A Return to Balance or Empowering the Powerful? Alberta's Bill 32

Creating a balance of workplace power between employers and employees is difficult. The Government of Alberta is currently addressing what it perceives to be a balance too favourable for employees with Bill 32: The *Restoring Balance in Alberta's Workplaces Act, 2020* [Bill 32 or the Bill].[1] According to the Government, the Bill aims to foster economic recovery in the province and "get Albertans back to work" by reducing regulatory burdens on employers.[2] Unions and other labour groups view the Bill differently. They claim the Bill is an attack on workers' rights. Gil McGowan, president of the Alberta Federation of Labour, called the Bill a "fundamental attack on worker rights and democracy."[3] McGowan claims the Bill introduces a double-standard by loosening regulatory burdens on businesses while increasing the burdens on unions.[4] While many of the Bill's changes do not implicate the Constitution, some of its changes potentially violate workers' rights that are protected by the *Canadian Charter of Rights and Freedoms*.[5]

Bill 32 Overhauls Labour Relations in Alberta

When Jason Copping, Minister of Labour and Immigration, first introduced Bill 32, he said the Bill would "provide employees and employers with clearer and more transparent rules, promoting fairness and productivity."[6] It attempts to do so in part by reducing "red tape."[7] Minister Copping said the Bill's purpose is to increase economic activity in the province by "reducing burdens on job creators."[8] Alberta Premier Jason Kenney said the Bill will help Alberta "keep jobs, create jobs, and support economic growth."[9] The Bill is aimed at shifting the balance of workplace power toward employers and away from employees. The governing United Conservative Party seems to believe the previous government of the New Democratic Party shifted the balance of workplace power too far in favour of workers and unions.[10]

Bill 32 is complex, amending at least six different labour and employment relations acts.[11] Jason Foster, associate professor of human resources and labour relations at Athabasca University, called Bill 32 the "single biggest overhaul of labour relations in thirty years."[12] Outlining all of Bill 32's changes is outside the scope of this article. Instead, this article will focus on two tasks. First, it will focus on summarizing some of Bill 32's changes that are likely not open to constitutional challenges. It will then focus on two changes which may, according to some critics and commentators, violate workers' *Charter* rights.

Bill 32 Amends the *Employment Standards Code*

Bill 32 makes several significant changes to the *Employment Standards Code* ["ESC"].[13] The ESC establishes the minimum standards of employment in Alberta in several areas

including pay, work hours, overtime, holidays, and termination.

Bill 32 changes "averaging agreements" into "averaging arrangements."[14] Averaging agreements were agreements between an employer and an employee that "averaged" the employees' work hours over a span of weeks or months. These agreements reduced the amount of overtime pay the employee received.[15] For example, the employee may have worked 60 hours one week and 20 hours the following week. Their hours could then be "averaged" over the two-week span so that the employer pays the employee for two 40-hour weeks, saving the employer from paying any overtime.

Bill 32 makes two major changes to averaging agreements. First, it allows employers to unilaterally impose averaging arrangements on employees without the employees' consent.[16] Second, it extends the amount of time over which employers can average an employee's pay from 12 weeks to 52 weeks.[17]

Another change Bill 32 makes to the ESC concerns how employees take breaks on the job. The Bill brings back the break period scheme that existed prior to amendments made by the previous NDP government.[18] Employees must now work five hours to qualify for a 30-minute break.[19] Employees must work ten hours to qualify for two 30-minute breaks. If the employer and employee do not reach an agreement on when the employee will take a break, the employer can choose when the employee will take their break.[20]

Bill 32 Amends the *Labour Relations Code*

Bill 32 also modifies the *Labour Relations Code* ["LRC"].[21] The LRC outlines the rights and responsibilities of employers, unions, and employees in labour relations.[22] One change concerns how certification votes must take place. The certification process is the process by which a union becomes the formal collective bargaining agent for a group of employees. To become a union, the group must meet certain requirements set by the LRC. If the potential union meets the requirements, the Labour Relations Board will hold a vote, called a certification vote, with the employees. If most of the employees choose to be represented by that union, the Labour Relations Board will certify that union as their representative.[23] Previously, this vote had to take place within certain strict timelines. Bill 32 removes many of these timelines and greatly lengthens others.[24] Critics of the Bill allege that this will reduce representation by giving employers time to "dissuade and intimidate workers" to vote against unionization.[25]

Potential *Charter* Challenge 1: Restrictions on Secondary Picketing

In addition to the above changes, Bill 32 makes two changes which some unions and labour rights advocates, as well as academics and legal analysts, say may violate workers' *Charter* rights.[26] The first such change is a restriction on secondary picketing. Bill 32 requires labour groups to get approval from the Labour Relations Board before engaging in secondary picketing.[27] Picketing normally occurs at the site of the labour dispute: the workplace. Secondary picketing instead occurs at an offsite location that is related to the employer. For example, in a famous Canadian case on secondary picketing, Pepsi-Cola

employees in Saskatchewan were in a labour dispute with the regional Pepsi-Cola distributor. In addition to picketing the factory, the workers also engaged in secondary picketing at some of Pepsi-Cola's retail outlets.[28]

Unions and labour organizations allege that by requiring them to get approval from the Labour Relations Board before engaging in secondary picketing, Bill 32 violates their *Charter* right of freedom of expression.[29] These groups say the Bill restricts unions' speech by removing secondary pickets from their expressive vocabulary unless the Labour Relations Board authorizes them.

The Supreme Court of Canada held in 2002 that the Pepsi-Cola employees' *Charter* right to freedom of expression protected their peaceful secondary picketing.[30] Secondary picketing is a form of expression by labourers. The Supreme Court of Canada has said that labour expression is "fundamental not only to the identity and self-worth of individual workers…but also to the functioning of a democratic society."[31] Where this expression takes place, be it at the workplace or at a secondary site, is irrelevant; all picketing is generally acceptable unless it is otherwise criminal or unlawful.[32] For example, picketing which devolves into intimidation, trespass, or criminal harassment will be unlawful, regardless of where it occurs.[33]

This decision by the Supreme Court of Canada means that to the extent Bill 32 places limits on or discourages secondary picketing, it may violate workers' *Charter* right to freedom of expression. However, rights in the *Charter* are not absolute. The government is allowed to violate *Charter* rights so long as it can justify its violation. To justify a violation, the government must show that the violation is a rational and proportionate way to achieve a pressing goal.

As the Supreme Court discussed in the Pepsi-Cola case, specific picketing activities can be unlawful, and as such can be limited.[34] Subject to the general constraint that they must "respect the *Charter* value of free expression and be prepared to justify limiting it," the government is free to develop their own "policies governing secondary picketing."[35] This means that while Bill 32's restriction on secondary picketing may violate workers' freedom of expression, it may also be legally justifiable and hence constitutional. For example, limiting secondary pickets that cause harm to *unaffiliated* third-parties may be a justified limit on unions' expressive freedom. The courts will have to determine whether Bill 32's provisions regarding secondary picketing are constitutional by balancing the workers' *Charter* right to free expression with the Government's justifications.

Potential *Charter* Challenge 2: Restriction on the Use of Union Dues for "Political Purposes"

A second potentially unconstitutional change Bill 32 makes concerns how unions spend their collected union dues. Union dues are financial payments paid by workers to fund the union. Dues cover the cost of collective bargaining, the cost of taking grievances to arbitration, the cost of surviving strikes or lockouts, and more.[36] Bill 32 requires unions to obtain the consent of each worker to use union dues for "political purposes."[37] The

definition of “political purposes” is broad. It includes:

- General social causes or issues,
- Charities or non-governmental organizations,
- Organizations or groups affiliated with or supportive of a political party, and
- Any other activities the government adds through regulations.[38]

Under Bill 32, unions must provide their members with detailed information on the amount of union dues that they will use for such political purposes before obtaining each member’s consent. The new rules create an “opt-in” scheme: a member’s dues cannot be used for any of the listed “political purposes” unless that member opts-in.[39]

Unions allege that this is an attack on workers’ ability to pool their money to advocate for themselves. They claim the opt-in scheme makes it more difficult to advocate for political change for their members.[40] In response, the Government’s justification for the scheme appears to be that it gives workers more choice in how unions spend their members’ money. During legislative debate on the Bill, Jason Copping, Minister of Labour and Immigration, said that the shift to an opt-in scheme gives Albertans “the right to make their own decisions” about how their union dues are spent.[41] Of course, it is worth remembering that union leadership is typically elected. As such, workers already have a say in how unions spend their dues – by electing leaders with whom they agree.

The Opt-In Scheme and Freedom of Association

The opt-in scheme may be a violation of workers’ right to freedom of association. Freedom of association protects the ability to work together to achieve common goals.[42] It often arises in labour contexts because it protects workers’ right to join unions, to bargain collectively, and to strike.[43]

The Supreme Court has previously held that legislation allowing unions to spend dues on political activities with which a member disagrees is allowable. In the case of *Lavigne v Ontario Public Service Employees Union*, an Ontario community college teacher was required to pay union dues under a collective bargaining agreement.[44] The teacher objected to the union spending some of the dues on political campaigns for Ontario’s New Democratic Party. The teacher alleged that this violated their freedom of association because it forced them to participate in the union’s political activities. All seven judges agreed that the rules allowing the use of union dues for political purposes with which a member disagrees were constitutional.[45]

Bill 32 creates the opposite issue. In *Lavigne*, the issue was an employee frustrated with the political expenditures of their union. Bill 32, on the other hand, makes it harder for unions to spend for political purposes. However, in *Lavigne*, all the justices seemed to agree that collective bargaining, the core purpose of unions, is not fully separable from political purposes.[46] Supreme Court Justice La Forest was concerned that allowing opt-outs on

political uses of union dues could hamper unions' ability to engage in core union practices like collective bargaining.[47] In particular, Justice La Forest felt that drawing a line separating a union's core purposes from its political purposes will depend on "one's political and philosophical predilections, as well as one's understanding of how society works."[48]

The key test for a violation of the right to freedom of association is whether the legislation "substantially interferes" with the meaningful process of collective bargaining.[49] Substantial interference is anything which seriously inhibits the employees' ability through the union to bargain collectively. The issue for the court to decide is whether by requiring unions to obtain consent from employees before spending dues on the listed "political purposes," Bill 32 is substantially interfering with unions' ability to engage in meaningful collective bargaining on their members' behalf.[50] If the line between core union activities and a union's political purposes is hard to draw, then this limit on "political purposes" spending may end up substantially interfering with a union's ability to engage in its core activities. If so, Bill 32 may violate workers' freedom of association right. Again, though, the Government may be able to justify their violation of the right by showing the violation proportionately pursues important state goals.

The Opt-in Scheme and Freedom of Expression

Rather than arguing that Bill 32 violates workers' right to freedom of association, a challenge to Bill 32's union dues changes may target its impact on freedom of expression. A freedom of expression challenge to the opt-in scheme could claim that the changes violate unions' freedom of expression by reducing although not formally removing their capacity to engage in political expression.[51]

A freedom of expression challenge seems unlikely to succeed, though, because even if a court finds the union dues rules to be a violation of expression rights, the Government may be able to justify them in several ways. First, Bill 32 does not forbid unions from spending dues on political purposes, it only requires them to keep detailed accounting of political expenses and get consent from members before spending. Second, Bill 32 does not simply limit freedom of expression, but also enhances it by giving individual members more say over how unions spend their money. Third, Bill 32 falls in a sphere of policy in which the courts will typically defer significantly to legislatures.[52] As the Supreme Court has said, policy-making "in the domain of labour relations is better left to the political process, as a general rule."[53]

However, some critics allege that this change only appears insidious when viewed in its entire context.[54] These critics point to the fact that most unions in Alberta support the Government's opposition, the New Democratic Party. They suggest that part of the Government's purpose in changing to the opt-in scheme is to make it harder for their political opponents to fundraise. This argument is supported by United Conservative Party press releases suggesting that the Bill's targeting of unions political spending is in part due to their prior support of the NDP.[55]

The argument that Bill 32 is, at least in part, a partisan attack on political opponents could

cause trouble for the Government in the courts. One of the first things a court does when determining if a violation of a right is justified is determine if the objective of the law is "pressing and substantial."[56] In addressing this issue, the courts need not accept the government's own description of the law's objective. If a court held that Bill 32's objective was "decreasing the fundraising potential of political opposition," they would likely hold the Bill's objective not to be pressing and substantial, and thus the Bill's violation of *Charter* rights to be unjustified.

Conclusion

As of July 29, 2020, Bill 32 is law in Alberta.[57] Its changes will come into effect over the coming weeks and months. A number of Alberta's largest unions have indicated they will challenge Bill 32's constitutionality in the courts. The Alberta Federation of Labour, with its 25 associated public and private sector unions,[58] Unifor, Canada's largest private sector union,[59] and the Canadian Union of Public Employees[60] have all indicated they will support legal opposition of Bill 32. As of now, it is unclear which provisions of Bill 32 these groups will challenge. It is very likely, however, that they will challenge either the secondary picketing changes or the changes to union dues on some of the grounds discussed above.

[1] *Restoring Balance in Alberta Workplaces Act*, SA 2020, c 28 .

[2] Overview, "Restoring balance in Alberta's workplaces," *Government of Alberta* (last visited 3 August 2020), online: <www.alberta.ca/restoring-balance-in-albertas-workplaces.aspx>.

[3] Alberta Federation of Labour, "'This is a dark day in Alberta history,'" *Alberta Federation of Labour* (7 July 2020), online: <www.afl.org/_this_is_a_dark_day_in_alberta_history>.

[4] *Ibid*.

[5] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

[6] Alberta, Legislative Assembly, *Hansard*, 30th Leg, 2nd Sess, No 40 (7 July 2020) at 1760 (Hon Jason Copping).

[7] *Ibid*.

[8] *Ibid*.

[9] Jason Kenney, "Bill 32 fulfills a big promise we made: no longer will union workers be forced to fund political campaigns of union bosses! We're also bringing back more balance to our labour laws to help us keep jobs, create jobs, and support economic growth as part of Alberta's Recovery Plan," (31 July 2020 at 18:18), online: *Twitter* <www.twitter.com/jkenney/status/1289354658205532163>.

[10] For some of the labour law changes introduced under the previous NDP government, see Staff, "A closer look at proposed changes to Alberta's workplace rules," *Global News* (24 May 2020), online: <www.globalnews.ca/news/3476166/a-closer-look-at-proposed-changes-to-albertas-workplace-rules/>; John Cotter, "NDP announces labour law changes to bring 'Alberta's workplaces in to the 21st century," *Global News* (24 May 2017), online: <www.globalnews.ca/news/3476075/ndp-announces-labour-law-changes-to-bring-albertas-workplaces-into-the-21st-century/>.

[11] Jason Foster, "Alberta's Bill 32 is a Seismic Break in Labour and Employment Law," *Canadian Law of Work Forum* (10 July 2020), online: <www.lawofwork.ca/albertas-bill-32-is-a-seismic-break-in-labour-and-employment-law/>.

[12] Jason Foster, "Taking Aim at Unionized Workers: The Impacts of Bill 32 (Part 1)," *Parkland Institute Blog* (15 July 2020), online: <www.parklandinstitute.ca/bill_32_part_1>.

[13] *Employment Standards Code*, RSA 2000, c E-9.

[14] Bill 32, *supra* note 1, part 1, ss 1-7.

[15] Jason Foster, "Increasing Employer Power at the Workplace: The Impacts of Bill 32 (Part 2)," *Parkland Institute Blog* (21 July 2020), online: <www.parklandinstitute.ca/bill_32_part_2>. See also Government of Alberta, "Averaging agreements," *Government of Alberta* (last visited 3 August 2020), online: <www.alberta.ca/averaging-agreements.aspx>.

[16] Bill 32, *supra* note 1, part 1, ss 7-8.

[17] *Ibid*, s 11(a)(ii).

[18] "Bill 32: Restoring Balance in Alberta's Workplaces Act, 2020," *Neuman Thompson* (last visited 3 August 2020), online: <www.neumanthompson.com/bill-32-restoring-balance-albertas-workplaces-act-2020>.

[19] Bill 32, *supra* note 1, part 1, ss 9-10.

[20] *Ibid*, s 9.

[21] *Labour Relations Code*, RSA 2000, c L-1.

[22] Alberta, Alberta Labour Relations Board, *A Guide to Alberta's Labour Relations Laws*, (last visited 3 August 2020), online (pdf): <www.alrb.gov.ab.ca/guide/guide.pdf>.

[23] Alberta Labour Relations Board, "FAQ: Certification – Unionizing a Workplace," (last visited 3 August 2020), online: <www.alrb.gov.ab.ca/faq_certifications.html>.

[24] Bill 32, *supra* note 1, part 2, s 13.

[25] Jason Foster, "Taking Aim at Unionized Workers: The Impacts of Bill 32 (Part 1)," *Parkland Institute Blog* (15 July 2020), online: <www.parklandinstitute.ca/bill_32_part_1>.

[26] See National Union of Public and General Employees, "Bill 32 a direct attack on workers' rights," *National Union of Public and General Employees* (8 July 2020), online: <www.nupge.ca/content/bill-32-direct-attack-workers-rights>; Chelsea Nash, "AUPE preparing members for strike action in wake of Alberta's Bill 32," *Rabble* (21 July 2020), online: <www.rabble.ca/news/2020/07/aupe-preparing-members-strike-action-wake-albertas-bill-32>.

[27] Bill 32, *supra* note 1, part 2, s 24.

[28] *R.W.D.S.U., Local 558 v Pepsi-Cola Canada Beverages (West) Ltd.,* 2002 SCC 8, at para 1 .

[29] See National Union of Public and General Employees, *supra* note 26; Nash, *supra* note 26. See also Alberta Federation of Labour, *supra* note 3.

[30] *RWDSU*, *supra* note 28 at para 101.

[31] *Ibid* at para 69.

[32] *Ibid* at para 103.

[33] *Ibid*.

[34] *Ibid* at para 107.

[35] *Ibid*.

[36] "Fact Sheet: Union Dues and the Rand Formula," *Canadian Union of Public Employees* (28 August 2013), online: <www.cupe.ca/fact-sheet-union-dues-and-rand-formula>.

[37] Bill 32, *supra* note 1, part 1, s 9.

[38] *Ibid*.

[39] Colin Feasby, "Restoring Balance? Bill 32, the *Charter*, and Fair Democratic Process," *ABLawg* (15 July 2020), online: <www.ablawg.ca/2020/07/15/restoring-balance-bill-32-the-charter-and-fair-democratic-process/>.

[40] Alberta Federation of Labour, *supra* note 3. See also Nash, *supra* note 26.

[41] Alberta, Legislative Assembly, *Hansard*, 30th Leg, 2nd Sess, No 52 (28 July 2020) at 2569 (Hon Jason Copping).

[42] *Mounted Police Association of Ontario v Canada*, 2015 SCC 1 at para 54 .

[43] *Ibid* at paras 52-54.

[44] *Lavigne v Ontario Public Service Employees Union*, 1991 CanLII 68 (SCC) .

[45] *Ibid* at paras 95, 191, 279, 281.

[46] See Dennis Buchanan, "Restricting a Union's Political Activities: The Constitutionality of Alberta Bill 32," *Law of Work* (27 July 2020), online: <www.lawofwork.ca/bill32-charter/>.

[47] *Lavigne*, *supra* note 44.

[48] *Ibid*.

[49] *MPAO*, *supra* note 42 at para 80. See also *Saskatchewan Federation of Labour v Saskatchewan*, 2015 SCC 4 at para 78.

[50] See Buchanan, *supra* note 46.

[51] Feasby, *supra* note 39.

[52] *R v Advance Cutting & Coring Ltd*., 2001 SCC 70 at para 257.

[53] *Ibid*.

[54] Feasby, *supra* note 39.

[55] United Conservative Party of Alberta, "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!" (8 July 2020 at 13:33), online: *Twitter* <www.twitter.com/Alberta_UCP/status/1280948014786334721>.

[56] See *R v Oakes*, 1986 CanLII 46 at para 69.

[57] Alberta, Bill Status, "Bill 32: Restoring Balance in Alberta's Workplaces Act, 2020," (last visited 4 August 2020), online: <www.assembly.ab.ca/net/index.aspx?p=bills_status&selectbill=032&legl=30&session=2>.

[58] Alberta Federation of Labour, "Jason Kenney's anti-worker, anti-union Bill 32 will be challenged in the courts," *Alberta Federation of Labour* (27 July 2020) online: <www.afl.org/jason_kenney_s_anti_worker_anti_union_bill_32_will_be_challenged_in_the_courts>.

[59] Unifor, "Unifor vows to continue fighting Kenney's anti-worker law," *Unifor News* (29 July 2020), online: <www.unifor.org/en/whats-new/press-room/unifor-vows-continue-fighting-kenneys-anti-worker-law>.

[60] “Kenny passes union busting bill 32,” *Canadian Union of Public Employees* (29 July 2020), online: <www.cupe.ca/kenney-passes-union-busting-bill-32>.