

LABOUR MANAGEMENT REVIEW COMMITTEE

June 15, 2016

Honourable Cliff Cullen
Minister of Labour and Immigration
Room 358 Legislative Building
450 Broadway
Winnipeg MB R3C 0V8

Dear Minister:

As requested in your letter of June 2, 2016, the Labour Management Review Committee (LMRC) has reviewed Government's proposal respecting amendments to *The Labour Relations Act* to make secret ballot votes mandatory before a union can be certified.

The management and labour caucuses are not unanimous in their support for this proposal, and we have attached separate reports containing each caucus' recommendations.

However, the caucuses do agree on several recommendations to Government in relation to the proposed changes. These recommendations are as follows:

- That Government ensure that sufficient staff resources are made available in the Department to conduct an increased number of certification votes within the timelines specified in the legislation; and
- That the Manitoba Labour Board's Sub-Committee be tasked with reviewing its policies and procedures to ensure that certification votes are held within the legislated timeframes whenever possible.

We would like to thank you for seeking the LMRC's input on this proposal, and would also like to thank the Committee members for dedicating their valuable time to this task.

If you have any questions, or wish to discuss any aspect of the report, please do not hesitate to contact the Chairperson.

Sincerely,



Kevin Rebeck
Labour
Caucus Chair



Michael Werier
Chairperson



Peter Wightman
Management
Caucus Chair

Enclosure

cc. Members of the Manitoba Labour Management Review Committee

REPORT OF THE MANITOBA LABOUR MANAGEMENT REVIEW COMMITTEE

June 15, 2016

MANDATE OF THE LABOUR MANAGEMENT REVIEW COMMITTEE

On June 2, 2016, the Minister of Growth, Enterprise and Trade requested that the Labour Management Review Committee (LMRC) review a Government proposal to amend *The Labour Relations Act* (the Act) to make secret ballot votes mandatory before a union can be certified.

Specifically, the proposed amendments included:

- removing the provision in Act that allows the Manitoba Labour Board to automatically certify a union as the bargaining agent for a group of employees where it has been shown that 65% or more of the employees wish to have the union represent them;
- maintain the current threshold to trigger a vote at 40% of employees wishing to have a union represent them; and
- repealing the Act's current interim certification provisions.

Although the Management and Labour Caucuses were able to reach a consensus on some recommendations respecting some policy matters related to the proposal, they were unable to reach a consensus on the contents of the proposal itself. Their separate reports are below.

1. MANAGEMENT CAUCUS SUBMISSION

The Management Caucus has had the opportunity to review the materials provided by the Minister of Growth, Enterprise and Trade, along with his letter of June 2, 2016. The Management Caucus also has reviewed additional background material helpfully provided by Karen Lockhart and Jeff McCulloch, as well as materials provided by Kevin Rebeck on behalf of the Labour Caucus. Finally, we have had the opportunity to discuss secret ballot votes for union certifications and related matters with the full membership of the LMRC at the meeting which was held June 8, 2016.

It will come as no surprise that the members of the Management Caucus whole-heartedly support a return to secret ballot votes as the primary means of determining Union support in certification applications. It is trite to say that the secret ballot vote is the cornerstone of our democratic tradition and has been used since time immemorial as the primary means by which our society makes important choices regarding who will represent them at various levels of government. Deciding whether to have a Union represent them in their relations with Employers is an equally important choice for workers. It therefore deserves a method which has proved itself to be the best and fairest by far.

That said, it is important that the process be as fair as possible and that appropriate safeguards be maintained and enhanced if possible. During the years between approximately 1997 and 2000 when the secret ballot vote was the primary means of testing union support in Manitoba, one of the best ways of ensuring fairness was provided by legislation requiring the Manitoba Labour Board, save in exceptional circumstances to conduct the vote within seven days of the application for certification being received. It is likely that this safeguard was instrumental in the

statistics which show that the overall success rate for applicants remained high in those years even with the removal of automatic certification.

However, statistics provided by the Department also indicate that over the last three fiscal years, certification votes were held within the seven day timeframe in only 68 percent of cases, and the timeframe was extended on the basis of exceptional circumstances in 32 percent of cases. While we do not doubt the Board had good reasons for finding exceptional circumstances, we consider 32 percent to be too high and we recommend to the Board, perhaps in consultation with its Sub Committee, that an assiduous effort be made to reduce this percentage. This is particularly important in the construction sector where the workforce can change dramatically within a relatively short period of time.

We recognize that issues often arise which make it difficult to adhere to the seven day timeframe. However, conducting a prehearing vote with some or all ballots sealed is a good way to approach the situation in many cases where there are issues regarding the composition of the bargaining unit or otherwise that must be determined at a later date.

Further, we note conducting secret ballot votes as a matter of course in applications for certification will add to the demands of the Board's time. Sufficient resources must be made available so the Board can accomplish this added responsibility.

We understand that while the government has announced its intention to introduce legislation reinstating the secret ballot vote as the primary means of testing union support, that other changes are not intended. We support this approach. Accordingly, we understand existing legislation regarding discretionary certification and permitting voluntary recognition will not be affected. In our view this is appropriate.

Management Caucus thanks the Minister for affording LMRC an opportunity to consider this matter and wishes to express its appreciation to the Labour Caucus for its professional approach during the meeting, discussing an issue which obviously is of concern to Labour.

While we recognize that there will not be consensus regarding the question of restoring the secret ballot vote as the primary means of determining applications for certification, we do note that much common ground exists between the Management and Labour Caucuses with respect to the surrounding circumstances.

2. LABOUR CAUCUS SUBMISSION

Manitoba has enjoyed a period of relative labour peace for more than a decade, marked by few labour disruptions (strikes and lockouts) and positive overall labour-management relations. Labour peace has been very positive for Manitoba's economic performance, for employers, and for workers and unions alike.

The Minister of Growth, Enterprise and Trade has asked the LMRC for comments on a proposal to amend the current *Manitoba Labour Relations Act* to eliminate provision for fast-tracked union certification (auto certification) through the achievement of a majority sign-up (or card check) threshold of 65% or more.

The Labour Caucus of the LMRC strongly opposes the elimination of auto certification as a move away from affording workers with the ability to exercise their democratic right to join a union, free from intimidation or coercion.

However, it is our understanding that government intends to proceed with this change. Therefore, the following comments are offered to explain Labour's position and to recommend alternative remedies to address our chief concern regarding intimidation of workers and interference with free votes.

In the context of rhetoric about "restoring secret ballot votes", it is important to recognize that the *Act* already requires a secret ballot vote on union certification when 40% or more, but less than 65% of workers freely declare that they want to join a union by signing a union card.

Only in cases where 65% or more of workers (a two-thirds super-majority) freely sign union cards is a workplace eligible for fast-tracked (automatic) certification, subject to independent verification by the Manitoba Labour Board that sufficient cards have been submitted, that cards have been signed voluntarily, and that there has been no pressure or coercion of workers to sign cards.

Manitoba's current legislative framework has worked well: it has sustained a climate of labour peace, and supported workers in being able to freely express their will with respect to choosing to join or not join a union. Moreover, we are unaware of any broad-based employer lobby to change or eliminate auto certification.

The Labour Caucus is unclear why the proposal to eliminate automatic certification has come forward at this time – what is the "problem" with status quo that government is seeking to resolve with this legislative amendment?

At 65%, the democratic will of workers is clear – they support joining a union. Requiring that an additional vote be scheduled and carried out by the Labour Board by secret ballot is unnecessary, wastes resources of the Labour Board and opens the process for potential interference, intimidation or bullying of workers in an effort to dissuade a pro-union vote.

In fact, it has long been Labour's position that the current automatic certification threshold of 65% is, in fact, too high. At 65%, Manitoba's threshold is the highest of all provinces with fast-tracked certification. Labour believes that the more traditional simple majority of 50% plus 1 is a more appropriate democratic test. The federal government is currently in process of moving back to a simple 50% plus 1 automatic certification threshold.

Auto certification greatly reduces the potential for employer interference with a certification vote. It is an unfortunate reality that once a secret ballot vote is called, some employers engage in intimidation tactics to pressure workers not to vote for a union. Hinting or outright asserting to workers that that wages may be reduced, that benefits may be clawed back, that shifts or duties may change or be reassigned, or that job losses may take place, are among the tactics which have been used to interfere with free votes on whether or not to unionize. Workers are robbed of a free choice in instances when employers use their greater power in the workplace to intimidate their employees before a vote.

In a case just last year, in the midst of a union organizing drive by Workers United, workers at a major multi-national fast food / coffee franchise were threatened with losing their jobs if they voted to join the union. Fortunately, in this case, an audio recording was made of the employer's

pointed (and illegal) threats. Faced with indisputable evidence of having committed an unfair labour practice, the employer backed-down and ultimately did not oppose certification.

If automatic certification is going to be eliminated – which the Labour Caucus does not support – then other measures need to be adopted to reduce the potential for employer interference and intimidation of workers. Ensuring the democratic right to form a union is fundamental to a fair society. The absence of automatic certification provisions makes it more difficult for workers to choose to join a union by exposing them to anti-union intimidation by employers. It is imperative that workers be protected to exercise their rights in a free and fair way.

In particular, we recommend that it be a legislated requirement that secret ballot votes be scheduled to take place within 5 days of a union's application (which already presupposes the achievement of 40% or more card sign-up).

At present, the Labour Board targets to schedule votes within 7 days, but statistics provided by the department indicate that this timeframe is extended for "exceptional circumstance" in 32% of cases – that's just shy of one third of total cases, a very substantial proportion.

The longer the period before a vote is held, the greater the risk of worker intimidation. Cases of "exceptional circumstances" should be limited and the Labour Board should be resourced adequately to achieve appropriate timelines.

The Manitoba Labour Board's Sub-Committee should be tasked with examining what the reasons are for 32% of votes not taking place within the 7 day time limit. Those barriers to a delaying a vote should be removed and at a minimum a pre-hearing vote should be conducted if there is a dispute about who is in the bargaining unit to minimize time for interference.

While Manitoba law has included provision for automatic certification for most of the last fifty years, provisions in other jurisdictions have varied across the country and over time. A recent pan-Canadian study by the federal government, *Union Certification Regimes and Declining Union Density in the Canadian Business Sector*¹, concludes that the absence of automatic certification provisions is associated with declining union density.

The Labour Caucus believes that the elimination of auto certification in Manitoba will make it more difficult for workers to exercise their free will to join a union, which will in turn, depress union density, along with worker wages, benefits and health and safety standards.

¹ Workplace Information and Research Division; Strategic Policy, Analysis and Workplace Information Directorate; Labour Programs – HRSDC: *Union Certification Regimes and Declining Union Density in the Canadian Business Sector* (November 2013)