MEMORANDUM

July 8, 2020

To: Terry Parker
Executive Director BTA

From: Robert R Blakely QC

CC: Affiliated Local Unions

RE: Analysis of *Bill 32 – Restoring Balance in Alberta's Workplaces Act*

INTRODUCTION

This is a high level, right out of the chute, review, and some analysis of the inaptly named *Bill 32*. I have endeavoured to cover off the topics that are most important to either Building Trades affiliates or to other significant portions of the Labour Movement.

Where I think that there is something that might be done to eliminate (or ameliorate) the effects of the provisions of the amendments to either the *Employment Standards Code (ESC) or the Labour Relations Code (LRC*) I have mentioned what ever popped into my head. Some of those ideas may simply be bad but a more in-depth analysis of both *Bill 32* and those ideas will be done in short order and give you a much more in-depth look into what these amendments can do to us or for us. It seems obvious to me that we ought not tip our hand too much until the *Bill* passes to keep someone from seeing a hole and plugging it!

One final point before launching into this, the impetus for these amendments either come out of the UCP platform document or are long-standing issues that have been repeatedly rejected by both the Progressive Conservatives and the NDP. It should be clearly understood that this is not the brainchild of

anyone in the Department of Labour but seems to be driven from the highest levels in the current government. It is also worthy of note that much of the rhetoric surrounding these amendments speak to how far the previous government went in favouring the "Unions" (which is just poppycock – – the previous government did little and what it did do was late in the mandate and at best brought Alberta into the middle of the pack of provincial labour laws) therefore the restored balance is achieved by pushing back the NDP reforms and returning significant portions of both statutes to the sort of place they were in in the 1970s.

My comments address *Bill 32* as it was introduced at First Reading. The Legislative process can result in changes before a final version is passed and receives Royal Assent. WE will deal with those potentials as the process unfolds.

Employment Standards Code **Amendments**

Some of the provisions of the *ECS* are worrisome such as the ability of an employer to hire 13 and 14-year-old workers. Formerly such workers could only be employed where the employer made a specific application, was approved and some safety standards were built in. This no longer exists. Safety, late hours, schedules, and the fact that young people are more likely to run the risk than older workers are now downloading on employers to decide. My own view is that this situation will be corrected but only after some very difficult, painful, and tragic circumstances.

Section 8 (2) which provided for what amounted to "lay off – pay off in 3 days" has been amended to provide that an employer can choose when it is going to pay off terminated employee. It is either 10 consecutive days after the end of the pay period in which termination occurs or 31 consecutive days after the last day of employment. This is outlandish!

Section 12, employers now will be able to recover overpayments from an employee's pay by simply deducting it so long as the deduction is made within 6 months of the overpayment and the employer must give an employee a written notice of the deduction.

Section 17 formerly required an employer, where they are going to change an employee's shift, to provide 24 hours written notice and an 8-hour break between shifts. A new subsection has been added which provides for different notice or rest provisions provided they are in a collective agreement.

Section 19 formerly required 4 consecutive days of rest after each 24 consecutive workdays. This section is amended so that it does not apply if different days of rest provisions are agreed under a collective agreement. So, the way is clear to significantly expand the number of consecutive workdays.

I have not concentrated much on the 'work averaging agreements' and how they are going to be construed. There are several sections which have been changed including sections 23 and 24. Suffice to say this will be the subject of concentration for the future.

Section 34 has been amended to clarify that workers continue to accrue vacation entitlement while on a job protected leave (like reservists leave). This is an improvement!

Section 62 is partially repealed, and that repeal removes layoff notices and the timeliness of those layoff notices. A long service employee no longer must be given 2 weeks prior notice of when the layoff is going to commence.

Section 63 – Temporary Lay-off, has been amended, in the past such Temporary Lay – off could not exceed 60 days that, has now been amended to 90 days and in the event of a COVID layoff this expands 180 days. What this means is that the layoff does not become permanent so payment of severance or some other entitlements simply wait to a much later date. In my view this will simply encourage people to quit and get on with their lives thereby saving deserving employers (the "job creators") severance etc.

Section 74 used to require a government official to issue a variation or exemption in respect to any of the provisions of the *ESC* or the *ESC Regulations*. That will change, now an Employer Association (read MERIT) or a group of employers can ask for the variation which is to apply to all of them. The means of posting the variance or exemption has changed, it will be harder for workers to

know that the changes have been made. Section 74.1 allows the Minister, by order, to exempt an employer, a group of employers or an Employers' Association in the same manner. These variances now may exceed 2 years and may be renewed.

There will be a host of regulations that need to be put in place to make the new and improved *ECS* work. These regulations are not currently in existence so there will be a number of transitional issues which need to be dealt with and that will mean that some of the changes to this *Act* (and to the *LRC*) will need to be phased in. This will allow the ministry and the LRB to be able to get geared up to deal with the issues which will inevitably arise coming out of the transition and the "rush" of some people to be able to make applications that they think will be of significant value to them.

Labour Relations Code

The changes in the *LRC* are interesting; there are number provisions which are particularly "get even" with the various public-sector unions and the AFL. It should probably come as no shock to anyone that over the course of the last year there has have been a lot of time talking about the answer to many issues being a general strike. This forewarning creates a reaction by a majority government. It is also unreasonable to spend membership money on political action and not expect some sort of retaliation.

The changes to Part 3 (Construction) were definitely considered to be campaign promises by at least the MERIT Shop and likely the CLAC. Add into the mix several losing cases by McLennan Ross that they want "fixed". The changes that were in the Discussion Paper(s) were issues that they had been campaigning for and rejected at least 3 times by both the Progressive Conservatives and by the NDP. There was a very scholarly review of these topics done for the Alberta government by Andy Sims QC which really commented on the situation in a way that most everyone would "hoist in". Nevertheless, some people persisted and this time several their wishes came true.

Again, I have not commented on every amendment but only those that seem to me to be quite significant.

The Preamble is a statement of purpose at the beginning of important statutes which is a significant aid to interpretation for people like the LRB. The statement of purpose sets the tone for the statute. There is a subtle change proposed to the Preamble which introduces concept of "expediency". What exactly will be made of that is not certain but the Canons of Construction for construing statutes clearly indicates that any word that is added (or deleted) must have meaning and must be considered in rendering decisions around the statute. This subtle change is a signal.

In the definition section [s1(1)] there is a change in the definition of construction and that change impacts how maintenance is to be considered as a part of both Division 1.1 and Division 8 of the construction provisions.

Section 9 expands the power of the Chair or a Vice- chair to sit alone on more cases and this includes where the Chair could find an "emergency".

Section 16 (4) adds to the ground on which the LRB (also called the Board in this document) can strike an application and this is where they deem that the application was made for improper motives. So, evil heart……. Just how motive is going to proven will be another interesting thing.

Section 17 is amended, and it limits very substantially the potential to get automatic certification based on an unfair labour practice. This Board power still exists but in a very much reduced way. The section will now only apply to the failure of a representation vote as a result of unfair labour practices and can only be applied by the Board if they find no other remedy would be sufficient to counter act the effects of the prohibited practice. This will also apply to the refusal to certify if the trade union commits an unfair labour practice.

A new section is going to be added to the *LRC* (section 24.1) which requires each union to give each member financial statement and to comply with the directions set out in regulations providing any information that is prescribed by those regulations. I will not go on at length about this new section. It should

suffice to say that this runs through the amendments to the *LRC* and allows members who are unhappy with the disclosure that they receive to be able to go to the LRB, who are charged with making everything right. What the regulations will be is a matter of conjecture but there is considerable scope for the Minister to make such regulations. What the purpose of the financial statement is to show to members how the union is "wasting their dues" on social or political causes that the member may not espouse. It is intended to create an aura of 'evil unions.

Another new section is added which is headed as the "Deduction election", this establishes a process that the union must use in setting union dues and in determining what money it is "wasting" on social causes, charities, NGOs, or political parties (and any other activity that may be prescribed by the regulations). The percentage of the union dues that is "wasted" can allow a member to elect not to pay for those "wasted" activities. In fact, members must elect (in accordance with the regulations) for dues to be used for these activities. To be clear contractors will still remit dues and you can continue use dues money for 'usual' purposes, but not for the purposes the *Bill* restricts without an authorization. The new section goes on to prevent the trade union from expelling or suspending a member or taking disciplinary action against someone because they have refused to make an election under this section. Further, the union **cannot** use the money from such 'wasted' dues unless and until the employee has made such an election. Disputes can be taken to the LRB. Where such a dispute is taken to the Board the union must produce all necessary information, and if the union loses the case it must make restitution or the Board could suspend the trade union's ability to collect union dues.

Is there some way of insulating ourselves against the consequences of these amendments; that remains to be seen? But it is certainly worth the inquiry. It is interesting to look at the Press Release from the government on this *Bill* where the boast is that job creators will save an estimated hundred million dollars per year by the reduction of red tape. That seems to apply for job creators but not for trade unions or their employer partners who could have to manage each member as an individual because of these amendments.

The time limits that formerly were at section 34 are to be repealed. The new *Act* will have a general time limit of certifications being dealt with in 6 months but if that is not possible the LRB may approve an extension. The removal of the time limits is significant; also significant is the fact that section 34(4) will be repealed and employers will no longer be required to provide the Labour Relations Board with information in order to facilitate the creation of the Board Officer's Report. Seemingly, this will become another significant hurdle in the certification process.

Section 37, as proposed, will, in effect, repeal the *Firestone* decision. A new subsection is to be added which will allow the employer and the bargaining agent (read CLAC) to enter into a new collective agreement at any time prior to the open period. The Board needs to be satisfied that the bargaining unit employees were informed that no applications for certification will be permitted if they vote to enter into a new collective agreement and "a majority of the employees in the unit voted to enter into the new collective agreement." If that is the case the open period is closed. No application for certification can be made once the open period is closed. There is an additional limitation with respect to the closing of the open period, that is the application to address questions respecting the open period must be made before the open period closes. This does not bode well for being able to raid CLAC units.

A new section 40 (5) is proposed. I am not certain what this amendment is going to do because it speaks to a trade union becoming certified for employees engaged in construction. Perhaps it has the effect of preventing a trade union that displaces from terminating that agreement in construction. There is another new subsection proposed which would allow the union that becomes certified bargaining agent to make an application to determine any question. Probably a good thing to have if you are not certain what the section means.

At the new section 52 revocation applications cannot proceed if a new collective agreement is entered into prior to the end of the term and before the open period commences. The same procedure discussed at section 37 must be followed in order to get this insulating factor and that is informing the employees

that no revocation application can be made and the there has been a majority vote of the employees in the unit to enter into the new collective agreement.

Section 53 is amended in the same fashion as section 34 wherein the time limits are removed, and a six-month general timeline is provided for.

Section 57 is amended to extend the time bar for an unsuccessful certification application from 90 days to 6 months.

To deal with the potential of the "general strike" a subsection is added to section 84 to make obstructing or impeding a person who wishes to cross a picket line a wrongful act. Further, picketing in conjunction with a labour dispute may only be conducted in accordance with section 84 and a new section 84.1. Section 84.1 deals with secondary picketing and essentially repeals decisions of the Board which has allowed secondary picketing in the past. To conduct secondary picketing those who wish to picket must first get an order made by the Board which describes picketing, permits picketing, and determines locations. Given that the regulation of picketing is contextual, it is difficult to see how the Board is going to pre-authorize the pickets.

The current section 88 is repealed and replaced with a new section that requires the Board to file any order, on request of any party, that it makes on picketing with the Court. Service of the Board order or directive is deemed to be service of the Court order.

First contract arbitration is being modified. It is going to be more difficult to access this provision and the Board must find that "no other remedy or remedies would be sufficient to counteract the effects of the failure to comply with the Act."

Although Division 15.1, 16 or 18 (Essential Services, Compulsory Interest Perpetration and Emergencies) do not affect us it is instructive to look at the measures that there are for illegal strikes in the public service. The union loses its right to collect dues for up to 6 months. To be fair and even-handed if there is an illegal lockout in any of these areas the employer may have to pay the equivalent of up to 6 months dues to the union.

Section 142 contains the powers of an arbitration board; the new and improved provisions repeal the power of an arbitrator to extend timelines and to grant extensions of time. This is a very significant loss.

Section 143 (1) is amended curtailing arbitrable authority by removing reference to "… Principles of Canadian labour arbitration."

Section 145 (3) removes from the remedial power of the LRB overturning a decision for a Breach of the Rules of Natural Justice and where the decision is indefensible. The Board may however now award any costs it considers appropriate.

The Unfair Labour Practices section 149 is amended to make it an unfair labour practice to coerce someone to/not to make an election in respect of union dues. Union dues cannot be deducted without an authorization for an election is made. So, they are serious about making members elect to spend their union dues on certain activities.

Section 149(2) now will severely limit the reverse onus provisions for employer unfair labour practices. This is a real loss.

Section 151 will now provide significant protection for those who do not wish to elect in respect of union dues.

AND FOR CLAC ---- Section 151 (i) (ii) is amended to limit the right of the union to discipline its members unless the union can show that the non-union employment "threatens the union's interest".

AND ALSO, FOR CLAC --- Section 151 (2) repeals the decision of the Court of Appeal in *Armstrong.* In order to discipline a member for working non-union the Board must address a number of factors: is the union job offered compatible to the current or former employment in respect of primary functions and responsibilities, duration, wages and benefits; a bargaining unit position is not reasonable alternate employment with respect to a managerial position; the employment must be in the same industry and such other factors as the Board may consider relevant. This means that if someone is working as a Superintendent

for a CLAC contractor to pull him off the job or lay charges under the union constitution you will need to offer a Superintendent's job with the union contractor. To make matters worse section 151 (3) casts a burden of proof and an onus on the trade union

in respect of the Duty of Fair Representation there is a bright spot at the newly proposed section 153 (3.1) the LRB can summarily reject a DFR where the complainant refused a fair and reasonable settlement.

Registration has been retained in the *Act* but in my view, the changes in this Part will make it extremely difficult for Registered Employers Organizations to survive. There is proposed a new Division 1.1 which will allow anyone to apply for either an all employee bargaining unit in construction or in maintenance and for more than one trade jurisdiction or for a trade specific bargaining unit. Where an all employee bargaining unit exists registration trades cannot bring an application for certification of an all employee unit. At subsections 6 the Board can apply a buildup principle to refuse a certification application.

Another new concept has been introduced at the new section 163.2 and that is a 'consolidated bargaining agent' -- either an employer or a union may apply. This will turn a trade specific relationship into an all employee unit if there are at least 3 trades represented and the application is timely. The LRB may exclude specific units from this consolidation. The mechanics of section 163.3 will allow the LRB to deal with any issues that arise such as terminating some of the collective agreements formerly in effect. If there are unrepresented employees in a consolidation application the Board must conduct a vote of those employees who may be included in the consolidated application if the vote is in favour of being added to the consolidated unit or excluded if against. Where a consolidated certification is in existence registration trades cannot apply to certify.

Another new concept is found at Division 7.1. This allows the Building Trades of Alberta to enter into an agreement with an employer (can be union, non-union or alternate union) for specific project and the agreement will stand outside of registration. This concept may be very useful in market recapture. Once

the BTA has negotiated the agreement, it takes the signatures of 2 registration trades to turn this into a project agreement. This has potential as a market recovery tool and for being able to show employers who used alternate unions what our forces can do. This is the brightest (and one of the few) gains in *Bill 32.*

Division 8 is modified; it now requires the Minister to consult and provides a form of bargaining which if not successful can be carried through to Compulsory Arbitration. There can be more than 1 Division 8 agreement.

As indicated previously the Transition to the new Act will be staggered to allow the LRB and others to get ready for the 'new world'.

CONCLUSION

Except for Division 7.1 and a couple of very small items we have not gained anything; in fact, we have lost significantly, and it will take a real effort to overcome this. The truth is that Unions have often done much better when opposed by government (as opposed to governments that offer benign indifference). We can still prosper but, we will need a plan that has a number of lines of operations; litigation (perhaps, or piggybacking on other litigation); strategic use and deployment of resources, member education and communication, and market share action to name a few.

If you need information, call me directly at 780 425 7200 or send me an e-mail rblakely@bdcounsel.ca

Cheers

Bob