

**Submission by the
Alberta Federation of Labour**



to

**The Honourable David Hancock
Minister of Alberta Human Services
on the Labour Code Review**

November 7, 2011

EXECUTIVE SUMMARY

This past summer, former Alberta Employment and Immigration Minister Thomas Lukaszuk launched a review of the Alberta *Labour Relations Code* (the “Code”).

The *Code* is of vital concern to the Alberta Federation of Labour (AFL) because it sets the terms for free collective bargaining, through which the terms and conditions of employment are established for literally hundreds of thousands of unionized workers in the province of Alberta.

The AFL is the largest union organization in the province, representing more than 145,000 of those workers. Given this reality, it is imperative that its voice be heard when any review of the *Code* is undertaken. It is for this reason that the AFL was disappointed not to be consulted when the Employment and Immigration Minister launched a review of the *Code* over the summer, but chose not to seek input from the AFL or from major unions whose members would be affected by changes being proposed.

Despite the failure of the Minister to invite our input, we are taking this opportunity to address this important issue and we have encouraged our affiliates to also make submissions. These submissions should not be construed as an endorsement of the review process: they are not. Instead we are making submissions to avoid being shut out of a process which we think has been, to date, unbalanced and unfair.

The AFL believes there are many problems with the review. Specifically, we think the process is seriously flawed and the premise behind the review is faulty. We also think that if the changes proposed by the so-called Construction Competitiveness Coalition are implemented, it will result in significant labour unrest, not the “increased stability” that the coalition promises. We submit that if there is to be a review, it should be fair, held in a public forum, and in front of a neutral panel. If the *Code* is to be opened for changes, the AFL has several concrete suggestions that would bring real stability, help grow our economy and benefit both employees and employers.

The AFL asks that the current process for reviewing the *Code* be stopped immediately. If the government insists on reviewing the *Code*, we think that a fair, neutral, consultative, public process should be established before a truly neutral panel.

Consultation process flawed

The AFL believes the process of the current review to be seriously flawed for a number of reasons.

- The review was not announced to the public.
- The list of stakeholders invited to take part excluded the legitimate representatives of many of the workers directly affected by proposed changes.
- The review is being held behind closed doors, rather than in a public forum where ideas could be presented, questioned and debated.
- The terms of reference seem to have been set by the so-called Construction Competitiveness Coalition (CCC), a small industry lobby group seeking to make changes solely to benefit its members.

- The panel appointed to hear the review has not a single representative of labour and is headed by a prominent management-side lawyer who has spent his career working against unions, not with them.

This is not how consultations on important legislation should proceed in an open and democratic province. If there is to be a review, let's make it equitable and let's make it transparent. The process should have the confidence of stakeholders.

Competitiveness claims have no merit

In agreeing to a review of the *Code*, former minister Lukaszuk at least tacitly accepted the CCC's rationale for a review. In particular, he accepted the CCC claims that the industrial construction industry in Alberta is not competitive and that labour costs are "pricing Alberta out of the market" especially oil-sands related construction.

These are the arguments, but we at the AFL feel very strongly that members of the CCC have got their facts wrong and that – as a result – the whole rationale that they offer to justify a review of the Code is faulty. The CCC has painted a very bleak picture of the construction situation in Alberta and set unions and unionized workers up as the scapegoat. But the facts tell a different – and much more positive – story about the real situation with construction in Alberta:

- Investment is not fleeing Alberta, it's flocking here. According to the Alberta government, per-capita investment in the province in 2010 was almost twice the national average at \$18,930.¹ Last month, the Alberta government listed nearly \$186 billion in major projects under way in the province, with \$111 billion going to major oil-sands projects.² There is no evidence – absolutely none – that Alberta's labour market situation is driving away investment.
- The kind of anti-union provisions sought by the CCC and already implemented in B.C. and Saskatchewan have not made those provinces beacons for investment as the CCC suggests. Alberta, with its current *Code*, boasts major capital projects valued at more than double the value of major capital projects in B.C. and more than triple those in Saskatchewan. Capital investment in Alberta's oil sands alone is more than all major capital investment in B.C. and Saskatchewan combined.
- The cancellation of upgrader projects in 2008 was caused by the global recession, falling oil prices and easier pipeline access to American refineries, not by construction costs. There are no credible authorities who believe the cancellations had anything to do with Alberta's Labour *Code*.
- Costs did increase in the oil sands, especially in the 2004-09 period, but those increases had nothing to do with the *Labour Code* or Alberta's labour relations system. Instead, the weight of

¹ Government of Alberta, "Alberta's Economic Development: Frequently asked questions," <http://albertacanada.com/about-alberta/frequently-asked-questions.html>

² Government of Alberta, "Inventory of major capital projects," <http://albertacanada.com/about-alberta/inventory-of-major-projects.html>

expert analysis and opinion clearly demonstrates that the real culprit was the rapid pace of development in the oil sands. The pace of development drove up costs for building materials and complicated both engineering plans and project management. Blaming workers and the Labour Code is like blaming a bystander for a car wreck. Using legislation in an attempt to lower wages for workers won't fix a problem that was been created by questionable government and corporate management (i.e., neither government nor business leaders worked to establish a more reasonable pace for development).

- The overheated climate that led to cost increases – and which forms the basis of the CCC's case for *Code* changes – seems to have changed substantially over the past two years as a result of the ongoing global financial crisis and resulting market uncertainty. Just this month (November 2011), for example, Rick George, the CEO of Suncor Inc, Canada's largest oil sands company, said that construction costs for oil sands related projects increased by only 3-5 per cent in 2011. And he said that costs are not expected to make a major jump in 2012.³ So the CCC's rationale for *Code* changes – which was already highly questionable and unfair – appears to have evaporated entirely.
- The Alberta construction sector does not have a problem with "stability" as the CCC suggests. Under the labour relations regime established by the existing *Code*, there has never been a major strike in construction. In fact, there hasn't been a construction strike in Alberta since the early 80s – before the current *Code* was adopted. How much more "stable" can our labour relations climate be than that? At the same time, the changes proposed by the CCC are clearly aimed at weakening traditional building trades unions at a time when they have proven their worth by negotiating contracts that provide exactly the kind of "cost certainty" that developers have been asking for and when the benefits associated with their continent-wide hiring networks have become more and more apparent. It escapes us how weakening such useful partners would improve either competitiveness or stability.

The real motive behind the proposed changes

The record clearly shows that Alberta does not have a competitiveness problem, especially not one associated with its provincial *Labour Code*. So if it's not really about competitiveness, what is the CCC really after?

The answer is obvious: It aims to have the Alberta government rewrite the rules to tilt the balance in favour of its own members (largely non-union construction contractors), to give them an unfair advantage over competitors (i.e., contractors who work with traditional building-trades unions). It seeks to do this by weakening the ability of unions to represent workers and to undermine those employers who are able to successfully work with unions.

A close look at the proposals shows that their aim is to drive real unions out of industrial construction in the province, and to weaken their ability to operate in other sectors.

They aim to make it easier for employers to bypass unions altogether, or to choose the employer-dominated Christian Labour Association of Canada (CLAC). Indeed, the proposals seek to make CLAC

³ Globe and Mail: Report on Business, "Suncor gets conservative with spending," November 4, 2011, p. B7.

“raid-proof” because, it seems, CLAC is afraid of competition from real unions that do a good job of representing workers.

Labour unrest

An imposition of these clearly union-busting proposals will lead to labour unrest and conflict, not the “stability” predicted by the employer coalition.

The labour movement in Alberta does not want this. We see ourselves as partners in growing the Alberta economy. We have worked hard to grow our economy and wish to continue doing so. But workers will not stand idly by while their hard-won rights are attacked and undermined

Progressive reform welcome

Should the government insist on opening the *Code* to review, it should be in a thorough, transparent, fair and public process. In this case, the AFL would make several submissions for changes to enhance the rights of workers and so encourage workers to come to this province. These changes would benefit employees, but also help employers compete in a tight labour market.

The AFL suggestions (but not limited to) the following:

- Allowing for card check certification;
- Allowing all affected construction workers to vote in a certification vote;
- Enhancing the ability of workers to be organized while working in remote locations;
- Allowing for first-contract arbitration;
- Removing the special opportunity for revocation of bargaining rights in the construction industry;
- Removing all restriction and statutory interference with MERFs;
- Requiring all collective agreements to include arbitration as the final option for resolution of all workplace disputes;
- Requiring minimum financial support for the union by a legislated Rand Formula;
- Adding whistle-blowing protection to the *Code*;
- Removing the apparent restrictions on secondary picketing; and
- Prohibiting the use of replacement workers when a lawful picket line is in place.

Section I: Flawed Process, Flawed Proposals

The Alberta Federation of Labour submits that the current process established by the former Minister of Employment and Immigration to the review of the *Labour Code* is unfair, undemocratic and unreasonable.

The review, as currently constituted, is built around an analysis and a set of recommendations formulated by the clearly self-interested Construction Competitiveness Coalition (CCC). We challenge

both the CCC's characterization of the problem and its proposed solutions. In particular, we challenge the notion that Alberta is losing its competitive edge, especially to places that have labour laws more obviously skewed in favour of construction employers (like B.C. and Saskatchewan).

Investment continues to pour into Alberta, especially to oil-sands related projects. It's true that costs have been going up, but that is the result of the pace of development and has nothing to do with provisions of the *Labour Code* or failures in our province's system for labour relations.

Despite the lack of a clear connection between the issue identified by the Minister (Alberta's competitiveness) and the solution proposed by the CCC (changes to the *Code*), the CCC is asking the government to make significant and far-reaching amendments to the *Code* – changes that would have profound (and we would argue, negative) implications for tens of thousands of working Albertans.

Given the potential impact on the lives of ordinary Albertans, we think it is incumbent on the government to make sure it has not been misled about the need for change, or its potential downsides.

We also think that it is incumbent on the government to pay attention to how a review is conducted, not only why. In other words, process matters. A proper consideration of proposals of this nature would include holding hearings before a neutral body which would hear evidence and submissions of the labour-relations community in a public forum. Parties would be entitled to question witnesses and bring forward their own evidence. Recommendations made based on evidence and thoughtful submissions made in a public forum would be made.

The process that the government has embarked on is the very antithesis of such a fair process. The review was started in relative secrecy. The Alberta Federation of Labour (AFL), for example, only learned of it through the media. While the proposed changes to the *Code* will affect almost all workers in the province in various sectors, only a small portion of the labour-relations community was invited to participate.

The stakeholders list of those involved in the review has some notable exemptions: the United Food and Commercial Workers, United Nurses of Alberta, Health Sciences Association of Alberta, Canadian Union of Public Employees and the Alberta Union of Provincial Employees. These five unions alone represent more than 184,000 workers, or half of the workers covered by collective agreements in Alberta. Their exclusion from a review of the *Code* is inexcusable and tantamount to a slap in the face of unionized workers and the Alberta public alike.

The panel set up to make recommendations was selected without input from the labour side of the community and further, does not include anyone who would be understood to be either a neutral player or a representative of the interests of labour. The panel is receiving submissions without sharing them with others and is holding private closed-door meetings with some parties. There is no opportunity to know what has been presented to the panel in such meetings or submissions and to properly respond to them.

The AFL protests this process as unfair, inappropriate and perhaps even unconstitutional. This closed-door, one-sided review should be stopped immediately. The AFL, although not invited to participate, is providing this brief to the Minister and to the panel, without in any way conceding the fairness or reasonableness of this process.

The AFL hopes that the Minister will end this inappropriate process and either simply drop the notion of a *Code* review at this time or commence a proper review. This is a time of growing economic activity in Alberta, with the construction industry expected to reach levels of employment never before experienced by next summer. There is no need to be focusing on a *Code* review at this time, when instead the focus should be on enhancing the attractiveness of the Alberta workplace to workers from all over the world.

The AFL will respond to each of the proposals for legislative change suggested by the CCC. Generally, the AFL submits that closer review of the CCC proposals reveals that the proposals amount to:

- Changes to protect unions supported by employers, such as CLAC, from being challenged by disgruntled members;
- Changes to remove any rights of employees to freely select the union which will represent them, or to change that selection from time to time;
- Changes to support a practice of Noah's Ark, limited employee complement certifications when there is a significant increase in the workforce expected;
- Changes to muzzle the freedom of speech and freedom of association of trade unions and their members;
- Changes to reduce the neutrality, representativeness, and expertise of the Labour Relations Board;
- Changes that affect the entirety of Alberta trade unions, not just those operating in the construction industry;
- Changes that, if implemented, would have no effect on the competitiveness of Alberta construction or other employers and that would provide no enhancement to the Alberta economy;
- Changes that are simply aimed at attacking all trade unions including, but not limited to, those operating in the traditional manner in the construction industry; and
- Changes that are requested without evidence of any particular problem that needs addressing, but that are instead simply an ideological attack on the very concept of union representation.

The AFL submits that if the government has any hope to ensure that there are sufficient workers in Alberta to address the growing demand for labour, now is not the time to decimate the rights of Alberta trade unions and the rights of Alberta workers – which is what the CCC proposals aim to do.

1. *The CCC seeks clarification of Division 8 of Part 3.*

AFL Position: Division 8 of Part 3 of the *Code* should be repealed, not clarified.

Under Division 8 of Part 3 (s. 194 – 201) of the *Code*, the government can, by regulation, designate a construction project under Division 8. The result is that a special regime of collective bargaining then applies. The designated principle contractor is granted the right to engage in voluntary collective bargaining with trade unions to achieve collective agreements that are in place for the duration of the project, which means that there will be no opportunity for a strike or lockout for the duration of the project. Also of note is that the designated principle contractor bargains directly with trade unions, bypassing the contractors who employ the workers on the project and their registered employer organizations. The CCC states that it is asking that Division 8 be strengthened to ensure that its use is not

subject to legal challenges, including those under the *Charter of Rights and Freedoms*, so that the protection against work disruption granted by a Division-8 declaration will be secure.

When the most recent Division-8 designation was granted for the CNRL Horizon project, there appeared to be a suggestion from CLAC and CNRL that the designation gave CLAC the right to collectively bargain one collective agreement with the principle contractor that would bind all employees, even those for whom CLAC held no bargaining rights at all. CNRL also made clear its position, again unfounded, that the effect of a designation was the removal of the right of employees to seek or change union representation. The AFL believes that since those interpretations are not supported by the legislation and are manifestly unconstitutional, it is clear that the CCC (which, we submit, has been intentionally unclear about what changes it considers necessary) is really asking in its submission for Division 8 to be strengthened to allow for CLAC, or some other union of the employer's choice, to negotiate a binding agreement on persons who have never chosen CLAC as their union and who have never worked in a CLAC bargaining unit. The CCC is seeking to allow the designated principle contractor to, in effect, select the union that will represent all employees working in the construction of the project for its entire duration.

Division 8 has been used only once in recent history in Alberta and it is simply an unnecessary part of the *Code*. Many Alberta construction sites, especially those in the oil patch, operate under freely negotiated project agreements, which commonly include an agreement that there will be no strikes or lockouts for the duration of the project. Those project agreements are negotiated with the trade unions chosen by the construction workers. The certainty and stability from work stoppages for construction projects that the CCC suggests it is seeking is not, practically speaking, dependent on a designation under the provisions of Division 8. The prevalence of successful large-scale construction in Alberta, including in the oil patch and in the energy sector, confirms that Division 8 is not necessary for a healthy Alberta economy.

The AFL believes that the true motivation for this submission of the CCC is to provide for a vehicle to allow the principle contractor, instead of construction workers, to choose which trade union will represent its construction employees for the entire duration of a project. Further, the CCC's proposal is, in essence, that the principle contractor can make this choice for construction workers, regardless of the fact that such workers have already chosen a trade union and hold membership in it. Finally, the CCC seeks to have the principle contractor have a right to negotiate a new collective agreement that will bind all construction workers, overriding the freely negotiated collective agreements between their union and registered employer organizations. The AFL believes that this is blatant union-busting and, perhaps more importantly, a proposal to end the ability of construction workers to exercise their own free choice as to which union will represent them. There is no principled reason to grant the request.

2. *The CCC seeks statutory continuation of old collective agreements when the employees achieve a change in their trade-union representation.*

AFL position: The current provisions of the *Code* regarding how and when a newly certified union can terminate an existing collective agreement should be left as is. The resulting imposition of the registration collective agreement in the construction industry should also remain.

In essence, the CCC is asking for statutory language to require that when the employees of an employer decide to change their bargaining agent and do so under the provisions of the *Code*, the newly certified union should be forced to administer the collective agreement negotiated by the displaced union for the balance of its term, no matter how long. This would mean, for example, if an employer negotiated a 50-year collective agreement with CLAC, the employees of that employer would have no ability to change that agreement, even if they lawfully selected another union, for the 50 years or at least until the end of the lengthy oil-patch construction projects.

Such a statutory provision would take away any the right of the employees who have, during a statutory open period, exercised their right to chose a new union to represent them, to bargain collectively with the union of their choice. The AFL states that such a provision would certainly be unconstitutional as a violation of workers' freedom of association. It is no more than a blatant attempt to end any benefit that employees joining another trade union receive, and would be even more impetus for employers to seek to impose unions who are employer friendly, on their workplaces so that long-term collective agreements could be put in place.

Under the *Code*, workers have a statutory right to periodically review the question of which trade union they wish to represent them. This right arises at the end of a collective agreement or if the collective agreement is over two years, it arises after the second year of its term and every year thereafter. The right to decertify a trade union and to then be either non-union or to select a new union (commonly called a raid by the new union) is a fundamental right for employees. It provides the employees with the ability to effectively ensure that the officials of their trade union are operating the union in the best interests of the majority of the members. Strong unions who enjoy the respect and support of their members, unions that abide by the wishes of their members and unions that fully represent the interests of their members do not have anything to fear from the regular occurrence of open periods. Weak, non-representative unions that employees wish to remove are motivated to protect themselves from a raid by removing all advantages that a raid by another union might bring. Employers who wish to ensure that the union representing their workers remains compliant also benefit from such strategies.

Under the current provisions of the *Code*, a newly certified trade union may, on notice, end the collective agreement negotiated by the trade union that was displaced and bargain a replacement agreement. In the construction industry, there is no need for a trade union that is part of the registration system to bargain such a new collective agreement because the *Code* mandates that the construction registration collective agreement already in place will operate for every construction bargaining unit. As a result, there is every expectation that newly certified unions operating under the registration system who replace another union customarily give this notice.

There is no reason to suggest that the operation of the current provisions of the *Code* in the construction industry impose any disparate hardship on construction employers. There is no evidence that any industry has suffered any kind of non-competitiveness due to these provisions, which have been in place for about 25 years. The Alberta economy has remained healthy and has enjoyed several significant upturns under the current legislation.

In the AFL's opinion, the change suggested is really an attempt to ensure that a freely selected trade union is unable to provide construction workers with any real benefit, thereby making a raid on unions such as CLAC by traditional trade unions far more unattractive to the bargaining unit members. Clearly, if CLAC were representing the members of a bargaining unit to the satisfaction of the construction workers, those workers would have no interest in changing their union. The change suggested by the

CCC is simply to provide statutory protection for weak, non-representative unions who cannot secure the support of their members by doing a good job for those members. The government, once it considers the true motive behind this submission, can only conclude that there is no basis for a change in the legislation.

3. *The CCC seeks statutory continuation of non-union terms and conditions of employment after certification of non-union workplaces for the “completion of existing work”.*

AFL position: The current provisions of the Code regarding how and when a newly certified union can negotiate a collective agreement or how and when the registration collective agreement will apply to newly certified workplaces should remain.

The CCC’s position is that if a union organized a non-union construction company, the company would be able to finish all existing work under the non-union terms and conditions of employment, for however many years such projects were to take. The CCC is basically seeking to nullify all rights to bargain terms and conditions of employment for a newly certified union or to nullify the operation of the registration system for construction certifications. This request is really very similar to the request just discussed in item 2, with the only change being that the terms and conditions of employment unilaterally imposed by a non-union construction employer will remain in place after a certification for the completion of the “existing work.”

Under the current provisions of the Code, when a trade union that bargains a collective agreement in the construction industry with a registered employer organization under the registration system is newly certified for a bargaining unit of construction workers, the applicable registration collective agreement automatically applies to that new bargaining unit. Generally speaking, individual cases of undue hardship can and have been addressed between the parties and there is no evidence of any particular difficulty for construction contractors that has not been addressed between individual contractors and the particular trade union. Alberta is not a jurisdiction rife with construction contractor bankruptcies or defaulting construction contractors.

The AFL believes that the change sought by the CCC would certainly be found to be unconstitutional and a violation of the Charter. The most fundamental and significant reason for organizing a trade union – the right to collectively bargain terms and conditions of employment – would be eradicated by the change suggested by the CCC. Again the AFL submits that the change sought by the CCC is simply an attempt to remove any benefit that a trade union might bring to the table for its members, not any legitimate concern for competitiveness in the construction sector.

The Alberta economy has and will continue to do well under the current labour-relations rules regarding construction collective bargaining and the impact of the registration system for the construction industry. There is no need for the change sought by the CCC.

4. *The CCC seeks changes in the law to allow for all employee bargaining units in construction.*

AFL position: No change is necessary.

When an application for certification is made, the Labour Relations Board determines what grouping of employees of the employer is the appropriate bargaining unit for that trade union and that particular employer. The Board has traditionally certified bargaining units in the construction industry based on trade designation, which respects the specific community of interest of the members of each designated and regulated trade as well as the historic building-trade union boundaries. In Alberta, non-building trades unions have always been free to also organize and represent workers in the construction industry and the Board has granted such unions trade-based certifications. A union such as CLAC has been able to successfully achieve trade-by-trade certification for all the trades represented by a particular employer. Further, the *Code* does not prevent CLAC from negotiating a single collective agreement to cover the multiple certifications that it holds for any one employer.

There is currently nothing in the *Labour Relations Code* that prevents the Labour Relations Board from ordering an all-employee bargaining unit in a construction-industry situation in Alberta, should an appropriate case be argued before it and should the Board be convinced there is sufficient reason for it to deviate from its long-established policy. The AFL points out that there is no need for any legislative changes, unless what the CCC is really hoping to achieve is a statutory mandate that, in the construction industry, the Board prefer all-employee bargaining units over the historic trade-based units.

It is important to consider the impact of the CCC's request on the registration system that the *Code* and predecessor legislation has imposed on the construction industry in Alberta since the 1970s. The registration system imposes significant restrictions on the freedom of trade unions and employers to bargain individual collective agreements and instead requires those parties to bargain construction-industry-wide provincial collective agreements on a trade-by-trade basis. This system has brought a great deal of stability and certainty to the construction industry. All-employee bargaining units in the construction industry operate outside of the registration system. Should all-employee bargaining units become the preferred bargaining unit structure in construction, then a significant amount of the stability and certainty achieved in the construction industry under the registration system will be destroyed.

The AFL believes that the true reason for this proposal is to make it virtually impossible for employees who find themselves in a CLAC bargaining unit to change union representation during an open period. For the most part, in the construction industry, the alternative trade unions to CLAC are the building-trades unions who only represent members of a single trade. A building-trades union would have significant difficulty raiding an all-employee CLAC bargaining unit as it would not be in a position to represent all the trades covered by such a bargaining unit. So the result of this proposal is to seek to make "raid proof" bargaining units for employer-favoured unions such as CLAC.

One of the fundamental principles of the *Code* is that employees are free to choose to be represented by a trade union of their choice and, as explained earlier, that employees are given a regular opportunity, by virtue of the statutory open periods, to review and change that choice if a majority of them wish to do so. That free choice would be made ineffective by the CCC proposal and ought not to be considered further.

Currently, CLAC has been able to acquire a significant number of certifications in the construction industry in Alberta. There is no evidence that the requirement that certification be trade-by-trade has, in any way, hindered CLAC's ability to acquire bargaining rights. Furthermore, CLAC has no history of difficulty bargaining collective agreements in the construction sector. There is simply no evidence to suggest that all-employee bargaining units are required for the success of non-building trades unions in the Alberta construction industry.

Also, there is considerable danger that all-employee bargaining units in the construction industry operating outside of the registration system will bring uncertainty and instability to the industry. There would be a significant risk that implementing this CCC proposal would destroy the registration system in its entirety as other unions may be forced to adapt and also seek all-employee units outside of registration. Clearly, this proposal is not about competitiveness, it is about raid-proofing CLAC bargaining units and removing the free choice of Alberta workers to select a union of their choice, regardless of the negative effect such might bring generally to the successful construction industry in Alberta.

5. *The CCC seeks legislative enshrinement of early renewal of collective agreements which close the open period during which employees are free to change the trade union which represents them.*

AFL Position: The Code does not allow for the closing of open periods by early renewal of collective agreements and the Labour Relations Board has recently confirmed that fact. There is no reason to change the Code.

The Labour Relations Board has recently, in two thorough decisions, examined the provisions of the Code and the practices in the construction and other industries and determined that closing of open periods by early renewal of collective agreements is not permitted. This result is wholly in keeping with the fundamental premise that employees are free to select the trade union that represents them and that they will have a regular opportunity to review that selection decision.

The past practice, which the Labour Board has recently overturned, was that if an employer and trade union renegotiate a collective agreement before the open period started and a majority of the employees voting ratified the collective agreement and waived the open period, the open period would not open. The result was a significant amount of litigation over whether or not the employees understood their rights and truly exercised a free choice to waive the open period. An aggravating factor in the construction industry is the ability for a company to periodically wind down its operations and thus have a very small complement of employees at work when the issue arises.

Also, in the construction industry, there were a number of cases where the employees were seeking to certify a raiding union over CLAC and the employer and CLAC were raising a hastily bargained new collective agreement and ratification vote which also allegedly waived the open period to defend against the raid – a situation that the Board found was clearly not contemplated by either the Code or the Board's past jurisprudence.

The end result was that the Labour Relations Board found that the fundamental right of employees to periodically evaluate and possibly change their bargaining agent that the statutory open period created was simply not open to be waived by employees.

It is these Labour Board decisions saying that there is no ability for any party to close a statutory open period, that the CCC proposal seeks to overturn. The CCC wishes the government to put in place legislation which would allow an incumbent union and an employer to agree to eliminate the right of the employees in the bargaining unit to periodically evaluate their selection of trade union to be their exclusive bargaining agent. The open period arises at the end of a collective agreement's term or, for longer term collective agreements, at the end of the second term and every year thereafter. During an

open period, the members of the bargaining unit are free to file an application to revoke the bargaining rights of the union and, if they desire, to have a new union apply for certification to represent them.

Trade unions that represent their members well do not fear the fact that a regular open period arises by law. Members who are supportive of their trade union and who feel that their union effectively represents their interests have no need to change their trade union representation. This CCC proposal is really about protecting those unions which are not respected and supported by their members from regular member evaluation. The proposal seeks to force ineffective unions who are not supported by their members on employees.

There is no argument available to suggest that protecting ineffective trade unions, which do not have the support of their members, is in keeping with the objects of the *Code* or would in any way enhance the economy of Alberta in any sector, including the construction industry. There is no reason for the government to make any changes to the *Code* that reduce or eliminate the right of workers to freely choose the trade union which will represent them, or to periodically change that choice.

6. *The CCC seeks legislative protection from the Labour Relations Board considering the build-up principle in the construction industry.*

AFL position: The Labour Relations Board should continue to be free to apply the build-up principle or not apply it in all industries in Alberta, depending on the circumstances of each case.

Currently, Labour Relations Board practice is that the build-up principle is not applied in the construction industry in Alberta in the same way it is applied in other industries. The build-up principle basically involves an evaluation of the nature of the workplace at the time of an application for certification. If it is apparent that the employer will be soon gearing up its business and hiring a significantly larger workforce than that present at the time of the application for certification, then the Board will not allow a small complement of workers to pick the trade union. The impending build up of the workforce will require the certification application to be rejected at that time. The historically short-term nature of construction projects is the foundation for the policy decision to not consider impending build up of the workforce in the construction industry.

As a result, in Alberta, a group of merely two employees can select the union that will be certified for their trade, even if the employer is planning to hire many more employees in that trade in the near future. This practice has allowed for CLAC to engage in a practice of “Noah’s Ark certifications” and the evidence establishing that CLAC practice was set out in the *Firestone* decisions.

The Labour Relations Board, in the recent *Firestone* decision issued in 2009, made comments which somehow led the CCC to believe that it might reconsider that approach in the right circumstances in the construction industry in the future, but the Board has not done so to date.

Generally, the build-up principle operates to ensure that a small group of employees do not get to take away the democratic opportunity for a larger group of employees to select the trade union that will represent them when the larger group of employees are expected to be hired relatively soon. There is no reason for a trade union that has the support of the employees in the bargaining unit to fear a requirement that it be selected by a larger group of employees who are soon arriving at the worksite. It

is only trade unions who are not able to garner popular support by employees who benefit from a practice that lets the first two employees on a project make the decision for all employees in the trade.

There is no mischief that needs to be addressed arising out of the possibility that the Labour Relations Board may, in future, decide to apply the build-up principle in the construction industry. This is just an attempt to seek legislative protection of weak unions which cannot gain support of the employees in a bargaining unit to represent employees who do not want them. Should the government legislatively tie the Board's hands such that it could not, in an appropriate case, apply the build-up principle in the construction industry, the government would be, in essence, legislating the appropriateness of Noah's Ark certification practices. Such legislation would fly in the face of the free choice of workers to select their own trade union. There is no reason for the Alberta government to legislate away the free choice of workers.

7. *The CCC seeks legislation preventing unions from requiring loyalty of their members.*

AFL position: There is no need for such legislation.

Generally speaking, a trade union, like a corporation, especially a privately held corporation, is entitled to govern its internal affairs. The amendment sought here is to force unions to keep as full members those persons who work outside of bargaining units that they represent. There is no good reason why the government would want to force unions to keep as members those who do not want to take on the work that is available in a trade union's bargaining unit.

A trade union is governed by the votes of its members; the members are privy to and make its strategic plans for collective bargaining, organizing of workplaces, for the administration of collective agreements, and many other private internal union matters. Further, for those unions such as the building trades, who are contractually bound to supply members to worksites upon employer request through hiring halls, the union requires its members to be ready and willing to fill those requests. Also, the union has a legitimate interest in sending its highly trained and professional members to work for its union contractors so that those contractors become contractors of choice in the industry because they bring with them the highest quality trades persons.

The CCC proposal is asking the Alberta legislature to overturn the decision of the Alberta Court of Appeal in *Armstrong*. In that case, the individual in question felt he was entitled to remain a member of the union, be exempt from the rules of membership applicable to the other members of the union while he worked for a company that had no bargaining relationship with the union and worked as a manager. The Court of Appeal upheld the union's right to discipline that member, provided that the union had work available for him in the bargaining unit. In essence the decision holds that a union has the right to require its members to make a choice between following the union's rules and staying a member or leaving the union to pursue a career that is not in keeping with the union's rules.

It is not in accordance with the policy of the *Code* to add more legislation restricting how the union governs its internal affairs. This proposal of the CCC seeks to prevent a union from being allowed to discipline members who don't follow the union's constitution, and, instead, support other unions or work non-union. A union and its membership should be allowed to make their own rules for how its members should behave.

There is nothing in the current law that prevents a building-trades union member from resigning from their union membership and going to work for a non-union or CLAC employer. There is no reason for the government to prevent those building-trade unions who have work available for their members in the trade they represent from requiring their members to make a choice – union membership in their union or to resign from their union or face punishment for working outside of their union.

The true basis for this proposal is that non-union and/or CLAC employers are unable to successfully recruit most building-trades members away from their union. This proposal is not about enhancing competition, it is about enhancing the ability of non-union and CLAC employers to poach the highly skilled trades professionals working in the unionized construction industry away from the union contractors and their unions.

8. *The CCC seeks legislation that limits how unions can spend or allocate union dues.*

AFL position: There is no need for such legislation.

The CCC seeks a legislative requirement that union dues be spent solely on representing union members under collective agreements and grievance procedures. The proposal amounts to a request that the government supervise the spending decisions of each and every trade union. There could be no greater interference with internal union affairs and it is a rather shocking suggestion. Not surprisingly, the CCC is not seeking that the government supervise the spending of contractors or organizations like the CCC, Merit Shop Contractors Association, or the Progressive Contractors Association of Canada in the construction industry in a similar manner.

Trade unions utilize union dues for many activities, including collective bargaining, administration of the collective agreement and processing grievances, organizing new bargaining units, addressing changing activities in the bargaining units they represent including addressing successorships, bankruptcies, closures, and unfair labour practices. Unions consider practical and legal matters relating to human rights, employment standards, workers compensation, occupational health and safety, trade certification and apprenticeship, pensions, health and welfare benefits, and other employee rights. Unions have to facilitate the needs of union members, including providing a staff to run the union, providing a union hall, running a dispatch system, training, apprenticeship, marketing and recruitment into the trade, social functions and recognition of members, connection with the broader labour movement in their trade, charitable endeavours of their members and of labour generally, etc. Trade unions are connected to national and/or international parent unions and to representative bodies such as the local District Labour Councils in each city, the Alberta Federation of Labour, the Canadian Labour Congress, the provincial, national, and international Building Trades Councils, and other similar groups.

It is beyond insulting to suggest, as the CCC does, that trade unions spend their funds on two things: collective-agreement administration and grievances and political activity. It is ridiculous to suggest that union members, any more than shareholders in a corporation, should have to individually approve all of the spending of the organization outside of collective-agreement administration. Just as the government would not consider such supervision of employers, there is no basis to consider such supervision of trade unions. Remember, union members are free to de-certify their trade union during statutory open periods and so the best supervision of union spending comes from the members. If the members do not approve of the spending, the members will seek to decertify the union.

In the construction industry, the building-trades union members affiliate with their unions in a manner which is significantly different from industrial or other unions. The labour-relations model used is one where employers call the union to dispatch workers to the employer on an as-needed basis, instead of the usual model of the employer recruiting and hiring employees who are then required to join the union. Union members in building-trades unions maintain their membership during times when they are not actively working in any bargaining unit and they look to their union as a source of employment opportunities. Further, the union provides pension, health and welfare benefits, training and apprenticeship support, and addresses many other ongoing or periodic needs of individual members or of the membership in general.

Trade unions, both in the construction industry and outside of it, also affiliate to larger labour organizations such as the AFL, the Canadian Labour Congress, provincial, national and international branches of the Building Trades Council, and international labour bodies. Trade unions also work with local, national, and international bodies to advance interests of union members concerning pension, minimum standards, occupational health and safety, etc. It is important to note that within this larger labour community, trade unions are involved in political action of all kinds as they seek to advance the interests of labour and advocate in favour of legislation that is respectful of labour interests.

Just as the CCC is, in this very proposal, seeking to change the labour laws in Alberta, there is no reason for the government to suggest that any trade union would be unable to do so for its members without specific written consent, which is simply impractical to obtain. The importance of effective government consultation with the affected trade-union community when labour laws are addressed to ensure that changes made to laws will adhere to the principles of the *Charter*, is just one example of the importance of allowing trade unions to continue to participate in political action.

The real motivation behind the proposal of the CCC, in the opinion of the AFL, is to stifle any opposition to its proposals. Advocates of change who seek to stifle informed debate of the change they seek are enemies of democracy and are afraid that their proposals will not withstand critical review. There is no principled basis for the Alberta government to support such a proposal.

9. *The CCC wants more legislative restrictions on MERFs.*

AFL position: The current restrictions on MERFs (Sections 148.1 and 148.2) should be repealed. Certainly there is no reason to enhance the restrictions.

The AFL leaves the support of this position to those unions directly affected by MERFS. The AFL submits that when a MERF is freely negotiated between contractors and trade unions, there is no basis for the government to restrict such agreements.

10. *The CCC seeks greater restrictions on picketing.*

AFL position: There is no need to add restrictions to the picketing provisions of the Code.

It is important to note that there has not been a construction-industry strike in Alberta since the early 1980s and thus this request is not aimed at the construction industry but rather at all of the other

unions in all other sectors. The AFL has particular experience representing affiliates in all sectors of the Alberta economy.

The CCC is requesting legislative restrictions greater than the restrictions that are regularly issued by courts in those jurisdictions where the regulation of strikes is not delegated by the applicable labour law to a labour relations board. For example, when a federally regulated employer has a strike, the Court in Alberta regulates picketing activity in Alberta. Courts and labour boards across Canada have regularly endorsed picket-line activities that include walking in front of those entering and exiting premises in vehicles or on foot to allow for communication of the union's message, albeit sometimes with particular temporal limits. The restrictions that the CCC suggests exist on freedom of speech and freedom of association relating to picketing are not, in the AFL's submission, supported in law or in practice.

The fact is that a picket line is an economic weapon used as part of the collective-bargaining process and can be used during a union-called legal strike or during an employer-imposed legal lockout. The purpose of a picket line is to communicate in a clear and unambiguous manner that there is a strike or lockout going on at the particular workplace. Further, unions communicate their issues and seek support of those persons who come near the picket line by the written messages on their picket signs, by the verbal messages conveyed by picketers and by written material handed out by the picketers. Provided that the picket line is lawful and the picketers are acting lawfully, labour boards and courts provide the picketers with an opportunity to effectively communicate their messages to those persons coming up to the picket line whether on foot or in a vehicle. These important rights of expression have constitutional protection.

This approach to picketing has existed in Canada since the advent of the Wagner Act styled labour statutes. The real motivation behind the CCC proposal is to minimize the effectiveness of a trade union's picket line, to stifle freedom of speech and to limit freedom of association. This proposal is not even remotely tied to the construction industry, and clearly there is no evidence that it would make any difference at all to an industry that has had no strikes or lockouts since 1988. Picketing, as it has existed, and as supervised by the Labour Relations Boards and the courts has not made Alberta less competitive or it has not proven to be a negative influence to the economic growth in the oil patch.

11. *The CCC seeks effective Labour Relations Board appointments.*

AFL position: The AFL sees nothing wrong with the appointment screening/ interviewing processes utilized by the Labour Relations Board to date. The AFL would endorse a clear policy that the Chair of the Board must endorse all appointments made by the Minister and without the Chair's endorsement of a particular person's appointment, the Minister would have no ability to appoint that person.

The Board is an independent expert tribunal. It is critical that the Board be composed of adjudicators, including the Chair, Vice-Chairs and Members who have the appropriate expertise. The Board's status as an expert tribunal is jeopardized if appointments of persons without the appropriate expertise are made. The CCC's proposal is clearly, in the AFL's submission, motivated by a desire to populate the Board with members from the CLAC, non-union, and Merit Shop organizations. Persons with such backgrounds do not bring the appropriate labour relations expertise to matters before the Board, and the lack of recommendations from the Chairs and the interview committees that have assisted the Chairs over the years of the appointment of such persons underlines their unsuitability.

The Chair is uniquely situated to know what background, training, education and skills are required of any particular candidate for the position of Vice-Chair or Member to provide the Board with panels which are able to continue the expert nature of the Board's adjudication. The Chair is situated to set up an interview committee that will critically examine each candidate in the areas that are important to the Board's expert and independent adjudication. The AFL agrees that it is important that the community be consulted and have input into the member and Vice-Chair appointment decisions of the Board. The AFL also believes that the Chair of the Board should have a veto over government appointments that he or she believes are not in the interests of the Board.

Section II: Addressing the Construction Competitiveness Coalition's claims

Former Employment Minister Thomas Lukaszuk stated that he decided to order a review of the *Labour Code* because he had been convinced, presumably by the Construction Competitiveness Coalition (CCC), that construction costs in Alberta are out of control and that these costs are driving away investment, especially in the oil sands.

For example, in the report that the CCC used to lobby the minister in favour of a *Code* review, the argument was made that "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."⁴ The CCC further states that, "the litany of cost overruns on major projects contributed to a climate of uncertainty that has eroded the perceived competitive advantage of a building major construction project in Alberta."⁵

The Alberta Federation of Labour agrees that costs have been going up in the oil sands. But we disagree that these costs overruns are the result of unions or union-negotiated contracts, or that it has anything to do with provisions of the *Labour Code*. We also disagree that these rising costs have discouraged investment.

The real reason why oil-sands construction costs have increased is because there are too many large projects under way at the same time. The basic laws of supply and demand (too many projects chasing scarce resources) has led to increasing costs for building materials and costly delays in engineering and project management. The rapid pace of development has also led to shortages of workers in certain construction trades and professional occupations.

None of the Construction Competitiveness Coalition's proposals will deal with the real problem in the oil sands: which is the unmanageable (and we would argue, irresponsible) pace of development. In fact, we submit that they might actually make problems worse by weakening traditional building trades unions whose hiring halls and North America-wide manpower networks are key tools for bringing skilled tradespeople to Alberta.

Instead dealing with the real issues, the CCC proposals are designed to do five things:

⁴ Construction Competitiveness Coalition, "Improving Alberta's Competitive Position," 1

⁵ Construction Competitiveness Coalition, "Improving Alberta's Competitive Position," 5

1. Drive down wages for constructions workers even as conditions in the market suggest that those wages should remain high. In other words, they want the government to use legislation to intervene in the market and defy the economic laws of gravity.
2. Make it easier for construction employers to sign “sweetheart” agreements with employer-friendly unions such as the Christian Labour Association of Canada (CLAC).
3. To more effectively “raid proof” the bargaining units held by employer-friendly unions like CLAC, thereby denying workers on those sites the right to chose alternative representation.
4. Force trades workers who would prefer to work for employers that have agreements with traditional construction unions to work, instead, for non-union employers or employers who have agreements with employer-friendly unions like CLAC.
5. Weaken the effectiveness of all union (construction and non-construction alike) in both the workplace and on the broader public and political scene.

Too many mega-projects creates cost uncertainty

The AFL is not the only observer of Alberta’s construction scene that has reached the conclusion that increasing costs are the result of the rapid pace of development in the oil sands, not the result of problems with the *Labour Code*. In fact, this is the same conclusion reached by numerous consultants, economists, academics – and industry leaders themselves.

For example, a 2011 report by Ernst & Young found that labour, service and commodity costs are increasing for oil sands development. The report found oil-sands operating costs increasing from \$19.6 per barrel in 2006 to \$25.5 per barrel in 2010.⁶ The report went on to say that the “primary drivers” of cost increases was the inflation and labour shortages associated with the rapid pace of development.

The Alberta *Labour Relations Code* was nowhere mentioned as a reason for oil-sands operating costs increases.

In a similar way, a 2007 report by the research and consulting firm Wood Mackenzie noted that in 2006, many of the main oil-sands players increased their forecasts for capital expenditures per peak flowing barrel by 32 per cent for integrated mining project and 26 per cent for in-situ projects. Between 2005 and 2006, the overall costs per peak flowing barrel increased by about 55 per cent. The significant increase in costs was due largely to labour shortages and increased material costs resulting from the sheer number of major oil sands project underway at the same time.⁷

The Wood Mackenzie report did not list Alberta’s *Labour Relations Code* as a factor in the shortage of skilled workers, nor were changes therein listed as a solution to the shortage. Rather, it was suggested

⁶ Ernst & Young, “Exploring the top 10 opportunities and risks in Canada’s oilsands,” August 29, 2011, 17

⁷ Conor Bint, Upstream Research Analyst – Canada and Alaska for Wood Mackenzie, in *Petroleum Review*, “Cost of playing in the oil sands, April 2007, 3

that the government try (emphasis ours) “**avoiding multiple 100,000+ barrel-type projects occurring concurrently**”⁸ as one of the ways to avoid stretching the supply of labour and materials.

As a result of the increasing costs caused by the rapid pace of development between 2004-2009, major energy companies started to make formal and informal arrangements with each other to stagger development. These efforts were not overly successful – largely because it’s difficult to convince competitors to cooperate – but it did demonstrate that even the energy industry itself had come to the conclusion that the pace of development was causing problems. Interestingly – and significantly – the overheated climate that led to cost increases – and which form the basis of the CCC’s case for *Code* changes – seems to have changed substantially over the past two years as a result of the ongoing global financial crisis and resulting market uncertainty. Just this month (November 2011), for example, Rick George, the CEO of Suncor Inc, Canada’s largest oil-sands company, said that construction costs for oil-sands-related projects increased by only 3-5 per cent in 2011. And he said that costs are not expected to make a major jump in 2012.⁹

So the real cause of escalating costs in oil-sands-related construction was the rapid pace of development allowed by the provincial government – not any deficiencies with the provincial *Labour Code*. To top things off, the cost increases that the CCC has used to justify *Code* changes are now starting to moderate. Given these realities, the obvious question is: why is the government continuing to consider *Code* changes that are not needed and which might cause unnecessary conflict with unions and undue hardship for individual working Albertans?

Issues such as cost escalation in oil-sands development are important and should not be ignored. Likewise, deficiencies in the *Code* should not be ignored. However, issues such as labour cost escalation are not a result of the *Code* – rather they are the result of too many large projects being developed at the same time, a fact that the Construction Competitiveness Coalition fails to understand.

Capital investments in Alberta continue

The Construction Competitiveness Coalition’s claims that “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.”¹⁰ They then go on to argue that this lack of “cost certainty” is driving away investment from the oil sands.

Unfortunately, the CCC’s argument ignores the fact that the Alberta Building Trades, in cooperation of employers involved in the Construction Labour Relations Association (CLRA), have recently concluded a ground-breaking agreement that provides exactly the kind of “cost-certainty” that industry has been asking for.

⁸ *Ibid.*, 32

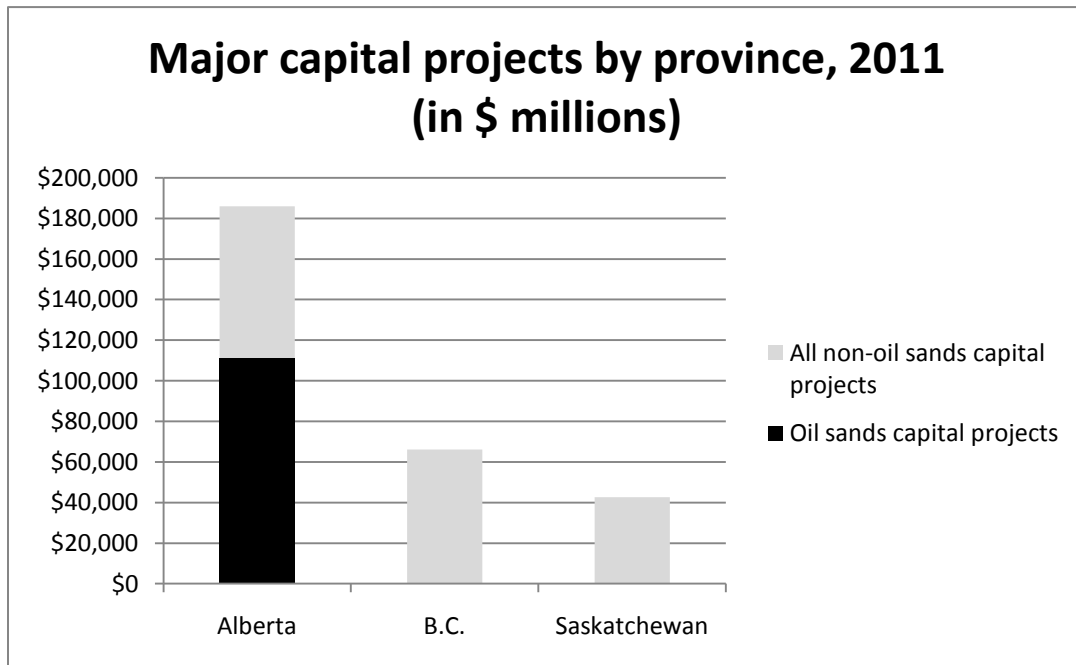
⁹ Globe and Mail: Report on Business, “Suncor gets conservative with spending,” November 4, 2011, p. B7.

¹⁰ Construction Competitiveness Coalition, “Improving Alberta’s Competitive Position,” 1

The CCC’s argument about lost investment in the oil sands is also not supported by the facts. According to the provincial government, investment in Alberta in 2010 was almost twice the national average at \$18,930 per person.¹¹

Furthermore, investors continue to flock to Alberta, despite the Construction Competitiveness Coalition’s claims to the contrary. As of August 2011, there were 912 major capital projects underway in Alberta with a total value of \$186 billion – 62 of these projects occurring in the oil sands valued at more than \$111 billion.¹²

In fact, major capital projects in Alberta are valued at more than double those in B.C. with \$66.2 billion in major capital investments¹³, and more than triple those in Saskatchewan with \$42 billion.¹⁴ Capital investments in Alberta’s oil sands alone are more than all capital investments in Saskatchewan and British Columbia combined.



(Sources: governments of Alberta, British Columbia and Saskatchewan)

Extremely tight labour market

If costs and wages are going up in Alberta, it’s not because of unfair provisions in the *Labour Code*, it’s because of the tight labour market created by breakneck development in the oil sands. For example,

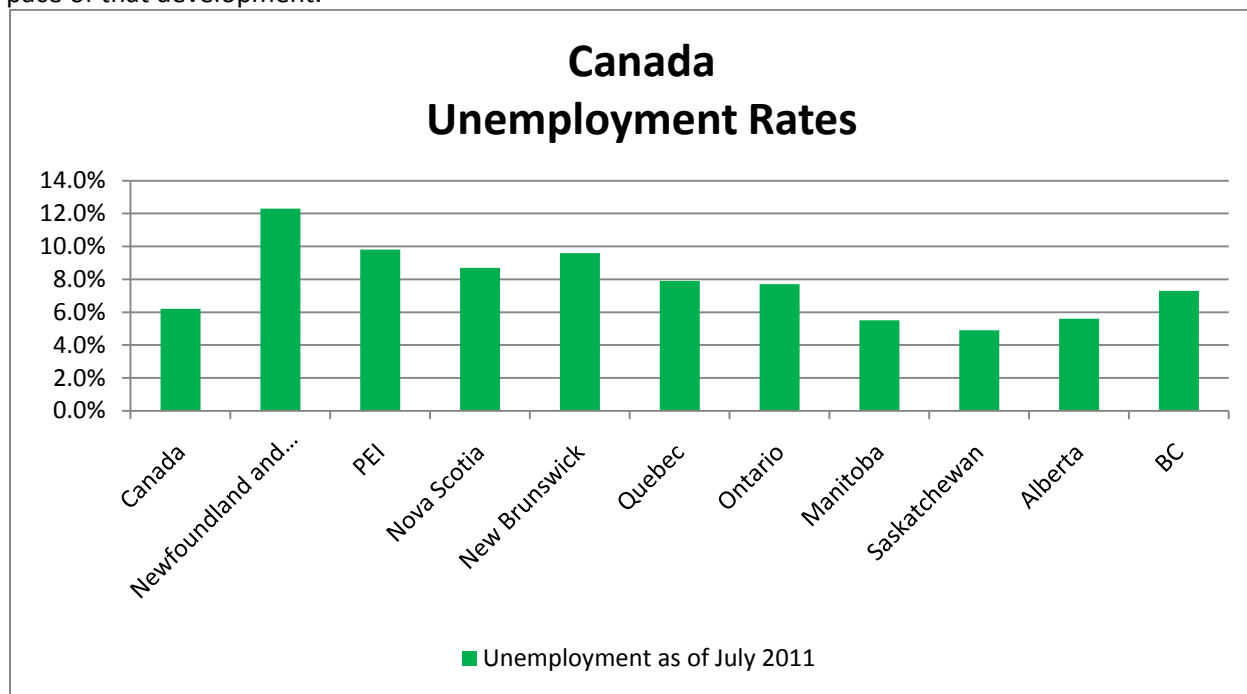
¹¹ Government of Alberta, “Alberta’s Economic Development: Frequently asked questions,” <http://albertacanada.com/about-alberta/frequently-asked-questions.html>

¹² Government of Alberta, “Inventory of major capital projects,” <http://albertacanada.com/about-alberta/inventory-of-major-projects.html>

¹³ Government of British Columbia, “Inventory of Major Capital Projects,” http://www.jti.gov.bc.ca/ministry/major_projects_inventory/pdfs/mpi_June_2011.pdf

¹⁴ Government of Saskatchewan, “2011 Major Projects Inventory,” <http://www.enterprisesaskatchewan.ca/Major-Projects-Inventory-2011>

Alberta has an extremely tight labour market for skilled workers. Between April and May of this year, our unemployment rate dropped from 5.9 per cent to 5.5 per cent. Employment grew by 2.8 per cent over the same period – the fastest growth of any province.¹⁵ Our unemployment rate is amongst the lowest in Canada, second only to Saskatchewan. Higher wages are the natural result of a functioning labour market – when a commodity (in this case labour) is in short supply, the price for that commodity goes up. If the Alberta government is truly a believer in “letting markets work,” then the last thing they should do is use legislation (i.e., changes to the *Labour Code*) to stop the provincial labour market from working. If they are worried about cost inflation, which naturally results when there are shortages of things like labour, engineering talent and building material, then they should endeavour to slow the pace of development, not punish the working people who are trying desperately to keep up with the pace of that development.

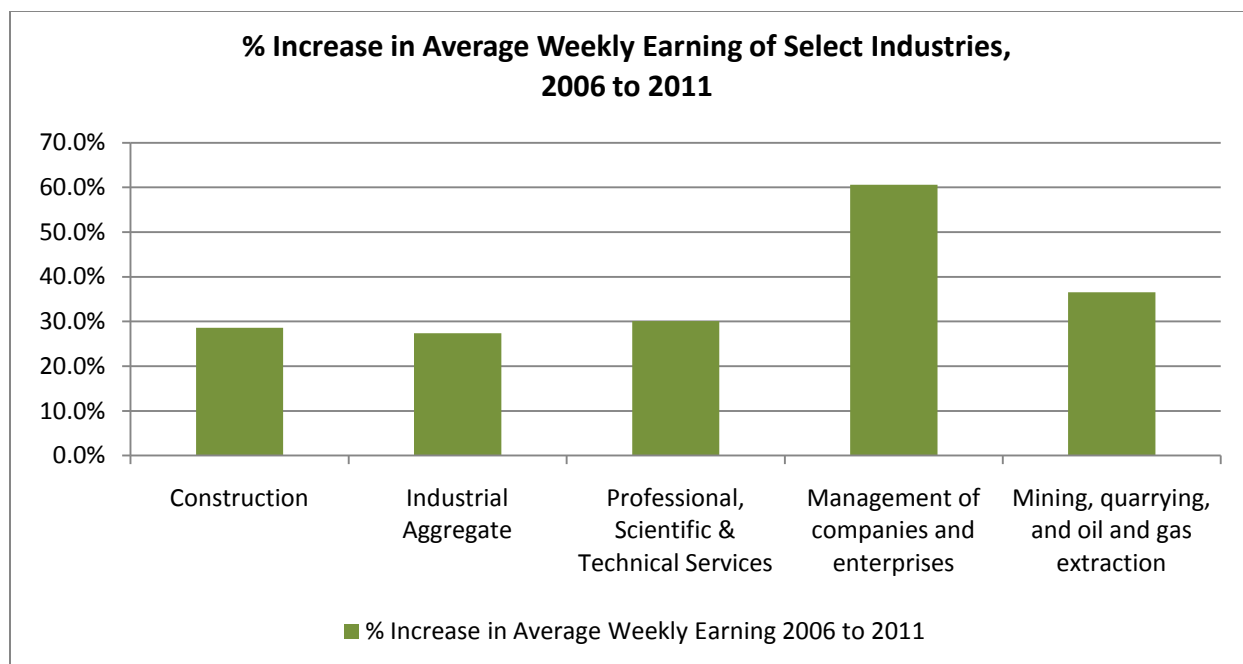


(Source: Statistics Canada, “Labour Force Survey,” June 10, 2011)

Management’s earnings increases at double the rate of construction workers

Interesting, the CCC has focused its attention on wages for construction workers, which have indeed increased as Alberta’s energy economy has heated up. But if the CCC’s goal is to “control costs” by intervening in the market to suppress wages, then we wonder why they haven’t paid similar attention to the wages of managers in the construction and energy sectors which have increased at a much more dramatic rate than wages for front-line workers. For example, the average weekly earnings of managers in Alberta increased by more than 60 per cent – double the rate of increase of construction workers – between 2006 and 2011. It is worth noting that managers are not usually members of unions, therefore deficiencies in the *Code* are not a factor in the tremendous increase in the earnings of management.

¹⁵ Statistics Canada, “Labour Force Survey,” June 10, 2011



(Source: Statistics Canada, CANSIM Table 281-0028)

“Don’t blame labour”

In 2010, Alberta workers had the highest productivity of all Canadian provinces. The total value added per hour in Alberta’s manufacturing sector exceeded the Canadian average by \$11.20 GDP per hour worked. In other words, Alberta manufacturing is 22 per cent more productive than the Canadian average.¹⁶

And yet, Alberta’s productivity growth rate is one of the lowest in the country and has been for the last decade. Between 2000 and 2010 business sector productivity grew at an average annual rate of 0.5 per cent, whereas the Canadian growth rate of 0.7 per cent per year.

Lori Schmidt, Senior Director of Productivity Alberta, an initiative of the provincial government, says that labour productivity is “maxed out” and that the government is concentrating its efforts on getting businesses to step up to the plate: “Alberta has the lowest investment in new equipment and technology in Canada. We’ve also been slower than the rest of Canada and the U.S. in adopting new technology. And even when Alberta develops a new innovation, the first adopters are usually out-of-province, not at home.”¹⁷

Other productivity experts agree that Alberta’s workers are not to blame for delays and cost overruns. In 2010, University of Calgary professor Dr. George Jergeas reported to the provincial government his findings on **identifying and addressing the greatest barriers to construction productivity**. The bottom line to increasing construction productivity is: “Plan, plan, plan. Don’t start building without 100 per cent

¹⁶ Government of Alberta, “Productivity Rates,” <http://albertacanada.com/about-alberta/productivity-rates.html>

¹⁷ Lisa Ricciotti, “It’s the Productivity, Stupid,” *Alberta Venture*, May 1, 2011, <http://albertaventure.com/2011/05/its-the-productivity-stupid/>

of the construction drawings complete. And don't blame labour. If workers are idle, it's a management practice."¹⁸

Both Dr. Jergeas' and Lori Schmidt's argument that workers are not to blame for Alberta's low productivity growth rate are corroborated by Bob Tague, a consultant with Hatch, a multi-disciplinary management, engineering and development firm, who says labour is not the largest impediments to construction productivity. Far from it: "Maybe 10 per cent of productivity issues are on the labour side. Productivity problems happen at the engineering level."¹⁹

Unions provide solutions

Real unions are already providing stability in labour costs on big oil sands projects. As mentioned earlier, the new provincial agreement between Alberta's traditional construction unions and CLRA under the *Code's* registration system provides developers in the oil sands the kind of "cost certainty" that many industry players (including the CCC) have been demanding. The agreement hinges on tying workers' wages to the price of oil and the consumer price index. This gives employers a stable supply of skilled labour and cost certainty over the next four years, and it gives workers a fair wage.

As former Minister Lukaszuk noted in his letter to stakeholders involved in this review, "A relatively stable labour relations climate, and a skilled and productive workforce have been important factors in the industry's success. The recent experiences in the registration bargaining process are a good example of collaborative efforts to support flexibility and competitiveness within the industry."

The Minister is right that the construction industry has been successful, which adds to the Alberta Federation of Labour's bewilderment as to why the Minister, at the behest of the Construction Competitiveness Coalition, has chosen now to review the *Code* and add an element of instability and uncertainty into Alberta's labour relations scene.

Section III: Progressive Reform Welcome

The Alberta Federation of Labour believes that changes to the Alberta *Labour Relations Code* along the lines proposed by the CCC are not warranted. With that in mind, we urge the government to stop the current review. That's not to say, however, that we are entirely happy with the *Code* as it stands. We believe strongly that the *Code* can and should be changed to provide better protections and a more level playing field for Alberta workers.

If the government is determined to proceed with a review, then we propose that they wipe the slate clean, and begin anew with an open and transparent process that includes everyone that might be affected by changes to the Alberta *Labour Relations Code*.

If a new, more balanced and transparent review were to be conducted, we submit that there are a significant number of deficiencies that could be addressed. The improvements to the *Code* suggested below would enhance the rights of Alberta workers, making the Alberta workplace one of choice for the mobile Canadian and international worker. Given the significant labour shortages expected in the upcoming year, the AFL submits that if the government is determined to examine the *Code*, it should set

¹⁸ Productivity Alberta, "Surveying the Industry," <http://www.productivityalberta.ca/articles/117/surveying-the-industry>

¹⁹ Productivity Alberta, "A Proactive Approach," <http://www.productivityalberta.ca/articles/116/a-proactive-approach>

up a fair process to consider the following changes, all of which would encourage workers to come to work and live in Alberta.

1. Allow for card-check certification

The problem:

- The *Code* requires that employees have a vote after a certification application is filed, no matter how many employees had expressed their support for the application at the time it is filed.
- Given that the vote is held after the employer has notice that an application for certification has been filed, employers have the opportunity to try to convince the employees to vote against the union. This often involves unfair labour practices, workplace disruption and employees being dismissed or disciplined.

The solution:

- Change the *Code* to require that the Labour Relations Board shall automatically certify a union that applies for certification with written evidence of support of a majority of the employees in the bargaining unit.
- Allow for a vote of the employees in the bargaining unit when the union applies for certification with written evidence of support of between 35 per cent and 50 per cent of the employees in the bargaining unit.

Model clauses:

- Sections 28 and 29 of the *Canada Labour Code*: card check certification on majority support.
- Section 40 of the *Manitoba Labour Relations Code*: card check certification on 65-per-cent support.

2. Allow for certification without a vote and without majority support when unfair labour practices are proven

The problem:

- The Labour Relations Board cannot grant an application for certification without a majority vote in favour of the union, no matter how unlawfully the employer has acted (Section 34 is the only route to certification).
- Employers can resort to unlawful tactics to stop the momentum of a union's organizing drive and/or to scare and pressure employees before the vote without fear that their own actions will result in certification of the union.
- Although the Board can give remedies for the unlawful acts, it cannot impose the certification even when it is convinced that the employees can no longer form independent judgments about the union.

The solution:

- Change the *Code* to allow for automatic certifications in the Board's discretion when it finds an unfair labour practice has occurred and when it finds that but for the unfair labour practice by the employer, the employees would have likely supported the union.

Model clauses:

- Section 99.1 of the *Canada Labour Code*.
- Section 11(2)(c) of the Ontario *Labour Relations Act*.
- Section 41 of the Manitoba *Labour Relations Act*.

3. Allow for certification of vulnerable workers

The problem:

- Agricultural and domestic workers cannot have union representation in their workplace [section 4(2)(e), s. 4(2)(f)].
- These groups include some of the most vulnerable employees who need representation in their employment and need the improvements that collective bargaining can make to their workplaces.

The solution:

- Remove the reference to agricultural and domestic workers from the exclusions from the *Code*.

4. Allow all affected construction workers to vote in a certification vote

The problem:

- Unlike employees in all other workplaces, employees in the construction industry are not allowed to participate in a certification vote affecting them unless they have been employed for 30 days before the date of the certification application and they have not quit before the date of the actual vote (Section 34.1).
- Construction work is often short term, and a particular trade can be employed on a job less than 30 days.
- These time lines mean that an application for certification cannot be made until at least 30 days after a project starts.
- The second restriction means that workers are forced to remain on a job until the day of a certification vote (which may be weeks after the certification application is filed) no matter what opportunities they have elsewhere or how bad their treatment, or the union's application may be in jeopardy.
- These restrictions are unique to the construction industry in Alberta.

The solution:

- Remove Section 34.1 from the *Code*.

5. Enhance procedural fairness in certification applications

The problem:

- The *Code* does not mandate a time line for a certification vote. Further, there are no time lines for other Board actions such as the date the Officer's Report will be issued and the date of the conduct of the vote.
- Delay allows opportunities for unfair intimidation of employees before the vote, and before resolution of the issues in the certification.

The solution:

- Add mandatory time lines within which a certification vote must be held and also for other Board processes within a certification application.

Model Clauses:

- Section 8(5) of the Ontario *Labour Relations Act*: votes held within five days.
- Section 48(3) of the Manitoba *Labour Relations Act*: votes held with seven days.

6. Enhance the ability of workers to be organized while working in remote locations

The problem:

- Many Alberta workplaces are located in remote locations with limited or no public access.
- Workers employed in remote locations do not make their homes in one City or even one Province, so contact between them and an organizing trade union once they leave the remote worksite is very difficult.

The solution:

- Change the *Code* to allow a union to apply for an access order to the remote worksite.
- Allow the Board to also order the disclosure by an employer to an organizing union of names, home address and other contact information for remote workers in the target bargaining unit.

Model Clauses:

- Sections 109 and 109.1 of the *Canada Labour Code*.

7. Require employers to bear the burden to prove the legitimacy of dismissal of employees who are fired during union organizing drives

The problem:

- When employees are fired for supporting a trade union, other employees are intimidated and scared to support the union.
- It is extremely difficult, if not impossible, for a union to prove the employer's anti-union motive.

The solution:

- Change the *Code* to place the onus on the employer to prove that it did not terminate employees with anti-union animus when employees are terminated during an organizing campaign.

Model clauses:

- Section 98(4) of the *Canada Labour Code*.
- Section 14(7) of the *B.C. Labour relations Code*
- Section 91(5) of the *Ontario Labour Relations Act*

8. Allow for first-contract arbitration

The problem:

- Employers who wish to undermine a newly organized union can, during the first round of collective bargaining, refuse to recognize the bargaining authority of the union, use unreasonable bargaining approaches, take unreasonable or uncompromising bargaining positions, commit unfair labour practices and/or bargain in bad faith without concern that such actions will result in an order forcing the resolution of the collective agreement by arbitration.
- Sufficient delay in the resolution of the collective agreement allows for the possibility of a decertification application or a raid by another union. (s. 52(3)(a), s. 37(2)(b))

The solution:

- Change the *Code* to allow the Labour Relations Board to direct that the first collective agreement be settled by arbitration in circumstances that the Board feels warrant such an order, including such actions as where there has been a refusal to recognize the bargaining authority of the union, bargaining positions have been uncompromising without reasonable justification, and the employer failed to make reasonable and expeditious efforts to conclude the collective agreement.

Model clauses:

- Section 43 of the Ontario *Labour Relations Act*.
- Sections 99 (b.1) and 80 of the *Canada Labour Code*.
- Section 87 of the Manitoba *Labour Relations Act*.

9. Remove the special opportunity for revocation of bargaining rights in the construction industry

The problem:

- The 2008 amendments to the *Code* added a 90-day window right for the employees of newly certified construction bargaining units to apply for revocation of the certification.
- This decertification window immediately after a new certification is not present in any other industry, including construction, in the rest of Canada.
- This window creates an opportunity for unfair and undue intimidation of employees when a new bargaining unit is certified. It is also designed to place control over whether the 90-day window continues in the hands of the employer, thus protecting unions such as CLAC, which are frequently favoured by employers, while at the same time targeting traditional building trades unions.
- Given the short-term nature of many construction projects, this window can effectively mean that the certification brings little or no benefit to the workers.

The solution:

- Remove sections 52(4.1), and 52(4.2) of the *Code*.

10. Remove all restrictions and statutory interference with MERFs

The problem:

- MERFs are a voluntary agreement between unions and contractors to enhance the competitiveness of organized contractors primarily in the commercial part of construction industry.
- Statutory restriction on these voluntary agreements is both unnecessary and an unreasonable intrusion into private arrangements.

The solution:

- Remove sections 148.1 and 148.2 of the *Code*.

11. Require all collective agreements to include arbitration as the final option for resolution of all workplace disputes

The Problem:

- The *Code* does not require arbitration of all workplace disputes; it only mandates a “method” of resolving differences.
- Other processes besides arbitration do not generally allow for fair and unbiased hearings to resolve disputed issues.
- Without the option of resolution by an arm’s-length third party, it is difficult to convince workers to trust the agreed-upon legal system.

The solution:

- Change the *Code* (remove Section 135 and amend Section 136) so that all collective agreements are deemed to include a provision that arbitration is the final step available to resolve all workplace issues.

Model Clauses:

- Section 57 of the *Canada Labour Code*.
- Section 78 of the *Manitoba Labour Relations Act*.

12. Provide for expedited arbitration at the option of either party

The problem:

- The first day of an arbitration hearing can take a year or more after a grievance is filed to commence.
- The “work now, grieve later” rule loses its effectiveness and workplace morale is diminished if grievances languish and are not resolved for months or years after the issue arises.
- An ineffective and stalled grievance procedure undermines a union’s effectiveness and support in the workplace.
- Delay in the resolution of challenges to management’s decisions benefits the management who made those decisions and often there is no effective remedy available to make whole the damage that such delay has caused.

The solution:

- Provide for an expedited arbitration process which either the union or the employer has the ability to initiate.

Model clauses:

- Section 104 of the *BC Labour Relations Code*.

13. Ensure that owners and clients who are not party to collective agreements do not govern labour relations

The Problem:

- Owners and clients attempt to impose “contract” or “policy” provisions on employers that are contrary to the negotiated collective agreements.
- Employers feel they must follow the owner’s/client’s requirements and ignore their contractual obligations to the union and its members.

The solution:

- Change the *Code* to make it unlawful for owners/clients to impose contract terms that are contrary to the collective agreement, the *Code*, or any other law (e.g., *Human Rights Act*.)

14. Require minimum financial support for the union by a legislated Rand Formula

The problem:

- There are no provisions in the *Code* which provide that the collective agreement must contain, if the union requests it, a provision that requires each employee in the bargaining unit, whether or not they are a union member, to pay union dues by way of payroll deduction and employer remittance (the “Rand Formula”).
- Unions require financial support to allow them to properly act as the exclusive bargaining agent on behalf of the members of the bargaining unit.
- The union’s duty to fairly represent the employees in the bargaining unit applies to all employees, whether or not those employees are members. It is unreasonable to expect unions to have to fund the representation of such free riders out of the dues paid by union members.
- Collecting union dues directly from members without the benefit of a payroll check off system is extremely costly and difficult for unions.
- When employers attempt to hamper the union financially, a union may be unable to provide good representation thus opening it up to duty of fair representation complaints or a decertification application.
- The Labour Relations Board has recently found the lack of a mandatory minimum Rand Formula in the *Code* to be unconstitutional.
- Resistance to a Rand Formula in first collective agreement bargaining is a tactic long favoured by anti-union employers.

The solution:

- Add a provision to the *Code* requiring, if the union requests it, the employer to agree to a clause in the collective agreement requiring the mandatory remittance of union dues by way of payroll deduction and remittance to the union by the employer.

Model clauses:

- Section 47 of the Ontario *Labour Relations Act*.
- Section 70 of the *Canada Labour Code*.
- Section 76(1) of the Manitoba *Labour Relations Act*.

15. Require all collective agreements in the construction industry, whether bargained under Registration or not, to expire on April 30 biennially

The Problem:

- Unions and employers bound to the Registration System must make collective agreements that expire on April 30 biennially (Section 183 of the *Code*) but parties who are not part of Registration are not required to do so.
- This provides an unfair competitive advantage to unions and employers who operate outside of registration, as they can time their collective agreement renewals such that they know the results of the registration bargaining before they start their negotiations.

The solution:

- Change the *Code* so that all collective agreements that apply to construction workers expire in accordance with Section 183, regardless of whether or not the agreement is bargained within or outside of the Registration System.

16. Allow construction trade unions to strike and construction employers to lock out in the same way as unions and employers in all other industries

The Problem:

- The *Code* provides an elaborate system of collective bargaining, the application for and taking of strike/lockout votes, the calling of a strike/lockout, and the ending of a strike/lockout in the construction industry which is not required in any other industry.
- This system is also not part of any industry, including construction in any other part of Canada.
- These provisions significantly hamper the independence of unions at the bargaining table and hamstringing their ability to effectively use a lawful strike as part of their collective bargaining strategy.
- These provisions allow for a minority of construction workers to undermine the collective bargaining strategy and options for the majority of construction employees.
- There is no basis for construction employees and their unions to have lesser bargaining power than any other union in Alberta.

The Solution:

- Remove Sections 184 to 191 of the *Code*.

17. Remove mandatory interest arbitration in the construction industry bargaining in the Registration System after 75 per cent of the registration collective agreements have been concluded

The problem:

- Unions and their Registered Employer Organizations who take a longer time to reach a resolution of their issues during collective bargaining are not permitted to conclude their agreement by free collective bargaining. Instead, once 75 per cent of the construction industry registration collective agreements are concluded, the rest of the industry is forced to interest arbitration.
- There is no other industry where this occurs and Alberta is unique in all of Canada in the construction industry.
- The formula of 75 per cent of the construction industry registration collective agreements means that a minority of construction workers can force arbitration on the majority of construction workers. This is because the 75 per cent reflects the number of collective agreements resolved, regardless of the number of workers affected by each agreement. Given the wide disparity of size of the various trades, 75 per cent of agreements often do not cover 50 per cent of the workers.

The solution:

- Remove Sections 189 to 191 of the *Code*.

18. Add whistle-blowing protection to the Code

The problem:

- There are no specific provisions in the *Code* to protect employees who bring forward unlawful employer practices.
- Many different statutory regimes recognize that employees need specific statutory protection to allow them to feel comfortable being whistle blowers.
- A culture of silence does not enhance workplace environments.

The solution:

- Add whistle-blowing protection for employees who bring forward violations by their employer of the *Code*, and other related laws; e.g., health and safety, human rights, employment standards.
- Place the burden of proof on employers who discipline or dismiss employees to prove that they did not violate whistle-blowing protections when such is alleged.

19. Remove Division 8 of Part 3 of the Code

The problem:

- Division 8 is unnecessary and the AFL believes that it is clearly unconstitutional.

- The only Division-8 declaration granted in the last many years has resulted in significant litigation and uncertainty in the construction industry.
- Most major projects in Alberta already operate under voluntary bargained project agreements which include provisions that there will be no strike/no lockout for the duration of the project so there is no need for this special statutory override of the *Code*.

The solution:

- Remove Division 8 of Part 3 of the *Code* (Sections 194 – 201)

20. Make it unlawful for construction employers to have both union and non-union related businesses

The problem:

- It is common for a parent construction company to have a building-trades-union subsidiary, a CLAC subsidiary and sometimes even a non-union subsidiary. Section 192(3) of the *Code* is designed to enable such double breasting.
- As a result, employers can undermine the representation rights of a union by spinning off business to their non-union or CLAC arm, thereby avoiding the collective agreement and the requirement to hire union members to do the work.
- In all other industries spin offs are caught by either the common employer or successorship provisions such that the new entity is also bound by the union’s certification and collective agreement.
- There is no basis for construction employers to be treated differently than any other Alberta employer.

The solution:

- Remove Section 192(3) of the *Code* and make it clear that the same successorship and common employer provisions apply to all employers, including those in the construction industry.
- Remove the words “date of application or any subsequent date” from Section 192(2) and Section 47(2) of the *Code*, to allow meaningful remedies to be granted in double breasting situations.

21. Remove the apparent restrictions on secondary picketing

The problem:

- Secondary picketing is part of freedom of speech and freedom of association, so any attempt to limit such activity is unconstitutional.
- Leaving the provisions in the *Code* which purport to limit secondary picketing leave open the possibility of unnecessary litigation.

The solution:

- Amend Section 84 of the *Code* to remove the apparent restriction to picketing only at one's place of employment.

22. Board appointments – Allow the Chair of the Board a veto on all appointments of Vice-Chairs and Members

The Problem:

- The Labour Relations Board is an independent, expert administrative tribunal. The Chair is uniquely situated to ensure that persons appointed to it are able to provide the necessary expertise to allow the Board to function properly.
- Currently, the Minister is free to ignore the advice of the Chair of the Board regarding any appointment.

The Solution:

- Add a provision to the *Code* providing that no Member or Vice-Chair can be appointed to the Board unless the Chair endorses their appointment.

23. Prohibit the use of replacement workers when a lawful picket line is in place

The Problem:

- Employers hire replacement workers to reduce the effectiveness of a strike as an economic weapon during collective bargaining.
- The use of replacement workers often inflame picketers, which can lead to litigation over picket lines.
- The use of replacement workers undermines the ability of the union to represent its members and can lead to prolonged strikes as the employer has less incentive to end the work stoppage.

The Solution:

- Add a provision to the *Code* prohibiting the use of replacement workers during a lawful strike.

Model Clauses:

- Section 94(2.1) of the *Canada Labour Code*.

Conclusion

The process of the review is flawed

The process of the review as set by the Employment and Immigration Minister is flawed and clearly unfair. There has been a startling lack of consultation with unions that will be affected. The changes proposed will affect hundreds of thousands of workers outside of construction, but no input has been sought from their legitimate representatives in the labour movement. The terms of the review have been set by a lobby group representing a small segment of industry seeking to change the rules in favour of its members. Finally, the panel appointed by the Minister has not a single labour representative, and is headed by a lawyer with a history of attacking unions.

The premise of the review is faulty

The review is not about competitiveness. Alberta's construction industry and workers are already competitive and productive, as the government's own statistics prove.

The real purpose of this biased, behind-closed-doors review is to weaken unions and to muzzle union activists and leaders. It aims to remove real unions from the industrial construction sector and to weaken them in all other sectors. It aims to severely tilt the balance in favour of non-union employers and those who work with the employer-dominated Christian Labour Association of Canada (CLAC), while undermining those employers who have successfully worked with real unions. Not satisfied with union-busting measures, the proposals seek to protect CLAC from being raided by other unions. The review proposals seek to deny workers the right to choose their own representation and to choose to switch away from CLAC when they see their needs are not being met.

The outcome of the review will be unrest, not stability

While the review purports to be aimed at providing stability, the outcome will be the opposite. For 100 years the labour movement in Alberta has been a partner in growing the economy and wants to continue in this role. However, faced with U.S. Tea-Party-inspired, Wisconsin-style attacks on unions, workers will respond energetically in defence of their rights. The current labour stability that Alberta enjoys will be replaced by a period of unrest.

If there is to be a review, let's make it fair and let's make it public

The Alberta Federation of Labour would welcome a review of the *Code* if the government was prepared to work more closely and respectfully with unions of all stripes, and if the process was open to the public so ideas could be exchanged and debated. The AFL has offered several suggestions for improvements to the *Code* that would enhance stability for both workers and employers, bringing benefit to all. These include:

- Allowing for card check certification;
- Allowing for certification of vulnerable workers;
- Allowing all affected construction workers to vote in a certification vote;
- Enhancing the ability of workers to be organized while working in remote locations;
- Allowing for first-contract arbitration;

- Removing the special opportunity for revocation of bargaining rights in the construction industry;
- Removing all restriction and statutory interference with MERFs;
- Requiring all collective agreements to include arbitration as the final option for resolution of all workplace disputes;
- Providing for expedited arbitration at the option of either party;
- Requiring minimum financial support for the union by a legislated Rand Formula;
- Allowing construction trade unions to strike and construction employers to lock out in the same way as unions and employers in all other industries;
- Adding whistle-blowing protection to the *Code*;
- Removing the apparent restrictions on secondary picketing; and
- Prohibiting the use of replacement workers when a lawful picket line is in place.

The AFL requests:

- That this current process for reviewing the *Code* be stopped immediately.
- That, if the government insists on reviewing the *Code*, that a proper, fair, neutral, consultative, public process be set up to allow for full and complete input by all of the labour-relations community before a truly neutral panel.
- That the Construction Competitiveness Coalition proposals be found to have no merit.
- That the proposal put forward by the AFL be adopted.

All of which is respectfully submitted on November 7, 2011:

Alberta Federation of Labour



Gil McGowan, President



Nancy Furlong, Secretary Treasurer