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The Law and Labour Relations : A Reaction to the Rand Report
Le droit et les relations industrielles

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Article abstract

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The Law and Labour Relations: A Reaction to the Rand Report

H. Carl Goldenberg

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There views on « The Law and Labour Relations » are based in large part on my own experiences and observations as a mediator and arbitrator in industrial disputes over a period of more than thirty years. I admit that at times I did not think I would survive to tell the tale — but I have ! So have the employers who pleaded that settlements I helped to negotiate would ruin them, and the trade union leaders who settled for less than what they assured me their members would ever allow them to accept. And so also has the system of free collective bargaining between employers and trade unions survived, notwithstanding criticisms and threats in the course of or resulting from prolonged disputes.

Some basic principles

I take it for granted that we all accept certain principles : that in a free society human labour is not a commodity or article of commerce; that a worker is free to join with other workers in a trade union; and that, on satisfying certain requirements, the trade union representing the workers should be free to bargain collectively with the employer with the object of concluding an agreement regulating the relationship between the employer and his employees and the employer and the union.

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We accept trade unions and collective bargaining as essential features of modern industrial society. In the absence of collective bargaining there would be no bargaining at all under a system where the parties are as unequal in power as the individual worker and the corporation which employs him. In a famous arbitration award rendered some twenty-five years ago, Mr. Justice Rand sait that « the history of the past century has demonstrated [that] the power of organized labour, the necessary co-partner of capital, must be available to redress the balance of what is called social justice. » [1] The social desirability of labour organization and collective bargaining is therefore now written into our law in the labour relations legislation which makes collective bargaining mandatory under prescribed conditions.

The right to strike

For effective collective bargaining employees must be free not only to form trade unions and to bargain with employers through their unions but also to invoke economic sanctions in support of their bargaining. In the words of Lord Wright, in a leading English case : « The right of workmen to strike is an essential element in the principle of collective bargaining. » The strike and the lockout are necessary counterparts to free collective bargaining : they are methods, however painful, for reaching agreement.

When workers exercise the right to strike they are exerting pressure by withdrawing their services in order to achieve certain ends, be they higher wages, improved working conditions or other benefits. The use of such pressure is, of course, not confined to trade unions. When professional associations fix the fees to be charged by their members they are advising the public that their services will not be available for less. We have seen the medical profession withdraw its services in Saskatchewan and threatening to do so in other provinces in protest against legislation they did not approve — a political strike. The radiologists in Quebec withdrew their services for a similar reason. But a strike is a strike whether you call it a « withdrawal of services » or any other name and whether the participants are blue collar or white collar workers or medical doctors.

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[1] Federal Department of Labour : *Labour Gazette* vol. 46 (1946) no. 1, Ottawa, p. 126.

Strikes are, of course, the feature of labour-management relations which attracts most public attention. They are publicized; the union openly exercises its right to support the sanction of the strike by seeking to halt production and to cut off markets through picketing; and third parties of the public interest may be affected directly or indirectly. The state has to intervene to define the lawful limits of the exercise of the rights of employees and trade unions to protect the interets with which these rights conflict. Accordingly, the right to strike may only be exercised at the times and under conditions prescribed by law.

The need for law

There is a tendency when strikes occur for people to say « there ought to be a law. » But, as we all know, there are laws and there must be laws to regulate the exercise of power and to curb its abuse both by collective labour and collective capital, which is the modern corporation. At the same time, however, we have to recognize the fact labour-management relations are problems in human relations with all the complexities involved. Such problems cannot be solved by law alone. This applies to relations between employers and employees as much as to relations within the family. For example, the law in some jurisdiction imposes upon wives the obligation to obey their husbands. I am confident that, in practice, where there is such obedience, it flows from other considerations.

Similarly, laws, however stringent, will not by themselves insure industrial peace. We have to face the fact that they are human beings on both sides of the bargaining table, that across the table each side faces human interests, human aspirations and ambitions and human fears. Peaceful relations between the parties will therefore depend not on laws but on the degree to which they are willing and able to understand each other and to make the compromises imposed by the facts which confront them. Compromise is not a sign of weakness. Edmund Burke, the great conservative thinker, wrote almost two hundred years ago that : « All government — indeed every human benefit and enjoyment, every virtue and every prudent act — is founded on compromise and barter. » This is particularly true in a democracy, and collective bargaining between employers and trade unions representing their employees is the application of democratic practice to industrial relations.

With public policy as expressed in the law favouring collective bargaining, trade unions have grown in size and in power. The exercise of that power reflected in certain strikes in the recent past has led to considerable criticism of trade union methods and to questioning of the adequacy of existing laws to protect the interests of the parties and the public. Should the right to strike be further restricted? Should the right to strike in certain industries and services be prohibited? Should certain tactics employed by trade unions be more circumscribed or even prohibited? Should we set up new legal machinery for dealing with industrial disputes? Should we adopt certain types of legislation and machinery which have been in operation in other countries? These are some of the basic questions for which answers are being sought.

Industrial Unrest

In seeking the answers, it is well to remember that the same questions are being asked in other countries. The tensions reflected by industrial unrest have manifested themselves in all parts of the globe and have taken forms which we have fortunately escaped in Canada. I regret that my old friend Mr. Justice Rand was somewhat carried away by the violence in China, France and the United States, to which he referred in his recent report, when he was inquiring into disturbances flowing from mass picketing as practiced at two small Ontario plants. After all, industrial disputes in Canada are not often marked by violence; major strikes and most minor strikes are normally legal; and the vast majority of collective agreements are negotiated through free collective bargaining without strikes and with no publicity.

Nonetheless we too have been experiencing a degree of unrest which has led to public concern. Some recent strikes have affected the public more than the parties themselves. Moreover, services seldom affected by collective bargaining have been interrupted. Doctors, nurses, teachers and postmen have gone on strike. And, in a period of inflation and of rapid technological change, trade unions have demanded wage increases and terms of employment which go beyond what the public has been accustomed to expect. The result has been a tendency to question the operation of collective bargaining as we know it.

Before seeking remedies it is well to look at some of the causes of current unrest — an unrest which, as we know, is not confined to trade unionists. A basic cause is that we are living in a society of rising expectations in which more and more people want more and more of the good

things of life. Mr. Justice and referred to this in his recent report as « the emergence of asserted claims by masses of men and women to a greater sharing of what the more successful of their fellows look upon as the prizes of life. Their class furnishes the labour for the achievements of this industrial age. The style they seek to follow is set for them by the more successful. It is this contest of satisfying desires that presents today in our communities one of the most, if not the most, intractable of society's problems. » [2]

The demands of the masses are intensified by mass advertising and the standard of living it portrays. Rising educational levels have also increased their desire for more material goods. In this, workers are no different from other people, and they look to their trade union leaders to obtain for them the necessary means to satisfy their wants. As the younger generation of workers takes over, trade unions become more militant in their demands and the older trade union leaders face rebellion if they cannot succeed in satisfying them. This accounts for the occasional refusal to ratify agreements negotiated by the leaders and for wildcat strikes.

I suggest that more restrictive labour laws are not going to put an end to the growing desire for higher living standards. It is nevertheless incumbent upon trade union leaders to avoid making exaggerated claims and demands which create undue expectations among their members, when the leaders know that they will have to compromise in the course of negotiations. Moreover, union negotiating committees should be given more decision-making authority. Employers cannot be expected to bargain with trade union officers who cannot make a bargain; they will not make their final offer if the union membership may refuse to ratify an agreement reached with their negotiators. Union democracy is important, but for effective collective bargaining and enforcement of contracts there must be some compromise between the authority of the elected officers and the control over their actions vested in the membership.

I now turn to another basic cause of worker unrest. It is insecurity flowing from the fear of displacement because of technological change. Men trained in particular skills, which they expected to use for the rest of their working lives, may find, at an age when it is impossible for them to be retrained or to obtain new employment, that their skills are no longer required. And the loss of their jobs may affect their pension rights,

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[2] Rand, Ivan, C.: Report of the *Royal Commission Inquiry into Labour Disputes*, Government of Ontario, 1968, pp. 17-18.

their seniority and other acquired rights. Here we find the raw material of conflict. It is anxiety for job security and fear of unemployment that lies at the root of some of the recent major industrial conflicts in America and threatens further serious unrest unless the problem is dealt with fairly by employers, unions and the state.

I believe that, before introducing changes which will displace or shift labour or otherwise materially affect the relationships with labour, it is the responsibility of management to give adequate advance notice of the proposed changes to the union representing its employees, to consult with it on the best means of adjusting to the situation, and to provide for retraining or relocation or compensation for the employees who are displaced. This is now provided for in some collective agreements but, in the absence of such provisions by agreement of the parties, the matter should be dealt with by legislation. In this connection, I draw attention to the Redundancy Payments Act in the United Kingdom, enacted in 1965, which imposes on the employer an obligation to make certain payments to employees who have been in his continuous employment for a minimum period of two years after the age of 18. The underlying principle has been stated by a leading authority, Professor Kahn-Freund, as follows : « If an employee's property in his job should be, in effect, expropriated as society seeks more efficient forms of production, he is entitled to receive compensation. »

I suggest that before we have recourse to more restrictive labour laws, which may or may not work, it would be wise to seek to deal with some of the basic causes of industrial unrest and, in relation to unrest, to review first the existing labour legislation in the light of experience and of changing conditions. The law in operation may at times contribute to unrest. For example, if it permits delays which serve to retard agreement unduly, the delays should be reduced. Undue delays in the hearing of grievances and undue delays intended to defer legal strike action are frequently responsible for wildcat strikes. Frustrating delays lead to irresponsible action.

It may also be found that procedures which are appropriate to some branches of industry are not appropriate to others. Procedures which meet the requirements of industries providing year-round employment in a factory do not necessarily meet the requirements of industries offering only irregular or seasonal employment, such as construction and shipping. Where new procedures and practices appear necessary, the law should be changed accordingly.

It is not enough, however, for the law alone to take cognizance of the facts of industrial life. It is more important that these facts be faced by the parties themselves. They have to live with them. And if to live with them requires compromises and changes in traditional bargaining procedures, both trade unions and employers must be prepared to make them. Failing this, public opinion may, wisely or unwisely, lead to the imposition of more restrictive controls.

I say *more* restrictive controls because the law now imposes restrictions on the exercise of the rights of both unions and employers. For example, the right to strike is carefully defined and violations subject the union and its members to penalties. I am aware that this has not prevented violations — but I know of no other laws on the statute-books, be they the law against fraud, theft or combines in restraint of trade, which are not violated from time to time. Organized labour is not less law-abiding than any other group in the community.

Strict controls are, of course, essential to curb abuse of power. In an age of big business and its counterpart, big unions, each in a position to wield great economic power, the exercise of such power, whether by unions or business, is properly a matter of public concern and calls for appropriate protection by law against its abuse. Unions, for example, are no longer voluntary associations of workers : they have acquired quasi-public powers. They are now granted monopoly bargaining rights in units appropriate for collective bargaining; they may freely negotiate union security clauses ranging from an « open union shop » to a « closed shop »; and they have almost complete control over entrance requirements and continuing membership. Such vast powers lend themselves to abuse and call for protection by law of the rights of the individual worker against discrimination in relation to such matters as union membership, his civil rights in the union and an equitable share in the distribution of work, with the right of appeal to a public tribunal.

As an example of abuse of authority, it is alleged that some union leaders call strikes without the approval of their members. Considering the problems faced in organizing and conducting a strike, I would say that such instances are rare. But, to the extent that the allegation is true, it points to an abuse that should not be condoned. The law now prohibits a strike until all other means of legal settlement have been exhausted. I believe that the law should further require that no strike shall be declared until the prior consent of a proper majority of the workers affected has been obtained through democratic procedures but that no strike vote

should be held until the exhaustion of the conciliation procedures prescribed by law. Insofar as concerns such union tactics during a strike as picketing, which is a lawful means for supporting the economic sanction, I believe that they should be governed by a code which accords with the legislative policy of collective bargaining but that the general laws for the protection of persons and property must continue to apply to acts in violation thereof.

Strikes affect the public image of labour and this is a factor which it cannot afford to ignore. This image is not improved by disputes arising from a persistent refusal to make reasonable compromises or peaceful adjustments required by the facts. There are, for example, strikes arising from jurisdictional disputes between unions. The public does not understand that the underlying reason for such disputes is the simple human instinct of self-preservation. In the construction industry, where these disputes mainly occur, the unions operate in a labour market with an extremely high rate of turn-over and, therefore, a very low degree of security of job tenure. Accordingly, they seek to achieve more security for their members by protecting their craft organization. But, jurisdictional disputes in the ranks of labour which lead to strikes and injure innocent parties do not help to create a favourable image and should not be condoned. The public understands strikes by unions arising from conflicts with employers; it does not understand strikes arising from conflicts between unions. This is a fact which must be faced because institutions operating in a democratic society cannot afford to ignore the impact of their conduct on public opinion.

The public must not be led to conclude that union leaders are « strike happy. » Nor should it be led to conclude that there is a cure-all for settling all industrial disputes without strikes or lockouts. Mediation or voluntary arbitration by third parties would be the more civilized method, but since mutual confidence has not yet replaced mutual suspicion, I am afraid that we have not yet attained the required degree of civilization. Nevertheless, the evolution of public policy on labour relations has affected the use of the strike weapon in Canada. The enactment of laws to protect freedom of association and to establish collective bargaining rights has to a large degree, although not entirely, eliminated what was for many years a major cause of strikes — the struggle to win employer recognition of unions. Such strikes are now illegal. So also are strikes over grievances, involving the interpretation or application of the contract : such disputes are now settled by compulsory arbitration.

It is sometimes suggested that compulsory arbitration should apply to all disputes. This means a denial of the right to strike which would be incompatible with our democratic system. To force men to work under conditions to which they object can only be justified in a democratic state by very exceptional circumstances. Compulsory arbitration is also incompatible with real collective bargaining : neither side will make the concessions which it is prepared to make if the final decision is likely to be made by a third party. Moreover, both labour and management are opposed to compulsion by a third party. Finally, there is no certainty that compulsory arbitration will eliminate strikes. In Australia, where compulsory arbitration has been in effect for many years, there are far more strikes and lockouts annually than in Canada, although they are much shorter in duration. It is of interest to note that, after visiting many countries to study their labour relations laws, Mr. Justice Rand concluded that « each has developed its own pattern which it would be out of the question to try to transplant bodily to another society. »

There are, of course, instances where governments in Canada have imposed compulsory arbitration because it was deemed that a work stoppage would injure a vital or essential public interest. Such intervention has been rare ; in a free society the power to force compulsory settlement must be used with great discretion. Nevertheless, we have to accept the principle that where the interests of the parties conflict with the overall interests of the community, it is the interests of the community which must prevail. This principle must govern in any area where it is established that the health, safety or welfare of the community may be injuriously affected by the conduct of organized groups, be they trade unions, business groups or professional associations. In such cases, having exhausted all other means of settlement, the state, in my opinion, is obligated to resort to compulsion.

Conclusion

There are many measures which have been recommended to governments in Canada in the recent past for the more effective dealing with industrial disputes and their consequences. I have already expressed my view that industrial relations being human relations cannot be solved by law alone. Too often laws are enacted in this field which cannot be enforced and legislation which is not enforceable serves only to bring the law into disrepute. I agree with the conclusion reached by Professor

Kahn Freund, of Oxford University, when he says that « the longer one ponders the problem of industrial disputes, the more sceptical one gets as regards the effectiveness of the law. Industrial conflict is often a symp-ton rather than a disease. I think we lawyers would do well to be modest in our claims to be able to provide cures. »

LE DROIT ET LES RELATIONS INDUSTRIELLES

Les remarques qui suivent sont en grande partie basées sur mon expérience personnelle en tant que médiateur ou arbitre de conflits industriels depuis plus de trente ans.

Notre législation reconnaît aujourd'hui la nécessité des organisations syndicales et de la négociation collective et oblige, sous certaines conditions, les parties à négocier et accorde le droit d'utiliser des sanctions économiques en cas de désaccord.

C'est évidemment cet aspect du domaine des relations du travail qui attire le plus l'attention du public que l'État protège en en définissant certaines conditions d'utilisation.

Mais les problèmes de relations du travail ne peuvent pas tous être réglés par la loi d'autant plus qu'il s'agit bien souvent de problèmes de relations humaines. La réussite d'une négociation et un bon climat dans les relations du travail ne dépendent pas de la loi, mais du degré auquel les parties sont prêtes et capables de s'entendre et de faire des compromis.

Le conflit industriel que nous connaissons au Canada est souvent de moindre importance que celui d'autres pays. Nous avons la chance d'avoir un atmosphère qui n'est quand même pas souvent vicié par la violence. Certains cas marginaux tendent à nous faire oublier le grand nombre d'accords et de conventions collectives signées dans l'ordre.

Nous croyons, cependant, qu'une législation du travail plus restrictive ne suffirait pas à mettre fin aux désirs croissants d'un plus haut niveau de vie, désir très légitime dans une société de consommation telle la nôtre. Notons, en plus, que la cause principale du conflit industriel aujourd'hui reste cette insécurité d'emploi à laquelle est soumise le travailleur suite aux changements technologiques.

Une solution comme l'arbitrage obligatoire généralisé est loin d'être compatible avec notre régime démocratique et avec la notion que nous avons de la négociation collective.

Nous l'avons déjà dit, et nous le croyons fermement, qu'étant des relations humaines, les relations industrielles ne peuvent être réglées uniquement par la loi.