

Labour, Courts and the Cunning of History

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I. Introduction

Under the heading “Canadian Labour History Reveals the Fundamental Nature of Collective Bargaining,” in its 2007 decision involving a dispute between the Health Service Unions and the government of British Columbia, the Supreme Court of Canada provided “a common law of labour history.”¹ This historical narrative formed part of the Court’s justification for overturning a series of decisions it made in the late 1980s, known as the Labour Trilogy,² which established that the freedom of association protected in the *Canadian Charter of Rights and Freedoms* did not include the rights to bargain collectively and to strike. History becomes common law when it is so widely accepted by legal practitioners, lawyers, judges, and law teachers that the burden of proof implicitly shifts to those asserting a contrary position.³ According to the Supreme Court, “association for purposes of collective bargaining has long been recognized as a fundamental Canadian right which predated the *Charter*. This suggests that the framers of the *Charter* intended to include it in the protection of freedom of association found in s. 2(d) of the *Charter*.”⁴

This judicial fiat was possible because it resonated with the worldview of industrial pluralists, such as Bora Laskin, who were the architects, administrators, and advocates of the collective bargaining system that was institutionalized at the end of World War II. They believed that collective bargaining, and the associated activities of striking and picketing, were rights. The change in the composition of the bench over the past fifty years helps to explain why judges now are more sympathetic to unions and their tactics than were judges in the past. Judges, who as lawyers practiced labour law, whether they represented unions or employers, tend to accept the legitimacy of the collective bargaining regime. Moreover, the conception of collective bargaining as a legal right was promoted and reinforced in law schools across Canada.

Eric Tucker has written about the ironies of the Court’s use of labour history in the Health Services case.⁵ The historical “truth” that the Court needed to prove was that collective bargaining is a fundamental right in Canada and not the creation of modern labour relations statutes. In doing so, the Court relied on several labour and legal

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¹ *Health Services and Support – Facilities Subsector Bargaining Association v. British Columbia*, [2007] 2 S.C.R. 391 para. 40 (“the *Health Services and Support* case”).

² The “Labour Trilogy” refers to three concurrently released appeals: *Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313 (“*Alberta Reference*”), *PSAC v. Canada*, [1987] 1 S.C.R. 424, and *RWDSU v. Saskatchewan*, [1987] 1 S.C.R. 460.

³ Neil M. Richards, “Clio and the Court: A Reassessment of the Supreme Court’s Use of History,” (1997) 13 *Journal of Law and Politics*, 889.

⁴ *Health Services and Support*, *supra* note 1, para. 40.

⁵ 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.

historians whose research demonstrates the extent to which both the courts and legislatures were loath to turn the social practices of trade unions, such as collective bargaining, picketing, and striking, into legally enforceable rights. While the Court's claim that "the history of collective bargaining in Canada reveals that long before the present statutory labour regimes were put in place, collective bargaining was recognized as a fundamental aspect of Canadian society" is accurate, it does not follow that the activity was recognized as a legal right with correlative duties on employers to bargain before it was given a statutory foundation.⁶

That there is a gap between the historical narrative recounted by the labour historians and courts is not surprising. Canadian historian Donald Bourgeois warned, "[t]he historian should be aware that the purpose of litigation is to settle a dispute with finality. Whether or not the decision is historically 'correct' is, from one perspective – that of the court – irrelevant... The court, ideally, attempts to determine the 'truth' or 'what really happened,' but that determination is incidental to its role in society..."⁷ The court's role is to mediate social conflict and to resolve particular disputes through the deployment of legal discourse, which uses highly stylized, internally rational, and normative arguments that follow distinct rules from everyday conversation. The discursive power of law is generally reinforced, although occasionally undermined, by its coercive power. Law's impact, its legitimacy and authority, depends upon the extent to which it resonates with other discourses that are widely accepted. Courts are always crafting legal arguments in a social and historical context.

Instead of focusing on the ironies in the Supreme Court's use of history, I want to focus on the cunning of history – the fact that the same historical process can, on the one hand, erode the traditional institutional supports for collective labour rights – trade unions and the welfare state – and, on the other hand, result in the Court's declaration of collective labour rights as fundamental and constitutional. To do so, I will look at how one species of collective labour rights – the right to picket – has been treated by Canadian courts over the past one hundred years. I will sketch the broad trajectory of the courts' approach by focusing on three illustrative moments – the beginning of twentieth century, the middle of the twentieth century, and the beginning of the twenty-first century.

II. The First Moment: Industrial Legality at the Beginning of the Twentieth Century

Courts were at the centre of industrial conflict at the turn of the twentieth century as employers turned to them for injunctions and restrictive interpretations of the criminal code.⁸ Courts espoused the values of liberal order – liberty, equality, and property. While employees were free to strike, employers were equally free to dismiss them and to hire replacement workers. Unions could attempt to persuade their employers to engage in collective bargaining, but employers were free to ignore these attempts since unions did

⁶ *Health Services and Support*, *supra* note 1, para. 41.

⁷ Donald J. Bourgeois, "The Role of the Historian in the Litigation Process," (1986) 67 *Canadian Historical Review* 197-98.

⁸ This discussion draws upon Judy Fudge and Eric Tucker, *Labour Before the Law* (Toronto: Oxford U.P. 2001).

not have a legally enforceable right. The fault line was the legality of trade unions' and workers' most potent form of persuasion and solidarity – picketing.

At a strike-cum-lockout at Vulcan Iron works in Winnipeg in 1906, the employer successfully obtained an *ex parte* injunction to stop the local ironworkers' union and its members from picketing to prevent the use of replacement workers during the dispute. At issue was the scope of the criminal code prohibition against watching and besetting to restrict peaceful picketing. Almost three years after the beginning of the dispute, the union had its day in court, with Justice Mathers, who would later head the federal Royal Commission into the Winnipeg general strike, presiding. Not only did he make the injunction perpetual, he awarded Vulcan \$500 in damages. According to him, “the persuasion, to be legal, must be such as to leave it to the absolutely free and untrammelled will of the workman as to whether or not he will terminate his employment.”⁹ Against this freedom, he contrasted the union's jurisdiction over its members, “with all of its coercive machinery and power”, to penalize for a refusal to obey its mandate.¹⁰

Workers and their unions saw that their privileges to strike and to engage in other persuasive tactics to promote collective bargaining were being undermined by a judiciary bent on preserving a slanted vision of public order and protecting employers' rights of property and contract. To them, their precarious legislative victories were being attacked by judicial decree.

III. The Second Moment: Industrial Pluralism and the Post-war Compromise

In 1944, the federal government used its wartime power to enact collective bargaining legislation. While legislation translated workers' legal privilege to join a trade union into a legal right (with a concomitant restriction on the employer's right to dismiss an employee for joining a trade union), it did nothing to relieve workers from restrictions on their freedom to act collectively. Employers were still free to exercise their property rights and freedom to contract, and to seek to enforce them in the courts. Nor did the legislation impose a collective agreement in order to resolve a dispute. The privilege to resort to industrial sanctions – the ultimate measure of bargaining power – continued to determine the contents of collective agreements.

Despite the emphasis of industrial pluralism on the need for specialized tribunals to interpret and to administer collective bargaining legislation, the judiciary continued to play an important role in limning the contours of industrial legality. In the decades after World War II, employers still attempted to use old-style coercion to enforce their common law rights. While there were strong supporters of industrial pluralism on the bench (Ivan Rand and Bora Laskin are the most prominent examples), the majority of judges were committed to the individualism and traditional contract and property rights recognized by the common law.

Writing in 1960, Harry Arthurs captured the growing sense of crisis produced by the confrontation between unions and employers over industrial legality: “[t]he lusty and forgivable infant that was trade unionism fifteen years ago has developed in public,

⁹ *Vulcan Iron Works Co. v. Ironmoulders Union* (1909), 10 W.L.R. 421, 425, 430-1.

¹⁰ *Ibid.*

legislative, and judicial imagery, into a churlish adolescent.”¹¹ The call to make trade unions “responsible” – to respect collective agreements, to eschew secondary action, and to manage workplace discontent – was revived amongst the legal elites. From the perspective of trade unionists, however, the imagery was quite different. They perceived employers becoming more antagonistic, governments passing labour legislation hostile to union interests, and judges unfairly granting injunctions against picketing.¹²

The 1963 Ontario Court of Appeal decision in *Hersees of Woodstock v. Goldstein*, a much-cited case concerning peaceful picketing at the site of a third party who had commercial dealings with the target employer, illustrates the judicial response to irresponsible unions.¹³ In this decision, Justice J.B. Aylesworth, who was counsel for the big three automakers during the hearings on Ontario’s first collective bargaining legislation in 1943, issued a ringing judicial affirmation of the traditional view of liberal order, the same year that Bora Laskin, who represented the car manufacturers’ nemesis, the Canadian Congress of Labour, at those hearings, joined him on the bench. Justice Aylesworth declared that secondary picketing, even if peaceful, was a civil wrong that could be enjoined:

The right, if there be such a right, of the [union officials] to engage in secondary picketing of the appellant’s premises must give way to the appellant’s right to trade: the former assuming it to be a legal right, is exercised for the benefit of a particular class only while the latter is a right far more fundamental and of greater importance, in my view, as one in which its exercise affects and is for the benefit of the community at large.¹⁴

From the end of World War II until well after the advent of the *Charter*, the predominant inclination of the majority of judges was to restrict unions’ and workers’ collective action, although there was some dissent. In a series of Supreme Court of Canada decisions in the late 1980s and early 1990s, collective bargaining was considered to be a modern legislative, and, hence, not a fundamental right, unions were analogized to gun clubs and the activity of striking likened to playing golf,¹⁵ and picketing was regarded as a signal that invoked a Pavlovian response from working people.¹⁶ Responsible unions occasionally turned to the courts to vindicate their rights, but they did so with much less frequency and much less success than employers.

IV. The Third Moment: Labour Rights as Constitutionally Protected Rights?

¹¹ H.W. Arthurs, “Tort Liability for Strikes in Canada: Some Problems of Judicial Workmanship” (1960) 38 *Can. Bar Rev.* 346, quoted in Eric Tucker, “*Hersees of Woodstock v. Goldstein*: How a Small Town Case Made it Big,” in Judy Fudge and Eric Tucker, eds., *Work on Trial: Cases in Context* (Irwin and Osgoode Society: Toronto, forthcoming).

¹² Tucker, *supra* note 11.

¹³ *Hersees of Woodstock v. Goldstein et. al* (1963), 38 D.L.R. (2d) 449 (Ont. C.A.).

¹⁴ *Ibid.*, 452-5.

¹⁵ See the cases cited in *supra* note 2.

¹⁶ *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573, para. 19 and *B.C.G.E.U. v. British Columbia (Attorney General)*, [1988] 2 S.C.R. 214 para. 30 citing Paul Weiler’s now infamous claim “The crucial variable determining the impact of peaceful picketing is whether it is addressed to unionized workers. That kind of picket line operates as a signal, telling union members not to cross. Certainly in British Columbia the response is automatic, almost Pavlovian.” Paul Weiler, *Reconcilable Difference* (Toronto: Carswells, 1980) 79. Aylesworth also noted the signaling effect of picket lines, *supra* note 13, 454.

A change in the judicial attitude towards picketing was discernable on the cusp of the new millennium. On several occasions, Justice Ian T. Donald, who had appeared as counsel for a variety of trade unions, managed to persuade a majority of his fellow and sister judges on the British Columbia Court of Appeal, a court that was particularly hostile to union pickets, that picketing was a legitimate tactic during a labour dispute.¹⁷ In 1998, he declared, “[t]he parties are engaged in an economic struggle. The union and its members have only two lawful weapons, the withdrawal of labour and picketing. Having exercised their right to picket peacefully, they should not have to operate with the sword of contempt over their heads.”¹⁸ Later he held that the signaling effect of picketing did not make it wrongful.¹⁹

The Supreme Court of Canada also began to distance itself from the earlier judicial approach to picketing. In a 2002 decision that dealt with the legality of secondary picketing, the Supreme Court of Canada stated:

The decision in *Hersees* ... reflects a deep distrust of unions and collective action in labour disputes. An expressive act that is legal and legitimate if done by an individual suddenly becomes illegal when done in concert with others.

Aylesworth J.A.’s reasons reflect the common sentiments of early 19th century legislation and subsequent judgments which held that the combination of workers in pursuit of their economic interest was unlawful and against public policy...

The effect of these judgments was to discount the importance of freedom of expression in the labour law context.²⁰

However, the fact that secondary picketing was not *per se* illegal did not mean that it was unregulated. The Court preferred a wrongful action approach as the method of regulating secondary picketing because of its flexibility:

Courts may intervene and preserve the interests of third parties or the struck employer where picketing activity crosses the line and becomes tortious or criminal in nature. It is in this sense that third parties will be protected from “undue” harm in a labour dispute. Torts such as trespass, intimidation, nuisance and inducing breach of contract will protect property interests and ensure free access to private premises. Rights arising out of contracts or business relationships will also receive basic protection. Torts, themselves the creatures of common law, may grow and be adapted to current needs.²¹

Thus, given the arsenal of general legal tools available to employers to restrict unruly union behaviour, the Court concluded that there was no need for doctrines that were specifically designed for trade unions.

Eric Tucker speculates that the change in judicial attitude was, at least in part, “contingent on a shift in the judicial imagery of organized labour from the ‘churlish adolescent’ that Harry Arthurs described in 1960 to that of a senior citizen who no longer

¹⁷ For a discussion of the British Columbia Court of Appeal’s approach to picketing over its one hundred year history see Judy Fudge and Eric Tucker, “‘Everyone Knows What a Picket Line Means’: Picketing before the British Columbia Court of Appeal,” (2009) 162 *BC Studies* 53.

¹⁸ *Fletcher Challenge Canada Ltd. (MacKenzie Pipe Pulp Division) v. C.E.P., Local 1092* (1998), 155 D.L.R. (4th) 638, 641.

¹⁹ *Prince Rupert Grain Ltd. v. Grain Workers’ Union, Local 333* (2002) 8 B.C.L.R. (4th) 91.

²⁰ *R.W.D.S.U., Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd.*, [2002] 1 SCC 156, para. 55.

²¹ *Ibid.*, para. 73.

poses a threat to others and [who] is losing her capacity to cope in an increasingly hostile environment.”²²

V. Conclusion

Recognizing collective bargaining as a fundamental right in the *Health Services*, the Supreme Court of Canada emphasized the significance of collective bargaining to fundamental Canadian values. According to the Court, “[c]ollective bargaining ... enhances the *Charter* value of equality. One of the fundamental achievements of collective bargaining is to palliate the historical inequality between employers and employees.”²³

But, however much the *Health Service Sector* case may signal a brave new world of freedom of association jurisprudence, it does not herald a brave new world of work. The problem is that the Supreme Court appears to have grasped the inner logic and significance of industrial pluralism, like the owl of Minerva, at the moment of its waning. Industrial pluralism was designed for the post-war economy, and even at its apogee covered less than half of the working population in Canada. Since the early 1980s, at the very time the *Charter* was entrenched, this system has proven to be less effective; the wages of unionized workers have stagnated and union density has declined.²⁴ The problem is that the primary institutions of Fordism – the welfare state, the large vertically integrated firm, and industrial unions – no longer work because they no longer fit with the dominant forms of governance and prevailing forms of economic organization in a global and networked post-Fordist world. Thus, it is important to historicize, and not to fetishize, the past if we are to learn any lessons from it.

²² Tucker, *supra* note 11.

²³ *Health Services and Support*, *supra* note 1, para. 84.

²⁴ Judy Fudge, “The New Workplace: Surveying the Landscape” (2009) *Manitoba Law Journal*, forthcoming 2009.