

## **DEVELOPMENTS AFFECTING UNION SECURITY AND UNION STRENGTH AT THE WORKPLACE - RIPE FOR EXPORT TO CANADA?**

### **Summary of Allen Ponak Presentation**

Primary jurisdiction over the regulation of labour relations lies with each of Canada's ten provinces. The federal government's jurisdiction is constitutionally restricted to several strategic industries including telecommunications, banking, airlines, ports, and nuclear facilities, amounting to less than ten percent of the workforce. The provinces control the rest and are free to craft their own labour laws as long as the laws conform to the Canadian constitution.

In theory, the labour laws of the 10 provinces, 3 territorial governments, and the federal government could vary substantially across Canada. In practice, there is a common core of principles, derived from the Wagner Act model, that underlie labour laws across the country. Arguably some provincial labour statutes could be construed as slightly more union friendly and some as slightly more employer friendly, but the common core of values predominate and all laws share far more similarities than differences.

There is no right to work (RTW) in Canada nor, for political and legal reasons, is there likely to be in the future.

Politically, Canada's labour movement has been effective at pushing back against any restrictions to mandatory dues collection for all members of the bargaining unit. It helps that more than 30% of Canadian workers are covered by collective bargaining agreements and that there is a viable political party, the New Democratic Party, with direct union affiliation. Conservative politicians have promoted the idea of RTW from time to time, but have usually quickly backed away in the face of strong opposition from organized labour and the other political parties. This has proven true even when conservative parties have governed and have had the parliamentary power to push through such laws.

In fact, most Canadian labour codes have the very opposite of RTW – it is considered a labour code violation for an employer to refuse a request by a union to collect regular union dues from all members of the bargaining unit via a check-off system. For example, Section 47(1) of the Ontario Labour Relations Act states:

#### **Deduction and remittance of union dues**

Except in the construction industry and subject to section 52 [religious beliefs exemption], where a trade union that is the bargaining agent for employees in a bargaining unit so requests, there shall be included in the collective agreement between the trade union and the employer of the employees a provision requiring the employer to deduct from the wages of each employee in the unit affected by the collective agreement, whether or not the employee is a member of the union, the amount of the regular union dues and to remit the amount to the trade union, forthwith.

To date, RTW has not been a political winner in Canada. The experience of the province of Alberta is instructive. Alberta is an oil and gas province with 40 years of uninterrupted rule by a conservative party that only ended in 2015. Union density is the lowest in the country, about 24%, and until 2015, the province had the most employer friendly labour legislation in the country. In temperament and industrial mix, Alberta is much closer to the Rocky Mountain and southwestern states that have adopted RTW than it is to central Canada. Yet when a serious effort was launched to introduce RTW in the mid 1990's, backed by the Canadian Taxpayer

Federation (then led by future prime minister Stephen Harper) and significant funding from United States RTW advocates, it was soundly rejected. Many large unionized employers either opposed RTW or stayed on the sidelines. The populist (and very popular) provincial premier at the time was quite content to see the matter buried. If RTW could not gain political traction in Alberta, it has limited prospects elsewhere in the country.

Even if the political will for RTW existed, legal impediments would almost certainly prevent its introduction. The Canadian constitution, which incorporates the *Charter of Rights and Freedoms*, specifies the freedom of association as a fundamental freedom (section 2(d)) along with, for example, freedom of thought and religion. At the same time as establishing these and other rights and freedoms, the *Charter* provides the following section 1 constraint: “The Canadian *Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.” [emphasis added]. Thus, legislation is subject to a two-fold test: 1) does the legislation infringe on a *Charter* freedom; and 2) even if it does infringe, is the infringement justified in a free and democratic society.

In a 1991 decision (*Lavigne*), a bargaining unit employee was compelled to pay union dues under the terms of the CBA. He complained, correctly, that dues were being used by his union to support political causes he opposed. The case was ultimately decided by the Supreme Court of Canada (SCC). In a split decision, the majority ruled that compelling the payment of dues and using them for causes unrelated to collective bargaining violated Mr. Lavigne’s freedom of association. However, the Court went on to find that the limitation on his freedom was justified under section 1 of the *Charter*. It ruled that enabling employees to choose not to pay dues for matters with which they disagreed would inhibit the ability of unions to participate in the social and political debates that contribute to democracy. As well, it concluded that the parsing of union dues into valid and non-valid expenditures was something the courts ought not to be drawn into. Three of the seven judges, including the chief justice, dissented. They agreed with the ultimate disposition of the case but argued that it was not a violation of the freedom of association to compel the payment of dues and for unions to use them for political objectives with which some employees might not agree.

*Lavigne* was decided in 1991. Since then, Supreme Court decisions have established a strong connection between collective bargaining and the freedom of association. In 2007, in *Health Services*, the Court ruled that protecting the right to a meaningful process of collective bargaining was an intrinsic part of the freedom of association. In 2015, in *Saskatchewan Federation of Labour*, the Court extended “constitutional benediction” to the right to strike as an inherent element of free collective bargaining, and therefore protected by the freedom of association. Also in 2015, the Court ruled in *Mounted Police* that prohibiting members of the RCMP (Canada’s national police force) from unionizing infringed on the freedom of association of members of the RCMP and this infringement could not be justified under section 1 of the *Charter*.

The effect of the Supreme Court decisions would, in my opinion, make it very probable that Canadian RTW legislation would be overturned by our courts. Despite the high flown rhetoric about individual freedom that sometimes accompanies RTW initiatives, I am confident our courts would see RTW for what it really is – an attack on unions and the right of employees to engage in collective bargaining. As such, RTW would be properly characterized as an infringement of the freedom of association under section 2(d) of the *Charter* and it is extremely unlikely that such infringement could be seen as justified under section 1 of the *Charter*.

## **Bibliography**

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