International and Public Policy Labor–Management Relations: Crisis, Recovery, and New Social Contracts

Public Policy vs. International Law: The Right to Strike in Saskatchewan

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After many years in power, Saskatchewan's moderately leftist New Democratic Party was defeated by the conservative Saskatchewan Party in 2007. The new government immediately introduced labor law changes that unions considered detrimental to their interests. One of those statutes put considerable constraints on the right of public sector workers to strike.[1]

Organized labor immediately went to court, claiming that the legislation offended the freedom of association clause in Canada's Charter of Rights and Freedoms. At the first level (Court of the Queen's Bench), judge (D.P. Ball) agreed and ordered the government to revise the law.[2] Instead, the government appealed and, very recently, Ball's ruling was reversed.[3] The unions are now considering whether to appeal to the Supreme Court of Canada, but it seems likely that they will.

Whereas most Canadian governments, even those controlled by conservative parties, are more cautious than governments in the United States about attacking organized labor, the urge to weaken unions, especially public sector unions, is on the rise. (Those in the private sector are already weaker than they have been in decades.) But in the Canadian environment, there is a counterforce to be contended with—international labor law, which has grown in importance over the past half-dozen years primarily as a result of the Supreme Court finding it to be a persuasive source in interpreting the charter's freedom of association clause.[4]

International law's new prominence has introduced a perplexing source of uncertainty into Canadian labor relations. Policy makers are not sure how seriously they ought to take it, trade unionists are not sure how to play it, and many judges prefer to avoid it—likely because they don't understand it very well and are not sure about how it does or should interact with Canadian domestic law.

The prime source of international labor law is the International Labour Organization a tripartite, UN-affiliated body that has been around since 1919. Over the years it has produced a very rich body of case law applicable to the right to organize and bargain collectively (see, e.g., Bartolomei de la Cruz, von Potobsky, and Swepston 1966 and Gernigon, Odero, and Guido 1998). Essentially all of the world's governments have accepted the legitimacy of this jurisprudence, and all ILO member states may be held accountable for infractions of the principles; nevertheless, many governments treat it as advisory rather than mandatory.

That was certainly the case in Canada until 2007. Governments frequently took action that was subsequently found to be in violation of ILO standards, only to ignore the ILO's "advice" on how to rectify the situation. But in that year, the Supreme Court of Canada handed down a decision (*BC Health Services* 2007) in which it applauded international labor law and, although it would not go so far as to say that it was binding in Canada, said pretty firmly that it intended to rely heavily on international labor law in the future to settle disputes over freedom of association—one of the basic rights guaranteed by the constitution. International law became, it appeared, the default to be deviated from only with good and unusual reason.

When the Saskatchewan Party came to power in 2007, it might have drafted a statute designed to stay on the right side of international law so that the courts would not overturn it. But that is not what it did. The

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new government ignored the global standards and put together a statute that, in my view, clearly countermanded that law. Competent in-house lawyers would have advised policy makers about that, so it must be assumed that the legislators framed a law they knew fell short of Canada's international obligations. The unions thought so, too (or their lawyers did), and they appealed the new law. The union lawyers flooded the Judge Ball with material on international law, including my expert opinion about the new law (Adams 2009).

The Saskatchewan case had to do with the right to strike. In the *BC Health* decision, the Supreme Court had not expressly addressed that issue. What it had done was to state that the right to bargain collectively was protected activity under the constitution's freedom of association clause. That court specified several of the behaviors that the parties must engage in (such as making a real effort to negotiate) to fulfill their constitutional obligation to bargain.[5] It also said that all Canadians ought to be able to rely on international promises made by government with regard to human rights. One of those pledges was to accept the ILO's collective bargaining jurisprudence, which clearly says that the right to strike is an essential element of the right to bargain collectively and that the right to bargain collectively is as much a human right as the right to be free from discrimination and the right not to be enslaved. As far as international law goes, your human right to bargain collectively means nothing unless you also have the right to strike (or, in certain circumstances, to engage in an equivalent dispute resolution procedure).

Judge Ball was convinced that the Supreme Court of Canada's promise to uphold the right of Canadians to rely on international human rights commitments at a minimum was sufficient to find a constitutional right to strike under the charter's freedom of association clause. But the appellate court did not see it that way.

Back in the 1980s the Supreme Court of Canada had been expressly asked to decide whether the freedom of association clause guaranteed a right to strike. It said no.[6] But that court also said that the freedom of association clause did not protect the right to bargain. The 2007 Supreme Court threw out the later dictum, saying that it did not "withstand principled scrutiny," but it issued no explicit opinion on the former because, it said, the case before them did not demand such an opinion.

A lot of messy developments would have been avoided had the court bitten the bullet and said simply that "Yes, of course the right to bargain subsumes the right to strike." Why didn't it? Most likely because it feared being accused of stepping too heavily on the toes of legislators. Prior to the *BC Health* decision, the legal consensus in Canada was that the judiciary ought to stay out of labor relations because it was a regime too specialized and complicated to be tampered with by amateurs. Given this background, the *BC Health* decision was immediately criticized as being an inappropriate effort by the court to rewrite labor law in Canada.

While trying to assuage fears that it was about to become majorly interventionist, what the court seemed to be saying to the legislative branch was something like this: "Canadians are entitled to rely on the international human rights commitments that you have willingly entered into. Your lawyers can tell you what that means as well as we can. As long as you effectively protect those rights, we will leave you alone. But if you don't effectively protect Canadian workers' rights, expect more trouble from us in future."

But the Saskatchewan Appellate Court was unwilling to connect those dots. Judge Richards, who wrote the decision, played his hand very conservatively. Because the current Supreme Court has not explicitly said anything about the right to strike, the 1980s jurisprudence, he said, still holds. In other words, whatever the contemporary Supreme Court has said about the rights that Canadians are entitled to at a minimum, and about its intention to continue to rely on international law as a prime interpretative source for figuring out what freedom of association means, until the court explicitly says otherwise, in Canada (or in Saskatchewan at any rate), the right to bargain and the right to strike are two different things. The former is constitutionally protected, the latter is not.[7]

What will happen if the case gets to the Supreme Court of Canada? If that court continues to do what it has said it intends to do, it must provide constitutional protection to the right to strike. But at least a few judges on the court have expressed their opinion that the court made a mistake when it constitutionalized the right to bargain in *BC Health* Services. They want that decision to be overturned (*Ontario* v. *Fraser* 2008).[8] As a

result of retirements and new appointments, the character of the court has changed recently, so prediction as to how it will go in the future is futile.

From a workers' perspective, the Saskatchewan appeal decision is disheartening. Workers clearly have a right to strike under international labor law, under international human rights law and—almost certainly—under Canadian constitutional law. But they are unable effectively to exercise the particulars of that right because of the intransigence of Canadian governments, the unwillingness of some courts to embrace international law and, under the circumstances, the slowness of the process. The labor movement's unfamiliarity with, and distrust of, international law has not helped. It provides only weak support for the Wagner Act model of labor legislation, for example, preferring freely negotiated bargaining structures and agendas over government-imposed schemes. The unions are especially leery about nonmajority unionism and the Pandora's box that they imagine it will open up (see, e.g., Clancy 2010). Therefore, they have not been pushing their political and academic allies to raise the kind of hell that they might. What most unions want is for international human rights dialogue to help them organize more members under the Wagner model, which it is not well suited to do.

The Supreme Court's 2007 *BC Health Services* decision, constitutionalizing the right to bargain collectively appeared to be a breakthrough that, if aggressively promoted, might well have seen the rapid expansion of collective bargaining. But that has not happened. Instead anti-union animus has increased, and the percentage of workers able to co-decide their conditions of work has continued to fall. The institutions and politics of Canadian democracy have, so far, failed them.

Endnotes

[1] The legislation provided for a mechanism under which unions could negotiate which workers were essential in the event of a strike or lockout. However, if no agreement was reach, employers were able to make the key decisions unilaterally.

[2] See *Saskatchewan* v. *Saskatchewan Federation of Labour* 2012 SKOB 62.

[3] See *Saskatchewan* v. *Saskatchewan Federation of Labour* 2013 SKCA 43.

[4] See *Health Services and Support–Facilities Subsector Bargaining Assn.* v. *British Columbia*, 2007 SCC 27; aka *BC Health Services*.

[5] Technically, only governments (as both policy makers and employers) are bound by the constitution. Private sector employers are not directly bound, but governments have a duty to ensure that they behave in accordance with the constitution.

[6] This judgment was handed down in a series of cases known as the Labour Trilogy. The cases are Reference re Public Service Employee Relations Act (Alta.), *PSAC* v. *Canada*, and *RWDSU* v. *Saskatchewan*.

[7] The legal publishing firm, Lancaster House, expressed considerable annoyance at the *Richards* decision: "It is difficult to take seriously the Saskatchewan Court of Appeal's assertion that, since the Supreme Court did not address the right to strike in *B.C. Health Services* and *Fraser*, its earlier ruling in the 1987 Labour Trilogy is still binding," it said in an online post on May 23, 2013. "If one thing is clear in *B.C. Health Services*, it is that the Labour Trilogy ratio, i.e. that freedom of association is confined to the right to join a union and does not extend to any union activities, has been repudiated." And further, "It could be said that it makes no difference what the Saskatchewan Court of Appeal says about the right to strike since the Supreme Court is likely to take the matter up in any event. But one cannot escape the feeling that Saskatchewan's appellate court ducked the issue when it did not have to, and ventured its views gratuitously when it should not have done so" (Lancaster House, May 23, 2013: [lancasterhouse.com] "Sask appeal court ducks issue of right to strike under Charter").

[8] *Ontario* v. *Fraser* 2011 2 S.C.R. 3.

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