United Nurses of Alberta

Review of the Alberta Labour Relations Code

Submission by United Nurses of Alberta

December 20, 2019

Background and Overview

On November 22, 2019, Alberta unions were asked to submit written responses to the Alberta Government's planned review of the Alberta Labour Relations Code. The Government asked for unions' written comments to be submitted by December 22, 2019, less than a month after the call for feedback was made.

In addition to this extremely short notice, very little information was provided about the changes the government is contemplating. Materials provided to assist stakeholders with the submission process, moreover, are rife with tendentious statements and short on evidence to support them.

For example, the "Written Submission Guide" distributed by the Government states that revisions to the code in 2017 "went too far and affected the balance in the workplace, including having a negative impact on the competitiveness of Alberta businesses." There is no evidence to support this claim, and an extremely strong case to be made it is completely false. Nor is there any information about who raised these concerns, which do not reflect the views of all Employers.

In addition, there has been no effort by the Government to hold joint Union-Employer consultation sessions at which Employer and union representatives with different interests and perspectives but a history of strong effective working relationships can work together to reach a mutually satisfactory agreement. This is an approach known to work well. The materials refer to "stakeholders," but there is no effort by the Government to define who it believes these stakeholders are. The obvious conclusion is that this review is not based on a genuine reflection of the views of Employers, but the result of a lobbying effort by anti-union special interest groups close to the governing party.

UNA does not accept the premise of this review. Moreover, in light of the 2017 revisions to the Code, the first in more than 30 years made after a lengthy and

fulsome consultation process involving both Employer and Union representatives, UNA does not accept the need for a review at this time.

Almost all the changes included in the 2017 revisions placed Alberta labour laws in the middle of the Canadian labour relations mainstream. Accordingly, to be clear, *there is no need to make changes to Alberta labour laws at this time.*

We remind the Minister of Labour and the Department of Labour that the foundation of the Canadian labour relations system, as in an any democratic society, is the effort to provide Employers and Employees with stability and certainty in their workplaces. So any changes contemplated to the system should keep that goal in mind, not deliberately undermine it. Without a legitimate labour-relations context in which to express and deal with their concerns, Employees will seek other avenues to vent their frustration and displeasure.

UNA makes this submission with the caveat that it believes the hurried steps leading to the 2019 review strongly suggest it is not a sincere, legitimate consultation, but merely window dressing for an effort to impose the governing party's ideology on the legal framework of labour relations.

United Nurses of Alberta is the representative of more than 30,000 Registered Nurses and Registered Psychiatric Nurses in Alberta, including those employed by the largest public health care Employers, Alberta Health Services and Covenant Health. In addition, UNA represents a small number of members of other occupational groups in a few private-sector worksites.

Process and Administration

Certification Statutory Timelines

UNA believes the more quickly certification applications are investigated and resolved, the better it is for all parties in the workplace. Less disruption, less uncertainty, and fewer chances of unfair labour practices are all a benefit to everyone in the workplace. There is no benefit to anyone if applications are delayed.

As a result, UNA believes it is not necessary to amend the current statutory timelines for certifications. We support the current timelines with the existing provision allowing the Chair to extend timelines when warranted. UNA has made numerous applications under the new rules and the Labour Relations Board has processed our applications in a timely manner. We have encountered no concerns with timelines, and we have never been advised of timeline concerns by Employers during the certification process.

UNA is aware of no evidence that the current timelines are not being met in a timely fashion, or that they do not contribute to stability and certainty during the certification process.

Reverse Onus Provisions

Current legislation provides a fair and efficient process for dealing with unfair labour practices. The reverse onus provision requiring Employers to show just cause for discipline and dismissal exists in all other Canadian provinces and in other jurisdictions where the rule of law prevails. It does not place an unfair burden of proof on Employers because it merely requires Employers to prove facts that are within their unique sphere of knowledge — in other words, the reasons they decided to discipline or dismiss an Employee and whether those reasons included support by the Employee for the union. This is knowledge that only the Employer can possess. This is hardly a difficult burden for an Employer to meet if it has not engaged in an unfair labour practice. There is no suggestion this burden of proof has ever created problems for Employers.

UNA is aware of no circumstances in which Employer onus has led to an inefficient or unfair hearing. This is undoubtedly because Labour Relations Board chairs and members are skilled practitioners who exercise their discretion appropriately.

This section of the Submission Guide also asks if there should also be an onus requirement for unions. It is unclear what the drafter of the document has in mind. As things stand, if the Employer discharges its burden, the onus then shifts to the union to show it was union activity that motivated the Employee's decision.

Alberta's current legislation and the established practice in all jurisdictions balances both parties interests in fair and efficient manner. No changes are required or desirable.

Limiting Union Discipline Powers

UNA is not one of the unions affected by these rules, which have been in place in Alberta since 1988 without problems. The current rules are not the result of legislation passed by the previous government. Nevertheless, we note that the provision was considered by the Alberta Court of Appeal in *Armstrong*, and found to provide a reasonable balance of interests between the interests of Employers and the right of unions to require availability of their members to fill jobs under a closed-shop collective agreement.

We would ask what the Government's concern is with this provision. How often do such concerns arise? In what circumstances?

Early Renewal of Collective Agreements

The right of Employees to choose, remove or change their union is a fundamental right protected by the *Canadian Charter of Rights and Freedoms* that should not be

removed or undermined by the union or Employer in any circumstance. The issue has been fully considered by the Labour Relations Board and the Courts and there is no reason to change this provision.

We are surprised a market-oriented government does not see the benefit of more, not less, choice in the market. The open period creates a market for unions and ensures quality representation for Employees.

The purpose of this proposal is clearly to allow Employer-friendly unions to nullify the constitutional rights of their members by avoiding the statutory open period. It is unlikely to survive constitutional challenge.

Strikes, Lockouts and Picketing Limitations

The Supreme Court of Canada has recognized the right to strike as an essential part of the freedom of association protected by section 2(d) of the *Canadian Charter of Rights and Freedoms*. Picketing is a form of expression, and so is also protected under section 2(b) of the *Charter*.

Moreover, in 2002 the Supreme Court recognized that secondary picketing "should be considered legal at common law absent tortious or criminal conduct."

There is no need, therefore, for regulations. The Labour Relations Board has sufficient powers to regulate picketing during both legal and illegal strikes and lockouts and effectively balance Employer and Employee rights. Any attempt to impose additional regulations is far from the spirit of the government's "red-tape reduction" agenda, and will result in expensive constitutional challenges.

UNA will continue to encourage its members to exercise their constitutional rights to free expression.

Labour Relations Board and Arbitrator Powers

Labour Relations Board Hearing Process

The Labour Relations Board tries to conduct fair and efficient hearings. Its efforts include resolution conferences for most matters and it avoids procedural delay and preliminary motions where possible.

However, UNA has experienced long delays, including cases where the decision took more than two years to be issued after the hearing and up to five years after the application was made. We are not clear about the reasons, although understaffing is likely a factor. Complexity of cases, lack of training for Board members, and other factors may also influence such delays.

It is interesting to note that the courts have required criminal trials to be completed and a verdict reached within 30 months. So far, they have allowed a longer time frame to stand when unfair labour practices are considered.

UNA is satisfied with the current options for informal settlement discussions that are offered by the Board. UNA believes the Board, its chairs and members must retain broad discretion related to adjournments, preliminary matters, bifurcation, and other procedural issues that arise at hearings.

Remedial Certification

This is an extraordinary remedy with prescribed criteria for its application. The Labour Relations Board has exercised its remedial authority on only two occasions. However, the existence of this remedy provides a real consequence for Employers who would otherwise commit unfair labour practices. Since the remedy is only applied when Employers break the law, there is no impact for law-abiding Employers. The legislation should not be changed.

Consequences for Prohibited Union Practices during Certification

The Labour Relations Board already has the power under current legislation to refuse to grant certification where unions have committed unfair labour practices. So on its face, there is no need for legislative change.

However, UNA notes with concern that claims in the Submission Guide purportedly dealing with unions not allowed to represent Employees as a result of unfair labour practices by the union are seriously misrepresented in the description.

Paragraphs 1, 2 and 73 for the *Cox Mechanical* case make it clear it was *management* that breached the *Code* and acted wrongly. Further, at Paragraph 66 of that decision it is made clear the manager was trying to ensure the workplace was organized, and the statement by the decision-maker that unionized staff was not in the Employer's best interest is unsupported by evidence. In the *ARAMARK Remote Workplace Services* case, the *Employer* was also shown to have committed the unfair labour practice.

The serious mischaracterization of these cases undermines the credibility of this consultation process. Misrepresenting the findings in the two cases makes it clear this is not intended to be a fair and considered review of the Labour Code.

First Contract Arbitration

The goal of first-contract arbitration is to ensure fairly negotiated agreements in a timely manner. The process works well, which is why it is the standard legal mechanism in all Canadian jurisdictions except Prince Edward Island, and has been

for many years in most provinces. Alberta was brought into the Canadian mainstream on this issue only in 2017. There has never been a case in Alberta that has proceeded to compulsory arbitration.

When a first collective agreement cannot be achieved through collective bargaining, first-contract arbitration provides a way for a bare-bones agreement to be reached so that the working relationship between Employees and Employers can move forward. Because they are bare-bones agreements, unions treat them as a last resort, a factor in making the collective bargaining process work as designed. Not having this mechanism, arguably, interferes with the constitutional right of Canadians to bargain collectively.

Provisions allowing this option to be implemented when first collective bargaining is not successful should be retained.

Other Board and Arbitrator Powers

The amendments introduced in 2017 have helped ensure the process is fair and reasonable, and therefore should be retained.

The ability of arbitrators to compel early disclosure between parties encourages settlement discussions that can avoid the requirement for a hearing. The powers ensure a fair and efficient hearing. In UNA's experience, arbitrators exercise their discretion with due consideration to the interests of all parties.

The ability of arbitrators to extend time limits protects Employees and ensures fairness. In cases of missed timelines, it permits the decision maker to consider the context. UNA would interpret removal of the right to extend time limits as clear evidence the Government is not interested in fairness to Employees. We believe such a move would increase militance among union members.

Use of the reasonableness standard to review decisions is a reflection of the Supreme Court's 2008 decision in *Dunsmuir*, which recognized that a greater level of deference should be given to arbitrators because they possess unique expertise. This preserves the right of parties to seek review on unreasonable decisions without expanding the process so broadly every decision must be reviewed, resulting in significant additional costs and time. Since Labour Relations Board Chairs possess equivalent expertise to arbitrators whose decisions they must review, the court system, which is already under strain from lack of resources, is relieved of additional pressure. Arbitration decisions provide certainty and stability. Use of a correctness standard will undermine these advantages.

Department staff should review the *Dunsmuir* decision.

Construction Industry

UNA is not positioned to comment on the issues of concern to the construction industry raised in the Submission Guide.

Other Considerations

In addition to the responses to points from the Submission Guide included in this submission, UNA requests an amendment to the definition of *"Employee"* in the *Labour Relations Code*.

The Alberta Labour Relations Board has now ruled that the exclusion of Nurse Practitioners under the Labour Code is unconstitutional and has provided the Government with 12 months to address the issue. Since the current Government appears motivated to make changes quickly, we assume they will want to address the unconstitutional exclusion from the rights and protections of the Labour Code of this group of Employees as soon as possible.

UNA takes the position that the exclusion of Nurse Practitioners from union membership should be removed at the earliest opportunity and Nurse Practitioners should be directed to the Direct Nursing Bargaining Unit.

The health care sector is divided by law into four functional bargaining units, and in 2003 the Labour Relations Board concluded that Nurse Practitioners belonged in the Direct Nursing Bargaining Unit.

If the Government intends to alter the current structure by revising the four functional bargaining units, UNA would expect significant consultation with all unions affected in those four functional bargaining units.