LABOUR CODE AMENDMENT ACT, 1983

The proposed amendments can be grouped under nine headings: -

1. Increased employer authority
2. A new Labour Relations Board
3. Bringing back the Courts
4. Limiting freedom of association
5. Encouraging decertification
6. Limiting lawful union activity
7. Restricting picketing
8. Expanding "essential services" to the private sector
9. "Economic development projects"

The whole denies the legitimate role of organized labour as a respected and contributing member of the community.

1. Increased Employer Authority

The Labour Code, its predecessors and collective bargaining legislation throughout North America was enacted to recognize and protect the right of employees to freely associate to advance employment and social interests. Section 27 once spoke of the Board's duty being directed to developing "effective industrial relations", "achieving or maintaining good working conditions" and "the well being of the public". In the place of this balance, the amendments to section 27 propose that the Board "protect the public interest".

By shuffling the subsections of section 3, priority is given to employer authority to act unilaterally. The new language, in effect, creates a presumption in favour of entrenched employer rights in crucial areas such as reorganization, lay off, contracting out, technological change, reclassification, etc. The Board, arbitrators and courts are directed to presume the employer is the authority and the union

and employees have only those rights they clearly and unambiguously have negotiated.

This may mean a large number of issues, such as "the right of an employer to make a change in the operation of his business reasonbly necessary for the proper conduct of that business" (s.3(1)(c)) in his view, may not be negotiated or, if negotiated, may not be enforceable at arbitration. This could result in some issues becoming off limits at the bargaining table.

Collective agreements will have to be clear and precise. Ambiguity or doubt on the items in section 3(1) are to be resolved in favour of the employer. By amendment to section 65, the Code and "requirements made under" the Code, which are unspecified (but would include a Cabinet order under the new section 73.1 - essential services), prevail over any collective agreement provision. This reinforces the amendment to section 3 enshrining employer authority.

Under section 73.1(3) an employee failure to comply with a Cabinet order for a cooling off period in an essential service (which is extended to the private sector) is deemed to be just cause for "demotion, suspension or dismissal" and fine (s. 73.1(4)) with no authority in an arbitrator to lessen the penalty.

By amendment to section 40 an employer must consent before a multi-employer bargaining unit can be certified.

2. A New Labour Relations Board

With the advent of collective bargaining legislation in Canada there was a vigorous debate about whether labour and management representatives would have any role in its

administration. In the United States, the National Labour Relations Board was and is constituted by Presidential appointment and the chairman changes with each President. Canadian unionists fought for a role in administering the new federal legislation of the 1940's because they knew self-government was the key to lasting labour-management peace and that social legislation depends more on its administration than its terms for its efficacy.

Only where there have been labour courts and in the past decade in the federal jurisdiction have employee representatives lost their right to equal representatives with employers in the composition of labour relations boards. This happened in the federal jurisdiction in 1972 over the objections of the C.L.C. The Minister of Labour promised that labour would be consulted about appointments to that new public interest board.[1] Today one of eight members of the Canada Labour Relations Board is a former C.N.T.U. unionist.[2] The rest are lawyers or former employer representatives. In 1980 the now B.C. Board Chairman, Stephen Kelleher, recommended to the Law Reform Commission of Canada that the Canada Board be returned to its original representative structure.[3]

The proposed amendments recreate the B.C. Board as a "public interest" board by amendments to section 12. Unlike presidential appointments in the U.S., Board appointments will not be publically scrutinized in advance. Unlike in the U.S. or federally in Canada, there is no tenure. All members, including chairman and vice-chairman will hold office "during the pleasure" of the largest employer that appears before them (s. 26 amendments). Cabinet members who may be parties before the Board in their private business endeavours or in their public office, as Pat McGeer was in one proceeding (see McGeer et al BCLRB No. 83/77, [1978] 1 Can. LRBR 431; BCLRB No. 73/79, [1979] Can. LRBR 454).

A panel deciding an unfair labour practice complaint, appropriate bargaining unit, picketing or any other issue under the Code can legally be composed of a chairman or vice-chairman and two employer representatives by amendments to section 13(4)(c).

This new Board is directed by the new section 27 "to protect the public interest". A statute originally enacted forty years ago to protect employees from employers is now to be administered to protect the public interest (which from the amendments to section 3 is the employers' interest).

Labour-management co-operation is to be replaced by a rule of law and order administered by a Board on which neither is guaranteed any representation. The unions, which represent employees who wish to freely associate, no longer have a secure voice in administering the law first created to protect that right.

By the proposed new section 28.1 the Board need not act as mediator, but may "on its own motion" make orders prohibiting what "may be in contravention" of the Code, a collective agreement or regulation until it decides whether it is or not - whenever it decides. In such a case, the Board will be policeman, prosecutor and judge.

3. Bringing Back The Courts

The new public interest Labour Relations Board is reintegrated into the hierarchy of legal review by the Courts - the Supreme Court of B.C., Court of Appeal and Supreme Court of Canada. While Chairman Kelleher recommended that the Law Reform Commission of Canada endorse confidentiality of investigating officer reports,[4] the proposed amendments to section 19 requires that reports be made available to parties (as they are in other

jurisdictions). By new subsections 19(4) and (5) the Board may edit the reports to hide the identity of "informants".

What is important is what is omitted. There is no mention of the confidentiality of the identities or numbers of union members and with the new section 19(3), the present regulation 29(4) preserving the confidentiality of union membership may no longer be a valid regulation by the Cabinet under section 150.

By amendments to sections 33, 31 and 34(2) the Board is no longer immune to judicial review. Any of its proceedings may now be brought before the Supreme Court on the grounds it exceeded or failed to exercise its jurisdiction.

The proposed amendments to sections 31 and 32 permit court proceedings arising out of alleged illegal picketing, strikes and lockouts. Suits for damages and injunctions (although not ex parte) have returned to the provincial jurisdiction.

Amendments to section 138 create an offence for anyone to contravene the new sections 3(2)(a) or (c) and the current section 5 which are the broad unfair labour practices provisions. They allow separate fines for each day an offence reoccurs under these sections and a refusal or neglect to carry out an order under the Code, such as a work stoppage on an economic development project designated by Cabinet order or a union's failure to give notice to employees of a Cabinet cooling off order under the new section 73.1(a).

Besides criminalizing what the parties have sought to resolve by other means, this amendment raises many questions about constitutionally guaranteed freedoms before the Board when an employer is accused of an unfair labour practice. Will the

new section 138(1)(b) negate the reverse burden of section 8(6), allow an employer to refuse to testify, or refuse I.R.O. examination of his records? These matters will undoubtedly be litigated.

4. Limiting Freedom of Association

A meaningful exercise of employee freedom of association depends upon the absence of employer influence or participation in the employees' decision and an efficacious administrative procedure for processing requests for certification.

The 1977 amendments authorizing employer communication to employees and its enshrinement as an overriding right in the proposed section 3(1) gives employers full license to dissuade employees. The more powerful weapon of changing terms and conditions of employment enshrined in the proposed section 3(1) will override the statutory freeze in section 51(1) of the Code by, in effect, enlarging section 51(2) to include the proposed section 3(1)(b) and (c).

The right to certification with less than a majority because a majority was denied or unascertainable as a result of employer interference or unfair labour practices is abolished by repealing section 8(e). In previous years and in its 1982 annual report the Board said this is a "remedy of considerable value" (p. 36). Its annual reports from 1974 to 1982 show that while it received over 138 request to certify under section 8(4)(e), it did so in only 7 cases in nine years.

The proposed new section 42(3) legislates the build-up principle which can be used to deny certification to employees involved in the preparatory stages of a new mine or any other new operation and to deny certification in various phases in the

construction industry. The Board has adopted this principle in part in Noranda Mines Limited (Goldstream) BCLRB No. 26/82, - [1982] 2 Can. LRBR 475.

The proposed section 40 allows employers, not the Board, to decide if they will be included in a multi-employer bargaining unit. This section may no longer be used to organize the unorganized or to amalgamate unorganized employees who wish union representation with those who are already organized (s. 40(2)). This amendment defeats the minority union representative argument in Artisan Industries Ltd. BCLRB No. 65/79, [1979] 3 Can. LRBR 518. In the construction industry it prevents a multi-employer unit based on the double majority of employees and employers as currently exists in Section 40. Combined with the economic development project amendment it paves the way for the so called "right to work" in the construction industry. A small pocket of non-unionized employees may work side-by-side with unionized employees on declared economic development projects and the Board's current ability to create a multi-employer unit is circumscribed by this amendment.

An application for certification must be supported by a majority of employees by amendments to section 39. The right to a vote with between 45% and 55% is gone.

While the proposed section 39(7) overcomes the decision of the Supreme Court of Canada in Metropolitan Life Insurance Co. (1970) 70 C.L.L.C. 14,008 by allowing the Board to look to union practices rather than the wording of its constitution to decide if a person is a union member, it goes further than other jurisdictions. Even if a person is properly a member of the union by practice or its constitution, the Board may decide and order he is not and thereby reduce memberships in support of an application for certification to less than a majority. There is no comparable Canadian legislation. Is this authority to be used to "protect the public interest"?

The major change is to abolish certification based upon evidence of employee wishes through union membership cards. The proposed new section 43 makes a representation vote mandatory in every case. The only other jurisdiction in Canada where this procedure is mandatory is in Nova Scotia where it was enacted following an eighteen month experiment during which votes were conducted within five days of application for certification. If there is employer interference the Nova Scotia Board may certify if the union has over 40% membership support.[5]

The Board reports that in 1982 it received 941 applications for certification of which 663 were for units of less than 10 employees. This is where they are most susceptible to employer pressures. There were 127 applications for units of employees numbering between 11 and 20. It processed 916 applications of which 150 were withdrawn. In accordance with its policy in Plateau Mill Ltd. BCLRB No. 87/76 [1977] 1 Can. L.R.B.R. 82, it conducted representation votes in 39 cases of which 4, covering 4,812 employees, were raids. On that year's statistics (916 - 150 = 766 less 46 dismissed for various reasons equals 720) there would have to be 681 (i.e., 720 - 39 = 681) more representation votes. This increased workload for departmental industrial relations officers is to be added to their increased workload under Bill 26 (Employment Standards Amendment Act, 1983).

Apart from the lack of manpower, there will not be fast votes. The proposed section 44 allows a union to request a prehearing vote. The Board may refuse in any case if the vote is to be conducted by mail (s. 44(3)(b)).

The vote will not be counted quickly. The ballot box must be sealed for 7 days to allow any "party", which includes the employer (s. 44(1)), to give notice that it wishes to make representations which the Board must hear (s. 44(6)). The Board

may then add or exclude employees and the vote must be re-opened to allow added employees to cast ballots (s. 44(8)). Excluded employee ballots must be destroyed (s. 44(10)). Therefore each employee's ballot must be able to be identified in some manner. This will increase hearings and make work for lawyers.

An estimated time lag - application followed by Board investigation followed by decision to order a vote followed by a vote, perhaps by mail, followed by a 7 day waiting period followed by representations and a possible hearing followed by new balloting followed by a count - is six months not the five days to two weeks in Nova Scotia for the whole process.

How will the votes be conducted? As set out in Cabinet regulations under the new section 55(1).

Who can vote? Under the new section 55(4) "a person who is not an employee in the unit at the time of the vote is not eligible to vote". In contrast, on decertification a person who "since the application was made, has obtained other permanent employment is not eligible to vote" (s. 55(5)). If he has not found other employment, but is laid off he may vote in a decertification application. Can he vote on a certification application? Not if the Cabinet's regulations on eligibility to vote made under the proposed section 55(6) say he cannot. And the new section 3(1) makes the employer's authority to transfer, layoff, suspend, etc. paramount.

The new section 45 requires the Board to certify if a majority in the count favour union representation. In any other case, no matter what the employer's conduct has been, the Board must refuse to certify and under the proposed new section 49 a subsequent application by the same union may not be made for 180 days.

If a union is decertified no other union may apply for certification for 180 days or "a different period specified by the board has elapsed" under the proposed new section 52(4). There is no limit on the time the Board may specify. It is direct to protect the public, not the employees' interest.

5. Encouraging Decertification

While access to union representation is made more difficult, the process to allow cancellation of certification is streamlined.

An application for cancellation may not be made during the 300 days (not 10 months) following certification or the 180 days following the dismissal of an application for cancellation (s.52(2.1)). This is no major change.

The change is that the Board must order a representation vote when a majority of employees sign a decertification application (s.52(2)). There is no discretion to refuse if the application is employer inspired. If the vote is for cancellation the Board must cancel (s. 52(2.2)(a)). There is no 7 day waiting period, no right in the union to make representations or request a hearing, etc.

The statutory freeze in section 51 is extended to applications for cancellation thereby providing a technique for employers, through employee applications for revocation, to suspend the right to strike. This can be enforced through the Courts and increased fines under the amendments.

The continued life of bargaining rights and collective agreement rights can be effectively terminated by Board "exemption order" under the proposed section 53.1. The exemption is to employer successor obligations and union rights on a sale

of business in cases of financial difficulty or if successor rights "would be unlikely to benefit the members of any bargaining unit affected by the sale, lease, transfer or disposition". It is when the employer encounters financial difficulty that the employees need successorship protection in order to secure unpaid wages, pension contributions, etc. This is a legislative policy of the Employment Standards Act. An exemption order can leave unionized employees less protected than the unorganized or the Employment Standards Act will override the new section 53. This area is fertile for argument. The employees' rights are abolished where the employees are "unlikely to benefit" from them. Every prudent lawyer will seek an exemption order on every business transaction that may raise successorship questions. Litigation on employer successorships will blossom.

6. Limiting Lawful Union Activity

To the union's duty of fair representation is added the duty of fair referral in the proposed section 7(3). The language is the same as in section 69 of the Ontario Labour Relations Act. In some cases, notably in the federal jurisdiction, the duty has been interpreted to apply not only to hiring halls but in all cases where union security clauses require union membership. In practice it will allow the Board to scrutinize internal union affairs, part of the job for the unnamed Labour Ombudsman. This legislation has gained acceptance across Canada and like the duty of fair representation was bound to arrive in B.C. It needs guaranteed, tenured employee representation on the Board for there to be a balanced administration and interpretation.

The crucial new Board power is the proposed new section 28.1. The Board "on the application or complaint by any interested person" (e.g. any member of the public) or "on its own motion" may order that any person (e.g. a union) cease what it

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considers "may be" (not is) in contravention of the Code, a collective agreement or the regulations, until it has made a final decision. This interim injunction authority, which unlike the Courts can be exercised ex parte, will be argued to be necessary as a result of the Tumbler Ridge proceedings. However, the new picketing, economic development project, and essential services provisions would be used in such a case. Therefore this must have another purposes. An example would be to make a political rally illegal by Board order and subject the union and employees to the fines under section 138.

Under the proposed new section 73.3 the Cabinet may issue orders that prohibit work stoppages, etc. during the life of a collective agreement. This conflicts with the right to cease work for health or safety reasons under Workers' Compensation Regulations or section 83(3) of the Code. How the interpretation conflict between sections 83(3) and 73.3 will be resolved is unclear.

An order designating an economic development project negates freely negotiated rights under non-affiliation, sub-contracting and other clauses.

The proposed amendment to section 90(3)(b) denies that unions may legitimately advance their own as well as employee interests or that the two can be the same.

The proposed section 127(3) amendment protects the Minister from scrutiny while unions come under closer Board, Minister and Cabinet scrutiny.

7. <u>Restricting Picketing</u>

The Code's avowed preservation of freedom of speech in section 83 and the constitutional guaranteed freedom of speech

and assembly of the Charter are eaten away by the new section 85, which replaces the present sections 85 and 86 and by the proposed amendments to section 90.

Unions and employees have fewer rights to inform the public and apply economic pressure than under the old Trade Union Act, than employees have in some other provinces and than they have in the federal jurisdiction in B.C. under the common law.

Picketing may occur at "the" site or place of the lockout or lawful strike. If it is also a common site the Board must "reasonably restrict it to the employer" involved in the dispute (s. 85(1)(a)).

Picketing may occur at other sites or places of business <u>after</u> the union applies to the Board and the Board grants permission. If it is a common site the permission must be on restricted terms decided by the Board (s. 85(1)(b). The same procedure must be followed before any ally may be picketed (s. 85(1)(c)).

The Board cannot authorize picketing of an economic development project site (s. 85(2)).

Whether or to what extent these amendments and the Courts resurrected role through amendments to sections 31 and 32 will affect picketing of provincial employers by employees engaged in a federal dispute is unclear. That ongoing debate may be relitigated under the amendments.

A section 90 declaratory opinion and order may be made when there is likely to be a substantial affect not just when there is a substantial affect, as under the present wording.

8. Expanding "Essential Services"

The Essential Services Disputes Act is repealed. New sections 73, 73.1 and 73.2 are proposed.

Section 8 of the Essential Services Disputes Act becomes section 73 of the Code with certain changes. The Minister makes a recommendation to the Cabinet (therefore the amendment to s. 127(3)) which may direct the Board and prescribe a cooling off period up to 45 (not 90) days. The definition of "normal operations" is carried into the proposed section 73(1) from the Essential Services Disputes Act. The cooling off period may be extended by Cabinet up to another 45 days (s. 73(3)), but no longer (s. 73(5)). An order must be obeyed (s. 73(4)) and the new penalty (s. 138) applies.

The current section 9 of the Essential Services Disputes Act is to be the new section 73.1 of the Code.

The important change is that, while the Essential Services Disputes Act applied to public sector employers listed in a Schedule, as part of the Labour Code the provisions apply to all employers, unions and employees covered by the Code. The test of "an immediate and substantial threat to the economy or welfare of the Province and its citizens" can be extended by Ministerial recommendation and Cabinet order to any dispute in the province in any industry.

For "essential service unions" (firefighters, policemen and health care) there is interest arbitration in the proposed section 73.2 as in Part 2 of Essential Services Disputes Act. The change is that an employer as well as a union may now opt for arbitration (s.73.2(3)). A new criteria for interest arbitrators is added: "the need, consistent with efficiency, to provide employment and to encourage the continuity of existing employment" (s. 73.2(6)(e).

9. Economic Development Projects

These are what the Cabinet say they are for as long as it orders (s. 73.3(1)). When an "activity or works" is so ordered or enlarged or the time extended (s. 73.3(2)), its sites or places may be designated (s. 73.3(3)).

When the sites or places are designated each is subject to section 73.3(4) which prohibits any work stoppage "during the term of a collective agreement" or doing anything to cause a work stoppage. Picketing may not be authroized by the Board (s. 85(2)).

Clearly this is aimed at construction sites and would allow non-union subcontractors on a union site regardless of any rights the employees may have to withdraw services under their collective agreement. The intent is to prevent the exercise of those agreement rights. The effect would be to abolish construction industry union security and create an open shop.

Designations could be used after as well as during construction. For example, high tech industry sites could be designated.

Notes:

1. House of Commons Debates, 28th Parliament, 4th Session, March 29, 1972, p. 1270 per Hon. Martin P. O'Connell.

2. Jacques Archambault

3. Canada Labour Relations Board (1980), p. 24.

4. Note 3, p. 42.

5. Innis Christie, "Certification - Is There A Better Way To Test Employee Wishes?" in Francis Baristow (ed) The Direction of Labour Policy in Canada (1977), p. 47.