Alberta Labour Relations Code

Issue

Updates to Alberta's Labour Relations Code should ensure a level-playing field that respects democratic freedoms and the pursuit of opportunity for both employers and employees. The Government of Alberta is currently undertaking a review of the *Labour Relations Code.* As this code governs how unions, employers and workers interact, Alberta's business community is concerned with the outcome of this review.

Background

Reform of the labour policy environment in Alberta has been on the legislative agenda for successive governments in recent years. In 2013, a review of the Alberta Construction Labour Legislation resulted in the "Sims" Report and a review of the Employment Standards Code was initiated. In 2015, Bill 6 was introduced to amend the Occupational and Health Standards for Farmers and Ranchers, and in 2016 a review of the Workers Compensation Board was launched.

The last time the Labour Relations Code (the Code) was amended was in 1988. This code represents a significant facet of the labour policy and regulatory framework in the province. The current Code has established a stable regime of peace between employers and employees for nearly 30 years, particularly outside of the public sector. Labour-related conflicts have been rare in the private sector, and created an environment of reasonable dialogue and negotiation. Should updates to Alberta's Labour Relations code be undertaken, it is important the outcomes of any updates maintain a "level playing field" between employers and employees to ensure economic growth, business viability and democratic freedoms are respected.

There are three areas of concern regarding the Labour Relations Code:

- How employees can unionize and de-unionize through the certification process
- The use of first contract arbitration
- When can employers utilize replacement workers during strikes

If an update were to occur, (a) current issues regarding the code should be addressed to maintain a level playing field and (b) certain changes that have been implemented in other jurisdictions should be avoided as they could negatively impact democratic freedoms and economic growth.

Review Process

The public review period on the *Code* took place from March 13 to April 18, 2017, and legislation is targeted for introduction in June 2017. Compared with the ongoing Workers' Compensation Board review, which began in March 2016, the timeline for consultation and legislative changes is very brief. Given the importance of this legislation to Alberta's economic growth, the Province should provide greater opportunity for consideration and feedback from all stakeholders and the public-at-large.

As noted by Labour Minister Christina Gray in her mandate letter to Mr. Andrew C.L. Sims, QC, "This is not a full-scale review of the *Code*; something that could not be accomplished within this session."[1] Given the *Code* has not been significantly updated since 1988, a complete review at this time would be preferable to a limited one to ensure a thorough and holistic evaluation. It is unclear how the items included in the review were selected. Labour relations depend on good faith, fairness and balance. The lack of transparency in the review process risks undermining the confidence of Albertans in the outcome of the review.

Mr. Sims has advised the Edmonton Chamber that recommendations being provided to the Province will take the form of advice to the Minister; that is, no written report or publicly-available statement of recommendations will be provided as a result of the *Code's* review. This is a significant departure for the Province. The Province has conducted reviews of Alberta's royalty system, climate regulations, energy efficiency, the buy-out of coal-powered generators, the Workers Compensation Board, amendments to the *Municipal Government Act,* and the development of city charters for Edmonton and Calgary. For each of these reviews, reports and recommendations have been made available to the public. This is a best practice for government – conduct a review using experts in the field, and provide an opportunity for relevant stakeholders and the public-at-large to comment on findings prior to introducing legislation. Prior work with the Province on essential services legislation in 2016 and construction industry labour relations in 2013 included publicly available reports.

If the Province does not provide a report of findings and recommendations, trust in the process will be eroded. Providing a report and recommendations that are available to the public demonstrates respect for the principles of good faith, fairness and balance, which lie at the heart of labour relations.

Card Check Certification

Alberta, alongside most other provinces, requires a two-step process to certify a union as the exclusive bargaining agent for a unit of workers. First, a union must show evidence that at least 40% of workers in the unit support certification, usually through workers holding union membership cards. If the 40% threshold is reached, the Alberta Labour Relations Board (ALRB) conducts a secret ballot vote. If a majority vote in favour, the union is certified.

A likely proposal is to amend the current system, eliminating the need for a vote if a significant percentage of workers buy membership cards. This is commonly known as card check certification, and most provinces have at some point used this system.

Maintaining the secret ballot vote protects the right of workers to make their decision anonymously, as is done with other democratic decisions in Canadian society. As pressure can be applied when workers are urged to sign a membership card by union organizers and co-workers, the secret ballot vote ensures workers can vote their conscience with anonymity. Furthermore, legislation already exists to prevent employers from using coercion, intimidation, threats, promises or undue influence to prevent certification. Maintaining the secret ballot is also consistent with mainstream Canadian policy on labour

[1] *Labour Relations Code* Review Mandate Letter, March 13, 2017 (Appendix A)

relations, with six of ten provinces using a mandatory secret ballot vote. Many of these provinces have used card check certification in the past and have returned to a secret ballot vote.[2345]

However, if the Province decides to move to a card check model, we recommend the membership threshold for automatic certification be set at 65%. This threshold would be consistent with both the Manitoba and Newfoundland card check systems, which were in place until 2016 and 2014, respectively. We also recommend that the ALRB conduct a secret ballot vote in instances where support lies between 40% and 65%, and in instances where there is cause to question the validity of membership support.

Also, changes made to the certification process should be mirrored with changes to the revocation process.

First Contract Arbitration

It is likely that the *Code* will be amended to require arbitration for first contracts that cannot be reached within a certain timeframe, as opposed to using mechanisms such as strikes or lockouts to break intractable disputes. The Edmonton Chamber of Commerce does not support the use of arbitration for first contracts.

As the first contract reached through collective bargaining sets the "floor" for all future negotiations, employers are rightfully concerned about having arbitrated decisions imposed on them. It is always preferable for both sides to come to an agreement on the first contract, as opposed to having one imposed.

If the Province decides to require arbitration for first contracts, we recommend that this be used as a tool of last resort. The ALRB should be the decision-making authority on applications for arbitration and should only approve applications if intensive mediation has already taken place. The ALRB should only consider applications for arbitration after both sides in the dispute have rejected a mediator's recommended terms for settlement as per section 65 of the *Code*. This will ensure that first contract arbitration is only used when all other options have been considered.

The Role and Authority of the Alberta Labour Relations Board

Currently, the Board has discretionary authority on certain matters. This authority creates uncertainty for employers and inhibits the ability for businesses to plan for growth. Moreover, this discretion seems to favour the facilitation of certification rather than maintaining a neutral position.

As an example, the Board may reduce the mandatory 90 day waiting period for unions making a second application for certification after their first application was dismissed or withdrawn. This allows for applications aimed at harassing employers and disrupting worksites.

Some Board rulings have indicated that employers are not allowed to communicate the impacts they perceived certification could have on their business, even when this information is honest and factual. If such communication is deemed to be an unfair labour practice, employers' ability to maintain business viability following certification is significantly reduced.

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[2] http://www.cbc.ca/news/canada/manitoba/secret-ballot-union-votes-finalized-as-legislative-session-ends-1.3846503

[3] http://www.cbc.ca/news/canada/newfoundland-labrador/labour-leaders-hammer-premier-on-union-certification-bill-1.2664192

[4] https://www.fraserinstitute.org/article/should-bc-revert-back-card-check-procedure-certifying-unions-no

[5] http://labourlawblog.typepad.com/managementupdates/2005/02/cardbased_versu.html

First Contract Arbitration

Once a union is certified, it must negotiate a collective agreement with the employer. Under the current provisions of the Code, employers and unions who reach an impasse in the negotiation of a first contract must use the traditional tools of a strike or lockout to break the impasse. Furthermore, the employees are able to decertify the union on the basis that it has failed to negotiate a collective agreement.

Some jurisdictions have implemented legislation which imposes mandatory arbitration on an employer and union in cases where the union becomes certified to represent employees but the parties are unable to negotiate a collective agreement. First contract arbitration undermines the competitiveness of businesses while also limiting the rights of employees to sober-second thought regarding certification.

Replacement Workers

"*When a trade union is unable to negotiate a collective agreement, they sometimes choose to strike an employer… Similarly, employers may choose to lockout their workers... Strikes and lockouts are often accompanied by picketing at the employer's place of business*."[6]

When a union commences a strike, employers are currently permitted to hire temporary replacement workers in order to ensure that the business is able to continue operating. Employers are not permitted to permanently replace striking workers with replacement workers and must guarantee striking workers their positions once a settlement is reached.

This fallback position ensures that a business' viability is maintained while it negotiates with its broader workforce and therefore, maintains employment levels. Studies have shown that legislative bans on the use of replacement workers have a negative effect on employment levels.

It is important for the long term competitiveness of Alberta's economy that labour legislation and regulation maintains a balance between employer and employee's rights and freedoms.

The Alberta Chambers of Commerce recommends the Government of Alberta:

1. Protect an individual's right to vote their conscience by maintaining a secret ballot vote in the certification process.
2. Should the Province introduce first contract arbitration, grant the Alberta Labour Relations Board decision-making authority to consider applications for arbitration from either unions or employers.
3. Maintain that portion of current legislation that precludes the use of first contract arbitration.
4. Require both unions and employers to participate in mediation, including consideration of a mediator's recommended terms of settlement, prior to either party applying for arbitration.
5. Amend the code to clarify that employers can freely distribute information on how to revoke a certification without violating the code.
6. Require the board to apply the same "free and voluntary" rules to both revocation and certification applications.
7. Eliminate board discretion to revoke a certification if employers have had no employees for three years.

[6] Alberta Labour Relations Board. (1996). Frequently Asked Questions: Strikes and Lockouts: Strikes, Lockouts & Picketing. Retrieved August 22, 2016 from http://www.alrb.gov.ab.ca/faq_strikes.html .

8. Prohibit new applications for certification for a fixed and longer period after the first one is dismissed or withdrawn.
9. Amend the code to make it clear that the board cannot relax the “appropriate bargaining unit” rules merely to facilitate certification.
10. Make the code clear on the fact that employers can communicate the impact of certification on their business without committing an unfair labour practice, as long as their comments are honest and factual.
11. Prevent business closures and job losses by maintaining the employer’s right to hire temporary replacement workers during labour action.
12. Provide the Alberta Labour Relations Board with marshalling powers to direct labour complaints to the appropriate forum.
13. Provide the Alberta Labour Relations Board with new powers to address nuisance and vexatious duty of fair representation complaints.
14. Extend the *Labour Relations Code* review timeframe to ensure affected stakeholders can participate in a thorough and transparent consultation process.
15. Publicly disclose recommendations made to the Minister as part of the *Labour Relations Code* review.