



Tipping the Balance

Bill 32, The Charter and
the Americanization of
Alberta's Labour
Relations System



| Jason Foster

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Acknowledgements	iii
About the author	iii
About Parkland Institute	iii
Executive summary	1
Introduction	3
Part One: Introduction to Labour Relations in Canada and the U.S.	5
Introduction to Labour Relations	5
Labour Relations in Canada and the U.S.	6
<i>Core Similarities</i>	7
<i>Differences Between the U.S. and Canada</i>	9
Part Two: What is in Bill 32	18
Making It Harder to Join a Union	19
<i>Certification Vote Timelines</i>	19
<i>Weakened Employer Penalties</i>	20
<i>Preventing Open Periods</i>	21
Restricting Union Activities	22
<i>Picket Line Limitations</i>	22
<i>Secondary Picketing Restrictions</i>	23
Interfering With and Penalizing Unions	23
<i>Financial Statements</i>	23
<i>Identifying Political Activities</i>	24
<i>Due Opt-In Requirement</i>	24
<i>Increased Penalties</i>	25
Part Three: The Effects of Bill 32	26
Effect on Labour Relations	26
<i>Making it Harder to Join a Union</i>	27
<i>Restricting Union Activities</i>	30
<i>Penalizing Unions</i>	31
Bill 32 and the Charter	33
<i>Relevant Charter Rights</i>	33
<i>Current Status of Labour Charter Rights</i>	35
<i>Bill 32 and the Charter</i>	36

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Part Four: Social and Economic Consequences of Anti-Union Legislation	53
The U.S. Experience	53
Effects on Unionization	55
Effects on Wages and Economic Growth	57
Effect on Equality	59
Effect on Political Discourse	60
Effect on Public Services	62
Conclusion	65
Endnotes	67
Charts and Tables	
Table 1: Certification Procedures, Canadian Jurisdictions	20

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Executive Summary

In the summer of 2020 the Alberta government introduced Bill 32: Restoring Balance in Alberta's Workplaces Act (2020). This 82-page omnibus bill proposed sweeping changes to a handful of employment-related and labour-related legislation. Some of the most significant amendments were to Alberta Labour Relations Code, the law that regulates union-employer relations in the province. Almost a year after its introduction, many aspects of Bill 32 continue to be poorly understood for a number of reasons.

One of those reasons is the public perception that the portions of Bill 32 dealing with labour relations only affect unions and their members. A minority of Albertans belong to unions and so the impression may be that the impacts of the bill do not touch most Albertans. However, an in-depth analysis suggests the bill's potential consequences extend far beyond unions. Many of the bill's provisions touch upon rights enjoyed by all working people and all Albertans generally. While unions may be the most directly impacted by the changes brought forth in Bill 32, its consequences will reverberate across many aspects of Alberta society. Further, the bill has the potential to profoundly impact the direction of Alberta's economy.

This report examines Bill 32 with a focus on its broader implications for the rights of Albertans, the health of democratic debate in the province and potential economic consequences. Specifically, the report makes two arguments. First it argues Bill 32 undermines key charter of Rights and Freedoms protections not just for union members but potentially for a wide range of Albertans. Second, the report argues Bill 32 represents an Americanization of labour relations in the province, with significant negative consequences for inequality, economic growth and democratic participation.

Part One lays the groundwork for the report. An introduction to labour relations is provided. The similarities and key differences between U.S. and Canadian labour relations systems are laid out to orient the reader to the two jurisdictions.

Part Two summarizes the key provisions in Bill 32, with a focus on the nine measures that will most impact Albertans: the removal of certification vote timelines; weakened penalties for employer violations; possible prevention of open periods; limitations to picket line activity; restrictions to secondary picketing; requiring unions to provide government-defined financial statements to all members; requiring unions to identify the portion of dues spent on political activities; mandating each union member opt-in to dues for political purposes; increased penalties against unions for violations. While some of these provisions may at first appear narrow and technical, they open up significant concerns regarding the ability of workers to express their charter-protected rights.

Part Three examines the effects of Bill 32 on labour relations in the province. It finds that the bill makes it harder for workers to join a union if they wish by increasing opportunities for interference, makes union activities less effective through new restrictions, and imposes disproportionate new penalties against unions. It also examines how the bill may impact a series of charter-protected rights for all Albertans. Specifically it finds Bill 32:

- Undermines workers' right to free expression through restrictions on picket activity and secondary picketing
- Interferes with the internal operations of private organizations
- Shifts rules regarding membership dues to an American-style approach that elevates individual freedom of speech at the expense of effective freedom of association
- Politically targets voices opposed to the government's agenda to undermine their ability to participate in democratic debate

Part Four examines similar anti-union measures taken in the U.S. and analyzes what their social, economic and political impact has been. These anti-union measures lead to:

- Lower unionization levels and more difficulty for workers trying to organize unions
- No net increase in economic growth
- Lower average wages
- Increased income inequality, in particular gender and racial pay gaps
- Lower democratic participation and a rightward shift in public policy
- Policies that cut funding for public services and undermine the quality of public services

The report concludes that Bill 32 moves Alberta's labour relations environment closer to the U.S. model to the detriment of workers in the province. A number of its provisions are unprecedented in Canada and much more closely reflect U.S. law that is more tilted in favour of employers. The bill will undermine unions' ability to represent their members, organize new members and engage in public debate.

More importantly, the report concludes that Bill 32 impacts more than just unions and their members. The consequences of changes like those in Bill 32 ripple out to all corners of society. All Albertans have a stake in the levels of inequality in our province. All Albertans are affected by the direction of our economic growth and what our labour market looks like. All Albertans benefit from quality public services. All Albertans should be concerned at the prospect of charter-protected rights being undermined. And all Albertans value and rely upon a healthy democracy where a multitude of voices can be heard.

Introduction

In the summer of 2020 the Alberta government introduced Bill 32: Restoring Balance in Alberta's Workplaces Act (2020). This 82-page omnibus bill proposed sweeping changes to a handful of employment-related and labour-related legislation.

Some of the most significant provisions of the bill amend Alberta's Labour Relations Code, the legislation governing union and employer relations in the province. When it was first introduced, labour relations experts observed that it marked a major change to many aspects of the labour relations regime in the province¹. Unions and their allies in civil society raised concerns². Despite these concerns, the government passed the bill without amendments. Many of its provisions have already taken effect and others will be implemented in the coming months.

Almost a year after its introduction, many aspects of Bill 32 continue to be poorly understood, for a number of reasons. In part, this lack of awareness is due to the often technical nature of the amendments which can be difficult for the general public to digest. Also, the government has moved swiftly in many policy areas and has introduced multiple controversial bills, leading to public attention being divided. Finally, the COVID-19 pandemic has disrupted many aspects of Albertans' lives, including their ability to fully engage with provincial politics.

There is also a general sense that the portions of Bill 32 dealing with labour relations only affect unions and their members. A minority of Albertans belong to unions and so the impression may be that the impacts of the bill do not touch most Albertans. And given that unions are not always the most popular institution in society, there are many who are happy to move on to more pressing issues.

An in-depth analysis of the bill suggests its potential consequences extend far beyond unions. Many of the bill's provisions touch upon rights enjoyed by all working people and all Albertans generally. While unions may be the most directly impacted by the changes brought forth in Bill 32, its consequences will reverberate across many aspects of Alberta society. Further, the bill has the potential to profoundly impact the direction of Alberta's economy.

This report examines Bill 32's labour relations provisions to reveal its impacts on unions and their members but also on all Albertans. It establishes the links between rights of unionized workers and their unions to the fundamental rights and freedoms of all Albertans. Finally, it looks at other jurisdictions to discover the economic and social impacts of laws like Bill 32 to offer a glimpse of where Alberta might be heading.

Two arguments are put forth in this report. First, it argues Bill 32 undermines key Charter of Rights and Freedoms protections. While unions may be the target of the provisions, the consequence of undermining these central rights spills over to all Albertans. In particular, Bill 32 raises questions about the right to expression and the right to associate.

Second, the report argues that Bill 32 represents a step toward an American model of labour relations. Many provisions replicate laws found in the U.S., and others display American influences. Americanizing Alberta's labour relations system has profound consequences not just for unions, but for all Albertans. Labour relations rules have an impact on economic growth, inequality, access to public services and other aspects of society. This report sheds light on how Bill 32 moves Alberta toward a more American approach to labour relations and considers the potential outcomes of such a shift.

This report begins by offering a short introduction to labour relations in Canada and in the U.S., including some of the key differences between the two countries. Part Two outlines the main provisions in Bill 32 affecting labour relations in Alberta. Part Three analyzes the bill for how it affects labour relations and for how it undermines charter-protected rights. Part Four examines key economic and social consequences of legislation like Bill 32 by looking at American examples and considering what the impacts might look like in Alberta.

Part One: Introduction to Labour Relations in Canada and the U.S.

Bill 32 makes a number of significant changes to Alberta's labour relations laws. Most people do not spend a lot of time considering these laws and have only an understandably vague sense of how labour relations work. Labour relations deals with unionized workplaces and the process for unionizing. Currently 25.4 per cent of Albertans are unionized³, meaning labour relations laws do not directly affect most Albertans, although what happens in unionized workplaces can have indirect consequences for everyone.

This report argues the changes found in Bill 32 move Alberta closer to an American approach to labour relations, which in general offers more advantages to employers. To understand how Bill 32 Americanizes the province's labour relations system, there is a need to summarize the key features of the two systems and highlight how they differ. Part One will provide a brief introduction to labour relations and then compare the Albertan and American labour relations system.

Introduction to Labour Relations

At its most basic, labour relations is the system governing the relationship between employers and workers represented by unions or wishing to be represented by unions. It has emerged as a distinct area because of the unique dynamics that arise when a union is introduced into a workplace. Labour relations law is a sub-set of employment law and supplements (and at times replaces) the statutory and common law governing the employment relationship generally.

While today's labour relations are a complex, formalized area of law and practice, they have a long history spanning hundreds of years. The employment relationship is one of unequal power; employers possess greater power than workers. This imbalance is anchored in the nature of the economic system and is rooted in employers' legal power to control the workplace and in the fact there is a permanent surplus of workers in the labour market. For hundreds of years workers have sought a way to reduce the imbalance. The most effective means they have found is to join together to create a collective voice to negotiate with the employer. By banding together, workers move beyond a collection of individual employment contracts and can compel the employer to sign a single "collective agreement" with all workers.

In practical terms, workers' collective voice is the union. Over the past 200 years unions have taken different forms and structures but their general purpose was the same – marshal workers' strength vis-a-vis the employer to negotiate better working conditions. Unions also take on a broader role in advocating for broader social change. This engagement in public debate has been a feature of unionism since the beginning.

In the 1880s and through the early 1900s efforts to unionize were met with fierce resistance. Clashes between workers and employers over unionization were bitter and often violent as employers aggressively resisted unionization. Governments were of little help, originally considering unions illegal and later passing laws heavily in favour of employers⁴. This shifted around World War Two when governments recognized that repression would not defeat unions and decided in the interests of economic stability that some form of normalization and regulation of unions was necessary. This marks the beginning of the modern labour relations system. The system is designed to legally recognize the legitimacy of unionization in return for curbing more militant aspects of union activity. As legal historians Judy Fudge and Eric Tucker observe:

the new regime of industrial pluralism underwrote the gains made by industrial unions through the exercise of their economic power in the war and the post-war era, allowing for the spread of collective bargaining to core industrial sectors. Unions in these sectors obtained for their members improved wages and occupationally-based benefits, seniority rights, and protection against arbitrary discipline and discharge. The price was that unions were tightly wrapped up in a web of industrial legality that constrained militancy, recognized management rights, and favoured fragmented bargaining.⁵

While there have been important developments and changes in the North American labour relations system over the past eight decades, the core principles of the system have remained unchanged since the 1940s. However, there is room for great variation in how those core principles are interpreted and implemented.

Labour Relations in Canada and the U.S.

The origins of the contemporary labour relations system are found in Franklin Roosevelt's New Deal in the 1930s. Specifically the National Labor Relations Act, passed in 1935. It is more commonly known as the Wagner Act after its sponsor. Amendments to the Wagner Act were implemented in 1947 in the Taft-Hartley Act and the two together comprise the core of American labour relations law.

Canada's experience is similar. Under its expanded powers during World War II, the federal government of MacKenzie King passed Privy Council Order 1003 (PC1003) which emulated most aspects of the Wagner Act. Following the war, the order was formalized in legislation and every province followed suit with similar enactments.

The systems in the two countries are built upon the same basic principles, which means they are highly similar in how they regulate labour relations. They are more similar to each other than to other jurisdictions, such as Europe. Over the ensuing decades the two systems have evolved in different directions, meaning there are important differences that have substantial impact on the relative strength of unions in each country.

Today 12.1 per cent of American workers are represented by a union (7.2 per cent private sector, 38.4 per cent public sector)⁶. In Canada, unionization sits at 31.3 per cent (15.8 per cent private, 77.6 per cent public)⁷. There are complex reasons for the difference, but it is widely accepted by researchers that areas of legal divergence are a key factor in the gap⁸. For this reason it is important to discuss the similarities and differences between the two systems to contextualize an analysis of Bill 32.

Core Similarities

Given their common origin and grounding in identical principles, the labour relations systems in Canada and the U.S. are both described as Wagnerian, or the Wagner Model (after the name of the first U.S. legislation). A few core principles define Wagnerism and are reflected in the legislation in both countries⁹.

The first principle establishes what is called “majoritarian exclusivity” or “majority unionism.” If a union demonstrates that a majority of workers in a proposed bargaining unit and is recognized by the government as such, it becomes the exclusive representative of those workers. No other union is allowed to act on the workers’ behalf. Other jurisdictions permit multiple unions to represent workers at a workplace.

The first principle triggers the second. Once formally certified as the bargaining agent for a group of workers, an employer becomes legally obligated to recognize and negotiate in good faith with the union. The union shares this obligation to negotiate in good faith along with a duty of fair representation to its members. Terms and conditions of employment will be determined by the parties through negotiation. This principle normalizes unions as a legitimate party in the labour relations process.

The third principle is that the state determines what is an appropriate bargaining unit and that those bargaining units are highly decentralized. In other words, bargaining generally takes place at the workplace or “enterprise”

level of a single employer (although there are exceptions). This is in contrast to Europe and elsewhere where multi-employer or industry-wide bargaining is predominant. This provision is seen as weakening unions' ability to establish industry-wide conditions and standards¹⁰.

The fourth principle consists of legal protections against state or employer interference with union activities, including organizing. Unions must be autonomous from any form of employer influence and workers cannot be punished for union-related activity. These protections are a prerequisite to workers being able to use their rights by preventing reprisal and employer domination.

The final principle is a restriction on the right to strike. In most cases strikes are permitted only after expiry of a collective agreement and once the parties have reached an impasse recognized by the government (the U.S. has provision for "concerted activities" by workers at any time regardless of union status). This is in contrast to pre-Wagner era labour relations when workers possessed the freedom to strike at any time simply by collectively deciding to stop working. This freedom was not necessarily recognized by the state and was actively opposed by employers but was a key feature of pre-Wagner labour relations¹¹. This principle is seen as labour's concession in the interests of economic stability for receiving legal recognition and protection¹².

In both countries, governments have delegated authority to apply and interpret labour relations rules to labour boards, which are independent, quasi-judicial bodies composed of labour relations experts. Orders of labour boards are binding and can be enforced through the courts, meaning parties can face penalties for contempt of court for failure to comply. Given their independence and authority, labour boards can significantly shape how labour relations laws are translated into practice in both countries.

It needs to be recognized these are high-level legal principles. In practice, adherence to these principles is uneven and complex and most of the time practice falls far short of the ideals stipulated in the principles. It is in the realm of legislative detail that much of the practical implications emerge. Governments enact rules that can strengthen or weaken the commitment to Wagnerian principles and the protections to workers it provides. Over the past 80 years the U.S. and Canada have approached implementing these principles in different ways, leading to significant differences in how their labour relations system work.

Differences Between U.S. and Canada

In both countries, labour relations is a split responsibility between federal and provincial/state governments. In the U.S., employment is a federal responsibility and labour relations for most private-sector employers is regulated nationally, but the federal government has authorized states to regulate in certain issues and in particular industries. States also have authority over public sector labour relations involving state employees.

In Canada, labour is a provincial jurisdiction, meaning provinces regulate the vast majority of workers and employers in both the private and public sector. The federal government has legislation covering federally regulated industries such as banking, interprovincial transportation, railways and airlines as well as federal government employees. In both countries the mix of jurisdictions does complicate discussions of specific labour relations provisions. In this section we will attempt to clarify whose jurisdiction covers an item under discussion.

There are many ways in which labour relations law and practice differs between the two countries. This section will restrict its consideration to those that are identified as being most significant in explaining the outcomes in each country and, in particular, those areas to which Bill 32 makes explicit reference. We can divide the relevant differences into three broad categories: organizing and certification; internal union affairs and dues collection; and, labour disputes.

1. Organizing and Certification

Both countries have a similar process for certifying a union in a workplace. If workers are interested in forming a union, they begin organizing within the workplace. At first the process is informal and may take place in secret. At some point the union must file an application with the respective labour board, who will determine if they meet a minimum threshold to proceed to the next step. In most jurisdictions (discussed below) the board would then supervise a formal secret ballot vote of workers. If a majority of workers vote in favour the union is certified and becomes the exclusive bargaining agent. The union then must negotiate with the employer for a first agreement to solidify their position in the workplace.

Labour relations scholars and practitioners have found this period from initial organizing to signing of a first agreement is the most vulnerable period for unions and their members¹³. It is this period when employers who do not wish to be unionized have the most opportunity to thwart workers' wishes. Therefore the differences between Canada and U.S. in this area are important. There are four main differences between the two countries.

EMPLOYER RIGHT TO FREE SPEECH

In both countries during all steps of the organizing drive, the employer has a right to express an opinion about unionization, to certain limits. Both countries allow employers to offer facts about what unionization will mean and express opinions about unionization in communications with workers. Both prohibit any form of threat, coercion, promise or false statement. Within this high level agreement a large divergence has emerged regarding the scope of what an employer is allowed to say and how.

In general, employers in the U.S. have a broader right to free speech in the workplace. The labour board tends to provide a greater degree of latitude in the content of employer communications, including not monitoring the accuracy of statements made¹⁴. The types of activities in which the employer can engage are also broader, giving them greater access to workers on a day-to-day basis than Canadian employers. One significant example is that legislation actively permits so-called “captive audience” meetings, which are mandatory meetings during work hours where the employer can present their case against the union¹⁵. Captive meetings occur in Canada (to an increasing degree), but labour boards view them more suspiciously and take into consideration the captive nature of the meeting. The broader scope for employer intervention has led to a large “union-busting” industry in the U.S., where consultants are hired to run sophisticated anti-union campaigns¹⁶. Again, consultants of this nature also exist in Canada but are not as widespread¹⁷.

Research shows that employer tactics during an organizing drive and certification campaign have a significant impact on the likelihood of a vote succeeding. “[V]irtually every study has demonstrated a negative link between employer resistance and the establishment of union representation rights”¹⁸. The more activities an employer uses, the more likely the vote will fail¹⁹. Captive audience meetings are found to be particularly effective at suppressing union support²⁰.

CARD CHECK AND VOTE TIMELINES

In Canada, some jurisdictions, including Quebec, New Brunswick, P.E.I. and federal, have provisions for automatic certification without a vote, called “card-check certification,” if the union can demonstrate majority support through signed membership cards. The remaining provinces, including Alberta, align with the U.S. in requiring a certification vote to confirm majority support. The key differences between Canada and the U.S. is the speed at which those votes take place. In Canada, votes on average take place between seven and 10 working days following filing of the application²¹. In the U.S. the timelines are between 24 and 30 calendar days²².

The key reason for this difference is procedural. In the U.S., once an application is filed, the labour board must conduct a hearing to determine its validity. It must decide on a range of matters including appropriateness of the bargaining unit, and whether the union has demonstrated sufficient support. Both the union and employer are allowed to make presentations at the hearing and raise objections. The process can result in a delay of a couple of weeks or more before a vote is ordered. In Canada, those issues are expedited by the board and many objections are held in abeyance until after the ballots are cast (and before they are counted), resulting in a much shorter turn-around to the vote.

The time between application and vote is crucial in determining the success or failure of the vote. The longer it takes to reach the vote, the more likely the vote will fail²³. In the U.S., research has shown that a difference of even four days can make a difference²⁴. The main reason is a longer delay provides the employer with more time to communicate with workers and to organize a counter-campaign²⁵.

WEAK EMPLOYEE REMEDIES

The third divergence is in the area of penalties for violating the rules. Both countries offer remedies for employer or union violations of the regulations, often called unfair labour practices. While both parties can commit unfair labour practices, most complaints are lodged against employers (in part because many of the protections in legislation are aimed at workers). Labour boards conduct hearings to determine if an unfair labour practice took place. Remedies for employer misconduct in Canada vary by province but generally include a basket of measures including ordering a new vote, providing union access to the workplace and re-instating fired workers. Many provinces, including Alberta before Bill 32, also empower the labour board to grant automatic certification if they believe the violation to be significant enough.

Researchers in Canada point to the ineffectiveness of remedies in this country²⁶. In particular, labour boards' reluctance to use automatic certification undermines the impact of this remedy. The weakness of remedies is an ongoing concern among labour relations researchers and practitioners in all Canadian jurisdictions.

In the U.S., the range of remedies is similar but generally applied in a more conservative manner²⁷. Researchers in the U.S. have long argued remedies generally applied in certification vote violations are insufficient in exacting a financial cost and come too late in the process to deter employers from engaging in illegal activity²⁸. Unions file a complaint in only half the cases where an employer is reported to have engaged in illegal activity, with the lack of effective remedies cited as a main reason²⁹. In no jurisdiction is automatic certification an available remedy.

Inadequate remedies negatively impact certification votes because they create an incentive for employers to engage in active anti-union activities. “Consistently failing to award fully compensatory remedies for ULPs [unfair labour practices] encourages employer law-breaking by fostering the expectation that employers will not likely be required to answer fully for their wrongdoing ... These expectations shape actors’ cost-benefit assessments and encourage lawbreaking by reducing the expected cost of violations for employers”³⁰. These findings are supported by research into employment regulation violations, which shows that imposing higher costs on employers for violations leads to greater compliance with regulations³¹.

While neither jurisdiction has a particularly effective system of remedies, the narrower scope and more conservative interpretations of the American system further erodes enforcement of labour relations law in the U.S. compared to Canada.

FIRST CONTRACT

Once certification is achieved, the workers are still not out of the woods. Collective representation is not solidified until a first contract is signed. In both countries, employers often use this uncertain period to make a final effort to thwart unionization. The most common tactic is to slow bargaining and delay a settlement as long as possible based on the calculation that the longer workers go without seeing a resolution, the less they will support the union. In both countries it has become increasingly difficult for unions to achieve a first collective agreement with a newly organized employer³².

This is an issue in both countries and to a degree there is little governments can do other than enforce existing rules and attempt to compel the parties to bargain in good faith. However, most jurisdictions in Canada have adopted a provision allowing the labour board to impose first contract arbitration where the unresolved issues are referred to an independent third party who will rule on the outstanding items. The arbitrator’s decision is binding on both parties and thus it is a method for reaching a first contract and establishing stability in the labour relations environment. First contract arbitrations are effective in decreasing the number of new certifications that flounder before reaching a first agreement³³. First contract arbitrations also reduce the number of labour disputes arising from first contract negotiations³⁴.

There is no access to first contract arbitration³⁵ in the U.S., and recent efforts to incorporate it into U.S. law have failed. Combined with other provisions related to replacement workers and unilateral employer declarations (discussed below), workers in the U.S. are more likely to fail to reach a first agreement³⁶.

2. Internal Union Affairs and Dues Collection

The second major area of divergence is how governments approach unions' internal affairs, including collection of membership dues. Regulation of how unions operate and collect revenue may appear a technical matter, but it can profoundly impact how effective unions are at representing their members. How governments regulate union affairs is an area where Canada and the U.S. have differed significantly.

In Canada, unions have a fairly complex legal status, but generally are perceived by governments and the courts as a form of voluntary organization where they are accountable to their members through internal structures and processes, including a constitution and/or bylaws³⁷. As a consequence, Canadian governments have largely remained hands off regarding union internal affairs. Unions are provided the same degree of autonomy and self-governance as other non-profit voluntary organizations³⁸. Government intervention restricts itself to ensuring unions comply with their duty of fair representation of members as found in labour relations acts.

Conversely, since the 1950s the U.S. has stringently regulated the internal affairs of unions. The Labour Management Reporting and Disclosure Act (Landrum-Griffin Act), passed partly in response to reports of union corruption and links to criminal activity (e.g., Jimmy Hoffa), tightly regulates union elections, financial disclosure and membership accountability. Terms for elected officials are explicitly outlined, as is a requirement for secret ballot voting in union elections. Unions are required to file annual reports to the government, that are available to the public, detailing their financial position, union officer salaries, operating rules and other information. Observers note that "labor organizations are among the most regulated organizations in U.S. society today"³⁹.

Similarly, the two countries approach dues collection (sometimes called union security) differently. Unions' primary source of revenue is membership dues. Historically unions needed to collect dues directly from each member, a time- and resource-intensive process (although also facilitative for organizing). In the contemporary labour relations regime, both countries have established procedures for dues to be collected by the employer from worker paycheques and remitted to the union, something called "dues checkoff." The two nations handle dues checkoff differently.

In Canada, access to dues checkoff was established in a 1946 arbitration decision by Justice Ivan Rand. In what is known today as the Rand Formula, Justice Rand decided that while workers could not be compelled to join the union, they continue to reap the benefits of being covered by a collective agreement and therefore should be required to help finance the activities that bring those benefits⁴⁰. Rand was avoiding what is often called "the free

rider problem,” where a collective good is undermined when a portion of the collective does not pay for the provision or upkeep of that good. The Rand Formula has been repeatedly confirmed as legal and constitutional and thus has become the norm in all jurisdictions⁴¹. Under Rand, workers can only opt out of union dues for a narrow range of reasons, such as religious denomination.

In the U.S., governments and the courts have placed a priority on their constitution’s First Amendment right to free speech when addressing the issue of dues collection, arguing workers should not be required to financially support an organization whose activities they oppose. This has resulted in a complex set of arrangements around dues. First, the closed shop, where a worker must become a member of the union to remain employed at the workplace, is explicitly forbidden. Closed shops are rare in Canada but governments treat it as a matter for bargaining.

Dues checkoff has evolved in the U.S. into a multi-tiered structure. Workers can opt to become full members of the union, pay full union dues and receive the rights of membership (right to vote, participate in union activities, etc.), or they may choose to not join the union and pay agency fees. Agency fees are calculated as a percentage of dues used for core representational activities – collective bargaining, contract administration, grievance settlement. Other activities, such as education, community outreach, political donations and issue campaigns are excluded from agency fees.

To implement this two-tier system, unions are required annually to provide all workers they represent the percentage of dues used for non-representational activities and provide an opportunity for the worker to opt out of membership. They must then repay or reduce the dues paid by dissenting workers accordingly. Agency fees range according to union but average 75 per cent of full membership dues⁴².

A recent Supreme Court decision has upturned this two-tier structure for public sector unions. In 2018 the Court decided in *Janus v. American Federation of State, County, and Municipal Employees* (Janus) that requiring public sector workers to pay any union fees violated their right to free speech. As a result, unionized public sector workers can now opt out of union fees entirely while still benefitting from the rights and benefits afforded by the collective agreement. Unions are still legally required to represent workers who opt out. Two years after the decision, most public sector unions have not experienced significant drops in agency fee workers or revenues and many have seen modest membership increases⁴³. In this period, unions have launched extensive organizing efforts to convert agency fee workers to full membership, so it remains unclear of the longer-term effects of this court decision.

Two other developments further complicate dues collection in the U.S., both related to state's delegated authority to legislate in certain matters and jurisdiction of state employees. In recent years, some state governments have implemented legislation (often called "paycheck protection" acts) prohibiting the collection of union dues to be used for political purposes⁴⁴. Some versions require the member's consent to collect those dues while other versions ban the collection of dues for political activity entirely.

Second, in the Taft-Hartley Act, the federal government extended to the states the authority to pass legislation related to union membership. The authority allows state governments to decide whether dues, including agency fees, can be collected without a worker's consent⁴⁵. Currently, 27 states have passed legislation prohibiting union membership or agency fees as a condition of employment. These laws, commonly referred to as right-to-work laws, have the effect of requiring the union to receive the active and ongoing consent of each worker it represents to have dues deducted from their paycheque. Right-to-work provisions are highly controversial, including their name, and are generally associated with low unionization rates and lower income levels. Their economic effects will be discussed more fully in Part 4.

3. Labour Disputes

The third area of divergence is related to the regulation of strikes and lockouts. While both countries regulate the timing of strikes and the permissibility of strike activities, there are small but important differences in how they approach them.

As stated earlier, both countries prohibit most strikes during the life of a collective agreement and both require certain steps to be taken (e.g., mediation, strike vote, notice) for a strike or lockout to be legal. Both also prescribe what kinds of activity can take place during a strike.

In both nations, picketing is the standard activity during a strike/lockout. The governments and courts in each country have attempted to balance workers' right to express themselves with the rights of the employer and the public to not be unreasonably interfered with. Each has landed in a different place on that spectrum.

In Canada, rules on picketing vary considerably by province, but in general, picketing at the employer's workplace is permitted and that picketing can disrupt the movement of others to the extent to allow communication but not further⁴⁶. Violence or coercion is not permitted. Secondary picketing (picketing a location other than the workplace such as a supplier or customer) was once forbidden but due to court decisions these prohibitions were found to be contrary to the Charter of Rights and Freedoms (to be

discussed more fully in Part 3). Secondary picketing is now legal under similar circumstances as primary picketing.

U.S. courts have been somewhat more restrictive. Picketing activity is regulated by state and local laws and thus also varies by jurisdiction. Primary picketing is permitted, and protected by freedom of speech, but courts have been more acquiescent to employer's property rights and have been less open to economic disruption caused by picketing⁴⁷. Secondary picketing is also permitted in the U.S., but the law includes a specific limitation: "it is unlawful for a union to coerce a neutral employer to force it to cease doing business with a primary employer"⁴⁸. In other words, a secondary picket can take place at a secondary location, the pickets can communicate with the owners or employees of the business or the public but cannot interfere with the operations of that business or attempt to compel the business to boycott or cease doing business with the employer at the heart of the dispute.

Another key issue is the use of replacement workers during a strike. Replacement workers are hired during a labour dispute to perform the work of the striking workers. They are highly controversial. Some research found that replacement workers prolong strikes and lead to lower wage settlements for workers⁴⁹. However, in general it has been difficult to isolate the effects of replacement workers due to the complexity of variables involved⁵⁰. Opponents argue the use of replacement workers undermines the union's ability to exact an economic price on the employer by allowing them to continue production. It is also logical to expect that replacement workers could increase the risk of violence on the picket line as strikers attempt to impede their access to the workplace. Only two provinces (B.C. and Quebec) prohibit the use of replacement workers in Canada. No jurisdiction in the U.S. prohibits them.

The key difference between Canada and the U.S. is that in Canada replacement workers are temporary and employers have a legal obligation to rehire striking workers upon resolution of the dispute (if the strike was legal). In the U.S., employers have the option of hiring replacement workers on a permanent basis and in most circumstances have no obligation to rehire striking workers. This vastly increases the risks of going on strike for American workers, as it is easier for the employer to avoid the economic costs and replace the workers entirely. As a result, the use of replacement workers reduces the incidence of strikes in the U.S.⁵¹.

4. Overall

Many of the differences between Canadian and American labour relations are small. However, small differences can lead to significant diversion in outcomes. The countries' relative unionization rates are a stark example of the different trajectories their labour relations regimes are pursuing. Unions in both countries are experiencing significant challenges in the face of neo-liberalism, globalization and growing anti-union animus among employers and governments. However, the small, apparently technical, ways their laws regulate labour relations have led to sizeable differences in outcomes for the respective labour movements.

The key differences appear to be in how each country handles the balance between employer rights and worker rights. Measures that restrict workers' ability to exercise their rights, such as restricting picketing, making certification more difficult and regulating internal union affairs, lead to a labour relations environment that is more hostile to worker collective activity. Measures that expand employer rights have a similar effect.

On one level, whether these effects are positive or negative depend upon one's perspective on the value of unions. That is why these laws are controversial and divisive. However, the effects spill beyond unions and their members and touch upon the rights of all workers and have significant consequences for the economy and the social fabric. These spillover effects will be discussed in Part Four. First, it is important to understand what the provisions in Bill 32 are, which we turn to next.

Part Two: What is Bill 32?

Alberta's History of Anti-Union Legislation

Bill 32 is not the first time Alberta provincial governments have passed legislation aimed at revamping labour relations and restricting the rights of unionized workers. Here is a list of some examples of legislation targeting union rights.

1981: Bill 85: Labour Relations Amendment Act. This bill, introduced a few months after the passage of the Labour Relations Act, amended that new act by adding a provision that a union cannot be certified as a bargaining agent if support for the union was the result of picketing.

1983: Bill 44: Labour Statutes Amendment Act. This bill again amended the Labour Relations Act. It banned strikes for health-care workers, instituting a system of compulsory arbitration instead. It is also the first bill to introduce sweeping penalties against unions, union officials and workers who engage in an illegal strike. Unions could be fined \$1,000 per day, union officials up to \$10,000 and other individuals \$1,000. The bill also authorized the labour board to suspend the collection of dues to the offending union for up to six months. This penalty was unique in Canada and remained in place for decades.

1988: Bill 22: Labour Relations Code. In an overhaul of the labour relations system, this bill eliminated card check certification, removed automatic certification as a possible penalty for unfair labour practices, relaxed rules regarding employer involvement in certification campaigns, and implemented strict restrictions on picketing, including a complete ban on secondary picketing. Interestingly, this bill was introduced in response to employer backlash over a bill (Bill 60) introduced the previous year that provided a more balanced approach to labour relations.

2013: Bill 45: The Public Services Continuation Act. One of a pair of bills aimed at restricting public sector workers' rights. Bill 45 expanded the prohibition on public sector strikes to include any articulation of a "threat" to strike. It imposed significant penalties on unions and individuals who have been found to threaten strike action, including dues suspension and fines of up to \$1 million per day. Bill 45 was passed but never proclaimed and formally repealed in 2015.

2013: Bill 46: Public Service Salary Restraint Act. The second of the pair of bills imposed a wage settlement on public sector workers of zero increases in the first two years and one per cent increases in the third and fourth year (it also offered a small lump sum payment). Unions received an indefinite court injunction preventing the implementation of Bill 46.

2019: Bill 2: An Act to Make Alberta Open for Business. This bill introduced early in the United Conservative Party's (UCP's) term repealed two provisions enacted by the previous New Democratic Party (NDP) government. First it removed the automatic certification ("card check") provisions if 65 per cent of workers sign cards. It also reduced the amount of time a union has to present signed cards from six months to 90 days.

2019: Bill 9: Public Sector Wage Arbitration Deferral Act. Public sector unions had signed collective agreements in the previous couple years that provided for a "wage re-opener" (where negotiations take place just over wages) in the last year of the agreement. Bill 9 unilaterally delayed the deadline for arbitration of these wage re-openers from June 30 to Oct. 31. Union efforts to prevent its implementation failed. Constitutional challenges on the bill are still outstanding.

2019: Bill 21: Ensuring Fiscal Sustainability Act. This omnibus bill included some provisions amending the Labour Relations Code. Specifically, it removed a ban on replacement workers in the public sector and authorized the provincial government to impose secret mandatory bargaining mandates on public sector employers.

2020: Bill 1: Critical Infrastructure Defence Act. This bill creates a new set of offences prohibiting interference or damage to "critical infrastructure." The term critical infrastructure is broadly defined and includes pipelines, manufacturing plants, refineries, roads and highways, agricultural operations, public utilities and more. Penalties range between \$1,000 and \$25,000 and/or up to six months imprisonment. The bill is widely viewed to include picketing activities as prohibited interference.

Bill 32, formally known as Restoring Balance in Alberta's Workplaces Act (2020), was introduced in the Alberta Legislature on July 7, 2020. It passed third reading on July 28 and received royal assent on July 29. Bill 32 is an omnibus bill amending six different employment and labour-related acts. The most extensive of the changes came to the Employment Standards Code and the Labour Relations Code (LRC). Inset 1 shows this is the latest in a series of legislation passed in Alberta's history targeting labour relations, including four additional bills introduced by the UCP government since 2019.

Changes to the Employment Standards Code include loosening of overtime rules by expanding "averaging arrangements," making it easier for employers to sidestep employment standards through "variances," and reducing employee protections related to layoffs. These changes are outside the scope of this report but are mentioned to highlight the sweeping nature of Bill 32's amendments.

This report will focus on nine significant changes that either curtail union activity or impair workers' right to organize and participate in a union: increased certification vote timelines; reduced employer penalties; prevention of open period; limitations to picketing activity; restrictions to secondary picketing; financial statement requirements; identification of political activities; mandatory dues opt-in; and, increased union penalties. There are additional changes, in particular to construction labour relations, which will not be addressed in this report. This section will examine the nine changes and explain how they diverge from previous legislative provisions. The relevant changes can be clustered into three themes based on what area of union activity is impacted.

Making it Harder to Join a Union

Bill 32 enacts three amendments that will make it harder for workers to exercise their democratic right to choose representation by a union. This section will summarize the amendments and discuss their impact on workers' right to organize a union.

1. Certification Vote Timelines

Before Bill 32, the Labour Relations Code (LRC) laid out a series of deadlines within which the Alberta Labour Relations Board (ALRB) must consider and decide upon an application for certification. From the date the union files the application, the entire process must have been completed, including a final decision, within 20 working days (25 days if using a mail-in ballot) unless granted an extension by the ALRB chair. Provisions also ensured the certification vote was held no more than 13 working days from date

of application (14 for mail-in). There were also deadlines for steps in the process, such as when employer needs to provide information to the ALRB. These provisions were implemented by the previous NDP government in 2017. Previously the LRC required a vote “as soon as possible.”

Bill 32 removes these detailed timelines and deadlines and replaces it with a six-month deadline for completion and only requires the ALRB hold the certification vote “as soon as possible” (s. 34), a return to the pre-NDP terminology. While the previous timelines in the LRC were broadly comparable to other jurisdictions, Bill 32 returns Alberta’s provision to among the weakest. Table 1 outlines certification provisions for each jurisdiction. The table shows that most jurisdictions opt for either automatic certification or a legislated timeline. Only Alberta and Saskatchewan provide neither.

Table 1: Certification Procedures, Canadian Jurisdictions

	Legislated Timeline to Vote	Automatic Certification
British Columbia	Five days	No
Alberta Pre-2019	13 days	Yes
Alberta Bill 32	“as soon as possible”	No
Saskatchewan	None	No
Manitoba	Seven days	No
Ontario	Five days	No
Quebec	None (60 days to final decision)	Yes
New Brunswick	None	Yes
Nova Scotia	Five days	No
PEI	None	Yes
Newfoundland	Five days	No
Federal	None	Yes

Source: Applicable Labour Legislation

2. Weakened Employer Penalties

Before Bill 32, the LRC contained two provisions aimed at reducing employer union avoidance strategies. The first was a provision permitting the ALRB to automatically certify a bargaining unit if the employer was found to have committed an unfair labour practice during the certification process that significantly interfered with workers’ right to choose unionization. A second was to permit the ALRB, upon application by one of the parties, to order binding arbitration to resolve a dispute between the parties involving the negotiation of a first agreement. Both of these provisions were introduced by the previous NDP government.

Bill 32 does not remove these provisions directly. The ALRB continues to have the discretion to impose remedial automatic certification and first contract arbitration. However, in both sections a key phrase has been added. Related to automatic certification, the following is added to s.17(1): “certify the trade union as the bargaining agent for the employees in the unit that the Board considers appropriate for collective bargaining only if no other remedy or remedies would be sufficient to counteract the effects of the prohibited practice” (emphasis added). A similar phrase is added to s.92.3 for first contract arbitration directing when the ALRB can impose arbitration: “(c) no other remedy or remedies would be sufficient to counteract the effects of the failure to comply with the act”. In both cases, the discretion of the ALRB is reduced and the measures can only be considered if all other actions have been rejected.

Remedial certification is available in most jurisdictions in Canada. Bill 32 replicates language recently introduced in Ontario, which also makes certification a remedy of last resort. A form of first contract arbitration is found in every jurisdiction except New Brunswick and P.E.I.

3. Preventing Open Periods

Before Bill 32, the LRC created a period during the valid term of a collective agreement where applications to leave or switch unions are permitted. These so-called “open periods” provide workers a legal opportunity to “change their minds” about whether they wish to be represented by a union or which union will represent them. In the LRC, the open period consisted of 60 days before the expiry of the agreement and a 60-day window each year for agreements longer than two years.

Bill 32 inserts language permitting the employer and the union to sign a new collective agreement before the open period begins, an action previously not permitted. A majority of members must vote in favour of the new agreement and the union must inform them that doing so would prevent the open period.

The concept of the open period may be confusing for those not engaged in labour relations. It is an important manifestation of workers’ democratic right to choose whether to be represented by a union. Much of the attention is on protecting that right when workers first move to join a union, which is when they are most vulnerable to employer attempts to undermine that right. However, to fully actualize the right, workers must also be able to choose to leave or switch union representation. Open periods were created to balance workers’ right with the need for stability following the signing of a collective agreement. Employers and unions have a legitimate interest in knowing that for a period of time the terms of the employment relationship will remain unchanged, including that the workers will be represented by

the union. During that time applications to decertify or change unions are not allowed. However, workers' consent to be represented is not forever. The open period provides a window of time during the life of each collective agreement when such applications are permitted. It is the time period when workers can act upon their right to change the nature of their representation.

The prevention of open periods was an allowed practice in Alberta until 2009, when an ALRB decision (Firestone [2009] Alta. L.R.B.R. 134) ruled that it violated workers' rights to choose their representation. The decision was the culmination of a series of controversial cases where unions signed early agreements expressly to avoid the threat of a raid by another union. The practice was also encouraged by employers seeking to retain a more employer-friendly union in the workplace. Bill 32 re-establishes the practice of preventing open periods and effectively overturns the ALRB decision.

Restricting Union Activities

Bill 32 also enacts two measures that restrict union activities. Specifically, it implements limitations on picket lines during labour disputes that substantially reduce the effectiveness of picket lines. This section outlines these restrictions.

1. Picket Line Limitations

Under the division regulating strikes, lockouts and picketing, Bill 32 adds the following section: "obstructing or impeding a person who wishes to cross a picket line from crossing the picket line is a wrongful act" (s.84(3.1)). The context for this provision is found in the section immediately preceding which stipulates that picketing "must be conducted without wrongful acts." The effect of this addition is clear. The act of stopping, blocking or delaying anyone who wishes to cross a picket line becomes illegal under Bill 32.

Picketing is a central activity during a labour dispute and serves multiple purposes. First, it signals to customers, other workers and the public that a dispute is ongoing. Awareness is important for drawing attention to the dispute. Second, the picket line provides workers an opportunity to communicate with potential customers about the dispute and encourage them to not patronize the employer until it is resolved. Third, it creates a physical presence to make it more difficult for the employer to engage in their regular business operations. Picket lines slow or impede traffic in and out of the business. This third purpose is both one of the most important functions of a picket line and one of the most controversial. For a strike to be successful, the workers must find a way to inflict costs on the employer and the most common method is to interfere with business operations. In contrast, employers seek to minimize disruption by circumventing or restricting picketing activity.

Legislation in most jurisdictions is either silent on picketing activity or contains vague language regarding prohibited activities, leaving the responsibility for interpreting what is legitimate activity to the labour boards and the courts. Alberta's language is the most restrictive in the country. The effects of this change will be discussed more fully in Part 3.

2. Secondary Picketing Restrictions

A group of striking workers may decide to establish a picket line at a location other than the workplace(s) of the employer engaged in the dispute. The location might be a supplier or customer of the employer, an associated location owned by the employer, or a third party engaging in activities that aid the employer during the dispute. These forms of picket lines are referred to as secondary picketing and they are considered legal forms of expression (a topic discussed further in Part 3). Bill 32 restricts secondary picketing by enacting a new requirement that a union must seek and receive permission from the ALRB before it engages in any secondary picketing (s. 84.1). The ALRB is also empowered to place any conditions on the nature of the picket as it sees fit.

B.C.'s legislation contains similar provisions to Bill 32. All other jurisdictions opt to not actively regulate secondary picketing, leaving its application to labour boards and the courts.

Interfering With and Penalizing Unions

Bill 32 also contains four provisions designed to either increase penalties on unions for legal infractions or to make it more difficult for unions to conduct the affairs of their organization. This section examines those provisions.

1. Financial Statements

Bill 32 adds a new clause (s.24.1) which imposes a requirement on unions to provide an annual financial statement "to each member" of the union. The bill allows for regulations to stipulate the information and form the statement must take.

As part of accountability to their members, most unions already make available a financial statement of some form. These are usually presented at the union's annual general meeting or convention. Therefore on the surface this provision does not appear to be onerous. However, two aspects of the provision should be noted. First, the provision allows the government to determine the form and content of the statement, which may deviate significantly from the accounting and reporting practices of the union. Second, the provision requires the statement be provided to every member. While it does not indicate how it shall be provided (which could make up part of the regulation), the requirement deviates significantly from current union practice.

Labour legislation in most Canadian jurisdictions contains provisions requiring a union to provide financial statements to a member upon request. No jurisdiction goes as far as to impose mandatory distribution to all members. The Harper Conservative government passed legislation in its final term, Bill C-377, that imposed stringent public financial reporting on unions. The bill was repealed by the Trudeau government before coming into force⁵².

2. Identifying Political Activities

Another new provision (s.26.1(1)) requires unions to indicate the percentage of dues dedicated to core activities related to representing members and fulfilling legal obligations and the percentage used for “political activities and other causes.” These other activities are broadly defined (s.26.1(1)(a)):

1. General social causes or issues
2. Charities or non-governmental organizations
3. Organizations or groups affiliated with or supportive of a political party
4. Any activities provided by the regulations

Alberta is the only jurisdiction in Canada to require unions to categorize their expenses in this manner. The provision will likely impose significant administrative burden on union operations as they will be required to classify every expenditure as core or other. Regulations clarifying the definition of each category have not been released, leading to confusion about how to proceed with the classification.

3. Dues Opt-In Requirement

The purpose of requiring unions to identify the share of non-representation activities is to give form to a related new provision (s.26.1(2) to 26.1(11)) requiring members to only pay the portion of dues related to core activities unless they elect to pay the full amount. In other words, every individual member must actively opt-in to dues dedicated for other activities.

Specifically, the union must provide every member with information regarding the percentage of dues used for non-representational purposes and provide the member the opportunity to “elect” to pay that portion of dues. Members will periodically be provided an opportunity to revoke any previously made election. Further, unions are prohibited from using dues collected for core activities for any other purpose and they are prohibited from taking any disciplinary action against a member who has not opted-in. When, how often and by what method such opt-ins will take place are subject to regulations, which have not been released at the time of writing.

This provision is unprecedented in Canada. No other jurisdiction has any requirements regarding allocation of dues and opting-in/out of paying of non-representational dues.

4. Increased Penalties

Two new provisions in Bill 32 seek to increase penalties for unions who breach the LRC. The first (s.57(1) & (2)) imposes an additional penalty on unions who breach the LRC during a certification drive. The LRC has long had a 90-day “cooling off period” when a certification application fails or is withdrawn. This is to prevent repeated or vexatious applications without merit and requires the union to start the process over. With Bill 32, a union who is found to have engaged in “a prohibited practice,” more commonly known as an unfair labour practice (ULP), during the drive is prohibited from filing a new application for the same bargaining unit for six months. This new penalty is in contrast to the weakened remedies applied against employers who engage in prohibited practices, discussed above.

The second provision (s.114) re-inserts a provision removed by the previous NDP government that permits the LRB to order a suspension of dues forwarded to a union by the employer for a period of six months if the union is found to have engaged in an illegal strike. This penalty is in addition to the fines that can be levied to the union, its officers and/or members (s.160). The union retains the legal right to collect dues directly from members. Bill 32 also inserts a parallel penalty against employers who engage in an illegal lockout (s.115), requiring them to submit dues to the union during an illegal lockout.

Part Three: The Effects of Bill 32

The previous part briefly outlined some of the practical implications of key provisions found in Bill 32. However, the effects of the Bill go beyond the specific measures enacted. When examined as a whole the Bill presents a large-scale reworking of Alberta's labour relations system. It directly impacts workers' ability to join a union and undermines unions' ability to represent their members. It is a significant regulatory shift in favour of employers. In many respects it introduces characteristics of the American labour relations system in Alberta.

The effects of Bill 32 go beyond labour relations and the specific rights of workers and unions. Many of the rights associated with unionization and union activity are protected by the *Charter of Rights and Freedoms*. Many of the changes in Bill 32 threaten those charter protected rights. The notion of undermining charter rights reverberates beyond labour and has implications for many segments of civil society. It is not only unions who will be losers under Bill 32.

This part will examine the broader effects of Bill 32. First it will examine the impact Bill 32 will have on labour relations in Alberta and how it Americanizes regulation of labour relations in the province. Then it will discuss the bill's implications for charter-protected rights in Alberta.

Effects of Labour Relations

Labour relations systems are more than a series of laws and regulations. They are the result of a matrix of economic, political, and legal factors. Legal scholar David Doorey has observed that every law related to work "is a result of the interaction among a variety of forces, including fierce debates, rich histories, reluctant compromises and sometimes violent and bloody clashes. The laws that govern work in any society emerge from this complex milieu. Therefore, we need to understand that legal rules do not operate in a vacuum"⁵³. Understanding this, we need to see the changes enacted in Bill 32 as more than the sum of their parts. The individual amendments interact with one another to create broader impacts on the system as a whole. Small changes that may on the surface seem minimal, combine with other factors to shift dynamics within the system.

More specifically, the changes brought forth by Bill 32 do more than change legal details. They will change the parties' behaviour by providing incentives and disincentives for certain actions. They alter the balance of power between the parties by providing more or fewer avenues for each party to exert power. Finally, the changes communicate a political context for labour relations, signaling whose interests will be considered paramount in any conflict.

To this end, we need to go beyond an analysis of individual amendments to understand how the package will alter Alberta's labour relations system. Many of the impacts will be profound. The broader impacts can be clustered into the same three categories as discussed in Part Two.

1. Making it Harder to Join a Union

The changes focused on certification combine to make it more difficult for workers to exercise their democratic right to join a union. They do so by removing the checks and balances established to contain and manage the actions of the parties. In particular, they remove protections that might inhibit employer interference in the certification process. The amendments will trigger changes in employer behaviour as they adjust to the new legal landscape. Research suggests that the nature of the amendments will lead to weakened access to unionization. They will do this in a number of ways.

If we look first at the removal of timelines for certification votes we find that the changes are likely to undermine workers' democratic voice. The key concern is the prospect of employer interference in the process. Under Canada's labour relations system it is workers' democratic right to decide whether to be represented by a union free of employer interference. Minimizing the opportunity for employers to interfere in certification decisions is the general motivation for governments to regulate this activity⁵⁴. In most cases, before the application is filed the union and its supporters are working in secret and the employer may not be aware of the organizing campaign. Upon filing the application, the desire of the workers to be represented by a union becomes public. The more time available between the application and the vote, the greater the opportunity for the employer to actively engage in the workers' decision process.

Employer engagement in the certification process is problematic. While most jurisdictions, including Alberta, afford employers a right to free speech to articulate their interests, the scope of what is an allowable action is bounded to prevent the employer from unduly influencing workers. However, determining what is appropriate or inappropriate employer engagement can be difficult. Research has found that employer campaigns against unionization have increased in both frequency and intensity⁵⁵. Inappropriate employer interference is also on the rise⁵⁶.

These patterns are relevant, as they demonstrate that lengthening the time between application and vote increases the risks that employers will interfere with the process. As discussed earlier, studies have consistently shown that certification success rates drop when jurisdictions shift from automatic certification to mandatory representation vote and even further when the time period between application and vote increases⁵⁷. Most scholars

conclude that the key variable is the opportunity for employers to influence workers at the worksite, a captive environment where the employer exerts disproportionate influence⁵⁸.

Extending or removing legislated timelines leads to longer delays. National Labor Relations Board (NLRB) data in the U.S. shows that under a series of changes enacted in 2015 by President Obama the median number of days from petition (application) date to election (vote) date dropped by over two weeks (from 40 days to 24 days). They then increased again to 31 days after Trump repealed some elements of the reforms, including increasing timelines⁵⁹. Further, the longer timelines are correlated with lower success rates in those elections⁶⁰. It is expected that under Bill 32, the number of days to reach a certification will increase. The consequence of a delay is the increased likelihood that employer involvement will lead to fewer successful certifications.

The ALRB does not release data regarding time lapsed from application to vote. It does provide data on certification applications and results. As of the time of writing the last available year is 2018/19, the second fiscal year the NDP amendments regarding automatic certification and timelines for votes were in force. During the two years with those provisions, 55.0 per cent (187 of 340) of applications were successful. In the two years immediately prior 51.7 per cent (104/201) of applications were certified⁶¹. Caution must be taken in interpreting this data as the sample size (two years) is small and many certifications fail for procedural reasons unrelated to the legislative changes. Without reliable data on election timelines it is difficult to reach firm conclusions. However, there does appear to be a small positive effect on certifications, likely due mostly to the automatic certification provision which removes completely the opportunity for employer interference.

Even if a certification vote is successful the workers and their union are not yet out of the woods. As discussed above, the period from certification to first contract also provides opportunity for an employer to overturn workers' unionization decision. During this timeframe there is no agreement in place to bind the actions of the parties, the union has not yet established its rights to represent the workers, and the workers have only minimal legislative protection. About 25 to 40 per cent of first contract negotiations end in failure⁶².

It is noted that Bill 32 does not remove the option first contract arbitration; it is maintained as remedy of last resort. However, here it is important to remember that the labour relations system is more than a set of specific legal provisions. The broader context of Bill 32 needs to be considered. The downgrading of first contract arbitration is one part of a multi-faceted political agenda, in Bill 32 and beyond, aimed at shifting the balance of power between workers and employers. The ALRB, granted the authority to adjudicate labour relations conflicts, is a quasi-judicial body independent from government control. However, the ALRB is a creation of the provincial government, the ALRB members are appointed by the government, and the ALRB is bound by the mandate and directions provided by legislation. Board members, when ruling on future cases, will read and attempt to interpret the intentions of the legislators when deciding appropriate remedies. Classifying first contract arbitration as a remedy of last resort will decrease the likelihood of their use. In analyses of Bill 32, employer-side lawyers and advocacy groups have pointed to these changes as significant (and positive), suggesting they see the potential benefit in such language⁶³.

The provision allowing the closure of open periods may seem, on the surface, to be a measure that will benefit unions by permitting them, along with the employer, to circumvent open periods, thus securing their certification. From one perspective, permitting workers to consent to an early application of a new collective agreement is unproblematic. If they are content with their representation, closing the open period is moot. If they are not content, theoretically, they could reject the new agreement and wait for the open period.

In practice, closing opening periods is more likely to protect weaker unions from accountability to their members. There have been documented cases in Alberta and Ontario where a union more inclined to collaborate with the employer has colluded with the employer to prevent an open period application to switch unions by disgruntled workers through early renewal of collective agreements, thus closing the opening period prematurely⁶⁴. A coalition of construction employers and an "alternative" union have been lobbying since for this provision to be included in the LRC⁶⁵. In the light of the history of its use, open periods can be seen as a potential threat to workers wishing stronger representation of their interests. The provision is more likely to shield a weaker union from accountability to its members than it is to increase security for traditional unions.

2. *Restricting Union Activities*

Where the amendments just discussed are aimed at making it less likely a worker joins a union, the two changes targeting picketing are designed to reduce the effectiveness when workers go on strike. Strikes and lockouts are controversial actions. They are also rare, as the vast majority of collective agreements are settled without a strike/lockout.

It is important to take a step back and consider the purpose of a strike or lockout. The parties have been unable to come to an agreement through negotiation. A strike/lockout is about increasing the price of not finding a settlement. Both parties pay a cost for engaging in a strike/lockout. The workers lose wages and private sector employers lose profits through reduced or halted operations. In the case of public sector strikes, the employer (the government) risks the loss of political capital through inability to deliver services and/or reduced public support. If the price of not settling becomes high enough, one or both of the parties will decide to shift their position to facilitate a settlement. This reality means that both parties will attempt to minimize their costs while trying to maximize the other party's costs.

In this dynamic the picket line plays a central role. Picket lines serve as a barrier to accessing the workplace. An effective picket line prevents people from crossing and thereby disrupts employer operations. A weak (or no) picket line makes it easier for the employer to maintain operations and lowers their economic price of the dispute. The less affected operations are, the longer the employer can maintain a strike/lockout, thus increasing the economic price for the workers.

Historically, governments and the courts have attempted to balance the parties' conflicting interests when establishing rules around picketing⁶⁶. Bill 32 shifts this balance in favour of employer interests by reducing the ability of strikers to slow down traffic in and out of the workplace. While the new provision has not yet received clear interpretation by the LRB, its scope raises legitimate questions about whether striking workers can even stop members of the public to discuss the dispute. It most certainly prevents picket lines from slowing trucks, replacement workers or managers going in or out of the workplace, which undoubtedly reduces the economic price the employer pays for the dispute, making it more likely disputes will be resolved in employers' favour.

Similarly, Bill 32's provisions regarding secondary picketing have the consequence of undermining their effectiveness. By requiring LRB permission for a secondary picket, the government is taking direct control of when, where, and how secondary picketing can take place. This control is likely to lead to fewer secondary pickets, which can be an effective strategy for placing pressure on the employer via its allies and business partners. The

provision also reduces the effectiveness of secondary picketing by removing the element of surprise. All parties will be aware well in advance when and where a secondary picket will be established. This notice provides time for the employer and their targeted allies to prepare a response to the picket. By undermining the effectiveness of secondary picketing, the union's range of tactics to increase the economic price on the employer is reduced and thus shifts the advantage in a labour dispute to the employer.

3. Penalizing Unions

The effect of Bill 32's provisions imposing new reporting requirements and dues opt-in and increasing penalties for union misconduct may not be clear at first. Both have a disproportionate and punitive effect on union activities.

Looking at increased penalties, on the surface this may seem not unreasonable. Creating consequences for illegal actions have long been a part of Canada's labour relations legal regime and attempting to deter undesirable actions is not unreasonable. However, it is important to see the changes in Bill 32, in particular the imposition of a dues suspension, in the broader context of how penalties are utilized in labour relations.

When a labour board finds misconduct has occurred any penalties imposed are remedial in nature (which is why they are called "remedies"). The goal is to nullify the effect of the misconduct and establish conditions that replicate those that would occur as if the act had never taken place. For example, an employer who illegally fires a worker for union activity may be ordered to re-instate the worker. If a certification vote is deemed to have been interfered with, a new vote may be ordered. Even remedial certification is an attempt to remove the impact of the illegal actions by "reflecting" the workers' true intentions.

All Canadian jurisdictions also contain provisions dealing with non-compliance with a labour board order by permitting the offence to be prosecuted in the courts and fines levied against the offending party. Maximum fines are laid out in the labour relations act. In Alberta for general offences an individual can be fined \$5,000 and employers and unions up to \$100,000. There are also specific fines for illegal strikes/lockouts. These fines are to create some material consequence for not complying with a board order and are rarely assessed.

By re-introducing a six-month dues suspension, Bill 32 adds an additional layer of penalties against an offending union. Alberta is the only jurisdiction in Canada to impose such a penalty and there is no similar remedy in the U.S., making this a truly unique measure. The previous version of the dues suspension penalty was only applied once, a two-month suspension to Alberta Union of Provincial Employees (AUPE) after an illegal strike in 2000. The penalty was upheld as legal by the courts⁶⁷.

Dues suspension, which can cost unions hundreds of thousands of dollars, are a powerful deterrent for illegal strike action, although it is impossible to know if unions have ever shied away from illegal action in fear of its imposition. The question is whether the penalty is proportionate to the nature of the misconduct. The contrast to penalties imposed on employer for interfering with workers' right to associate, which remain remedial and impose no financial cost, is also noteworthy.

The new reporting and dues opt-in provisions have the potential to significantly impact union operations. It is difficult to know how burdensome providing financial statements and categorizing spending will be for unions, however it is likely to be more than inconsequential. If we look to the one precedent on financial reporting, the Harper government's Bill C-377 which imposed stringent public financial reporting on unions, then we may be able to surmise that the impact could be greater than anticipated. That bill, which laid out a long list of requirements, was heavily criticized for its over-reach and its disproportionate impact on union operations⁶⁸. The extent of the financial reporting under Bill 32 is as yet unknown as the regulations have not been released, but the parallel is worth noting.

While the administrative burden of providing financial statements and categorizing spending activity is irksome and will come with some financial impact, it is a minor inconvenience compared to the opt-in requirements. As mentioned above, the financial impact of opt-in requirements have the potential to be severe, both in revenue reduction and additional costs to collect opt-ins.

The dues opt-in is unprecedented in Canada and reflects an American approach to union dues. In fact this provision goes further than most similar U.S. provisions as it sets opting out as the default and workers must actively provide consent. It is more in line with state-level efforts to prohibit dues for non-representational purposes. The provision will hamper union's ability to exercise its functions by reducing the revenue available to conduct its work. It is also a significant break from how governments and the courts in Canada have traditionally approached internal union affairs. It is also a direct repudiation of the long-accepted Rand Formula, establishing a free rider problem where workers receive the benefit of union representation

without having to pay a full share of the costs of ensuring that benefit. The provision is highly punitive and will have significant impact on internal union operations.

Bill 32 and the Charter

The effects of Bill 32 go beyond shifting dynamics in the labour relations system. Many of the measures impact rights protected by the Charter of Rights and Freedoms. In that regard, the changes threaten to undermine worker rights at a fundamental level. In doing so, they raise questions about how the bill impacts the rights not just of unions and their members, but of all Albertans. There may be consequences, intended or unintended, for a range of groups in civil society. This section will briefly outline the relevant sections of the charter that relate to Bill 32 and the current status of jurisprudence in labour-related matters. It will then discuss the possible ramifications of Bill 32's provisions for those rights. The following is a broad summary of charter jurisprudence and is not intended to be a complete legal analysis.

1. Relevant Charter Rights

Since its enactment in 1982 governments and the courts have attempted to interpret how the rights listed in the charter's 32 sections apply to different aspects of Canadians' lives. The charter has had a large impact on how we view the rights of Canadians as workers. In general, collective rights – rights that are only exercised by groups rather than individuals (such as the right to strike) – have generally not fit well into the individualistic logic of the charter. However, in the past 20 years thinking about how the charter applies to employment-related matters has evolved. Initially the courts defined such collective rights narrowly, essentially only extending the right to organize through the freedom of association, but courts have recently expanded the scope of the charter's application to the right to collective bargaining and the right to strike.

Two sections of the charter are most germane to labour-related rights: freedom of expression (section 2(b)) and freedom of association (section 2(d)). The courts also consider in all charter cases the impact of section 1, which outlines the reasonable limits for the expression of these rights.

FREEDOM OF EXPRESSION

Section 2 lists freedoms considered fundamental and held by everyone. Section 2(b) identifies expression as a fundamental freedom. Its specific wording is "freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication." The courts have

interpreted freedom of expression broadly, arguing it should be restricted by government only in the rarest of circumstances. The courts have regularly ruled that “any interference with the freedom of expression that is more than trivial or insubstantial is sufficient to establish a violation of section 2(b)”⁶⁹.

FREEDOM OF ASSOCIATION

Section 2(d) reads: “freedom of association.” Defining association has proven to be challenging and the courts have shifted significantly over its scope. At its core it is based in the notion that “an individual has the freedom to do in association what he or she may do lawfully alone”⁷⁰. However the courts have debated whether it also extends to actions that cannot be completed individually, introducing a component of collectivity to the freedom. Recently the courts have adopted this broader understanding of association⁷¹.

REASONABLE LIMITS

The charter begins in section 1 with this statement: “The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.” It is intended to place the rights laid out in the sections that follow in context. Its intention is to ensure that individual rights and freedoms are appropriately balanced by the broader public interest.

What has emerged as a consequence of section 1 is that the courts apply a “proportionality test” to government actions being challenged as violations of the charter. To put it simply, the courts take the position that a government action can violate the charter but still be allowed to stand if it meets certain criteria. The government must have a pressing and substantial objective for its actions. If that pre-condition is found to exist, the courts then move to a three-part test known as the Oakes Test⁷². First, the action must be a rational connection between the action and the objectives it is designed to meet (rational connection test). Second, the action should impair as little as possible the freedom or right in question (minimal impairment test). Third, there must be proportionality between the effects of the measure and the importance of the objective (balance of harm test). A government action deemed to have violated a charter right must pass all three components of the test to prevent being struck down.

2. *Current Status of Labour Charter Rights*

As mentioned, the status of labour-related rights under the charter has evolved over time⁷³. Early on, in a series of decisions known as the Labour Trilogy, the courts agreed that the right to form and join unions was a protected freedom of association but at the time did not extend that protection to union activities such as collective bargaining and strikes.

The courts have had a conflicted understanding of picketing and the charter. They have long recognized that many picket line activities, such as placards, leaflets, talking to people, attempts at persuasion and the presence of a picket line itself are protected forms of expression under s.2(b). Decisions have been clear that laws prohibiting or unreasonably restricting secondary picketing are a violation of the charter (e.g. RWDSU Local 558 v. Pepsi-Cola 2002). The courts have been less clear on the signal and physical barrier aspects of pickets and have attempted to balance the expressive and coercive elements⁷⁴. Many legal scholars argue that recent decisions point in the direction of greater protection for picket line activities as forms of expression. “It is fair to say that there has been a recent movement by the Supreme Court toward recognizing broader expressive rights for unions and workers, particularly in the context of otherwise lawful picketing and strike action”⁷⁵.

The courts’ thinking has evolved on freedom of association as well. The current state of collective bargaining and strikes as protected rights is complex and lawyers and legal scholars hold ranging views. It is widely accepted that both are broadly protected under section 2(d) as being necessary to give meaning to the right to associate in a workplace context. Governments cannot act to prohibit or suspend workers’ access to collective bargaining or cancel a collectively bargained contract if the action amounts to a “substantial interference” with a “meaningful process of collective bargaining” and the government failed to bargain or consult in good faith. Neither can governments act in a fashion that bans the right of workers to strike or that renders that strike “effectively meaningless”⁷⁶. The meanings and boundaries of the terms are the source of the complexity and the primary subjects of ongoing legal action and will continue to evolve.

The logic of recent jurisprudence around labour rights and the charter expresses a link between individual rights and freedoms expressly included in the charter and the collective action required to give those rights meaning. The courts have come to recognize that the freedom to express and associate can only be manifested in a workplace context through collective action due to inherent power imbalances at work. As the Supreme Court indicated in *SFL v. Saskatchewan* (2015): “this Court has long recognized the deep inequalities that structure the relationship between employers and

employees, and the vulnerability of employees in this context. While strike activity itself does not guarantee that a labour dispute will be resolved in any particular manner, or that it will be resolved at all, it is the possibility of a strike which enables workers to negotiate their employment terms on a more equal footing.”

Labour rights under the charter are linked. For the freedom to associate through a union to have meaning, workers must have access to meaningful collective bargaining. For collective bargaining to be meaningful workers must have access to the right to collectively remove their labour, in other words the right to strike. And the right to strike must be sufficient to allow it to contribute to the collective bargaining process. Governments retain the ability to regulate aspects of these rights, in particular to balance other rights, but they can no longer act in an arbitrary manner that undermines these core rights.

3. Bill 32 and the Charter

In the context of current jurisprudence regarding labour rights, many of the changes proposed in Bill 32 can be seen as problematic and possibly contrary to charter protections. While Bill 32’s provisions explicitly target activities related to labour charter rights their impact will be felt far beyond workers in or wishing to be in unions. The changes also have direct and indirect effects on all Albertans. This section examines some of those effects.

Restricting Activities

Bill 32’s provisions related to picketing activity and secondary picketing speak directly to the efforts of the courts to find a balance between picketers’ right to expression and prevention of coercive effect. As stated, it is widely accepted that the expressive elements of picketing should not be unduly restricted. It is equally clear that acts of physical violence or intimidation are not acceptable picket line activities. The areas in between are much more difficult to determine. For this reason most Canadian governments have left the determination of valid picketing activities to the labour relations boards and the courts to rule on a case-by-case basis using the specific facts of each case.

Most provinces' labour relations acts are silent on the issues of picketing activity and the minority that do regulate picketing activity minimize the degree of restriction. New Brunswick, for example, grants striking workers the right to persuade people to not do business with the employer "without acts that are otherwise unlawful" (s.104(1)). Manitoba does not directly address picketing but does define strike-related misconduct as "incitement, intimidation, coercion, provocation, infiltration, surveillance or any similar conduct intended to interfere with, obstruct, prevent, restrain or disrupt the exercise of any right under this Act in anticipation of, or during, a lockout or legal strike" (definitions, p. 6). These wordings are intentionally vague as to allow maximum interpretative latitude by the board and the courts.

Further, some jurisdictions, such as B.C. and New Brunswick, encode active protections for the persuasive elements of picketing by explicitly allowing such activity. Overall, between legislation and jurisprudence there is a broad consensus that some degree of inconvenience is permitted as picketing activity and, thus, protected as free expression. In practice, slight delays of traffic in and out of the workplace has been viewed as a reasonable infringement for the purposes of protecting the right to free expression⁷⁷.

In contrast, Bill 32 offers a more sweeping prohibition on picketing activity. The section contains no reference to intimidation, coercion or other terms that express the intent of permitting free expression by curbing the elements of picketing with which the courts have been uncomfortable. Without anchoring the provision to coercive acts it is unclear how broadly to interpret the phrase "obstructing or impeding." As a result, it is possible that persuasive acts can be included in the prohibition. For example, to talk to a member of the public a picketer is required to momentarily slow their progress to make their case. They might wish to briefly stop a vehicle to hand out a leaflet. Under Bill 32 it is possible these actions would be interpreted as obstructing or impeding and therefore prohibited.

The consequence of this possibility is instantly clear. If the provisions prevent striking workers from momentarily delaying people crossing the picket line, their freedom of expression is curtailed. The provisions may overreach, moving beyond prohibiting coercive aspects of picketing and restricting expressive elements. Such a restriction could be considered a violation of the workers' charter-protected rights.

A similar situation exists for the provisions addressing secondary picketing. Legislation in every jurisdiction in Canada, except B.C., are silent about secondary picketing, once again leaving this activity for the courts to determine what is allowed. By remaining silent in legislation these jurisdictions have allowed the moving consensus in common law to govern the boundaries of secondary picketing.

B.C. has a similar provision to that found in Bill 32, requiring the labour board to provide permission for picketing to take place at a location other than the employee's workplace. However, the B.C. Act explicitly excludes from the requirement activities normally associated with secondary picketing by removing them from the definition of picketing. The definition of picketing "does not include lawful consumer leafleting that does not unduly restrict access to or egress from that place of business, operations or employment or prevent employees from working at or from that place of employment" (s.1). This new language was implemented in 2019 to bring the definition in line with the charter⁷⁸.

Bill 32 implements similar LRB control over secondary picketing. By requiring LRB approval, the Alberta government has shifted from allowing the courts to interpret the boundaries of free expression during secondary pickets to directly regulating secondary pickets. In other words, Bill 32 provides the government with the power to determine when, where, and how striking workers' will be allowed to express themselves. This is a significant shift in practice.

Further, Bill 32 does not provide the same definitional clarity as B.C.'s act. As currently worded, any expressive activity taken by striking workers at locations other than the workplace are illegal unless authorized by the LRB. The scope of this prohibition, and its consequences, are best explained through two scenarios. In the first scenario a group of consumers are boycotting a store. They gather in front of the store (on public property) with leaflets about the boycott and briefly stop customers before they enter the store to give them the leaflet and explain the purpose of the boycott. As long as the protesters do not unduly impede the ability of the public to enter the store and do not use threats, violence or coercion to intimidate the public, their action is legal and fully protected by the charter.

In the second scenario, the group of people are workers engaged in a legal strike against an employer. If they gather in front of a store that sells items produced by their employer and briefly stop customers to share information about the strike that activity would be illegal under the provisions of Bill 32 unless the LRB has authorized that activity. The only fact that has changed in the two scenarios is that in the latter the workers are on strike. This highlights the importance of B.C.'s definitional boundary and Bill 32's lack of one. An act is being curtailed by law solely because it takes place in the context of a strike, which may be a violation of the charter.

Further, the restrictions run contrary to the Supreme Court's position on picketing, namely that activity and not location should determine what is allowed and not allowed. "Secondary picketing has been, as we have seen, location defined. Indeed, many of the difficulties the courts have encountered over the years in defining secondary picketing flow from how to determine the relevant location. A conduct approach based on tortious and criminal acts does not depend on location. All picketing is allowed, whether "primary" or "secondary," unless it involves tortious or criminal conduct"⁷⁹. Establishing separate rules for secondary picketing attempts to re-establish the rejected location-based definition of picketing.

It is not yet known how the LRB or the courts will interpret the new provisions. However, Bill 32 deviates significantly from the norm of Canadian labour law as to raise red flags about its impact. Where most jurisdictions are silent on picketing or provide a balance of protecting expression while regulating coercion in order to maintain adherence to the charter, Bill 32 actively interferes with striking workers' ability to express themselves on picket lines.

EFFECT ON ALBERTANS

The Alberta government's willingness to interfere with workers' freedom of expression is not just a matter of concern for unions and their supporters. It is a tendency that could impact all Albertans. The freedom of expression forms one of the fundamental rights in a democratic society. Bill 32 is one of a series of moves made by the current Alberta government to place roadblocks to Albertans' exercising this freedom. The Critical Infrastructure Defence Act, passed in 2020, prohibits anyone from "obstructing, interrupting or interfering" with critical infrastructure such as highways, pipelines or utilities. While the provisions of that act have not yet been tested in court, and an analysis of the legislation is beyond the scope of this report, many rights advocates have decried the legislation as contravening the charter⁸⁰. The United Conservative government has also unilaterally voided the province's contracts with doctors and eliminated many worker health and safety protections in Bill 47: Ensuring Safety and Cutting Red Tape Act.

No one likes strikes. Yet, strikes and the activities associated with them are an essential component of democratic free expression. The restrictions on picketing activity have the dual consequence of making strikes less effective – making workers' ability to defend their rights weaker – and of curtailing legitimate avenues for freedom of expression – undermining all Albertans' democratic rights.

Penalizing Unions

Bill 32 also enacts a series of measures that aim to interfere with the internal operations of unions, specifically those requiring distribution of annual financial statements, identification of percentage of dues for non-representational activities and requiring individual member election to collect non-representational dues. These measures have significant practical impact on unions, in particular a negative financial consequence. They also raise questions about the right to associate and the right to free expression under the charter. Further, there are potential impacts on charities, community organizations and the rights of all Albertans. There are four areas of concern.

INTERFERENCE IN A PRIVATE ORGANIZATION

First, the provisions mark a disproportionate interference in the internal operations of a private organization, which impacts members' right to associate. They do so in two ways. Bill 32 requires unions to distribute to all members an annual financial statement. The content of the financial statements are to be defined in regulation, which have not yet been released. The provision deviates from longstanding Canadian practice regarding the regulation of internal union affairs. Canadian governments have adopted an approach of "statutory abstinence"⁸¹ where they do not regulate unions' internal affairs. Similarly the courts have viewed the membership relationships of unions as "purely personal and contractual, and they therefore would not review an internal decision of a union except on narrow procedural grounds"⁸². In short, unions have legal status of voluntary organizations, which means governments have a minimal role in regulating their operations. The Bill 32 provision is more reflective of the approach taken in the U.S., where governments place stringent rules around financial reporting and accountability to members.

The Bill 32 provisions regarding financial statements go beyond what the government requires for non-profit societies, the closest analogy to unions. The Societies Act states that a society "shall hold an annual general meeting in Alberta and shall present at that meeting a financial statement setting out its income, disbursements, assets and liabilities, audited and signed by

the society's auditor" (s.25). Since regulations addressing the content of union financial statements has not been released, we cannot know if they will be more stringent than these broad requirements in the Societies Act. What we do know is that the requirement in Bill 32 that the statements be distributed to "each member" goes beyond requirements of non-profit societies, who are only required to present statements at the annual general meeting.

Governments have taken a more active role in prescribing creation and distribution of financial statements in corporations, requiring they be distributed to all shareholders and outlining in regulation the information to be provided (Business Corporations Act and Regulation). However, it is widely recognized that corporations possess a very different relationship to their shareholders, who are not members but investors, and their fiduciary responsibility to those shareholders – and the degree of financial investment at stake – require a higher degree of regulation.

The second way Bill 32 interferes with a private organization is the government imposed division of the organization's activities. The government, through regulation, will define what activities are “representational” and therefore mandatory and what activities are non-representational and therefore optional. Normally for voluntary associations the setting of membership dues and the use of those dues is a purely internal matter, governed by the bylaws or constitution of the association. It is an unprecedented intrusion into the autonomy of a private organization for the government to define what activities a member should or should not pay.

Further, it is imposing an authorization process on the organization, indicating what form a member's consent will take. Again, this is something all voluntary organizations address internally through bylaws or policies, and government-imposed rules are without precedent in Canada.

MISUNDERSTANDING REPRESENTATIONAL ACTIVITY

The second area of concern is that the legislation fundamentally misunderstands the nature of unions' representation function. The regulations outlining specific activities have not yet been released. However, the act is quite clear in its demarcation. Representational activities are viewed to be restricted to the narrow band of responsibilities outlined by the LRC and are specifically linked to “collective bargaining and representation of members.”

The logic behind the division is reductionist and not reflective of the complexity of “representation” in a collective bargaining context. While the work of bargaining, managing grievances and handling workplace-specific issues is an integral part of a union's responsibilities to members, it is not the only facet of its obligations. Unions also have a responsibility to attend to the broader wellbeing of their members. There is a long history of activities that members have reasonably come to expect as part of the union's commitment to serving its members.

Since their formation, unions have concerned themselves with members' economic and social welfare. Early unions created benevolence funds to financially support members and their families who could not work due to injury or illness. Social and community gatherings were central aspects of union membership, where members and families were brought together to build community spirit. Early craft unions engaged in training of apprentices and created health benefit packages for members.⁸³

Representation is not just about what unions win at the bargaining table. Today building trade unions administer health and pensions plans for their members, whose work involves multiple employers. Other unions will establish benefit plans for workers in workplaces where the union has not yet been organized. Some unions organize and represent groups of workers who do not yet have a legal bargaining agent (often referred to as "associate members" or "community members")⁸⁴. In these cases, while the union cannot formally bargain with the employer they can advocate for these workers, provide assistance with employment standards and other complaints, and provide health and other benefit packages.

Unions employ staff who address specific areas of membership concerns not strictly related to collective bargaining. Most unions have specialized staff to address Workers' Compensation Board claims, occupational health and safety issues, and/or human rights concerns. They also have education departments mandated to provide training to members. All unions actively engage in education of members to build bargaining and representational skills (through shop steward or collective bargaining training), to teach workplace-related skills (e.g., occupational health and safety or workplace privacy training), or to increase members' ability to advocate for themselves (e.g., anti-racism or leadership training).

Unions also engage with organizations outside the workplace to advance their members' interests. They may support charities who do work that benefit their members. They may employ organizations, such as Parkland Institute, to conduct research on issues that affect their members and make the union more effective representing them. Unions, either directly or through non-partisan advocacy organizations, may lobby and campaign for policy or legislative changes that will benefit their workers. Although unions are not permitted to donate to political parties in Alberta, they can engage in political campaigns in support or opposition of electoral candidates and may choose to do so if they believe the candidate will benefit their members' interests.

Most of the activities outlined above would be considered non-representational under the provisions of Bill 32 and therefore subject to individual member election to have dues deducted for this purpose. Without the regulations it is impossible to be certain which would be allowed and which wouldn't. However, even this uncertainty highlights that the problem is the line between representational and non-representational cannot be drawn neatly and functions may serve both a representational and non-representational purpose simultaneously.

Representation takes many forms. For example, a union may choose to bargain stronger health and safety protections for its members through the collective agreement. Under Bill 32 that is considered representational. Instead, the union may opt to lobby the government for changes to occupational health and safety regulations to enact similar improvements. That activity is considered non-representational, even though its purpose is identical – to achieve greater safety protections for the union's members.

The matter becomes more complex. The union may choose to educate their members on how to advocate for safety improvements in the workplace. Under Bill 32 that is in a grey zone. Contracting to a consultant to conduct research into the hazards at the workplace may be non-representational. If the union donated money to a non-profit organization that conducts occupational health and safety training and advocacy, that would be considered non-representational. Providing income or other support to workers injured on the job (for example if Workers' Compensation Board benefits are denied) may also be non-representational.

The example highlights the logical pitfall in attempting to demarcate forms of activity for which dues are mandatory. Bill 32 reduces the union's role to a narrow definition of bargaining and legal representation, potentially excluding many aspects of union activity that is directly linked to representing the interests of its members. Aside from presenting a fundamental misunderstanding of unions' representative role, the task of deciding what activities are representational should be that of the members, not the government.

It should also be noted all the activities mentioned are functions that any voluntary organization has the legal right to take part in, and their right to determine if and how to do it are protected under the association provisions of the charter. The issue is that these provisions take away union members' autonomy to decide what they consider representational and non-representational activities. Members are presented with two options – agree to pay dues that fund ALL union activities or only pay the portion of dues the government decides are representational. In other forms of voluntary associations members have the authority to determine how to interpret

the mandate of the association and what activities align with that mandate. Having the government interpret the meaning of the association mandate is unprecedented and possibly contrary to members' freedom to associate.

associate. They do so in two ways. Bill 32 requires unions to distribute to all members an annual financial statement. The content of the financial statements are to be defined in regulation, which have not yet been released.

EXPANDING THE FREEDOM TO NOT ASSOCIATE

The provisions related to dues and non-representational activity relate to a longstanding political debate in Canada. Specifically, for three to four decades many groups have advocated that union members should not be required to pay for activities with which they do not agree⁸⁵. The groups argue that mandatory dues equate to forced association and thus contravenes the charter.

Negative freedom of association, or freedom to not associate, is accepted as part of the charter. For example, someone cannot be compelled to express something they do not believe and people have a right of freedom from religion. It is similarly true that workers have a freedom to not associate under s.2(d).

The source of opponents' of mandatory dues concern originates in the Rand Formula which requires workers represented by a union to pay dues even if they are not a member. While this has been a long-established practice in Canadian labour relations, it has raised the ire of anti-union advocates who consider it a form of forced association.

The concept of requiring all workers to pay for the benefits of unionization has held up under legal scrutiny. As a result, advocates against compelled union dues have turned their attention to the portion of dues not directly used for collective agreement administration. In other words, they argue Rand does not extend to political, community or other forms of activities since those activities do not relate to necessary financing of union activities. The core of their argument is that workers should not have to pay for campaigns and activities they do not personally support. Bill 32 enacts the proposals of these advocates by restricting mandatory dues to representational activities only.

Opponents of mandatory dues raise the specter of forced association, arguing paying dues amounts to a violation of the right to not associate. However, the question is not whether workers have a right to not associate and a right against compelled or forced association. Canadians possess the freedom to not associate. The question is whether simple payment of dues amounts to forced association and whether their payment is justified under the charter.

It is not at all clear that payment of dues equates to association. Is paying money sufficient to be considered association? That matter is unclear. Regardless of the legal answer to that question, the courts have ruled that mandatory dues are justified under the charter.

The Supreme Court of Canada has twice ruled that workers can be compelled to pay union dues for activities not directly associated with administration of the agreement. The justices in both *Lavigne v. Ontario Public Service Employees Union* (1991) and *R. v. Advance Cutting & Coring Ltd.* (2001) decided that while a formal right to not associate exists and that right is violated by the Rand Formula (*Lavigne*) and compulsory unionism (*Advance Cutting*), but that the actions in question are “saved” by section 1 because unions serve an important function in society beyond their role in representing members. It is worth quoting from *Lavigne* at length on this question:

The state objectives in compelling the payment of union dues which can be used to assist causes unrelated to collective bargaining are to enable unions to participate in the broader political, economic and social debates in society, and to contribute to democracy in the workplace. These objectives are rationally connected to the means chosen to advance them, that is the requirement that all members of a unionized workplace contribute to union coffers without any guarantee as to how their contributions will be used. The minimal impairment test is also met. An opting-out formula could seriously undermine the unions’ financial base and the spirit of solidarity so important to the emotional and symbolic underpinnings of unionism. The alternative of having the government draw up guidelines as to what would be deemed valid union expenditures could give rise to the implication that union members are incapable of controlling their institutions. Given the difficulty of determining whether a particular cause is or is not related to the collective bargaining process, the courts should not involve themselves in drawing such lines on a case-by-case basis.

It is noteworthy the Supreme Court explicitly recognized the problem created by governments or the courts determining what activities are directly related to collective bargaining in that it undermines workers’ autonomy over their organization, as discussed above. It also acknowledges that there is no simple divide between activities aimed at the workplace and activities contributing to debates in society. *Lavigne* has stood as the precedent around union dues for 30 years.

Bill 32 is the manifestation of a new strategy regarding mandatory dues. The courts have clearly upheld mandatory dues as justifiable under the charter. Bill 32 aims to enact a more aggressive expression of the right to not associate through legislation by requiring opt-in for non-representational dues. Whether this more aggressive interpretation is constitutional is an open question. Where Lavigne answered the question that compulsory dues are constitutional, Bill 32 is attempting to legislate a ban on compulsory dues. The courts have not yet addressed whether governments have a right to impose a two-tier dues structure on unions. While the strict legal issues are different, politically Bill 32 is clearly an attempt to overturn Lavigne.

Further, there is no evidence that the current system for membership accountability over union activities is broken. Unions are directed by their membership, either directly or through elected representatives, regarding which activities they can undertake. In other words, unions take direction from their members about which activities the members are comfortable undertaking. For example, while some unions opt to actively support political parties, others have taken clear non-partisan stands. These positions reflect the priorities and wishes of their respective memberships. The status quo does not provide members with an individual right to opt-out of such decisions but it does provide a mechanism for the exercise of democratic rights within the organization. Like all democratic structures, members are not guaranteed a specific outcome but they are afforded a transparent process for articulating their opinion on a subject. Canadians do not possess the right to opt out of a portion of taxes that fund government spending with which they do not agree because it is universally held that compulsory taxation serves a greater public good and government's power to tax is built upon a foundation of democratic decision making by citizens, justifying it under the charter. A similar justification holds for compulsory union dues. The public interest in union engagement with public debate combined with unions' robust democratic internal structures provide a justification for mandatory dues.

The provisions in Bill 32 instead appear to take their inspiration from the United States. Laws in the U.S. restricting the collection of union dues, including agency fee rules and recent state-level actions, are anchored in their First Amendment, which guarantees the right to free speech. This apparently fine legal point alters the analysis the court applies to issues related to union dues. In the U.S. union non-representative activity is viewed through a lens of compelled speech, supporting a view one does not agree with. In contrast, Canadian courts have interpreted union dues as an issue of association, which changes the frame of the issue. Bill 32 attempts to move toward a more American understanding of dues and individual rights.

TARGETING UNIONS' FREEDOM OF FREE EXPRESSION

The fourth area of concern regarding the dues restriction provisions relates to section 2(b), the freedom of expression. Bill 32's provisions do not directly address freedom of expression as unions and their allies continue to have the right to participate in public debate and have the resources to disseminate their views. However, the bill's provisions privilege individuals' right to not express over the organizations' right to express. This shift inserts an American understanding of free expression as it relates to union activity. Further, the dues opt-in measures are intended as a directed political attack on viewpoints opposed to the current government. This targeting is a problematic interference with democratic debate.

One of the complications in this issue is that the provisions target unions' access to money, not their right to express opinions. Money is not expression, although the courts have recognized that the use of money to facilitate expression is an aspect of the freedom⁸⁶. An example of this recognition is that the courts have upheld laws that regulate political spending (e.g., *B.C. Freedom of Information and Protection of Privacy Association v. B.C. 2017*), but they have done so by saving provisions using section 1, a recognition that such laws violate an aspect of the freedom but are justified due to their function in protecting elections. Courts have struck down legislation restricting how organizations, such as charities, use their money (e.g., *Canada Without Poverty v. AG Canada 2018*). However, in both of these examples, the issue centred on the *use* of money, not how it was collected. Bill 32 targets the latter and not the former. In this way, it moves onto ground not addressed by existing jurisprudence.

That said, the provisions clearly articulate a new approach to balancing the freedom of organizations to express themselves with that of individuals within an organization to object to that expression. As discussed earlier, the courts have been reluctant to interfere with the internal affairs of voluntary organizations, including unions, the internal democratic processes being deemed sufficient protection. Bill 32 expresses a lack of confidence in those internal processes and elevates an individual right to disagree with the union, a right *to not* express as it were. The courts have treated union dues as an issue of association and not expression, so this approach introduces a new perspective on how union dues and union activity should be interpreted. It is one that prioritizes the right of the individual over that of the organization of which they are a part. This position is a clear attempt to insert American legal approaches into the Canadian context where dues are seen as an extension of free speech, rather than association. How the courts will respond to this new interpretation is unknown.

Even if a legal argument could be made in defense of the opt-in provisions through freedom of expression, the explicitly political motivations for the measures and their targeted nature make them highly problematic. Requirements found in electoral financing legislation, for example, apply equally to all individuals and organizations, which is one of the reasons the courts have saved the provisions. Bill 32 explicitly targets only one segment of civil society.

The UCP government has been open about the motivation behind these measures. In the Assembly, UCP cabinet ministers and members of the legislative assembly using hyperbole and personal attacks made clear their goal is to target political activities opposed to the government agenda:

I think it's unfortunate that Gil McGowan, the union boss for the NDP, the head of the NDP, the guy who is calling and begging the NDP to filibuster this bill to be able to make sure that hard-working union members have to still give him union dues to spend it on his political interests, is campaigning against things that are against their interests. (Jason Nixon, July 22, 2020, Hansard p.2339)

Now, if union workers, Madam Speaker, don't want to support their union boss, Gil McGowan, if they don't want to support those campaigns or they don't want to support campaigns against the very industries that they are employed in, then they should have a choice not to fund those types of activities that threaten their very livelihood. They should not have to fund anti oil and gas, antipipeline campaigns if they don't want to. They should have a choice for their hard-working dollars, where those dollars go and whether they support those campaigns. (Rebecca Schulz, July 14, 2020, Hansard p.2021)

A Tweet from the UCP Caucus goes even further: "If groups like the AFL, that are embedded in the NDP constitution, want to use dues collected from workers to oppose pipelines and run big campaigns, their members deserve *a choice* on whether or not their money is used to fund AFL's political activism!"⁸⁷

These comments reveal the political intentions of the provisions. The government is not expressing concern that unions donate money to charity or run education courses using compulsory dues. They are explicitly targeting the political activities of unions, in particular those that may run contrary to the government's agenda. The rather absurd political rhetoric aside, the commentary reveals a goal of undermining the voice of unions in political debate.

The effects of the opt-in provisions need to be understood in the context of this political goal. The government's expressed intention is to restrict access to member dues for political purposes and require unions to divert resources to obtaining opt-in. The overall result is less money (through reduced dues and increased costs) available to unions for political advocacy. Less money means unions will be less effective at engaging in advocacy and participating in public debate on key issues. A weakened union voice in democratic debate is the government's primary goal in enacting these provisions. It can be argued their appeal to individuals' right to choose is a convenient cover for their political agenda.

The effects of the provisions go beyond unions. It is well known unions contribute, financially and in-kind, to a range of community advocacy organizations. These organizations, often reflecting a broad cross-section of civil society, participate in public debate about contemporary policy and political issues. They may conduct and disseminate research, coordinate public awareness campaigns, engage in community organizing, purchase advertising, or directly lobby government.

If unions' ability to garner resources for non-representational activity is restricted, then their ability to contribute to these broader civil society efforts is also weakened. As a consequence the effectiveness of these coalitions is undermined. Unions are not the only segment of civil society with sufficient resources to support extensive participation in public debate, but their available resources and willingness to utilize those resources are significant. If unions' ability to contribute to civil society efforts is curtailed, as Bill 32 explicitly indicates, the effectiveness of those efforts is weakened. Bill 32 does not only target union expression, but the expression of a wide range of community groups and organizations engaging in public debate. It is an attempt to weaken the government's political opponents.

EFFECT ON ALBERTANS

To many people, undermining the ability of unions to participate in politics and public debate may not seem like a bad thing. Unions are polarizing institutions. Unions and their civil society allies usually advocate for policy solutions that are described as progressive or left-of-centre. Often the issues unions talk about are controversial and divide public opinion. They may be highly unpopular among some segments of society. Bringing them down a peg or two may not seem unreasonable to some.

That is why it is important to understand Bill 32's provision in context of the freedom of expression. The core principle of freedom of expression is that it is a fundamental building block for a free and democratic society. Freedom of expression ensures that voices, no matter how unpopular, can be heard and have space within public debate. The ability to hear multiple perspectives is a

pre-requisite for democracy. One need not agree with the positions unions and their allies take to value the need for those positions to be articulated effectively and openly.

By targeting unions' freedom of expression, Bill 32 affects all Albertans. Restricting unions' ability to use their resources weakens their ability to participate fully in public discourse, which weakens the quality of that discourse. A weaker public discourse leads to a more fragile democracy, where only some voices become dominant. Inequality of access to public debate is an ongoing issue in western democracies, and government actions like Bill 32 contribute to that inequality.

Given the focused nature of Bill 32, it can be argued that the provisions are an attempt to silence the government's political opponents. The government is not curtailing all actors' ability to communicate with the public, only those allied with unions. The real concern about these provisions of Bill 32 is their targeted nature. They only apply to one set of views, not equally across the political spectrum (such as with electoral financing rules). And while the provisions only make accessing resources for political activities more difficult and do not prevent those activities outright, the precedent of singling out one political perspective for punitive regulation is troubling. It speaks to an animus that is both anti-democratic and anti-worker.

Punishing Unions

The third basket of provisions returns attention to the right to associate. Amendments to alter penalties for unions and employers, to eliminate certification vote timelines and to allow for the elimination of open periods all make it more difficult for workers to exercise their right to association under the charter. The difficulty arises due to the known impacts such provisions have on success rates for certification. As discussed in a previous section research shows that these provisions decrease certification success, in effect making it more difficult for workers to translate their desire for unionization into legal certification by providing more latitude and fewer consequences for employers to interfere in the process and disproportionately penalizing unions for misconduct.

The right to associate related to specific elements of the labour relations system is not well defined. The courts have taken the position that the charter protects workers' right to associate through collectively participating in a union but that protection does not extend to any specific model of collective representation⁸⁸. In other words the government has a positive obligation to ensure labour relations rules do not unduly infringe on workers' right to join a union. For example, laws prohibiting collective bargaining for some workers or placing excessive restrictions on how they can form unions are clearly contrary to the charter. However, the specific

model used in Canada to determine union representation – the Wagner Model – is not expressly protected. Governments could authorize some alternate form of union recognition (e.g., minority unionism) and that action would be constitutional.

The upshot is that changes to the details of the certification process, even if they have a detrimental effect on certification success rates, are likely not to be found in contravention of the charter. Delaying certification votes is not a serious enough breach of association rights to warrant a charter challenge unless that delay could be demonstrated to render success impossible. The provisions in Bill 32 are unlikely to reach that bar.

However, it is still worthwhile to consider the negative implications for the right to association. Any government regulation that makes it more challenging for workers to translate their desire for a union into legal representation strikes at the freedom to associate. As discussed, all labour relations legislation is a mixture of measures that curtail workers' freedom of action and measures that protect workers' freedom through restrictions on employer action. Most legislation aims to create a balance between the two sets of interests. Bill 32, with its diverging consequences for employers and workers, alters that balance toward employer interests. That shift weakens workers' freedom to associate, even if it does not undermine it entirely.

In recent jurisprudence the courts have developed a concept of “meaningful” access to collective bargaining. This concept recognizes that providing a formal right is rendered moot if the necessary co-requisites are not also provided. The courts have linked the right to collective bargaining with the right to strike using this logic. It could be useful to apply this logic to certification. If the roadblocks to legally certifying a union are significant enough to make it almost impossible to achieve certification then workers do not have meaningful access to unionization. Without meaningful access to unionization, workers' freedom to associate is compromised. Bill 32 may not reach the point of making access to unionization meaningless, but it does tilt the balance away from meaningful access and that is a step backward for the freedom to associate.

The certification and penalty provisions in Bill 32 mark a shift toward a more American approach to these issues, where long delays and nearly unfettered employer involvement have, in many respects, rendered access to unionization in the United States meaningless. A recent case in point is the failed certification vote at the Amazon plant in Bessemer Alabama. More than 60 per cent of workers at the plant had signed union cards, an indication of support for the union. The much delayed vote resulted in fewer than 30 per cent of workers voting to unionize⁸⁹. Observers point to Amazon's aggressive anti-union campaign as the reason for the flip⁹⁰. Many

of the tactics utilized by Amazon would be prohibited under Canadian law (it should be noted the union is challenging some of Amazon's tactics).

Bill 32 opens the door to increased employer interference in certification elections by removing timelines and reducing penalties. While the provisions will not result in Alabama-like conditions, it will increase the frequency and effectiveness of employer interventions. This is significant because allowing employer interference in the certification process is one of the most significant barriers to successful certification, meaning employer interference poses the biggest threat to workers' freedom to associate. Any move in the direction of greater employer interference is a concern.

EFFECT ON ALBERTANS

The details of labour relations regulation are normally not a matter of concern for most Albertans. At any given time only a small fraction of workers are actively seeking unionization. Only a couple hundred certification applications are filed in Alberta each year⁹¹. However, if we link these rules to the broader principle of the freedom to associate, small changes can have a big significance. All Albertans have a stake in ensuring that charter-protected rights have meaning. The freedom of association is most vulnerable at the workplace because of the power imbalance that exists there. Government action that aims to undermine that freedom, even if it is only for a small percentage of people, should be a matter of concern for all Albertans.

Part Four: Social and Economic Consequences of Anti-Union Legislation

Bill 32 is designed to shift the balance in labour relations to employers at the expense of unionized workers and their unions. Experience from other jurisdictions demonstrate that such anti-union measures have more than just an effect on unions and unionized workplaces. Instead, anti-union legislation has lasting social and economic impacts. These impacts affect all residents of a jurisdiction. This part will examine the research into anti-union measures enacted in the U.S. to provide insight into what might happen in Alberta if Bill 32 were to remain in force.

The U.S. Experience

Part One of this report outlined some of the key ways in which labour relations in the U.S. deviates from Canada. Much of that deviation has been due to specific legislation passed by states to undermine the effectiveness of unions in their jurisdiction and by U.S. courts finding a different balance regarding rights in the workplace. There have been two broad approaches to curtailing union rights in the U.S: restrictions on dues collections and union membership; and government-imposed collective bargaining rules.

Restrictions on dues collections such as partial agency fees have been discussed earlier in this report. The most extensive effort in this area has been the imposition of “Right-to-Work” laws prohibiting mandatory collection of union dues. Right-to-work (RTW) is highly controversial and has been the subject of extensive research into its effects. Currently 27 states have enacted some version of RTW. Alberta has considered, and rejected, RTW twice in its history (see Inset 2).

The second approach is more recent. States enact bills that severely constrain the scope of bargaining and impose contract terms on public sector workers, often in the name of fiscal management. The highest profile example of this approach is Wisconsin. In 2011 the Wisconsin government passed Act 10, a sweeping legislation overhauling public sector labour relations in the state. First, it reduced the scope of bargaining to wages only, prohibiting discussions over any other matter and restricted collective agreements to terms of one year. Second, it regulated that wage increases could not exceed rate of inflation. Third, it unilaterally increased employee contributions to health and pension plans. Fourth, it made public sector strikes illegal and empowered the Governor to fire any worker who engaged in strike action. Fifth, it stripped the right to unionize from a range of occupations,

including child care workers and home-care workers. In addition to these measures aimed directly at bargaining, Act 10 also enacted RTW-like rules, including a ban on mandatory dues, prohibition of payroll deduction, and mandatory annual re-certification elections.⁹² In 2015, the same government enacted a series of RTW provisions affecting private sector unions in the state⁹³. Wisconsin unions challenged the constitutionality of Act 10, but the Wisconsin Supreme Court upheld it as valid, citing that collective bargaining is a statutory, not constitutional, right in the U.S.⁹⁴.

The consequences of the recent Janus decision also need to be taken into account, as in that decision the U.S. Supreme Court in effect instituted RTW across the public sector. The constitutional prohibition on mandatory union dues has the same effect as state-level RTW laws and may even have a more profound effect given the size and scope of public sector unionism in the U.S. as more than 50 per cent of union members are in the public sector and union density is five times higher in the public sector compared to the private sector⁹⁵.

Bill 32 does not go as far as RTW, the Wisconsin Model or the Janus decision. Those provisions are both starker and more sweeping. However, there is no question that Bill 32 moves in the direction of these laws and it contains many elements in common with the U.S. measures. Therefore there is some merit in examining the broader economic and social impacts of these policies.

Alberta's History of Right-to-Work

At least twice in Alberta's recent history the provincial government has considered implementing right-to-work provisions in law.

- In 1987 during consultations on revamping the Labour Relations Act some employer groups advocated for right-to-work provisions. Many argue such provisions were actively considered by the government before ultimately opting to reject them⁹⁶.
- In 1995 a motion moved by a government backbencher, Gary Friedel, called on the government to study the economic benefits of right-to-work legislation. Upon its approval, the government established a review committee. The committee recommended against right-to-work arguing that Alberta's economic environment was sufficiently competitive without it⁹⁷.

Effects on Unionization

The most direct and obvious consequence of anti-union laws is their impact on unionization rates and union effectiveness. Researchers agree that RTW and other anti-union measures reduce the number of union members and the number of workers covered by a collective agreement. There is also evidence that these measures make it harder for workers to organize unions. However, it is less clear that it makes unions less effective at making gains for their members.

Overall, unionization rates in RTW states are half that of non-RTW states (6.5 per cent to 13.9 per cent)⁹⁸. Further, there is clear evidence that RTW laws lead to a decline in union membership and union coverage⁹⁹. One recent study found RTW leads to a decrease of 23.6 per cent in public sector union coverage and a 22.2 per cent decrease in the private sector¹⁰⁰. Of the overall decline in U.S. union membership over the past four decades three per cent to eight per cent is attributable to the growth in RTW measures¹⁰¹.

The Wisconsin Model led to a reduction in public sector union membership by 28.4 per cent in the years that followed. One study of four state public sector unions found a 70 per cent decline in membership, mostly attributable to the complete collapse of one of the unions¹⁰². Wisconsin's follow-up RTW laws led to a 38 per cent reduction in the private sector¹⁰³. The National Education Association, the union representing teachers and educators and one of the largest unions impacted by Janus, has estimated that it will experience a 10 per cent membership reduction following the decision¹⁰⁴.

That anti-union measures lead to lower union membership is not a surprise. Proponents openly acknowledge that is the purpose of the legislation¹⁰⁵. There are two mechanisms that are found to trigger the reduction. First is the

increase in free riding – workers receiving benefits of unionization without contributing to the costs of that benefit. Free riding is directly linked to lower union density¹⁰⁶. States that switch to RTW experience a 54.2 per cent increase in the occurrence of free riding¹⁰⁷. Second, RTW makes it more difficult to join unions. In economic terms RTW laws “tend to successfully increase the costs of remaining in and joining labor unions”¹⁰⁸. These dual effects, easier to drop out and harder to opt in, lead directly to fewer union members. The upshot of these findings is that the drop in membership is not an indication of workers’ desire for unions, but a reflection of the economic cost-benefit calculation being knocked off-balance in favour of not being a union member.

Further, anti-union laws make it more difficult to organize a union. RTW states have almost half the number of NLRB-supervised certification votes as non-RTW states and those votes are less likely to be successful¹⁰⁹. Strikes are also far less frequent in RTW states. “There were as many walkouts in, say, Illinois (30 strikes) and Pennsylvania (10) as there were in all 27 right-to-work states. Add in California (30) and Washington (15), and those four non-right-to-work states alone more than double the output of the right-to-work club when it comes to labor unrest”¹¹⁰.

If you are an opponent of unions, those findings may read like good news. However, lower certification attempts and victories and reduced strike activities are signals that workers find it hard to exercise their democratic rights in the workplace. Legal obstacles increase the cost of exercising these rights and reduce the prospect of success, leading workers to make a calculation against attempting unionization. Lower union activity is not necessarily an indication of worker interest in unions, but rather can be a consequence of a legal regime that restricts access to organizing and mobilizing. Unionization activity must be understood in the broader context in which it takes place.

Paradoxically, the one area where RTW does not seem to impact unions is in the union wage premium. The wage (and benefit) premium is the difference unionized workers earn compared to non-unionized workers. In the U.S. the overall wage premium is about 19 per cent (about \$4.65 an hour)¹¹¹. In Canada, it is between eight per cent and 15 per cent (\$2.50 to \$5 per hour)¹¹². Unionized workers are also more likely to have benefit and pension plans¹¹³. These premiums have declined somewhat in recent years but have been relatively persistent.

Interestingly, research has shown that the wage premium remains or even increases in RTW states¹¹⁴. While average wages drop overall (to be discussed below), the gap between union and non-union workplaces is not affected. Even in RTW regimes workers make economic gains through

union membership¹¹⁵. These findings suggest that anti-union measures have an impact not by undercutting union effectiveness overall but by reducing the opportunities for workers' desire for unionization to translate into certification¹¹⁶. In other words, anti-union legislation targets workers' rights to expression and to assembly by placing roadblocks in the exercise of those rights.

Effects on Wages and Economic Growth

The most contested terrain regarding anti-union legislation is its impact on jobs, economic growth, and wages. Proponents argue for RTW and other measures on the basis that they will result in increased employment, investment, and economic growth. Opponents have long argued that anti-union measures drive down wages.

Macro-economic analysis analyzing RTW vs. non-RTW states over the past few decades generally finds that RTW states have had higher rates of economic and employment growth over time¹¹⁷. The numbers can vary based on the type of analysis performed. One study found RTW states had an average increase in real GDP of 3.32 per cent annually over a thirty-year period, compared to 2.58 per cent for non-RTW states¹¹⁸. Other studies have compared economic growth in border counties (one in RTW, one in non-RTW) to attempt to control for variations in economic contexts with similar results¹¹⁹. Results such as these have anchored the RTW debate for some time.

More recent research has developed a more nuanced understanding of the economic impacts. First, it has been found that much of the effect found in the national-level comparisons can be attributed to the differing starting places for respective states¹²⁰. The first RTW states in the 1940s were found in the south, while non-RTW states were primarily in the northeast and west coast. Comparatively the RTW states were less economically developed than the non-RTW states and therefore went through different economic stages in the ensuing decades and would be expected to grow at a faster pace, in part due to their lower starting point. It can be difficult to isolate the effects of RTW measures amidst this historical divergence¹²¹.

Second, researchers have pointed out that much of the research on economic growth has relied on difference of mean between the two groups. In other words, the research reports averages, which can conceal important aspects of distribution. "The problem with averages presented in the absence of standard deviations is that they create the misleading impression that the average is more or less representative of everyone in the group"¹²². When examining the distribution of states, association to economic and job growth disappears as both groups have over- and under-performing states¹²³.

Third, recent studies suggest the economic impact of RTW measures has been declining over time and that much of the effect found in previous studies is an historical vestige and that in recent years RTW had effectively no impact on key employment metrics¹²⁴. Other research has pointed out that regional economic differences found in the post-war period have dissipated. “Any measure of comparative job growth over the past several decades captures the deindustrialization of the Northeast and upper Midwest and the mass relocation of firms to the South starting in the 1960s. ... That wave of relocation may show up in the long-term employment growth of Southern states, but at this point the relocation is complete”¹²⁵.

Further the latest wave of research using more sophisticated methods that control for other factors have consistently shown no economic or employment effects attributable to RTW¹²⁶. These results are coupled with case studies of states which have recently adopted RTW, including Oklahoma, Wisconsin, Indiana and Michigan, which all have shown that the promised economic benefits of RTW have not materialized, with the states showing no economic bump or even lagging behind their non-RTW neighbours¹²⁷.

In all, the latest understanding about the economic impact of RTW is that historically there may have been some effect, although that is uncertain, but that in the contemporary period there is no evidence that RTW boosts a jurisdiction’s economic fortunes. Many argue it is impossible to disentangle the effects of a single policy initiative when analyzing macro-economic patterns¹²⁸.

Wages

The other side of the economic question is much clearer – anti-union measures reduce wages. Repeated studies using a range of methodologies have consistently shown that workers in RTW states earn between two and eight per cent less than workers in non-RTW states¹²⁹. The study by Bruno and colleagues sums up the effects well: “RTW has a negative effect on worker wages, holding all else constant. RTW laws lower a worker’s hourly wage by about \$2 per hour. RTW is also found to be responsible for between at 2.1 and an 8.2 per cent plunge in a worker’s hourly wage”¹³⁰. Lower wages has been one of the most consistent findings regarding RTW.

A related finding is that workers in RTW states are also less likely to receive health and pension benefits. The most comprehensive study found that workers in RTW states are 3.8 per cent and 12.1 per cent less likely to receive health and pension benefits, respectively¹³¹. In part this is due to lower union density, but is also attributable to other employment effects.

In the aftermath of the implementation of the Wisconsin Model, public sector wages immediately dropped between 8.5 per cent and 11.3 per cent and have

stagnated over the past decade¹³². Teachers, who were the target of the most severe changes, saw significant reductions. Six years after the passage of Act 10, teachers were still earning between three and six per cent less overall. They also experienced a 19 per cent cut in the monetary value of their benefit plans.¹³³ Public and private sector compensation in Wisconsin has lagged behind neighbouring states¹³⁴.

The primary mechanism for the reduction in wages is the previously discussed reduction in union density. By reducing the number of workers represented by a union, fewer workers receive the benefit of the union wage premium. Further, while those workers who are unionized retain their relative premium, their capacity to negotiate wage increases is impaired, lowering their wage levels as well.

Effect on Equality

It is widely accepted that unions, in both Canada and the U.S., reduce overall income inequality and racial and gender pay gaps¹³⁵. The reason is tied to the concept of the union premium discussed above. Unions tend to increase wage rates compared to equivalent non-union workers. Given who are most likely to be represented by unions, this tendency leads to increased wages for lower paid workers, thereby shrinking the gap between the highest and lowest paid. This study succinctly summarizes the dynamic:

Unions reduce wage inequalities because they raise wages more at the bottom and in the middle of the wage scale than at the top. Lower-wage, blue-collar, and high school-educated workers are also more likely than high-wage, white-collar, and college-educated workers to be represented by unions. These two factors – the greater union representation and the larger union wage impact for low-and mid-wage workers – are key to unionization's role in reducing wage inequalities.¹³⁶

The same dynamic leads unions to reduce gender- and race-based inequity, as women and racialized workers are more likely to be in lower wage occupations, although relative union density (racialized workers are less likely to be unionized) can mediate this effect¹³⁷.

It stands to reason, therefore, that as union density declines inequality increases. In most countries union density is negatively correlated with inequality¹³⁸. Canada and the U.S. fit this dynamic as Canada has a Gini Coefficient (a widely accepted measurement of inequality) 20 per cent lower than the U.S. (33.3 to 41.4)¹³⁹. Researchers in the U.S. have estimated that 20 per cent to 33 per cent of the rise of inequality in the U.S. is attributable to their decline in union density over the past few decades¹⁴⁰.

If we look at the impact of anti-union measures specifically, research in the U.S. has confirmed this general link. A recent study examining inequality before and after the passage of RTW laws shows that RTW increases income inequality overall, although there are some complexities¹⁴¹. The rise in inequality is highest in states where unions were strongest before the passage of RTW laws. The study also confirms that wages on the low end of the pay scale drop post-RTW. In a related measure, RTW states have higher poverty rates than non-RTW states¹⁴².

Rising inequality has differential impacts on different groups of workers. The gap in wages between blue collar and white collar workers increases under RTW, as does the gap between workers with lower and higher levels of education¹⁴³. Repeated studies have confirmed that the gender pay gap also increases with RTW¹⁴⁴. The data for racialized workers is more complex. Studies find a general worsening of conditions for African-American workers, while they find mixed impacts on Hispanic workers¹⁴⁵. Some studies have shown that Hispanic and African-American workers experience a larger wage drop post RTW in part due to the fact they receive a higher union premium when unionized¹⁴⁶.

Rising inequality under anti-union measures is not just a factor of fewer workers being in unions, although that is a key reason. The results speak to the broader role unions play in society and their work outside the workplace to affect social change. Weakening unions fosters greater inequality because unions engage in broader social issues. “Strong labor unions may operate as an essential mediating institution that helps reduce political and economic inequality”¹⁴⁷. Undermining them can undercut the bonds that hold societies together.

Effect on Political Discourse

The discussion on equality speaks to a degree to unions’ influence in politics and the shaping of public policy. Undermining unions weakens their ability to participate in public debate, which leads to policy decisions that increase inequality and other inequities in society. This is a very direct consequence of anti-union measures. The impact goes further than just weakening union voice.

Some research has focused specifically on the electoral effects of anti-union legislation. Feigenbaum and colleagues conducted a border county comparison analysis examining a number of political outcomes¹⁴⁸. They find, unsurprisingly, that the vote share for Democratic candidates decreases post-RTW by four to six per cent. Voting turnout overall is reduced. The authors find that much of the reduction in Democratic votes is attributable to reduced turnout by Democratic voters. They argue that RTW reduces

unions' ability to fund Democratic campaigns, making those campaigns less able to contact potential Democratic voters and to assist them in voting.

Further, the study finds that over the long term RTW affects who runs for office. Fewer working class people run for office and fewer are elected to state legislatures. This shift in who fills elected office leads to a rightward shift in state public policy overall. "State policy as a whole, moreover, moves to the ideological right in RTW states following the passage of those laws"¹⁴⁹. RTW states were already more conservative than non-RTW states (hence the enactment of anti-union measures). This study suggests that RTW and other measure entrench and intensify that political lean.

Similar arguments are made for measures targeting public sector unions like the Wisconsin Model. They have the effect of weakening the financial position of public sector unions, which leads to a rolling back of their political activities¹⁵⁰. This effect is argued to be a goal of such legislation. "The weakening of public sector labor laws is a deliberate attempt by Republicans to hinder the political mobilization of Democratic-leaning institutions"¹⁵¹.

That these laws are designed to undermine union political power is not controversial. Many RTW and Wisconsin Model advocates are quite explicit about the target of such legislation to undermine the political influence of unions. One activist was recently quoted discussing a U.S.-wide campaign to enact anti-union legislation: "[Our goal is to] defund and defang one of our freedom movement's most powerful opponents, the government unions ... [to] deal a major blow to the left's ability to control government at the state and national levels. I'm talking about permanently depriving the left from access to millions of dollars in dues extracted from unwilling union members every election cycle"¹⁵². Much of their attention focuses on unions' influence over public services and government spending, considering such efforts a conflict of interest and detrimental to taxpayers¹⁵³.

The intention and impact of these measures is not just to reduce the "union influence" in politics. It is to ensure politicians sympathetic to the issues unions and their members care about are less successful, allowing their political opponents to thrive. In such an environment elected officials can make decisions about a whole range of policies that affect the lives of working people. Anti-union measures need to be seen within the broader political context of shifting electoral and political power away from working people and to interests opposing them.

Effect on Public Services

The final effect to consider is whether anti-union measures impact the delivery of public services. Since most of the measures taken in U.S. states in recent years have focused on public sector workers, it is reasonable to ask whether these actions have affected the levels of funding for public services and/or the quality of those services.

In Wisconsin the restrictions on public sector bargaining were accompanied by a set of budget cuts. The government cut \$1 billion from the state budget over two years, including a 7.9 per cent reduction to schools plus a 5.5 per cent reduction in school tax revenue and an 11.6 per cent cutback to municipalities¹⁵⁴. This reduction was followed by multiple years of budget restriction. Ten years later, inflation-adjusted school funding continued to be \$75 million lower than in 2011¹⁵⁵ and funding for municipalities continues to drop. Teacher turnover has increased, retention has decreased, and more school boards report difficulty recruiting new hires¹⁵⁶. Per capita funding dropped from 12th in the U.S. to 24th over the 10 years¹⁵⁷ and teachers' working conditions deteriorated¹⁵⁸. While overall education outcomes remained stable, statewide figures mask increased inequality between richer and poorer school districts¹⁵⁹. During this time tax cuts amounted to \$13.6 billion cumulatively¹⁶⁰.

Other states, including Ohio, Michigan and Indiana, followed Wisconsin and also engaged in significant budget cutbacks, with resulting cuts to services similar to the experience in Wisconsin¹⁶¹. While the issues of restricting bargaining and government funding cutbacks are theoretically unrelated, advocates have explicitly linked the two, justifying the attacks on public sector unions as part of the effort to reduce deficits and control government spending¹⁶².

There has not been much research examining how RTW affects the funding levels for and quality of public services. There is evidence that RTW states have lower overall government expenditures per capita¹⁶³, although this statistic includes a wide-range of budgetary commitments. The studies that have been performed focus on education, which is the largest state-level funding commitment. RTW states spend, on average, 31.6 per cent less on elementary and secondary education than non-RTW states¹⁶⁴. A new study examining the effect of RTW on education outcomes finds that "prohibitions on agency fees for teachers' unions lead to declines in teachers' union power, but contrary to what many union critics have argued, I find that these efforts did not result in political opportunities for education reforms nor did they result in increases in student outcomes. If anything, RTW policies have decreased student achievement"¹⁶⁵.

Some interesting research has found that RTW is associated with a 14.2 per cent increase in occupational-related death¹⁶⁶. Other studies have found increased incidence of fatal accidents in construction in RTW states¹⁶⁷. In both cases the effect is found to be primarily related to the decrease in union density and a reduction in the union safety effect.

There appear to be at least some evidence for negative impacts on public health. Median life expectancy in non-RTW states is slightly higher (77.6 vs. 76.7 years)¹⁶⁸. Infant mortality rates appear to be higher in RTW states (6.3 vs. 5.2 per 100,000 births)¹⁶⁹. However, care should be taken in interpreting these statistics as they rely upon averages across states (the same problem that plagues economic growth estimates). It is also very difficult to isolate causes for complex public health outcomes. The data should not be ignored, either, for it is well known public health outcomes are linked to factors that are affected by RTW, including levels of poverty, inequality and access to affordable health care.

Leading up to the Janus decision some public health researchers expressed concern of its longer term impacts on public health: "We argue that a win for Janus would threaten public health by eroding organized labor's power to improve working conditions"¹⁷⁰. The authors argue that reduced union power will lead to greater inequality and worse access to health care for lower income workers, pointing to the American Public Health Association's longstanding position that union organizing is beneficial for public health due to its role in decreasing inequality.

Assessing the impact of anti-union measures on public services can be challenging. There has been little direct research into the subject and it is difficult to isolate those effects from other factors or the effects of other policy decisions. What information that is available lays out an argument that weakening union strength can undermine their ability to affect broader social and political issues and it is that impact that can lead to an erosion of public services.

It should also be highlighted that we cannot disentangle anti-union measures from a broader political agenda aiming to advance neo-liberal policies and government austerity. As our examination of the U.S. has shown, they are two sides to the same agenda. While we cannot demonstrate that RTW and other anti-union laws directly weaken public services in the same way as they lower union density and decrease workers' wages, we can show that they are accompanied by other policy and fiscal solutions that negatively impact public services. We certainly observe a similar pattern in Alberta, where anti-union measures are only part of a broader political agenda to "re-make" Alberta.

Conclusion: The Americanization of Labour Relations in Alberta

This report has examined the labour relations-related provisions in Bill 32 and considered their potential impacts on Alberta. It has examined the bill from the perspective of how it might impact the charter-protected rights of Albertans. It has also explored how its provisions resemble aspects of labour relations law in the United States.

The two issues are related. The contemporary state of labour relations in Canada is due, in part, to an evolving understanding of the balance between individual and collective rights, how those rights express themselves in the charter and, ultimately, how workers' collective actions in the workplace are protected (or not) through legislation and policy. Whether the courts and governments have struck the right balance in protecting those rights is a legitimate subject of debate, and whether the understanding of that balance will continue to evolve is unknown. At present, Canada's approach to this balance differs markedly from that of the U.S., which has sided much more firmly with individual rights at the expense of collective expressions of those rights.

As a consequence there has been greater latitude for governments in the U.S. to interfere with collective-based rights through legislative action, one that many have opted to utilize. The result has been a weaker labour movement south of the border. As has been discussed, that weakened union position has led to a series of social, economic, and political impacts including greater inequality and inequity. The differing approaches to labour relations is one of the factors creating the differences between the two countries.

Bill 32 moves Alberta's labour relations environment closer to the U.S. model in two ways. First, a number of its provisions are unprecedented in Canada and much more closely reflect U.S. law. In particular the interference with union internal affairs and the dues opt-in provisions appear to be copied from American examples. These and other provisions will undermine unions' ability to represent their members, organize new members, and engage in public debate.

Second, Bill 32 deviates from the delicate balance of rights established in Canadian labour relations. Its provisions elevate individual freedom of choice, employer freedom of expression, and employer economic rights above the collective rights of workers to associate. The provisions are very much in the tone of the American understanding of these rights and how they are to be balanced.

It is important to not overstate the stability or desirability of the Canadian approach. The Canadian system has its critics on both sides and much of the current thinking related to the charter is only a few years old. Canadian workers do not have an easy time exercising their collective rights and large numbers of workers have those rights denied in multiple ways. It is only that they have an easier time than their counterparts in the U.S. While that may be small comfort for those workers, it is a difference that should not be ignored.

Besides, in the world of work, small differences matter. We have known for a long time that small changes in labour and employment policy can result in significant differences in economic and labour market outcomes¹⁷¹. Recognizing this reality, this report has intentionally expanded the scope of analysis beyond certification levels, union density, and union finances to examine the broader impacts of these “small” changes. The impacts of Bill 32 will extend much beyond these technical matters of labour relations practice and reach into the lives of ordinary working Albertans. Bill 32 matters, in part, because of the scope of its impacts.

As the bill has only recently been passed and some of its more American-inspired pieces are not yet in force (as of the time of writing), we cannot be certain what the total impacts will be. We cannot be sure if provisions will be struck down by the courts as violating the charter. We do not know if the economic, social, and political impacts experienced in the U.S. will be replicated here. Only time can unravel that story.

What we do know is that Bill 32 moves Alberta closer to an American form of labour relations, one where workers’ rights are subsumed by other interests. It is a decided shift in balancing competing interests, one that will advantage employers at the expense of their workers. That shift is likely to have noticeable consequences for workers’ exercise of their rights. That is worth paying attention to.

Finally, this report argued that Bill 32 impacts more than just unions and their members. The consequences of changes like those in Bill 32 ripple out to all corners of society. All Albertans have a stake in the levels of inequality in our province. All Albertans are affected by the direction our economic growth and what our labour market looks like. All Albertans benefit from quality public services. All Albertans should be concerned at the prospect of charter-protected rights being undermined. And all Albertans value and rely upon a healthy democratic politics where a multitude of voices can be heard.

Bill 32 touches upon all of those things. That is why understanding Bill 32 matters.

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