Bill Johnson

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BJ: Thank you, Susan. By way of background, I'm a Saskatchewan stubble jumper from a small town in Saskatchewan. Went to Saskatoon for my first university and then to Toronto to Osgoode Hall to obtain my law degree, always intending to come back west. I started at one of the big downtown Calgary firms and my personality didn't fit in with a big corporate commercial firm. I moved over to work with Barron McBain, which was the leading labour law firm in the province at the time, with Ross McBain. Some of the history there is Barron came out of Chicago in the late 40s, 50s, and told Ross that labor was the future. Ross decided to pursue labour law, and that was the growth of Ross McBain as being a leading labour lawyer and then chairman of the Board and then a member of the Court of Queens Bench. Obviously he became a mentor of myself. I worked in the Edmonton office that Barron McBain had for a couple of years, then I returned to Calgary and became more involved in labour. I didn't start out planning to be a labour lawyer but more having joined the firm of Barron McBain and having been exposed to it, I had the choice of following different areas of law. Certainly I pursued labour once I got exposed to it. I certainly enjoyed the speed of the files and the social and political debate that's always involved in labour law. That has kept me going and still continues to keep me going. It's a lot of fun and good challenges. So that started. I would say I got out front carrying files in 1981 when Ross McBain left to become chairman of the Labour Relations Board and I more or less filled in a chunk of the void with his departure. From my perspective, some of the first big issues that I got exposed to were the construction industry labour disputes that were going on in the early '80s, primarily motivated by the hot economy in the late '70s that fell in the early '80s. Some people blame the National Energy Program; I think it's more complex than that. What happened was there was about a 22 to 24% wage increase over a two year agreement because of inflation. Almost immediately thereafter we went into a negative economy and there was difficulty trying to adjust. That led to the creation of the 24-hour lockout and a lot of labour disputes as to whether employers could do a 24-hour lockout or not. That took

three or four years of litigation to sort out. It resulted in a legal situation now where a lockout isn't what we thought it was at that time, of refusing to allow the employees into the plant, but just refusing to employ at the old terms and the ability for the employer to require the employees to attend work under the new proposed terms of the employer, leaving the union no choice but to strike in that type of situation. That was all litigation that would've gone from '82 to '85 or '86 and also had a big impact on the change in the construction industry. In the early '80s about 80% of and 80 to 90% of industrial construction was unionized. That has diminished dramatically to here in 2009, commercial in southern Alberta is minimal, maybe 15% and in northern Alberta industrial at a very crude estimate, I'm going to say 30 or 40% is unionized. So there's been a big change in the construction industry bargaining and collective agreement recognition. So then if we progress from there, I wasn't heavily involved but the 1986 Gainers strike was a very significant impact on the politics in unions in the province. It was a major confrontation; it was a long-lasting strike. I think that, combined with the difficulties in the construction industry, led to a revisiting of our Labour Relations Code and a reexamination, and caused the government in '87 to do a major review of the labour code and to attempt to do some updates and address it. The Gainers strike had been with UFCW representing the workers. They had brought in some people from Toronto and that had created some opposition when they brought those people in to assist them. It just politicized the labour at that current time. The revisiting of the labour code in 1987 involved what we in the game have called the “rainbow committee,” that did traveling around to various locations in Europe and the States to look at their legislation, then invitation for stakeholders in Alberta to come and speak to the committees. Then I remember the University of Calgary put on a conference that was actually quite helpful in the whole process, because it put some balance into it and we brought in some outside speakers to speak to it. It resulted in a new labour code that came in in 1988. That 1988 labour code did a couple of things. The old labour act was quite old and needed some updating. It segregated the employment standards from the labour code where they'd all be under one statute, and correctly divided it. The unions wanted to retain what was called automatic certification, and they were unsuccessful. The government legislated that out at that time. Also the 1988 amendments introduced the vote for certification

process, whereas prior to that if you had a majority of the employees signed up to membership cards you were certified. It changed, so we now go to if you have 40% you go to a vote. The interval between filing the application and the vote is a very tense time and the support of the employees can be undermined. It's made certification a lot more difficult in the current time. The construction industry got another issue, a more difficult issue – double breasting had started up by companies trying to keep unions away in the '80s. In the 1988 amendment a special subsection was put in the common employer section to make it more difficult for unions to challenge double breasting. Those were some of the changes that occurred in that timeframe.

Q: What are the forced votes, and what's double breasting?

BJ: Prior to 1988, the Labour Relations Board, as a remedy of an unfair labor practice, could order certification if the conduct had destroyed the support for the union and had caused the board to conclude that but for that misconduct the union would've achieved the necessary support. After 1988 that was taken away from the board. The best remedy you can get is a second vote, which is quite a challenge because if the employee support has been undermined by the unfair, a second vote is going to be a challenge to overcome that. So that was a change that's more difficult to overcome. The double breasting is when--it happens a lot in construction but not only in construction--is a unionized company sets up a collateral parallel company to do business of that company which is non-unionized and therefore they're free from the union. There's a section in the Labour Relations Code that we call the common employer section, to challenge that and eliminate it and to get the second company under the collective agreement. There's a significant qualifier added for the construction industry in the labour code that makes it very difficult to achieve a common employer declaration. That came about in 1988 in the amendments. There were some improvements in the code. Certainly from an administrative point of view, the code is more structured and works better. The board did add one unfair labour practice complaint process that I think has been significant, and it was an omission under our code, because most all other provinces had it. That is the prohibition against interference with representation of employees by a union, which was

introduced in 1988 in our code that wasn't there before. That's a very significant section for advocating for unions, so it wasn't all negative in 1988. Rolling off into the '90s, the construction industry was slow through the '80s and started to pick up part way through the '90s, but it would be the last half of the '90s that it got going. The healthcare industry in the '90s took some significant events. One is the move to regionalization, which caused a rejigging of the unions and who represented them, and reduced the unions. We first went to 17 regions and then in 2003 we went to nine health regions, and now in 2009 we're going to one health region, and I'll come back and revisit that. But in 1995 when we were also addressing the labour relations, the civil service type employees, including the healthcare, took some significant hits. The economy in the late '80s to '90s had been difficult. Relative wise, the province had some significant deficits starting in '94 roughly. The government took some very aggressive action to address that issue and did what we call the 5% rollback. It was across the board and almost all budgets were publicly funded – province of Alberta employees, municipal employees if I recall right, healthcare employees definitely. All of that commenced with this 5% rollback. That led to various issues. It depended how the employers dealt with it. Some employers laid employees off, some employers reorganized and downloaded the work onto lower classified positions, some employers went for a pure 5% rollback, some employers went to eliminating days of work and reducing the work time. Certainly that then led to various litigation responses as to whether some of that conduct might have been an illegal lockout by refusing to employ certain terms. Sometimes it occurred in the midst of bargaining, so there's bargaining in bad faith. Sometimes it occurred during a bargaining freeze and was seen as a wrongful change. There was significant litigation generated from it. This was also the straw that broke the camel's back that led to the laundry workers' strike. As I recall it, there was a very distinct contemplation of contracting out that work in Calgary and I believe elsewhere in the province. The prospective contract had been determined. The healthcare workers had also given up a significant rollback prior to this in the hopes of maintaining their employment in the hospitals. Then the 5% rollback hit and in essence the workers felt they didn't have much to lose, so they went out. It was a spreading dispute that was growing. It was employee driven and that's what gives unions a lot of their strength. When these people were doing this it had the potential to really grow,

because there was an extreme amount of frustration. My involvement was not substantial in that I had one very intense hearing at the Labour Relations Board where, on my return from Lethbridge, I was contacted as I was driving back to be at the Labour Board for a cease and desist for an illegal strike. I suspect that occurred in the second day of this dispute, if I recall right. That is when we had a fairly long and tense hearing at the Board that resulted in the Board issuing a cease and desist to the people who were out. It continued, the dispute, despite that cease and desist, and it actually grew. It started at the Calgary General and then went to the Foothills as I recall right. Then there was political intervention at the very top to try to get the parties together to resolve it and to avoid its growth, because it had a real political tension of growing and expanding. They did negotiate a resolution. The exact terms of the resolution I can't recall, but there was some preservation and security concepts given for the laundry workers so that they weren't quite as threatened with their continued employment. So that was 1995 roughly. The reorganization in the healthcare industry of going from no health regions but individual hospitals and hospital districts to 17 regions and then to nine regions in 2003 and now to one region has changed the healthcare industry. It forced four big bargaining units and one union for each of those bargaining units. I should be careful; that's a significant dispute at the time I'm talking of this. But that's the concept that's pursuing. While that has eliminated some bargaining units and eliminated some unions, by making four big units or something similar to that, depending what the current litigation results in, the province has created four big strong units. They're going to be coordinated and they're going to be very forceful. It's going to cause the bargaining to be basically directly with the government. Whereas before you used to bargain with the hospital or the region, that would be the phantom, but you're always looking for the third player in the room, the one sitting in the empty chair over there, which was the government. Now it's more focused – it is the government; it can't help but be that. You're going to confront the issues more directly and the bargaining agents are going to have a lot more employees behind them. It's going to be bigger issues, broader scope, and more impact. The reorganization had nothing to do with a direct aim at the unions. The reorganization was the ongoing difficulty of dealing with healthcare. It was perceived that health regions were a method of trying to get healthcare under control. It was conceived that we should have fewer

health regions, and now we have one health region, for better or for worse. That's where we have ended up. But there's been a significant and substantial collateral impact on the unions involved. The political atmosphere has changed between when I first started out and the current timeframe. I had the benefit of doing some historical research just out of personal interest. In the late '40s when the Labour Relations Code was first established, and into the '50s and '60s at least, the minister of labour would consult annually with the head of the Alberta Federation of Labour. There was a lot more consultation and dialogue. That communication doesn't appear to be there at the current time. The parties don't talk to each other and they don't consult as well, other than they talk to each other through the media it seems at the current time as opposed to sitting down and really discussing problems. In the last 10 or so years there's also been an evolution that I think has caused labour law to become more sensitive to political pressures. It wasn't designed deliberately to do it but the result has been that. One is, and it's not unique to Alberta, was there used to be departments of labour, one cabinet position in the Cabinet. You had a focused effort on labour. That department frequently was not a big department within the government and it wasn't a priority cabinet position, but it was there in the Cabinet with a focus on labour. I think every government went to the same conference and seminar, because they all changed their name to Human Resources and Development or Human Resources and Economics, some similar name. The departments have expanded to other responsibilities. Social services are within the department, and various factors. That has caused labour to become diminished within that department and diminished within the focus of the decision-making people in the government. Labour doesn't get the attention that it used to get and I think it leads to a lack of understanding sometimes by the decision makers. In addition, starting again in 1995 roughly, when the rollbacks and the 5% rollbacks were going on, there was a decrease, a deliberate diminishing of the staff in the department of labour, and contracting out of services. The government released a significant number of people in the mediation-conciliation department and they now contract that work out. What they lost was within their government structure labour relations intelligence and history and infrastructure, so that the decision makers again had the benefit of these people and had the benefit of being in communication with the stakeholders on a day-to-day basis. So again you've had the lack of focus and then the

lack of advice and structure. That has caused labour to be subject to outside political pressures a lot more and it's lost its centre keel, if I can call it that. There was then, roughly around 1999, the government of Alberta chose to terminate in mid-term the then chair of the Labour Relations Board. The unfortunate thing about that was that it traumatized the Board significantly and raised concerns about political interference in the process, and also just created an ongoing concern that it could occur again. It's undermined the confidence and the faith in the Labour Relations Board, rightfully or wrongfully, and has made it more difficult for the current Board to inspire confidence in the community because of that event. That's 10 years ago and it still lingers out there, and that's an unfortunate thing. Sitting here today in 2009, from my perspective, one of the big pushing issues is the 2007 decision from the Supreme Court of Canada and Health Services. That decision reversed what we call the trilology of three Supreme Court of Canada decisions that held that collective bargaining was not a Charter right under freedom of association, and in those cases dated back from 1987 roughly. Health Services in 2007 said the Charter right of freedom of associations includes collective bargaining and therefore prohibits substantial interference with collective bargaining rights. That has given unions a new tool that they are using to challenge legislation and changes that occur and I think is causing some caution on steps that governments will take, because it is a restriction or a limitation on what governments can do, and they have to be cognizant of it and have to be more careful on how they progress. The concern I have though with the Health Services decision and the charter is that too frequently unions are wanting to resort to that to respond to an issue instead of trying to respond to the issue through working with the employer and employees and coming to the solution in that fashion, and hoping that they can achieve their rights through litigation, which I'm not so sure we lawyers can always deliver. That's the difficulty that I have on that point. But the Charter has certainly changed the game. The other area is what we call the Pepsi Cola case. That talks about freedom of expression as a Charter right, and picketing. It opens up greater picketing opportunities when there is a strike, and would eliminate some of the restrictions that are put on picketing by various labor statutes. So the Charter of Rights has had an impact and it's been helpful to unions, there's no doubt about that. I think I've run out of gas here.

Certainly there has been three leading Supreme Court of Canada decisions so far. There is the Pepsi Cola case, that through freedom of expression challenges picketing restrictions and statutes, and I think it challenges the picketing under our Labour Relations Code, which limits it to place of employment. Two is the Health Services decision on collective bargaining being under freedom of association. That challenges various sections in the code. Maybe it's more prospective on a go-forward basis, such as currently in 2009 with the reorganization of healthcare. There's going to be a Charter challenge as to whether that's substantially interfering with the unions when it tries to reduce the unions to four major bargaining units, or puts the ambulance personnel into the paramedic union where they've traditionally been represented by CUPE. That'll be another Charter challenge under freedom of association. The last one is on Ontario we had the decision that agricultural workers should not be excluded from collective bargaining, as they are a group with minimal bargaining power and it's inappropriate to exclude them from collective bargaining rights. We have not seen any legislative changes to adjust to those Supreme Court of Canada cases. The most recent one was the 2007 Health Services decision. I think it will have an impact in decision making as to what the government may or may not do on the go-forward basis. I think it is the strongest one for unions to use. The picketing one: it's disappointing that the government didn't amend the code to reflect this change. So you now have a section in the code that is very suspect as to whether it is valid legislation. The difficulty is if you're in a situation where there is picketing and you appear before the Labour Relations Board, the Labour Relations Board has to say, well it's still valid legislation until it's struck out by a court.' So they act under the statute as is – issue restrictive picketing, cease and desists. But then you go to court and challenge that; by the time you get it resolved the strike is hopefully over. So that's a disappointment that occurs. The agricultural workers is long overdue for an adjustment. The one thing that I'm cautious about advocating adjusting the Labour Relations Code is if the code is opened up in a general sense for amendments, it's opened up for all stakeholders to advocate. You have to be concerned that the end product might not be just what unions would like to see, but employers would also get their opportunity. The balance that the legislation is trying to create might not be the balance that the unions

would like. So you have to be careful about what you ask for, and you move with caution. I think I've run out of gas again.

Q: Where do you see things going? Any last thoughts?

BJ: The Lakeside strike is an issue that is certainly relevant to the labour history of Alberta, Lakeside being a plant in Brooks, Alberta, a meatpacking plant and cattle feedlots all around that location. It was in existence in the '80s, was a small plant, did the 24 hour lockout actually and went non-union for a very long time. The union was not able to achieve bargaining rights after that for a long time. Lakeside, with the reorganization in the cattle industry to large feedlots and large plants and the small plants closing down, the Lakeside plant became a major plant in Alberta. It went through various ownerships, became owned by a large international meatpacking company out of the States called Tyson, if I'm correct. UFCW 401 was very committed to organizing it. They had done a very good job of organizing Cargill when Cargill first came into High River, and organized that. The union made various efforts to achieve certification, which took a huge investment of time and money to achieve. They finally succeeded, but the certification just became basically almost a right to go on a legal strike to force a collective agreement. They bargained, they didn't get an agreement, therefore they went on strike. They went on a very long strike, a very high profile strike which generated a lot of litigation. It happened right during the mad cow disease aftermath; the meatpacking industry was in trouble. I certainly recall we were heading into the fall and I thought it was an ongoing dispute that looked very difficult to get to an end. To my pleasant surprise, all of a sudden, bang, they turned around and achieved a collective agreement. Despite that very adverse approach, what has been pleasantly surprising subsequent to it is where everyone expected there'd be a lot of fights administering the collective agreement, in reality they seldom go to arbitration and they settle their grievances almost 99% of the time without arbitration, and have been fairly successful in keeping a meaningful working relationship in place since then.

Q: On the eve before the strike, the government intervened.

BJ: There is a section under the Labor Relations Code where the government can intervene to a point of a mediation-type process. There are qualifications as to when you can and cannot do that. It caught the union off guard because it took the union a lot of effort to get the membership ready for the strike. Through some type of process, who knows how, the government was persuaded that a strike ought not to proceed and the parties ought to go into this forced mediation that prohibited a strike at that time. That was a setback to the union. It was quite disappointing to them and quite frustrating. They were concerned whether the strike would be able to be rejuvenated if they didn't get an agreement, and they did not get an agreement. The mediation process was not successful at all and the union wasn't surprised about that. That was UFCW. So they ended up going on strike. The August 8 was a lot better for a strike, because it's summer and easier to be out. It was pushing it towards the fall when they got back, so there was a real concern whether the weather conditions and the changes in the markets and keeping pressure on the meatpacker would still be there. But they ran a very large strike. It wasn't just the workers sitting outside of work refusing to work, but they were doing a marketing program and a campaign to keep pressure on the employer to come to an agreement in various fashions. Eventually they succeeded and to their credit they got an agreement and got that bargaining unit a funder collective agreement, so that was good news.

Q: Can you talk about the violence?

BJ: Various picket lines have various events of violence. That union does not necessarily go into violence. Right today they have a strike going on here in Calgary at Old Dutch, where the picket line is actually quite quiet and tame. The Lakeside one was the meatpacking industry and they have a very robust membership in that kind of industry that is very challenging. The employer was very aggressive at trying to keep the plant working. So the factors were there to ignite conflict on the picket line, and there was conflict. There was an unfortunate experience where, in trying to serve an order on the president of the union, it escalated to the point where his vehicle rolled in the ditch and he was injured, not fatally. He's still there and still advocating for his members, but it was a

time of concern when that occurred. That led to almost a comical experience. I wasn't there, but the Labour Relations Board was in Brooks conducting a hearing on a Sunday on some of the picket line difficulties. As I understand it, RCMP walked into the hearing room right during the hearing and removed from the hearing room one or two advisors to the employer's lawyer in the middle of the hearing, and walked him out. From a dramatic point of view it would've been interesting to observe, is how I'd put it. But to the credit of everyone, they have a pretty solid working relationship right now. The meatpacking industry has been a major issue in labour relations right from the 1940s. Meatpacking plants have been a major part of Alberta and they've been a major unionized area of Alberta. You'd asked about federal undertaking. Certainly the federal code applies to some industries in Alberta: the telecommunications industry, railway industry, the trucking industry. Three or four years ago now TELUS had a major strike that was B.C.-Alberta primarily driven. They did a full lockout in B.C. and locked everyone out in Alberta. They did basically what I'd call the 24 hour lockout in that they invited the employees back to work with the game plan that they thought they could get enough workers back in Alberta to keep TELUS operating, to force the union to the agreement. That led to a strike from late July to November 21, 2005. It got quite heated, quite vigorous. The picket line activity was interesting from a legal perspective, because that is one of the first times that I was able to argue the Pepsi Cola freedom of association analysis for picketing that allowed the unions to picket in a fashion that they would not have been allowed prior to Pepsi Cola. It allowed them to have picketers at entrances and exits so long as they didn't create a trespass or a nuisance. It allowed them also to picket secondarily at locations other than the place of employment. That was interesting, and a variation.

Q: There was a fair bit of labour turmoil at that time.

BJ: That's correct actually, now that you draw my attention to it. In 2005 the TELUS one was going on and the Lakeside one was going on very soon thereafter. Labour disputes were in the forefront of the news for quite a time period at that time. Currently they don't appear to be in the news that much, but there's some undertows there that we could be

back into some major disputes. The healthcare industry is having some frustrations, the downturn in the economy is going to create some conflicts, the construction industry in Fort McMurray is going to create some issues. From an arbitration point of view, I think arbitration law has changed to fewer hearings but bigger and more complex hearings and more sophisticated hearings. The expansion of human rights into recognition and application in employment matters is big. The prohibition against discrimination, particularly physical and mental disorders, creates sophisticated legal issues and a demand for sophisticated evidence from medical people frequently. The difficulty there is you become quite concerned about the expense it takes to challenge the issue. But also, the unions have been invaluable in advocating and helping define the issues and defining the boundary lines as to when drug testing can occur, and when can employers terminate an employee because of a disability, and when must they accommodate the employee, and how far must they accommodate the employee. They've advocated those issues and I think employers are now becoming significantly more conscious of those responsibilities. It's totally because of union advocacy that has done that, so that has been a big contribution. That issue is still going to grow because that law is not totally solidified yet; it's still moving on. Privacy rights are another concept that's going to start becoming more of an issue to be addressed in employment – where it begins and ends, what are the boundaries, and how do you balance it with other competing rights. I don't think we totally understand why we legislated we want privacy statutes, but we have them. Exactly where they begin and end is still to be determined. We'll see lots of litigation on that on a go-forward basis.

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