negative impact on those workplace parties who act in good faith.

12. Extend freeze period provided for the negotiation of first collective agreement.

- **Issue:** Service of notice to bargain the first collective agreement after certification freezes the existing terms and conditions of employment for only 60 days. (s. 147)
- **Alberta Solution:** Extend this freeze until the conclusion of the first collective agreement or until the commencement of a lawful strike or lockout.
- **Canadian Mainstream:** The mainstream is mixed. In Canada (s. 36.1) and Nova Scotia (s. 35) the freeze is from the date of certification to the conclusion of the first collective agreement and in Ontario (s. 86) the freeze is until the conclusion of mediation. But these and other jurisdictions also allow for first contract arbitration, which mitigates the need for longer freeze periods as the collective bargaining of the first contract cannot drag on and on.
- **Explanation:** The time during which the first collective agreement is bargained is the most vulnerable to Employer delays and Employer interference. If the working conditions are not frozen until the conclusion of the first agreement, then delay becomes the strategy of some Employers in the hopes that the clock will run out and they can use the threat of adverse changes to working conditions to encourage a decertification application. As well, if the Employer is able to change terms and conditions of employment without the Union's agreement, the effectiveness of the newly certified Union is totally undermined.

13. Statutory minimums for collective agreements: just cause, Rand Formula and arbitration for dispute resolution

- **Issue:** The Code does not set the minimum requirements for collective agreements fairly as there is no requirement for Employers to have just cause for discipline and/or dismissal, there is no requirement that all collective agreement disputes must be referred to third party independent arbitration for resolution if the parties are unable to resolve such disputes, and there is no requirement that all employees, whether union members or not, must contribute Union dues (rand formula). (s. 135 - 137)
- **Alberta Solution:** Add a statutory minimum requirement that all collective agreements must include:
 - just cause for discipline and /or discharge of employees,
 - all disputes will be referred to third party independent arbitration if not resolved, and
 - all employees working in the bargaining unit must pay the Union dues, regardless of their union membership
- **Canadian Mainstream:** There is no Canadian consensus on these issues. Just cause is required by B.C. (s. 84(1)) and Manitoba (s. 76), Saskatchewan requires only arbitration to resolve differences (s. 6-45) and a minimum Rand Formula dues payment s. 6-42). Many jurisdictions require arbitration for settlement of disputes or a process agreed to by the parties. The anti-union sentiments in Alberta warrant these requirements to restore balance between the workplace parties.
- **Explanation:** These rights are critical to Union members in all industries.

The first two, just cause and independent arbitration are cornerstones to fair employee treatment. Arbitrators, including Alberta arbitrators, have implied just cause provisions into collective agreements which don't include specifically state them given the fundamental nature of this right and recognition of this principle. Independent arbitration for the resolution of disputes is so universal that it is surprising to know that such is not required in Alberta as long as the parties agree to another method of dispute resolution. Alberta arbitrators had held that employer controlled dispute resolution methods are sufficient dispute resolution methods and thus their hands are tied to take jurisdiction over a dispute.

Finally, Unions bear the duty to fairly represent all members of the bargaining unit, whether or not those employees are union members. Given the cost of such representation, it is appropriate that all protected employees contribute to the cost as the minimum standard in Alberta.

These "language" items, as opposed to "monetary" items are very hard for Unions to fight for against powerful anti-union Employers. They are a set of fair and just minimum requirements and should not be items that the Union and the employees have

to focus on at the collective bargaining table or to have to strike over.

14. Information sharing with the Union

- **Issue:** Employers are not statutorily required to share information with the Union representing their employees.
- **Alberta Solution:** Add provisions requiring the sharing of employee information and details of the compensation packages of bargaining unit employees.
- **Canadian Mainstream:** Manitoba (s. 66 and 27) and New Brunswick specify information that is to be provided to the Union. Otherwise Canadian statutes do not specify the sharing of information.
- **Explanation:** Knowing the existing compensation package of the bargaining unit employees, including details on benefits and pensions is fundamental for the Union to be able to knowledgably and effectively bargain terms and conditions of employment for the members of the bargaining unit. As the exclusive bargaining agent, the Union is entitled and required to know the members of the bargaining unit and also their full compensation package. Employers who do not readily share this information simply waste the Union's time and resources fighting for such information. Such statutory requirements do not prejudice reasonable Employers who recognize the need of a bargaining agent to have this information.

Employers often use privacy laws to try to keep information secret from the union. While there is no doubt that the privacy laws in Alberta, and across Canada, were never intended to interfere with day to day labour relations in workplaces, Employers often suggest otherwise. A clear statement in the Code that Unions are entitled to this information and that Employers must share it in the normal course of workplace labour relations would put such practices to an end.

Construction Industry

15. Restrict double breasting in construction

- **Issue:** The Code has not been understood to restrict construction companies from "double breasting" by operating both unionized and non-union operations under common control and direction. (s. 192 and s. 47)
- **Alberta Solution:** Remove the special construction industry provision regarding common employer, making it clear that construction companies are subject to the same common employer requirements as all other Employers. Remove restrictions on retroactivity so that in appropriate cases the Board has discretion to craft a meaningful remedy. Remove the provision in the current subsection 192(3) which directs the Board not to make common employer declarations against companies that do not themselves

employ tradespersons, so that in appropriate cases it is clear that corporate “parents” can be bound by the collective bargaining obligations of their subsidiaries. Allow discretion to the ALRB to relieve against significant impacts in the construction industry where appropriate.

- **Canadian Mainstream:** No other jurisdictions allow for double breasting in the construction or any other industry. Alberta is a thousand miles outside of the Canadian mainstream on this issue.
- **Explanation:** Where multiple companies controlled by the same individuals or the same corporate parents are structured so that one operates “union” and one “non-union” or through an organization such as the Christian Labour Association of Canada (CLAC), bargaining rights are rendered meaningless and union members suffer real losses.

In Alberta, it has become the industry understanding that double breasting or even triple breasting is allowed by the Code, despite the wording of Section 192. Significantly, s. 192 applies, at best, to construction, which is defined in Section 1 (g) as specifically not including maintenance. However, we are starting to see the view that Code granted permission to double breast even extends to maintenance – underlining the need to change this provision now.

The purpose of common employer provisions is to prevent the defeat of bargaining rights by “spinning off” new companies to operate free and clear of obligations to unionized employees and their unions. However, if a declaration cannot, in appropriate circumstances, be retroactive and instead is restricted to the date of application there will be no effective remedy – as companies are “caught” new ones can be formed. The current system involves an expensive cat and mouse game that encourages employers to game the system. In fact, “triple breasting” has developed in Alberta’s construction industry – a group of companies may include a company with building trades collective agreements, a “non-union” company, and a CLAC company. Construction employers have, notoriously, sought to establish CLAC relationships for the purpose of preventing organizing activities by the unions that have traditionally represented construction trades, and have used multiple corporate alter-egos to facilitate this. Effective common employer provisions, as exist in other jurisdiction, will serve to minimize the corporate shell game that has become an embarrassing feature of Alberta’s construction industry.

It is anticipated that Employers who have established non-union and/or alternative union arms will suggest such a change will destroy the construction industry and/or their operations. No other jurisdiction in Canada allows for this practice and their construction industries are fine. Any negative impacts on current Employers can be addressed in the collective bargaining process. Employers could also ask the ALRB to consider their specific issues, as supported by actual evidence, in common employer applications. The Board could then exercise its discretion in those few cases where real and significant prejudice is proven to provide suitable remedies.

16. To maintain fairness in light of the registration system, all collective agreements in the construction industry should expire on the same date and have the same term, including collective agreements between non-registration unions and employers.

- **Issue:** The Code requires that all Registration collective agreements expire on April 30 “calculated biennially from April 30, 1989”. The ALRB has ruled that construction collective agreements between CLAC and Employers can expire on any date and be for any term. (s. 183)
- **Alberta Solution:** Change s. 183 to apply to all collective agreements that cover construction in Alberta so as to level the playing field between all unions operating in construction.
- **Canadian Mainstream:** This is mainly an Alberta issue.
- **Explanation:** As a result of the Registration System set up in the Code, when a building trade union that is a party to a construction registration collective agreement receives a certification for a new construction bargaining unit with a new employer, that Employer is automatically bound to the registration collective agreement for that trade. All of the traditional building trades unions (those unions which represent a single trade, such as elections, ironworkers, carpenters, etc.) are part of the registration system.

All of the registration construction industry collective agreements (as opposed to maintenance or shop collective agreement) are required by the Code to have the same expiry date of April 30, “calculated biennially from April 30, 1989.” The common expiry date means that the trade unions and registered employer organizations in the construction industry all enter into collective bargaining at the same time and generally conclude their agreements in the same time frame, both of which bring stability to the construction industry.

However, the ALRB has held that unions which are not part of the registration system are not required to comply with s. 183. Those unions, primarily CLAC, are able to negotiate different expiry dates with Employers, often in a manner which is seen to give CLAC market advantage as their collective agreements are set while the rest of the industry is forced to be in collective bargaining by the impact of the common expiry provision. There is no policy or practical reason for this disparity except to favour CLAC over traditional building trades unions. Instead, it is time to level the playing field.

It is important to just note that this provision applies to construction, which, by the definition set out in subsection 1(g) of the Code does not include maintenance. This change would apply to construction collective agreements only.

17. *The building trades unions are effectively unable to collectively bargain effectively or strike in the construction industry due to oppressive group provisions in the Code.*

- **Issue:** In respect to the construction industry, the Code contains a complicated process which groups the building trades unions together for the purposes of strike votes, strike notices, strike commencement and strike continuation. After 75 per cent of the building trades unions settle their collective agreements, the rest are forced to interest arbitration where the industry pattern is forced upon them. (s. 184 – 191)
- **Alberta Solution:** Remove s. 184 – 191 of the Code and let the regular Code provisions regarding collective bargaining and strike/lockout apply to the construction industry.
- **Canadian Mainstream:** There is no other jurisdiction in Canada which ties the hands of building trades unions in the construction industry regarding how they collectively bargain or strike in a manner even close to the Alberta legislation. Alberta is very far from the Canadian mainstream.
- **Explanation:** The only explanation for the complex and intrusive process of collective bargaining and striking that exists in the Code is to prevent building trades unions from ever being able to use a strike as part of their collective bargaining strategy. There should be no doubt that sections 184 to 191 of the Code are unconstitutional, in light of the recent Supreme Court of Canada decisions.

In the *SFL* case, the Supreme Court of Canada said:

75 This historical, international, and jurisprudential landscape suggests compellingly to me that s. 2(d) has arrived at the destination sought by Dickson C.J. in the *Alberta Reference*, namely, the conclusion that a meaningful process of collective bargaining requires the ability of employees to participate in the collective withdrawal of services for the purpose of pursuing the terms and conditions of their employment through a collective agreement. Where good faith negotiations break down, the ability to engage in the collective withdrawal of services is a necessary component of the process through which workers can continue to participate [page290] meaningfully in the pursuit of their collective workplace goals. In this case, the suppression of the right to strike amounts to a substantial interference with the right to a meaningful process of collective bargaining.

Even worse perhaps than removing any actual chance to go on strike is the fact that the mandatory arbitration when 75 per cent of the industry has settled their collective agreements happens and the steadfast insistence of such interest arbitrators in imposing on the industry “pattern” on any trades who were trying to bargain individual deals. This means that the building trades union that made an effort to collectively bargain terms and conditions unique to their trade and membership can be totally undermined by the Registered Employer Organization simply delaying the bargaining of those unique terms. Then, once 75 per cent of the other trades settle their collective agreements, the union

trying to bargain its own requirements is required to go to interest arbitration where the industry pattern is imposed on that union and its members. There is no actual individual collective bargaining allowed in the construction industry as a result of these oppressive provisions of the Code.

There is no justification for these provisions except to undermine the bargaining authority of the building trades unions, their independent identities and their ability to strike.

The fact that the industry has been able to work out some voluntary group bargaining approaches does not, in any way, fix the problems with these sections of the Code. In fact, the current approach of the industry simply underlines the problems with the provisions of the Code.

There is simply no reason why building trades Unions operating in the construction industry should be restricted in this way. CLAC is free to bargain in the construction industry in the same manner as all other Unions in Alberta under the main provisions of the Code. Removal of the provisions of s. 184 – 191 would simply level the playing field in construction.

It should also be noted that this submission has already advocated for first contract legislation for all industries, including construction.

18. Unions of convenience

- **Issue:** Historically employer dominated and employer selected unions, such as unions like CLAC, have been used by the Employers in the construction industry to block organizing attempts by traditional building trades Unions.
- **Alberta Solution:** Add provisions requiring greater scrutiny of non-traditional building trades unions seeking to organize in the construction and maintenance industries for employer domination generally and especially in situations when there are a very low number of employees at the time of the certification application.
- **Canadian Mainstream:** The other statutes are silent on this particularly Alberta problem. All jurisdictions, including Alberta, prohibit employer domination of a trade union and employer support of a certification application. Despite this restriction, there is a significant history of allowing employer dominated unions of convenience to hold a great number of bargaining rights in construction in Alberta and as such more needs to be done to stop the practice.
- **Explanation:** Over the years, Alberta Employers have worked with unions of convenience, especially CLAC, to undermine the opportunities for trade unions that operate independently of Employers to be certified. In many cases, particularly in the construction industry, CLAC has achieved certification with only two employees supporting the application in circumstances that suggest Employer support. This history

is well documented in the *Firestone* decision and to a lesser degree in the *Finning* decision as well.

Code mandated requirements for greater scrutiny of the certification applications of such unions is the easiest way to address this longstanding situation, which has become an accepted business practice in Alberta.

19. Special construction industry recent statutory additions

- **Issue:** In 2008, additional requirements were added with respect to organizing, revocation, and market enhancement recovery funds in the construction industry via Bill 26 of the 27th Legislature, 1st Session, 2008, a Bill that was introduced and passed in three days and which received Royal Assent five days later. (s. 34.1, s. 52(4.1), s. 52 (4.2), s. 53.1, s. 148.1, s.148.2)
- **Alberta Solution:** Remove all of these sections from the Code.
- **Canadian Mainstream:** No labour laws in any jurisdiction in Canada include similar provisions. Alberta is far from the Canadian Mainstream regarding each of these recent additions to the Code in the construction industry.
- **Explanation:** This amendment was carefully crafted to disadvantage building trades unions while permitting Employer-inspired CLAC certifications to succeed. These provisions do nothing to enhance the rights of workers or Unions and simply make it easier for Employers to avoid unionization in the construction industry.

The first change was to disqualify employees who otherwise met the usual requirements to vote from voting in construction certification application unless they had worked for that employer for at least 30 consecutive days prior to the date of the application for certification and the employee had not quit work before the date of the certification vote. Given the “just-in-time” nature of construction industry hiring, it is not common for a group of trades persons to be on site for 30 days before they might seek to be represented by a trade union of their choice. Furthermore, it is not uncommon for a group of trades persons to work a total of less than 30 consecutive days on a construction project at any time.

The second change was, for the construction industry only, to open a 90-day window right after the date of certification where a revocation application can be filed and then, again, limit those who can vote on such application to the employees who worked at least 30 days prior to the revocation application.

The third change was to outlaw market enhancement recovery funds. Very basically, some of the building trade unions and their corresponding employer organizations had, over the years, developed funds to reduce the impact of certification and the immediate application of the registration collective agreement in the construction industry on employers who had bid jobs based on different compensation packages than set out in

the collective agreements. These funds, established by industry cooperation, were outlawed and required to disband. The only reason to do so was to improve the market position of alternative unions, such as CLAC, in comparison to the building trades unions.

Each of these 2008 amendments punished building trades unions and those employees who wished to be represented by them in construction when no actual problems existed. There is simply no reason for these provisions at the time and certainly no reasons for the current government to continue them.

20. Division 8

- **Issue:** Division 8 allows the government to declare a construction project outside of the strike and lockout provisions of the Code for its entire time, and has many other onerous provisions regarding the rights of Unions and the operation of their collective agreements.
- **Alberta Solution:** Remove Division 8 entirely and cancel all outstanding declarations.
- **Canadian Mainstream:** Division 8 is unique to Alberta.
- **Explanation:** Division 8 is entirely unnecessary and is a draconian provision that lets the Government interfere with the constitutional rights of Unions and their members to strike, and potentially the right to join unions and to collectively bargain. Over the years, Unions and contractors have come close to litigation over the impacts of the Division 8 declaration at the CNRL Horizon site but no litigation has ever resulted in a decision, so there has been no actual guidance on which views are correct.

More importantly, Division 8 is not needed. The building trades unions in Alberta have successfully negotiated many project labour agreements with the contractors and owners in the construction industry which bring about an enhanced level of stability and labour peace. Such freely negotiated project labour agreements allow the workplace parties to enter into a bargain that reflects the balance of rights that all players need. The Code should encourage an approach that does not violate the constitutional rights of Unions and their members.

Successorship and Common employer

21. Place an evidentiary onus on the Employer in successorship and common employer applications.

- **Issue:** The Union, as applicant, bears the onus of proof while the Employer has all the detailed information about how their organization operates.
- **Alberta Solution:** Require an evidentiary burden of proof on Employers and disclosure of documents and information by Employers as to the nature of their operations when a

successorship or common employer application is filed.

- **Canadian Mainstream:** Manitoba (s. 57) and Saskatchewan (s. 6-79) specify the evidentiary onus of proof is on the employer in successorship applications. There is no clear approach to this issue.
- **Explanation:** The point of successorship and common control provisions is to ensure that the rights of employees to choose their Union are not curtailed by the Employer reorganizing operations to move work to a non-union side of the operation and then close down or limit the work available to union members. Employers know the details of their operations but when they are attempting to avoid the transfer of the Union's bargaining rights to their new or contemporaneous operations, Employers hide this information from their Union.

To achieve the legislative purpose, it makes sense for Employers to be required to share the information that only the Employer has access to. The current system encourages employers to be inappropriately secretive and renders what should be relatively simple proceedings prohibitively expensive.

22. Recognize successorship rights for successive contractors.

- **Issue:** The ALRB has determined that in contract situations, there is no successorship as a new contractor takes over.
- **Alberta Solution:** Allow the successorship provisions to apply to successive contracts.
- **Canadian Mainstream:** This is not a provision that is specifically set out in other jurisdictions.
- **Explanation:** This exception to successorship applies to situations where the Employer contracts with another, usually an owner, to provide services to the operations. For example, food services, security, parking lots and janitorial services to larger operations may be contracted to a third party. The Union's certification for the owner of the operation does not cover the employees of the contractor.

When a Union organizes the employees of the contractor, it often happens that then the owner puts the contract up for rebid and the now unionized contractor is replaced by a non-union contractor. Successorship rights ought to apply, as the new contractor and its employees are performing the same work and are engaged in the same business as the outgoing contractor. In many cases the new non-union contractor even hired many of the old employees, although often not those employees who are perceived to be pro-union.

Strikes

23. Make the use of replacement workers to perform the work of striking or locked out employees illegal.

- **Issue:** It is currently legal for Employers to use other employees and management to perform the work of employees who are on strike or who have been locked out, thus undermining the effectiveness and impact of the strike on the operation.
- **Alberta Solution:** Make the use of replacement workers illegal.
- **Canadian Mainstream:** Canada (s. 68) prohibits the use of replacement workers during a strike if the use of them undermines Union representation, B.C. (s. 68) prohibits replacement workers and short-term employees from working during a strike, Ontario (s.78) and Manitoba (s. 14) prohibits use of professional strike breakers. There is no clear approach to this issue.
- **Explanation:** The right to strike and to use a strike as an economic weapon to attempt to force an Employer to change its position at the bargaining table so that a collective agreement can be achieved has been recognized as a constitutional right of trade unions and their members. Allowing Employers to make use of replacement workers and management to do the work of employees who are on strike can seriously undermine the effectiveness of the strike. Further, allowing Employers to lock out employees and then give their work to replacement workers is equally unfair as the Employer is thereby mitigating the employer impact of the lockout unfairly.

The right to strike and lockout has been hugely curtailed already by the provisions of the Code which restrict when a strike or lockout may occur. Allowing for replacement workers advantages only Employers in an unfair and probably unconstitutional manner. Furthermore, banning replacement workers would significantly increase the pressure on the Employer to reach a collective agreement if a strike was called. The successful conclusion of freely negotiated collective agreements is the object of collective bargaining and restriction of the use of replacement workers wholly supports that goal.

24. Restriction on secondary picketing.

- **Issue:** The Supreme Court of Canada found that restrictions on secondary picketing were unconstitutional years ago. However, the Code continues to include that restriction. (s. 84)
- **Alberta Solution:** Remove the language from s. 84 of the Code that purports to restrict secondary picketing.
- **Canadian Mainstream:** Other jurisdictions do not have legislation that purports to restrict secondary picketing. Alberta is outside of the Canadian Mainstream.

- **Explanation:** First, legislation should not include unconstitutional provisions as sometimes decisionmakers rely on those provisions, which leads to wrong decisions that parties must appeal to rectify with the attendant costs and delay. Delay in the case of a strike is devastating to the effectiveness of a strike. Further, even if the workplace parties understand the unconstitutionality of a law, ordinary workers, managers and the public often do not. As a result there are expectations that secondary picketing is not allowed, that requests of workers to engage in such are inappropriate, and that secondary picket lines are illegal. All of this undermines the respect for the Union and its strike strategies by its members, management and the public, which is again, devastating during a strike.

There is no justification for the continuation of clearly unconstitutional laws.

25.A process to resolve prolonged strikes and lockouts should be added.

- **Issue:** Some strikes or lockouts are unduly protracted and will not resolve due to inherent power imbalances between the employer and the union. This is particularly so when there is no restriction on management's use of replacement workers.
- **Alberta Solution:** Provide both parties to the labour dispute the opportunity to apply to the ALRB for the referral of the dispute to binding interest arbitration when it is proven that the strike or lockout is unduly protracted (for example, applications could be made after 8 weeks or more from the start of the strike/lockout) and/or that there is evidence that further collective bargaining has little likelihood of resulting in a collective agreement. Provide the ability for the injured party to make such an application at any time when unfair labour practice complainants and/or bargaining in bad faith complaints have been held to have been committed by the other party. Restrict the use of replacement workers during strikes and lockouts.
- **Canadian Mainstream:** There are similar provisions in Manitoba, ss. 87.1 – 87.4 of *The Labour Relations Act*.
- **Explanation:** Historically, many strikes/lockouts in Alberta have resulted in freely negotiated collective agreements. However, there are several examples of situation where the power imbalance between the union and the employer, the presence of unfair labour practices, bargaining in bad faith, adverse economic conditions, the use of replacement workers, and other factors led to the prolonging of a strike/lockout. While the constitutional right to strike needs to be fully respected, there should also be a mechanism for either party to seek a means to finalize the collective agreement when economic weapons cease to have little, if any, effect.

There is little value to the public, to the economy or to the workplace parties of protracted labour disputes in such circumstances. Labour unrest is understood to be seen as destabilizing to the economy and to therefore have a negative impact on investment and as such, when it is ineffective, alternative methods to resolve the collective are

advantageous to the public and to the parties.

Allowing for a process for the ALRB to hear an application to refer the dispute to binding interest arbitration when the strike/lockout has become unduly prolonged would provide the necessary balance of all rights and also provides for a practical assessment of the situation by the ALRB in the overall context of the dispute. Such provisions would have the added benefit of encouraging the parties to bargain in good faith to effectively resolve their collective agreements and also to respect and obey the unfair labour practice provisions of the *Code* to avoid the imposition of binding arbitration. Adding restrictions on replacement workers would also strengthen the effectiveness of strikes/lockouts and reduce their duration.

Alberta Labour Relations Board Powers and Procedures

26. Expedited hearings and/or interim reinstatement and other interim remedial orders.

- **Issue:** The processing of, hearing of and deciding of applications and complaints to the Alberta Labour Relations Board hearings takes too long, particularly for matters involving the intimidation of workers.
- **Alberta Solution:** Add provisions which mandate expedited consideration by the ALRB of interim hearings and interim relief in cases where the allegations are that the impact on the parties, employees, and/or the workplace is significant. Ensure that such provisions require the Board to schedule expedited hearings on no less than four hours notice and up to 10 days notice, depending on the nature and seriousness of the issues raised.
- **Canadian Mainstream:** Other jurisdictions allow for interim relief. There are no provisions that mandate the use of such hearings.
- **Explanation:** One of the overall important components of Wagner Act model for Canadian labour relations is the balance between workplace peace and the rights of workers to stand together to use their bargaining power to gain benefits for all by withdrawing their labour. The result is that modern labour laws in Canada mandate that strikes and lockouts may only occur in very specific circumstances and that all other wildcat walkouts and lockouts are illegal. Instead, workplace disagreements are required to be resolved through collective bargaining and using grievance and arbitration of unresolved disputes on a work now and grieve later philosophy.

A similar fair balance is achieved in terms of *Code* complaints and applications when the Board's attention and resources are focused on moving those matters to conclusion as quickly as possible. One way to reduce the impact of institutional delay in setting dates, hearing matters and providing reasoned decisions is to provide interim relief on an expedited basis in every case possible. Presently, the ALRB is only required to consider interim relief if a party requests it and only in particularly egregious kinds of situations.

Provision of a time frame of four hours to 10 days notice of the commencement of the expedited hearing, with a requirement that the Board carefully exercise its discretion in the delay allowed based on the circumstances of the issues raised, will ensure that expedited matters proceed quickly. Four hours notice is already the Board's practice for the scheduling of wildcat strike applications, so this timeline is not out of step with the Board's abilities to respond to applications.

27. New technologies.

- **Issue:** New technologies are available for voting, filing documents and communication with the Board but the Board does not use them.
- **Alberta Solution:** Add a provision mandating the ALRB to utilize new technologies to streamline and expedite votes, filing of applications, communications with the ALRB and for hearings.
- **Canadian Mainstream:** Other jurisdictions are silent on the use of new technologies. However, amendments in those jurisdictions have, for the most part, not been made recently.
- **Explanation:** The ALRB relies on in-person and fax for filing of applications and communications with the ALRB. For voting, voters must either appear in person or send in mail-in ballots. Hearings are conducted in person or minor procedural matters are heard via telephone conference call. There is no provision for communication and filing by email, new voting technology, sharing of documents via cloud-based services, video or telephone hearing appearances, presentation of exhibits electronically at hearings, etc.

New technologies are being routinely used in the Court system in Alberta and across Canada at some other administrative tribunals. New technologies generally expedite processes and reduce costs. Technologies can allow workers, Unions and Employers who are based outside of Edmonton and Calgary to participate in Board proceedings with far less expense and with greater ease. While in-person appearances will always be necessary for longer hearings, the lack of other options generally reduces access to justice and increases the costs of participation, all of which places a significantly greater burden on Unions and employees than on Employers, especially larger Employers.

New technologies, after the initial investment in establishing the processes to ensure that they work fairly and with proper security and privacy, would expedite the completion of cases, which is an overall savings to the Board and the workplace parties. More importantly, it is fundamental, as the late Justice Bora Laskin said, that “labour relations delayed is labour relations denied.” The Board should have a legislative mandate to make use of all methods to expedite the resolution of the cases before it.

28. *The Alberta Labour Relations Board composition and length of terms.*

- **Issue:** The ALRB is not representative of the diversity of the Alberta population and the suggestion that Board appointments are subject to outside laws regarding the length of appointments compromises the Board's diversity and expertise.
- **Alberta Solution:** Legislate a priority for gender, racial, cultural, and other diversity among the Board Chair and Vice-Chairs and Members. Exclude the *Code* from the operation of any outside statutes setting up term limits for the Board Chair, Vice-Chairs and Members.
- **Canadian Mainstream:** Other jurisdictions do not have diversity requirements for their Labour Relations Board in their legislation. Alberta can be a leader in this regard.
- **Explanation:** Until the very last round of appointments of Board Members in the early summer of 2016, there were substantially more male Board Members (including Chair and Vice-Chairs) than female members. Representation from the First Nations, LGBTQ, and other communities has been almost or completely non-existent. Every current Board Member, including the Chair and Vice-Chairs is white.

A look around the workplaces in Alberta will show a diverse multi-cultural workforce of all genders and sexual preferences. Clearly, without a legislative mandate, the current appointment processes for the ALRB do not result in Board makeup reflective of our community.

Term limits have the effect of lessening the willingness of those who are not in the majority being willing to take the time from their careers or from being supported by their employers (whether from the management or the labour community) to serve on the ALRB as Members or as Chair or Vice-Chair. The expertise and independence required for ALRB Members, Vice-Chair and Chair is enhanced by allowing longer terms of office.

29. *Board independence from Government.*

- **Issue:** Members of the ALRB should not be involved in drafting the legislation and/or regulations that they will adjudicate upon.
- **Alberta Solution:** Add a provision stating that the Chair, Vice-Chairs and Board Members are not permitted to adjudicate any matter which concerns the application or interpretation of legislation or regulations that they wrote or assisted in writing.
- **Canadian Mainstream:** There are no similar provisions. However, the common law supports the need for independence between the executive and judicial arms of the state.
Explanation: In Alberta, there has been a history of the Board Chair and/or Vice-Chairs being rumoured to have been involved in the drafting of the Code, amendments

to the Code and regulations, with some of those rumours ultimately confirmed. Those same persons did not disqualify themselves from hearing matters of interpretation of the provisions that they had written.

Arbitration provisions of the Labour Relations Code

30. Improve the powers of arbitrators appointed under a collective agreement or the Code.

- **Issue:** Arbitrators in Alberta do not have the power to relieve against breaches of mandatory time limits in appropriate circumstances, to order pre-hearing disclosure of documents, or to fully apply the doctrine of estoppel.
- **Alberta Solution:** Add to the powers of Arbitrators to give an arbitrator the power to relieve against mandatory time limits in appropriate circumstances, to order pre-hearing disclosure of documents and to fully apply the doctrine of estoppel as both “a shield and a sword.”
- **Canadian Mainstream:** Many jurisdictions allow arbitrators to extend time limits (for example, B.C. (s. 89(e)), Manitoba (s. 121(2)(e)), Saskatchewan (s. 6-49(3)(f)), Nova Scotia (s.43D) and order document production (Manitoba (s. 120(1)(e), and Nova Scotia (s. 43B). Arbitrators in other jurisdictions apply the full doctrine of estoppel, it is only in Alberta that the Court of Appeal has prevented that option.
- **Explanation:** Arbitrators are expert independent decisionmakers appointed by the agreement of the parties to hear and decide grievances under collective agreements and also to hear arbitrations to finalize the terms of collective agreements when interest arbitration has been agreed to or imposed.

The provisions of the Code have been interpreted to mean that Alberta Arbitrators cannot extend or relieve against the impact of a breach of a mandatory time limit in the grievance procedure. This means that when a Union representative, who is often a volunteer union steward, misses a time limit to advance a grievance, the grievance cannot proceed to be heard or ruled upon.

If the mistake is due to a failure of the Union to fairly represent that member, the ALRB can, as a remedy for a duty of fair representation complaint, extend the time limits and send a grievance to arbitration. However, this approach requires first that the Union member make a formal complaint against their union and generally will delay the hearing of the grievance for about a year or more from the date of the mistake.

A more fair approach is to allow the Arbitrator to determine if the circumstances leading to the missed time limit warrant an extension of the timelines. This process is much faster and it allows the dispute over whether the timeline should be extended to be argued between the Employer and the Union rather than the Union and its member.

As grievances and workplace technology become more complex, the relevant documents in an arbitration have become more numerous and more complex. Pre-hearing disclosure orders allow the parties to be prepared to address those documents when the hearing begins, rather than having hearings start and then need to adjourn while the parties, usually the Union, takes the time necessary to understand documents and prepare a response to them. The delay is even more problematic given that the dearth of Alberta Arbitrators means that hearings are generally scheduled a year in advance or more.

Estoppel is an equitable doctrine applied by the Courts. Although it is much more complex, estoppel basically allows a party to rely on a representation by the other party as to the application of the contract between them, provided that the first party relied to its detriment on that representation. The Alberta Court of Appeal has held that Alberta Arbitrators can only apply estoppel to protect rights set out in the collective agreement from being taken away, but not to require an Employer to continue to provide rights or benefits that are not written in the collective agreement (that is, estoppel can be used as a shield but not a sword). This result is out of step with the jurisdiction of Arbitrators across Canada and the jurisdiction of the Courts in Alberta and across Canada. There is no policy reason to support it.

Sectoral Bargaining

31. Provisions that allow for sectoral bargaining in industries with a majority of precarious workers are needed.

- **Issue:** Traditional approaches to organizing and representing labour are not always effective for precarious workers.
- **Alberta Solution:** Add the opportunity for unions in a recognizable sector of the economy to apply to the Board to bargain sectorally and/or in groups. Add a provision to allow for the acceptance of novel approaches to sectoral bargaining. Include a provision similar to the US National Labour Relations Act s. 7, protecting concerted activities of employees.
- **Canadian Mainstream:** This is an emerging issue but similar sectoral systems exist in continental Europe and Quebec.
- **Explanation:** As the workplaces in Alberta change, there is an opportunity to allow for approaches to collective bargaining to change too. New approaches to collective bargaining that reflect some of the challenges and realities of increasingly common precarious work, where workers do not have effective access to collective associational rights through traditional organizing and bargaining models, can complement with and integrate into these existing models. Reference to successful models of sectoral bargaining in Europe, including Austria, Belgium, Germany, Switzerland, France and the Netherlands, as well as the decree system in Quebec, supports the inclusion of this concept in Alberta. Sectoral bargaining allows all workers in a single sector, regardless of

employer, to benefit from the bargaining process.

Retail and food service workers are typically identified as potential beneficiaries of a sectoral bargaining regime, as it would allow workers from multiple franchise locations who perform similar tasks to come together to seek certification. Under the traditional Wagner Model, such workers would not be able to realize their right to collective action through a union. Anti-union tactics are more effective in smaller groups, especially where anonymity is not as strong. Employees in these sectors are usually not enterprise-based but often change jobs or employers frequently within the same sector. There are also significant constraints on the organizational and institutional capacities of unions to successfully organize smaller workplaces. Thus, the ability to extend minimum standards to a sector reduces the incentive and ability of employers to prevent the certification of a particular worksite. Indeed, as a review panel in British Columbia found, rights under existing legislative models are so difficult for workers in precarious jobs that "... for these persons certification and collective bargaining rights are illusory."

The inclusion of a sectoral bargaining model would allow for the establishment of minimum standards across defined labour markets as a means to provide security for workers while maintaining the flexibility necessary to respond to business or technical realities of certain sectors. We would also be able to extend labour law and union-standard protections to workplaces like franchises more easily. By bringing more employees together to bargain, it also achieves one of the key objectives of our labour relations regime, which is to address the power imbalance between employer and worker.

Unify Labour Law

32. There is no need for labour laws to be spread among multiple statutes.

- **Issue:** In Alberta, a significant number of workers in the public sector and the broader public sector have their rights to join a union and participate in collective bargaining governed by the *Public Sector Employees Relations Act* ("PSERA") and the *Post Secondary Learning Act* ("PSLA"). Both PSERA and the PSLA provide significantly less constitutional rights and usual protections to unions and to workers.
- **Alberta Solution:** Repeal PSERA and the labour relations sections of the PSLA and move those workplaces covered by PSERA and the PSLA into the provisions of the *Code*.
- **Canadian Mainstream:** There is a mixture of approaches to the labour relations of the public sector across Canada. Also in those jurisdictions with separate statutes, there is often recognition of far more rights to unions and their members than exist in Alberta.
- **Explanation:** It makes no sense for the employees, Unions and Employers under the PSLA and PSERA to have less rights and protections than those under the *Code*. All workplace parties benefit from consistent labour laws which level the playing field

between them. At this juncture in labour relations, with the recent guidance of the Supreme Court of Canada regarding the constitutional rights to collectively bargain, chose a union of the workers choice and strike, there is no reason for significant groups of employees in Alberta to be treated as they currently are.

Pay Equity

33. There is no recognition of the systemic gender based wage gap in Alberta and no place for workers or Unions to attempt to remedy it.

- **Issue:** A gender-based wage gap exists in Alberta.
- **Alberta Solution:** Add a provision mandating that all collective agreements entered into after January 1, 2017 must contain a process to identify, evaluate and rectify any systemic gender-based wage gaps, including a process for independent arbitration of any differences. Alternatively, separate pay equity legislation that takes effect no later than January 1, 2017 would be another approach.
- **Canadian Mainstream:** Other jurisdictions address pay equity issues in a separate statute or as part of their human rights legislation. Alberta has no such legislation and can be a leader by allowing the workplace parties to resolve these issues collaboratively.
- **Explanation:** It is shameful that the last reports on the gender based pay gap in Alberta project the 2016 gap to be that women make about 50 cents when men make \$1.00 for work of equal value. There is no excuse for the Government of Alberta to allow this systemic discrimination and devaluation of women to continue.

According to a 2016 report by Kathleen A. Lahey published by the Parkland Institute: “Gender pay inequalities lie at the core of women’s economic inequality in Canada, and Alberta has the largest gender income gap in the country – 41 per cent compared to the national average of 33 per cent. In dollar terms, Alberta women working full-time, full-year are on average making \$31,100 less than their male colleagues each year”... Pg. 6

“In 2016, the difference between total market incomes for women compared to men in Alberta is projected to be 50 per cent – with all factors and sources of income taken into account, women in Alberta are likely to earn just half of what their male counterparts will take home in a year. In addition, Alberta women are burdened with working a “double day,” averaging 35 hours of unpaid work weekly, compared to 17 hours for Alberta men”. Pg. 1

“It is striking that in Alberta, women’s average wages (\$28,132) are likely to be less than half of men’s average wages (\$58,080) in 2016.” Pg. 7

Kathleen A. Lahey. “Equal Worth: Designing Effective Pay Equity Laws for

Human Rights

34. *Workplace parties – particularly owners and project managers – are immune from compliance with the Alberta Human Rights Act for employment situations.*

- **Issue:** Section 7 of the Alberta Human Rights Act only prohibits actions of an “employer”. The Alberta Court of Appeal, in *Lockerbie & Hole Industrial Inc. v. Alberta (Human Rights and Citizenship Commission, Director)*, 2011 ABCA 3, has very narrowly interpreted the word employer.
- **Alberta Solution:** Change the word employer in section 7 of the Alberta Human Rights Act to person.
- **Canadian Mainstream:** Most jurisdictions use the word person, not employer for the protection of human rights in the context of employment. Furthermore, the Alberta Court of Appeal decision is out of step with decisions from many other provinces which interpret the word employer in many contexts (labour, workers compensation, occupational health and safety, etc.) very broadly.
- **Explanation:** Limiting human rights requirements to employers means that an owner or project manager can place restrictions on the contractors that violate human rights but there is no ability to challenge them. For example, an owner of a privately held company can say, no women are allowed to work on this site. The contractors have to follow the restrictions of the owner and thus will not be able to employ women on that site. This is unjustifiable in this century.

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