SUBMISSIONS TO LAW AMENDMENTS COMMITTEE ON BILL 102

BY

THE MAINLAND NOVA SCOTIA BUILDING AND CONSTRUCTION TRADES COUNCIL

AND

THE CAPE BRETON ISLAND CONSTRUCTION AND BUILDING TRADES COUNCIL

1. The Mainland Nova Scotia Building and Construction Trades Council and the Cape Breton Island Construction and Building Trades Council represent most construction trade unions in Nova Scotia. The Councils firmly support the introduction of First Contract Arbitration. The Councils strongly oppose the proposed exclusion of the construction industry.

A. The Need for First Contract Arbitration

2. First contract arbitration is not new to Canada. Seven of the eleven Canadian jurisdictions have adopted first contract arbitration: British Columbia (1974), Quebec (1978), Federal (1978), Manitoba (1982), Newfoundland and Labrador (1985), Ontario (1986), and Saskatchewan (1994). (Prince Edward Island passed first contract arbitration legislation in 1994 but has not proclaimed it to be in force.) The legislation has enjoyed unanimous political support through successive different political regimes. These jurisdictions cover 80% of Canadian workers. The norm in Canada is First Contract Arbitration ("FCA"). Only Nova Scotia, New Brunswick, and Alberta still lack FCA legislation. If adopted in Nova Scotia, the province is simply catching up to the rest of the country.

3. When employees want a union to represent them in their dealings with their employer, they are voting for their union to conclude a collective agreement with their employer. Without a collective agreement, unionization is meaningless. Employers know this, and so it in their interest to delay negotiations until the employees lose patience and confidence in their union and vote to revoke the certification.

4. The advantages of first contract arbitration are numerous:

1. It enables workers who wish to engage in collective bargaining to achieve a first collective agreement.

2. A first collective agreement establishes the groundwork for a collective bargaining relationship in the future.
3. It will likely reduce the number of work stoppages in first agreement situations.

5. Recently, Sarah Slinn and Richard W. Hurd reviewed first contract arbitration results in Canada (*First Contract Arbitration and the Employee Free Choice Act: Multi-Jurisdictional Evidence from Canada*, 2011, Advances in Industrial and Labour Relations, Volume 18, 41 – 86). The authors concluded that, on average, in the seven jurisdictions, 98.6% of first contracts were resolved without arbitration. The authors also commented at page 80 that "…it is evident that the FCA process often has been able to establish a foundation for durable labour-management relationships."

6. In an article, "First Contract Arbitration: Effects on Bargaining and Work Stoppages", July, 2010, Industrial and Labour Relations Review, Volume 63, No. 4, Author Susan J. T. Johnson reviewed the Canadian first contract arbitration experience. The author concluded at pp. 602-3 as follows:

> Based on the Canadian experience, evidence suggests that the availability of FCA creates the incentive for parties to freely negotiate collective agreements without resorting to disruptive and costly work stoppages or using a third party to impose the terms and conditions of employment. Concern that FCA undermines the collective bargaining process seems to be unwarranted; on the contrary, FCA appears to support and encourage collective bargaining.

7. The purpose of the Manitoba model of FCA is to achieve a first collective agreement in a timely fashion. Bad faith bargaining may or may not be the reason why bargaining is protracted. FCA remedies situations where the parties may, in good faith, bargain for months or years without reaching an agreement. It has the dual purpose of preventing both prolonged bargaining and strikes.

B. The Construction Industry: Nature of the work

8. Work in the construction industry is project-based, sporadic, and temporary. Construction contractors submit bids for projects to owners, project managers, and general contractors. Contracts are awarded based on the past ability of the contractor to execute the work competently and on time. The subcontractor may further subcontract work to another subcontractor. Employers bid on construction projects in all areas of the province.

9. Because the nature of the work is temporary and transient, so too is employment. Employment with a particular construction employer may last hours, weeks, or months, depending on the length of the work. Trades people may work for several different employers in the course of a month; when work finishes on one project with one employer, the employee will pick up employment with another employer on another project. The employees travel to where the work is located.

10. Other than general contractors, employers tend to specialize in a particular facet of the construction industry: formwork, electrical, plumbing, drywall and so on. Each specialization uses certain trades people, which means that employees are organized by trade, such as electricians, plumbers, carpenters, and labourers. Each trade has a particular work jurisdiction usually described in the Regulations to the *Apprenticeship and Trades Qualifications Act*.

11. The industry has some capital barriers to entry. Road building, for example, requires specialized asphalt spreaders, rollers, and other equipment. Large formwork projects require access to a tower crane. This makes it difficult for contractors to dabble in sectors.

12. To summarize, there is no job security in the construction industry. Seniority rights are non-existent. Any employee can be terminated for "lack of work" at any time, regardless of the length of their employment with an employer. An employee has no right to be recalled to work when work picks up again.

C. The Unionized Construction Industry in Nova Scotia

1. The definition of a construction trade union

13. The established work practices of construction trade unions in Nova Scotia include negotiation of collective agreements that contain (1) a union security clause; (2) exclusive trade jurisdiction over work; and (3) subcontracting only to unionized sub-contractors. The union security clause ensures that only union members are hired. The exclusive trade jurisdiction clause means, for example, that carpenters don't do labourers' work, and vice-versa. The subcontracting provision ensures that the employer does not avoid the union by the simple expedient of contracting out some or all of its work.

14. Without these clauses in a collective agreement, a union is not a construction trade union under the Trade Union Act and would not be permitted to represent employees in the construction industry: see *Construction and Allied Workers Union (CLAC), Local 154 v. 360 Cayer*, LRB #2088C. Indeed, without these clauses, the union could not represent its members in the construction industry.

15. Bargaining units in the unionized construction industry generally follow craft lines; e.g., a bargaining unit of electricians, a bargaining unit of carpenters, and so on. Two or more construction crafts or trades may unionize an employer, representing different tradespeople who are needed at different stages of a project. A construction trade union is certified to represent *all* employees of a particular craft in *all* sectors of the construction industry, not just ICI.

2. Work in the accredited sector of the construction industry

16. The Nova Scotia Trade Union Act is divided into two parts: Part 1 is non-construction, while Part II regulates the construction industry. The construction industry is divided into four

separate "sectors", roughly characterized by end use: industrial and commercial ("ICI"), road building, water and sewer, and residential. Each sector usually requires some specialized equipment and trade skills. Construction industry contractors, in general, tend to specialize primarily in one sector, but nothing prevents them from working in other sectors as well.

17. In late 1970's, the Nova Scotia Construction Labour Relations Association (NSCLRA) was accredited as the accredited employers' organization in the ICI sector of the construction industry in Nova Scotia. The effect of accreditation means that employers in Nova Scotia who become unionized are bound by the NSCLRA collective agreement with that particular trade for any work performed within the ICI sector. The construction trade unions each negotiate with the NSCLRA a sector-wide collective agreement for that particular trade. For example, the Carpenters' Union negotiates a collective agreement with the NSCLRA which binds all employers unionized with the Carpenters' Union for any work performed by the carpenter employees of that employer when that employer does work in the ICI sector of the industry. This creates a level playing field for all unionized contractors and construction trade unions in this particular sector of the construction industry. No unionized employer has better or worse terms or conditions than any other unionized contractor in this sector. (The ICI sector is the only accredited sector; the union must negotiate separate collective agreements with each individual employer for work in the other sectors. This is similar to bargaining under Part I.)

18. It is important to note that the three crucial clauses for union representation have existed in the NSCLRA collective agreements for decades. In addition, the NSCLRA collective agreements provide for multi-employer pension and health and welfare benefits.

19. While the bargaining relationship between the construction trade unions and the NSCLRA is a mature one, fluidity still exists. First contracts would arise in the ICI sector if:

1. a new trade was created, or a present trade was split into two separate bargaining units;
2. a construction trade union obtained jurisdiction over work formerly done by another construction trade union; or
3. a new accredited bargaining agent was accredited for another sector, or the ICI sector.

These scenarios would require that a first collective agreement be negotiated with in the ICI sector. For example, in the 2009 round of negotiations, the NSCLRA and the International Union of Operating Engineers, Local 721, split an existing bargaining unit in half. They then negotiated two new collective agreements for the two new bargaining units. If the parties had been unable to reach agreement for these two new bargaining units, first contract arbitration would have been a tremendous asset.

3. Work outside the ICI sector

20. For work in the other sectors, the Union must negotiate a separate collective agreement with each individual employer. The same issues apply here as would apply in Part I unionized settings. Construction trade unions face the same concerns over the inability to reach a first collective agreement as in Part I. Failure to obtain a collective agreement with an employer for non-ICI work may result in a decertification application, even though a collective agreement exists in the ICI sector.

21. The need for FCA is just as necessary in the construction industry as it is under Part I. An employer can simply refuse to agree to include a union security clause, a subcontracting clause, or a trade jurisdiction clause, all of which are normal aspects of construction industry collective agreements, forcing the union to bargain indefinitely.

22. Will FCA be a "windfall" for construction trade unions? The answer is no. First, it only affects unionized employers. For an employer to be unionized, a construction union needs to have as members more than 50% of an employer's construction trades people in all sectors of the industry. That includes workers in ICI, road building, water and sewer, and residential sectors. A majority of the employees in all sectors must want the union to represent them. As with non-construction workers, FCA will enable those workers who want a union to get a collective agreement without a strike or interminable bargaining over the key clauses. (It is also important to bear in mind that a construction union can have its certification revoked in the open season by a majority of all workers in all sectors.)

23. Second, if FCA was available to the construction industry tomorrow, it would be rarely used. Perhaps five or six out of the hundreds of unionized contractors do significant non-ICI work at present on mainland Nova Scotia. In Cape Breton, unionized contractors tend to follow the ICI collective agreement for non-ICI work.

24. Will FCA unduly harm contractors who have already bid on contracts with lower wage rates? The answer is no. First, newly certified contractors working in the ICI sector of the industry now have to immediately apply the NSCLRA agreement to all their ICI work, regardless of the rates they initially bid before certification. No one has suggested this is an undue burden on employers. Similarly, some non-construction employers will have entered into contracts with customers at lower wage rates, but FCA will apply to them. In any event, the Labour Board or agreed-upon arbitrator will take into account any jobs bid upon prior to certification and industry norms in setting wage rates. Neither the union, the employer, nor the Labour Board wishes a collective agreement that renders the contractor uncompetitive.

25. Will FCA impose uncompetitive terms and conditions of employment on employers? Not so. If the experience in Ontario is any guide, the Labour Board will impose conservative industry-standard terms and conditions on construction employers. Again, it is in no one's interest to make the employer uncompetitive.

D. Conclusions

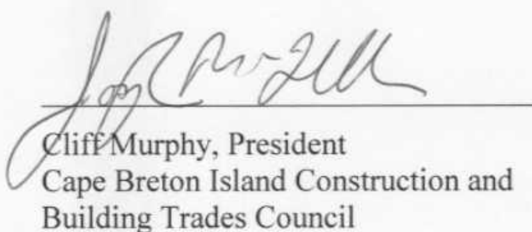
26. There is simply no reason to exclude the construction industry from the scope of first contract arbitration. The presence of an accredited employers' bargaining agent affects only one of four sectors of the industry; the parties still have to negotiate first collective agreements for work in the other three sectors. Moreover, first collective agreements have and may arise in the future in the ICI sector.

27. No other Canadian jurisdiction with FCA excludes the whole construction industry. (Ontario excludes collective agreements with an accredited employer's agency.) Indeed, the

Ontario Labour Relations Board has referred several construction industry applications to first contract arbitration.

28. The Councils strongly support the introduction of the Manitoba model of FCA in Nova Scotia. There is no reason to exclude the construction industry from its scope.

Respectfully submitted this 29th day of November, 2011.



Cliff Murphy, President
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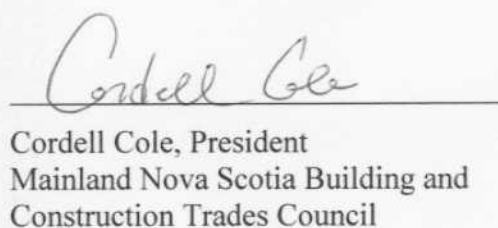

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