The Right to Strike in Canada – recent developments

By

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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 one of which 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) the judge (Ball) agreed and ordered the government to revise the law (see Saskatchewan v. Saskatchewan Federation of Labour 2012 SKOB 62). Instead, the government appealed and, very recently, Ball's ruling was reversed (see Saskatchewan v. Saskatchewan Federation of Labour 2013 SKCA 43).

Whereas most Canadian governments, even those controlled by conservative parties, are more cautious than governments in the USA about attacking organized labor, the urge to weaken unions and especially public sector unions – is on the rise. (Private sector unions are already weaker than they have been in decades). But in the Canadian environment there is a counter force 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 (see Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia, 2007 SCC 27; aka BC Health Services).

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 Labor Organization a tripartite, UN-affiliated body that has been around since 1919. Over the years it has evolved a very rich body of case law applicable to the Right to Organize and Bargain Collectively (see, e.g., Bartolomei de la Cruz, Hector, Geraldo von Potobsky and Lee Swepston (1996) The International Labor Organization. The International Standards System and Basic Human Rights, Boulder, Colorado: Westview Press and

[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.

Gernigon , B.A., A. Odero and H. Guido, "ILO Principles Concerning the right to strike," International Labor Review, vol. 137, no. 4, 1998, 441-483). 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[2]. But in that year the Supreme Court of Canada handed down a decision (BC Health Services) in which it applauded international labor law and, although it would not go so far as to say that it was binding, said pretty firmly that it intended to rely heavily on it in future in order 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 new government ignored the global norms and put together a statute that, in my view, clearly offended international law. Competent in-house lawyers would have advised the policy makers about that and 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 that the new statute clearly offended that body of law (Expert Witness Testimony of Roy J. Adams Regarding Saskatchewan Bills 5 and 6. Prepared at the request of the Saskatchewan Federation of Labour, June 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 indicated several of the behaviors that the parties must engage in (such as making a real effort to negotiate) in order to fulfill their constitutional obligation to bargain[3]. 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

[2] As a member of the ILO, the US has also acknowledged the human rights character of Freedom of Association and the legitimacy of the ILO's Freedom of Association jurisprudence but, like Canada, it has often ignored its international obligations. For example, with regard to the right to strike, the ILO has found that permanent strikebreakers offend that right (see International Labor Organization, Committee on Freedom of Association, Complaint against the Government of the United States presented by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), para. 92, Report No. 278, Case No. 1543 (1991)) but the US government has left the offending regulation in place. By doing so it has knowingly denied a fundamental human right of its citizens.

[3] 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 accord with the constitution.

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 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, an equivalent dispute resolution procedure).

Judge Ball was convinced that the SCC'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 SCC had been expressly asked to decide whether or not the FofA clause guaranteed a right to strike. It said no[4]. But that court also said that the Canadian Charter of Rights did not protect the right to bargain either. The 2007 SCC 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 require 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 re-write 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 Appelate Court was unwilling to connect those dots. Judge Richards, who wrote the decision, played his hand very conservatively. Because the current SCC has not explicitly said anything about the right to strike, the 1980s jurisprudence, he said, still holds. In other words whatever the contemporary SCC 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 it explicitly says otherwise, in Canada (or in

[4] This judgement was handed down in a series of cases known as "The Trilogy". The cases are: Reference re Public Service Employee Relations Act (Alta.); PSAC v. Canada; and RWDSU v. Saskatchewan.

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[5].

At the end of June, 2013, the Saskatchewan Federation of Labour made an application for leave to appeal the Saskatchewan appellate decision to the Supreme Court but, at the time of this writing the SCC has not yet made a decision to hear the appeal. What will happen if the case does get to the SCC? 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 SCC made a mistake when it constitutionalized the right to bargain in BC Health Services. They want that decision to be overturned (see Ontario v. Fraser 2011 2 S.C.R. 3). As a result of retirements and new appointments the character of the court has changed recently and so prediction as to how it will go in future is hazardous.

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 either. 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. Most unions are still firmly wedded to some version of the Wagner-Act Model.The unions are especially leery about non-majority unionism and the pandora's box that they imagine it will open up (see, e.g., James Clancy, "In unity there's strength! Meaningful collective bargaining must involve support of the majority of workers**"** International Union Rights, vol. 17, no. 4, 2010). So 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.

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[5] 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 "

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 the percent 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.