

Labour Relations in Canada: The changing landscape of collective bargaining after *Ontario (A.G.) v. Fraser*

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Introduction

Following the decision of the Supreme Court of Canada (SCC) in *Ontario (A.G.) v. Fraser*¹ (*Fraser*), there has, predictably, been widespread speculation as to its eventual effect on the labour relations landscape in Canada.² A departure from other recent SCC case law, *Fraser* found that there was no constitutional guarantee for any specific form of labour relations or collective bargaining regime. Even if the decision was significant in shaping Canada's constitutional framework for collective bargaining, any tangible effect on labour policy has yet specifically to materialize. That said, there has certainly been a shift in the discourse concerning labour relations, labour policy, and the role of unions in Canada, and certain recent policy initiatives suggest that broader change may very well be coming.

This article highlights some of those initiatives, discusses how *Fraser* laid the groundwork for them, and considers what they could mean for the future of labour relations in Canada. In doing so, this article first traces the jurisprudential treatment of labour relations policy since the SCC decision in *Health Services and Support – Facilities Subsector Bargaining Association v. British Columbia*³ (*BC Health*) – the immediate constitutional precursor to *Fraser*. It then reviews a number of post-*Fraser* policy initiatives, the effect they have on the labour relations landscape, and their potential implications for the future.

The pre-*Fraser* 'era of optimism': after the *BC Health* case

The four-year period between the *BC Health* decision and the *Fraser* decision was marked by a certain measure of cautious optimism within the labour movement. Commentators regarded the *BC Health* majority court's recognition of constitutional protection for a meaningful process of collective bargaining as a symbolic victory for the labour movement,⁴ one that could even signal the eventual recognition of a constitutional right to strike.⁵ Indeed, even post-*Fraser*,

¹ 2011 SCC 20.

² See, for example, Richard Chaykowski, "Canadian Labour Policy in the Aftermath of *Fraser*", 16 *Canadian Lab. & Emp. L.J.* 291 (2011), Judy Fudge, "Constitutional Rights, Collective Bargaining and the Supreme Court of Canada: Retreat and Reversal in the *Fraser* Case", *Ind. Law J* (2012) 41 (1)

³ 2007 SCC 27.

⁴ 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 *Indus. L.J.* 25 at 48.

⁵ See, for example, Brian Etherington, "Does Freedom of Association under the *Charter* Include the Right to Strike after *B.C. Health*? Prognosis, Problems and Concerns" 15 *Canadian Lab. & Emp. L.J.* (2009-2010) 315.

this prognostication found at least some limited support within the judiciary in certain jurisdictions.

Of particular note from this 'era' are the Ontario Court of Appeal's 2008 decision in *Fraser v. Ontario (A.G.)*⁶ (the precursor to the SCC's *Fraser* decision), the Ontario Superior Court's 2009 decision in *Mounted Police Association of Ontario v. Canada (A.G.)*⁷ (*Mounted Police*), and the 2012 decision of the Saskatchewan Court of Queen's Bench in *Saskatchewan Federation of Labour v. Saskatchewan*⁸ (*SFL*) (post-*Fraser* but, given the decision's reasons, still representative of the era of optimism).

In the *Mounted Police* decision, citing favourably⁹ the decision of the Ontario Court of Appeal in *Fraser*, the court found that the RCMP's Staff Relations Representative Program, as a compelled alternative to the "Wagner" type¹⁰ collective bargaining model under the *Public Service Labour Relations Act*,¹¹ was unconstitutional, as it was "not an independent association formed or chosen by members of the RCMP," and it could not "reasonably be described as a process of collective bargaining."¹² At that point in time, it appeared that, based on *BC Health*, a specific labour relations or collective bargaining regime could be required by the *Canadian Charter of Rights and Freedoms*.¹³

The labour movement's cautious optimism was also validated in a 2012 decision where the Saskatchewan Court of Queen's Bench in *Saskatchewan Federation of Labour v. Saskatchewan (SFL)* found that the right to strike is protected by the guarantee of freedom of association under section 2(d) of the *Charter*. Though this decision was later overturned, it did still—at least initially—lend some credence to the notion that the labour movement had cause for optimism in the wake of *BC Health*.

Though the courts in these decisions were careful not to explicitly state that they were constitutionalizing any particular process of collective bargaining—the SCC itself in *BC Health* was careful to stress that the right to collective bargaining was

⁶ 2008 ONCA 760.

⁷ 96 OR (3d) 20.

⁸ 2012 SKQB 62.

⁹ *Supra* note 7 at paras. 50 to 54 and 73.

¹⁰ Derived from the American *National Labour Relations Act* and so named for the act's principal drafter, Senator Robert F. Wagner. The Canadian permutation is largely accepted as having first been introduced in 1944 by order-in-council PC 1003.

¹¹ S.C. 2003, c. 22, s. 2.

¹² *Supra* note 7 at para. 60.

¹³ Part I of the *Constitution Act, 1982*.

not a right to a “particular statutory regime”¹⁴ or a “particular model of labour relations”¹⁵—it certainly appeared that the courts favoured the “Wagner” model of labour relations.

Under the Wagner model as traditionally contemplated in Canada, a certified union has the exclusive right to bargain collectively on behalf of its members, strike and lockout activity is prohibited during the term of a collective agreement, there is a mechanism (i.e. strike/lockout or arbitration) to resolve disputes and bargaining impasses, and the parties to the relationship are under a duty to bargain in good faith and abstain from unfair labour practices. The resemblance of the Wagner model to the developing judicial conception of what represented constitutionally protected collective bargaining after *BC Health* was most apparent in the following passage from the Ontario Court of Appeal’s *Fraser* decision:

If legislation is to provide for meaningful collective bargaining, it must go further than simply stating the principle and must include provisions that ensure that the right can be realized. At a minimum, the following statutory protections are required to enable agricultural workers to exercise their right to bargain collectively in a meaningful way: (1) a statutory duty to bargain in good faith; (2) statutory recognition of the principles of exclusivity and majoritarianism; and (3) a statutory mechanism for resolving bargaining impasses and disputes regarding the interpretation or administration of collective agreements.¹⁶

This, of course, prompted the SCC’s majority in *Fraser* to directly comment as to whether or not the Wagner model was *the* constitutional model:

The Court of Appeal held that *Health Services* constitutionalizes a full-blown Wagner system of collective bargaining, and concluded that since the *AEPA* did not provide such a model, absent s. 1 justification, it is unconstitutional. The court appears to have understood the affirmation of the right to collective bargaining in *Health Services* as an affirmation of a particular type of collective bargaining, the Wagner model which is dominant in Canada.

¹⁴ *Supra* note 3 at para. 19.

¹⁵ *Ibid.* at para. 91.

¹⁶ *Supra* note 6 at para. 80.

With respect, this overstates the ambit of the s. 2(d) right as described in *Health Services*. First, as discussed, the majority in *Health Services* unequivocally stated that s. 2(d) does not guarantee a particular model of collective bargaining or a particular outcome.¹⁷

Fraser's Impact on the Judicial Treatment of the Wagner Model

Not surprisingly, the SCC majority's unequivocal rejection of the Wagner model as constitutionally protected precipitated a notable, though not immediate, about-face with respect to the judiciary's treatment of freedom of association or collective bargaining cases.

Among the first to decide such issues was the Ontario Court of Appeal in *Mounted Police Association of Ontario v. Canada (A.G.)*,¹⁸ with its setting aside of the Ontario Superior Court's pre-*Fraser*, *Mounted Police* decision referenced above. Discussing the Wagner model at great length,¹⁹ the Court of Appeal ultimately decided that the Wagner model contemplates a much broader collective bargaining right than what is actually constitutionally protected:

In my view, the Supreme Court has established that the content of the constitutionally guaranteed right to "collective bargaining" is narrower than how that term is used in Wagner model regimes. "Collective bargaining" under s. 2(d) protects only the right to make collective representations and to have those collective representations considered in good faith.²⁰

As the shift took hold, even decisions issued after *Fraser* that had originally given the labour movement cause for optimism were subsequently overturned on the basis of the *Fraser*. For example, as mentioned above, the Saskatchewan Court of Appeal²¹ overturned the determination of Saskatchewan Court of Queen's Bench in *SFL* that the right to strike was constitutionally protected based on *BC Health*. Expressly rejecting the notion that, per the Wagner model, a labour relations regime must have an inbuilt dispute resolution mechanism (in that particular case, the right to strike), the Court of Appeal stated the following:

¹⁷ *Supra* note 1 at paras. 44 and 45.

¹⁸ 2012 ONCA 363.

¹⁹ *Ibid.* at paras. 23 to 34.

²⁰ *Ibid.* at para. 119.

²¹ 2013 SKCA 43.

If the right to strike is characterized as a dimension of collective bargaining – and this is how the trial judge proceeded – it is not at all clear that the Supreme Court’s recent decisions lead to a conclusion that strike activity is protected by s. 2(d). I say this because the analysis pressed by SFL and the unions in this regard is based on the notion that meaningful collective bargaining necessarily entails the existence of some sort of mechanism for effectively resolving disputes between employees and their employers. The strike, so the argument goes, is that mechanism. But, at least to this point, the Supreme Court has not mapped the freedom to bargain collectively in these broad terms. Rather, it has said that collective bargaining involves only: the right of employees to organize, to make collective representations to their employers and to have those representations considered in good faith....

Thus, as indicated, Fraser appears to say that a mechanism for resolving bargaining impasses (regardless of what institutional form it might take) is not part of what s. 2(d) requires in the context of collective bargaining. It would seem to follow, as a result, that the strike (a particular institutional mechanism for resolving impasses) is not comprehended by s. 2(d).²²

The cumulative effect of these decisions²³ has been to provide increasingly powerful reassurance to policy makers and legislators that direct incursion into collective bargaining, both in terms of imposing outcomes and of shaping the process, will satisfy a constitutionality litmus test if challenged. The result has been the introduction of a number of initiatives which, if ultimately implemented, would represent a marked transformation of Canadian labour relations policy. The next section will review a selection of these initiatives.

²² *Ibid.* at paras. 54 and 59.

²³ Along with the others in the ‘Wagner series’ – see, for example, *Québec (Procureur général) c. Confédération des syndicats nationaux (CSN)*, 2011 QCCA 1247 (finding that absent a constitutional protection for the Wagner model, there is no constitutional protection for a process of union certification), and *Association of Justice Counsel v. Canada (A.G.)*, 2012 ONCA 530 (finding that a legislative incursion into collective bargaining that establishes set wage increase levels is not unconstitutional, as it does not preclude a meaningful process of collective bargaining).

Post-Fraser Policy and Legislative Initiatives*

Ontario's Bill 115, the *Putting Students First Act*, 2012²⁴

Perhaps the most publicized initiative—at least in Ontario—Bill 115 effectively imposed specific collective agreement terms on Ontario teachers and prohibited strikes during a particular restraint period. The imposed terms included freezing wages, restructuring sick leave entitlements, and imposing unpaid leave days. The act has since been repealed, but because the collective agreements it compelled have been established, its effects remain.

While this legislation did not fundamentally restructure the labour relations regime of Ontario's K-12 education sector, it directly impacted collective bargaining outcomes. It is that action of governments to modify labour relations outcomes in a post-*Fraser* world that many in the labour movement argue should be constrained significantly if a process of collective bargaining is going to be truly meaningful. Others argue that imposing legislated limits on what can appropriately be achieved through bargaining is not only constitutionally sound based on *Fraser*, but also entirely acceptable, as a process of bargaining can still take place - though perhaps just not that which is envisioned in a strict interpretation of the Wagner model.

Bill C-377, *An Act to amend the Income Tax Act*²⁵

A federal Conservative private member's bill, Bill C-377 seeks to impose significantly expanded financial reporting requirements on labour organizations (chiefly unions) and its officers. Though some would say it does not directly modify the relationship between unions and employers, others may argue that it does potentially herald a much broader shift in labour relations policy in Canada as it relates to the 'right to work'.

Right-to-work systems are seen in many US jurisdictions. In them, workers in unionized workplaces are not automatically required to become union members or pay dues to unions regardless of whether they receive the benefits the unions provide. In place of the right-to-work system, jurisdictions in Canada have historically used the Rand Formula. This formula, long recognized as a fundamental tenet of Canadian labour policy, precludes bargaining unit

²⁴ S.O. 2012 C.11.

²⁵ 1st Sess., 41st Parl., 2011 (Adopted with amendments proposed at 3rd Senate reading 13 September 2013).

employees from opting out of the payment of dues regardless of their union membership status. This is based on the principle that because all bargaining unit employees, whether members of the union or not, benefit from the work of the union in negotiating and enforcing the collective agreement, all employees covered by the collective agreement should contribute union dues. The formula relates directly to the Wagner principles of exclusivity and majoritarianism, which afford a duly certified union the exclusive right—a right which would arguably be significantly constrained if workers could opt out of dues payment—to represent the workers in a particular work unit.

Though Bill C-377 itself is not right-to-work legislation, as it does not propose to alter the approach to whether and how union dues are collected, its connection to the right-to-work debate is notable. Consider, for example, the submission of Daniel Kelly, president of the Canadian Federation of Independent Business, at a meeting of the House of Commons Standing Committee on Finance concerning the bill:

We in most associations, and certainly in my association, have completely voluntary membership fees. If a member of ours, a small business owner and a member of CFIB, at any given point in time feels that my spending, our spending, is inappropriate or has questions or doubts about that in any way, they can quit the next day.

In Canada, because of the Rand formula, that is impossible. You are required by law to pay union dues whether or not you want to be a member.

I accept that most union members likely want to belong to the union and support the union that they're a part of. I don't take any issue with that. However, I will say that because legislation in Canada, legislation that is largely unprecedented in the world these days, gives unions massive powers to collect dues from those who may not wish to belong, then additional sets of responsibilities should be taken to address them to ensure that those—perhaps few—members who don't want to belong and don't want to pay dues are able to get as much information as they can to inform their thinking about the organization they are funding....

If a union is uncomfortable with this legislation, perhaps there could be an exemption made for those unions that decide to make their

union memberships and union dues voluntary. Perhaps then they wouldn't need to be subject to this additional standard.²⁶

Consider also the comments of Pierre Poilievre, Conservative Member of Parliament for Nepean-Carleton, concerning Bill C-377:

Union bosses should not be allowed to force workers to pay union dues for political causes they do not support. Rather, workers should have the right to see how their money is spent and the freedom to opt out, if they don't like what they see. All I seek is accountability for union bosses and free choice for workers.²⁷

As evidenced above, proponents of the bill draw a direct link between the disclosure of union spending and a worker's right to make an informed choice concerning whether to pay union dues. There has been similar discourse on the provincial stage in Ontario as well.

Tim Hudak's *Paths to Prosperity – Flexible Labour Markets White Paper*²⁸

In June 2012, Tim Hudak, the leader of Ontario's opposition Progressive Conservatives, published a sweeping report documenting his party's proposals for labour policy reform in Ontario. A number of these proposals were aimed at introducing right-to-work policy:

PATH 1

... (P)ut power and choice back in the hands of unionized employees. No clauses in any provincial legislation, regulation or collective agreement should require a worker to become a member of a union or pay union dues as a condition of employment.

PATH 2

Union leaders, not employers, should collect dues from the workers they represent....

PATH 3

Amend legislation so that unions must provide full and transparent disclosure of their revenues and how they spend their funds.²⁹

²⁶ House of Commons, *Meeting of the Standing Committee on Finance*, No. 83 (25 October 2012) at 1635 (Daniel Kelly).

²⁷ Pierre Poilievre, Media Release, "Making Illegal Donations, Unions Now Try to Intimidate Critics" (9 September 2012), online: <<http://pierremp.ca/unions/http://pierremp.ca/unions/>>.

²⁸ June 2012, online: <<http://timhudakmpp.com/wp-content/uploads/Flexible-Labour-Markets.pdf>>.

In support of these proposals, the report criticized the existing regime in Ontario for “giv(ing) union leaders substantial power with little or no accountability”³⁰ by allowing them to use dues to fund campaigns unrelated to workplace issues, and claimed that “(i)nstituting worker choice reforms”³¹ like those listed above would remedy this accountability issue and “put the province in a leading competitive position in Canada.”³²

Bill C-525, An Act to amend the Canada Labour Code, the Parliamentary Employment and Staff Relations Act and the Public Service Labour Relations Act³³

This bill, titled the *Employees’ Voting Rights Act*, seeks to change the process for union certification and decertification by requiring a secret ballot vote for all applications. This would replace a card-check approach. In addition, and perhaps most controversial about the bill, it also seeks to alter the threshold for certification and decertification. Rather than requiring a majority of those who vote to support certification, the bill would require support from the majority of all employees in the proposed bargaining unit, meaning that not voting has the same practical effect as voting against certification. Similarly, a union could be decertified if, after 45% of employees in the bargaining unit support a decertification vote, the union does not achieve majority support from all employees in the unit, again effectively rendering non-votes as votes against certification.

While the language of this bill is not itself a departure from the Wagner model of labour relations, the practical implications of it relate directly to the future of Wagnerism as a system of labour relations in Canada. A fundamental tenet of the Wagner model is that a union with majority support receives the exclusive right to represent employees in a particular bargaining unit. If such support becomes difficult to achieve or maintain, and majority rules are not solely determined on the classical 50% + 1 vote model, then a union’s role in a particular workplace may deviate from what is presumed under a Wagner model and evolve to something else. Alternatively, the relevance—and therefore possibly the presence—of unions in the workplace could fade.

²⁹ *Ibid.* at 10.

³⁰ *Ibid.* at 9.

³¹ *Ibid.* at 10.

³² *Ibid.*

³³ 1st Sess., 41st Parl., 2011 (Introduction and first reading in House of Commons 5 June 2013).

Conclusion

While it certainly remains to be seen precisely how all these initiatives will play out and what they mean for the Wagner model of labour relations in Canada, one thing is for certain: it will not be easy times for the labour movement. Unions are already facing a decline in density. Chaykowski, for example, notes that union density in Canada has declined from 33.7% in 1997 to 31.5% in 2012,³⁴ and he explains this decline, at least in part, by the spillover effect of shifts in US labour policies in ways unfavourable to the labour movement, (i.e. increased presence of right-to-work laws)³⁵. This slide in density, coupled with the new realities of the post-*Fraser* world, will require innovative thinking by and clarity of purpose from the labour movement. If the post-*Fraser* initiatives discussed above are any indication, unions will likely face a significant challenge to maintain effectiveness and relevance in an ever evolving jurisprudential, legislative and political environment.

* **Editor's Note:** At the time of writing, Bill C-4, *Economic Action Plan 2013 Act No. 2*, was not yet tabled before Parliament. In the bill, there are sweeping changes to the labour relations and collective bargaining regime in the federal public service, primarily through amendments to the *Public Service Labour Relations Act*.

³⁴ Richard Chaykowski, "Systemic Pressures in Ontario Public Sector Industrial Relations" in Richard R.P. Chaykowski and R.S. Hickey, eds., *Building More Effective Labour-Management Relationships* (Montreal & Kingston: McGill-Queen's University Press, 2013) 13 at 34.

³⁵ *Ibid.* at 40-44.

Reference List

Association of Justice Counsel v. Canada (A.G.), 2012 ONCA 530

Chaykowski, Richard. "Systemic Pressures in Ontario Public Sector Industrial Relations" in Chaykowski, R.P and R.S. Hickey, eds., *Building More Effective Labour-Management Relationships* (Montreal & Kingston: McGill-Queen's University Press, 2013) 13.

Chaykowski, Richard. "Canadian Labour Policy in the Aftermath of Fraser" (2011) 16 *Canadian Labour & Employment Law Journal* 291.

Etherington, Brian. "Does Freedom of Association under the Charter Include the Right to Strike after B.C. Health? Prognosis, Problems and Concerns" (2009-2010) 15 *Canadian Labour & Employment Law Journal* 315.

Fraser v. Ontario (Attorney General), 2008 ONCA 760

Fudge, Judy. "Constitutional Rights, Collective Bargaining and the Supreme Court of Canada: Retreat and Reversal in the Fraser Case" (2012) 41 *Industrial Law Journal* 1.

Fudge, Judy. "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 *Industrial Law Journal* 25.

Health Services and Support - Facilities Subsector Bargaining Assn. v. British Columbia, 2007 SCC 27

Hudak, Timothy and Randy Hillier. *Paths to Prosperity: Flexible Labour Markets* (June 2012), online: <<http://timhudakmpp.com/wp-content/uploads/Flexible-Labour-Markets.pdf>>.

Mounted Police Association of Ontario v. Canada, 2012 ONCA 363

Mounted Police Association of Ontario v. Canada (Attorney General), 96 OR (3d) 20

Ontario (Attorney General) v. Fraser, 2011 SCC 20

Poilievre, Pierre. "Making Illegal Donations, Unions Now Try to Intimidate Critics" (9 September 2012), online:
<<http://pierremp.ca/unions/http://pierremp.ca/unions/>>.

Québec (Procureur général) c. Confédération des syndicats nationaux (CSN), 2011
QCCA 1247

R. v. Saskatchewan Federation of Labour, 2013 SKCA 43

Saskatchewan Federation of Labour v. Saskatchewan, 2012 SKQB 62

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