CANADIAN CENTRE FOR POLICY ALTERNATIVES-SK

Saskatchewan Notes

June 2012

The Shield or the Sword? The Saskatchewan Labour Legislation Review

By Dan Cameron

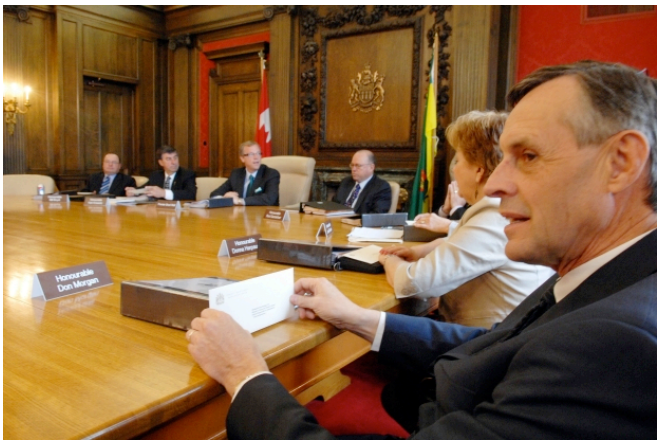
"Every Saskatchewan worker is in danger of losing basic workplace rights and protections, yet most will have little or no opportunity to have their voices heard by government as it moves to re-write the province's labour laws.." SGEU Press Release, May 8, 2012

In response to the question "what does labour want?" turn of the century labour leader Samuel Gompers gave an oft-quoted one word response; "more! " In fact, the primary thrust of the labour movement is not "more." Rather, it is first and foremost, the preservation of what has been gained, followed by adding to those gains. This was best expressed by the former president of the Canadian Auto Workers (CAW) Bob White who, when faced with industry demands for concession, stated "this union does not walk backwards."

And thus it is, as illustrated by the above preservative response of the Saskatchewan Government and General Employees Union (SGEU) to the Government of Saskatchewan's *Consultation Paper on the Renewal of Labour Legislation in Saskatchewan,* released on May 2, 2012.

Like its previous revisions to the Trade Union Act and the introduction of the Public Service Essential Services Act in 2007, this review was not a campaign issue in the 2011 re-election of the Brad Wall-led Saskatchewan Party. As well there appears to be no obvious public groundswell demand for this initiative; indeed its introduction came as a bit of a surprise.

The Review applies to 15 separate pieces of employment legislation and requires public responses be submitted no later than July 31, 2012. The legislation covers such areas as labour relations (6 acts) employment standards (4 acts), occupational health and safety (3 acts) as well as 2 other related pieces of legislation.



Labour Relations Minister Don Morgan. Photo Credit: Don Healy, Leader-Post

The stated purpose of this review is to address the following questions:

- Is the current legislation serving its intended purpose and if not, what changes are necessary?

- Are the rights of workers adequate and the duties of parties at the workplace clear?

• Does the legislation reflect the changing nature of the work place and the need for "flexibility" by employers and employees?

• Might the various pieces of legislation be consolidated in one act to ease understanding and application?

The consultation paper sets out certain "questions" intended to guide discussion; some are contentious, others not; for example:

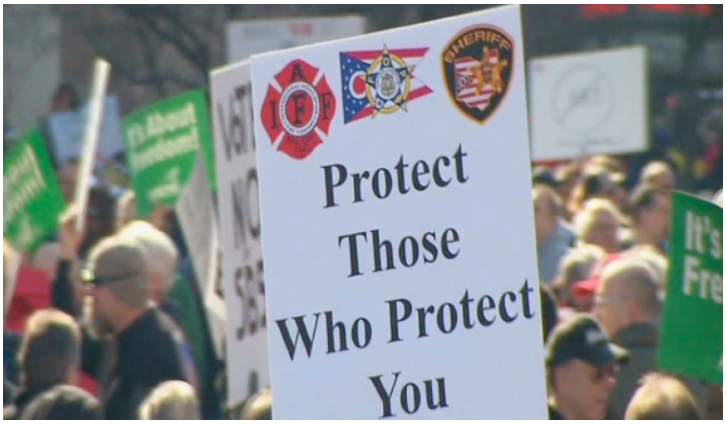
• Should union members be able opt out of paying union dues for individual union initiatives they do not agree with?

• Should the Labour Relations Board play a larger role in determining the number and nature of essential services to be provided in the event of a public sector strike or lockout?

In launching this review, the government has taken the high ground, "to ensure the labour legislation reflects today's changing work environment, while supporting flexible work arrangements to enhance work life balance within Saskatchewan workplaces".

In its 2007 Supreme Court ruling (British Columbia, Health Services and Support - Bill 29), the court stated that government has a responsibility to consult with organized labour when it intends to revise labour legislation impacting on collective bargaining. The 90 day review period set by the Wall government is a minimalist acknowledgment of that legal requirement given the scope of the legislative review involved

The Government's language suggests it wishes this review to be seen as the adoption of progressive labour legislation appropriate to a rapidly changing work environment. Given the acrimonious relationship it has with organized labour the latter's negative response was not unexpected. The Wall government may choose to characterize labour's response as a defence of the status quo, a resistance to change, out of touch with current business realities, etc. However, while organized labour has taken a defensive position in response to this review, to this point it has not viewed this consultation process as an opportunity to effect positive change.



Organized labour will without doubt address the red flag issues raised in the consultation document. One such issue is the suggestion that employees have the right to opt out of union dues for union initiatives not related to collective bargaining.

The Supreme Court of Canada, in its 1991 ruling (Levigne vs Ontario Public Service Employees Union) denied such opting out stating that this is not a violation of the individual's Charter right of expression or association. Indeed the "Rand Formula", requiring the mandatory payment of union dues, ruled on in Levigne, has been a characteristic of Canadian labour law since 1945. The Court also stated that a union must be able to engage in the discussion of political, economic and social issues. As well, that such opting out would be prejudicial to the financial viability of the union and the collective bargaining process.

The decision to undertake such initiatives are

adopted within a union's democratic processes. As well, there are no similar legal limits on other organizations who may also lobby on these same issues. Presently, Alberta is the only jurisdiction that does not legally require the deduction of union dues or permit deduction at the written request of the employee.

The consultation paper fails to mention or recognize that the Levigne decision is currently the fundamental law in Canada on this issue.

The review also proposes that certain classes of labour, (students, minors or persons where union dues would constitute a "financial hardship"), not be required to pay union dues. *The effect would be to remove union representation from such persons who by their very nature are vulnerable at the workplace.* A union required by law to represent such non-dues paying members would be characteristic of "right to work" legislation, common in the United States but not in Canada.

The review also proposes consideration of including all 15 pieces of legislation under review in a single act. The Federal Government, via the Canada Labour Code, has such an arrangement, (ie: incorporating collective bargaining, occupational health and safety and labour standards in a single piece of legislation). However, this Act has a narrow application, applying to approximately 10% of the Canadian labour force, (ie: broadcasting, telecommunications, chartered banks, postal service, airports and air transportation, shipping and navigation, some crown corporations as well as interprovincial or international transportation). All other classes of labour, from physicians to child care workers, are governed provincially. No other provincial jurisdiction has such a consolidated legal arrangement. As well, the case law decisions that have been developed over the years on the application of these various statutes and which serve as a guide to employees, unions and management would be lost if these statutes were re-written and consolidated.

This proposal should be rejected, at a minimum, on the basis of administrative efficiency.

The Labour Standards Act already sets threshold conditions of work for employees; its primary application is in non-unionized settings. It covers such matters as, hours of work, wages, overtime payments, holidays etc. Enforcement is via an employee driven complaint process; anonymous complaints are permitted. Employees who raise such complaints are supposedly protected from employer discipline. However, the complainant is clearly in a vulnerable position, particularly in the service sector with its high percentage of contingent labour. Such employees may be subject to retaliatory employer actions, subtle or otherwise after the fact, (eg: reduced hours of work, etc). Organized labour could propose that to ensure these labour standards are enforced as intended, and to remove any employee fear as a disincentive to raise a complaint, legislation be revised to allow any 3rd party to file a complaint of contravention on behalf of the affected employee or employees. Such a 3rd party could continue to monitor and provide any assistance should the complainant face retaliatory action by the employer.

However, there is a reality not mentioned in the proposed review document. This reality is so predominant that its absence was no doubt deliberate. As well it is one that provides organized labour with its greatest opportunity for positive change.

In its 2007 decision, (British Columbia, Health Services and Support - Bill 29). the Supreme Court of Canada made the following declaration:

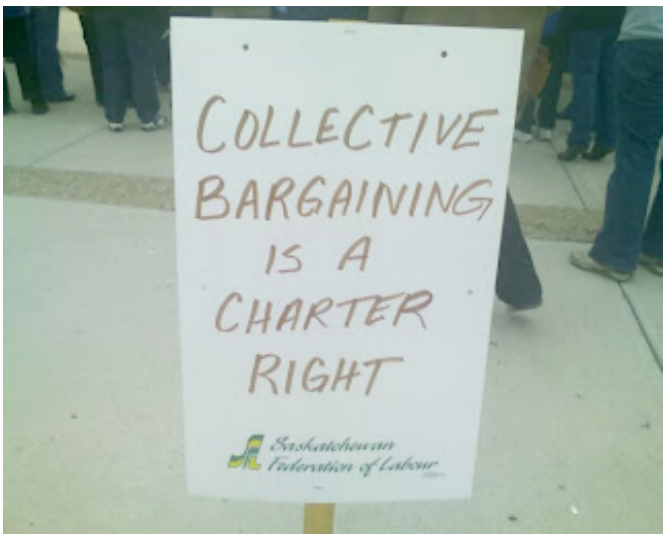
employees have the right to associate together, to make representations to their employer on

workplace issues, to collectively bargain these issues and the employer has the obligation to negotiate these issues in good faith.

In effect, collective bargaining is the constitutional right of every Canadian employee. Any interference with that right must effect its exercise minimally. This right is based on section 2(d) of the Charter of Rights and Freedoms, ie: freedom of association. It is the fundamental law of Canada. This ruling overturned 20 years of previous Supreme Court decision that declared collective bargaining was not constitutionally protected. As well, the 2011 Supreme Court decision (Ontario Attorney General vs Fraser) reinforced the ruling found in B.C. Health Services. But it went further.

The Fraser case involved the application of the Agricultural Employees Protection Act, which gave Ontario farm employees the right to make representations to their employer but not full collective bargaining rights. In its decision, the Ontario Court of Appeal, referring to the B.C. Health Services decision, gave Ontario farm workers full collective bargaining rights, recognized the principle of exclusivity and majoritarianism (if the union had the support of the majority of employees it represented them all) and provided a mechanism for resolving bargaining impasses and disputes over the interpretation and application of collective agreements. Basically it granted the "Wagner" model of collective bargaining that is so common in North America.

This decision was ultimately referred to the Supreme Court. In its decision the Court declared the Ontario Court of Appeal had gone too far. It reiterated its decision in Health Sciences, ie: that employees have the constitutional right to make representations to their employer and employers must deal with such representation in good faith. However, it also said that its ruling in Health Science does not automatically provide workers with access to a particular form of collective bargaining, and in the Fraser case, the Wagner model.



Together these two decisions state:

• collective bargaining is the fundamental right of every Canadian employee. This right can only be limited minimally and in exceptional circumstances, ie: Section 1 of the Charter, "...subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

• that freedom of association does not give employees the right to a particular *form* of collective bargaining or a particular outcome. In effect the Court has rejected the Wagner model and its principles of exclusivity and majoritarianism and stated that various collective bargaining arrangements are possible.

The latter decision has caused some consternation in the union movement. However, it also lifts the restraints of the Wagner model and presents certain opportunities:

• can the majority of a proposed bargaining unit deny the minority its constitutional right to

collective bargaining? Are minority unions now possible?

• on the same basis, is a minimum card threshold of 45% to obtain collective bargaining rights constitutionally valid?

• the Labour Relations Board has the power to make decisions on what is an "appropriate unit" for collective bargaining: this decision that is made on the basis of administrative effectiveness. Does the latter trump an employee's constitution right to collective bargaining?

On the basis that exclusivity and majoritarianism cannot stand in the way of employees exercising their Charter protected right to collective bargaining, the present threshold barriers to expanding collective bargaining are removed.

As well, at a minimum, the current preface to the Trade Union Act should be amended to reflect the Supreme Court decision in B. C. Health:

An Act respecting the Constitutional right of employees to associate together in unions of their own choosing for the purpose of engaging in collective bargaining with their employer on workplace issues.

In summary, while the proposed review certainly contains threats to current collective bargaining arrangements, it also presents certain opportunities to expand collective bargaining from the current narrow confines prescribed by the Wagner model. As well, this opportunity is progressive, based in fundamental law and is publically defensible. The question is, will organized labour use existing legislative arrangements as a shield to protect it from the attacks implicit in the review or, will it also use the review process as a sword to expand the process of collective bargaining?

Dan Cameron was the former Director of Employee Relations with the Sask. Public Service Commission and served as chief Government spokesperson in public service negotiations. He has served as a sessional lecturer in industrial relations in the Hill School of Business, University Of Regina.