# Striking a Collective Bargain: The Supreme Court Decision in *B.C. Health Services*

Buzz Hargrove*

As I reflect on the forty plus years that I have spent as a labour activist I think of hard-fought battles that our members have won as a result of their collective decision to engage in strike action. I vividly remember many of the victories that have been achieved at bargaining tables as skilled union negotiators hammered out deals that protected the interests of our members. When I think of the successes of our union and of the broader labour movement, I do not think of the courts. Traditionally, the courts in this country have chosen to interpret the law in a manner which is generally unsympathetic to the circumstances of working people and the trade unions which represent them.

The passing of the *Canadian Charter of Rights and Freedoms* ("*Charter*") offered some hope to trade union activists, but the promise that the *Charter* offered was quickly extinguished. Rejection of a collectivist approach to rights, which were collectivist in nature, made it a virtual certainty that our courts would not provide workers with a tool that could be used to assist them in the fight for economic and workplace justice.[1] Following the disappointing decisions of the Supreme Court of Canada ("the Supreme Court"), in what became known as the "labour trilogy" many trade unionists concluded that the courts would not expand the rights of working people and that the demands for economic fairness for working people would have to be won in the public sphere.[2] It is a view that I share.

Recent Supreme Court jurisprudence is being heralded as a sea-change in some circles. Trade unions, their supporters and other social activists are pointing to the Supreme Court's pronouncements in *B.C. Health Services* as a landmark decision which gives labour rights new status as rights which warrant constitutional protection.[3]

*Buzz Hargrove is the former National President of the Canadian Autoworkers Union.

1 Enacted as Schedule B to the *Canada Act 1982* (U.K.) 1982, c. 11.

2 The labour trilogy, as it has come to be known, consists of three Supreme Court decisions from 1987 and includes: *Reference Re: Public Service Employee Relations Act (Alberta)*, [1987] 1 S.C.R. 313, 51 Alta. L.R. (2d) 97; *Retail, Wholesale and Department Store Union, Locals 544, 496, 635 and 955 v. Government of Saskatchewan*, [1987] 1 S.C.R. 460, 38 D.L.R. (4th) 277; *Public Service Alliance of Canada v. Canada*, [1987] 1 S.C.R. 424, 38 D.L.R. (4th) 249.

3 *Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia*, [2007] 2

Any recognition by the Supreme Court of the importance of the right to collectively bargain, and its connection to the fundamental right to freely associate is welcome. However, I would not consider this a radical change in direction. The Supreme Court's recognition of the right to associate freely reflects a recent trend in which the Court makes incremental changes to labour laws so that they better reflect modern day social realities.

Ultimately, it is my view that no court will ever take the initiative to provide workers with any significant degree of workplace justice. Expansive legal protection of fundamental labour rights, including the freedom to associate, and its associated activities, will not be extended until workers recognize their shared experiences and the strength of their collective voice. It is only when workers use the power of their numbers to demand a fundamental shift in the political and economic structures which determine the quality of their work lives that societal institutions, including the courts, will be forced to take notice.

**The *Charter*'s Early Years: Association as an Individual Activity**

When the *Charter* was enacted many trade unionists were hopeful that rights which we have always viewed as fundamental to workers, including the right to collectively bargain might be recognized by our legal system. It seemed self evident that in order to give any meaning to the fundamental freedom of association as recognized by section 2(d) of the *Charter*, the courts would need to acknowledge the very activities which were necessary to give any meaningful content to the right. Any notion that the *Charter* would provide legal protections for labour rights was quickly dispelled. The Supreme Court decisions in the labour trilogy made it clear that the collective action that workers require to protect their rights would not be granted constitutional protection.[4]

In the cases that constitute the labour trilogy, the Justices of the Supreme Court inexplicably reasoned that freedom of association applied to protect individuals exercising their rights, but that it did not provide any substantive protection for the very activities which were necessarily meaningful to the exercise of the right. In the view of the Court, this meant that the right to strike and the right to collective bargaining were not rights which the courts would be willing to protect vis-à-vis constitutional mechanisms. The decisions were rapidly, and in my view rightly, criticized by supporters of the labour movement. Even members of the Supreme Court recognized that the failure to protect the very activities for which an association was formed was a "legalistic", "ungenerous", and "vapid" interpretation of the freedom of association.[5]

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S.C.R. 391, 283 D.L.R. (4th) 40.

4 Labour Trilogy, *supra* note 2.

5 *Reference Re: Public Service Employee Relations Act (Alberta)*, *supra* note 2 at para. 81, Dickson CJ & Wilson J dissenting.

The refusal to recognize fundamental labour rights, while disappointing, was not surprising, nor was it without precedent. Canada has a long history of refusing to provide substantive protection to core labour rights, despite being signatory to international conventions and covenants which recognize these rights as fundamental.[6]

**The Supreme Court Breathes Life Back into the *Charter***

It would not be unfair to say that in the early years of *Charter* jurisprudence the labour movement's attempt to use the *Charter* to seek constitutional protection of labour rights was not fruitful. More recent attempts have met with some degree of success. Most recently, in *Health Services and Support Facilities Subsector Bargaining* ("*B.C. Health Services*") the Supreme Court, acknowledged the importance of the processes which give some meaning and content to these core labour rights.

What makes the *B.C. Health Services* decision so startling is not the outcome of the case, but the thorough review and rejection of, previous Supreme Court jurisprudence. Early on in the decision the Supreme Court did an about-face and concluded that section 2(d) of the *Charter* protects the capacity of union members to engage in collective bargaining.[7] The Supreme Court then surveyed its historical treatment of cases respecting the freedom of association, including those regarding the right to collectively bargain and the right to strike. In distancing itself from the decisions in the labour trilogy the Supreme Court relied on the dissent of then Chief Justice Dickson in the *Alberta Reference*, *supra,* and quoted approvingly from the conclusions of Justice Bastarache in *Dunmore:*

> ... [B]ecause trade unions develop needs and priorities that are distinct from those of their members individually, they cannot function if the law protects exclusively what might be "the lawful activities of individuals". Rather, the law must recognize that certain union activities – making collective representations to an employer, adopting a majority political platform, federating with other unions – may be central to freedom of association even though they are inconceivable on the individual level...certain collective activities must be recognized if the freedom to form and maintain an association is to have any meaning.[8]

In expressing its appreciation for this viewpoint, the Supreme Court as-

6 *International Covenant on Economic, Social and Cultural Rights*, 3 January 1976, 993 U.N.T.S. 3 ("ICESCR"); the *International Covenant on Civil and Political Rights*, 23 March 1976, 999 U.N.T.S. 171 ("ICCPR"), and the International Labour Organization's (ILO's) *Convention (No. 87) Concerning Freedom of Association and Protection of the Right to Organize*, 9 July 1948, 68 U.N.T.S. 17 ("Convention No. 87"). Canada has endorsed all three of these documents, acceding to both the ICESCR and the ICCPR, and ratifying Convention No. 87 in 1972. This means that these documents reflect not only international consensus, but also principles that Canada has committed itself to uphold.

7 *B.C. Health Services*, *supra* note 3, at para. 2.

8 *Ibid.* at para. 17, where the Court quotes extensively from the decision of Bastarache, J., in *Dunmore v. Ontario (Attorney General)*, 2001 SCC 94, [2001] 3 S.C.R. 1016.

serted that the remarks of Justice Bastarache disabuse any notion that the freedom of association should only apply to activities capable of performance by individuals.

Acceptance of a collectivist approach to defining and delimiting the fundamental freedom of association, is a significant leap forward from early *Charter* jurisprudence in which collectivist approaches to rights were firmly rejected. In order to explain what appears to be a dramatic change of direction the Supreme Court engaged in a detailed and contextualized review of the evolution of modern day labour relations. Tracing the development of legal norms, as they have been applied to trade unions and labour relations regimes, the Supreme Court described periods of interplay between trade unions and societal institutions in terms of eras of repression, tolerance, and recognition.[9] In the view of the Supreme Court, the extension of constitutional protections to the process of collective bargaining was a natural progression, really just a "culmination of a historical movement".[10]

Having made its pronouncement, the Supreme Court quickly moved to narrow the scope of the constitutional protection being offered. After choosing to depart from prior decisions, which "...overlooked the importance of collective bargaining to the exercise of freedom of association in labour relations", the Supreme Court went on to define the parameters of the right to collectively bargain.[11] In doing so, the Court tread carefully and provided a limited degree of protection for the process of collective bargaining in respect of fundamental workplace issues.

The constitutional protection to be extended would neither guarantee outcomes of collective bargaining, nor would it enshrine protections for labour relations regimes, as they are defined in various legislative initiatives. Instead, the Court agreed to simply protect the right of employees to associate in a process of collective action to achieve workplace goals. The Supreme Court made two other significant observations about the protections being afforded. First, that it would only be governmental action which amounted to substantial interference in the process of collective bargaining that would cause a breach of the fundamental freedom of association as outlined at section 2(d) of the *Charter*. Secondly, that the issue of a constitutional claim to a right to strike was not being considered in the case at hand.[12]

**What Does It All Mean for Labour?**

Recognizing that the *Charter* only applies to state action, it is clear that the decision will have more immediate practical implications for public sector unions. As any observer of labour politics would attest, public sector unions are frequently confronted with governmental efforts to override negotiated collective bargaining agreements.

9 *B.C. Health Services*, *supra* note 3, at paras. 45-50, 51-4 and 55-63, respectively.
10 *B.C. Health Services*, *supra* note 3, at para. 68.
11 *B.C. Health Services*, *supra* note 3, at para 30.
12 *B.C. Health Services*, *supra* note 3, at para. 19.

The Supreme Court has chosen to send a strong message to our legislators: unilateral legislative imposition of contract terms will not be an appropriate substitute to good faith negotiations.

The decision may also be of relevance to unionized workers in the public, quasi-public and private sectors as it may provide a basis for subjecting governmental interference, in other parts of the collective bargaining process, to increased judicial scrutiny. Specifically, it may discourage legislators from enacting sweeping legislation which interferes with collective bargaining rights or from rapidly and prematurely intervening in work-related disputes vis-à-vis back to work legislation.

In terms of substantive outcomes the decision does very little for workers and the unions that represent them, regardless of whether workers are employed in the public or private sphere. This decision does not compel particular outcomes in bargaining, it merely demands dialogue between workers their workplace representatives and employers and good faith in the process. Labour relations processes will continue as they always have, no new demands have been put on employers, and no new rights have been carved out for workers or for trade unions.

Giving a small degree of constitutional protection to the process of collective bargaining really just provided the most basic recognition of collective bargaining as an accepted legal norm, both on the domestic and international stage. The process of collective bargaining constitutes a significant part of the labour relations regimes which have existed in this country for decades, but this process is merely one element of widely-accepted labour relations standards and practices. Effectively, all the Supreme Court has done is to acknowledge that this part of the modern day labour relations regime in this Country has become institutionalized over the course of modern day labour history. In the simplest terms, the Supreme Court has provide a minimal, but important, guarantee which prevents governments from taking away certain procedural rights and benefits which have been fought for and won.

Having reflected on the decision of the Court, and what it means for workers and for unions, I am compelled to say that I remain somewhat skeptical about the real value of constitutionalizing rights. Providing a minimal level of constitutional protection to a part of the collective bargaining process will not mean that there will be economic or social progress for workers. In my experience, such gains can only be made by exerting power at the bargaining table, by voicing workers' demands in the public forum, and by pressuring political actors to understand the importance of a worker's platform.

In coming to the decision in *B.C. Health Services*, the Supreme Court spoke of the values which underly the *Charter*: human dignity, equality, liberty, respect for the autonomy of the person and the enhancement of democracy. Acknowledgment

of both the intrinsic and extrinsic value of collective bargaining activity led the Supreme Court to conclude that giving workers an opportunity to influence the rules and conditions which govern their workplace could only enhance these *Charter* values.[13] These sentiments are the ones that union activists have been propounding since the very inception of organized labour. Trade unions have always been about injecting an element of fairness into, and removing arbitrary decision-making from the workplace. Most importantly, they are about helping people reclaim their dignity as workers.

The decision in *B.C. Health Services* shows us that the structures of labour relations which become institutionalized become legitimized and that this legitimization may lead the courts to extend legal protections to aspects of labour rights which we view as fundamental. This sends us a clear message; if we hope to influence our social, political, economic, and judicial institutions to better protect worker's rights and allow workers to have any meaningful say in their working lives, we must continue to voice our collective demands in the public sphere.

Accordingly, what this decision means for labour is what it has always meant, trade unions must continue to fight the same fights they have been fighting in this country for decades. We must continue to press our demands for decent wages, working conditions, and fairness and dignity in our workplaces. We must continue to demonstrate to the public, to our government and to our courts that the voices of workers are voices which have as much legitimacy as the voices of our employers.

Even a casual glance at the current economic and political climate in our country highlights the importance of raising our collective voice and asserting our demands. Canadian workers are reeling from the incessant pressures of the corporations which employ them and from a lack of government action. If we look to the manufacturing sector in this country it is clear that we are in crisis. We are bleeding tens of thousands of jobs which pay decent salaries and benefits to workers and their families. The workers who have frequently spent decades providing their labour rarely get even a small portion of what is owed to them in terms of severance pay, termination pay, and pension benefits. Our government takes no action because our citizens have not collectively voiced their demands on a broad scale.

As long as we as workers fail to influence the political environment, we will continue to be marginalized and discarded. We will only be able to spark societal change by taking action in our workplaces and in our communities. Such actions must inspire the electorate to make political choices which are for the benefit of working people. If we do not succeed in these endeavours our government will have no cause to act and the courts will have no impetus for following suit.

It is up to us as workers to bring about the societal changes which will allow

13 *B.C. Health Services*, *supra* note 3.

the law to do what we believe it should. The *Constitution,* which includes the *Charter,* is described as a metaphorical living tree, one that is meant to grow and can adapt to reflect societal change. In that sense, the decision in *B.C. Health Services* should not be viewed as a "culmination" of the evolution of labour history. Rather, it should be viewed as the first step toward extending domestic legal protection to core labour rights. We have always had the opportunity to lead our society in a direction where fundamental rights of workers become ingrained and institutionalized. Labour's task is to seize this opportunity.