# FREEDOM OF ASSOCIATION AND THE RIGHT TO STRIKE IN CANADA AFTER *FRASER*

## CALL CONFERENCE

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In my presentation today, I want to review the political and recent historical context of the right to strike in Canada and then discuss whether the courts are likely to protect the right to strike under s.2(d) after the recent trilogy of *Dunmore/B.C. Health/Fraser.* Much of the discussion will be political because I think that the applicable legal analysis should not be controversial. Like most entrenched bill of rights, the *Charter* calls into play a number of political considerations which sometimes overtake the legal issues involved. This is not surprising in that the *Charter* is a political document which is intended to regulate government action or inaction.

Ironically today is the first anniversary of the initial assault on the right to strike by the Harper government. It was on June 16th of last year that the federal government introduced the first of its several "back to work laws". We have a federal government which is addicted to back to work legislation and which has no respect for the rights of workers, the rule of law or basic democratic principles.

Initially, let me give you a brief review of the first year in the life of the Harper majority government. One year ago today the government introduced the *Continuing Air Service for Passengers Act* to legislate striking CAW – represented workers of Air Canada back to work. Approximately one hour after the bill was introduced in Parliament, the CAW announced that they had reached a settlement. As a result, the legislation did not move beyond first reading.

The day before on June 15, 2011, less than one day after CPC announced a national lockout of the postal workers, the Harper government served notice of its intention to introduce back to work legislation which it did on June 20.

This law was called the *Restoring Mail Delivery for Canadians Act.*

In introducing the law, the Minister said that the purpose of the law was to protect Canada's recovering economy and to safeguard Canadian families, workers and businesses.

The law was passed on June 26, and did a number of things:

(i) took away the postal workers' legal right to strike;

(ii) imposed wages below the last offer made by CPC – beyond jurisdiction of arbitration;

(iii) imposed severe penalties for officers up to $50,000 per day for a violation of the legislation;

(iv) it empowered the government to appoint the arbitrator. – In fact the government appointed an arbitrator with no labour relations experience or expertise and who did not speak French. This appointment power has led to a number of federal court applications.

(v) FOS – dictated the arbitral criteria which favoured the employer particularly in regard to pensions, a crucial issue in bargaining. Employer was seeking a two tiered pension plan.

This law led to a constitutional challenge by CUPW in the Ontario Superior Court.

In September, CUPE which represents flight attendants at Air Canada, threatened a lawful strike after the employees refused to ratify a tentative settlement reached between the union and Air Canada. The Minister of Labour threatened back to work legislation if the flight attendants exercised their right to strike. However, before she did this, the Minister used an esoteric provision in the CLC (s.87.4) to refer to the CIRB the question of whether a strike would cause "an immediate and serious danger to the safety or health of the public". Regardless of the lack of merit in the reference, the CIRB ruled that such a referral suspends the lawful right to strike until the Board has resolved the Minister's reference which could take months. CUPE then agreed to arbitration before the CIRB which avoided the Ministerial reference and back to work legislation.

Six months later on March 6, 2012, the Machinists at Air Canada announced that they would engage in a lawful strike in one week. Two days later, the Minister pre-empted any IAM strike action by referring the matter to the CIRB pursuant to s.87.4 of the *Code*. On the same day, the Minister also referred the dispute between Air Canada and the pilots to the

Board. The Minister was widely quoted in the media as having referred this public health and safety question to the Board because a strike would interrupt Canadian families' March break holiday plans.

On March 9, 2012 the Minister announced the government's intent to prohibit all strike action at Air Canada. On March 12, 2012 the government introduced the *Protecting Air Services Act*. It became law on March 16th.

This led to two more constitutional challenges in the Ontario Superior Court.

A few weeks ago, the government legislated the workers back to work at Canadian Pacific. At least here, the government permitted the workers to go on strike for a few days before legislating them back.

I review this history not only to show the government's cavalier attitude to legal rights and fundamental freedoms but also to question the public

reaction to this massive assault on workers' right to strike. Unfortunately, there was none. As a result, this government will continue on with its anti-democratic conduct in complete disregard of the rule of law. The question is whether the courts will stop them.

Under the cover of jobs, economic recovery and March breaks, the government took away or threatened to take away the fundamental rights of thousands of Canadian workers without any evidence that the economy would seriously suffer or that there would not be alternative available services even if a strike took place. e.g. Westjet, Porter. The CPC situation was particularly egregious in that it was the employer who caused the national cessation of postal services by its countrywide lock out. The last time I looked the federal government was the sole shareholder of CPC and could have ordered the post office to re-open and restore mail delivery to Canadians, the Orwellian title of it's back to work law.

Quite apart from the issue of the *Charter,* most industrial relations experts believe that these back to work laws have a very harmful effect on the collective bargaining process.

(i) they interfere in the collective bargaining process by upsetting the balance of power between the parties – this is particularly so when unfair arbitration is imposed as a substitute for the right to strike;

(ii) they will have a chilling effect on workers exercising their legal rights in the future. There is a clear message to Workers ... it is futile to go on strike: In fact, you may even be the subject punitive measures for exercising your legal rights;

(iii) some argue the opposite. That is, if the government will immediately withdraw the right to strike there is little risk on the employees in calling a strike. As a result, these experts argue that these employees will be less likely to accept a tentative settlement bargained on their behalf and thereby making the union's job far more difficult in bargaining a settlement;

(iv) it is also a clear message to employers – why should you be reasonable at the bargaining table when the

government will bail you out if the workers threaten or exercise their lawful right to strike.

(v) after the employees return to work, worker morale is low and the collective bargaining relationship is damaged.

That brings us to the question of whether the right to strike is protected by s.2(d) in the post *Fraser* world in Harperland. I say Harperland not only because he will have a majority government for the foreseeable future but also because the Prime Minister will be in position to have appointed a majority of the SCC with his next appointment which is imminent. He will likely have two more appointments by the time these cases reach the SCC.

As far as the legacy of *Fraser* is concerned, as labour lawyers we should be emphasizing the following six holdings of *Fraser.*

(i) *B.C. Health* was expressly upheld;

(ii) s.2(d) has a collective dimension regardless of libertarian notions suggested by McIntyre and Rothstein;

(iii) the positive rights – negative freedom distinction is of limited use conceptually;

(iv) international law is a useful source of law for interpreting s.2(d);

(v) Canadian labour relations practice, history and experience is also a useful source for interpreting s.2(d), and

(vi) judicial deference is applied at the s.1 stage and not at the threshold stage of interpreting the scope of s.2(d). In the labour context, s.2(d) is not a "judicial no go zone".

In my view, the case for s.2(d) protecting the right to strike is stronger than the case that s.2(d) protects the right to collective bargaining. The right to strike does not have any of the conceptual difficulties which some judges have with the right to bargain collectively:

(i) it is a purely negative freedom – it does not impose a duty on any other person;

(ii) it is not a creature of statute. It predates collective bargaining legislation by about 3,000 years. Moreover, it is not an

exclusive feature of the *Wagner* model . It is a remedy or sanction used in most other labour relations regimes. We will not be constitutionalizing the *Wagner Act* who of course is the psychotic fear of Professor Brian Langille which Justice Rothstein relied upon in *Fraser* in his attempt to overturn *B.C. Health*.

(iii) it is analogous to a single person withdrawing their services in order to improve their working conditions: On the restrictive view of s.2(d), dating back to the labour trilogy, freedom of association permits persons to do in association what a single person can lawfully do.

(iv) it is a much less controversial right than collective bargaining in international law.

Of course, the present jurisprudence of the SCC is that s.2(d) does not protect the right to strike. However, that law dates back 25 years to the *McIntrye/Dickson* divide in the labour trilogy. Chief Justice Dickson's dissents in the trilogy are now the law with the evolution of the jurisprudence from *Dunmore* through *B.C. Health* to *Fraser.* In his eloquent

dissent in the *Alberta Reference*, Chief Justice Dickson relied upon Canadian industrial relations policy and practice and Canadian and international industrial relations practitioners to conclude that s.2(d) protects the right to strike:

> Closely related to collective bargaining, at least in our existing industrial relations context, is a freedom to strike. Professor Carrothers, *Collective Bargaining Law in Canada* (Toronto, Butterworths, 1965), describes the requisites of an effective system of collective bargaining as follows at pp. 3-4:
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> > What are the requirements of an effective system of collective bargaining? From the point of view of employees, such a system requires that they be free to engage in three kinds of activity: to form themselves into associations, to engage employers in bargaining with the associations, and to invoke meaningful economic sanctions in support of bargaining.
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> The Woods Task Force Report at p. 129 identifies the work stoppage as the essential ingredient in collective bargaining:

> Strike and lockouts are an indispensable part of the Canadian industrial relations system and are likely to remain so in our present socio-economic-political society.

At p. 138 the Report continues:

> Collective bargaining is the mechanism through which labour and management seek to accommodate their differences, frequently without strife, sometimes through it, and occasionally without success. As imperfect an instrument as it may be, there is no viable substitute in a free society.

At p. 175 the Report notes that the acceptance of collective bargaining carries with it a recognition of the right to invoke the economic sanction of the strike. And at p. 176, it is said, "the strike has become a part of the whole democratic system".

The importance to collective bargaining of the ultimate threat of a strike has also been recognized in the cases. Lord Wright noted in *Crofter Hand Woven Harris Tweed Co, Ltd. v. Veitch,* [1942] 1 All

E.R. 142 (H.L.) at pp. 158-9, "The right of workmen to strike is an essential element in the principle of collective bargaining."

As the editors of *Khan-Freund's Labour and the Law,* 3rd ed. (London, Stevens & Sons, 1983), point out in respect of this comment: "If the workers could not, in the last resort, collectively refuse to work, they could not bargain collectively") (at p.292).

Apart from Chief Justice Dickson, union counsel can also rely upon the judges who addressed this question in *Fraser.* Indeed, a close reading of Justice Rothstein, demonstrates his view that if s.2(d) protects the right to collective bargaining as the majority held, it must also protect the right to strike as this right is necessary in order to make the duty to bargain meaningful... he relied upon the old legal maxim that if there is a right, there must be a remedy. Indeed, even on his restrictive view of what s.2(d) protects, i.e. the right to bargain collectively but with no duty to bargain imposed on the employer, the right to strike should still be protected because it is necessary in order to make his view of the right to bargain effective.

In her dissent, Justice Abella agreed that s.2(d) must protect an enforcement mechanism to resolve bargaining disputes if the right to collective bargaining is to be meaningful. Of course, in most situations this enforcement mechanism is the right to strike.

Another consideration in support of an affirmative response is international law. As I said before, the right to strike is clearly recognized in international law unless there is a threat to public health or safety because of the strike. If there is such justification, then as a substitute the law must provide speedy effective and impartial arbitration.

Finally, it would seem obvious that like the right to collective bargaining, the right to strike promotes *Charter* values such as equality, human dignity, democracy, respect for the autonomy of the person and liberty. Indeed, one would think that if the *Charter* does not protect the liberty to strike, then slavery is lawful in Canada.

Not yet Mr. Harper!

Unquestionably, we will be in a difficult period for a few years. Governments across Canada are responding to the economic crisis created by Wall Street by taking their pound of flesh from workers and their unions particularly public sector workers. Somehow the left could not seize the opportunity created by this crisis in capitalism . However, don't lose the faith or the fight. There is some light at the end of the tunnel.

- occupy movement which has made equality crucial issue
- Quebec students who are standing up for core public service
- even in the U.S. – Wisconsin - Ohio
- the NDP will form the next federal government.

One last point that we should realize as lawyers – the struggle will not be won in the courtroom. Yes, lawyers can win sometimes at the margins. However, the larger battle will be WON elsewhere whether it is in the legislature or on the streets or more likely in both. Canadian legal history demonstrates beyond a reasonable doubt that courts will not be the agent of change in Canadian workers' struggle for justice.

Thank You!