

**Improving Alberta's Competitive Position Through Improved  
Labour Relations Legislation Affecting the Construction  
Industry**

A Report by the Construction Competitiveness Coalition

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# Improving Alberta's Competitive Position Through Improved Labour Relations Legislation Affecting the Construction Industry

## Executive Summary

Unique characteristics of development in the Alberta oilsands requires strategies to ensure that natural resource investors view Alberta as a jurisdiction that provides reasonable cost certainty for their investments. Unfortunately, Alberta's labour relations scheme has fallen behind the labour relations schemes in some other jurisdictions (particularly BC and Saskatchewan) in terms of its ability to provide cost certainty and efficiency for investors. This creates significant disadvantages for Alberta because Alberta's labour relations approaches are a key factor in capital investment decisions. Labour costs are the most variable aspect of a construction project and constitute the greatest risk element to a potential investor in terms of costs and completion schedules. Strategies that reduce these risks will increase Alberta's competitive position. Fortunately, a number of opportunities exist to reduce these risks through improvements to Alberta's labour relations legislation.

These opportunities generally fall into one of the following categories:

- Creating economic advantages through cost and schedule certainty;
- Creating bargaining structures for today's workplace; and
- Improving fairness for employees and employers.

Brief summaries of these opportunities are set out below. More detailed explanations of these opportunities are set out in the balance of this document.

## Creating Economic Advantages Through Cost Certainty

- **Clarification of Division 8 of Part 3:** Division 8 of Part 3 of the Alberta Labour Relations Code (the "Code") provides opportunities for novel labour relations strategies. It has been and could continue to be used to significantly improve the feasibility of some large scale projects within the province. It provides a framework that: (i) allows project owners to establish a project collective agreement so that all non-union workers and those from all construction unions work side-by-side on the project with harmonious terms and conditions of employment; and (ii) avoids strikes or lockouts for the duration of the project. The attendant benefits of this approach on project costs and schedule can be significant. However, there is some hesitation to use this section of the Code due to a risk that some interpretations of Division 8 may invite litigation and violate the Canadian Charter of Rights and Freedoms. Amendments to Division 8 could open up greater opportunities to use Division 8. **Recommendation: Amend Division 8 to clarify and improve the language of these sections in order to improve the utilization of this Division.**
- **Continuation of Collective Agreements:** In the construction industry, when a union becomes the bargaining agent for a workforce and there is an existing collective agreement in place for that workforce, the incoming union can terminate the existing collective agreement on very short notice and the contractor may become bound to a new collective agreement with very different terms. Consequently, the contractor could find itself subject to

very different labour costs. This can be financially devastating for a contractor. By contrast, in British Columbia, the incoming union cannot terminate the existing collective agreement and employers are not faced with this economic risk. **Recommendation: Adopt legislation similar to that in British Columbia.**

- **Completion of Work under existing terms:** Similarly, where a building trade union certifies a contractor's employees, the contractor automatically becomes subject to a collective agreement without any opportunity to influence the terms of such agreement. As a result, the contractor could find itself subject to very different labour costs. This, too, could be financially devastating for an employer. **Recommendation: Amend the Code to allow such employers to complete existing work under the labour obligations that existed prior to the new certification.**

### **Creating Bargaining Structures for Today's Workplace**

- **Allowing for All Employee Units:** The Alberta Labour Relations Board ("LRB") grants certificates in the construction industry using a system which divides the workforce, and the certificates, according to traditional trades (carpenters, labourers, etc.). This system accommodates "registration collective bargaining" that applies to Building Trade Unions and their contractors, but the system does not reflect the current realities concerning industrial-based unions and their contractors. It also fosters segregation of the workforce and undermines the productivity of the workforce. The British Columbia Labour Relations Board has recognized this and grants certificates in the construction industry that cover all of the employees working for an employer. The Saskatchewan government recognized the need to adopt a more modern approach to labour relations in the construction industry and passed legislation in 2010 which allows the Saskatchewan Labour Relations Board to grant certificates similar to British Columbia. The Saskatchewan Labour Relations Board has subsequently granted certificates covering all employees working for an employer. **Recommendation: Amend the Code to allow for certificates in the construction industry that cover all of the employees working for an employer.**
- **Early Renewal of Collective Agreements:** In 2009, the LRB issued a decision (the "Firestone" decision) that reversed 30 years of jurisprudence relating to the way in which employers, unions, and employees renegotiated new collective agreements. This decision will require employers to amend their business practices and will undermine labour stability and cost certainty in many industries. **Recommendation: Incorporate the pre-Firestone state of the law into the Code.**
- **Incorporating Approach to Build-up Principles in Construction into the Code:** The Firestone decision also suggested that another long standing practice in the construction industry should no longer apply. This practice allows the LRB to grant certificates in the construction industry notwithstanding the variability in the size of a contractor's workforce over the course of a project. If that practice no longer applies, there is a greater risk of a high cost of labour disruptions in the construction industry and litigation before the LRB. **Recommendation: Incorporate the long standing practice into the Code.**

## **Improving Fairness for Employees and Employers**

- **Restricting Union Fines:** There is a history of unions unfairly fining workers who choose to work for non-union employers or for employers who are certified by competing unions. Unlike the labour regimes in other provinces, the Alberta labour regime has not sufficiently protected employees in these circumstances. **Recommendation: Amend the Code to prohibit unions from fining their members when the member simply works for its employer of choice.**
- **Limiting Use of Union Dues:** Employees of a unionized workforce must pay union dues. These union dues are often used by the union for political purposes without the employee's individual consent. **Recommendation: Amend the Code to prohibit unions from using union dues to support activities other than fulfilling the union's obligations under the Code unless the union obtains prior consent of the employee.**
- **Improving Code Provisions that address market enhancement recovery funds ("MERFs"):** Despite the amendments to the Code in 2008 to address MERFs, they continue to exist and the LRB has not adequately regulated these activities. **Recommendation: Improve and clarify the enforcement mechanisms related to MERFs.**
- **Consistent Enforcement of Rules Relating to Picketing:** The LRB seems unwilling to prevent unions from unlawfully causing delays to employers and their customers, employees, or independent contractors through a union's use of picket lines at a place of business. **Recommendation: Amend the Code to remove any time lines that permit picketers to cause delays to employers, their customers, other employees and independent contractors.**
- **Effective Appointments to the Alberta Labour Relations Board:** The practices and procedures to appoint Chairs, Vice-Chairs, and other members of the LRB do not facilitate balanced representation on the LRB. **Recommendation: continued diligence is required by the Minister of Employment and Immigration to ensure that the Labour Relations Board consists of members who will reflect the legislature's policy intentions.**

# **Improving Alberta's Competitive Position Through Improved Labour Relations Legislation Affecting the Construction Industry**

## **1.0 Introduction**

This document has been prepared and is submitted by the Construction Competitiveness Coalition, a group which includes some of Alberta's leading construction contractors, owners, and construction associations.

<b>Construction Contractors</b>	<b>Construction Associations</b>
<ul style="list-style-type: none"><li>• PCL</li><li>• Peter Kiewit Sons Co.</li><li>• JV Driver</li><li>• Flint Energy</li><li>• Ledcor</li></ul>	<ul style="list-style-type: none"><li>• Merit Contractors Association</li><li>• Progressive Contractors Association of Canada (PCAC)</li></ul>

The document outlines the group's collective recommended changes to Alberta's Labour Relations Code (the "Code") which, in the opinion of the group, will create a labour scheme that is better suited to Alberta's construction industry and will improve Alberta's competitive position and productivity as compared to other provinces and international markets. The recommendations generally fall into one of the following categories:

- Creating economic advantages through cost certainty;
- Creating bargaining structures for today's workplace; and
- Improving fairness for employees and employers.

Each of these categories, and the recommended legislative changes that fall under each category, are discussed under separate headings below. However, prior to providing this summary, we will first outline the reasons for implementing these changes at this time.

## **2.0 Why Change Now?**

Albertans have the good fortune of living in a province that possesses vast natural resources. The "crown jewel" of these natural resources is Alberta's oilsands. Therefore, not surprisingly, Alberta's economy is largely driven by large scale investment in our oilsands and ancillary industries.

The importance to Alberta, and to Canada, of facilitating development of the oilsands and ancillary industries cannot be overstated. According to a 2009 report by the Alberta Government and Construction Owners Association of Alberta<sup>1</sup>:

- 240,000 jobs across Canada are directly and indirectly linked to the oilsands;
- for each permanent oilsands related job, nine additional indirect, direct, and induced jobs are created; and

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<sup>1</sup> Alberta Finance and Enterprise, Construction Owners Association of Alberta (COAA), Benchmarking and the Alberta Report: COAA Best Practices Conference May 20, 2009 Pgs. 2-4

- it was estimated that oilsands development between 2000 and 2020 hold the potential to generate at least \$124 billion in royalty and tax revenues for Canada's federal and provincial governments.

Similarly, the Canadian Energy Research Institute recently estimated that Alberta will receive over one trillion dollars in oilsands royalties between 2011 and 2044.<sup>2</sup>

Although the oilsands provide a strong foundation for Alberta's economy, the construction activity in the oilsands in recent years has reflected some unique challenges associated with the cyclical nature of oilsands development. For example, prior to the world economic downturn in 2008, Albertan's enjoyed several years of remarkable economic growth and prosperity. This included construction of multiple large scale projects in the oilsands and ancillary industries. However, many of these projects suffered from unprecedented cost overruns due to labour and material shortages. For many investors, the litany of cost over-runs on major projects contributed to a climate of uncertainty that has eroded the perceived competitive advantage of building a major construction project in Alberta. This perception is reflected in the 2009 Canadian Heavy Oil Association Guide which noted, "All Alberta upgrading projects have been afflicted by sky rocketing costs which in some cases doubled or even tripled partly due to the skills shortage."<sup>3</sup>

Conversely, the global economic crisis that commenced in late 2008 significantly affected the economic conditions in Alberta during late 2008, 2009, and 2010. In the Alberta oilsands and ancillary industries, a drop in commodity prices contributed to cancellation or deferral of projects valued in the hundreds of billions of dollars. For example, in September 2008, the major construction projects inventory compiled by the Alberta Government listed projects reflecting over \$283 billion in possible investment. By 2009, the planned investment in the official inventory fell by 15% to \$238 billion. During this period of global economic recession and recovery, investors world-wide were more cautious and Alberta found itself competing with other jurisdictions to attract the investment dollars necessary to develop the oilsands.

Alberta appears to be entering another period of economic growth. This period may include labour shortages similar to the problems faced prior to 2008. In fact, the Construction Sector Council recently published a report that predicts sustained shortages of skilled labour in the Alberta construction industry from 2011 to 2019<sup>4</sup>.

Given the challenges associated with the potential cyclical nature of development in the Alberta oilsands, Alberta must take advantage of all reasonable mechanisms for creating an environment that provides the economic conditions, during periods of varying levels of economic growth, which enable natural resource investors to view Alberta as a jurisdiction that provides reasonable cost certainty for their investments. This includes mechanisms that will maximize the efficiency and competitiveness of the Alberta construction industry.

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<sup>2</sup> Canadian Energy Research Institute: Canadian Oilsands Supply Costs and Development Projects (2010 - 2044) (Dinara Millington, Mellisa Mei)

<sup>3</sup> Richard Macedo, Under Pressure, Canadian Heavy Oil Association: Heavy Oil Sands Guidebook and Directory IV (2009) Pg. 134

<sup>4</sup> Construction Sector Council: Construction Looking Forward, An Assessment of Construction Labour Markets from 2011 to 2019 for Alberta

Labour costs are the most variable aspect of a construction project and constitute the greatest risk element to a potential investor in terms of costs and completion schedules. As such, mechanisms that facilitate efficient and progressive labour relations strategies will improve the efficiency and competitiveness of the Alberta construction industry. Some of this may be achieved through amendments to Alberta's labour relations regime. Though the Labour Relations Code was amended in 2003 and 2008, it has not significantly changed since 1988. However, Alberta's economy and construction industry have undergone dramatic changes since that time. In addition, other jurisdictions (including British Columbia and Saskatchewan) have adopted labour relations schemes that are better adapted to the new construction reality than Alberta's labour relations scheme and provide greater cost certainty for investors. It is for these reasons that we have prepared this submission.

### **3.0 What Should We Change?**

#### **3.1 Creating Economic Advantages through Schedule and Cost Certainty**

As noted, economic prosperity in Alberta is largely affected by investment in Alberta's natural resources and, in particular, in Alberta's extraction and upgrading projects. The oilsands projects, of which there are several in various stages of planning and development, are unlike any others in North America. Each of these projects is a mega-project valued in the billions of dollars. Cumulatively, the projects that could be developed in Alberta in the coming years are valued in the hundreds of billions of dollars. Similarly, the contractors who undertake these projects often enter into contracts which span multiple years and are of significant value.

Because of the scale of these projects and the construction contracts associated with them, any measures that enable the parties to improve the schedule and cost certainty associated with the undertaking will significantly improve the financial viability of the projects. These will, in turn, make these projects more attractive as compared to projects in other jurisdictions. The following three changes to the Code will facilitate this cost certainty.

##### **3.1.1 Division 8**

Division 8 of Part 3 of the Code is entitled "Collective Agreements Relating to Major Construction Projects". It provides a mechanism that enables the owner of a major construction project to negotiate collective agreements that are binding upon any construction employer engaged on the project. Through this process, an owner can ensure labour harmony on its project. It is a much more effective tool than a "no strike/no lockout" agreement between an individual employer and a union because a no strike/no lockout agreement (including a normal project agreement) terminates when the underlying collective agreement terminates and the affected employees may strike during any provincial labour disputes. In contrast, Division 8 avoids potential labour disruptions associated with provincial labour disputes.

Division 8 has been used on several occasions. Most recently, it was used on the CNRL Horizon Project. The CNRL Horizon Project was the most novel labour relations model for industrial construction in Canada. On that project, CNRL negotiated agreements that

enabled alternative union contractors, non-union contractors, and building trade contractors to work on the same site. In summary, CNRL adopted an all-inclusive model that accessed the broadest possible labour pool and provided economic opportunities for contractors, and for employees, regardless of their labour affiliations.

Unfortunately, there is a concern about a potential argument that Division 8 may violate the Canadian Charter of Rights and Freedoms. These potential legal challenges have created a chilling effect that has undermined the attractiveness of this novel labour relations approach for other projects. As such, changes to the Code to address any legal uncertainties of Division 8 will facilitate greater use of Division 8. These changes would not alter the overall purpose of Division 8 which is to allow for project-based collective agreements that supersede other collective agreements and prevent strikes and lockouts from occurring during the course of the project. However, the changes would do the following:

- clarify some uncertainties in the existing language of the Code;
- make clear the potential for more than one project collective agreement with different unions and the ability to require collective bargaining by unions with members on site (with the possibility of arbitration if collective bargaining did not succeed);
- address maintenance issues as well as construction; and
- protect against the adverse cost consequences of union organizing on the project site.

### 3.1.2 Continuation of Agreements

In Alberta, there are limited time periods where a unionized employer can be open to an organizing drive by a competing union. When this occurs, and when the competing union successfully organizes the workforce, the incoming union has the right to terminate the collective agreement on two months' notice.<sup>5</sup> In British Columbia, by comparison, the Labour Relations Code expressly provides that the existing collective agreement remains in force.<sup>6</sup>

The British Columbia model provides much greater cost certainty for a construction contractor. Specifically, in British Columbia, when a construction contractor bids work, it will not face circumstances where the collective agreement upon which it based its bid costs is suddenly terminated and replaced with another agreement negotiated with a

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<sup>5</sup> This is expressly provided in section 40(3)(b) of the Code:

(3) When a trade union becomes a certified bargaining agent for employees in a unit and at the time of certification a collective agreement is in force respecting those employees, the trade union

.....  
(b) may, insofar as the collective agreement applies to the employees and notwithstanding anything contained in the collective agreement, terminate the agreement at any time by giving the employer at least 2 months' notice in writing.

<sup>6</sup> Section 27(1)(c) of the BC Code states:

27 (1) If a trade union is certified as the bargaining agent for an appropriate bargaining unit,

...  
(c) if a collective agreement binding on the unit is in force at the date of certification, the agreement remains in force.

replacement union. This, in turn, reduces the contractor's risk on the project and typically enables the contractor to reduce the risk-associated contingencies in the cost that it offers to an owner.

By comparison, contractors in Alberta enjoy no such protection. If a union organizes the contractor's workforce while the contractor is engaged on a lengthy project and if the union cancels the collective agreement, the contractor could become bound to different collective agreement obligations that significantly increase the contractor's costs. In Alberta, to account for this risk, the contractor can include a contingency in the cost that it offers to an owner. However, this simply increases the costs to the owner of developing a project.

This condition could be improved by adopting legislation that is similar to that enacted in British Columbia.

### **3.1.3 Completion of work under existing Terms**

Similar considerations should apply in the context of registration bargaining in the construction industry where a building trades union organizes a contractor's workforce.

In the late 1960's and early 1970's many provinces in Canada adopted accreditation or registration (as it is called in Alberta) legislation to govern construction industry labour relations. This concept was introduced to address an imbalance in bargaining power that existed between employers and unions. The theory was that groups of employers bargaining together, as opposed to single employers, would be able to achieve more competitive collective agreements with the large internationally based building trade unions.

The registration system provides a uniform set of collectively bargained terms and conditions of employment for all unionized contractors in a trade. Where a registration system agreement exists, a contractor that is newly certified with a building trade union is immediately bound by the collective agreement and its terms without any ability to complete current work in progress under the terms and conditions on which it was initially based.

In any other industry (including maintenance), the employer would have the right to negotiate terms and conditions appropriate to the business environment, thereby ensuring the company's viability and the jobs of existing employees are given due consideration. Similarly, in B.C., contractors have the right to negotiate their own collective agreement. However, this is not the case for a construction company in Alberta caught within the realm of a pre-existing compulsory and binding registration agreement. When a company has secured work under certain economic assumptions, a newly imposed collective agreement can place the company in economic jeopardy and place jobs at risk. Again, to account for this risk, the contractor can include a contingency in the cost that it offers to an owner. However, this simply increases the costs to the owner of developing a project.

To provide greater economic certainty to contractors, contractors that are newly certified with a building trade union and have not had an opportunity to influence the registration

collective agreement should be able to complete all work successfully bid prior to the certification under the terms and conditions that existed prior to the certification coming into effect. In this way, the company would not face economic jeopardy as a result of the change and could adjust future bidding to reflect the new agreement terms.

### **3.2 Creating Bargaining Structures for Today's Workplace**

There are a number of other amendments that should be implemented to reflect the current employment environment in the construction industry or to codify practices that have developed as a result of LRB decisions spanning decades. These are set out below.

#### **3.2.1 All Employee Bargaining Units**

The Code does not specifically address union certification according to traditional craft boundaries or, alternatively, all employee units in the construction industry. However, pursuant to a policy which is described in an Information Bulletin issued by the LRB<sup>7</sup>, the LRB grants certification of bargaining units in the construction industry along traditional craft boundaries. In other words, for the employees of each particular employer, the LRB grants separate certificates for carpenters, labourers, operating engineers, and other recognized trades. Outside the construction industry, certificates are commonly granted for the entire workforce.

The LRB policy that establishes certification according to traditional craft boundaries in the Alberta construction industry was most recently examined by the LRB in 1997. At that time, the LRB provided the following reasons for continuing to grant certificates along traditional craft boundaries:

Most construction employees who choose trade union representation choose the building trade union appropriate to their craft. There has been little organizing by industrial unions in this area. Unionized construction employees maintain strong allegiance to their craft unions. Partly this is due to the hiring halls, the health, welfare and pension benefits and social facilities these unions offer.

The training construction employees receive parallels the jurisdictional lines followed by the craft unions. This reinforces trade based allegiances and creates a strong community of interest amongst employees in the various crafts.

Registration bargaining under the Labour Relations Code also follows craft lines. Considering these facts, the Board sees no reason to depart from its long established policy of certifying construction employees on craft lines.<sup>8</sup>

Since 1997, there have been a number of changes in the construction industry which undermine this assessment. In particular, there has been significant growth in the use of

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<sup>7</sup> The Information Bulletin is attached as Appendix 1.

<sup>8</sup> This report is attached as Appendix 2.

non-traditional unions (CLAC, CEP) which operate on an industrial basis (i.e., not trade specific). For example, recent developments in the Alberta oilsands have involved contractors with collective agreements with these unions. As these unions have grown, they have been able to provide health, welfare, pension, and training benefits that are as good as the benefits provided by the building trade unions. In addition, workers in the construction industry are now often multi-skilled and do not necessarily align their training and allegiances in accordance with traditional craft boundaries.

Alberta's craft unionism approach to certifications in the construction industry is also inconsistent with the available bargaining units in British Columbia and Saskatchewan where a single certificate can cover all employees working for a particular contractor (a "wall to wall certificate"). In British Columbia, the growth of wall to wall certificates (referred to as "open shop") in B.C. was a product of owners, who had grown tired of being held captive by the building trades, increasingly turning to open shop contractors. The B.C. Labour Relations Board facilitated the growth of open shop contractors by holding that the building trades unions and craft unions have no priority or preeminence in the construction industry. More recently, the Saskatchewan government amended Saskatchewan's labour relations legislation to permit wall to wall certificates, and the Saskatchewan Labour Relations Board has subsequently granted a wall to wall certificate. Clearly, in this area, labour relations bodies and the leaders of our provincial neighbors are more progressive than their counterparts in Alberta.

The LRB has not updated its practices to reflect the changes in the workplace and the trends in other jurisdictions. Alberta should facilitate all employee bargaining units and their significant related productivity advantages. Accordingly, our legislators should update the Code to reflect the current construction market and to specifically facilitate all-employee certifications.

### **3.2.2 Early Renewal of Collective Agreements**

In Alberta, a unionized employer is guaranteed labour stability during the term of a collective agreement with the exception of specified periods of short duration. These short periods are referred to as "open periods." During the open periods, employees can choose to revoke their union's bargaining rights or another union can apply to displace the existing union. In Alberta, a practice has developed whereby an employer and the union representing the employees may negotiate a replacement collective agreement before the open period is reached and thereby avoid the pending open period. To ensure that the process truly reflects the wishes of the employees, a majority of the employees must confirm their acceptance of the new agreement, and the fact that they will be waiving their right to an open period, through a secret ballot ratification vote.

This practice benefits employees, employers, and others who purchase the services offered by those employers. Employers are able to create periods of labour stability and cost certainty. This enables the employer to bid future work more competitively. This, in turn, increases the possibility that the employer will be awarded further work and improves employees' job security. From the perspective of those who purchase services from these employers, this increases the competitiveness of the prices offered for the

services, gives assurance that the employer will not suffer labour disruptions, and improves the attractiveness of Alberta as a jurisdiction to invest within.

The practice in Alberta of negotiating and ratifying replacement collective agreements ahead of an open period developed following a number of LRB decisions spanning more than 30 years. The Alberta construction industry and other industries (such as health care) have developed in accordance with the law established by these LRB decisions.

In 2009, the LRB issued a decision, the “Firestone decision”, which has essentially reversed the earlier LRB decisions. The judicial review of that decision continues to be litigated.<sup>9</sup> Accordingly, the parties who have acted in accordance with the law established by the earlier LRB decisions now find well established practices to be inconsistent with the law. To purchasers of construction services, who experienced periods of severe cost escalation prior to the recent economic downturn, this change in the law heightens project risk and further undermines any perception that projects can be constructed in Alberta with a reasonable level of cost certainty.

A legislative amendment that incorporates the pre-Firestone state of the law into the Code would eliminate the disruption associated with re-aligning business to reflect amendments to the common law. It would also provide a clear message to purchasers of construction services that safeguards have been put in place to facilitate cost certainty.

### **3.2.3 Incorporating Approach to Build-up Principles in Construction into the Code**

The build-up principle in labour relations prevents the LRB from issuing a certificate in circumstances where the employees who apply for the certification do not reflect the expected future size of the workforce. For example, if a business opens a new factory in Alberta and expects to grow its workforce from 8 to 80 employees, the original 8 employees could not apply for a certificate at the start of the “build up” covering all of the future workforce. If presented with this type of certification application, the LRB would typically reject the certification application on the basis that the employees applying for certification do not represent the expected bargaining unit.

This principle is well founded and suitable outside the construction industry. However, on construction projects, the size of the workforce will typically fluctuate significantly during various stages of the project. Accordingly, more than 30 years ago, the LRB established a different approach for construction projects and held that the build-up principle does not apply in the construction industry.

Like the principles relating to early renewal of collective agreements, this well established aspect of Alberta labour relations law is susceptible to sudden changes through future LRB decisions. In fact, in the Firestone decision, the LRB suggested that the build-up principle should perhaps apply in the construction industry. This change would increase the duration of potential periods of labour instability and would potentially

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<sup>9</sup> See Appendix 3 for a summary of the Firestone decision.

shift applications to certify a workforce to periods where the workforce on a project has reached its maximum size, when any labour disruptions will cause the greatest economic harm. In addition, uncertainty over the proper time to grant a certification to a construction workforce whose size is fluctuating would increase the risk of litigation before the LRB relating to the validity of a certification application. Obviously, none of these circumstances would improve the relative attractiveness of Alberta as a jurisdiction for investment. Fortunately, we can avoid these consequences by incorporating the long standing approach for construction projects into the Code.

### **3.3 Fairness for Employees and Employers**

The remaining areas of suggested legislative amendment are intended to improve the fairness of Alberta's labour relations regime for employees, employers, and unions. These are set out below.

#### **3.3.1 Restricting Union Fines**

In the current construction environment, it is not unusual for tradespeople to work in the building trade, non-union, and non-traditional union sectors. We believe that this is a right that requires legal protection. Unfortunately, there are numerous cases of building trade unions forcing members to cease working for a specific employer because the employer is a non-union company or unionized with a competing union by fining the member. This practice is unfair for employees. The employees should be free to work where they wish without the fear of union reprisals.

In addition, contractors, owners, and the province as a whole will benefit from a labour system that enables contractors to hire the individuals who wish to accept employment.

Unfortunately, the Alberta labour relations regime does not prevent these union reprisals. In fact, in October 2010, the Alberta Court of Appeal handed down its decision in a dispute between Warren Armstrong and the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local Lodge No. 146 (the "Boilermakers"). That case involved a \$5,000 fine imposed by the Boilermakers on Mr. Armstrong because Mr. Armstrong accepted employment with a contractor that was not certified by the Boilermakers. The Court of Appeal concluded that the Alberta Labour Relations Code allowed the Boilermakers to impose this fine, even though the Boilermakers could not offer comparable work to Mr. Armstrong. As a result, Mr. Armstrong was liable to the Boilermakers for the \$5,000 fine simply because he accepted employment with another contractor who offered him employment at superior terms and conditions.

The outcome of the Armstrong decision is very troubling. Specifically, at a time when our province is potentially facing labour shortages associated with upcoming work in the oil sands and improved growth of our economy, labour mobility is of paramount importance. Unfortunately, the outcome of the Armstrong matter undermines labour mobility. It validates the imposition of monetary and other sanctions by unions where workers simply accept employment with the employer of their choosing. One can certainly expect that the threat of these fines will act as a deterrent for other workers who may wish to change employers.

Moreover, the outcome of the Armstrong decision is inconsistent with other jurisdictions in Canada. For example, in B.C., the labour relations regime is such that unions are restricted from imposing penalties on an employee who simply chooses to work for his or her employer of choice.

The law of Alberta should not punish Alberta workers for seeking better employment that improves their lives. They should be free to work for employers of their choosing. We recommend amendment to the Code to provide protection to employees similar to the protection provided to employees in British Columbia.<sup>10</sup>

### **3.3.2 Limited Use of Union Dues**

Unions receive dues from employees who are governed by the terms of a collective agreement between the union and the employee's employer. Even in circumstances where a particular employee does not wish to join the union, employers often agree to incorporate a provision in the collective agreement that requires the employer to collect dues whether or not the employee joins the union. In addition, in a recent decision of the LRB, the LRB held that the Code is unconstitutional insofar as it fails to expressly mandate such deductions from employees who do not wish to join the union. These principles are supported on the basis that the employees benefit from the collective agreement regardless of whether or not they join the union. Therefore, in circumstances where they do not wish to join the union, they should nevertheless be obligated to pay for these benefits like any other employee.

However, there are no provisions that require a union to use those funds to represent the employees through administration of the collective agreement and grievance procedures as required by the Code. In fact, many unions use funds received through union dues to engage in political activism. This is generally conducted without the employee's individual consent.

Individual union members have the right to vote for candidates of their choosing in an election and also have the right to financially support or not support a particular candidate or political party. Forced union dues used for political purposes circumvent this basic right. Unfortunately, the Code lacks the checks and balances that exist in other jurisdictions such as Europe. Further, national polling research by Nanos Research indicates that 81% of Canadians do not believe that forced union dues should be used for political purposes unrelated to collective bargaining or grievance administration.

Accordingly, in fairness to employees, we recommend amendments to the Code which prohibit unions from using union dues to support activities other than fulfilling the union's obligations under the Code unless the union obtains prior consent of the employee.

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<sup>10</sup> Suggested change: Section 151(i)(i) of the Code should be amended as follows:

No trade union and no person acting on behalf of a trade union shall expel or suspend a person from membership in the trade union or take disciplinary action against or impose any form of penalty on any person for engaging in employment with any employer.

### **3.3.3 MERF Regulations**

Prior to 2008, a number of building trade unions operated market enhancement recovery funds ("MERFs"). These MERFs were primarily funded by unionized contractors in the industrial markets. These contractors were required, pursuant to collective agreements, to contribute funds to the MERFs based upon the number of manhours worked. The building trade unions typically used the MERFs to facilitate a cross-sector subsidy of unionized contractors operating outside the industrial markets. For example, where a unionized contractor was bidding for work on a commercial building project against non-unionized contractors, a MERF would be used to subsidize a unionized contractor's bid and to provide a competitive advantage to the unionized contractor.

In 2008, the Alberta government enacted amendments to the Code and the *Market Enhancement Recovery Fund Distribution Regulation*. These were intended to prohibit certain aspects of MERFs and required the dissolution of MERFs.<sup>11</sup> However, some building trade unions continue to use MERFs, and MERF funds have not been dissolved, as required.

In 2009, Merit Contractors Association provided materials to the LRB for the purpose of assessing whether four unions were filing disclosure reports required pursuant to the *Market Enhancement Recovery Fund Distribution Regulation*. This regulation imposes an obligation on the LRB to require the trade union to file the disclosure report if it comes to the attention of the LRB that a trade union or trustee has not filed a disclosure report. In a brief decision, the LRB concluded that the applicable sections of the regulations did not clearly define the role of the LRB in investigating the matter and further concluded, on the basis of the evidence presented, that there was not sufficient evidence to assess whether the MERFs remained in existence.<sup>12</sup> Since then, incontrovertible evidence has come to light indicating that building trade unions and unionized contractors restructured their MERF schemes to take advantage of deficiencies in current legislation and regulations (e.g., by reducing employer contributions to benefit programs).

In summary, the continued use of MERFs and the reluctance of the LRB to regulate the practice highlights the need to improve and clarify the enforcement mechanisms related to MERFs. This could easily be achieved through amendment of the applicable sections of the Code or the *Market Enhancement Recovery Fund Distribution Regulation*.

### **3.3.4 Picketing**

The LRB has demonstrated an unwillingness to prevent unions from unlawfully causing delays to employers and their customers, employees, or independent contractors through a union's use of picket lines at a place of business. Unions and employees engaged in a labour dispute are entitled to communicate. They have a freedom of expression. However, what they do not have is a right to force people to listen to them and cause delays to access and egress to property for that purpose. The LRB's

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<sup>11</sup> See Appendix 4 for the language enacted to address MERFs.

<sup>12</sup> A copy of the decision is attached as Appendix 5.

interpretation of the Code has been to grant to picketers a right to obstruct employers, suppliers, other employees not on strike, and the public in general, and improperly interfere with the use of property. Accordingly, the Code should be amended to remove any time lines that permit picketers to cause delays to employers, their customers, other employees and independent contractors..

### **3.3.5 Effective LRB Appointments**

The Chair or a Vice-Chair of the LRB is responsible for adjudicating matters brought before the Board. These individuals exercise quasi-judicial roles and are often required to issue decisions that require consideration of complex legal principles. Once issued, their decisions can significantly affect employees, employers and unions in Alberta. In short, it is very important to appoint individuals who will correctly interpret complex legislation and issue decisions that are consistent with the legislature's policy intentions.

The Procedure Guide issued by the LRB describes the intended process for appointing or reappointing the Chair or a Vice-Chair of the LRB. This process is supposed to involve significant stakeholder consultation. It is not effective to that end, but more importantly, the appropriate and efficient development of this Province is not fostered by the process contemplated in this policy. Additional stakeholder consultation is required for appointing or reappointing the Chair or a Vice-Chair of the LRB to ensure that the most appropriate candidates – those who are capable and willing to issue decisions that reflect the legislature's policy intentions - are considered and ultimately appointed.

In respect to the appointment of other members to the Labour Relations Board (from management and labour), the process is flawed. In Alberta, there are competing trade union groups and organizations such as the Building Trade Council of Unions on the one hand and the Christian Labour Association of Canada or the Communications Energy and Paperworkers Union on the other, who are at most times quite belligerent with each other. For some reason, the Labour Relations Board policy has allowed union representatives of one group to participate in the interviews of competitor representatives, and as well have the power to veto the appointment of these competitors regardless of whether the candidate is qualified for the position. The process that has been utilized prevents the appointment of candidates who have the required qualifications for the position, but may not share a particular union agenda or philosophy. Recent appointments have, to some extent, taken a small step in the right direction. However, continued diligence is required by the Minister of Employment and Immigration to ensure that the Labour Relations Board consists of members who will reflect the legislature's policy intentions.

#### **4.0 Methods for Implementing the Necessary Amendments**

Throughout this document, we have outlined recommended changes to Alberta's Labour Relations Code. However, a number of these amendments could be effected through regulation rather than through an amendment to the Labour Relations Code. This could be further enhanced by strengthening the power to create regulations under the Code.

#### **5.0 Conclusion**

As Alberta endeavors to improve its position as a major global energy player and sustain prosperity and a high quality of life for all Albertans, it must look for all opportunities to improve its competitive position. Fortunately, there are a number of opportunities to improve Alberta's competitive position through amendments to the Alberta Labour Relations Code, as outlined in this document.

Upon request, we are prepared to offer suggestions for specific language relating to these amendments.