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GOVERNMENTS FOCUS ON EMPLOYMENT AND LABOUR LAW CHANGES

HIGHLIGHTS

- There has been a renewed interest, on the part of the federal and some provincial governments, in employment standards and labour law reform. In part, this reflects greater public concern over inequality, the growth of “precarious” employment, and the impact of technological innovation on the job market.
- Since 2014, Ontario and Alberta have modified aspects of their employment standards and labour relations legislation, including by instituting a significantly higher minimum wage. At the same time, the Trudeau government has altered the rules for collective bargaining and employment standards in federally-regulated industry sectors.
- As documented in this article, in some respects the policy and legal changes adopted in Ontario and Alberta bring these two provinces into alignment with where BC already sits today. Even so, with an NDP government in place in BC, new labour and employment standards legislation is likely to be under consideration here.
- Recently, the BC government signalled that the province will move to a \$15.00 an hour minimum wage over the next few years. The government will seek advice from a soon-to-be-established Fair Wage Commission on the specific pathway for getting to \$15 an hour.
- When considering changes to labour and employment standards legislation, BC policy-makers need to be mindful of the cost impact on employers, pay attention to developments in other jurisdictions, and avoid taking actions that could jeopardize the strong economic growth and robust job creation the province has enjoyed in recent years.

There has been a renewed interest, on the part of Canadian governments both federal and provincial, in employment standards and labour relations legislation reform. The federal government adopted new labour legislation earlier this year, and similar legislation is now being enacted in both Ontario and Alberta.

With the NDP forming government in British Columbia, supported by the Green Party, changes to the

province’s labour and employment laws and regulations are expected. One signal of a renewed policy interest in labour and employment matters was the new government’s decision to re-establish a stand-alone BC Ministry of Labour. Then, in early August, the NDP government announced that the minimum wage will climb to \$15 an hour by 2021.¹

WHAT IS MOTIVATING LEGISLATIVE REFORMS?

The answer lies, at least in part, in concerns over changes in the nature of work, a shrinking middle class, and growing inequality in the distribution of wealth. There are also concerns over the growth of a contingent workforce, an increase in both part-time and lower-paid work, the emergence of an unregulated “gig” economy, and the challenges

¹Relatedly, the NDP government also announced the re-establishment of the Human Rights Commission. Public consultations on its specific structure and mandate will take place over the rest of 2017, with new legislation likely to be introduced next year.

facing working families struggling to care for children and aging parents. A significant segment of the population feels left behind in terms of economic prosperity and insufficiently protected from social and economic forces beyond their control. All of this has fed public discontent with governments and added to the pressure to address aspects of labour and employment policy.

In his essay "[Economic Possibilities for our Grandchildren](#)", published in 1930, John Maynard Keynes predicted that technological advancements would result in increased productivity that, in turn, would pave the way for a dramatic reduction in the demand and need for human labour. The average work week in 1930 stood at 47 hours. Keynes predicted this would fall steadily to 15 hours a week by 2030, with people generally working less while still enjoying a much higher standard of living.

While productivity has increased eightfold since 1930, hours of work have not declined appreciably and in some cases have increased. Aggregate productivity in Canada has grown faster than average real wages over much of the period since 1981. From 1981 to 2011 labour productivity increased by 53%.² Over the same period, the average real hourly wage in Canada rose by approximately 10%.³

In the [U.S.](#) the productivity/average real wage differential is more dramatic, with — according to one

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source — productivity up by 74% (1973 to 2013) and average real wages increasing by only 9% over the same period.⁴ The problem, according to some (and not foreseen by Keynes), is that productivity gains have not been sufficiently widely shared. The pressures of work on families have not abated – indeed, to some extent they have increased, thanks to advances in information and communications technology.

Technological innovation has also changed *how* work is performed. In many jobs technology has essentially eradicated the idea of a regular, clearly demarcated work day. In an effort to separate the continuum between work and personal time, France enacted legislation earlier this year that prevents employers with 50 or more employees from e-mailing their employees outside of regular working hours.

In other areas of work, like transportation and personal services, technology has given rise to a “gig” economy in which individuals work on-demand or as they wish, taking

on “gigs” as Uber drivers or Instakart grocery shoppers or Task Rabbits. California is among the jurisdictions taking action to require Uber to compensate its drivers as if they were employees. The European Court of Justice’s Advocate General stated on May 11, 2017 that Uber is not simply an “app” or computer platform, but is a transportation system subject to legislation regulating work, following similar rulings in the UK last year. A 2016 [Pew Research Center](#) study reported that there were two times as many gig workers in the U.S. earning under \$30,000 per year than regular employees at the same pay level.

Against this backdrop, it is not surprising to see politicians who wish to retain power, and those seeking office, promoting legislation that would address workplace-related concerns.

RECENT ELECTION PLATFORMS IN CANADA

The federal Liberals ran on a platform in 2015 that promised to “restore fair and balanced labour laws that acknowledge the important role of unions in Canada”. The platform also rested on the premise that “labour unions play an important role in protecting the rights of workers and growing the middle class”.

After winning office, the Mr. Trudeau’s Liberal government enacted Bill C-4, which came into effect on June 19, 2017. It amends the *Canada Labour Code* to implement a card based

² Statistics Canada, CANSIM 383-0221 labour productivity.

³ Statistics Canada, “The Evolution of Canadian Wages Over the Last Three Decades,” March 2013. Real wages are reported separately for males and females. The 10% increase cited in the text is a weighted average of the two series. It should be noted that non-wage compensation received by workers in Canada increased significantly over the period and is not included in the data on real wages. Thus, total real labour compensation rose by quite a bit more than real wages alone.

⁴ As estimated by the Economic Policy Institute, “Understanding the Historic Divergence Between Productivity and a Typical Worker’s Pay,” Briefing Paper #406, September 2, 2015.

union certification system.⁵ The result is that federally-regulated employees can become certified if the union can establish membership evidence of more than 50% of the employees in an appropriate bargaining unit. A secret ballot vote would only be required if the membership evidence was between 35% and 50%. At the same time, the threshold to trigger a de-certification vote has been raised from 40% of employees in the bargaining unit to 50%.

The Ontario Liberal government is in the process of ushering in substantial changes to employment standards and labour legislation in that province. Bill 148, which amends both pieces of legislation, cleared second reading on June 1, 2017. The new legislation follows an extensive review of labour and employment law and policy issues in Ontario conducted by two experienced neutrals, Michael Mitchell and the Honourable John Murray.

The Ontario Liberals have governed for 13 years and face an election on June 7, 2018. Perhaps cognizant of the shifting political winds discussed earlier, the government is responding with proposed minimum wage increases from \$11.40 to \$14.00 an hour on January 1, 2018, rising to \$15.00 an hour a year later. Proposed legislation concerning employment standards also contains a suite of new leave provisions to address the squeeze on working parents. It also captures the growth of temporary employment agencies which, according to a recent report in the *Toronto Star*, have increased

by over 20% in Ontario over the past decade. The legislation would require agency employees (and part-time employees) to be paid the same for work performed by permanent employees at the customer's place of business.

In Alberta, the NDP was elected in 2015, following 44 years of Conservative rule, on a platform that spoke of ensuring that "the benefits of better economic policies are more widely shared" and of "increasing the minimum wage to \$15.00 per hour by 2018". The platform also promised to "review employment standards to support family-friendly work standards, including improving compassionate care leave and providing time off for family responsibility". These promises have been acted on, with significant amendments to the *Labour Relations Code* effective June 7, 2017, and changes to the *Employment Standards Code* that will come into force on January 1, 2018.

In British Columbia, the NDP's election platform briefly mentioned employment and labour law reform, reflecting concerns similar to those highlighted by the federal Liberals and the Alberta NDP. In their election material, the BC New Democrats cited a study by CIBC Economics, which "... reported that the proportion of low wage jobs grew faster in BC than in any other province. Many people are working multiple jobs to make ends meet or doing unpredictable contract work that makes planning ahead difficult". The NDP promised to "ensure employment laws and standards

matched the realities of working today," and to raise the minimum wage to \$15.00 an hour by 2021 -- and thereafter index it to inflation.

The ability to deliver on some of the NDP's platform commitments may be complicated by the fact that the NDP formed a minority government, holding 41 seats, to the Liberals 44,⁶ with the Green Party holding the balance of power with 3 seats - votes that the NDP will need to pass any legislation that is not supported by the Liberals. Green Party leader Andrew Weaver is on record as saying that he would "never support legislation that will eliminate the secret ballot", referring to the prospect of changing the current secret ballot union certification system in British Columbia to a card check system, which the federal government and governments in Alberta and Ontario (for some sectors) have now implemented or are proposing to implement in the case of Ontario.

There is little doubt that labour and employment laws and regulations can influence the flow of capital and affect business competitiveness as between jurisdictions. ... Governments need to be alert to the risk that employment standards and labour legislation may create a disincentive to trade or inhibit capital investment and business expansion in their respective provinces.

⁵ The Bill was amended by the Senate to retain the secret ballot vote requirement, but the House rejected the amendment. In the end, the Bill was passed in a split vote by the Senate, based on the version originally approved by the House.

⁶ The Liberals now hold 41 seats with the resignation of former Premier Christy Clark on July 28, 2017 and the recent election of Liberal MLA Darryl Plecas as speaker.

LEGISLATIVE REFORM AND COMPETITIVE (DIS)ADVANTAGE

All of this comes at a time when the provinces have implemented a new [Canadian Free Trade Agreement](#) that came into effect on July 1, 2017. This agreement eliminates (or reduces) a host of trade barriers between provinces, harmonizes regulations pertaining to transportation, and rationalizes training requirements.

Why is this relevant? Trade agreements seek to level the playing field for businesses operating in different jurisdictions to ensure that competitive advantages do not negatively affect trade. For example, the North America Free Trade Agreement (NAFTA) has two side agreements that address environmental standards and labour and employment standards as between the three countries. The side agreements sought to ensure that environmental and employment standards were comparable and were properly enforced, so that one country did not gain an unfair competitive disadvantage over the others.

There is little doubt that labour and employment laws and regulations can influence the flow of capital and affect business competitiveness as between jurisdictions. If this is true for trading nations, it is even more true at the provincial level within Canada. Governments need to be alert to the risk that employment standards and labour legislation may create a disincentive to trade or inhibit capital investment and business expansion in their respective provinces.

In anticipation that there will be some consideration of new labour and employment standards legislation in British Columbia, it is worth asking where our province stands today, given the changes being implemented in Ontario and Alberta and the legislation that exists elsewhere in Canada.

LABOUR LAW REFORMS

On the labour relations front, the proposed legislation in Ontario and Alberta in many ways brings those jurisdictions in line with provisions that are now found in the *BC Labour Relations Code*.

By way of example, both Ontario and Alberta are modifying the definition of employee to include “dependent contractors”. Our *Code* already includes dependent contractors. Both Ontario and Alberta will authorize their labour tribunals to automatically certify a union to remedy egregious unfair labour practices on the part of an employer. Our Labour Relations Board already has that power.

Alberta is moving to a card check certification system, with 65% as the threshold for employee support. Ontario is implementing card check certification only for the temporary help agency industry, the building

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services sector, and the home care and community services industry, with a 55% support threshold to apply in these cases. A mandatory vote would be required for other industries. The card check system is in line with New Brunswick, Prince Edward Island and Newfoundland and Labrador, but out of step with the mandatory vote requirement in Saskatchewan, Manitoba and Nova Scotia, British Columbia (currently) and Ontario (for some industries). While the Alberta amendments would provide for automatic certification with certain threshold membership support, a mandatory secret ballot vote would still be required for decertification.

Ontario’s legislation is being amended to permit the Labour Relations Board to consolidate bargaining units. The BC legislation gives the Board that ability now, as does the Alberta legislation.

Both the Alberta and Ontario amendments bring their laws into line with BC by implementing statutory freezes on terms and conditions of employment during collective bargaining. Alberta is also implementing mediation and binding interest arbitration for first collective agreement resolution (Ontario will make first collective agreement arbitration more accessible), which the BC statute has had in place since the early 1990s.

Alberta is bringing its essential services legislation more into line with the *BC Labour Relations Code* and with health sector legislation in Ontario. The same is the case for a provision in Alberta to permit unions to apply for access to an employer’s property in remote locations to

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organize employees, a provision that already exists in Ontario and BC.

The Alberta Board will now have the authority to review an arbitration decision, similar to the review jurisdiction of the BC Labour Relations Board, although the Alberta Board's jurisdiction will be broader.

The point of this brief summary is that many of the amendments being proposed in Ontario and Alberta will align those jurisdictions closely with current law and practice in British Columbia.

There is, however, one area where British Columbia is markedly out of step with the rest of Canada – replacement worker prohibitions. There is no other common-law jurisdiction in Canada that restricts the employer's right to use replacement workers during a strike or lockout, as does the Labour Relations Code in BC. This arguably puts British Columbia at a competitive disadvantage vis-à-vis other jurisdictions in attracting business to the province.

EMPLOYMENT STANDARDS REFORM

The employment standards changes proposed in Ontario and Alberta are designed to address the changing nature of work, including the shift from full-time jobs to part-time, increased temporary and contracted work, to support those who are providing the work and to help parents with child care responsibilities to balance one or more jobs each.

The Ontario legislation speaks to some of these concerns by prohibiting a differential in pay depending on employment status, thus requiring employers to pay part-time, casual or temporary employees the same as full-time employees performing the same work.

Under the new rules, Ontario employers would be required to provide 4 days' notice of schedule changes to allow employees to adjust. Plus, employees would receive 3 hours' pay for being on call or reporting to a shift that's cancelled with less than 48 hours' notice. In Ontario, employees will be able to refuse work if it is scheduled with less than 96 hours' notice.

Personal emergency leave would remain at 10 days per year in Ontario; however under the new legislation, the first 2 days would be paid. Family medical leave is increased to 27 weeks in a 52-week period, and new leave provisions are introduced for the death of a child. Temporary health agencies must not pay employees less than the employee of the client, performing substantially the same kind of work for the client.

The Ontario legislation also precludes treating employees as "independent contractors", with the onus of proof on the employer to prove that the worker is not an "employee".

The new Alberta legislation has similar provisions. Compassionate Care Leave is increased to 27 weeks from 8 weeks (unpaid). A new provision for Personal and Family Responsibility Leave of 5 unpaid days per year brings Alberta in line with the existing entitlement in British Columbia. The same is true for bereavement leave, where Alberta is implementing a new 3 day leave provision, consistent with British Columbia. In Ontario, bereavement leave is covered under Personal Emergency Leave (2 days paid and 8 days unpaid).

Both Alberta and Ontario have also addressed Domestic Violence Leave in their recent legislative reforms. In Alberta, 10 unpaid days of leave are provided, whereas in Ontario such leaves are covered by Personal Emergency Leave (2 days paid and 8 days unpaid). In British Columbia, a private member's Bill⁷ introduced by the NDP just prior to the election passed first reading on March 17, 2017. It would provide 10 days of paid and 17 weeks of unpaid leave if the employee or employee's child experienced domestic or sexual violence.

Both Alberta and Ontario will provide unpaid leave for the critical illness of a child (Alberta 36 weeks, Ontario 37 weeks), and also for the death or disappearance of a child (Alberta 52 weeks, or 104 weeks if the child dies as a result of the crime; Ontario 104 weeks).

⁷ Bill M 235, the *Employment Standards (Domestic Violence Leave) Amendment Act*, 2017.

In Ontario, 13 weeks of unpaid leave will be provided for surgery for the purpose of organ donation; such a leave is not part of the updated Alberta legislation.

Both Ontario and Alberta address averaging agreements to deal with variable hours of work without attracting overtime, similar to the provisions that currently exist in British Columbia.

Finally, Alberta and Ontario both plan to boost the minimum wage to \$15.00 an hour — by October 1, 2018 in Alberta, and January 1, 2019 in Ontario. Both provinces will include tips and gratuities in the definition of wages. As noted above, BC intends to follow suit, by lifting the statutory minimum wage to \$15. A proposed ‘Fair Wages Commission’ (yet to be established) will provide recommendations on the specific pathway and timeline to get to \$15 an hour.

A higher minimum wage will have non-trivial effects on BC’s economy and the labour market. While many lower-paid employees should benefit, profit margins in some industries will come under downward pressure. Of interest, Canada has one of the highest employment rates for young people (ages 15 to 24) among all advanced economies – 57%, compared to an average of 41% collectively for the countries that are members to the Organization for Economic Cooperation and Development.⁸ In 2016, 61% of minimum wage earners in Canada were under age 25. Arguably, then, younger workers stand to be most affected by a rising minimum wage – as beneficiaries, but also in

a negative way to the extent that a higher minimum wage causes employers to cut back on their use of labour.

Today (August 2017), BC’s minimum wage amounts to 45% of the average (all-industry) wage. At \$15 an hour in 2021, the minimum wage will equal approximately 56% of the average industrial wage, assuming the latter rises by 2% a year. Focusing just on part-time work, currently the BC minimum wage is equal to 62% of the average part-time wage; by 2021, this will have climbed to roughly 80%. It remains to be seen how such sizable increases in the ratio of the minimum wage to average wages will play out in the labour market context.

WHAT LIES AHEAD

The same concerns that motivated the federal government, Ontario and Alberta to develop new labour and employment legislation are found in British Columbia. There is no question the new BC government will move to tackle these issues in the coming months. Premier John Horgan’s [Mandate Letter](#) to the Minister of Labour commits to “update employment standards” and to “reviewing the Labour Code”.

What is less certain is how quickly BC plans to act, and the extent to which legislation and policy will be aligned with other jurisdictions. There is good reason for our government to be mindful of the costs that will be imposed on employers through legislative reform, to avoid putting BC in an uncompetitive position that could disrupt the economic prosperity and the strong job growth the province has recently enjoyed.

There is a risk that a combination of significantly higher minimum wages, more complex and costly employment standards and related regulations, and modifications to labour laws could affect the level of new investment and the pattern of business expansion in some industry sectors.

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⁸ National Bank of Canada, Economics Department, “Canada Watch,” August 21, 2017.