Prospects for Labour's Right to Bargain Collectively After *B.C. Health Services*

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In its 2007 *B.C. Health Services* decision, the Supreme Court of Canada (SCC) constitutionalized labour's right to bargain collectively.[1] The Court ruled that the *Canadian Charter of Rights and Freedoms* "should be presumed to provide at least as great a level of protection as is found in the international human rights documents that Canada has ratified".[2] At present, however, only some aspects of Canadian law and practice are consistent with international standards. My intent in this essay is to review the current situation in Canada in light of international standards and speculate on future developments.

In the international system, the International Labour Organization (ILO) has been given the task of developing international labour law. The primary institutions within the ILO that deal with issues of freedom of association and collective bargaining are the Committee of Experts on the Application of Conventions and Recommendations and the Committee on Freedom of Association. The first is generally known simply as the Committee of Experts and the latter as the CFA. The Committee of Experts oversees the implementation of Conventions and Recommendations (the two key ILO legislative instruments) by member states that have ratified the relevant instruments. The primary function of the CFA is to oversee the implementation of the constitutional duty of all ILO member states to respect and protect ILO principles regarding freedom of association and the right to bargain collectively. Although the two sets of responsibilities may be considered technically distinct, ILO staff coordinate the work of the two committees closely and, with respect to freedom of association and the right to bargain collectively, their "jurisprudence" is essentially identical.

The key ILO conventions with respect to the right to organize and bargain collectively are No. 87 on Freedom of Association and the Right to Organize and No. 98 on the Right to Organize and Collective Bargaining. Since Canada has not

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1 *Health Services & Support-Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27, [2007] 2 S.C.R. 39 [*B.C. Health Services*].

2 *Ibid.* at para. 70 referring to Dickson C.J.'s observation in the Alberta Reference. The understanding of workers' rights as human rights, although not new, has been strongly reaffirmed in recent years. See, e.g., J. Fudge, "The New Discourse of Labour Rights: From Social to Fundamental Rights?" (2007) 29 Comparative Labour and Employment Law Journal 29 and Roy J. Adams "From Statutory Right to Human Right, the Evolution and Current Status of Collective Bargaining" (2008) 12 Just Labour 48.

ratified No. 98, some Canadian authors have concluded that Canada has no responsibilities under it.[3] Whether true or false, that assertion is of little practical relevance. Because of the coordination between the two key ILO committees, the CFA has interpreted Canada's duties under the ILO constitution to be essentially identical to those of countries that have ratified Convention 98.[4] As an ILO member, Canada has a duty to ensure that workers are able to exercise those rights and that employers and the government fulfill the duties that enable workers to exercise their rights.

Canada has, in addition, ratified the U.N. Covenant on Civil and Political Rights and the U.N. Covenant on Economic, Social and Cultural Rights. Each of those covenants guarantees freedom of association which, in international law, embraces the right to organize and bargain collectively. Agencies with the mandate to interpret the meaning of state duties as signatories of those covenants generally defer to ILO jurisprudence with respect to freedom of association and the right to organize and bargain collectively.[5] The ILO constitution and the two covenants are considered to be treaties under which Canada has legal obligations. Below, I consider some of the relevant rights and duties regarding union organizing and recognition for bargaining purposes.

THE RIGHT TO ORGANIZE

Under international law, Canadian workers have a right to organize in a format with which they are comfortable. They may join an existing union or set up their own association or union. If they choose the latter they have the right to establish a formal constitution or to simply operate informally.[6]

Under international law, members of employee organizations have the right to choose their own leaders. This right has relevance when contrasted with theemployers' right to establish schemes that permit employees to participate in discussions about terms and conditions of work and work organization. When employers establish employee representation schemes, they generally assume the right to determine the issues that will be discussed and how employees will be chosen to participate. Under international law, such schemes, disparagingly known in Canada and the United States as company unions, are not valid substitutes for organizations formed and controlled by employees. In other words, although employers may establish employee representation plans as part of their corporate human resources strategy, these plans do not fulfill their duty to recognize and bargain collectively with independent worker organizations.

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3 Brian Langille, "Can we rely on the ILO?" (2007) 13 C.L.E.L.J. 273.

4 Roy J. Adams, "The Supreme Court, Collective Bargaining and International Law: A Reply to Brian Langille" (2008) 14 C.L.E.L.J. 111.

5 Patrick Macklem, "The Right to Bargain Collectively in International Law:
Workers' Right, Human Right, International Right?" in Philip Alston, ed., *Labour Rights as Human Rights* (New York: Oxford University Press, 2005) 61.

6 Bernard Gernigon, Alberto Odero & Horacio Guido, "ILO Principles concerning collective bargaining" (2000) 139 International Labour Review, 33 at 34.

Once formed, independent labour organizations have the right to develop a program to defend and advance the employment interests not only of their members but also the interests of the entire class of similarly situated employees. Just as seniors, women and members of ethnic groups may establish associations for the defense and advancement of the interests of all seniors, all women, all members of the ethnic group in Hamilton, in Ontario or in Canada as a whole, so may retail clerks employed by Wal-Mart organize to seek the advancement of all similarly situated Wal-Mart workers in the same store, in all stores in Ontario or in all stores across Canada. Employees also have the right to seek collective negotiations with their employer. These international rights—to organize, develop programs, elect leaders and seek negotiations—have long been considered Canadian constitutional rights as well. However, because of customs that have arisen around the operation of Canadian statutes providing for the certification of exclusive bargaining agents, these rights are not well known and are underexercised. With respect to the United States, professor Clyde Summers has remarked that there is a general belief that uncertified associations have no role to play in the industrial relations system.[7] Much the same may be said about Canada.

THE RIGHT TO BE RECOGNIZED FOR BARGAINING PURPOSES

Under international law, Canadian workers who form associations to defend and advance their employment interests have a right to be recognized for bargaining purposes by their employers.[8] This right does not require the employee organization to attract a majority of the relevant workers, nor does the failure of such associations to attract a majority exonerate employers from recognizing them for the purpose of bargaining collectively. In short, under international law employers have a human rights duty to recognize what are often referred to in North America as "minority unions."[9] In its *Dunmore* decision, the Supreme Court of Canada referred to these unions (and other uncertified employee organizations) as "non-statutory unions."[10]

Independent, non-statutory unionism is largely an alien notion in Canada. It has long been accepted, not only by employers but also by unions, governments and the public, that collective bargaining is something done by certified bargaining agents and that if there is no certified agent there can be no collective bargaining. The verb "to unionize" is understood to mean to certify an exclusive bargaining agent.

At a recent talk that I gave to a meeting of the Canadian Auto Workers Union, I mentioned that the faculty association at McMaster University, although not government certified, negotiates wages and conditions with the administration. During the question period, one CAW member asked why the faculty had decided

7 Clyde Summers, "Unions without Majority – A Black Hole" (1990) 66 Chi-Kent L. Rev., 531.
8 *Supra* note 6 at 37. See also, *supra* note 4 at 111-121.
9 See, for example, Roy J. Adams, *Labour Left Out, Canada's Failure to Protect and Promote Collective Bargaining as a Human Right*, (Ottawa: Canadian Centre for Policy Alternatives, 2006) and James Atleson *et al.*, *International Labor Law* (St. Paul: Thompson-West, 2008).
10 *Dunmore v. Ontario (Attorney-General)*, 2001 SCC 94, [2001] 3 S.C.R. 1016 at 31 [*Dunmore*].

not to unionize. I responded that in most parts of the world the judgement would be that, in fact, we had. In turn, I asked him why he thought that it was necessary to have a government certificate in order to be considered a real union. If Canadian law and practice are to align with international law, the idea that employee associations need government approval to be considered legitimate will have to change.

The duty of employers to recognize and bargain with non-majority unions has been interpreted by the ILO's committees to mean that employers are duty-bound to recognize and bargain with legitimate minority unions "at least on behalf of their own members".[11] States have developed various legislative approaches to deal with employer objections to the time, expense and complications that such a situation might create. Some countries rely on the "most representative union" concept, under which employers, faced with multiple unions, are required to recognize and bargain with the one that is the most representative of the relevant employees at the firm, industry or national level, even if it has not attracted majority support.

Canada and the United States use the exclusive representation system, which has been adopted by a handful of other countries. Under this system, an independent employee association or union must attract a majority of employees in a government-designated "bargaining unit"—all blue collar workers in a manufacturing plant, for example, or all clerks in a retail store. If the employee organization is able to demonstrate majority support to the relevant provincial or federal labour relations board, the board will designate it as the exclusive agent for all employees in that unit and the employer will be legally required to bargain with it and forbidden to negotiate with minority unions that might appear and demand recognition. This enables employers to avoid having to bargain with multiple unions making contrary demands. The Ontario Court of Appeal recently referred to this approach as "majoritarian exclusivity".[12]

The CFA and Committee of Experts have concluded that this system, although it technically removes the right to organize and bargain collectively through agents of their own choosing from employees who might not prefer the exclusive agent, is a reasonable one that establishes an acceptable limit on workers' rights. However, and this is a critical point in the Canadian context, where employees have chosen not to certify an exclusive agent, they retain all of their basic rights to organize minority unions and to negotiate with their employers through them. What we would call "non-union" employers continue to have a human rights duty to recognize and bargain with non-certified, minority unions. Thus, according to the ILO's Committee of Experts, if: "no union covers more than 50 percent of the workers, collective bargaining rights should be granted to all unions in this unit, at least on behalf of their own members".[13]

11 *Supra* note 6, at 38.

12 *Fraser v. Ontario (Attorney General)*, 2008 ONCA 760, 92 O.R. (3d) 481 at 91.

13 From the Committee of Expert's General Survey of 1994 from Gernigon, Odero & Guido, *supra* note 6 "has upheld principles and decision along the same lines..." at 38.

As a member of the ILO, Canada has committed to respect and promote that organization's jurisprudence on the right to organize and bargain collectively, but Canadian governments have made no attempt to secure minority union rights or to ensure that employers fulfill their human rights duties with respect to minority unions. Instead, they have identified with and given credibility to a domestic norm under which it is understood that employees who want to bargain collectively must certify an exclusive bargaining agent.

In its recently released *Fraser v. Ontario* decision, the Ontario Court of Appeal formalized this situation when it ordered the Ontario government to institute a majoritarian exclusivity regime for farmworkers. In doing so it took a position contrary to international standards when it stated that:

> It is impractical to expect employers to engage in good faith bargaining discussions when confronted with a process that does not eradicate the possibility of irreconcilable demands from multiple employee representatives, purporting to simultaneously represent employees in the same workplace with similar job functions. It is not overstating the point to say that to avoid chaos in the workplace to the detriment of the employer and employees alike, it is essential that a representative organization be selected on a majoritarian basis and imbued with exclusive bargaining rights.[14]

The Court made no reference to the Supreme Court's declaration in *B.C. Health Services* that Canadian workers should be able to rely, at a minimum, on the standards embedded in the treaties of which Canada is a signatory. Nor did it make any reference to the ILO's jurisprudence on the issue.

Should the Ontario Court of Appeal's position be affirmed in future by the Supreme Court the result, in my opinion, will be to make it all but impossible for most Canadian workers to exercise their right to negotiate through agents of their own choosing. The result will be not to secure but to deny the human right to bargain collectively to most Canadian workers.

B.C. Health Services has different legal effects in the public sector and the private sector. Constitutional requirements in Canada rest on governments but not directly on private organizations such as corporations. The SCC has made it clear in *B.C. Health Services* that the duties of state actors apply both to their persona as legislators and as employers. In short, public sector workers who have not yet organized now apparently have a constitutional right to form minority unions and have them recognized by their government employers for bargaining purposes.[15] To

14 *Supra* note 12, at para. 92.

15 For a brief discussion of this aspect of the law see Judy Fudge, "The Supreme Court of Canada and the Right to Bargain Collectively: The Implications of the *Health Services and Support* case in Canada and Beyond" (2008) 37:1 Indus. L.J. 25.

date, this new right and duty have had few practical effects of which I am aware.

For several years, independent associations of the Royal Canadian Mounted Police have been seeking recognition and bargaining rights from RCMP management. Shortly after the publication of *B.C. Health Services,* they renewed their efforts, but RCMP management continued to refuse to recognize and bargain with them. A legal challenge to that stand is now working its way through the system.[16]

Another example is that of part-time workers in Ontario colleges who were in the process of forming an association called OPSECAAT when the *Health Services* decision was announced. Since part-time workers were not covered by the province's *Colleges Collective Bargaining Act,* OPSECAAT could not make use of the legal rights protected by the *Act.* However, instead of seeking what might be called constitutional recognition, the association successfully lobbied the government to change the law and establish a process to enforce statutory protections.

In the private sector, as in the public sector, all workers now have a constitutional right to organize and to bargain collectively. However, private sector employers have no direct duty under the Canadian constitution to recognize and bargain with minority unions. The onus rests on governments to legislate such duties. However, it is unlikely that this legal situation will bring about significant change in the private sector (in the short run at least), for several reasons.

First, Canadian corporations commonly oppose unionization. Very rarely do they voluntarily recognize independent employee organizations. Generally they will negotiate only with labour organizations that have achieved certification. Commonly they utilize their legally regulated free speech rights to discourage employees from pursuing certification.[17] There is no indication subsequent to *B.C. Health Services* that employers are prepared to change that behaviour unless pressured to do so.

Second, the SCC has made it clear that the onus on governments to secure worker rights and require employer duties in the private sector is a light one. While private sector workers have constitutional rights to organize and to bargain collectively, the initial onus is on them to attempt to exercise those rights. In short, workers must attempt to bargain through non-statutory unions and only if they find those attempts to be, in the SCC's words, "next to impos-

16 Roy J. Adams, "Collective Bargaining at the RCMP, Management Declines to Negotiate", online: (2007) Straight Goods <http://www.straightgoods.ca/Features7.cfm>. See also Roy J. Adams, "The Human Right of Police to Organize and Bargain Collectively" (2008) 9:2 Police Practice and Research, 161; On 6 April 2009, the Ontario Superior Court of Justice found the RCMP's refusal to negotiate with independent employee associations to be unconstitutional and gave the agency 18 months to institute a policy consistent with *B.C. Health Services*. See *Mounted Police Association of Ontario v. Canada* [2009] O.J. No. 1352.

17 Adams, *supra* note 9.

sible" is the Court likely to consider requiring positive government action.[18]

The key case here is *Dunmore,* which preceded *B.C. Health Services.*[19] In *Dunmore,* the conservative Ontario government of Mike Harris removed agricultural workers from legislative coverage amidst widespread publicity regarding the government's position that collective bargaining was inappropriate for those workers. In the Court's view, that action made it nearly impossible for agricultural workers to exercise their constitutional rights, and hence the Ontario government was ordered to put in place legislation protecting those rights. The resulting *Agricultural Employees Protection Act* recognized and protected the employees' right to associate, but it did not include an employer duty to bargain nor a dispute-resolution mechanism.

The recently released *Fraser v. Ontario* decision of the Ontario Court of Appeal remedies those deficiencies. However, as noted above, by ordering the Ontario Government to institute what might be called an exclusive majoritarian exclusivity regime, the court left unprotected the right of agricultural workers to organize and bargain collectively in alternative formats as they are entitled to do under international law. Indeed, the Court's comments on the potentially negative aspects of minority unionism might be read to imply that to seek negotiations through minority unions is to offend public policy by rendering placid workplaces chaotic. Just as the Harris government's *Agricultural Employees Protection Act* made it all but impossible for agricultural workers to organize and bargain collectively, *Fraser v. Ontario* will almost certainly further chill an already icy climate for non-statutory unionism.

With continuing employer opposition to the recognition of minority unions, it is unlikely that provincial governments will act unless pushed hard to do so by organized labour. But there is little probability of that happening in the foreseeable future. The leadership of the established unions has demonstrated little to no interest in securing such legislation. The professional capital of trade union officers is entirely vested in the exclusive agent system and they are almost entirely committed to it. Indeed some unions are hostile to the idea of representation through minority unions.

It is possible that the SCC will constitutionalize the right to strike since that right is considered to be an essential aspect of collective bargaining in international law.[20] Indeed, if the Court is to apply the standard that it established in *B.C. Health Services*—that international law should be seen as a floor for workers' rights in Canada—it must constitutionalize the right to strike.[21] Doing so might encourage independent minority unions by giving unorganized workers an instrument for making them effective without the help of established unions. However, international law clearly recog-

18 *B.C. Health Services, supra* note 1, at para. 34.

19 *Dunmore, supra* note 10.

20 Gernigon, Bernard, A. Odero and H. Guido, "ILO Principles concerning the right to strike," (1998) 137: 4 International Labour Review.

21 Fudge, *supra* 15.

nizes the right of governments to regulate the right to strike. In Canada, those workers who are covered by the principal labour relations statutes have no protected right to strike unless they certify an exclusive agent. Were that approach to the regulation of the right to strike to be challenged at the ILO, I suspect that the Committees would find the restriction to be too broad. The SCC, however, even if it were to constitutionalize the right to strike, might accept the limitations of contemporary Canadian law as reasonable in a democratic society and, if it did, the status quo would be maintained.

ORGANIZED LABOUR AND *B.C. HEALTH SERVICES*

From my perspective, the most dramatic aspect of the Canadian Labour Congress (CLC) convention held in Toronto in May 2008 was the near invisibility of B.C. Health Services. One might have thought that the constitutionalizing of collective bargaining would result in a major effort by the labour movement to insist upon new policies and legislation that would bring Canada in line with international labour standards. But that has not happened. The delegates at the CLC convention were offered no plan whereby organized labour might maximize the potential of a hugely pro-labour decision. Although labour leaders are generally pleased with the symbolism of the decision, they have reached no consensus on how to put it into play. Indeed, as suggested by the discussion above about minority unionism, Canadian labour's position on international collective bargaining standards is equivocal at best.

One of the best indicators of organized labour's hesitancy is the fact that its political partner, the New Democratic Party, has not embraced compliance with international norms as one of its policy planks. Personally, I have spoken several times with federal NDP leader Jack Layton, as well as with a number of NDP MPs who have been asked to handle the labour policy portfolio. I have urged them to demand that the federal government take action to bring Canadian labour policy in line with the international standards it has affirmed and promised solemnly to respect—to no avail. On collective bargaining issues, the general policy of the NDP is to look for guidance from the unions. Since the CLC has not requested that the NDP aggressively push for compliance with international labour norms, it has not done so.[22]

The major policy issues on the CLC's union organizing agenda are card-check certification and first contract arbitration. Under card-check, labour boards will certify an exclusive agent on the basis of union membership. The signing of membership cards by the majority is typically taken as evidence that the majority want to certify an exclusive agent. The alternative is to hold an election under which certification is based upon a government organized vote. Under that system, the unions have found, certification is more difficult to achieve. In recent years, several prov-

22 After I met with Green Party leader, Elizabeth May, in the summer of 2007 she expressed sympathy with the goal of bringing Canadian labour law into alignment with international law. However, language in the Green Party's program, put forth for the recent federal election, fell far short of that position. Green Party of Canada, media release, "Vision Green" online: <http://www.greenparty.ca/en/policy/visiongreen/partone#_Toc179815126>.

inces have moved from card-check to the election system to labour's disadvantage.[23]

First contract arbitration is a scheme where unions may submit disputes over the terms of a first contract to binding arbitration if negotiations fail. That option exists in several provinces but is absent in others.

These are measures that make union organizing easier within the confines of the existing system. But neither card-check nor first contract arbitration are protected by international law and neither of them are likely to be granted constitutional protection by the SCC. Indeed when the SCC said in the *B.C. Health Services* decision that not all aspects of Canadian collective bargaining are constitutionally protected, these may have been some of the issues that the Court had in mind.

In short, *B.C. Health Services* will do nothing to help labour achieve its legislative agenda with respect to union organizing. What the unions might be able to achieve—bargaining rights and the right to strike for minority unions—is of little or no interest to them at this point in time. And that is a great misfortune for the many thousands of Canadian workers who would like effective, independent representation but in a format more flexible and less adversarial than the exclusive agent system is perceived to be.

WHERE TO FROM HERE?

In the conventions, recommendations, jurisprudence, declarations and programs of the ILO the end goal of its efforts in promoting labour rights is clear. Ideally, all workers with standardized conditions of work would have independent collective representation and all collectively conceived and implemented conditions of employment would be negotiated. Although it is hard to find a simple statement to that effect, that goal is implicit in all of the ILO's promotional work regarding collective bargaining.[24]

In *B.C. Health Services* the SCC lent support to the ILO's vision and goals. Collective bargaining deserves constitutional protection because, the Court said, it "reaffirms the values of dignity, personal autonomy, equality and democracy that are inherent in the *Charter*." By implication, in workplaces where there is no collective bargaining there is a shortfall of dignity, autonomy, equality and democracy, and the end goal of Canadian labour policy should be to fill that gap.

Our democratic shortfall is particularly troubling. The only legiti-

23 See, for example, Sara Slinn, "An Empirical Analysis of the Effects of the Change from Card-Check to Mandatory Vote Certification" (2004) 11 Canadian Labour and Employment Law Journal 258-301.

24 See, for example, International Labour Organization, report, 9789221194811, "Freedom of Association in Practice: Lessons Learned, Global Report under the Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work, Geneva, 2008" (2008). Although universal collective bargaining is the general goal, for some workers – those with unique skills and thus unique employment contracts, for instance, or those in very small work organizations – it might be impractical.

mate government is one whose mandate is drawn from the governed. Under collective bargaining that principle is, at least obliquely, honoured. Outside of collective bargaining it is not. Outside of collective bargaining we practice a form of industrial governance that is entirely contrary to democratic norms. We dishonour principles fundamental to our larger democratic project.

We are a long way from the realization of the ILO's vision of universal representation in Canada. In the private sector more than 80 percent of Canadian workers are denied the opportunity to negotiate their conditions of work. In the public sector the representation gap is only about 30 percent, but that is still much too high. Survey evidence indicates that most unorganized workers want some form of independent representation but are instead forced to conform to a system in which conditions critical to their well-being are dictated to them.[25] They are at the mercy of the vagaries of the market, their employer's benevolence and the thin net of labour standards legislation.

International collective bargaining norms have been established to ensure that workers are able to enjoy the values they secure and Canada has pledged to respect and protect those norms. However, the main industrial relations actors in Canada—employers, unions and governments—have not yet accepted the Supreme Court's position that international norms should be considered the floor of workers' rights. Eventually, if it remains consistent with the standard it set up for itself in *B.C. Health Services*, the Supreme Court must compel legislatures to rewrite the Canadian labour code. The problem with that outcome is that there are many legal configurations that are compliant with international law and the parties may have a hard time accepting a system created piecemeal as governments attempt to comply with court orders. But it may take a few court-imposed unpleasant surprises before labour, management and government find the will to take the bull by the horns and put in place a constitutionally acceptable system with which they can live. The most sensible course of action is not always the most apparent.

25 Adams, *supra* note 9.