

Alberta Labour History Institute (ALHI)

Presentation by G. Brent Gawne on Alberta Labour Laws
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The 1980's, as many of you know, saw a legislative lurch to the right in Alberta, driven by a combination of factors that conspired to sacrifice the rights of workers in Alberta in the misguided hope that these legislative changes would help kick start the economy and return us all to prosperity. You may remember the early 1980s and the National Energy Program resulted in a virtual standstill in the oil patch in Alberta. The vast wholesale migration of drilling companies out of the province, and the alarm that it caused in the business streets of Calgary was seen as necessitating a fundamental change.

I'm not an economist so I won't presume or pretend to understand the logic behind this legislation. What I aim to do over the course of the next few minutes is to take you back to the 1980s. Back in the times when, I did a little bit of checking, gas was 25 cents a liter. You could buy a nice car for \$7,500, a new house for under \$100,000. An income of \$15,000 was darn good. Eddy Van Halen and Phil Collins were competing for your entertainment dollars, and Ronald Reagan and the Iran contra was driving the American economy to the ground south of the border.

What I want to do is tell you about some of the more repressive legislative measures that the Alberta conservative government introduced in the 1980s, and some of the legal cases that were spawned or created as a result of this legislation. I want to do this so that you might understand how we came to be where we are now, and what we ought to change to get where we want to be in the future.

1968, - My analysis begins 12 years earlier, in 1968; an extremely important year in Alberta, because that was the first year that about 30,000 people gained the right to bargain collectively in the province. That was the year that collective bargaining in any sense came to the public sector, the Alberta provincial government public sector. It came about as a result of some flawed legislation where the parties could bargain to impasse, and then at impasse get whatever the employer unilaterally chose to give them. It produced a kind of pointless collective bargaining, as you might imagine. Any time you asked for something and the employer said no, the writing was on the wall as to what the result would be at the end of the day. It was in this sense of frustration that many AUPE members turned to the Conservative Opposition and asked the then-leader of the opposition, Peter Lougheed, what he would do if he were elected and formed the next government. In these informal talks, informal assurances were given; i.e., "I become the

next premier, public sector workers will get the right to bargain collectively and the right to strike.”

1972, Crown Agency Employee Relations Act - Well the rest is history. In 1971 Lougheed wins, forms the government, and 1972 we have enacted for the first time the Crown Agency Employee Relations Act, which gives unions the right to bargain collectively, but not the right to strike. Lougheed reneged on his informal promise, and what was produced in 1972 was this creature called interest arbitration, where if the parties bargained to impasse, they had to go in front of an interest arbitrator, and there were certain rules or criteria that the interest arbitrator had to take into account in deciding how to craft the new collective agreement for the union. Some of the criteria that the arbitrator had to take into account had absolutely nothing to do with any of the issues that were in dispute between the union and the employer; e.g., what was “in the best interest of the public.” One of the things that the arbitrator had to take into account was wage rates in the private sector and in the non-unionized sector. What on earth did that have to do with what would be fair or relevant for public sector unionized workers? The third problem with the legislation was if the parties couldn't agree on who would be the arbitrator for this interest arbitration, the employer got to pick. So you could guess what kind of result the early interest arbitration panels came up with in fashioning new collective agreements.

Why I say '68 was so important is because this was the beginning of the disillusionment that organized labour began to experience with the new Conservatives. First of all, they didn't deliver on their promises. Secondly, and most importantly, the route that they took instead of what they said they were going to do, was leading increasingly into a dispute resolution mechanism that was one sided. It put all the advantage and power on the employer's side of the table and none on the union's side of the table, however, it put a veneer of legality over it all, so that it insulated some of the more atrocious employer actions from review in the courts.

1977, Public Service Employee Relations Act - Needless to say, this didn't foster a sense of respect for the law, and we started to get some illegal strikes. In my experience with AUPE, and I've acted for them since 1981, there have been by my count seven illegal strikes by AUPE. Touch wood - no one has ever gone to jail, and until 2001 no union had ever paid a fine. I'll tell you about what happened in 2001 a little bit later on, but we're concentrating now on the '80s. In 1977, roughly 6 years after Lougheed's first election, he introduced some new legislation called the Public Service Employee Relations Act. Instead of honoring his promise to allow free collective bargaining for public sector workers, he took these 30,000 people in the general service and he put a blanket prohibition against striking that he had taken from his 1972 Act, the Crown Agencies Employer Relations Act, and applied it to the entire public service. So that meant that if you were a greens keeper on the lawn of the legislature or if you were changing light bulbs in the Department of Highways locker room, you were an essential civil servant and didn't have the right to strike.

1979, ILO Appeal In 1979, AUPE retained well respected constitutional expert, Tim Christian, who was a lawyer, to challenge the Bill 41, the Public Service Employee Relations Act, arguing that it violated international law. Canada had entered into a treaty in 1919 to end the first world war, the Treaty of Versailles, which established the International Labour Organization in Geneva, which in turn established a protocol, Convention 87 concerning Freedom of Association and protecting the right to organize. It was adopted by the United Nations and ratified by Canada in 1966. AUPE's argument was this international treaty protecting the right to organize and the right to free collective bargaining implicitly protected the right to strike, and no provincial act of

the legislature could violate an international treaty. Therefore, Bill 41 was *ultra vires*, beyond the jurisdiction of the province to legislate. Very good argument, well written, well researched. Unfortunately you have to go to court in Alberta. That means you have to try this case in front of an Alberta judge, no less than the Chief Justice at the time. Chief Justice Bill Sinclair, who was famous for his bright red face and his Elmer Fudd laugh, heard the case himself and decided, not surprisingly, that it would not be sustained; that the legislation was compliant with Canada's international obligations, because in substance, according to his analysis, the ILO really didn't mean that the right to strike was protected by this protection. All that it protected was the right to bargain collectively, and of course AUPE had the right to bargain collectively, it just didn't have the right to bargain effectively.

So the union then appealed to the Alberta Court of Appeal, and in 1981 the Court of Appeal dismissed AUPE's appeal. In December '81 the Supreme Court refused to grant leave to hear the matter further, so the matter died in the Alberta Court of Appeal. The Alberta Court of Appeal though came out with some pretty interesting and hard line comments. There was a judge in the Alberta Court of Appeal who became my nemesis for 10 years. His name was Roger Belzil. Justice Belzil had a particularly hard line view on unions. Curiously enough, any time I went to the Court of Appeal on an AUPE matter I happened to get Justice Belzil. It was the beginning of kind of a connect the dots learning process for me that suggested that you had to overcome certain hurdles when you are litigating labour matters in Alberta. The first hurdle is get the hell out of Alberta. If you don't get to the Supreme Court of Canada, you are not going to have a happy day litigating here. But what started to happen then is we see this theme of very narrow scope of collective bargaining with a thin veneer of legality over top of it just to make sure we can say we're not a third world banana republic, without really giving labour any teeth to affectively use these rules to bargain on anything close to common ground with the employer. In the hope that in suppressing labour, we will enable management to go about its business and promote business, bringing new money into the province, bringing in prosperity, and we'll all live happily ever after.

1981 The Labour Relations Amendment Act Again, I'm no economist, so I can't tell you how that system is supposed to work. All I know is it created a lot of misery for over 10 years within this province because of some extremely misguided notions that the more repressive our labour legislation was, the better it would be for our people. So, the government started to realize, if we repress free collective bargaining, we can tinker around with it a little bit more to repress creative unionism. So what happened next in 1981 was the Labour Relations Amendment Act, amending section 39 subsection 2 to provide a trade union shall not be certified as a bargaining agent if in the opinion of the board picketing resulted in membership in a trade union. Wow, that's pretty far reaching. If picketing results in membership in the trade union, that's an excuse not to certify the trade union for collective bargaining. So what message does that send to the union? Well if you want to grow, don't picket. If you picket too much, you're not going to grow.

1982, the Health Services Continuation Act What happened next then in 1982 was the Health Services Continuation Act. Because a lot of professionals within the public service were getting extremely angry with the consequence of this new bargaining regime, which was essentially repressing wage rates. Nurses, in particular, didn't take kindly to this legislation. So in 1982 the Health Services Continuation Act came into force. It applied only to nurses and it applied only until December 31st, 1983. It made strikes illegal and it created an arbitration tribunal to settle by interest arbitration their next collective agreement, embracing the same language that we saw in

the Crown Agencies Employer Relations Act and the Public Service Employer Relations Act, which requires interest arbitrators to take into account a bunch of criteria that had nothing to do with their dispute but everything to do with making sure that those interest awards stayed low.

1982, Canadian Charter of Rights and Freedoms Also in 1982, the rest of Canada still managing to function despite Alberta's efforts to correct its economy by suppressing its workforce, we see the federal government introduce the Charter of Rights and Freedoms. It came into force April 17th, 1982. Once again there was some hope that by entrenching freedom of association into the constitution, this would somehow protect workers' rights to organize, bargain collectively and, if necessary, strike to protect the welfare of their membership. In 1982 some research was done for this purpose, and I was part of a group of lawyers who researched whether it would be viable to bring an action against the province of Alberta for breaching the charter by prohibiting free collective bargaining under these various provisions against nurses, against police officers, against crown agency workers, and against government employees.

1983, The Labour Statutes Amendment Act Before we could render an opinion, however, the Labour Statutes Amendment Act was introduced as Bill 44 in 1983. Many of you may remember Bill 44, because it was even more draconian than all the previous provisions put together. It established mandatory interest arbitration for all hospital workers, including people who trimmed the grass in front of the hospital, who operated the parkade in the hospital, and who changed the light bulbs in the laundry rooms in the hospital. It was blanket legislation. There was absolutely no escape from this no-strike provision. It provided legislation like what was in PSERA which arbitration boards had to consider, criteria that arbitration boards had to consider in granting awards. Shortly on the heels of this legislation in 1984 there was an amendment to the Employment Standards Code, or the Employment Standards Act, as it was in those days. It used to be the Act allowed for an appeal. If you felt you had been dismissed and not paid proper severance pay, you could go to the Employment Standards and file a complaint. If you didn't like what the officer directed, you could appeal that to the court.

1984, Individual Rights Protection Amendment Act In 1984 it was determined that there were way too many of these appeals going on. They're frivolous, they're vexatious - so in order to curb these frivolous and vexatious appeals, you would now have to post a \$300 bond if you wanted to appeal a refusal of an Employment Standards Code officer's decision on your entitlements under the minimal employment standards protection legislation. This was viewed later by Ian Reid in his 1988 survey of labour as a good thing. We didn't need frivolous appeals clogging up the courts. In 1985 we also saw the advent of amendments to individual rights law. The Individual Rights Protection Amendment Act introduced the notion of reasonable and justifiable as a defense to discrimination charges by employees against their employer. So if the employer could say, yes I discriminated against you, but it was reasonable and justifiable, it suddenly wasn't discrimination anymore - it was OK. If you could argue that my restaurant won't function with an old waitress, it would be considered reasonable and justifiable that I discriminate on the basis of age - it's OK. We started to see bizarre awards coming out of individual or human rights tribunals, justifying these kinds of practices in the face of obvious discrimination and Alberta's Individual Rights Protection Act became a laughingstock in the country, in fact, of the continent.

1985, The Industrial Wage Securities Act 1985 also saw changes to the Industrial Wage Securities Act, with an amendment removing the requirement for employers in the coal industry to post security for wages. Some of you may remember back in the '20s, '30s and '40s, the coal

industry in Alberta was notorious for not paying its employees. Coal companies would be working on such flimsy margins that they would be weeks, months, and in some cases a year behind in pay - then they would just go under. So the employees would be left with nothing. In order to protect employees in the '50s, legislation was introduced to require coal companies to post security bonds to make sure there was sufficient money to pay for their employees. By 1985 this was determined against the better interests of industry, and against the better interests of business and commerce. So you saw this kind of worker protection legislation withdrawn.

1988, Alberta Labour Relations Code & Employment Standards Code In 1988 with Ian Reid and his traveling road show finished going throughout the world to determine what would be the best labour relations code for Alberta, he introduced wholesale changes to the labour code, embracing many of these changes that we talked about within the Public Service Employer Relations Act dating back to 1972 for hospital workers and police officers, as well as all the public sector workers. However, we also saw provisions in 1988 that continued to go over the top. The Labour Code for example, for the first time section 17 prohibited automatic certification without a vote. So if an unfair labour practice occurred during a certification drive - Mariposa is a good example - the Board no longer had the power to certify without a vote. The best the Board could do would be to order a vote in the poisoned environment and chilled atmosphere of unfair labour practices by employers that simply defied remedy. Ever since then, we had a pattern of employers who don't want certification, who are able to avoid it by committing unfair labour practices and paying whatever fine or penalty might be imposed on them by the Labour Board as the cost of doing business, because it's cheaper than having to put up with a union. That's why I would be very surprised if you ever saw a Walmart certification application in this province. They know that the worst that can happen is they will be able to commit unfair labour practices with virtual impunity, push the matter to a vote after the bargaining unit has been so terrorized or chilled by what they have seen, and then win the vote.

Alberta Reference Unions have tried to fight back. In 1982 with the advent of the Charter of Rights, AUPE, UNA and the police officers association decided that they would mount a constitutional challenge that Bill 44 was unconstitutional, that it defied the constitutionally protected freedom of association, and was therefore inoperative. The matter was set down again to be heard before Justice D.C. McDonald, who was a bit of a maverick in Alberta. He called shots as he saw them, but he was viewed as being fair and ultimately a friend of labour, in his day, as far to the left as you could be and still be a judge in Alberta. It so appalled certain segments of the community to find that Justice McDonald had been appointed to hear this case, that the government intervened. It used its powers under the Judicature Act to convene a reference. That is a court challenge that goes straight to the Court of Appeal, instead of going through the Court of Queens Bench and then to the Court of Appeal. This had two very attractive features to it. First of all, it put it in the Court of Appeal where my friend Justice Roger Belzil lived, and got rid of Justice McDonald. It also put it in a forum where the government got to speak first. They decided the question, they crafted the question. Then the Court of Appeal had to decide the question. We get to argue last. In fact it's worse than last, we get sandwiched in the middle, because then the government gets last word. So they speak first and last, and we're kind of a sideshow in the middle. And they stacked the Court of Appeal with a 5-judge panel. Ordinarily there are 3 judges, but this time there was 5 to make sure the matter would be decided wisely, 5 judges being smarter than 3.

What happened was the judges had very little difficulty. It was a 4 to 1 split; 4 said the legislation didn't violate the Charter, and the 5th said it really, really didn't violate the Charter. That was Justice Belzil, he was the good guy. They concluded that section 2-d does not protect all actions by all groups to carry out all group purposes. In fact it's an interesting way that they put it. This is Justice Belzil: The strike and lockout in collective bargaining are intended to extract concessions by causing economic harm. The charter establishes the constitutional right of the subject, vis-à-vis public authority; it does not guarantee one citizen an inviolable right to harm another. That's how he saw the Charter. You don't get the right to hurt each other, what's going on here, this can't be right. The majority said it is not being suggested, let alone proved, that the legislative scheme intends to or does destroy or render impotent the trade union movement among public service employees in the province. Assuming that the freedom of association must be interpreted so as to protect the vitality of the trade union movement, it has not been shown that the vitality is at risk under this legislation. Which is really surprising, because in that period of years, in that span of time, the negotiated wage increases for the public sector lagged behind the private sector by 15 to 25%. The same year the MLAs voted themselves a 47% increase, the interest arbitrator assigned to settle their employees' contracts, held them to a 2% increase. However, there was no evidence that this legislation did anything to disadvantage the vitality of the trade union movement. I guess it depends on where you look and from what vantage point you look to determine that question.

That was stage one of the Charter reference in Alberta. Now we had to appeal to the Supreme Court of Canada. The Supreme Court of Canada decision was a split decision again. It was part of what's now called the labour trilogy of cases. There were 3 cases decided at the same time, all dealing with the constitutionality of the right to strike. The majority in this case was headed by a judge by the name of Justice McIntyre. As only really smart people can do, he twists the notion of freedom of association around in a pretty remarkable way. Freedom of association, he said, belonged to the individual and not to the group. Get your head around that just for a minute. You have the right to be yourself with as many people around you as you want - but that's all you have, is the right to be yourself. Chief Justice Dixon and Justice Bertha Wilson, I must confess, they're the 2 judges of the Supreme Court that I admire the most - they dissented, and put forward a different view. They said freedom of association is the freedom to combine together for the pursuit of common purposes or the advancement of common causes. The content of a Charter of Rights is not to be determined solely on the basis of pre-existing rights or freedoms of the individual.

Remarkable words, because this was said back in 1987. It took 13 years before that case would come back before the Supreme Court of Canada in a case called *Dunmore*. *Dunmore*, you may remember, was the chicken farmer in Ontario. Agricultural workers and farm workers under the Ontario legislation denied the right to bargain collectively, excluded from the operation of the Ontario Labour Relations Code, much like farm workers are in Alberta. But things take a little bit longer here, so we're still waiting for the *Dunmore* application to come out west. Let me back up 6 months. There was a very famous Quebec case 6 months earlier called *Advance Coring and Cutting*. In that case, the Quebec construction legislation required all construction workers to be a member of bona fide trade unions. You had to join a union in order to work construction in Quebec. Pretty remarkable legislation; it's hard to believe that that's the product of a separatist government. But they come out with this remarkable legislation that required one to join a union to work in construction. Some employers got some workers to challenge this legislation, arguing that freedom of association means the freedom not to associate, the freedom to be free of an

association, and arguing Justice McIntyre's theory that associational rights are rights of the individual, not of the group.

In a split decision, the Supreme Court refused to decide who was right, McIntyre or Dixon, and they came up with a goofy "it only matters in Quebec" kind of decision. Six months later the problem arose again in Dunmore, and since this time, it's an Ontario case, the Supreme Court can't dodge it any more. They have to choose who's right, McIntyre or Dixon. Gratifyingly, Dixon is finally vindicated, as the Supreme Court in Dunmore came down on all sides supporting Dixon's broader notion of the right of freedom of association. What he says - this time it's Justice Bastarash for the majority - is he took a more purposive approach to the analysis of section 2-d. He says it commands a single inquiry: has the state precluded activity because of its associational nature, thereby discouraging the collective pursuit of common goals? That's the only question you have to ask. If the answer to that question is yes, the legislation fails to comply, or it breaches the freedom of association. So Dixon is ultimately vindicated. Bastarash says: A purposive approach to section 2-d demands that we distinguish between the associational aspect of the activity and the activity itself. You have to think about that for a minute. The associational aspect means your right to involve yourself in trade union activities, as opposed to the activity itself, which might be a union representing you with your employer. Such an approach begins with the existing framework established in the Alberta reference case, which enables a claimant to show that a group activity is permitted for individuals in order to establish that its regulation targets the association per se. In other words, if the legislation prevents you as individuals from doing something, then it's bad. But if it affects you as a group from doing something, it's not bad. Where the burden cannot be met, however, it may still be open for a claimant to show by direct evidence or by inference that that legislature has targeted associational conduct because of its concerted or associational nature.

I'll explain how that works in just a second. State action limits legitimate associational activities purely on the basis of their associational nature will be contrary to section 2-d. Even if those activities cannot be understood as lawful activities of individuals. Put this all in perspective. Let's fast forward to 2000. In 2000 we had another illegal strike. The hospital workers, auxiliary nurses in AUPE throughout the province went out on an illegal strike, desperately trying to capture at least some measure of the gains made by the registered nurses in the UNA collective agreement. The gains by the judges in the judges case, the increases to the MLAs that the MLAs gave themselves, and the increases that the teachers were able to get. But they couldn't get it in bargaining, so they went out on an illegal strike. The government decided to employ a provision that first found its way into Alberta in 1972, that allowed employers to seek to suspend the deduction remission of union dues for 6 months in the face of an illegal strike. The way they suspended is they just stopped the dues checkoff provision, and then the union has to go around cap in hand and try to get dues from its members or from some other means. This measure was calculated to drive a wedge between the union and its members.

However, collective bargaining is meant ultimately to operate as an economic weapon to balance the playing field, because it is a balancing of competing interests, when you bargain collectively. If the playing field isn't even, one side will win way too often, ultimately at the expense of society at large. We're now starting to realize through 20 years of litigation that that is the case, and we're on the verge of a big change. It just coincides that we're probably looking at a couple of elections this year. The message is out there. I look at my track record in the last 20 years and I'm appalled at how many cases I've lost. Then I think, well wait a second, this is Alberta; you

have to put things in perspective here. Where we're starting to win is in the areas that really matter, in the areas that recognize the legitimacy of collective bargaining. I think even in Alberta we're starting to see a turn. You won't get the 'right-to-work' legislation that we're seeing in the United States. We are getting visiting professors from University of Harvard who are lecturing in the University of Calgary, that hotbed of liberalism, saying, you guys are wrong-headed in going on a repressive labour regime. Your legislation in Alberta is still more liberal than the most liberal state in the United States, New York. There are more unionized employees on a per capita basis in Alberta than there are in the most liberal jurisdiction in the United States. What you have here is a measure of labour peace and prosperity that we can't begin to dream of in New York state or New Jersey. These Harvard professors are speaking to the right wing now saying, "You've gone too far. You have to recognize the good thing that you've got in this kind of labour environment where you still at least some modicum of respect for the law by your people. You don't have wholesale black or gray economies that they have in the States. You don't have wholesale corruption that you have in the States. You don't have the kind of disregard for the law that you have in the States. You don't want to lose that, because once it's gone you're not getting it back."

But anyway, that's the tip of the iceberg of what happened in the '80s.