

Bill 80 reforms aren't panacea gov't envisions

BY JOHN D. WHYTE, SPECIAL TO THE STARPHOENIX APRIL 22, 2010

Following is the viewpoint of the writer, a professor of law at the University of Saskatchewan.

Bill 80 contains the government's proposals to amend Saskatchewan's collective bargaining regime for the construction industry.

Everywhere in Canada, labour relations in the construction sector follows the pattern of bargaining between comprehensive employer groups and unions that represent specific crafts or trades. There are good reasons for using this structure instead of the usual arrangement of having a single union represent all the employees at a specific firm or worksite.

First, system-wide bargaining means that the constant changes in workforce size and workers' place of work don't require constant reorganization of unions or repeated certification application. Second, a craft-based union system means that unions can -- and do -- take responsibility for training and developing a skilled workforce.

Third, craft unions have strong national networks that facilitate the migration of skilled workers to places such as Saskatchewan, where they are needed. Finally, under the system-wide model, labour relations in Saskatchewan's construction sector have been stable and disruption free. All strikes are costly to the economy, but stoppages in construction have especially serious ripple effects.

The government proposes the indirect dismantling of the current labour relations scheme through encouraging worksite, or firm-based, collective bargaining. And it is making it easy for employers, by recognizing new unions, to terminate existing union certifications.

The Labour minister justifies the new law, which will produce the inevitable instability of firm-by-firm collective bargaining, by saying it's in keeping with developments in constitutional law. In fact, the Supreme Court of Canada has recently articulated constitutional principles that should apply to labour relations. Far from justifying the plan in Bill 80 to undermine the established structure for the construction industry, the principles enunciated by the high court support the existing arrangement.

There are two aspects to constitutionally protected collective bargaining. The first prevents interference with the process of collective bargaining that affects "the capacity of the union members to come together to pursue goals in concert." The second relates to the degree of impact on the "collective right to good faith negotiation and consultation."

Bill 80 clearly harms the ability of construction workers to pursue their interests in concert; it unravels current agreements and arrangements, and subjects to the vacillations of construction employment the process of collective bargaining and the benefits gained from it.

In addition, the retroactive features of Bill 80 undermine good faith bargaining.

The Supreme Court also stated that the constitutional right to collective bargaining will be shaped by circumstances, so that different regulatory arrangements will be needed to meet the obligation.

Consequently, it cannot be claimed without reservation that Bill 80's changes are unconstitutional. What can be said, though, is that the harmful impact on workers' interests makes the bill suspect, and that its changes cannot be justified on the grounds that they are constitutionally mandated.

Furthermore, in two instances the proposed reforms give employers the ability to overturn labour arrangements that have been agreed upon and are in current operation. Thus, Bill 80 operates retroactively to remove established rights.

There is an absolute constitutional prohibition against retroactive criminal legislation, while retroactive changes to civil legal relations are also considered a legislative offence.

Citizens and groups invest in existing regulatory structures through their efforts, commitments and planning, and it is only in the most compelling of circumstances that retroactive legislation that reverses ground rules can be accepted.

For instance, the Supreme Court allowed British Columbia to change procedural rules that relate to the liability of cigarette manufacturers for health-care costs because, without this element of retroactivity, industry accountability could not be established for disease caused by smoking.

Such a pressing social purpose is not present in the case of construction labour relations. Even if Bill 80's purposes were legitimate, they could be achieved through the normal legitimate enactment of prospective legislation.

The provisions of Bill 80 allow individual employers to recognize any union (including employer-sympathetic unions). At that point, existing employer obligations under the present collective bargaining arrangement could be removed.

Second, employers can ask the Labour Relations Board to declare that currently certified unions have abandoned collective bargaining if, at any time in the past, they did not engage in worker representation for three years. Since this rule applies even to an employer who has had no relevant craft employees for three years (which has been common in Saskatchewan's construction industry) this can become a significant weapon for dismantling the existing and fair structure for construction industry labour relations.

If the government's priorities are stable relations between construction employers and their workers, concern for the rights and interests of employees, and to sustain constitutional integrity, it has badly missed the mark. It has chosen instead to be influenced by the mistaken idea that the freer the labour market, the better it is for workers and the economy.