Submission to Federal Labour Code Part III Review

October 2005

The Alberta Federation of Labour (AFL) appreciates the opportunity to answer how we can modernize Canada's employment standards regime for workplaces in the federal jurisdiction. The decision of the federal government to convene a comprehensive review, including public hearings, and many months to allow Canadians to respond, displays openness and a willingness to hear from Canadians that is far too rare in government these days.

The AFL is Alberta's largest labour body, representing over 115,000 workers and their families. Our mandate is to participate in public policy debates that are significant for working people in Alberta. Our membership spans all sectors and industries of the economy, including thousands of workers in the federal jurisdiction.

The AFL specializes in matter of provincial jurisdiction, and most of our direct experience is with the provincial government. However, there are many parallels between the employment standards regime in Alberta and in federally - such as issues of enforcement, inadequate coverage for contingent workers and others. To this end, we believe we can speak with accuracy and poignancy on the Part III of the Canada Labour Code.

The number of issues to be addressed is extensive. We could spend many pages offering our position on myriad details in the Code. We believe at this stage this is not the most fruitful avenue to proceed. Instead, we will do two things. First, we will focus our comments on the federal Code to a discussion of broad trends, and a handful of priority issues for our organization. Second, we append to this submission a summary of the recommendations we made last month to the Alberta government review of its Employment Standards Code. While not all issues apply, there is enough overlap that the provincial Code summary can serve as a proxy for our federal positions.

Purpose of the Code

We need to begin by briefly accounting for the fundamental purpose of an employment standards code. A clear articulation of the basic purpose will guide us when determining what functions and specific provisions a code should include. It is - in a manner of speaking - the basic framing of the house. You cannot decide on the colour of the upholstery until you have constructed the walls and roof.

To state it directly, the purpose of employment standards is to ensure a set of minimum standards that all employers and workers must abide. It is our society's moral statement of what is not acceptable at work, and what is a fundamental right for any worker or employer. It should apply to all workplaces within its jurisdiction - as the law should apply equally to all.

But more importantly, employment standards are predicated on one key assumption - there is a power imbalance in the workplace. The employer, through their ownership of capital and their legal ability to hire, fire, and control the labour process, possesses the predominance of power in a workplace. This is inherent to the employer-employee relationship, and is not workplace specific, or affected in any fundamental way by the ebbs and flows of the labour market.

As a result, employment standards are predominantly worker-protection legislation. The bulk of provisions focus on guaranteeing certain working conditions for all workers, and disallowing certain employer practices. While it is important to balance fairness for workers with employer ability to comply, we should not lose sight of the fact that employment standards are fundamentally about protecting workers against misuse of employer power.

There is nothing in the societal or economic patterns of the past 50 years that suggests this power imbalance has changed. The rise of technology, and knowledge workers, have not reduced worker vulnerability. The dot.com experience demonstrates with poignant clarity how nothing has really changed in the labour market. For a short spell, technology workers appeared to break the pattern of employment relationships - negotiating independence, authority and control over their work. Until, that is, the bubble burst. Today, they face the same issues all other workers face - increasing demands for productivity, layoffs and unemployment, little opportunity for freedom at work. At best, any shift in the power balance is a short term illusion. This is something that needs to be remembered by crafters of legislation.

The fundamental need for worker-protection legislation has not changed. What has changed are some of the issues it must address to protect workers and the mechanisms it uses to ensure fairness in the workplace.

Trends in the Workplace

In the past two decades we have seen a number of changes in Canadian workplaces and the Canadian labour market - changes not adequately addressed by Part III. The work world has changed, and now the Labour Code needs to change with it.

The biggest shift in work is the trend away from standard employment relationships. The full time, nine-to-five, permanent job - while still prevalent - is shrinking as a proportion of work in Canada, and has been for the past two decades. Today, over one-third of workers are engaged in non-standard work (Law Commission of Canada).

The question is: Is this a good thing or a bad thing? Many employers will say that increased flexibility of work arrangements is beneficial for workers needing special arrangements, and conducive to productivity. There is a certain amount of truth in this statement, for certain workers and particular types of work arrangements. However, the general statement lacks an acknowledgement of the fundamental power imbalance at the workplace. "Flexibility" is usually

defined by the managers, and will most often be crafted to suit productivity, with worker interests becoming secondary.

The growth of self-employment, contracting out and temporary work have given employers a flexible workforce that can expand and contract quickly. However, for workers, it means instability, uncertainty, bouts of unemployment, lower wages and few benefits. We must be careful of what a person means when they say "flexibility is a good thing". We must ask, for whom?

The growth in precarious work has become a growing interest of study for academics, labour researchers and economists. But why should policy makers care? Because the current Labour Code presumes a standard work relationship, and these alternative relationships are not adequately accounted under its provisions.

We shall use one example to make our point. We have seen in Canada a polarization of working hours in the past ten to twenty years. There has been an increase in the number of workers who work part time, or receive partial hours (seasonal work, part-year layoff, etc.). At the same time there has been an increase in the number of workers who are working 50 hours or more per week. This trend is greatest in Alberta, where workers work the highest number of overtime hours in Canada, including the most unpaid overtime hours. (Statistics Canada)

Unfortunately, Part III does not tackle many of the key issues facing these two groups of workers. With part-timers, they can be paid less than full-timers, for the same work, have no rights regarding scheduling, and have no access to benefits available to full-time workers. There are no effective controls on the use of part-time hours as a means to punish workers, and as an avenue to avoid paying full-time benefits.

Regarding overtime, the rules around limits on overtime allow for many exceptions (e.g. averaging), so to make the limits on work hours inconsequential. The types of workers who are most exposed to unpaid overtime are often excluded from coverage of the Code. There is no legal right to refuse overtime, and so workers are often in the position of being forced to accept unwanted overtime (at the same time as there are part time workers wishing for more hours).

The end result is that the Code has been ineffective at slowing the trend toward hours polarization and at protecting workers who find themselves at one of the polarized extremes.

Because the Labour Code has not kept pace with changing workplaces, employers have found ways to turn loopholes and new developments into their advantage. It does not need to be about a conscious calculation to mistreat workers (although, unfortunately, sometimes this is the case), but can be an unintentional consequence of an arrangement that looks good from a management perspective.

Contracting out, homework, temporary contracts are enticing for an employer, because it lowers labour costs and can (sometimes) increase productivity. But just because it works for one party on economic terms is not a justification for the government to remain silent.

We believe Part III of the Labour Code needs revision to reflect modern realities. We reject, however, the calls for a narrowing of its objectives in the name of "flexibility". Modernization is not akin to deregulation. Rules can reflect new work relationships AND maintain a clear expectation of minimum standards. We will discuss below how that can be achieved.

Specific Issues

As indicated earlier, we cannot address all the areas of concern in the Code. We trust other presenters across the nation will ensure all of these issues are dicussed. Below we will briefly discuss a handful of issues that require the attention of the Commissioner, along with our recommendation for how to address them.

Definition of Employee

The Code currently has no definition of employee. It defines an employer as having employees, but is silent on what an employee is. Thirty years ago, there was probably little need to concern ourselves with a definition, as it was self evident. Given current trends, this has become a huge point of contention.

When an employer takes a former employee and spins them off as a "contractor", doing the very same work, and with them as the only client, they get to take the person off of their payroll. And with it goes the person's employment standards protections. But what, in real terms, has changed? The work is the same. The dependent relationship is the same.

There are numerous ways in which employers structure relationships with workers to prevent the restrictions of the Code. They arrange a piecework contract. They offer temporary contracts. They locate the work in the person's home. They set up fee-for-service. They work through a temporary employment agency (even for longer term employment). Each of these approaches allows the employer to avoid meeting the minimum standards under Part III.

The Code needs a clear and explicit definition of "employee". Alberta's definition, along with most provinces, is inadequate to meet the task. The Revenue Canada approach offers some assistance, as it attempts to examine the content of the relationship, but still does not go far enough in clarifying the issue.

In this respect, the federal government should become a leader in clarifying the employment relationship in the 21st century. And reminding of ourselves of the purpose of employment standards, the definition should be reflective of a power balance between the worker and the employer.

We recommend constructing a definition of "employee" that includes the following concepts:

- It recognizes a power imbalance between the parties
- One party is dependent economically on the other party
- The scope and breadth of the arrangement extends beyond standard contractor relationships (e.g. ongoing or wide ranging work as opposed to one specific task with an end date)
- Does not restrict definition to individuals, but can include an incorporated entity that itself does not employ workers

Scope of Coverage

Closely related to the definition of employee is the issue of the Code's scope of application. Currently many types of occupations are exempted from Part III, and many industries have specific exceptions to standard provisions. Also, workplaces with collective agreements are not included either.

We recently argued in the Alberta review for a shift in how to determine exemptions and exclusions. We repeat our recommendation for the federal jurisdiction. Currently, the rules are a mish-mash of exemptions, exclusions and special provisions.

We argue all exemptions should be removed. The principle is that every worker and every workplace should be covered by the basic minimum rules. This principle should be codified in the legislation.

The Code should then specify a process for amending the rules for a specific industry, occupation or situation. The process must include a full public consultation, a panel of stakeholders including industry representatives, labour and employers not from an affected industry, and an objective evaluation of the merits of the argument.

To exempt an industry or occupation, the onus of proof should rest with the applicant, and the criteria for acceptance should be restricted. Only arguments of undue hardship should be considered. No economic arguments, such as lowering labour costs, should be accepted.

Any exception that passes the process should be introduced as a change to the Code itself - requiring passage through Parliament. Quiet regulation changes, or Director's Permits only create the potential for abuse (as happened recently in Alberta with the hiring of 12 year-olds).

This new approach ensures all workers are given equal protection under the law. It also, though, recognizes there are times when the rules unintentionally pose difficulties for a job or task. Asking a firefighter to leave in the middle of fighting a blaze because of work hour limits is unreasonable. Our proposed process is flexible enough to address substantive concerns about the rules, but maintains a strict coverage for application.

Our position remains consistent when applied to workplaces with collective agreements. No agent, even a well-intentioned union, should be permitted to negotiate a contract that provides less than the legal minimum under Part III.

We believe making Part III applicable to all workplaces offers clarity for employers and workers. For unions, it provides a floor upon which they can bargain. But most importantly, it maintains consistent application of the concept that all workers have the right to minimum standards.

We recommend:

- Removing all exemptions, exceptions and exclusions from the Code
- Codifying the principle that all workers are covered by the minimum standards
- Establishing a process for assessing applications for exemption
- Including unionized workplaces under the provisions of the Code

Part Time Work

Part time work is a complex beast. For many workers it is the preferred option. For others it is how to get by while looking for something better, or because there are no other available options. The goal of Code provisions should be to ensure part time is not used as a method to shortchange workers, and that part time workers are not unfairly disadvantaged at the workplace.

We recommend the following provisions to the Code to allow part time work to be a valid employment choice, but ensuring that unwanted part time work is not a trap.

- Require employers to provide benefits to part time workers, on a pro-rated basis, in line with benefits provided to full time workers.
- Equal pay for work, regardless of type of employment relationship (e.g. part time, temporary, casual, etc.).
- Requirement to offer additional hours of work to part time employees before hiring new workers to perform the same work.

Other Visions of Flexibility

Usually the term flexibility comes from employer groups, and is raised in tandem with requests for looser overtime rules, calls for temporary work, contracting out, and reduced enforcement. This is one definition of flexibility.

Another, rarely included in employer submissions to government reviews, is allowing workers the flexibility to better balance work and home life. Professional HR journals speak of the need to help employees balance work and life by offering a range of benefits for workers, including on-site child care, flex time, and part time work. Many large employers have implemented so-

called "family-friendly" policies. But there is more that can be achieved, and the Labour Code can assist.

If you poll workers, most will state that they feel squeezed between work responsibilities and their family responsibilities. This is no easy task, and legislation can only go part way to alleviate this stress. But the piece it can contribute is important. There are practical provisions that can be implemented to assist workers to be both good family members and good workers.

We recommend:

- Removing eligibility limitations (6 months of continuous employment) to maternity and parental leave
- Implementing a Family Responsibility Leave of 5 days per year, accumulative for 3 years, for attending to family responsibilities (sick child, funeral, moving, etc.)
- Implementing a Compassion Leave of up to 12 weeks per year for attending to a seriously ill family member or other serious matter
- Encode the right to have hours reduced or opt for flextime for a reasonable period of time for the purposes of caring for a family member

Rest Breaks

In preparing for this submission, we were taken aback by one particular omission from the Code. Nowhere in the Code or regulations are provisions ensuring a worker receives a rest break during their shift. We were surprised by this glaring hole in the rules.

Guaranteeing rest breaks is one of the most fundamental provisions in any employment standards regime. The argument for its necessity is straightforward. It is to ensure the worker's wellbeing by guaranteeing that they have, first, an opportunity to eat, and second, a mental break from the stress of work. This is not just about economics, it is about basic health and safety.

We recommend:

- Guaranteeing a 30 minute rest break scheduled at intervals to ensure a worker does not work more than 5 hours consecutively without a rest

Violence and Harassment

Awareness of violence and harassment in the workplace has been growing for many years. As a society we have stopped accepting the Louie DePalma from Taxi version of a manager - the boss who yells and screams and hurls insults. And thank goodness.

However, that boss has not entirely disappeared from our workplaces. And violence and harassment takes many forms, most subtle and insidious. It does not have to be loud to be harassment.

For years, many have argued for stronger rules around violence and harassment. However, advocates for rules find themselves in a strange revolving door. No branch of workplace standards wishes to take responsibility for legislation.

In health and safety circles, advocates are told it is not, strictly speaking, a safety issue, and is best addressed through human rights or generic employment laws. At employment standards, they are told it is a safety issue. At Human Rights commissions, they are told they can only pursue acts against identifiable groups.

This is precisely what the AFL has been told in Alberta by government officials. And the CLC was told similar things at the last Part II review.

The merry-go-round must stop. And it should stop at Part III.

Violence and harassment is something that can affect any and all workers. Rules about violence and harassment speak to our society's moral statement about what is not appropriate at work. Canadians are saying loudly and clearly that violence and harassment - perpetrated by employers, by customers, or by other workers - is not acceptable. Our legislation needs to heed that message.

We can think of no other place more appropriate than Part III of the Labour Code.

We recommend:

- Language prohibiting acts, or threatened acts, of violence or harassment at a workplace against any worker
- Strong penalties specific to contravention of this section
- Clear protection for workers lodging a complaint under this section, and guaranteeing avenues of recourse to ensure their continued protection

Minimum Wage to A Living Wage

The minimum wage provisions of employment standards tend to create more political heat than is justified given its impact on the labour market. It is a trigger issue that gets many employer and worker groups hot under the collar. Our organization spends a great deal of energy in Alberta advocating for increases to the minimum wage. And as we do so, we often develop a disconcerted notion of the nature of the minimum wage debate.

It has become increasingly aware to the AFL that the terms of the minimum wage debate are all wrong. We fight over the economic impact of increasing the minimum wage. We fire up

political rhetoric about the impact on small business, low wage workers and so on. And for what? To increase the lowest wage by 25 cents, or maybe a dollar, staggered over a year or two.

The end result is that the lowest wage workers in Canada continue to earn a wage that makes it impossible for them to reach the poverty line. A lot of heat, and very little to show for it.

In Edmonton or Calgary, a worker earning the minimum wage at a full time job (40 hours per week) will be $1.10 an hour below the poverty line for a single person. For a family of three, they will be $5.27 below the poverty line.

For minimum wage jobs, 40 hour work weeks are rare, so we can expect them to be even lower in real terms.

The time has come to shift the discussion away from wage costs and economics and political will, and toward a more reasonable discussion. We need to ask ourselves: "What does a person need to live with dignity in Canada?" If we ask ourselves this question, we change the nature of the conversation.

We have choices as a society. We can choose to ensure that no working person lives in poverty in Canada. We can choose to make a priority of permitting all workers the ability to pay their bills, participate in the community, and maybe save a little for the future.

If we make this choice - collectively - then the rest of the debate becomes about mechanics. The AFL strongly believes no working person should live in poverty (we believe no person should live in poverty, but that is beyond the scope of this review). And we believe the "minimum wage" should reflect that priority. And we believe most Canadians agree.

We propose that the federal minimum wage be replaced by a Living Wage. This is not difficult, as the current federal minimum floats depending on the going minimum wage in each province. In effect the federal government has removed itself from the business of setting a minimum wage already.

This gap allows for something more innovative, forward-looking and more reflective of Canadian values.

A Living Wage would set the minimum wage allowed under law at a level that would allow a person to escape poverty. In this manner, we make a statement that no worker should live in poverty while trying to earn a living. And we, in a simple and elegant manner, develop a policy instrument that will achieve it with speed.

We appreciate the federal jurisdiction is only 10% of the workforce, but the federal government would be an important starting place for the concept of a living wage.

We recognize that there is considerable debate about at what level a living wage should be set. We believe at this point, engaging in that debate is premature. It would quickly devolve into the same arguments we see around the minimum wage. We propose an alternative approach:

The new Code should include two new elements. First, it should commit the federal government to maintaining a Living Wage as the bottom regulated wage. It should then establish a Living Wage Commission, whose mandate will be to assess what an appropriate living wage is, legislate that wage as the minimum wage in the federal jurisdiction and annually review it to determine if it requires adjustment.

This new approach achieves two goals. First, it establishes that the bottom income workers will earn a wage sufficient to remain out of poverty (if they work full time). Second, it will establish a regular and rational process for adjusting the wage annually.

We recommend:

- Replacing the minimum wage with the concept of a Living Wage
- Establishing a Living Wage Commission to establish a legislated living wage, which will act as the minimum wage in federal jurisdiction, and to annually review and, if necessary, adjust, the legislated wage

Enforcement

We leave what is likely the most important issue until last. The reality of labour legislation is that the best and clearest rules on paper mean absolutely nothing if they are not enforced. To bring employment standards to life, the government must take an active role in educating, inspecting, investigating and ensuring compliance.

In Canada, the government is shirking this role, and the result is that Part III is nothing more than an extensive wish list with no real practical implication in workplaces.

In a government sponsored evaluation in 1998, only 25% of employers were in full compliance with Part III. Worse the remaining 75% were receiving little or no contact from the federal government about how to become compliant.

There have been no prosecutions for infractions under the Code since 1987. Officers inspect workplaces only upon receiving a complaint - there are no pro-active inspections. Even if a contravention is found, the policy of "voluntary compliance" (in place since 1986) prevents the officer from issuing an order. In short, the enforcement system is an unmitigated disaster.

If the provisions of Part III are to have any significance in the 21st century, the starting place must be better enforcement. In our minds enforcement has two parts. First, there needs to be greater emphasis on education - for both employers and workers. Most workers, and many employers, are unaware of their rights and obligations under the Code. There needs to be clear

communication about the rules, and how - for workers in particular - they can take steps to ensure fairness at work.

But education is only the first piece, for many employers will actively choose to ignore the rules. And here active enforcement, with the threat of real penalties, must occur. The enforcement regime needs revamping. We propose a four-part system.

First, the complaint-driven enforcement must continue, but be given a higher profile. Workers need to know who to call, and people other than employers and workers - such as customers or members of the public - need to have the right to complain if they see an infraction.

Second, the government should implement a system of targeted inspections. The department would determine what industries and groups of employers have the lowest compliance levels, and begin a process of methodically investigating these workplaces. They may visit the workplace a number of times in a year, and rigourously assess their compliance with the Code.

This method of targeted inspections was implemented recently in occupational health and safety at the Alberta government. By all measurements, it has been a resounding success. It has reduced non-compliance, and increased awareness among these employers of the provisions of the Act. It is an effective use of staff resources - as it is focused on poor performers. And it has succeeded in lowering accident rates in those industries. This is a model that needs to be emulated in employment standards.

Third, prosecutions for serious infractions need to be accelerated. Prosecution through the courts will never be used for one-time or minor infractions, as the cost and time is too extensive to be valuable. However, the prosecution avenue should be actively pursued for repeat offenders, or when the contravention affects a wide number of workers. More public profile needs to be given to these prosecutions, so that all Canadians can see the results of non-compliance.

Fourth, there should be a system of administrative fines - ticketing - instituted for smaller infractions. This is a quick and direct method to ensure accountability and appropriate penalty for breaching the Code. The ticket should only be issued to employers, for the bulk of rules require employer compliance, and the fine should be tied to a percentage of payroll, so that penalty fits the employer.

In all forms of enforcement, the policy of voluntary compliance should be repealed, and officers allowed to use their discretion when determining appropriate steps to ensure compliance.

Our proposal above will require a substantial increase in funding for employment standards. In our minds, this is long overdue. The increase can be justified with ease - as it is an area traditionally under-funded and its purpose is the protection of workers. It is a core area of government activity, and the overall amounts of money are small in comparison to health care, justice or other programs.

We recommend:

- Revamping the enforcement regime to repeal voluntary compliance, institute targeted inspections and create a system of administrative fines
- Substantial increases in funding to employment standards enforcement for the hiring of more officers, and creating more resources for education, enforcement and prosecution

Conclusion

The AFL appreciates the opportunity to address the review of the Canada Labour Code Part III. We appreciate the extensiveness of the review, and the generous timelines for its consultations. Our comments above do not constitute all of the issues and concerns our organization possesses about the Code. We have attempted to focus on a smaller range of key issues. We trust others will address other issues which we have chosen to leave unstated.

We wish the Commissioner luck in his deliberations, and trust he will start construction on a stronger and more effective employment standards system.

Respectfully Submitted,

Alberta Federation of Labour