

Inventing union rights

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Around Labour Day, Canada's unions love to say: "Labour rights are human rights." But Canadians should be aware of what this doesn't mean: Unions do not mean employees have the right to join a union or not, or to choose to pay dues for political purposes (or not). In fact, Canada's unions don't even interpret human rights to include quaint notions such as secret-ballot votes before employees are unionized.

Given that too many unions can't keep up with basic 19th-century democratic practices, it's hardly a shock they're not up to speed with 21st-century employee-friendly practices from around the world. What is a surprise is the slowness of our provincial legislatures, federal Parliament and Supreme Court to follow the lead of others such as the European Union, Australia and New Zealand in protecting employee rights by recognizing the power imbalance between unions and employees.

This past June, the Supreme Court struck down three sections of a contentious piece of 2002 legislation brought in by the B.C. Liberals. Bill 29, the Health and Social Services Improvement Act, was an attempt to reverse years of New Democratic favouritism towards public-sector unions at the expense of taxpayers and B.C.'s economy. The NDP misled taxpayers, stating in the late 1990s that public-sector wage increases would be "zero, zero and two" percent. The actual increases, arising from secret, back-room deals called accords, were worth \$1.3-billion, or "zero, zero and eleven."

On the campaign trail in 2001, the B.C. Liberals promised the public sector they would not rip up their collective agreements. Arguing a fiscal crisis in health care tied to the secret accords, they broke their crystal-clear promise after becoming government with the controversial Bill 29. That bill unilaterally changed provisions of collective agreements with British Columbia's health-care unions. Among other actions, it voided clauses preventing public-sector health-care employers from contracting out non-clinical services. It also rewrote layoff and bumping provisions. The government did what no unionized private-sector employer can do: It unilaterally altered a collective agreement.

Had the government first attempted to negotiate with these unions, there almost certainly would have been a different court judgment. Regardless, the Supreme Court's Bill 29 decision reversed 20 years of its own constitutional jurisprudence that clearly stated there is no Charter right to collective bargaining. The court's June reversal means that unions have a "procedural right to collective bargaining" under the Charter's freedom of association provision.

How did the court reverse 20 years of its own decisions? First, the court clearly took umbrage with the government's failure to engage in any bargaining before legislating on such important issues. Second, the justices criticized their prior decisions, saying they "do not withstand principled scrutiny." Third, the court

asserted significance to collective bargaining in Canadian industrial labour relations past and present. Fourth, the court argued it was time for Canada to keep up with Canada's international obligations.

The court agreed that under "Canada's federal system of government, the incorporation of international agreements into domestic law is properly the role of legislatures." The court even noted that these international documents are "not binding" and then offered a large "but": "However, Canada's international obligations can assist courts charged with interpreting the Charter's guarantees."

It's important to note the court's doubletalk. How do inanimate, non-binding, international obligations "assist" a court that already admits incorporating international agreements is properly up to Parliament and the provinces? Answer: This court strode in where previous Supreme Courts refused to tread, i.e., it invented a Charter right which Canadians were told did not previously exist - largely because a government failed to try to bargain, reaching instead for the blunt instrument of legislation.

However, in other areas, the court has declined to apply international standards, where those standards promote the rights of employees over those of unions. Canada's unions can (and already do) negotiate collective agreements with employers where unionized employees are also forced to join and maintain union "membership" as a condition of employment -- or be fired. Such firings can and do happen. Most Canadian governments and courts also allow forced dues for political (and other) purposes from unionized employees.

This is in contrast to developments in the international arena, where increasingly the rights of employees come first, employers and unions second. In three decisions from 1981 to 2006, the European Court of Human Rights made illegal any attempt to force membership as a condition of getting and/or keeping a job. This year, the same court made dues for politics legal only for unionized employees who decide to join a union. Thus, unionized employees who decline "membership" cannot be required to pay additional dues for political (and other) purposes. In Australia, between 1996 and 2006, the government used statutory law to add such protections for unionized employees.

Canadians should not have to wait while the Supreme Court muses over which of its past decisions regarding forced union "membership" and dues for political (and other) purposes do not withstand "principled scrutiny."

If labour rights are to be seen as human rights, our Supreme Court and legislatures need to recognize the power imbalance between employees and the unions who represent, or wish to represent, them. The Supreme Court and legislatures should truly ensure free employee choice in unionized workplaces.

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