

# Alberta's Unconstitutional labour laws

## An invitation to union-busting

- tom fuller, AFL

When labour relations experts look at Alberta, the first thing they notice is the low rate of unionization in the province's workforce.

At last count (in 2006) just 22.3% of workers in Alberta were union members – by far the lowest rate in Canada. Journalists and academics have noted this fact and discussed possible reasons for it. Much of the discussion centers around Alberta's conservative political culture, "entrepreneurial values" and "cowboy spirit." Rugged individuals like us, apparently, just don't like the idea of joining together with others in an attempt to better ourselves; we'd rather go it alone.

To anybody with on-the-ground experience doing union work in Alberta, that explanation is ludicrous. The fact is: workers in Alberta, at least a significant number of them, want to unionize; but that our province's anti-union labour laws make it very difficult for them to exercise their right to do so. "Give us some halfway balanced labour legislation," say the organizers, "and we'll see if the "cowboy spirit" still keeps workers away from unions!"

There is some objective evidence to support this line of argument. If we look at the success rate of union certification drives in western Canada over the period 2001 – 2004, it is obvious that Alberta is the "odd man out." In Alberta, certification applications are successful less than half of the time (and remember, these applications are only filed after the union has demonstrated over 40% support among employees), while in Saskatchewan, Manitoba and B.C. similar applications show a success rate between 65% and 90%. Why the difference? Do workers in these other provinces have no grasp at all of the cowboy spirit, the "Code of the West?"

### the problem with Alberta

The reality is a lot simpler. In Alberta, once a union has applied for certification, the Labour Relations Board (LRB) will order a certification vote. It is during the period before the vote is held that the employer is most likely to engage in the harassment or intimidation of union activists – even firing key organizers. Such activity is a clear violation of the Alberta Labour Relations Code (ALRC), which expressly forbids this kind of employer interference.

Unfortunately, what the Code does not include is any significant punishment for an employer. Even if the union files an Unfair Labour Practice complaint, and the LRB finds the employer guilty of misconduct, the most that the Board will do is to make a declaration that the employer has violated the Code and order the employer to rescind any improper discipline taken against union activists.

This is a completely inadequate response to the "chilling effect" of employer intimidation, and other jurisdictions in Canada have long recognized this fact. As long ago as 1980, the Ontario Labour Relations Board admitted as much, stating:

*The mere reinstatement of the employee directly affected, with backpay some time later, may do little to assure his or her fellow employees that the employer is prepared to live within the requirements of the statute and that effective remedies exist of those occasions where he will not.*

In 1993, the Ontario Board went further, affirming that

*Moreover, the Board has found on quite a number of occasions that the discharge of a union organizer during a union campaign may lead to a situation where the true wishes of employees can no longer be ascertained, despite the Board's ability to reinstate the organizer. In other words, the intimidatory effect is so powerful that employees can no longer express their real views on unionization.*

In other words: by abusing employees and trying to fire activists, an employer can poison the atmosphere in the workplace so much that a fair vote is impossible. By failing to address this problem, the ALRC in effect encourages this kind of misbehaviour.

### **fixing the code**

There are a couple of ways that this weakness in the Code could be fixed. First, the LRB could be empowered to grant automatic certification if the union can submit proof, in the form of signed union cards or a petition, of majority support in the bargaining unit. This would eliminate the "election period," when most employer misconduct occurs.

No doubt some employers will object that such a procedure would deprive them of the opportunity to exercise their right to "free speech" during the election period. In point of fact, however, employers (unlike their employees) have the right to voice their opinions on unionization at any time.

They can discuss issues of unionization with their employees, they can post notices or policies or opinion pieces on bulletin boards in the workplace, and they can call all-employee meetings (with compulsory attendance) to discuss the issues. Removing the campaign period does not materially impinge on employers' right to free speech. It does, however, protect employees from the chilling effect of employer abuse. Provisions for automatic certification in cases of demonstrated union support already exist in a number of other Canadian jurisdictions, including Manitoba and Saskatchewan.

Another possibility would be to allow the LRB to certify the union in cases where employer misconduct is proven. This would attach an effective sanction to the Code's ban on employer interference in organizing drives, while leaving the election process in place as long as the employer doesn't interfere.

Several other jurisdictions in Canada, including B.C. and Manitoba, currently have such provisions in their labour laws.

### **protecting charter rights**

These are not dry legal technicalities. The right of all Canadian citizens to freedom of association is guaranteed by Section 2.d of the *Charter of Rights and Freedoms* — it is constitutional law in this country.

As of last spring, the Supreme Court of Canada has ruled that this freedom includes the right to join unions and bargain collectively. The ALRC allows anti-union employers to evade the law and deny workers in this province their constitutional rights.

That has to change.