

IN DEFENCE OF THE RIGHT TO STRIKE

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In October 2007, the Canadian Autoworkers (CAW) signed an historic deal with the automotive parts firm, Magna International, that gave up the right to strike in exchange for the opportunity for Magna employees to vote to join the CAW unimpeded by their employer. This voluntary concession of one of labour's fundamental rights sparked a furor of debate over the importance of the right to strike in contemporary industrial relations. Was this deal a sell-out of labour rights or a harbinger of innovation and change to labour-management relations in Canada?

The CAW's concession of the right to strike came at the very moment that the Autoworkers had joined with other unions in Nova Scotia to form a coalition of health care unions to defend the right to strike from provincial governments' attempts to remove health care workers' right to strike. Since then, the Ontario provincial government has ordered striking Toronto transit workers back to work while the newly elected federal Conservative government introduced an economic statement that included provisions to suspend federal government employees' right to strike.

These instances illustrate the renewed debate over the place of the right to strike in current economic affairs. Ironically, these encroachments on the right to strike come at the very time when levels of strike activity in Canada are at an all time low. These low rates of strike activity underline questions about the real importance of the right to strike for unions and their capacity for effectiveness. Do low strike rates suggest that the 'age of strikes' has come to an end? Have we reached a time when unions can and should give up the right to strike as a weapon more suited to the 'old' economy, or 'old' unions who are themselves better suited for the industrial than the post-industrial age? Or should unions continue to defend the right to strike and if so why? This research note explores some answers to these questions that underline the critical importance of defending the right to strike.

STRIKE STATISTICS

To begin the discussion we need to examine patterns of strike activity and unionization in Canada. Whether measured in terms of total number of strikes or person days lost due to strikes, Canada's strike rate has declined precipitously over the last twenty-five years (See Table 1), with the low point reached in 2003. Between 2003 and 2005 there was a noticeable increase in the number of strikes and person days lost as a result of

strikes, although these numbers remained low in historic comparison. According to Ernest Akyeampong of Statistics Canada, strikes in the period from 2003-2005 were concentrated in Quebec and Ontario and, most interestingly for the purpose of this article, were concentrated in manufacturing, education, and health and social services.¹ Although strikes in the information and cultural industries only accounted for 2 percent of total strikes, this industry accounted for approximately 25 percent of total workdays lost to strikes in Canada in 2005 due to the effect of the strike at the Canadian Broadcasting Corporation. Such an impact on lost time is explained by the fact that this strike was prolonged, a characteristic of many strikes in Canada. Briskin shows that strike duration has increased significantly in Canada since the 1960s, with average strike duration growing from 22.3 workdays in 1960-64 to 41.1 workdays in 2000-2004.²

Table 1. Strikes and person-days not worked, Canada 1980–2005

Year	Total Number of Strikes	Person Days Not Worked	Number of Employees
1980	1,028	9,130	9,621
1985	829	3,126	9,901
1990	579	5,079	11,250
1995	328	1,583	11,212
2000	379	1,657	12,391
2003	266	1,736	13,271
2005	293	4,107	13,658

Source: Ernest Akyeampong, "Increased Work Stoppages" Perspectives on Labour and Income, August 2006. Statistics Canada. <http://www.statcan.gc.ca/pub/75-001-x/10806/9292-eng.pdf>

It is not surprising that unions and their core activities of collective bargaining and collective action, including strikes, have come under attack. Increased economic competition, the neo-liberal celebration of individualism at the expense of collective action, and a deluge of commentary that compares unions to dinosaurs which have served their purpose has eroded the legitimacy of unions and opened them up for criticism and attack. For the last twenty-five years, employers have stepped up their

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1 Ernest B. Akyeampong, "Increased Work Stoppages" Perspectives on Labour and Income (August 2006) Statistics Canada at 7-8.

2 Linda Briskin, "From Person-days Lost to Labour Militancy: A new Look at the Canadian Work Stoppage Data" (2007) 62(1) Ind Relat Quebec 31-65 at 51.

opposition to unionization³ and demanded concessions from unions, threatening plant closure or de-investment if their demands are not met. For their part, governments have systematically curtailed unions' collective bargaining rights and right to strike. In addition to sweeping re-writes of many provincial labour codes that have made it harder for unions to organize workers or gain effective redress from employers that break the law, governments have relied increasingly on back-to-work legislation, with a noticeable upswing in its usage since 2000.⁴ In a recent article, Joseph Rose noted that governments have moved away from assigning arbitrators to settle disputes ended by back-to-work legislation, and instead have begun unilaterally imposing terms of agreement. The penalties for defying such legislation are harsh. Governments have withdrawn the right to strike from some groups, such as nurses in Alberta, or used the designation of 'essential' services to all but withdraw the right to strike for other public sector workers.

Not surprisingly, under this kind of pressure union density in Canada has been slowly though steadily declining, with especially steep declines in the private sector. In 1997, union density in Canada stood at 31 percent compared to 29 percent in 2008, and in the private sector dropped from 22 percent to 16 percent in the same period.⁵ Unions have had increasing difficulty in recruiting new members over the past ten years.⁶ Under these conditions, it is not surprising that strike rates are in decline and that unions such as the CAW look to cutting deals with employers that exchange increased membership and union density in their core industry, the automotive industry, for the right to strike. Do these recent trends and events justify giving up the right to strike as part of adjusting to the 'new' economy? In the remainder of this article, I will advance three reasons why the right to strike continues to be critically important to unions and why it must be defended by unions as well as governments.

'YOU CAN'T GIVE UP WHAT YOU DIDN'T HAVE': INDUSTRIAL CITIZENSHIP AND THE RIGHT TO STRIKE

In defence of its decision to give up the right to strike for Magna employees who voted to join the CAW, the CAW argued that workers were not giving up anything, as they could not give up something that they had never had. This logic makes sense if we see workers and labour power as commodities that can only be possessed if traded, bought or sold. But the right to strike is more than a commodity; it is a crucial part of a bundle of rights and responsibilities associated with industrial citizenship and membership in

3 Karen Benthall, "Employer Resistance to Union Certification: A Study of Eight Canadian Jurisdictions" 57(1) *Ind Relat Quebec* 31-65 at 51; Charlotte Yates & Felice F. Martinello "Union and Employer Tactics in Ontario Organizing Campaigns" David Levin & Bruce Kaufman, eds., *Advances in Industrial and Labor Relations*, vol. 13 (New York: Elsevier, 2004) at 157-190.

4 Joseph B. Rose, "Regulating and Resolving Public Sector Disputes in Canada" (2008) 50(4) *Journal of Industrial Relations* at 556.

5 Ernest B. Akyeampong, "A Statistical Portrait of the Trade Union Movement" *Perspectives on Labour and Income* (Winter 1997) Statistics Canada; "Unionization" *Perspectives on Labour and Income* (August 2008) Statistics Canada.

6 Charlotte Yates, "Missed Opportunities and Forgotten Futures: Why Union Renewal in Canada has Stalled" in ed., Craig Phelan, *Trade Union Revitalisation: Trends and Prospects in 34 Countries* (Oxford: Peter Lang Publishing, 2007) at 57-74.

a union.

Unionization, with its intended goal of granting workers some influence over the terms and conditions of their employment, only becomes meaningful when associated with certain activities, responsibilities, and rights. Thus unionization without the ability to engage in free collective bargaining limits the effectiveness of union membership but also strikes to the heart of the debate over whether union membership and collective bargaining are essential components of freedom of association. Arguments made by organized labour to the Supreme Court of Canada in the early 1980s insisted that protecting the right to belong to a union as part of freedom of association was hollow if the actions of that collective organization were not also protected. Although organized labour initially lost this argument in the famous labour trilogy decisions of the Supreme Court in the late 1980s, the Supreme Court revisited these issues in 2007 and issued a decision in the case of the *Health Services and Support – Facilities Subsector Bargaining Association v. British Columbia* that reversed the decision in the Trilogy. The 2007 decision endorsed a more expansive definition of freedom of association that included protecting the right of unions to engage in collective bargaining.⁷

Rights, whether human, political, civil, or social, are associated with belonging to a particular community that brings with it entitlements as well as obligations and responsibilities. Although more contentious than basic human, civil or political rights, the rights of industrial citizenship are associated with belonging to unions, communities of workers who come together to exercise influence over the terms and conditions of their employment, most often through negotiations with an employer. The bundle of entitlements associated with belonging to unions includes a series of collective as well as individual rights such as the right to engage in collective bargaining with employers and the right to withdraw labour to put pressure on an employer in the event that negotiations fail. This right to withdraw labour can be seen as attempting to balance capital's right to close down places of employment and withdraw or reduce investment. In addition to the various responsibilities associated with belonging to a union, unions in Canada experience several limitations on their rights, many of which are codified in laws such as, for example, laws ordering unions not to take workplace action during the life of a collective agreement, ordering the provision of essential services by public sector workers in the event of a labour-management dispute, or requiring a vote to ratify or reject a collective agreement. Thus, through Canadian labour law originally framed in the 1940s, a form of industrial citizenship was extended to workers which limited the rights associated with commerce and property ownership.

Without these rights intact, unions are unable to fulfill their responsibilities, which include effectively negotiating the terms and conditions of their members' employment. By taking away or giving up the right to strike, unions deprive workers of one of the fundamental rights of industrial citizenship, which in turn erodes the very

⁷ 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.* at 25-48.

foundation of freedom of association in the workplace. Further, once unions begin to give away some of their rights in exchange for representation of workers they are in danger of creating two classes of citizens within their own organizations. Just as political citizenship requires that all citizens having certain rights, such as the right to vote, so too does industrial citizenship require that all union members have the same rights. However, by giving up the right to strike, unions also undermine the basis for their defence of free collective bargaining, as both these rights rest upon an acceptance by the state that workers have the right to form and act as independent unions as part of their rights to industrial citizenship. By giving some of these rights away, unions are in danger of unwittingly undermining their capacity to defend their other rights, opening the door for further erosion of workers' freedom of association and the basis for industrial citizenship. The importance of negotiating the terms of employment, which includes backing up negotiations with the threat of a strike, has become increasingly evident as more and more working people who are not represented by unions fail to make a living wage, working and living in poverty.

What gets lost in debates over whether the right to strike should be retained or constrained is how prudently unions exercise their rights—including the right to strike. Although it is true that the most recent downward trend in strike activity has only partly to do with union choice, and a lot to do with economic uncertainty and the pressures of globalization experienced by workers, the history of collective bargaining and industrial citizenship in Canada points to a remarkably limited use of strikes to settle contract disputes. The large majority of contracts in Canada are settled through collective bargaining without industrial action. Furthermore, when strike levels have been especially high, this has often reflected the impact of political strikes (such as Ontario's Days of Action, protests against national wage and price controls, or the Newfoundland public sector strikes, protests against restructuring). Given their political motivation, these kinds of strikes are unlikely to be discontinued because of changes to regulations about the use of strikes during regular collective bargaining. Therefore, legislative or voluntary concession of the right to strike is unlikely to have the desired effect, if that effect is to reduce workplace disruption through industrial action.

RIGHT TO STRIKE IN UNIONS' STRATEGIC REPERTOIRE

Beyond the debates around legal rights and responsibilities, the right to strike needs to be situated in the context of union effectiveness and strategic capacity. Unions are organizations whose purpose is to shape the terms and conditions of employment for members as well as others in the labour market. For more than one hundred years unions have used a certain set of strategies to pursue these goals, including collective bargaining, strikes or other industrial workplace action such as work to rule, and political activism. Upholding the right to strike—even when it is used as infrequently, as it is in the current era—is critical to union effectiveness as striking is an essential part of unions' strategic repertoire.

Unions have very few means by which they can push their demands onto reluctant employers. If negotiations for a new collective agreement break down there are a limited range of options open for unions to advance their positions. This limited range of options stems from the particular nature of power resources available to unions with which they might exercise influence. Information pickets are legal and may inform the general public about the nature of an industrial dispute, but such information dissemination has a limited effect except in areas of the economy most vulnerable to public pressure. Even there, as we saw in the two-week elementary school teachers' strike in Ontario in the 1990s, strike action accompanying information sharing is often critically important to pressing home the importance of issues such as funding of elementary schools and class size.

Various forms of arbitration have and are used in Canada as a substitute for strikes. Certainly arbitration was the CAW and Magna Corporation's agreed means for resolving their disputes once they agreed to give up the right to strike. Yet a growing mass of evidence points to the negative consequences of arbitration.⁸ Robert Hebdon and Maurice Mazerolle's analysis of arbitration in the public sector examined the impact of arbitration on bargaining behaviours and concluded that compulsory arbitration had both a "chilling" and a "narcotic" effect on the bargaining process, resulting in much higher rates of bargaining impasse than occurred in those sectors in which the right to strike was maintained.⁹ Arbitration reduced the likelihood that the two parties would agree to compromises or make trade-offs due to the perception that arbitrators made decisions by splitting the difference between the last bargaining positions of both parties. This understanding of arbitration discouraged compromise as the party that agreed to a compromise was perceived to be more likely to lose in the arbitration process. This experience under arbitration had a 'narcotic' effect as parties to the negotiations became dependent on arbitration and, according to Hebdon and Mazerolle, lost their ability to negotiate. The long-term effect of this dynamic was to discourage the creation of positive collective bargaining relationships.

A third option, in the absence of the right to strike, is to allow employers unilateral capacity to determine the terms and conditions of work. Although this 'option' may seem absurd, evidence from the United States and growing actions by governments in Canada, including the tendency to use back-to-work legislation and unilaterally impose contract conditions, suggests that this is the intent of governments and employers as they increasingly restrict the place and capacity of unions to recruit new members, bargain and strike. It is therefore worth considering the effect of allowing employers free rein in determining the terms and conditions of employment. Non-union employers pay lower wages than unionized employers, with the effect that overall wage rates are significantly reduced in countries with low rates of unionization. Moreover, the spread of wages between the richest and poor-

8 The one exception to this is first contract arbitration which is seen by most analysts to be a positive way of establishing collective bargaining in a newly unionized workplace.

9 Robert Hebdon & Maurice Mazerolle "Regulating Conflict in Public Sector Labour Relations: The Ontario Experience (1984-1993)" (2003) 58(4) *Ind Relat Quebec* at 671.

est is greater in countries where unionization rates are low. Provincially regulated minimum wages in Canada are set significantly below what is required for a “living wage”, which means that poverty rates would be likely to increase under non-union labour market conditions. Finally, there is a significant body of literature that underscores the negative impact of declining unionization on the state of social policy and level of government social provisions such as pensions, health care, and public education.¹⁰ Low rates of unionization are also strongly correlated with low levels of public social investment and infrastructure. A decline in social benefits such as health care, unemployment insurance and pensions has commensurate negative effects on a person’s income, their health and their capacity to cope with and possibly recover from a ‘disaster’ in their lives, such as a long-term lay-off or an injury at work.

So what is wrong with unions having the right to strike? When do they use it and under what conditions? Unions use the threat of a strike more often than they actually go on strike in pushing their bargaining agenda. Approximately 97 percent of collective agreements are settled without industrial action of any kind. If anything the past ten years in Canada have shown that unions use strikes as a last resort. Strikes are high risk for unions as there is no guarantee that workers on strike will recoup what they lose by unpaid days on the picket line or that jobs will remain as factories close and employers relocate.

But statistics alone do not tell the full tale of why the right to strike continues to be an important tool, if one that is now rarely used. Increased competition, the rise of global markets in which governments play only a small regulatory role and the “cult of the individual” have laid the conditions for tilting the balance of power in employers’ favour. Employers have responded to these threats and opportunities with downward pressure on wages and working conditions, a consequence of which is seen in deteriorating real wages in many parts of the private sector, most notably in manufacturing where unions at one time had been able to drive up wages. Workers in the meat packing industry, for example, have seen wages halved and working conditions become increasingly dangerous; they now face hostile employers who repeatedly violate human rights and employment regulations. In the face of these conditions, workers have seen no option other than to go on strike, as when the meatpacking plant in Brooks, Alberta, took to the picket lines. In the public sector, teachers, nurses and other public sector workers have decided that the only way in which they can protect standards of public service and mobilize public support is through strikes, though these are often illegal. In a large number of instances the public has been supportive of their demands, linked as they are to the provision of social, education, and health services that Canadians define as essential. Without the right to strike, the capacity of workers to defend their rights and protect their dignity is eroded, undermining basic tenets of industrial democracy and internationally recognized worker rights.

¹⁰ Lane Kenworthy & Jonas Pontusson, “Rising Inequality and the Politics of Redistribution in Affluent Countries” (2005) 3(3) *Perspectives on Politics* at 449-471.

NEW ECONOMY, NEW WORKERS: THE RIGHT TO STRIKE IN THE NEW ECONOMY

Many commentators have argued that as unions lose their relevance in the new post-industrial economy, the rights to strike and bargain collectively are no longer as necessary as they were in the past. Those who put forth these arguments see unions as having declining relevance to new workforces or new types of work; unions were needed in the old heavy industries such as automotive manufacture and steelmaking, but not in information, service, and cultural industries. Evidence used to support this line of argument tends to include the low rates of union density in many of these “post-industrial” sectors, the decline in employment and therefore union membership in older industrial sectors, and cultural arguments that proclaim that new workers have no interest in collective organizations or solutions but are more attuned to individual and flexible options.

Ironically, there is a growing amount of evidence that it is exactly in ‘new’ or growing post-industrial service industries as well growing parts of the workforce—namely new Canadians, racialized groups and women—that strikes are being used to uphold workers’ rights, and where some of the most creative new forms of industrial action are being developed. On the question of strikes in emerging sectors where employment of racialized groups is often high, education, along with health and social services, posted the second highest proportion of strikes nationally between 2003 and 2005, after manufacturing. This sector is one that has expanded considerably but has also undergone significant restructuring through outsourcing, privatization and work intensification. Teachers have become increasingly militant across the country, using the strike to defend class size and investment in public education. In the case of the British Columbia elementary teachers’ union, a two-week strike in October 2005 was led by a woman and Indo-Canadian, Jenny Sims, who was able to mobilize widespread support throughout the for teachers to protest the government’s declaration of teachers as an essential service whose right to strike and demands for a wage freeze could therefore be taken away.

Ancillary and support workers in the education sector, many of whom are racialized minorities or new immigrants, have also turned to the strike to defend their claims for better wages and working conditions. The cleaning staff strike at Seneca College in March 2008 was made more poignant by the fact that these workers were not fighting the College, but a large American multinational, Aramark, that had subcontracted cleaning services. This strike was to achieve a first contract. Many cleaners were new immigrants who were stuck in these jobs despite having university or college educations and managerial or professional job experience. Workers were paid \$9.90 per hour, far below a living wage. Insult was added to injury when the company offered workers a mere 1.25 percent pay increase, or an additional \$0.10 an hour. The company also refused to pay for benefits that it had promised employees when hired. This strike was part of a wider North Ameri-

can campaign by the union to protest Aramark's poor wages and labour standards.

Meanwhile, hotels have been the site of several creative industrial disputes, characterized by the mobilization of public support and an air of festivity in struggle.¹¹ These and countless other strikes in small manufacturing and service based organizations, such as taxi companies, point to the changing face of strikers as more women and racialized workers lead union struggles for better wages and workplace rights.

The strikes of technicians, journalists, and administrators at the Canadian Broadcasting Corporation, as well as those of Hollywood writers, illustrate the use of 'old' industrial tactics by cultural and creative workers who are most often associated with the new, rather than the old economy. These strikes included high-profile celebrities, who, in the CBC dispute, played leadership roles and were clearly visible on the picket lines. Many hosts of programs began doing guerrilla programming as a new form of protest, framing the dispute as one of the protection of national culture. In these strikes, old tactics were often framed and strategized in new ways, at the core of which, nonetheless, lay the right to strike.

Another group that has become increasingly prominent in labour activity, notably during strikes, is women. Women have been the fastest growing segment of the workforce in the post-war market around the world. Although women have historically been involved in strikes, they have taken on a new leadership role in strikes and industrial disputes. Whether we examine the illegal strikes of nurses, teachers and other public servants who use the strike weapon to defend social services and resist government cutbacks, or we look at strikes amongst University staff in Ontario many of whom have joined forces—and memberships—with older industrial unions such as the United Steelworkers of America or the Canadian Autoworkers, women continue to use and need to strike to press their bargaining demands.

All this evidence points to the endurance of the right to strike as a critical right for workers, especially for new groups of workers and new types of work. Just as industrial unions used the strike to make breakthroughs in bargaining and the extension of the workplace rights, so too are new generations of workers in emerging sectors of the economy.

CONCLUSION

Low strike rates are a reflection of the enormous constraints under which unions and workers operate in the contemporary economy, as well as the caution exercised by unions when entertaining the possibility of a strike. Patterns of strikes suggest that there have been shifts in the sectors and workers involved in strikes. Emerging sectors of the economy, including health, education, and culture, have seen

¹¹ Steven Tufts, "Renewal from Different Directions: The Case of UNITE-HERE, Local 175" in Pradeep Kumar & Chris Schenk, eds., *Paths to Union Renewal* (Toronto: Broadview Press, 2005) 201-208

increases in the incidence of strikes coincident with the rise in participation in industrial action by women, new immigrants and racialized minorities. There has also been a rise in the length and political use of industrial disputes and strikes. Thus strikes have survived the transition to a new economy, whether defined as a post-industrial, knowledge or service economy, and are being transformed.

However, at the root of the defence of the right to strike lies its importance as one of a bundle of rights associated with industrial citizenship. Just as voting is one of our political rights, so too must the right to strike be seen as an essential component of industrial citizenship. With encroachment on the right to strike comes the erosion of the capacity of independent unions to engage in meaningful collective bargaining and play a role in shaping the terms and conditions of employment. Without unions, income inequality rises and the wages and working conditions of the most vulnerable in society deteriorate. Engaging in debate about the right to strike brings us squarely into a debate about the kind of society in which we want to live.