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REDRESSING THE BALANCE

BY BILL STEWART

Alberta's Bill 26 ensures a level playing field for open shop construction contractors, and may pave the way for other provinces to follow.

Since the early '90s, Canadian open shop construction employers and employees have had to deal with many unfair, but legal, building trade union "market recovery" schemes. Various known by acronyms and terms such as COMET, salting, JTFs, STABs or MERFs, they are all, in the words of the International Brotherhood of Electrical Workers (IBEW), "part of a strong organizing program aimed at securing monopoly of local labour markets."

UPON LEARNING THAT A NON-UNION CONTRACTOR WAS HIRING, UNION MEMBERS OR "SALTS" WERE ENCOURAGED OR DIRECTED TO APPLY TO WORK FOR THE COMPANY. UNDER ALBERTA LAW, WHEN THE COMBINED NUMBER OF SALTS AND UNION SYMPATHIZERS REACHED 40 PER CENT OF THE BARGAINING UNIT, THE UNION WAS PERMITTED TO APPLY TO THE LABOUR BOARD FOR A UNIONIZATION ELECTION VOTE.

How effective were these schemes? In Portland, Ore., it reportedly took only six years for IBEW Local 48 to increase its market share from 40 per cent to 85 per cent. Dealing with this potential threat to fair and competitive construction markets is one reason North American contractors could ultimately be helped by recent groundbreaking changes in Alberta labour laws.

On June 5, 2008, the Alberta government passed Bill 26, the Labour Relations Amendment Act (2008). It contains amendments targeted specifically at union salting and MERF practices. These practices were adapted by Canadian Building Trades Unions from their U.S. counterparts.

Fuelled by high energy prices, Alberta's economy rapidly expanded. Coincidentally to this expansion, building trade unions such as the IBEW and the Plumbers and Pipefitters union (UA) convinced some major oilsands project developers to grant them labour supply monopolies to build the province's largest construction projects. The projects provided the financial means for exploiting faults in Alberta's Labour Relations Code.

Salt Without Savour

The right to join and form a labour organization is fundamental in all democracies. Alberta's Labour Code protects the right of employees to select whether they want union representation. To ensure this right is protected, employers are prohibited from taking retributive action against employees for engaging in legitimate organizing activities. Recently, though, some unions perverted these pro-

tections through an organizing tactic they called "salting."

Upon learning that a non-union contractor was hiring, union members or "salts" were encouraged or directed to apply to work for the company. Under Alberta law, when the combined number of salts and union sympathizers reached 40 per cent of the bargaining unit, the union was permitted to apply to the Labour Board for a unionization election vote. In certain instances, when the union campaign was successful, the salts abandoned the company – what the union called "stripping" – to work with another non-union company, expanding its workforce.

This put many contractors in double jeopardy. On one hand, they could not discriminate in hiring. On the other, they dealt with the potential of the union directing members to withdraw services at critical times.

This is precisely what happened to a reputable general contractor. As the company's personnel requirements peaked and the availability of tradespeople grew tighter, it advertised for workers. In time, a union applied to unionize the company. Immediately after the vote application was filed and at a critical phase in the construction schedule, a number of employees abandoned their jobs without notice. And even though these former employees abandoned the employer at a critical time and had no continuing interest in the company, the Labour Board ruled they were still eligible to vote in the unionization election. Their additional votes resulted in the company being unionized.

Consequently, the remaining workers were saddled with a pre-existing industry-wide collective bargaining agreement that they had no say in negotiating and could

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do nothing to change. The agreement included a mandatory union membership requirement. The law also stated that they had to wait until the 23rd or 24th month of the agreement to even apply to hold a vote to revoke the unionization order.

It's difficult to conceive that legislators seeking to protect an employee's right to unionize also sought to entrench rules allowing union agents to infiltrate reputable companies and subvert workplace democracy – especially when a majority of employees, who would not otherwise choose to be represented by a union were being forced into one. Equally disconcerting was voter eligibility. The same eligibility standard existed regardless of whether an employee worked a single day or had 20 years of service with a company.

Alberta's Bill 26 amendments remedy both of these issues. Under new rules, construction industry employees are eligible to vote in a unionization election after they work a minimum 30 days with a company prior to the union filing its application with the Labour Relations Board for a representation vote. Further, to maintain their eligibility to participate in the representation election, they must not quit prior to voting day. This changed the Labour Board's rule allowing salts to vote even if they were employed only on the day the application was made.



Employees in newly unionized construction companies also have up to 90 days to apply for a secret ballot vote to revoke a recent unionization order. This rule change deals with situations where the union strips its agents and leaves remaining employees saddled with an undesired ongoing union relationship. If employees believe the union campaign was legitimate, this window can be closed through ratification of a collective agreement. Alternatively, if they are satisfied with the process, then they simply won't apply to hold a de-unionization vote.

Bid For Fairness

One of the more insidious strategies adopted by Canadian unions from their

U.S. affiliates was the so-called market enhancement recovery fund (MERFs). In Alberta, most of these schemes emanated from collective bargaining agreements.

The Alberta schemes amounted to cross-sectoral transfers of economic rents from a group of construction owners and contractors in one sector to contractors and owners in another. Essentially, this occurred because some large oilsands developers were willing to pay a small premium on their multibillion-dollar construction projects to gain access to pools of unionized tradespeople.

The long-term financial implications of incurring these incrementally higher costs were mitigated by Alberta's royalty regime that saw developers pay reduced royalties

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to Alberta's treasury until capital costs were recovered. The funds were then used to subsidize projects with developers accustomed to having their projects built on schedule for the lowest price. In reality, then, MERFs were a tax on the economic

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rents unions were able to extract primarily from the oilsands construction sector being redistributed to commercial construction projects where similar economic rents did not exist because of competition from open shop contractors.

The schemes were reflected in a number of collective bargaining agreements that stipulated contractors would pay a portion of the total wage costs (up to \$2.32/hour) into a union-controlled fund. Unionized contractors would then apply for subsidies on a project-by-project basis. Immediately prior to the tender closing deadline, the contractor would be advised of a subsidy amount that could be used to reduce the contractor's bid. The criteria and amounts of subsidy varied widely, depending on the union and the number of hours the contractor estimated needed subsidization. In certain instances, the hour rate subsidy was estimated to be as high as \$15 per hour worked.

As a matter of custom and practice that is recognized in law, the construction tendering system is based on contracts being awarded to the qualified contractor submitting the lowest bid. Given the wide range of subsidies, the use of these funds frequently compromised the integrity and stability of the tendering system.

Published bidding results on a significant electrical package for a major shopping mall renovation showed that two open contractors submitted the low-

est bids. The lowest unionized contractor placed a distant third. A relatively small change in specifications was made. Contrary to standard industry practice, all three electrical subcontractors were requested to resubmit their bids. With the benefit of knowing the base bids from the two non-union contractors, the union and the unionized contractor were able to estimate the precise subsidy needed to secure the project. Ultimately, the unionized contractor's overall bid price was lower than those

submitted by the open shop contractors and it received the contract. Clearly the Labour Code was not conceived to promote, sanction or provide a legal haven under the guise of collective bargaining for this type of unfair activity.

Alberta's new law now narrowly restricts how MERFs are collected and disbursed. Direct payments from employers to unions and unions to contractors to undercut the bids of more competitive contractors are now prohibited. And while unions and union members may operate funds where the union can subsidize the wages of its members, the law

requires that this process be transparent and voluntary – a first in Canadian labour law. For these funds to lawfully operate, employees must authorize deductions in writing and the deduction amount and purpose must be separately shown on both employee and employer payroll records. It is also now an unfair labour practice for a union to expel or suspend a person from membership or take any disciplinary action or impose any form of penalty on anyone refusing to contribute to such schemes.

While the legislation only now applies to Alberta, it is an important landmark development for the open shop sector across North America. Contractors can now positively point to Alberta's legislation as an example of a significant government response to the unique labour relations challenges in the construction industry. While construction industry employees have faced periodic setbacks in some jurisdictions on issues like secret ballot votes, it is important to recognize that reforms in this area are comparatively new in construction labour law. As contractors well know, it only takes a spark to light a fire. Contractors now have a precedent to end abusive "market recovery" schemes. ☐

What is Bill 26?

In June 2008, Bill 26 (the Labour Relations Amendment Act) passed through the provincial legislature in Alberta.

Bill 26 does not limit legitimate attempts to unionize, but it does prevent dubious organizing practices from affecting Alberta companies and contractors. The bill serves to deter unions from infiltrating or "salting" construction firms with pro-union workers, who leave or "strip" from the firm shortly after but are still permitted to vote for the unionization of the employed workers. Under the bill, workers must be employed with the firm for a minimum of 30 days in order to participate in union voting.



Bill 26 also bans the practice of market enhancement recovery funds (MERFs), where bids of union contractors are unfairly subsidized. Under the new law, workers who do not want to contribute to MERFs will not be penalized, but any direct MERF payments from employers to unions or unions to contractors will be prohibited.