Canadian Foundation *for* Labour Rights

Labour rights are human rights

SUBMISSION ON

Consultation Paper on the Renewal of Labour Legislation in Saskatchewan

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OVERVIEW

THE CONSULTATION PAPER on Labour Legislation in Saskatchewan arrives at a time when the Government's respect for the rights and freedoms of workers remains in question. Over three years ago, the Government of Saskatchewan enacted legislation that effectively stripped the right to strike from thousands of public sector employees. A companion bill raised obstacles to unionization for private sector employees. From across the province, workers and their unions stood up to oppose these statutes and protect their rights to associate, to organize, and to meaningfully advance collective goals with their employers. The Supreme Court of Canada has affirmed the importance of freedom of association and collective bargaining to Canadian society:

> *Recognizing that workers have the right to bargain collectively as part of their freedom to associate reaffirms the values of dignity, personal autonomy, equality and democracy that are inherent in the Charter.*[1]

On February 6, 2012, the Court of Queen's Bench upheld this challenge and ruled that the Government of Saskatchewan had violated

1 Health Services and Support – Facilities Subsector Bargaining Association v. British Columbia, 2007 SCC 27, at para. 86

the rights and freedoms of workers. The Court struck down the Public Service Essential Services Act as unconstitutional and confirmed that the Government's changes to the Trade Union Act would necessarily lead to lower unionization rates and could leave employees vulnerable to employer interference and intimidation.[2] The International Labour Organization (ILO) has similarly concluded that Saskatchewan breached international treaties protecting labour rights.[3] The Government has not only declined to accept the judgment of the Court and the views of the ILO, it has now initiated a wide ranging "comprehensive review" of all labour statutes in the province.

The Canadian Foundation for Labour Rights would like to express its concern about the Government's current approach to labour rights, and highlight the risk that sweeping legislative changes may have for labour relations stability in the province. Some of the statutory reforms being considered in the Consultation Paper would result in protracted organizing drives, heightened employer interference, and repetitive de-certification applications. Not only would this lead to labour relations uncertainty for employers and unions alike, it would

2 Saskatchewan v. Saskatchewan Federation of Labour, 2012 SKQB 62 at paras. 122, 222 and 254 [hereinafter "Saskatchewan Federal of Labour"]

3 ILO, 356th Report of the Committee on Freedom of Association, GB. 307/7 (March 2010), Case No. 2654 (Canada) at paras. 372-376

necessarily result in lower unionization rates for Saskatchewan workers. Some of the possible changes would also constitute further violations of workers' rights and freedoms, as protected by the Canadian Charter of Rights and Freedoms and international law.

The purpose of many of the statutory provisions under review is to protect union activities from improper interference and to enhance and promote unionization generally. Canadian labour relations law and policy has long recognized the positive effect of unionization on worker autonomy, fulfillment and economic equity. In Saskatchewan, workers are proud to contribute to the current economic boom that the province is enjoying. Unionization ensures that workers will share in Saskatchewan's economic growth. Wholesale changes to the province's labour relations regime which make it harder for workers to organize will only increase income inequality.

CHANGES UNDER CONSIDERATION

THE CONSULTATION PAPER raises a number of wide ranging possible changes to 15 statutes dealing with employment standards, labour relations and occupational health and safety. Given the CFLR's focus on the importance of freedom of association and labour rights, the comments below will be restricted to the Consultation Paper's section on labour relations statutes.

While these submissions will only address labour law provisions, the CFLR notes and emphasizes that employment standards and workplace safety laws are critical for maintaining the well being of workers and the stability and growth of the economy. There is also a strong relationship between freedom of association, unionization and statutory protections for employment standards and health and safety. Historically, it was the organization and advocacy of trade unions that were largely responsible for the establishment of such laws.

Scope under the Trade Union Act – Character of Employment

Every labour relations statute in Canada currently excludes managerial personnel from the definition of "employee". None of these statutes defines the terms "manager" or "mana-

gerial function", yet labour boards have developed jurisprudence to effectively distinguish between employees and those staff who regularly exercise true management functions, such as hiring and firing. Some jurisdictions have included language to ensure that the managerial exclusion is not too broad, saying that the excluded employee must "primarily" perform such functions.[4]

The interests of supervisors are not incompatible with collective bargaining rights, and in most cases supervisors can be included in the same bargaining unit as other employees. To ensure supervisors are not denied the right to collective bargaining, some jurisdictions in Canada expressly provide that supervisory employees can be in the same bargaining unit as other employees, or can be placed in a separate bargaining unit.[5]

The overriding purpose of these provisions is to minimize the number of employees who may be excluded from the statutory collective bargaining regime. This is important because exclusions are effectively an interference with the freedom of association. The current scope of the Trade Union Act, as it pertains to managerial

4 See, e.g., Manitoba Labour Relations Act, CCSM c L10, s. 1 definitions

5 See B.C. Labour Relations Code, RSBC 1996, c 244, s. 29; and Canada Labour Code, RSC 1985, c. L-2, s. 27(5).

or supervisory employees, is already consistent with labour laws across Canada.

Accountability

The Consultation Paper expresses concerns about the "accountability" of trade unions to its membership and the public. These questions suggest the authors of the Paper are unaware of how trade unions operate and function. Unions are inherently democratic organizations, holding conventions regularly to elect their leadership and vote on other important union business, such as constitutional amendments, dues increases, significant spending decisions, and so on. As the Supreme Court of Canada has observed, unions are "self governing and democratic institutions", and "the entire process of union representation carries the hallmark of democracy."[6] It is worth pointing out that very few other organizations in society are managed in accordance with democratic principles.

Consistent with the democratic nature of unions, all members should be entitled to see audited financial statements. While this is a requirement in most labour relations statutes in Canada, practically every union constitution already includes a provision making financial statements available to its membership. But there is no sound reason for making a union's

6 Lavigne v. Ontario Public Service Employees Union,[1991] 2 SCR 211 at 302 and 338

financial statements public. As with other organizations, unions and union members should be entitled to privately manage their own affairs, without disclosure to others, such as employers, who may want to use that information unfairly or to gain strategic advantage.

Union dues are important and necessary to support a union's activities. The Consultation Paper questions whether each union member should be able to stipulate how his or her dues' are spent, with the right to opt out of paying dues that are not used for "labour relations purposes". This ignores the fundamental democratic principle that group decisions are legitimately made by majority vote. All union members, through their elected workplace represntatives, have the right to vote on important budgetary issues as well as the right to elect those who will lead the union. Allowing any single individual to impose stipulations on how his or her dues may be spent undermines the collective goals of the union as a whole. The Supreme Court of Canada has observed that this would be like allowing a taxpayer to personally decide how his or her taxes will be spent.[7]

It has long been recognized that unions can and should engage with social and political issues that may influence or affect the overall work-

7 Lavigne, supra, at 260-261

place environment. Compelling union dues for all who are represented by a union, without opt-outs or restrictions on how dues may be spent, serves two important societal goals. First, it allows unions to support a wider range of causes and issues that influence the social, legal and political context of collective bargaining. Second, it promotes union democracy by encouraging all those who are represented by a union to participate in its decisions. As the Supreme Court of Canada explains,

> *[T]he number of causes (a union) will be able to support will be severely reduced if individual contributors are free to "opt out" in order to avoid funding causes they find distasteful. The ability of unions to favourably affect the political, social and economic environment in which collective bargaining and dispute resolution take place will be correspondingly reduced. Just as importantly, these developments will have serious consequences for the state objective of encouraging healthy democratic decision-making and debate within unions. Under an opting-out regime, the criterion under which expenditure decisions will be made may well become the acceptability of proposed expenditure to those likely to exercise the right to opt out, rather than a genuine attempt to identify and pursue what is in the best interests of those represented by the union.*[8]

8 Lavigne, supra, at 338

The CFLR calls on the Government of Saskatchewan to recognize that unions are democratic organizations, fully accountable to their membership. Unfair or discriminatory provisions that seek to impose burdens on unions that do not apply to other types of organizations, or which interfere with autonomous and democratic union governance, would be incompatible with the right to freedom of association.

Certification and De-certification of Unions

The Government of Saskatchewan has already recently amended the Trade Union Act to make it more difficult for unions to get certified. The Consultation Paper considers further changes to the certification regime that would open the door to a wide range of "union avoidance strategies" by employers, including the power to influence an employee's choice of union. Consistent with the freedom of association, labour relations statutes should be designed to promote unionization and workplace democracy. The CFLR is concerned that the measures being considered will have the opposite effect.

While most jurisdictions in Canada allow employers to voluntarily recognize unions, these statutes also address the risk that employers will prefer certain organizations that are prepared to offer a "sweetheart deal" to the employer.[9]

9 Adams, George. Canadian Labour Law (Canada Law Book: 2nd edition, looseleaf)

As a counter balance, jurisdictions will usually include a provision that allows employees to apply for a declaration that such a union is not representing the members' interests and an order nullifying the certification.

De-certification applications can be motivated by many different things. The main reason why de-certification applications are limited to certain "open" periods is to allow unions to focus their energies on representing members, not constantly fending off de-certification or raiding attempts. Repetitive de-certification applications can be expensive and disruptive, thereby interfering with a union's representative activities. There is also the obvious concern that some de-certification efforts may be secretly supported by the employer.

The overriding goal of certification and de-certification provisions is to ensure that employees can freely choose their representation without being undermined by "union avoidance strategies". If the Government of Saskatchewan was to change these provisions, it would be sending the wrong message to employers by suggesting it is "open season" on unions. Aside from undermining the values that unions are positive and enhance workplace democracy, these negative changes will also lead to an unstable labour relations environment.

Successorship Rights (Transferring Certification)

The Consultation Paper raises the possibility that there should be changes to the successorship or common employer provisions in the Trade Union Act. These kinds of provisions are designed to protect hard won union certifications and collective agreements. In some cases, employers will use different corporate vehicles or arrangements to escape their collective agreement obligations to employees. It is demeaning to employees to find that, after a sale of company, or transfer to a corporate subsidiary, they are suddenly expected to perform the same job but negotiate all over again for the wages, benefits and protections which they have already won over several collective agreements.

The Consultation Paper also questions the legitimacy of successorship provisions that protect lower wage government jobs performed by contractors. It must be pointed out that workers in the low wage service industry are particularly vulnerable, with lower dues and thus fewer resources to periodically conduct new certification drives and negotiate collective agreements. The Government of Saskatchewan should not undermine the rights of these lower income employees by inviting companies to compete for government contracts through cutting wages and benefits of existing employees.

Negotiations and Third Party Dispute Resolution

The Consultation Paper questions whether the Government of Saskatchewan should consider changes to the statutory provisions dealing with conciliation, mediation and arbitration. The utility of such services will generally depend on the local experiences of unions and employers. The Government of Saskatchewan should ensure it consults widely with unions and employers about their specific experiences before contemplating changes. The CFLR would, however, like to bring to the Government's attention that the ILO Committee on Freedom of Association has expressed the following basic principles respecting free collective bargaining and third party dispute resolution:

> *Legislation which provides for voluntary conciliation and arbitration in industrial disputes before a strike may be called cannot be regarded as an infringement of freedom of association, provided recourse to arbitration is not compulsory and does not, in practice, prevent the calling of the strike.*
>
> *[…]*
>
> *The Committee has emphasized that, although a strike may be temporarily restricted by law until all procedures available for negotiation, conciliation and arbitration have been exhausted, such a restriction should be accompanied by adequate, impartial and speedy conciliation and arbitration proceedings in which*

> *the parties concerned can take part at every stage.*
> […]
> *Employees deprived of the right to strike because they perform essential services must have appropriate guarantees to safeguard their interests; a corresponding denial of the right of lockout, provision of joint conciliation procedures and where, and only where, conciliation fails, the provision of joint arbitration machinery.*[10]

Duty of Fair representation

As democratic institutions, unions can and must be accountable to their members if they act unjustly or unfairly towards them. The duty of fair representation contained in section 25.1 of the Trade Union Act codifies this obligation, stating that every employee has the right to be represented in a manner that is not "arbitrary, discriminatory or in bad faith". The Consultation Paper asks whether s. 25.1 of the TUA is sufficient to ensure adequate representation.

It must be emphasized that the duty of fair representation enshrined in the TUA is practically the same as comparable provisions across Canada. Some provinces include negligence as another ground that would establish a violation

10 Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO, 5th (revised) edition (2006), at paras. 549, 551 and 600

of the duty of fair representation. However, the Saskatchewan Labour Relations Board has expressly adopted the jurisprudence from other jurisdictions and interprets s. 25.1 of the TUA in a broad and remedial manner to include negligence.[11] In short, the duty of fair representation in the TUA is every bit as strong as provisions in other Canadian jurisdictions.

Picketing

The Consultation Paper asks whether certain forms of picketing should be restricted by statute. At one time, Saskatchewan courts prohibited practically all "secondary picketing", i.e., picketing at locations other than the actual workplace. However, the Supreme Court of Canada found these restrictions violated the Charter, emphasizing that picketing in any form engages the right to freedom of expression, "one of the highest constitutional values".[12] The Supreme Court expanded on the importance of picketing and free expression to unions, workers, and society at large:

> *The core values which free expression promotes include self-fulfillment, participation in social and political decision making, and the communal exchange of ideas. Free speech protects*

11 See, e.g, Berry v. Saskatchewan Government Employees' Union, [1993] 4th Quarter Sask. Labour Rep. 65, LRB File No. 134-93, at 71-72; and MacNeill v. Retail, Wholesale, and Department Store Union, 2005 CanLII 63107 (SKLRB) at paras. 14-17.

12 R.W.D.S.U., Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd., [2002] 1 SCR 156 at para. 32

human dignity and the right to think and reflect freely on one's circumstances and condition. It allows a person to speak not only for the sake of expression itself, but also to advocate change, attempting to persuade others in the hope of improving one's life and perhaps the wider social, political, and economic environment.

Free expression is particularly critical in the labour context. As Cory J. observed for the Court in U.F.C.W., Local 1518 v. KMart Canada Ltd., [1999] 2 S.C.R. 1083, "[f]or employees, freedom of expression becomes not only an important but an essential component of labour relations" (para. 25). The values associated with free expression relate directly to one's work. A person's employment, and the conditions of their workplace, inform one's identity, emotional health, and sense of self-worth: Reference Re Public Service Employee Relations Act (Alta.), [1987] 1 S.C.R. 313; KMart, supra.

*Personal issues at stake in labour disputes often go beyond the obvious issues of work availability and wages. Working conditions, like the duration and location of work, parental leave, health benefits, severance and retirement schemes, may impact on the personal lives o*f workers even outside their working hours. *Expression on these issues contributes*

to self-understanding, as well as to the ability to influence one's working and non-working life. Moreover, the imbalance between the employer's economic power and the relative vulnerability of the individual worker informs virtually all aspects of the employment relationship: see Wallace v. United Grain Growers Ltd., [1997] 3 S.C.R. 701, at para. 92, per Iacobucci J. Free expression in the labour context thus plays a significant role in redressing or alleviating this imbalance. It is through free expression that employees are able to define and articulate their common interests and, in the event of a labour dispute, elicit the support of the general public in the furtherance of their cause: KMart, supra. As Cory J. noted in KMart, supra, at para. 46: "it is often the weight of public opinion which will determine the outcome of the dispute.

Free expression in the labour context benefits not only individual workers and unions, but also society as a whole. In Lavigne v. Ontario Public Service Employees Union, [1991] 2 S.C.R. 211, the reasons of both La Forest and Wilson JJ. acknowledged the importance of the role played by unions in societal debate. As part of the free flow of ideas which is an integral part of any democracy, the free flow of expression by unions and their members in a labour dispute brings the

debate on labour conditions into the public realm.[13]

Legislatures that seek to limit picketing must therefore respect and take into account the fundamental importance of freedom of expression to Canadian society. Any statutory restrictions would have to be justified as being consistent with the Charter and the principles of necessity and minimal impairment. The Government of Saskatchewan will have to seriously consider whether restrictions that go beyond the "wrongful actions" approach set out by the Supreme Court in Pepsi-Cola Canada are necessary and defensible.

Strikes and Lock-outs – Reinstatement Provisions

The freedom to strike is a necessary incident to collective bargaining. As found by the Saskatchewan Court of Queen's Bench, the right to strike is a fundamental freedom protected by international law and s. 2(d) of the Canadian Charter of Rights and Freedoms, along with the interdependent rights to organize and bargain collectively.[14] The Trade Union Act regulates strikes and lock-outs in many ways, and includes the guarantee of reinstatement to striking or locked-out employees after the work stoppage is over. The Consultation Paper asks

13 R.W.D.S.U., Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd., supra, at paras. 32-35

14 Saskatchewan Federation of Labour, supra, at para. 115

whether the right of reinstatement in s. 46 of the TUA is "appropriate".

The CFLR notes that the Consultation Paper is contemplating what is known as the "Mackay doctrine". In the United States, it has been accepted that employers who hire replacement workers or strike-breakers during a strike or lock-out may continue to employ those workers in preference to the striking employees after the dispute is over.[15] In the U.S., this means that unions that go on strike must attempt to negotiate a right of reinstatement as part of the resolution of the dispute. This is a strong tool for American employers to intimidate striking workers and break unions.

The ILO Committee on Freedom of Association has concluded that the "Mackay doctrine" violates international law by derogating from the freedom to strike:

> *The right to strike is one of the essential means through which workers and their organisations may promote and defend their economic and social interests. The Committee considers that this basic right is not really guaranteed when a worker who exercises it legally runs the risk of seeing his or her job taken up permanently by another worker, just as legally. The Com-*

15 While individuals who go on strike retain their status as employees under the U.S. National Labor Relations Act, they are not guaranteed the right of reinstatement in preference to replacement workers: NLRB v. Mackay Radio & Telegraph Co., 304 U.S. 333 (1938).

> *mittee considers that, if a strike is otherwise legal, the use of labour drawn from outside the undertaking to replace strikers for an indeterminate period entails a risk of derogation from the right to strike which may affect the free exercise of trade union rights.*[16]

In Canada, most jurisdictions have expressly protected the right of reinstatement following a strike in the same manner as s. 46 of the TUA. However, even before such a right was explicit in some statutes, it was held that refusing to reinstate striking employees undermined the good faith collective bargaining process and constituted an unfair labour practice.[17] Aside from the corrosive effect on the right to strike itself, eminent labour law scholar George Adams observes that "the refusal to re-employ long-standing striking employees in favour of 'scab' replacements has a punitive connotation", which, he notes, "carries with it the seeds of ugly picket-line violence and is amenable to the characterization of being 'inherently destructive.' "[18]

The CFLR submits that repealing the right of reinstatement following a strike would be a re-

16 ILO Committee on Freedom of Association, Complaint against the Government of the United States presented by the American Federation of Labor and Congress of Industrial Organization (AFL-CIO), Report No. 278, Case No. 1543 (1991) at para. 92

17 See, e.g., Eastern Provincial Airways Ltd v Canadian Air Line Pilots' Association (1983), 3 CLRNR (NS) 75 (CLRB)

18 Adams, supra, at para. 10.540

gressive step that violates international law, likely breaches the Charter, and seriously undermines the basic right to strike. It would be adopting U.S.-style labour policy which has contributed to extremely low unionization rates in that country. In the wake of the Court of Queen's Bench ruling in Saskatchewan Federation of Labour, it would also send a terrible message that the Government of Saskatchewan is determined to violate workers' rights.

Union Dues

In the United States, some jurisdictions have adopted laws that prohibit collective agreement provisions that require new employees to pay union dues. These kinds of statutes are called "right to work" laws by their proponents, and they legally entrench the problem of "free riders" – i.e., those who receive the benefit of collective bargaining through better wages and working conditions, but do not have to pay for it. In the best Orwellian tradition, "right to work" laws actually lead to drastically reduced levels of unionization. The Consultation Paper seems to suggest that Saskatchewan should consider these same kinds of "opt out" provisions for union dues.

In Canada, the compulsory payment of union dues – even by those employees who do not wish to participate in union activities - is a le-

gal principle known as the "Rand formula".[19] The Supreme Court of Canada has affirmed that the Rand formula serves three important functions. It:

- Prevents "free riders";
- Promotes collective activity and union solidarity, as those who pay dues are more likely to participate in union decision-making; and
- Ensures unions have sufficient financial resources to discharge the functions of bargaining and collective agreement administration.[20]

For more than 60 years, the Rand formula has prevailed in every jurisdiction in Canada. Saskatchewan would be the first province to adopt U.S.-style laws that allow employees to opt out of dues. The CFLR would suggest, again, that this would be a regressive step for Saskatchewan workers, necessarily leading to weaker unions, lower unionization rates, and ultimately less favourable terms and conditions of employment.

19 Supreme Court of Canada Justice Ivan Rand introduced this formula – an automatic dues check off for all employees who receive the benefit of union negotiation and representation – as part of an arbitration in 1946 to resolve a strike at the Ford Motor Company in Windsor, Ontario. Within a few years, practically every province adopted legislation protecting automatic dues check off provisions.

20 Lavigne, supra, at 227 and 282-283

CONCLUSION

MANY OF THE CHANGES suggested for consideration in the Consultation Paper are either directly antagonistic towards unions and workers' rights and freedoms, or otherwise reflect a lack of knowledge about the democratic character of unions as organizations. In some cases, the changes under consideration are in conflict with constitutional and international law. Following the Court's ruling in Saskatchewan Federation of Labour, the Government of Saskatchewan should consider building bridges with Saskatchewan workers, not weighing new measures that may also violate the Charter.

Saskatchewan has a long tradition of respecting and promoting labour rights and the fundamental rights and freedoms associated thereto. Some of the possible changes identified have no comparator in this country and appear to be drawn from the U.S. experience.

Adopting U.S.-style legislation that has already been found to violate international law, and would likely breach the Charter, would lead to labour relations instability and conflict at a time when the people of Saskatchewan should be working together to maintain the province's unprecedented prosperity and economic growth.

The CFLR submits that the Government of Saskatchewan should consider whether wholesale changes to its labour relations regime are appropriate at this time. At a minimum, Saskatchewan should avoid any legislation that could encroach upon constitutionally protected rights and freedoms.

The Canadian Foundation for Labour Rights (CFLR) is a national voice devoted to promoting labour rights as an important means to strengthening democracy, equality and economic justice here in Canada and internationally.

■ CFLR was established and is sponsored by the National Union of Public and General Employees (NUPGE).

■ For more information visit:
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