EMPLOYMENT STANDARDS CODE REVIEW COMMISSION: SUBMISSIONS FOR CHANGE

Myers Weinberg LLP Labour Department
Barristers and Solicitors
724 - 240 Graham Avenue
Winnipeg, MB R3C 0J7
Telephone: 942-0501

For additional information, contact Trevor Ray or Shannon Carson at
tray@myersfirm.com or scarson@myersfirm.com.

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INTRODUCTION

The *Employment Standards Code* is critical legislation which protects the interests of employees in Manitoba regardless of their standing as part time, full time, hourly, salaried, unionized or non-unionized. The *Code* has not been amended for several years and we commend this government for undertaking a review of its provisions to determine whether changes should be made. A review of Employment Standards legislation which asks for public input does not happen very often in this Province, and we submit that this Review Panel should consider issues beyond those identified in the *Discussion Guide* document. Though the issues contained in this *Discussion Guide* are important, there exist other issues which should be considered at this time as well. We ask the Review Panel to give serious consideration to the following four topics.

1. "BASKET OF BENEFITS"

Introduction

The purpose of *The Employment Standards Code* ("the *Code*") is to ensure basic minimum working conditions and standards for employees, both unionized and non-unionized. The *Code* provides for several basic and minimum standards in a variety of categories including but not limited to:

- wages
- hours of work
- overtime
- general holidays
- annual vacations and vacation allowances
- termination of employment of individuals and groups of employees

The *Code* also provides for investigation and enforcement of these basic minimum standards. In addition to providing for minimum benefits in various categories, the *Code*

also prohibits any agreement between an employer and an employee or an employer and a union that falls short of providing the minimum guaranteed benefits as contained in the *Code*.

Section 3(3) of the *Code* states:

> *This Code prevails over any enactment, agreement, right at common law or custom that*
>
> *(a) provides to an employee wages that are less than those provided under this Code; or*
>
> *(b) imposes on an employer an obligation or a duty that is less than an obligation or duty imposed under this Code.*

Further, Section 4 of the *Code* states:

> *An employee's agreement to work for less than the prescribed minimum wage or under standards that are contrary to or less than provided for in this Code is not a defence in a proceeding or prosecution under this Code.*

Clearly, the legislation in Manitoba was written in such a manner as to guarantee each and every minimum benefit provided for under the *Code* and to prohibit agreements between employers and employees or between employers and unions that provide benefits that are less than the benefits contained in the *Code*.

Further, in addition to prohibiting agreements that fall short of the benefits provided in the *Code*, the *Code* also expressly permits agreements that provide benefits that are greater than benefits contained in the *Code*.

Generally speaking, the *Code* is aimed at protecting non-unionized employees. However, there is no question that the minimum standards guaranteed by the *Code* are also intended to protect unionized employees.

Unions acting on behalf of their members are often able to negotiate benefits that exceed the minimum benefits contained in the *Code*. Often, wages earned by unionized employees are substantially more than provided for in the legislation as are other benefits such as right to overtime and overtime pay and annual vacations. Further, many unions have successfully negotiated additional general holidays often referred to as "floater days" which can be used by employees as days off with pay in addition to statutory holidays.

Enforcement of the *Code* for non-unionized employees is through complaint to Employment Standards. Alternatively, enforcement of provisions in a collective agreement are, in many cases, limited to referral to arbitration.

While disputes related to terms and conditions of employment contained in collective agreements are resolved through arbitration, arbitrators often refer to legislation such as the *Code* in interpreting provisions contained in collective agreements. Recent arbitration awards in Manitoba have required arbitrators to consider minimum standards contained in the *Code* in interpreting articles contained in collective agreements.

Regrettably, decisions made by arbitrators in Ontario have recently been applied by arbitrators in Manitoba with the result that some unionized employees are receiving employment benefits in certain categories that fall short of the benefits provided by the *Code*. The Ontario line of cases has been commonly referred to as the "basket of benefits" cases.

<u>"Basket of Benefits/Global Comparison"</u>

Despite provisions in the *Code* that prohibit employment contracts (including collective agreements) that provide less than the statutory benefits contained in the *Code*, some

parties have negotiated agreements that fall short of the minimum statutory requirements. Arbitrators in Manitoba have upheld these agreements despite express language in the *Code* that such an agreement is impermissible. More concerning, these decisions have been upheld by Manitoba Courts on judicial review.

In upholding employment agreements that provide less than the minimum statutory benefits, arbitrators and courts have applied the "basket of benefits/global comparison" approach. This approach to analyzing benefits contained in an employment contract appears to have originated in Ontario and has subsequently been applied in other provinces including, now, Manitoba. Simply stated, the basket of benefits approach allows an employer to provide less than the minimum statutory benefits required by the *Code* so long as, when viewed globally, the totality of benefits in the agreement are greater than the minimum benefits provided by the *Code*.

In our view, the Legislature did not intend to permit parties to an employment agreement to undercut minimum statutory requirements or to "cherry pick" which minimum benefits would be provided simply because, overall, the employment agreement provides more benefits when viewed "globally".

The Manitoba cases and the cases from other jurisdictions as cited therein provide several examples of the demonstrated concerns. The two cases in Manitoba are fairly complex legal decisions and we do not intend to review them in this submission. However, we encourage the Review Committee to review the decisions when considering amendments to the *Code*. The two Manitoba decisions of which we are aware are:

1. *Re Westfair Foods Ltd.*, [2001] M.G.A.D. No. 74, upheld on judicial review *United Food and Commercial Workers Union Local No. 832 v. Westfair Foods Ltd.*, [2004] M.J. No. 163 (Quicklaw);

2. *Communications, Energy and Paperworkers Union of Canada v. Tolko Industries Ltd.*, [2003] M.G.A.D. No. 52, upheld on judicial review *Communication, Energy and Paperworkers Union of Canada, Local 1403 v. Tolko Industries Ltd.*, [2004] M.J. No. 245 (Quicklaw).

Conclusion on "Basket of Benefits/Global Comparison"

Employment standards legislation and the minimum benefits contained therein are created to ensure that employees receive fair and reasonable working conditions as determined by the legislature. These minimum standards were created to protect employees. To ensure these standards, express provisions are provided in the *Code* to prevent parties from contracting out of their statutory obligations.

The intention of the *Code* is to provide the "floor" of benefits that must be provided by all employers. We respectfully submit that this intention has been misinterpreted by arbitrators and the courts in this province. The unfortunate result has been to bypass the provisions of the *Code* to the detriment of employees in Manitoba. We hope that the learned legislators will take this opportunity to clarify the intention of the *Code* by adding simple amendments to ensure that each of the separate categories of minimum benefits contained in the *Code* are complied with regardless of any other additional benefits which may be provided by a contract of employment or a collective agreement.

2. APPEALING ORDERS OF THE MANITOBA LABOUR BOARD

In Manitoba, an employee wishing to file a complaint about overtime wages, leave of absence, improper termination, equal wages or payment of wages files the complaint with an officer of the Employment Standards Officer. If an Officer makes an order that wages are to be paid, a person named in the order has the right to request the matter be referred to the Manitoba Labour Board for a hearing. The Labour Board holds a hearing and makes its decision. Under section 130, a person who is a party to the board's order can appeal to the Court of Appeal:

Appeal of board order re unpaid wages

130(1) A person who is a party to a final order of the board made under this *Code* in respect of a matter referred to the board under section 110 may appeal the order to The Court of Appeal.

Leave to appeal required

130(2) An appeal may be taken only on a question of law or jurisdiction and by leave of a judge of The Court of Appeal.

Section 130 forms a statutory right to appeal decisions of the labour board on questions of law or jurisdiction, with leave of the Court. We submit that this review should recommend a legislative change to section 130 to create a full privative clause in the place of a statutory right of appeal.

The purpose of the complaint procedures in the *Code* is to provide employees in Manitoba with access to a quick and efficient procedure to resolve complaints, particularly for unpaid wages. Employees do not have to hire a lawyer to participate in this process. Employment standards officers investigate the claim on their behalf and make an order if the complaint is valid. The branch has access to sophisticated mechanisms under the *Code* to create an interest in an employer's property and assets, and to enforce payment on orders, including statutory liens etc. There is a six month time limit for an employee to bring a complaint to the Board, which ensures that complaints are brought in a timely manner. Conversely, only six months worth of wages can be claimed by an employee.

This process is an extremely valuable alternative to an employee suing an employer in Court, and even more so when the employee is claiming for unpaid wages and lacks financial resources. It is thus extremely important for this process to be kept as quick and efficient as possible, and for the decision makers chosen by the legislature to be viewed as the final arbiters of a dispute.

When the Director issues an order against an employer, and the employer requests a hearing before the Board which must then render a decision, the process is lengthened. When the losing party chooses to challenge this decision by appealing to the Court of Appeal, the process becomes much longer still, which is particularly concerning where an employee is waiting for unpaid wages. First, a leave to appeal application is brought in Court of Appeal Chambers with the consequent filing of motion briefs etc., and a decision must be made. If leave is granted, factums are filed, an appeal is heard, and another decision must be rendered. The frustrating length of this process is exemplified by the *Michalowski v. Nygard* decision. Ms. Michalowski filed her complaint for unpaid wages with the Employment Standards Branch on February 6, 2003. The appeal of this decision is not scheduled to be heard until March 2006, over three years later. We submit that there are very important policy reasons for discouraging appeals from decisions of the labour board. The Manitoba Labour Board is an expert panel with a long history of rendering decisions on labour and employment matters in this province, and its decisions should be respected as being final and binding.

An important way to keep the complaint resolution process short and efficient is to discourage appeals from labour board decisions by implementing a full privative clause in the place of a statutory right of appeal in section 130. A full privative clause is a strong factor towards creating a “patently unreasonable” standard of review, and goes a long way towards discouraging parties from filing appeals and/or applications for judicial review. Moreover, a full privative clause for decisions of the Labour Board in the *Code* would be consistent with the full privative clause for decisions of the Labour Board in the *Labour Relations Act*. Section 143 states as follows:

> **Relationship between board and courts**
>
> 143(1) Except as provided in subsections (5) and (6), the board or any panel of the board has exclusive jurisdiction to exercise the powers conferred upon it by or under this Act and to determine all questions of fact or law which arise in

any matter before it, and the action or decision of the board or panel in any matter is final and binding on the parties thereto.

…

Judicial review on constitutional grounds

143(5) The constitutional jurisdiction of the board or any panel of the board may be reviewed by any court of competent jurisdiction.

Judicial review of final decision

143(6) Notwithstanding any other Act, a final decision, order, direction, declaration or ruling, but not a procedural, interim or any other decision, order, direction, declaration or ruling, of the board or a panel of the board may be reviewed by a court of competent jurisdiction solely by reason that the board or the panel failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction, if

(a) the applicant for review has first requested the board or the panel, as the case may be, to review its decision under subsection (3), and the board or the panel has decided not to undertake a review, or has undertaken a review and rendered a decision thereon, or has failed to dispose finally of the request to review within 90 days after the date on which it was made;

(b) the board has been served with notice of the application and has been made a party to the proceeding; and

(c) no more than 30 days have elapsed from, as the case may be, the decision by the board or panel not to undertake a review, or the date of the decision rendered by the board or panel on the review, or the expiration of the 90 day period referred to in clause (a).

Manitoba Courts have affirmed that the standard of review for decisions of the Board under the *Labour Relations Act* is “patently unreasonable”. See, for example, *Rowel v. Hotel and Hotel and Restaurant Employees and Bartenders’ Union, Local 206*, [2003] M.J. No. 462 (C.A.). We submit that the board is just as expert when its jurisdiction arises from the *Labour Relations Act* as the *Employment Standards Code*, and there is no reason that the Board’s decisions should not be protected by similar privative clauses.

Many of the employment standards acts in other jurisdictions contain a privative clause as opposed to a statutory right of appeal, and a review of them demonstrates that Manitoba's legislation is out of step in this area. For example, sections 252.12(6) and (7) of the *Canada Labour Code* states as follows:

> (6) The referee's order is final and shall not be questioned or reviewed in any court.
>
> (7) No order shall be made, process entered or proceeding taken in any court, whether by way of injunction, *certiorari*, prohibition, *quo warranto* or otherwise, to question, review, prohibit or restrain a referee in any proceedings of the referee under this section.

British Columbia section 110 of British Columbia's *Employment Standards Act* states as follows:

> 110(1) The tribunal has exclusive jurisdiction to inquire into, hear and determine all those matters and questions of fact, law and discretion arising or required to be determined in an appeal or reconsideration under Parts 12 and 13 and to make any order permitted to be made.
>
> (2) A decision or order of the tribunal on a matter in respect of which the tribunal has exclusive jurisdiction is final and conclusive and is not open to question or review in any court.

Ontario's *Employment Standards Act, 2000*, s. 119(13) and (14) appears to be unique in that it states the standard of review for decisions which interpret the Act:

> (13) A decision of the Board is final and binding upon the parties to the review and any other parties as the Board may specify.
>
> (14) Nothing in subsection (13) prevents a court from reviewing a decision of the Board under this section, but a decision of the Board concerning the interpretation of this Act shall not be overturned unless the decision is unreasonable.

New Brunswick's *Employment Standards Act*, s. 54, contains the following:

> 54(1) The Board has exclusive jurisdiction to exercise the powers conferred upon it under this Act and to determine all questions of fact or law that arise in any matter before it including any question as to whether
>
> (a) a person is an employer or employee;
>
> (b) an employer or other person is doing or has done anything contrary to this Act or the regulations, or has failed to do something required by this Act or the regulations;
>
> (c) this Act applies to an employment contract, having regard to section 5; or
>
> (d) the facts of any situation give rise to an exemption under this Act or the regulations.
>
> 54(2) A decision, determination, direction, declaration or ruling of the Board is final and conclusive and, except on the grounds of an excess of jurisdiction or a denial of natural justice, shall not be questioned or reviewed in any court, and no order shall be made or proceedings taken in any court, whether by way of injunction, declaratory judgment, order on judicial review or otherwise to question, review, prohibit or restrain the Board or any of its proceedings.

Prince Edward Island's *Employment Standards Act*, s. 4 states as follows:

> (16) The board has exclusive jurisdiction to exercise the powers conferred upon it by or under this Act and to determine all questions of fact or law that arise in any matter before it, and the action or decision of the board thereon is final and conclusive for all purposes, but nevertheless the board may at any time, if it considers it advisable to do
> so, reconsider any decision, interim order, order, direction, declaration or ruling made by it and vary or revoke any such decision, order, interim order, direction, declaration or ruling.
>
> (17) No decision, interim order, order, direction, declaration or ruling of the board shall be questioned or reviewed in any court, and no order shall be made or process entered, or proceedings taken in any court, whether by way of application for judicial review or otherwise, to question, review, prohibit or restrain the board or any of its proceedings.

Thus, there are several examples of strong privative clauses in employment standards legislation across the country. An amendment in this area would bring Manitoba's legislation in line with the rest of Canada's legislation.

Conclusion on Appealing Decisions of the Labour Board

To make the complaint and hearing procedure in Manitoba's *Code* as effective and efficient as possible, the legislature should consider amending section 130 to provide for a strong privative clause which would discourage appeals or judicial review, and would encourage respect for the decisions rendered by the Board. A strong privative clause which makes decisions of the Board final and binding and which prohibits review by any court should be substituted for the statutory right of appeal. This amendment would serve to strengthen the complaint procedure.

3. EMPLOYER CONTRIBUTIONS TO PENSIONS AND BENEFITS DURING LEAVE OF ABSENCE

Another amendment which the legislature should consider in this review process concerns continued employer payment of pension contributions and health or benefit plan contributions during a leave of absence. There are jurisdictions in Canada where employment standards legislation requires an employer to continue to make payments into an employee's pension while that employee is on a leave of absence. We submit that this is an important issue, particularly in light of changing demographics in the workforce and the number of female employees in the workforce over the last few decades. Requiring employer pension contributions to be continued during a leave of absence such as maternity leave is an important aspect of guaranteeing equality between male and female employees. Female employees who have children have no choice but to be absent from work for a period of time when infants are born, and many choose to take up to a year of maternity leave. Maternity leave is simply a reality of the modern workplace. There is also a growing trend for adoptive parents and natural fathers to take parental leave as well.

The law has evolved to recognize that men and women must be paid equally for the work they do. Compensation for work should not be dependent on one's sex or any

other immutable characteristic. Pensions and other benefits are a very valuable source of an employee's wages and are an essential part of a compensation package. Manitoba's *Code* does not currently require employers to continue contributing to an employee's pension or benefit plan while an employee is on maternity or parental leave. This is an issue which we submit particularly affects female employees who are more likely to take leave than male employees, although it is an issue which can certainly affect male employees who take parental leave as well. How a pension is funded affects how much pension an employee receives on retirement, and we submit that pension contributions should not be affected by an employee's sex and her decision to have children and take leave. The legislature should consider an amendment to the *Code* which requires employers to continue to make contributions to a pension and other benefit plans while an employee is on leave. Such an amendment would be significant to guaranteeing the equality of male and female employees in the workplace.

Some jurisdictions are silent on the matter of pension contributions, and some jurisdictions have legislation which states that contributions do not have to be made by an employer during leave. However, a number of jurisdictions do require pension and benefit plan contributions to continue during leave. These jurisdictions require the employer to continue to make contributions if the employer is the sole contributor to the plan. If the employee also contributes to the plan, the legislation provides that employers must continue to make contributions so long as the employee does not choose to suspend her own contributions during the period of leave.

Section 209.2 of the *Canada Labour Code* provides as follows:

> **209.2** (1) The pension, health and disability benefits and the seniority of any employee who takes or is required to take a leave of absence from employment under this Division shall accumulate during the entire period of the leave.
>
> (2) Where contributions are required from an employee in order for the employee to be entitled to a benefit referred to in subsection (1), the employee is responsible for and must, within a reasonable time, pay those contributions for

the period of any leave of absence under this Division unless, before taking leave or within a reasonable time thereafter, the employee notifies the employer of the employee's intention to discontinue contributions during that period.

(2.1) An employer who pays contributions in respect of a benefit referred to in subsection (1) shall continue to pay those contributions during an employee's leave of absence under this Division in at least the same proportion as if the employee were not on leave unless the employee does not pay the employee's contributions, if any, within a reasonable time.

(3) For the purposes of calculating the pension, health and disability benefits of an employee in respect of whom contributions have not been paid as required by subsections (2) and (2.1), the benefits shall not accumulate during the leave of absence and employment on the employee's return to work shall be deemed to be continuous with employment before the employee's absence.

(4) For the purposes of calculating benefits of an employee who takes or is required to take a leave of absence from employment under this Division, other than benefits referred to in subsection (1), employment on the employee's return to work shall be deemed to be continuous with employment before the employee's absence.

Section 56 of British Columbia's *Employment Standards Act* provides as follows:

56 (1) The services of an employee who is on leave under this Part or is attending court as a juror are deemed to be continuous for the purposes of

(a) calculating annual vacation entitlement and entitlement under sections 63 and 64, and

(b) any pension, medical or other plan beneficial to the employee.

(2) In the following circumstances, the employer must continue to make payments to a pension, medical or other plan beneficial to an employee as though the employee were not on leave or attending court as a juror:

(a) if the employer pays the total cost of the plan;

(b) if both the employer and the employee pay the cost of the plan and the employee chooses to continue to pay his or her share of the cost.

(3) The employee is entitled to all increases in wages and benefits the employee would have been entitled to had the leave not been taken or the attendance as a juror not been required.

(4) Subsection (1) does not apply if the employee has, without the employer's consent, taken a longer leave than is allowed under this Part.

Section 51 of Ontario's *Employment Standards Act, 2000* provides as follows:

> **51.** (1) During any leave under this Part, an employee continues to participate in each type of benefit plan described in subsection (2) that is related to his or her employment unless he or she elects in writing not to do so.
>
> (2) Subsection (1) applies with respect to pension plans, life insurance plans, accidental death plans, extended health plans, dental plans and any prescribed type of benefit plan.
>
> (3) During an employee's leave under this Part, the employer shall continue to make the employer's contributions for any plan described in subsection (2) unless the employee gives the employer a written notice that the employee does not intend to pay the employee's contributions, if any.

Manitoba's legislation is behind the times in failing to address pension and health benefit contributions during periods of leave. The time has come for the legislature to turn its mind to this issue.

Conclusions on Continued Pension and Benefit Contributions During Leave

We submit that Manitoba's *Code* should be amended to fall in line with the above cited jurisdictions to guarantee workplace equality to employees who take leave, particularly female employees. However, while we commend the above jurisdictions for addressing this issue, we submit that Manitoba should go a step further by addressing the inequity that employer contributions can cease when an employee who contributes to the plan chooses not to maintain contributions during leave. Simply put, there is no convincing reason to distinguish between employer contributions depending on the funding of a plan. We submit that employers should be required to continue to contribute to pension plans during periods of leave regardless of whether the employee makes contributions to the plan or not or whether he or she chooses to maintain these contributions during a period of leave. Employees should be given choice if they want to continue to make

their own contributions during a period of leave, but this choice should not disentitle them from continuing to receive an employer's portion of contributions.

4. UNION ACCESS TO THE *CODE* TO ENFORCE PAYMENT OF CERTAIN WAGES

As already addressed in this submission, the *Employment Standards Code* applies to all employees in Manitoba, including unionized employees. However, by and large, unionized employees utilize the grievance and arbitration procedure to resolve workplace complaints and differences as opposed to filing complaints with an employment standards officer. Employees and Unions can also seek redress for unfair labour practice complaints before the Manitoba Labour Board. Both of these processes are set out in the *Labour Relations Act,* and they are the primary dispute resolution mechanisms utilized by a unionized workforce.

Although arbitration and labour board hearings generally suit the needs of a unionized workforce, there is one significant benefit provided under the *Employment Standards Code* which is not provided under the *Labour Relations Act*. Under section 94 the *Code*, Officers and the Director have the jurisdiction to lien the assets and property of an employer for unpaid wages even before an order for payment is made. Moreover, the officers and director have jurisdiction to use various other means available to ensure that wages are paid after an order is made. For example, under section 99, the Director can make a demand to third parties who will become indebted to the employer or who owe the employer money. The third party then makes payment of the amount owing to the Director instead of the Employer. Under section 100, an employer is deemed to hold wages that are due or accruing in trust for employees, and the employee has a lien and charge on these amounts regardless of whether an employer's business is in receivership. Up to a maximum of $2,500, these wages have priority over other claims against an employer's property. Under section 113, the Director can request an employer to provide security over wages in the form of a bond. The above provisions

provide important means of protecting the wages of employees in Manitoba. There are no similar provisions in the *Labour Relations Act*.

A unionized employee could bring a complaint for unpaid wages to Employment Standards and thus have access to these important mechanisms to enforce payment. However, Courts have interpreted the legislation (under the predecessor *Payment of Wages Act*) as having no application to the portion of an employee's wages which it assigns to a Union. An important source of compensation for many unionized employees includes their health benefits and their pension. Many collective agreements require that health and welfare and pension contributions by the employer be paid directly to the union which may operate its own plans. In *Gunn v. Angus*, [1989] M.J. No. 98 (C.A.) the court heard an appeal from a labour board ruling on a claim made by the Union for unpaid health and welfare and pension contributions, and dues which were deducted from employees' pay but not remitted to the Union. The Court of Appeal held that these contributions were "wages", but that they were not recoverable under the scheme of the *Act* because they were assigned from the employee to the Union. The Court stated that the *Act* only contemplated recovery of wages owing from the Employer to the Employee, and the Union would have to resort to other means to get funds which were assigned.

The Union has recourse to try to recover these monies by going to arbitration or filing an unfair labour practice complaint, obtaining a judgment, registering it in court and attempting to make good on the judgment, but this process takes time. The *Labour Relations Act* does not give an arbitrator or the labour board jurisdiction to use the same mechanisms to ensure wages are paid that are available to the Director in the *Code*. Moreover, under the *Code*, an employer's assets can be liened before an order for payment of wages is even made. We submit that all employees in Manitoba should benefit from the wage protection mechanisms in the *Code*, and they should benefit regardless of whether their wages are paid to them directly or are paid to a third party

like a Union. The ability to seek protections in a speedy manner from an employer who fails to pay the wages it is contractually obligated to pay is important. An employee's right to have unpaid wages protected should not be defeated by a technical argument that wages assigned to a Union are not recoverable under the *Act*. As such, we submit that the *Code* should be amended to allow both an employee and a Union to make complaints for unpaid wages to the Director, and to specify that wages include moneys assigned to a third party like a Union.

Conclusion

Thank you for considering these submissions in undertaking a complex review of legislation which is critically important to employees and unions in this province.