ENTER STAGE RIGHT: PLAYERS AND ROLES IN A POST-*B.C. HEALTH SERVICES* WORLD

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When the Supreme Court of Canada issued its decision in *Health Services and Support–Facilities Subsector Bargaining Association v. British Columbia* in June of 2007, the Canadian labour relations world was taken by surprise.[1] Most participants in collective bargaining relationships and commentators on labour issues had assumed that the Court had articulated its basic approach to the associational rights protected in the *Canadian Charter of Rights and Freedoms* in the labour trilogy of the 1980s.[2] It seemed unlikely that, a scant twenty years later, the Court would readily alter such a foundational statement on the nature and scope of *Charter* rights.

The trilogy had itself disappointed many who had hoped the *Charter* would be a useful vehicle for trade unions and their members to assert their rights. The Court seemed reluctant to draw on international instruments which characterized the activities of employees through their trade unions in human rights language. In addition, the Court analogized the rights attached to trade unions with those associated with other kinds of voluntary organizations—a process famously captured by Harry Arthurs in his trenchant expression "the right to golf."[3] Supporters of collective bargaining perhaps naturally concluded that the opportunities apparently offered by the wording of section 2(d) had been definitively foreclosed by the decisions in the trilogy.

Though it was significant, the 2004 decision of the Court in *Dunmore v. Ontario (Attorney General)* did not immediately seem to point to a comprehensive reappraisal of the trilogy.[4] The decision of the Ontario legislature to re-exclude agricultural workers from collective bargaining legislation—which had only shortly before been amended to include them—brought into sharp relief the absolute nature of the exclusion. The Su-

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1 2007 SCC 27, [2007] 2 S.C.R. 391, [*B.C. Health Services*].

2 Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.; *Reference re Public Service Employees Relations Act (Alta.)*, 51 Alta. L.R. (2d) 97, [1987] 1 S.C.R. 313, [*Alberta Reference*]; *PSAC v. Canada*, [1987] 1 S.C.R. 424, 38 D.L.R. (4th) 249 [*PSAC*]; *RWDSU v. Saskatchewan*, [1987] 1 S.C.R. 460, 38 D.L.R. (4th) 277, [*RWDSU*]. See also *Professional Institute of the Public Service of Canada v. Northwest Territories (Commissioner)*, [1990] 2 S.C.R. 367, 72 D.L.R. (4th) 1, [*PIPSC*].

3 Harry W. Arthurs, "'The Right to Golf: Reflections on the Future of Workers, Unions and the Rest of Us Under the Charter" (1988) 13 Queen's L.J. 217.

4 2001 SCC 94, [2001] 3 S.C.R. 1016, [*Dunmore*].

preme Court of Canada concluded that a total prohibition of agricultural workers from access to associations through which they could make representations to their employers fell afoul of section 2(d). The Court made it clear, however, that the legislature need not permit agricultural workers access to the same collective bargaining regime as other employees, and emphasized that workers were entitled to associate to approach their employers but that the *Charter* guarantee did not protect any specific process or outcome.

The decision in *Dunmore* did not clearly signify that the Court had had a change of heart about the conclusion in the trilogy that there is a basic separation between the rights of individuals to join and be part of organizations, and any activities those organizations may engage in or purposes they may have. Nor did it suggest that the Court would consider exploring the scope of associational rights in relation to particular aspects of the collective bargaining process once employees are represented by unions, or in relation to particular subject matter which collective bargaining may address.

In the *B.C. Health Services* decision, however, the Supreme Court rejected many of the limitations placed on the interpretation of section 2(d) in the trilogy. The Court went beyond considering merely whether the associational right under the *Charter* would permit workers access to some form of collective bargaining and found collective bargaining itself to enjoy protection. In assessing the constitutionality of British Columbia legislation which would limit collective bargaining rights in the health care sector, the Court considered whether the legislation would "substantially interfere" with collective bargaining and therefore infringe employee rights under section 2(d).

The Court found that the legislation did violate the *Charter* rights of employees, either by disregarding the results of past collective bargaining or by pre-empting the possible results of future collective bargaining. The Court stressed that section 2(d) in this context protected the process of collective bargaining, not any substantive content or outcomes of that process. The Court focused on provisions of the legislation which would permit employers to contract out work without consulting the trade unions representing their employees and to ignore any clauses in collective agreements which required consultation, and on provisions concerning layoffs and bumping rights. The Court held that these provisions constituted substantial interference with collective bargaining, and that these infringements of *Charter* rights were not saved by section 1.

Though the Court stated that the right protected by the *Charter* is a right to process, not a right to outcome, the assessment that precluding collective bargaining on certain key issues or ignoring the agreements the parties have reached on those issues can constitute substantial interference with collective bargaining has taken the Court a long way into evaluating what content is at the core of meaningful collective bargaining. It is interesting in this respect that the decision was informed by the Court's understanding of the evolution of the institution of collective bargaining in Canadian labour history; the choice of collective bargaining as a labour relations model worthy of statu-

tory protection came about in response to conflicts and events which were only significant because they were examples of disagreement about concrete subject matter.[5]

The *B.C. Health Services* decision has not yet been completely absorbed into the legal discourse concerning the appropriate scope of collective bargaining. That it has implications going far beyond those of *Dunmore* has been confirmed in the recent decision of the Ontario Court of Appeal in *Fraser v. Ontario (Attorney General)*, where the legislation that replaced the legislation struck down in *Dunmore* was subject to a constitutional challenge.[6] The Court found that, though the new legislation might adequately provide for the right of employees to organize, it did not provide adequate protection for collective bargaining. In particular, it did not: 1) establish a duty to bargain in good faith, 2) recognize the principles of exclusive representation based on majority support, or 3) create a mechanism for resolving bargaining impasses and disputes regarding the interpretation and administration of a collective agreement. It might be argued that, although that the Court of Appeal in *Fraser* took the principles in *Dunmore* to a new level using the prism of *B.C. Health Services*, its preoccupation was essentially with the same issue raised in *Dunmore*—how to ensure threshold access for workers to a mechanism that meaningfully supports their associational rights. The Court of Appeal decision in *Fraser* does demonstrate at the same time that one of the messages of *B.C. Health Services* is that the courts regard the term "collective bargaining" as referring to a framework with its own coherence, integrity, and core content, and that substitutes will be viewed with suspicion.

If it is too early to be sure where the principles laid out in *B.C. Health Services* will ultimately take us, it still may be useful to try to assess the significance of this surprising decision. I will briefly consider the implications of the *B.C. Health Services* case for one particular set of issues, those related to the various actors in the labour law environment—employers, unions, governments, courts, labour tribunals and international organizations. In the ongoing drama of labour relations in Canada, these actors have all acted and reacted in ways which over time have become familiar. With the *B.C. Health Services* decision, however, the balance has subtly shifted and I would suggest that the actors' roles are being redefined in ways we cannot yet fully appreciate.

THE COURTS

It is the courts which have undergone the most complete transformation over the past two decades or so. North American collective bargaining legislation emerged partly as a corrective to the stifling effect of common law judicial doctrine on collective activity by workers. The boundless enthusiasm and endless creativity of judges in the invention of industrial torts, the deployment of the labour injunction and the myriad rationales

5 Though the reliability of the historical version deployed by the Supreme Court has been called into question; see Eric Tucker, "The Constitutional Right to Bargain Collectively: The Ironies of Labour History in the Supreme Court of Canada" (2008) 61 Labour/Le Travail 151.

6 2008 ONCA 760, 92 O.R. (3d) 481, [*Fraser*]; The Supreme Court has granted leave to appeal in *Fraser*; see *Ontario (Attorney General) v. Fraser*, [2009] S.C.C.A. No. 9.

for the defence of employer prerogative led trade unions and their supporters to see the courts as partisan and repressive. After World War II, Canadian legislatures, following the example set by the United States Congress with the passage of the *Wagner Act*, accepted that the recognition of collective bargaining would promote industrial peace and economic prosperity.[7] Given the courts' reluctance to accept the legitimacy of collective activity by workers, legislatures created new mechanisms in the form of tripartite labour tribunals for the administration of collective bargaining statutes and the resolution of disputes between the parties to collective bargaining relationships.

The courts initially made efforts to restrict the authority of these new bodies through the instrument of judicial review, and continued to make use of traditional doctrines, particularly in the context of industrial disputes, where the elaboration of causes of action in tort—primarily as a backdrop for issuing labour injunctions—continued unabated.

It is not possible in this paper to describe the evolution of judicial review of administrative decision-making over the last fifty years. It is sufficient for my purpose here to point out that a reappraisal of the stance of the courts towards labour tribunals operating under collective bargaining legislation formed the basis of new principles for judicial review articulated in the 1970s and 1980s. In decisions like *Canadian Union of Public Employees v. New Brunswick Liquor Corporation*, the Supreme Court of Canada—in particular, Dickson J—acknowledged the importance to employees of their working environment and expressed a new spirit of deference to the bodies overseeing the collective bargaining process that determined working conditions.[8] This new approach culminated in the decision in *St. Anne Nackawic Pulp & Paper Co. Ltd. v. Canadian Paper Workers Union, Local 219* where the Court held that the relevant labour tribunal—in that case an arbitration board—had exclusive jurisdiction over issues related to the violation of a no-strike clause in a collective agreement.[9] In *St. Anne Nackawic*, the Court excepted from this exclusive jurisdiction the authority of courts to issue injunctions, but this was the only caveat to the recognition that labour tribunals were entitled to a high level of deference. The Court explained this deference by alluding to the fact that the legislatures had thought it necessary to remove decision-making in labour relations from courts, and confide it to bodies more equipped to understand the dynamics of the employer-employee relationship and to accept that employees should have the option of bargaining collectively.

By the time of the Trilogy, then, the courts had adopted a posture of deference to labour tribunals on judicial review, and articulated a fairly complete rationale for such deference. They exercised injunctive power in relation to labour disputes, and this continued to be important, but by the mid-1980s it was thought that the courts might see the *Charter* as providing further support for collective bargaining

7 *National Labour Relations Act*, 29 U.S.C. §§ 151-169 [*Wagner Act*].
8.[1979] 2 S.C.R. 227, 97 D.L.R. (3d) 417.
9 [1986] 1 S.C.R. 704, 28 D.L.R. (4th) 1, [*St. Anne Nackawic*].

by placing worker and union claims in a human rights framework. The Trilogy responded, apparently definitively, to these hopes with the interpretation that, though workers' right to form and join trade unions was protected, those organizations themselves and their core activities were not amenable to protection by the *Charter*.

The courts alluded to this reading of the *Charter* repeatedly over the ensuing years. It is true that in 2002, in *Retail, Wholesale and Department Store Union, Local 778 v. Pepsi-Cola Canada Beverages (West) Ltd.*, the Supreme Court of Canada upheld that picketing during an industrial dispute was an activity protected under section 2(b) of the *Charter* as an exercise of freedom of expression; the recognition that this protection included secondary picketing, which had been seen as almost inherently illegal, should perhaps have been seen as foreshadowing a more comprehensive overhaul of *Charter* principles.[10] Instead, *Pepsi-Cola* was accepted as evidence that the Court was more willing to extend protection to expression than to become involved in the issues of group rights posed by freedom of association.

Still, the alterations in the principles of judicial review, the conclusions that labour tribunals are uniquely placed to answer labour relations questions and that their jurisdiction is exclusive for many of those questions, and the willingness to be more flexible about issues like picketing created juridical space for the operation of collective bargaining. These changes laid a foundation for a new role for the courts.

Dunmore and especially *B.C. Health Services* completed the transformation of the courts' role with respect to collective bargaining. Rather than characterizing the promotion of access to collective bargaining as a policy choice which legislatures may make and to which courts will defer if they do, these later decisions present access to collective bargaining as a right for all workers, protected by section 2(d) of the *Charter*. In the Trilogy, the Supreme Court expressed the view that the nuances of labour relations were essentially a political matter which legislatures were better equipped to address through policy and statutory initiatives; though they recognized that some aspects of the constitutional rights of individuals were bound up in their adherence to trade unions, they did not see those rights as inherently tied to the particular kinds of activity that constitute collective bargaining. In *B.C. Health Services* the Court explicitly repudiated this approach. The majority of the Court attached a deeper meaning to the activities associated with collective bargaining organizations than those associated with other organizations less central to the welfare of individuals and found that meaningful protection of the associational rights of employees must encompass protection of collective bargaining as a vehicle for carrying out the purposes of association.

By taking this approach, the Court signaled that it would act as a guarantor of employee rights in the labour relations context. The Court also announced its intention to prod legislatures and other decision-makers whose deeds fall within the reach

10 2002 SCC 8, [2002] 1 S.C.R. 156, [*Pepsi-Cola*].

of the *Charter* not merely to avoid infringing on constitutionally protected rights, but to take positive steps to ensure that employees have the ability to assert those rights. *Charter* jurisprudence is, of course, replete with examples of the courts adopting the role of constitutional guarantor in relation to many categories of Canadians and many different rights enumerated in the *Charter*. The role is a new one in this particular context, however, and the decision of the Court to take up a challenge it had specifically refused to entertain in 1987 must still be counted something of a surprise.

In *B.C. Health Services*, the Court made an effort to follow a thread from the Trilogy through *Dunmore* by insisting that the *Charter* guarantee protects access to the process of collective bargaining and to the principle of mutual respect between employer and union which that process represents; the guarantee is not meant to privilege any particular model of collective representation or to create an entitlement to demand any particular outcome. After *Dunmore*, the Ontario legislature seems to have assumed that almost any mechanism for collective representation would meet the requirements of the *Charter*. In *B.C. Health Services,* the Supreme Court (and more recently in *Fraser* the Ontario Court of Appeal) made it clear, however, that acceptable models of collective representation must possess at least some of the features familiar to us from existing collective bargaining legislation. Though not all of these features have yet been considered, it would seem that to meet an acceptable standard collective bargaining legislation must reflect the principles of majority choice, exclusivity and good faith (*Fraser*); furthermore, a legislature cannot make arbitrary changes which override the consultative aspects of the collective bargaining process where key issues are concerned (*B.C. Health Services*). Thus it is not only the existence of collective bargaining rights but their scope which the courts have undertaken to monitor for constitutional compliance. Though the Supreme Court indicated in *Dunmore* that there might be a number of models of collective representation which would do, subsequent discussion in *B.C. Health Services* makes it clear that there is more flesh on the bones of *Charter*-protected collective bargaining than that, and, indeed, the requirements start to look quite like collective bargaining as we know it from other legislation.

Indeed, notwithstanding the Supreme Court's assertion that the role of the courts is limited to guaranteeing access to a process, it has proven difficult to avoid being drawn into questions of whether there is any irreducible substance to collective bargaining. In *B.C. Health Services*, for example, it is possible to describe in terms of process the Supreme Court's finding that the legislature could not constitutionally override existing contracting out provisions of collective agreements or prevent the conclusion of new ones without consultation. It is also possible to characterize this finding as one which identified contracting out as subject matter of such significance that it must be subjected to the collective bargaining process in order to give that process intelligible meaning.[11]

11 This is somewhat less true of the Ontario Court of Appeal decision in *Fraser*, where the Court was considering what was necessary in legislative terms to create an effective representation structure for workers.

It is another interesting feature of the decision in *B.C. Health Services* that the Court was willing to go beyond assessing whether legislation was sufficiently robust to support effective representation of workers—the issue in *Dunmore* and *Fraser*—in order to evaluate the implications of legislative intrusion into a mature bargaining relationship, one in which simple access to collective bargaining was no longer a question.

LEGISLATURES

It is possible that the *Wagner Act* and other New Deal phenomena were the result of a peculiar alignment of the planets; it is certainly the case that the United States Congress almost immediately made efforts to undo the more radical effects of that sequence of legislative events. Whatever the political and social forces that produced this model of collective bargaining legislation—worldwide depression, the vision of Franklin Roosevelt, the dubious Congressional deals between northern and southern Democrats—the *Wagner Act* model was taken up by Canadian legislatures of the 1940s, which assumed the role of promoter and protector of worker claims to enhanced workplace participation.

The basic features of the *Wagner Act*—legal exclusivity based on majority support, new tribunals to resolve disputes, emphasis on process rather than outcome—were all imported into Canadian collective bargaining statutes in recognizable form, though with some variation from jurisdiction to jurisdiction.[12] In the political and public discussion which led to the passage of these statutes, the rhetoric was framed in terms of industrial harmony and regulation of conflict rather than in terms of worker rights. This collective bargaining package was nonetheless seen as providing employees with "rights"—if not in a constitutional sense, then in the sense of expectations—and the term "rights" actually crept into some of the legislation.

It was therefore to the political and legislative process that workers and unions—and on occasion employers—looked to set or correct the balance between surviving employer prerogatives and employee claims to influence their terms and conditions of employment. The scope and substance of collective bargaining legislation was seen as a question of public policy, and legislatures were seen as the forum in which the debate would take place over how this kind of legislation should be modified. Though they resisted at first, the courts gradually accepted that their role in this realm was a limited one; though they might comment on the irrationality of tribunal decisions—as they did with other kinds of statutory decision-makers—and they might have a residual capacity to intervene in cases of industrial conflict, they saw labour relations as a sphere where a combination of political process and specialized expertise was more useful than traditional common law doctrine had ever been.

13 In *Toronto Electric Commissioners v. Snider*, [1925] A.C. 396, the Judicial Committee of the Privy Council held that labour relations is a subject falling within the legislative jurisdiction of the provinces. Thus, collective bargaining legislation was enacted by provincial legislatures (and by Parliament for employees under federal jurisdiction); this legislation shared common features of the *Wagner Act* model—exclusivity of representation, for example—but there were variations in the form and details of the statutes.

This view of the role of the legislature in relation to collective bargaining formed part of the rationale in the Trilogy for declining to accord constitutional protection to the activities carried on by employees through their trade unions. Indeed, in the *Alberta Reference*, McIntyre J described collective bargaining as a legislative invention of "recent vintage" rather than something firmly embedded in Canadian society. Legislators therefore continued to occupy the central position in articulating labour relations policy, and the limitations on their freedom in this respect were almost exclusively political ones.

As it happened, in the years following the trilogy, those political limits were again put to the test. The post-war accord between business, labour and government must be viewed in the context of a political system largely influenced by Keynesian economics and public support for the erection of the welfare and administrative state. By the 1980s and 1990s, however, the assumptions which underlay the operations of most Canadian governments were being challenged by a newly-animated conservative politics, whose adherents called into question the legitimacy of the existing industrial relations regime, sometimes in extreme terms. Governments of a conservative stripe reconsidered features of the collective bargaining system which were regarded as fixed points in the landscape—union security provisions, union disciplinary powers, protections for employees during union organizing campaigns. Some of these initiatives might be seen as empty rhetorical flourishes or tests of political support, and even a Common Sense Revolution finds it difficult to turn the whole government system on its head in short order, but the large area of commonality in Canadian labour legislation could not longer be taken for granted.

In *B.C. Health Services*, the Supreme Court described collective bargaining in a different way, and thus posed a new set of questions for legislatures. Rather than a transient phenomenon created to serve the policy choices of particular legislatures at particular times, collective bargaining was presented as part of the fabric of Canadian economic and political life, an institution which had become inherent in the Canadian workplace. Hence, the Court concluded that policy choices with respect to labour relations are constrained by constitutional considerations, and that there may be basic features of collective bargaining as we know it that are protected by the *Charter*.

For legislators accustomed to thinking of collective bargaining legislation as malleable or even dispensable, and for governments whose political capital consists in part of their willingness to challenge established assumptions about whether worker representation is deserving of statutory protection, the idea that they have a positive obligation to provide all employees with access to a recognizable collective bargaining process may be unwelcome. Though the courts have thus far been careful not to commit themselves on the issue of whether the right to strike enjoys constitutional protection, the logic of the position taken in *B.C. Health Services* and other recent cases suggests that the Supreme Court may reconsider whether this right, too, is part of the core of associational activity which enjoys protection under the *Charter*.

Legislators may have difficulty adjusting their ideological or political instincts to the requirement to gauge legislative assessments against the constitutional template newly outlined by the courts. It is a matter for debate whether it is now open to a government to court political support by promising to withdraw the right to strike from public workers, as Prime Minister Harper recently did, or to enact legislation countermanding a labour tribunal's decision that collective agreements existed between workers in residential care facilities for children and the disabled and their employers, as the government of Quebec recently did.[13] The courts have stated that they will continue to defer to legislatures on the details of policies and legislation concerning collective bargaining, but it is also clear that they will now expect all legislation enacted in this field to pass constitutional muster.

TRADE UNIONS

It is difficult to recapture what worker and trade union aspirations might have been when the 1940s version of Canadian collective bargaining legislation was formulated. It is likely, however, that many assumed that the structure and process laid out in the legislation would stimulate employee interest in collective bargaining, that trade union representation would become the normal vehicle for negotiating the employment relationship, and that employers would gradually accept the legitimacy of trade unions as worker representatives, despite their initial reservations.

Labour relations in Canada following the passage of *Wagner Act*-type collective bargaining legislation did not bear out these assumptions. Instead, unions had to operate in a harsher and less predictable environment. Their early successes in organizing in traditional manufacturing and industrial settings were later compromised by the decline of that sector in the economy, and by the effects of globalization. They encountered extensive challenges in their efforts to represent workers in service industries and in the financial services sector, which assumed a higher profile. They gained representational rights almost overnight in untapped parts of the public sector, but often had to fend off efforts by governments tempted to use their legislative powers to restrict and redefine the bargaining rights of their own employees. Since the structure of collective bargaining legislation in Canada requires organization and representation workplace by workplace, employer by employer, unions have been inhibited from acting on a sectoral basis or across jurisdictional boundaries.[14]

Though the reach of collective bargaining has remained relatively stable, the statistics for union density create a somewhat deceptive picture. Union support is buoyed by the broad extent of unionization in the public sector, and

13 In *Confédérations des syndicats nationaux c. Québec (Procureur général)*, 2008 QCCS 5076, the Quebec Superior Court found this legislative initiative to be inconsistent with section 2(d) of the *Charter* and, also in violation of section 15 because it disproportionately affected women workers.

14 There have, of course, been some exceptions to this within provinces in sectors like health care and construction, but the kind of broad-based national or sectoral bargaining which occurs in Europe has been out of the question.

the stability of the figures there helps to disguise the fact that new union organizing and certification has proceeded slowly and does not quite offset losses in traditional bases of union support. Unions have tried to adopt new organizing strategies, to appeal to a broader range of worker interests and to make their internal processes more responsive and democratic, but they have continued to face difficulties in reaching some kinds of workers—part-time workers, workers employed by small employers, workers in sectors without a history of union representation.

Another disappointment for unions is the continued resistance of employers to union representation of their employees. Though generalization is dangerous here, employers tend to regard union organizing as an irrelevant intrusion into their relationship with their employees. Rather than holding the promise of a new kind of partnership, organizing by a union is seen as upsetting the economic balance of the enterprise and undermining the natural ebb and flow of employer-employee relations.

It is not surprising in this context that the political process, and mounting continued pressure to retain and if possible extend legislative gains, has been the primary focus of Canadian unions. After the introduction of the *Charter*, the idea of turning to the courts—traditionally seen as an ally of employer interests—as a way of asserting new constitutional rights, was controversial; the reluctance of the Supreme Court in the trilogy to give robust form to associational rights probably did not surprise the majority of trade unionists.

The new expansiveness of the Supreme Court, culminating in the *B.C. Health Services* decision, on the other hand, may very well have been a surprise, and like other players in the system, trade unions may have to adjust their thinking to take account of the new constitutional character of collective bargaining. Like legislators and employers, trade unions have become accustomed to thinking of collective bargaining as a mutable institution, dependent on political forces for its characteristics, indeed for its survival.

Some have argued that unions should resist the temptation to adopt a model of labour rights linked to human rights on the grounds that this model of labour rights makes labour relations more legalistic, blunts the edge of class consciousness and renders political activity secondary.[15] It is likely, however, that trade unions will see in the *B.C. Health Services* approach opportunities to shield collective bargaining from legislative assault and to make use of the overarching nature of constitutional rights to legitimize their status.

Given that the Supreme Court has shown greater willingness in cases like *B.C. Health Services* to look to the international arena for constitutional criteria, it is

15 See e.g. Larry Savage, "Labour Rights as Human Rights: A Response to Roy Adams" (2008) 12 Just Labour: A Canadian Journal of Work and Society 68.

also possible that the redefinition of labour rights as constitutional rights will create opportunities for trade unions to forge more solid bonds with the international labour movement and to make use of a new platform of international norms. There has been relatively little evidence to date that these international norms or increased labour solidarity across national boundaries can provide an effective counterweight to the hollowing out effects of the easy global movement of capital, but it cannot be assumed that this feebleness at the international level is inevitable, or that trade unions will not be able to devise ways of offering more effective protection to workers in this context.

EMPLOYERS

The North American model for collective bargaining legislation emerged from a period of economic crisis and industrial conflict, and the *Wagner Act* and its Canadian progeny reflect its origins in many ways. Though the labour movement may have hoped that the passage of this legislation signaled a broad acceptance of workers' right to participate in decisions regarding workplace issues, other actors in industrial relations believed the legislation was primarily designed to promote labour peace and create an orderly means for resolving workplace disputes. The peculiar features of the North American model—exclusivity of representation, preoccupation with the appropriateness of bargaining units, certification on the basis of majority support—supported this interpretation, and made each campaign for union certification a test for individual employers' relationship with their employees seeking to be represented. In Canada, the constitutional decision that labour law regimes fall under the jurisdiction of the provinces reinforced this fragmentation.

Rather than seeing collective bargaining legislation as the foundation of a new era in all workplace relationships, private sector employers tended to see it as creating the possibility that they in particular would be challenged to share workplace authority with a union representing their employees. They saw it as a contest over economic strength and the survival of managerial prerogative, not as a question of how to accommodate the citizenship interests of employees. The appropriate bargaining unit aspect of the *Wagner Act* model narrowed the scope of union organizing efforts, and gave employers an almost personal stake in resisting union certification in their own workplaces; should they fail at fending off certification, employers also saw it as important to bargain vigorously to minimize the extent to which management authority would be eroded.

This is not to say that no private sector employers have settled into mature and constructive bargaining relationships with the unions representing their employees. Many employers engage in civil negotiations and dispute resolution with unions, and many employer representatives make significant and constructive contributions to the tripartite labour tribunals which administer labour statutes and collective agreements. Whatever fortitude an individual employer may display about the advent of a union, however, employers tend to view the union-employer relationship as essentially

an adversarial one, and they are inclined to resist defining the partnership in expansive and inclusive terms.

I hasten to say that none of these attitudes is illegal according to collective bargaining legislation in its current form. Indeed, the premises and structure of Canadian collective bargaining legislation more or less invite employers to adopt this combative posture. My purpose in outlining this set of employer views is to emphasize the distance which may have to be crossed, from a viewpoint which regards the certification of a union as an unwelcome and perhaps illegitimate intrusion with the potential to undermine valid employer authority and create financial uncertainty, to a viewpoint which would accept the premise that it is a fundamental right of employees to be represented by unions in their dealings with their employers.

It should also be noted that, like unions, employers have looked to legislation and to the political process as a vehicle for asserting their interests. They have primarily tried to convince governments to place additional restrictions on union organizing and collective bargaining, or at least not to expand collective bargaining rights any further. Though the efforts of employers—and, one might add, the efforts of unions—have had surprisingly little effect in fundamentally altering post-war collective bargaining legislation, these initiatives demonstrate clearly that private sector employers view the existence and scope of collective bargaining requirements as the result of a sequence of political events, and see political pressure as a means of protecting their interests.[16]

The history of collective bargaining with public sector employers is somewhat different. It must be said as a starting point that, except in Saskatchewan, the 1940s generation of collective bargaining statutes and regulations excluded many public servants and other public sector workers from access to collective bargaining. The rationale for this was often that they performed essential or monopoly services, and the public could not be subjected to the risk of cessation of these services. In the 1960s and 1970s, these exclusions were generally removed, and other strategies adopted for providing essential services or restricting the use of the strike option.

Once legislatures cleared the way for broader collective bargaining in the public sector, public sector employers generally accepted union representation as a fact, and entered into bargaining in good faith. After all, if the government views it as positive public policy to protect and promote collective bargaining, it is hard for a public sector employer to deviate from this basic position.

Though public employers may recognize their legal obligation to treat with unions, there are still occasions when they feel it appropriate to raise public

16 By this I do not mean that unions and employers have not succeeded in bringing about the addition or subtraction of important legislative provisions, but the basic *Wagner Act* disposition has remained remarkably stable.

interest concerns about the implications of bargaining, and occasions when governments may feel that what they see as public interests justify legislating or otherwise using governmental authority to interrupt the normal course of collective bargaining. Governments have turned to this authority to trump settlements which are considered too costly, for example, or to end politically unpopular strikes. There are, of course, occasions when government can responsibly resolve the tensions between participation in collective bargaining relationships as an employer and acting in the public interest as elected legislators only by overriding the demands of the former. Governments should, however, be careful to distinguish between these roles and recognize the nature of their obligations in each of these settings.

In any case, the heightened significance of the public interest as a theme for public sector employers may make a human rights paradigm for collective bargaining unappealing to public sector employers as well as private sector employers, though for different reasons.

Associational rights under section 2(d) of the *Charter* can only be asserted in relation to some governmental activity, which would include legislation or specific actions of government entities, including public employers. The actions of private sector employers do not come under direct scrutiny against the template of the *Charter*. Still, the new approach taken by the Supreme Court culminating in the *B.C. Health Services* decision has implications for all employers. Defining access to collective bargaining, and access to a familiar form of collective bargaining, in human rights terms, gives worker claims to union representation a constitutional legitimacy which employers have not generally accepted. The resistance to union organizing and to collective bargaining which has been an important—and, to date, legitimate—element of employers' reactions to union claims cannot be an effective instrument in the political process if governments are prevented from giving effect to these sentiments in legislation.

Furthermore, the Supreme Court stressed in both *Dunmore* and *B.C. Health Services* that they saw section 2(d) as protecting the process of collective bargaining, not its content. Though *B.C. Health Services* goes some distance to indicating what subject matter may be essential to collective bargaining, it does not guarantee any particular outcomes for employees. This does not mean, however, that it can necessarily be business as usual for employers at the bargaining table. Employers are not directly caught by the provisions of the *Charter*, but this is not true of the labour tribunals to which employees and unions may turn to resolve their differences with employers. Those bodies must take into account the human rights framework in making their decisions, though it is not yet obvious what impact this will have.

A collective bargaining relationship built on adversarial principles, where the primary employer objectives are to protect employer prerogatives and to achieve settlements which are as financially favourable as possible, is different in concept

from a relationship based on the rights of workers as citizens to participate in decisions about issues that affect them. Conventions of mutuality and respect would be important for the development of a relationship of the latter kind, and, though there are many exceptions, employers in general are still better equipped for bargaining of an adversarial nature.

Employers have become quite familiar with human rights concepts. They have been required to make adjustments in their approach to many issues, from the duty to accommodate employees on a variety of grounds to hiring practices to pensions. In some cases, human rights issues have surfaced at the bargaining table, and have been reflected in such agreement provisions as those which prohibit discrimination or provide for wage adjustments to meet the requirements of pay equity. Essentially, however, these issues have been approached like other issues on the table, as part of an ultimate "deal" which is arrived at by the usual yielding and withholding process. In such an environment, human rights do not have any absolute or preeminent status. Parties to collective bargaining may recognize that human rights concerns have some additional significance, and in that respect they are not quite like shift premiums or uniform allowances, but they are rendered negotiable, and must take their place among the items which will only be reflected in the agreement if one of the parties attaches enough importance to them to put them forward in priority to other things.

The paradigm enunciated by the Supreme Court in its recent decisions suggests that human rights issues are central to the collective bargaining enterprise, that collective representation is an exercise of workers' rights as citizens. This places employees and their unions in a position of legitimacy which can no longer be denied by employers on the grounds that the institution of collective bargaining is a legislative invention that can be altered or even eliminated through the political process.

It is unlikely that Canadian employers are fully prepared to align their attitudes with the human rights premises of labour relations which the Supreme Court sketched in *B.C. Health Services*. As the courts move towards redefining the legal and constitutional status of the collective bargaining relationship, many employers are unprepared to play the significant role assigned them in this new environment.

LABOUR TRIBUNALS

Labour tribunals, often taking a tripartite form, are one of the hallmarks of the North American collective bargaining system. Labour relations boards administer collective bargaining statutes, while arbitrators or arbitration boards determine disputes about the meaning or interpretation of collective agreements; both have played a critical role in articulating the ground rules for the bargaining relationship and in acting as a neutral arbiter on disputes which the parties cannot resolve through negotiation.

The courts for some time did not consider it appropriate for labour tribunals to play an interpretive or remedial role in relation to the constitution, and when the Supreme Court did begin to allow some space to tribunals to interpret and apply constitutional instruments like the *Charter* or *quasi*-constitutional legislation like human rights codes, it was a matter of some controversy among the judges themselves.[17] Over time, however, the courts have granted labour tribunals the authority to interpret and apply the constitution and human rights legislation, though they have made this contingent on the application of a standard of correctness on judicial review. Indeed, in *Parry Sound (District) Social Services Administration Board v. O.P.S.E.U.*, the Supreme Court suggested that arbitrators should interpret each collective agreement as though human rights legislation formed a part of that agreement.[18] No analogous direction has been given to labour relations boards, but clearly they are expected to take into account *Charter* and human rights norms when determining the issues placed before them.

Labour tribunals have generally assumed this new role with goodwill and there is a growing body of labour relations board and arbitral jurisprudence which addresses issues of human rights and discrimination. These tribunals have themselves raised concerns about the demands their new role places upon their resources, and about the possible effect of complex constitutional and human rights questions on the nimbleness of tribunal responses to emergent issues. Others outside tribunals have expressed doubt about the competence of tribunals to make judgments on constitutional questions. Nonetheless, labour tribunals now have a secure role in articulating how constitutional norms play out in the workplace.

I earlier mentioned that, having at first expressed strong concern about the legitimacy of *quasi*-judicial tribunals operating in the labour field, the courts eventually came to respect labour tribunals as experienced and flexible bodies which could generally be relied on to serve the policy interests embodied in the collective bargaining legislation. On this basis, the courts have expressed confidence that labour tribunals can play a positive role in interpreting constitutional provisions and explaining their implications in the specialized setting of the unionized workplace. Labour tribunals have proceeded some distance in the development of a body of jurisprudence which connects labour legislation, collective agreements and workplace practices with the *Charter* and with human rights legislation.

Labour tribunals have most frequently dealt with human rights and discrimination issues as they relate to individual parties to collective agreements. Now that the Supreme Court has declared that access to collective bargaining is itself a human right, labour relations boards may have to reconsider their approach to a wide range of issues related to such things as union organizing, unfair labour practices and the nature of the bargaining process; arbitrators will have to reap-

17 See e.g. the fundamental clash between the views of Lamer CJC and McLachlin J in *Cooper v. Canada (Human Rights Commission)*, [1996] 3 S.C.R. 851. See also *Nova Scotia (Workers Compensation Board) v. Martin; Nova Scotia (Workers Compensation Board) v. Laseur*, 2003 SCC 54, [2003] 2 S.C.R. 504.
18 2003 SCC 42, [2003] 2 S.C.R. 157.

praise whether collective agreements need to be interpreted differently in light of the Supreme Court's decision. However, tribunals are already acculturated to the constitutional dimension of their role and have a developed understanding of the expectations of the courts in this respect. They will probably adjust to post-*B.C. Health Services* norms more easily than other players in the labour relations system.

INTERNATIONAL ORGANIZATIONS

At a diplomatic and rhetorical level, Canada has been involved in the deliberations of international organizations, has signified assent to international statements of principle, and has agreed to obligations in relation to international covenants like the North American Agreement on Labour Co-operation, which is a side agreement to the North American Free Trade Agreement. In international circles, Canadian representatives appear to speak the language of labour rights fluently and with commitment.[19]

Domestically, however, Canada's international commitments have had relatively little purchase. This is, in part, because the division of powers under Canada's constitution complicates the implementation of international agreements; Canada may sign its name to international agreements without being able to guarantee that provincial legislators will fulfill its commitments.

Furthermore, the tone and vocabulary of international discourse on the subject of collective bargaining have not been acknowledged by legislatures or courts as relevant to the framework for consideration of these issues in Canada.

Increasingly, however, the Supreme Court of Canada has tried to integrate Canada's international commitments into the interpretation of Canadian law. This creates a new avenue of influence for international organizations, and new incentives for parties in Canada to pay attention to the activities of international bodies.

Canadian unions and employers may also wish to become involved in international associations and coalitions in order to have some influence on the deliberations of international organizations whose directives and statements are likely to be given weight in Canadian courts. To some extent, Canadian trade unions have a tradition of adherence to international organizations in the interests of international labour solidarity, but these ties seem to have become stronger in recent years. Employers too have taken note of the importance of international links, even those who do not operate across borders themselves, though employer interest has to date largely been directed to the rules by which international trade will be conducted, rather than "softer" issues like human rights. It is likely, however, that Canadian unions and employers will both devise strategies for utilizing the processes of international diplomacy

19 An untested hypothesis is that this fervour is related to their assumption that the commitments being discussed are aimed at alleviating the situation of the benighted elsewhere, and that there are no real ramifications which can come home to Canada.

and politics to exert pressure in the international arena in relation to labour issues.

CONCLUSION

While the decision of the Supreme Court of Canada in *B.C. Health Services* lays a foundation for significant changes in the collective bargaining system in Canada, the principles set out in that case did not come entirely out of the blue. In *Dunmore,* and even in earlier cases, the Court had outlined a number of significant conclusions: that the *Charter* and human rights legislation were relevant to the workplace; that some way must be found to integrate adjudication of issues in the unionized workplace with human rights norms; that Canada's international commitments placing employee interests in a human rights framework should be given tangible form in Canadian law; and, in *Dunmore* itself, that access to collective bargaining was a right enjoying protection under the *Charter.*

In *B.C. Health Services*, the Supreme Court clarified that collective bargaining was not, as might be concluded from *Dunmore*, a generic idea which could correspond to an infinite variety of representational models. It was a defined concept characterized by certain essential features. The observations in *Dunmore* could be interpreted as signifying only that vulnerable groups of workers had the right to a forum of *some* kind to express their views to their employers. *B.C. Health Services* established that the human rights paradigm encompasses all workers—including those already part of collective bargaining relationships—and that it was some recognizable version of the existing institution of collective bargaining which was required to meet the requirements under the *Charter.*

The principles set out in *B.C. Health Services* call on all of the actors in the collective bargaining system to play new roles, or at least to play their existing roles differently. *B.C. Health Services* is significant for legislatures because it tells them that it is no longer open to them to respond exclusively to political considerations when they are introducing or modifying labour legislation. It reinforces earlier messages to labour tribunals that they must interpret legislation and collective agreements in a way which integrates human rights and constitutional norms in their decisions, and adds that they must do this where their decisions concern the scope and nature of bargaining itself.

For workers and unions, the good news from *B.C. Health Services* is that there is constitutional, and not only statutory, support for the proposition that workers

should be entitled to representation through a union.[20] This in itself does not obviate the challenges of organizing groups of workers who have been untouched by collective bargaining. Nor does it suddenly render irrelevant whatever skills unions have developed to succeed in an adversarial environment. It means however, that Canadian unions have been given an opportunity to develop political strategies which will broaden the debate about collective bargaining, and about what forms of collective bargaining legislation will give optimal space to workers to assert and exercise their constitutional rights. By political strategies, I mean approaches which will both affect the legislative process and change the tenor of the bargaining relationship itself.

Employers are perhaps the least prepared for a reorientation towards a human rights paradigm for collective bargaining. The structure and format of North American collective bargaining legislation—as well as their own inclination to see employee representation by unions as an intrusion on their prerogatives, an insult to the effectiveness of their management, and a threat to their economic viability—have led them to deny the legitimacy of collective bargaining and to view workers as part of the economic and management equation, rather than as citizens with a valid if distinct stake in the enterprise. Employers could hardly be expected to be ready overnight to embrace the new legal framework described by the Supreme Court in *B.C. Health Services,* as their awareness and understanding of constitutional dimensions to the workplace circumstances of employees has only shallow roots. For them to come to terms with a human rights version of employee status, and to realize that there are now limits on the powers of even the most sympathetic legislature to rescue them from obligations to deal with representatives of their employees, will be a process that takes some time.

From an academic point of view, the questions of how far the courts will pursue the direction set in *B.C. Health Services*, and how the principles set by the judges will be reflected in the political and collective bargaining arenas, are fascinating ones. These questions may also fascinate the actors in the collective bargaining system, although their experiences adjusting to the new legal framework may also be difficult and perhaps uncomfortable. Scholars and other observers will watch with interest as the changes wrought by *B.C. Health Services* unfold.

20 I was going to complete this sentence with the phrase "if they choose." A more radical reading of *Dunmore* and *B.C. Health Services* might support the idea that representation of workers would become a pervasive and normal part of workplace governance, and that the process of "choosing" a representative would lose significance. This reading might suggest a judicial trajectory which would mandate employee representation in all workplaces without reference to bargaining units or majority support. It is hard to imagine the courts having an appetite for anything this far-reaching, though on the evidence of *B.C. Health Services*, the response might be that anything is possible.