Alberta Growth Initiative Submission for Labour Law Review

April 18, 2017

This submission is filed on behalf of the Alberta Growth Initiative Ltd. ("AGI") in response to the Alberta government's review of Alberta's labour legislation.

AGI

AGI is a coalition of business organizations representing hundreds of employers, employing more than a million people, and serving millions of customers. The AGI board consists of representatives from the Alberta Hotel & Lodging Association, the Alberta Enterprise Group, the Canadian Meat Council, and Restaurants Canada.

The Alberta Hotel & Lodging Association currently serves approximately 800 fixed roof hotel and campground members and 250 associate members, representing 90% of the guest rooms available in Alberta. The Alberta Enterprise Group is an organization comprised of over 100 members who collectively employ over 150,000 people and generate several billion dollars in economic activity each year. The Alberta Enterprise Group was formed in 2007 to help promote Alberta and its businesses and to act as an advocate in policy matters. The Canadian Meat Council represents meat packers and advocates for the needs of its members to secure and improve Canada's global meat competitiveness. Restaurants Canada is the voice of food services with more than 1 million employees, 80,000 locations, and 18 million customers a day. The restaurant industry is the number one source of first jobs for young people. AGI is also supported by grassroots Albertans with similar goals.

AGI and its members represent a diverse array of interests and have experience in a variety of industries working in union and non-union environments. AGI has a vested interest in the success of Alberta and Albertans. AGI formed to promote the well-being of Alberta's economy and support Alberta's continuing economic growth and prosperity. Alberta has been a source of investment, innovation, growth, and free enterprise that have been the envy of Canada and the world. In turn, Alberta workers have benefited from job opportunities, income, labour participation, and growth that lead the country.

This success does not come by luck. It is essential to have a regulatory environment that allows individuals to pursue opportunities and thrive with limited burdens and costs of activity. Given the significant setback Alberta has experienced over the last two years, it is a priority of AGI to ensure government policy does not hinder the opportunities we have experienced over the years.

The Review Process

Labour legislation has an important impact on Alberta business and employment. It is a particular interest of AGI and its members. Successful employment relationships are a cornerstone of business success, and AGI believes that Alberta business, employees, unions, and the public have a shared interest in ensuring a labour relations system that is stable, fair, competitive, and efficient. It is a delicate and nuanced balance.

Given the importance of the Labour Relations Code (the "Code") to employment relationships in Alberta, AGI is greatly concerned by the current review process. There are two parts to this concern. First, insufficient time has been set aside for the current review. Second, the statement of issues to be addressed is unclear and lacks transparency. Combined, these procedural concerns conspire against a positive outcome.

As the government has noted, the Code has operated for 30 years. AGI says those years have largely demonstrated growth, stability, and high incomes in the labour market. In considering changes to this legislation, it is therefore very important that we carefully consider the options so that the next 30 years are equally successful. That is especially a concern in light of Alberta's current economic malaise. The last thing anyone should want is new legislation that unnecessarily increases employer burdens, discourages investment, and exports employment opportunities. New government initiatives should not be a source of further harm to the economy.

A proper review requires adequate time, deliberation, and informed consultation.

AGI is aware that the current government has taken months to consider other labour legislation, such as legislation in respect to essential services, post-secondary learning, farm workers, and workers' compensation. The government is allocating three months to consider the Castle Park management plan. Similarly, the Ontario workplace review has taken years. The legislation under review has wide-ranging implications for Albertans.

In contrast, the review of the Code is occurring over a handful of weeks. It is rushed.

AGI has concerns over any process that doesn't take the measured and thoughtful time to consult and engage all Albertans – so that there is an opportunity for informed input and all affected voices are considered.

AGI asks that the government take the following steps:

1. Delay the current review timetable;

2. Specifically identify issues and options that are being considered and allow for feedback and consultation once those issues are defined. The government says its review is limited (which is laudable), but the 10 areas under consideration are very broad and open ended. Albertans do not know what really is under review and what ultimately will be the subject of any legislation. This lack of clarity and the compressed timetable will result in less input generally and less informed input specifically.

The Review Factors

The government has questioned whether the Code is up to date, consistent with the mainstream, and fair, balanced, and effective.

AGI submits that the Code has overall provided positive outcomes to Albertans. It broadly addresses the collective representation of employees in ways that are consistent with other jurisdictions, and consideration of its success should take into account the relatively few and limited labour disputes that occur in Alberta, the fact it has not deterred investment in Alberta, and the fact that the Alberta employment market has led the way in job growth and income.

AGI submits there is no empirical support that there are any substantial problems with the operation of the Code or any need for change. To the contrary, it has proven to be effective legislation. Parties are generally aware of the rules that apply and operate accordingly. In contrast, any change in regulatory regime creates the need for adjustment, uncertainty, and frequently litigation. Change can be destabilizing, and now is not the time to add further uncertainty and instability to the Alberta employment market.

Alberta has experienced a flight of capital to other provinces and countries as a result of other regulatory decisions. Changes to the Code should not deter employers from establishing operations in Alberta or encourage them to favour other jurisdictions over Alberta. The Code should promote job opportunities and growth in Alberta. Changes that make Alberta less attractive to investment and expansion are contrary to the public interest.

The fact the Code has operated for 30 years should be seen as a positive thing, not a negative. In any event, the Code is modelled after American legislation that dates back to 1935. The general concepts of labour relations have not radically changed. There is no need for radical change to the Code.

Despite suggestions by some to the contrary, the reality is that the Code is part of the mainstream in Canada (not that being mainstream should be the key measure of good legislation anyway). Changes implemented in the Code in 1988 have been similarly applied by legislation in other provinces and federally.

While fairness, effectiveness, and balance are relevant considerations, these concepts are open to interpretation and different opinions. AGI proposes that any changes should be considered through the lens of whether change is needed, and why. Ultimately, the public interest in a strong and healthy economy, favourable investment climate, and competitive job market should take precedence over what individual unions or employers might like changed because it will give them an advantage in their own labour relations.

Finally, considering labour law review should not be premised on trying to increase the rate of unionization in Alberta. Unions play an important role in Alberta, and the right to choose a union or not is one that must be left to individual workers. AGI has heard some unions argue that government should facilitate increased unionization. The reality is that the proportion of unionized workers in Alberta has been on a long-term decline, just as it has been throughout Canada and in other countries. There are many reasons for this trend. Whether anyone in particular thinks that more unions are a good or a bad thing, it ultimately is a matter of freedom of association. The Code must respect the right both to join a union and to not join.

Areas of Consideration

AGI's position overall is that changes to the Code are not warranted. A need to make changes cannot be demonstrated. In addition, AGI comments below on each of the 10 areas identified in the consultation mandate of Andy Sims.

As the issues are unclear, AGI asks for the opportunity to address specific issues and proposals once they are known, in line with our proposals above regarding the review process.

"Whether to mandate a Rand formula in collective agreements."

The Rand formula requires employers to deduct union dues for all employees under a collective agreement, regardless of who is a union member. Many collective agreements contain the Rand formula; others do not. AGI supports the freedom of contract for employers to negotiate collective agreements without the Rand formula. AGI notes the following points about using the coercive power of the state to mandate financial support contrary to the wishes of an individual worker:

- It is contrary to the freedom of association under the Canadian Charter of Rights and Freedoms;
- It is not fair to individual workers;
- It is not necessary. Disputes over Rand formula in collective agreements are not common.

The reality is that the Rand formula requires the worker to fund many different activities that unions engage in, not just those that benefit the worker. A worker should be entitled to disassociate from union activities the worker does not support.

The concerns over this issue could be alleviated if Alberta's legislation limited union dues to use on collective bargaining and administration or required financial disclosure from unions. Such changes would be consistent with the legislative restrictions on union donations to political campaigns, which the government has supported.

"Assessing the processes used to let employees exercise their constitutional right to choose, change or cancel union representation in a timely and effective way."

To the extent this topic relates to card-based certification (and revocation), AGI strongly objects for the following reasons:

- It is anti-democratic;
- The value of a secret ballot vote is obvious common sense. The anonymity of secret ballot voting makes people feel more comfortable expressing their true views when they know they can do so

without peer pressure, fear of reprisal, or intimidation. General elections use a secret ballot for this very reason – to ensure voters have privacy, and to prevent corruption, vote buying, and other problems. It's also why unions use the secret ballot method to select their own executives and officials;

- Experience demonstrates that voters in all types of elections change their minds from an initial indication of support. Specifically, employees change their minds on certification and revocation applications even though they may have initially supported such an application. Card-based certification would result in outcomes not in line with employees' true wishes;

- The best evidence of union support (or lack of support on a revocation application), is a confidential anonymous vote;

- Employees sign cards and petitions based on misinformation or without fully knowing or understanding the implications. A secret ballot vote allows employees the opportunity to be fully informed of both reasons for and against union representation, while at the same time protecting against employer or union intimidation, coercion, and threats. Employees should be entitled to hear from their employer in advance of making the important decision on whether to have a union or not, and employers have a right of free speech under the Code, the *Charter,* and other mainstream legislation;

- AGI takes exception to the premise that employees are not astute enough to choose what is right for their individual situations;

- The Labour Relations Board already has the ability to order re-votes in cases of employer unfair labour practices (a power that has been used rarely);

- Votes in Alberta are conducted impartially by the Labour Relations Board in a timely manner;

- There is no evidence of any need for a change to the secret ballot. There is no mischief in the current system;

- Employees may be members of more than one union. Union membership does not necessarily mean you want that union to certify a specific employer;

- The International Labour Organization (ILO) Committee of Experts prescribes that there should be a majority vote before legislation compels exclusive employee representation;

- It is contrary to the freedom of association to require workers to be represented without the procedural safeguard of a secret ballot vote;

- While some unions might want card-based certification because it would be easier to organize employers, that is not an appropriate test. Similarly, the desire for greater unionization does not justify removing the right to a vote. In addition, the unionization rate has also declined in jurisdictions without a secret ballot vote;

- The secret ballot vote is in accordance with mainstream legislation. When the Code was enacted in 1988, fewer Canadian jurisdictions required secret ballot votes. Since that time, most Canadian provinces (including all of the western provinces) and the federal government have all enacted the requirement of a secret ballot vote;

- Removing the secret ballot vote would make Alberta less attractive to new investment compared to neighbouring provinces;

- Removing the right to a vote is not fair, balanced, or effective.

There is no evidence to justify removing the fundamental democratic right of employees to a vote.

To the extent this topic relates to sectoral bargaining, AGI strongly objects for the following reasons:

- Sectoral bargaining is not a mainstream concept. It would be a radical change to the Code;

- There is no demonstrated need for sectoral bargaining;

- Sectoral bargaining is a complicated matter that can apply in different ways, to different industries and positions;

- The only area where sectoral bargaining applies in Alberta is in respect to part of the construction industry, and that system was driven by employer support. Alberta employers will not support sectoral bargaining in other industries;

- It is not fair to tie employers in an industry to the same terms and conditions of employment without their consent;

- Sectoral bargaining without employer consent is likely contrary to the freedom of association;

- AGI does not accept the premise that sectoral is good because it increases unionization for vulnerable workers or in under-unionized industries. Retail and hospitality are sometimes cited as industries to which sectoral bargaining would be appropriate. AGI members operate in these industries and do not agree that sectoral bargaining is required or would be beneficial. The reality is that these industries are competitive. Adding further regulatory burdens would jeopardize businesses and drive up consumer costs;

- Sectoral bargaining can lead to industry-wide labour disputes, disruption, and chaos.

Any consideration of sectoral bargaining would require separate study, proposals, and consultation. The time-constrained process of the current review is not appropriate to address this issue.

"Whether it is appropriate to provide for the type of reverse onus provisions used elsewhere in respect to certain alleged unfair labour practices."

AGI opposes the introduction of reverse onus provisions in the Code for the following reasons:

- Like others under the law, employers should be innocent until proven guilty, particularly when applying legislative sanctions;
- There is no demonstrated need for the introduction of reverse onus provisions in Alberta. The standard onus that currently applies is not creating any hardship or mischief;
- Employers should not be required to prove a negative – that their actions are not anti-union;
- Creating a reverse onus will encourage spurious complaints and unnecessary litigation because there is nothing to lose by pursuing such complaints. Introducing a reverse onus would create a need to punish such inappropriate complaints, in costs or otherwise, something the Labour Board has been reluctant to do.

"Reviewing current definitions of 'employer' and 'employee' to ensure they are consistent with today's workplaces, including the manner in which bargaining rights may be maintained, adjusted, or changed as workplaces and ownership change."

AGI responds as follows to this item:

- AGI is not aware of any need to change or expand the definitions of employer and employee;
- The Code and case law already provide ample flexibility to address different work relationships. For instance, the Code is commonly applied to dependent contractor relationships;
- AGI opposes any move to expand the current provisions in respect to successorship and common employer declarations, particularly any proposed changes to prevent double breasting. The Code and Alberta case law are clear and well established in respect to the tests for successorship and common employer declarations. The relevant principles are generally consistent with other Canadian legislation. Alberta employers have structured their operations to comply with the existing standards, and there is no mischief created by their current application. Making changes in how successorship and common employer apply has the potential to cause great disruption, instability, and unnecessary litigation. There is no offsetting benefit to the hardship that could be created by changes in this area;
- AGI members include franchise operations. AGI is aware that some unions have proposed equating franchisors and franchisees for the purposes of the Code. Franchisors are very distinct from franchisees, and there is good reason to leave them distinct. Franchising is a valuable business model in Canada through which successful organizations are able to develop economic activity and employment. Franchises are successful because the franchisor and franchisee each bring different expertise, contributions, and inputs to the business model. The franchisor frequently provides the

business structure and systems, while the franchisee provides the day-to-day management, including responsibility for employment. Any changes to the Code should not interfere with the success of the franchise model, and there is no need for this to be the case. Under the current legislation, the Labour Relations Board is able to make "true employer" declarations based on well-established factors. There is no reason to expand the obligations of employers to situations that do not satisfy the current tests of who is an employer;

- AGI advocates restraint in imposing the obligations of employers upon arm's length parties such as business clients and site owners (e.g., owners of construction sites). AGI members include organizations that engage contractors on their sites. There is a clear and valid distinction between employers and their clients, and that distinction should be honoured by our legislation;

- To the extent that specific provisions are being proposed to require remote site access for unions, such changes are not required. Alberta case law already allows for site access, subject to safeguards. As representatives of site owners, AGI strongly advocates for the sanctity of private property rights and caution in doing anything that would circumvent those rights;

- AGI is not aware of any need to remove current exclusions within the Code for professionals.

"The options available for dispute resolution in intractable disputes. This may include situations that involve unresolved first contracts, proven unfair labour practices, or the failure to maintain essential services or public emergency."

AGI opposes first contract arbitration or mandatory arbitration in private sector strikes or lockouts. With respect, it would be hypocritical for Alberta to impose mandatory arbitration when the entire premise of our new essential services regime is based on the fundamental right to strike. New legislation removing this right would be contrary to the freedom of association. Parties should be free to negotiate and apply the tools of strike and lockout. The proposal to implement first contract arbitration is designed to help unions and impose a new collective agreement in a way that preempts employees who might seek to revoke their union's bargaining authority. Contract arbitration fundamentally alters the bargaining relationship. It should be applied only where there is good reason to do so. There is no evidence that any good reason exists to require first contract arbitration in Alberta.

AGI opposes automatic certifications in cases of unfair labour practices for the following reasons:

- It is unnecessary;

- It would have limited application. Cases when it might be employed are rare;

- This power is rarely used in places where the legislation allows for it;

- The Labour Board's current authority is sufficient to address unfair labour practices;

- It is contrary to the freedom of association and the right of employees to choose their bargaining agent.

AGI opposes any ban on replacement workers for the following reasons:

- It is fundamentally unfair to deprive employers of the ability to operate in a labour dispute and to deprive workers of the opportunity to work if they want;

- It is contrary to the freedom of association;

- It is contrary to the notion that strikes and lockouts are permissible economic warfare by which parties are entitled to exert pressure on the other to negotiate terms of a collective agreement. That "warfare" includes bilateral pressure. Employees can withhold services while at the same time receiving strike pay and taking up employment elsewhere. Employers can lock employees out and continue to operate with replacement workers, managers, and employees who cross the picket line.

If other issues are being considered under this area, AGI asks for notice of them.

"Whether to broaden the Alberta Labour Relations Board's mandate to enable adjudication of a wider range of workplace disputes."

AGI says the following in response to this item:

- AGI does not support any changes, largely because it is not aware of a need for such changes;

- It is unclear how the Labour Relations Board's authority would be expanded. The options are considerable and complex, particularly if giving the Board authority over other legislation such as WCB, OHS, privacy law, Employment Standards, and Human Rights. Specific consultation would be warranted for such substantial changes;

- Care would be required to ensure the skills, experience, and expertise of the Labour Relations Board are suitable for the expanded role. In doing so, it is important not to lose out on the benefit of the current Board's specialized expertise under the Code in favour of more general knowledge of employment legislation without particular expertise in any one area.

"Improving the Alberta Labour Relations Board's powers, procedures and remedial options with a view to more timely dispute resolution, flexibility in the use of mediation, and available remedies reflective of labour relations realities."

AGI's response to this issue depends on what changes are being proposed. AGI is not aware of any need for change, and the Labour Board currently has broad remedial authority, currently engages in active mediation through resolution conferences, and has adequate control over its procedure (e.g., case management; document production; scheduling; interim applications).

One remedy AGI opposes, as referenced above, is directing certification orders without a vote (whether in the case of an unfair labour practice or otherwise).

AGI also cautions against making any changes that would reduce the current flexibility demonstrated by the Labour Relations Board in dealing with parties. The Labour Board functions well on this front already.

"Improved powers and procedures in grievance arbitration, including the current judicial review processes and the option of initial Labour Board oversight."

AGI is not aware of any need for changes in this area and does not propose any changes. AGI prefers the current process of judicial review through the courts. AGI would not recommend adding an additional step before parties can get to court, and such a change would not be advantageous. The Labour Board's expertise is not in collective agreement interpretation. We see this change as adding an unnecessary step and cost to litigation.

"Improved mechanisms for ensuring the fair representation of employees in matters arising out of collective agreements."

Duty of Fair Representation ("DFR") complaints are not a big concern to employers, but they do consume public resources, often on matters of little merit. Though there is no great need for changes, AGI does not oppose streamlining the process for the Labour Relations Board to deal with DFR complaints.

What AGI does oppose are any changes that would override union collective agreement obligations in respect to filing grievances, such as time limits. Trying to address DFR complaints by allowing the Labour Relations Board to direct more employee complaints into grievances would simply add an unnecessary burden to employers, provide additional motivation for disgruntled employees to file DFR complaints, and create more litigation and consumption of resources. DFR complaints already consume unnecessary resources. We should be seeking to reduce this use of resources, not increase it.

"Examining areas of the Code where, due to the wording of legislation, or developed practice, Alberta's labour law processes depart, without benefit, from the Canadian mainstream."

AGI does not know what this means. We are not aware of any changes required as a result of this point. As discussed above, Alberta and Albertans have reaped great benefits from our overall approach to labour relations. We should not be trying to fix what isn't broken.

Conclusion

The Code is important legislation with wide-ranging impact upon employers. For this reason, caution should be exercised in considering changes to the Code and their potential impact upon the economy, investment, and employment. The view of AGI is that the present review is unduly rushed and lacks transparency. The outcome will be less public input and less informed input. AGI proposes to delay the current review and allow for input on specific issues and proposals.

AGI submits that the Code is in line with the mainstream and is fair, balanced, and effective. There is no evidence to show a strong need for changes. At the same time, making changes risks destabilizing industry, at a time when Albertans are already suffering. AGI recommends that changes not be made and particularly not in respect to such fundamental issues as card-based certification, first-contract arbitration, replacement workers, sectoral bargaining, and reverse onus.

We ask for a meeting with the consultant to discuss these issues further.

Respectfully submitted by the Alberta Growth Initiative Ltd.