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### Strikes and the Law A Critical Analysis Les grèves et la loi Une analyse critique La Huelga y las leyes Un Análisis Crítico

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# *Strikes and the Law*

## *A Critical Analysis*<sup>1</sup>

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*In this paper, I adopt a critical sociological approach to analyse how labour law shaped a 23-day strike at a western Canadian university in the fall of 1995. I begin with a brief discussion of the sociological alternative. Next, I provide a chronology of the strike, followed by a brief analysis of how both economic and sociological models contribute to understanding the “rationale” of the strike. I then discuss the implications of specific labour laws for this rationale, extending the critical legal studies tradition by establishing how legal biases against unions shape strike activity. I conclude with a discussion of possible labour law reforms which follow from the analysis.*

Labour law has long been viewed as of central importance for shaping strike activity. Yet research into the relationship between strikes and the law has been limited, and that research which has been conducted has tended to focus on the economics of strikes, in large part viewing strikes as negotiating mistakes attributable to imperfect or asymmetrical information (e.g., Gunderson, Kervin, and Reid 1986, 1989; Gunderson and Melino 1990; Cramton, Gunderson, and Tracy 1995; Budd 1996). This research suggests that labour law may have important implications for strike activity.<sup>2</sup> Yet it

1. This paper was presented at the Fifth Annual Bargaining Conference, the University of Minnesota, Oct. 11-12, 1996. Paul Phillips, Jo Durup, and Ray Currie made valuable comments on an earlier version.
2. The analysis by Cramton, Gunderson, and Tracy (1995) is perhaps the most definitive. They estimate that a ban on replacement workers increases strike incidence, strike duration, and wage settlements; that mandatory strike votes and the right to reopen negotiations reduce strike incidence but not duration or outcomes; and that compulsory conciliation and cooling off periods are not significantly associated with these three outcomes.

typically does not address how the law shapes either the behavioural rationale of strikes (Godard 1992a, 1992b), or their social and psychological consequences. It also does not consider how the law can impinge upon the ability of workers to engage in meaningful strike activity and, ultimately, meaningful collective bargaining.<sup>3</sup>

This paper addresses these limitations by outlining a more critically oriented, sociological approach to the analysis of strikes and the law, and drawing on this approach to analyse how the law shaped a 23-day strike at a western Canadian university in the fall of 1995. In so doing, I build on earlier work characterizing strikes as manifestations of collective voice (Godard 1992a, 1992b). I also build on the critical legal studies tradition (e.g., Stone 1981; Klare 1982; Woodiwiss 1992), demonstrating not only how the institutional context of collective bargaining is biased against unions and hence contrary to the orthodox pluralist doctrine of joint sovereignty, but also how these biases affect the likelihood, dynamics, and outcomes of strike activity.<sup>4</sup>

I begin with a brief discussion of the approach adopted in this paper. Next, I provide a chronology of the strike, followed by a brief analysis of how both economic and sociological models contribute to understanding the rationale of the strike. Finally, I discuss the implications of specific labour laws for this rationale, and in so doing both illustrate the value of a critical sociological approach and establish a case for selected labour law reforms.

### *A CRITICAL SOCIOLOGICAL ALTERNATIVE*

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There have been a number of critical sociological analyses of strike activity (e.g., Hyman 1972; Edwards and Scullion 1982; Fantasia 1988). The assumptions underlying these analyses often vary and in many cases are not clearly established. But as employed in this paper, the critical sociological alternative can be characterized as follows.

First, in contemporary market economies, the conventional employment relation is, at law, an asymmetrical social relation in which workers

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3. This need not be considered a criticism, for virtually by definition this literature is concerned only with the economic side of strikes. More thorough assessments of this literature as it compares to alternative approaches appear in Cohn and Eaton (1989); Franzosi (1989); Edwards (1992); Godard (1992a, 1994a).

4. The implicit argument is not that labour laws operate strictly against the interests of unions, but rather that they fail to create a situation under which workers and their unions are on "equal ground" with management, and that this has a variety of negative consequences.

are in a position of subordination to managerial authority. Because “capital hires labour” (rather than vice versa), this authority is exercised primarily in accordance with the interests of owners. As a result, “behavioural” problems having to do with trust, fairness, and legitimacy are endemic to the employment relation. Strike activity is, in turn, largely a manifestation of these problems, serving as a primary means through which workers are able to collectively voice discontent and distrust, either with the exercise of managerial authority in general, or with management’s position on a particular issue (Godard 1992a, 1992b).

Labour laws play a major role within this context, for they not only provide workers with rights within the employment relation, they also tend to limit these rights and to reinforce the asymmetrical nature of this relation (see also, e.g., Stone 1981; Woodiwiss 1992).<sup>5</sup> Both can have major implications for the conditions of subordination, for the nature and content of collective bargaining, for the ability of workers to mount a meaningful strike, and, ultimately, for the likelihood, the dynamics, and the consequences of strikes themselves. Thus, it is important to address not only how labour law shapes the behavioural side of strikes per se, but also the importance of the broader institutional context of employment relations and the role of labour law within this context.

Second, strikes have important non-economic consequences. Not only can strikes prove to be highly traumatic for the parties directly and indirectly involved, they can also fundamentally reshape how individuals view themselves and others, with implications for their orientations towards their work, their employer and their unions. Accordingly, it is important to explore how the law shapes these consequences.

Third, the right of workers to collectively express discontent through strike activity is a fundamental democratic right. It is also fundamental to the *effective* functioning of free collective bargaining, and hence to the ability of workers to negotiate with their employers on anything approaching equal terms. Any analysis of strikes and the law must therefore go beyond the economic implications of labour laws to afford a central place for the a priori ability of workers to engage in meaningful strike activity.

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5. Of particular relevance to this paper are laws reinforcing the doctrine of management rights both during and subsequent to the term of a collective agreement. The extent to which this is the case can of course vary. For example, management rights would appear to be more limited when collective bargaining is complemented with alternative systems of legal representation, including works councils and codetermination. This, however, is outside of the purview of this paper.

Fourth, strikes are ultimately a reflection of conscious choice processes and interactions between the parties and their constituents.<sup>6</sup> These processes and interactions are shaped by conventional industrial relations variables, and this is why systematic associations tend to be observed. Yet these variables by no means determine the actions of the parties, and they often have competing and even contradictory implications, so that their apparent “effects” ultimately depend on largely unpredictable social processes. These processes can be understood only through interpretive, qualitative analysis. Accordingly, while quantitative methods can play an important role in strike research, it is essential that they be complemented by more interpretive, qualitative analysis.

Below, I apply this approach to analyse the implications of established labour laws for a 1995 faculty strike at a western Canadian university. The analysis reflects a participant-observation methodology (Whyte 1955), and is based largely on observations garnered as a rank-and-file member of the union, and on extensive conversations with other striking faculty both during and after the strike. Although this method may suffer important limitations, it is less susceptible to the communication barriers and interpretive difficulties which can plague conventional field research. To ensure accuracy, the analysis reports widely agreed upon developments and interpretations of these developments, and has been checked for accuracy by both the chief union negotiator and by a major actor on the management side.

### *THE STRIKE*

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#### *The Context*

The university in question is located in the province of Manitoba, which has a population of approximately one million. Roughly 700,000 people live in the capital city of Winnipeg, distinguished in industrial relations circles by its General Strike of 1919. Manitoba is both ethnically and politically diverse, with two predominant political parties: the left-of-centre New Democratic Party, and the right-of-centre Conservative Party. Labour union density is approximately 37 percent, which is about average for Canada as a whole (Murray 1995: 163).

Manitoba labour law is broadly consistent with that of most other provinces. With respect to strikes, workers in the private sector and most of the public sector (including post-secondary institutions) have a right to

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6. See Godard (1993, 1994b) for an elaboration on this point, and an attempt to reconcile it with quantitative research methods.

strike, but only after an agreement has expired and a good faith attempt has been made to reach a settlement. Employers are permitted to hire replacement workers, but workers have a right to return to their jobs after a strike. The provincial Minister of Labour can also order either conciliation or mediation in the event of an impasse, with the latter requiring the mediator to write a report with recommendations if a settlement is not reached. In addition, the union is required to hold a secret ballot vote prior to calling a strike, and must win majority consent in this vote. All settlements must be ratified by the membership. Finally, if a settlement is not reached within one year of the expiry of an agreement, the employer can choose to disregard that agreement, provided it has given a twelve-month notice of its intention to do so.

The university is the dominant post-secondary institution in the province, with a student body of 22,000 full- and part-time students, and a full-time faculty of approximately 1500. It was initially founded in 1877, but grew relatively slowly until the “baby boom” hit in the late 1960s. At this time, it underwent a rapid expansion, both in programs and in faculty size. The faculty association was legally certified as an independent union in the early 1970s, largely in response to the reportedly autocratic style of a newly appointed university president. Over the ensuing two decades, relations between union and administration officials became increasingly adversarial, with both sides preferring to resolve disagreements through the formal grievance and arbitration process, and relying increasingly on lawyers and legal remedies. However, the relationship remained strike- and lockout-free through to 1995.

In addition to improved wages and benefits, the faculty association managed to negotiate a number of rights and protections for its members during this period. Of particular importance to the present analysis was a financial exigency clause, enabling the administration to resort to layoffs of faculty only if there was a major financial exigency and alternative measures could not be found. In addition, layoffs could be made only after extensive and lengthy consultation processes with both union representatives and the university senate, and only by declaring entire departments (rather than individuals) redundant. These restrictions were intended to ensure that the academic needs of the university would not be unduly sacrificed in the event of a financial crisis, and that any such crisis could not be used as a pretext for targeting individuals (or their courses), thereby protecting academic freedom.<sup>7</sup>

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7. The exigency clause, and the accompanying redundancy clause, were 12 pages in length. They are available on request.

Beginning in the early 1990s, matters began to change. In 1992, a newly re-elected Conservative government appointed a commission to explore the future of post-secondary education in the province. Dubbed the "Roblin Commission," after its chair, Duff Roblin, this commission consisted of influential Conservative party supporters, none of whom had any meaningful experience with post-secondary education beyond the attainment of undergraduate degrees two decades (or more) earlier. Their report was widely viewed as negative, concluding:

a) that the quality of teaching is declining; b) that research has become the paramount function of universities to the detriment of teaching and, moreover, academic rewards are skewed in favour of research; c) that research lacks sufficient provincial focus; and, d) that there is a lack of transparency in relation to teaching, research, and service (Roblin et al. 1993: 15).

Based on these conclusions, the commission's recommendations included greater attention to teaching (1993: 17), more applied research (1993: 22), increased "provincial focus" in research (1993: 20), and enhanced accountability (1993: 17-21). The commission report also suggested that the province privilege the community college system over the university system in the future allocation of resources (1993: 88). Finally, it expressed a need to alter existing exigency and redundancy arrangements (1993: 66).

In 1994, the board of governors of the university took some preliminary steps to begin to implement governance changes suggested by the Roblin Commission. One of these changes included greater involvement in collective bargaining by the board. While the negotiation of collective agreements had in the past been almost entirely left to the administration, the board established its own committee to oversee negotiations. But the university was slow to adopt the main recommendations, resulting in a deteriorating relationship between the university and the government.

The university also found itself subject to increasingly tight funding, with budget cuts of approximately five percent in real dollars between 1993 and 1995. In 1993 and 1994, the administration managed to negotiate consecutive one-year contracts with no wage or benefit increases, and a freeze on career increments. In addition, in early 1993, the provincial government mandated fifteen days off without pay for all provincial government employees, and authorized all government-funded organizations to follow suit unilaterally. In response, the university administration declared six days off without pay for both the 1993-94 and the 1994-95 academic years.

### *The Dynamics of the Strike*

Negotiations on a new contract began in the spring of 1995, with the administration giving notice of its intent to disregard the agreement after a one-year period and introducing more stringent demands as negotiations continued. Of particular concern to the union was a demand by the administration, consistent with the Roblin Commission report, that the financial exigency clause be substantially weakened, enabling the administration (subject to the approval of the board of governors) to unilaterally declare financial exigency and decide which individuals would be laid off, with only a limited right of appeal for those affected. The union executive interpreted this as a major potential attack on academic freedom, arguing that it would allow administrators to target individuals for political reasons.

Though the parties continued to meet, little progress was made at the bargaining table. A strike vote was held in early October, with a turnout of about 70 percent, and 73 percent of those voting supporting a strike. But there was still little change in the administration's position. The strike was finally called on October 18, with three-quarters of all faculty in the bargaining unit respecting the picket line. The strike lasted for 23 days, during which picket line attrition was minimal.

The dynamics of the strike were relatively straightforward, with the administration attempting to convince faculty, students, and the general public that the clause they were seeking would not threaten academic freedom, and faculty representatives claiming that it would mean an end not only to academic freedom, but also to the very integrity of the university. Meanwhile, the administration attempted to keep as many classes as possible in operation, with some faculties actually bringing in "replacement" instructors. No official, university-wide policy was initially stated as to whether students refusing to cross the picket line and attend continued classes would be penalized, although the associate dean of the Faculty of Management posted a statement informing students that failure to attend scheduled classes was essentially at their own peril.

Two weeks into the strike, the provincial Minister of Labour met with the parties and initially agreed to appoint a mediator. However, he subsequently altered his original offer, agreeing to do so only if striking faculty went back to work in the interim, a condition which the union would not accept. Accordingly, the strike continued for another week, until the Minister changed his mind and appointed a local labour lawyer to mediate the dispute. He was given a three-day deadline, at which point he would be required to submit recommendations to the minister and the parties if a settlement was not achieved. Although it was necessary to extend the



deadline by two additional days, a tentative settlement was finally reached and approved by the faculty on November 9.

### *The Outcomes*

The settlement was three years in duration, with no across-the-board pay increases, but some upward adjustments on the pay scale. Faculty were originally to be subject to eight days off without pay in each of the first two years and six days off in the third, but because of the money saved during the strike, the administration agreed to wave the eight days off in the first year. In order to make up for lost class time during the strike and hence "save" the term, striking faculty were also to teach an extra two weeks past the originally scheduled end of the term, *without pay*. On the financial exigency clause (available on request), the administration was now permitted to declare faculty redundant on the basis of program as well as departmental affiliation, but only if a financial exigency was declared by a tripartite committee, subsequent to an independent financial consultant's report if the parties could not agree on the extent of the exigency. Faculty declared redundant would receive severance pay equivalent to between 12 and 18 months of salary, depending on their years of service. They would also have recall rights for a three year period, for any position for which they could establish competence. Finally, they also had the option of one year of retraining support, so that they could qualify for other positions.

### *INTERPRETING THE STRIKE*

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It is outside of the purpose of this paper to attempt an in-depth analysis of the rationale of the strike. However, a brief interpretation is necessary to set the stage for addressing the implications of labour law.

To an extent, the strike can be interpreted using an economic approach. Consistent with this approach, there appears to have been substantial confusion on both sides of the bargaining table. On the administration side, there were at least eight different groups with potential direct or indirect involvement.<sup>8</sup> On the union side, there were only three groups

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8. These groups included: the bargaining team (all from the administration), the central administration of the university, a board of governors's bargaining oversight group, the board of governors, a small group of deans sympathetic to the concerns of striking faculty, influential "downtown" conservatives (represented in part on the board), the Ministry of Labour, and the Conservative government caucus. It is unclear as to the relative influence each of these parties was able to exert in the negotiation process. But there can be little doubt that most if not all of these groups had some involvement, greatly complicating the decision process on the administration side.

(the bargaining team, the union executive, and faculty members), but none of the three members of the negotiating team had prior experience negotiating with the administration, and the union president had been in office for less than six months. In addition, the administration's proposed exigency clause was lengthy and ambiguous, and there was considerable uncertainty as to its precise meaning and implications, with both sides offering different interpretations. Further complicating matters, there was extensive uncertainty as to the real agenda underlying the proposal of this clause, with many fearing that it was a Trojan Horse through which the government was planning to impose a neoconservative agenda on the university. Finally, the administration appears to have miscalculated with respect to the collective resolve of faculty members and the reaction of students and the public to a strike, which were far more favourable (or less unfavourable) to the union than many had originally expected, and which may in turn explain the attempt to continue classes.<sup>9</sup>

It would thus appear that, at least on the surface, the economic approach may be of considerable value in accounting for the strike. Had it not been for the levels of uncertainty and complexity surrounding the negotiation process, a strike might not have occurred. Yet this approach fails to allow for the most critical factor in the strike: the resolve of faculty members. Without this resolve, the strike either would not have taken place, or it would have been of much shorter duration, with much different outcomes. It is in this respect that the sociological approach is of value.

There are four interrelated explanations for the resolve of the faculty. The first is fear. Many strikers (though probably a minority) were worried that they could be targeted if the proposed clause was adopted. The second is "moral." There was genuine concern about the implications of the clause for academic freedom and ultimately the integrity of the university, and about the possibility that, if faculty gave in, it would serve as a precedent at other Canadian universities. The third is affective. Many of the faculty were demoralized by cutbacks and by perceived government disdain for the university, and the strike served as a mechanism to voice their discontent. The fourth, and most important, however, is distrust. If faculty

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9. As noted earlier, only about 70 percent of faculty voted in the strike vote, and only 73 percent of those voting favoured a strike. There was speculation among "anti-union" faculty that nonvoters would not strike, and that many of those voting in favour were simply trying to provide a mandate to the union, and, when push came to shove, would also not strike. Thus, only a minority were actually likely to strike, and many of these would soon "cave in" to public and student opinion, especially once they realized they were in a minority. But for this scenario to hold, it would be necessary to continue classes.

had been able to trust the administration to apply the proposed clause in a constructive manner, and only as an absolute last resort, it is highly unlikely that a strike would have even occurred. But instead, there was widespread distrust of how such a clause would be used. This distrust reflected the traditionally adversarial relation between the faculty association and the administration, although it had been heightened considerably by the Roblin Commission report and by what appeared to be a deteriorating relationship between the university and the government.

These four explanations arguably come closer than do their economic counterparts for explaining the rationale of the strike. But a real understanding of the strike requires an analysis of the role played by labour law, not only in shaping the resolve of strikers, but also in shaping the dynamics and outcomes of the strike in general.

#### *THE ROLE OF LABOUR LAW*

Established labour laws affected the strike in a number of ways. Some of these are consistent with economic models. For example, if a respected neutral had been brought in to provide an interpretation of the meaning of the proposed exigency clause, much of the uncertainty surrounding its implications would have been reduced. Similarly, if a mediator had been ordered in earlier in the dispute, the dispute may have been settled earlier, either during the mediation process or subsequent to the mediator's issuance of recommendations. Yet, there was no provision for a neutral "fact-finder" under the law, and because the government had a vested interest in negotiations and apparently believed that a mediator would not serve this interest, it delayed its decision to appoint a mediator. If the decision to call in a mediator had fallen under the jurisdiction of a neutral body (e.g., the labour board) rather than the Minister of Labour, this delay might not have occurred.

It would thus appear that the economic model is of some value for analysing the implications of labour law for the strike. Had the law been different, the level of uncertainty and misinformation might have been reduced, with important implications for the likelihood and duration of the strike. Yet labour law had a number of more important implications, implications which pertain primarily to the sociology of the strike. Below, I identify seven such implications. These implications are inter-related, and some have to do with laws which are specific to the province of Manitoba. The purpose will be to establish not just the importance of individual laws, but also to demonstrate the value of adopting a sociological approach to the analysis of the importance of labour laws in general.

First, and of perhaps most fundamental importance, is the legal doctrine of residual rights under collective bargaining. Consistent with North American labour law in general, virtually anything which is not specifically negotiated into the collective agreement in Manitoba falls under the purview of management. This creates a fundamental imbalance (Stone 1981; Woodiwiss 1992), because although management can otherwise act to unilaterally change the status quo at any time, employees can only attempt to negotiate any such changes, and even then only at specified intervals and over a limited range of issues. In addition, employees in effect start with “nothing,” instead having to negotiate rights away from management. Not only does this place them at a fundamental disadvantage, it means that they appear as the aggressor. It also results in increased adversariness and a bureaucratization of the labour-management relation, as the union is compelled to “fight” for elaborate provisions simply to ensure a minimal attainment of the very rights and protections normally assumed for a democratic society. This in turn has major implications not only for the content and administration of collective agreements, but also for the nature of labour-management negotiations and ultimately, the likelihood of strike activity.

These implications were especially apparent in the faculty strike. This strike was not about a particular grievance held by faculty members, but rather about mistrust as to how the administration would act in the future, if given the opportunity. To an extent, this mistrust reflected the specific circumstances and historical context of the employee-employer relation. But even if this were not the case, the residual rights doctrine, coupled with the nature of the employment relation in general, created a circumstance where such trust would be virtually impossible. Without a specific clause in the agreement, faculty would have no recourse if the administration chose to act in bad faith in the future, regardless of how it had acted in the past. Thus, rather than wait until such time that a financial exigency occurred (if it ever did), and the administration made its intentions known, faculty members were placed in a position of having to fight for protections against a future contingency which might never have occurred.

A second, and closely related problem, is the prohibition against strikes during the term of an agreement under Manitoba (and virtually all Canadian) labour law (also see Haiven 1995). The ability to strike would essentially provide employers with increased incentive to accommodate employee concerns in the event of any major alteration of the status quo during the term of an agreement. Without this ability, this incentive is far less important, and any problems employees might have with any management-initiated change are deferred until the next round of negotia-

tions. Not only does this result in greater complexity in these negotiations, it also means that employee concerns are not dealt with in a timely manner, even though managerial actions from which they derive may have devastating, irreparable, and often unjust consequences for the individuals affected. Union negotiators must therefore anticipate such consequences and attempt to negotiate protections against them in advance. This exacerbates the negative implications of the residual rights doctrine for both the negotiation and content of collective agreements. This clearly seems to have been the case with respect to the faculty strike. At minimum, this strike would not otherwise have occurred until such time that management actually attempted to declare financial exigency, and even then only if it acted inappropriately.

Third, the limited “bridging” provision, under which management has the right to disregard a collective agreement one year after its expiry, both reflects and reinforces the asymmetrical nature of the employment relation under the law, for it means that, at the end of this period, all previous union gains are nullified, and full authority reverts to management. It also places workers in a defensive position, where they have little choice but to strike regardless of whether they are the aggressor. This in turn not only opens the door for management to encourage union members to cross the picket line (i.e., because there is no lockout), it also has negative implications for how the union is viewed by third parties.

These implications were especially apparent with respect to the faculty strike. If faculty had continued negotiations without a strike for any length of time, a settlement might not have been reached before the twelve-month period was up. Thus, the administration would have “won” by default, and hence been able to declare individuals redundant. Because faculty did not trust the administration to use such new-found discretion in an appropriate manner, a strike became the only option. Indeed, if this right had not existed, faculty would have had little reason to strike, and so it would have been incumbent on management, as the real aggressor, to declare a lockout. This would have had major implications for both public and student opinion, and it would have effectively prevented the administration from attempting to continue classes during the dispute. It is thus quite likely that the administration would not have called a lockout, and if it had, that the stoppage would have been much shorter. But regardless of whether this would have been the case or not, the existence of this right not only left faculty with little choice but to strike, it also placed them at an unfair disadvantage relative to the administration. Under alternative circumstances, it may have precluded them from exercising their right to strike altogether.

A fourth, related aspect of labour law, and one which is unique to Manitoba, is the requirement that the employer provide a twelve-month notice that it will no longer recognize an expired agreement. This appears to be designed to provide adequate warning to the union, and hence does not entail a specific bias against unions. Yet it is of interest because it represents an attempt to introduce an element of "fairness" that would not otherwise exist, but can also have the unintended effect of increasing the level of distrust and adversariness between the parties. This was especially true in the strike in question, where faculty perceived the administration's notice as indicative of an intent to play hardball, and perhaps even to break the union. This appears to have substantially altered the interpretive "lens" through which the administration's subsequent actions were viewed. In particular, many read the administration's bargaining posture, especially its unwillingness to move substantially after a strike vote had been taken, as confirming their initial fears. The issue then became one of not whether to strike, but rather one of determining when, strategically, was the best time to do so. Whether a strike would have been averted had notice not been required, and hence not given, is unclear. But the administration's subsequent actions may have been interpreted differently, thereby resulting in less adversarial negotiations and, perhaps, a lower level of support for the strike.

Fifth, the legal right of employers to continue operations during a strike in effect enables employers to attempt to undermine a strike and ultimately the union involved. It also escalates the level of acrimony and distrust both during and after a strike, not only between striking workers and management, but also between striking workers and their nonstriking counterparts. Moreover, it can have substantially negative consequences for third parties, who can find themselves "caught in the middle," having to act in ways which are against their consciences.

These consequences are especially apparent with respect to the faculty strike. First, to many, the administration's actions signalled that it did not respect a principled decision of faculty to defend the university's integrity, and, to the contrary, was seeking to undermine that decision. This in turn increased the level of acrimony and distrust, both during and after the strike. Second, those who crossed the picket line were viewed with considerable derision, both because doing so conveyed to strikers a disrespect for the results of a democratic process, and because doing so undermined those who were on strike for what they believed to be an important cause. Those who crossed also came to be viewed as "free riders," not only because they would not be subject to the proposed exigency clause, but also because they benefited from the eight-day credit in days off without pay, and were not required to teach for an extra two

weeks, as were those who respected the picket line. Third, students were subject to considerable uncertainty as to whether they would be penalized for refusing to attend classes during the strike, and hence were effectively coerced to attend – thereby supporting the administration – even if doing so was against their conscience.

Sixth, just as the right of the employer to continue operations has detrimental consequences, so does the corresponding right of union members to cross the picket line without sanction. For a legal strike to be called in Manitoba, the union must hold a secret ballot vote, and must receive majority consent. Yet there is no *quid pro quo*. If a majority vote against striking, then a minority cannot disregard that vote and go on strike without substantial risk. But if a majority votes in favour of striking, a minority can disregard the vote, cross the picket line, and collect their pay with impunity. A union cannot enforce any fines it might attempt to levy against nonstrikers, and while it can expel these individuals from its membership, doing so does not affect their employment status. Not only does this represent a clear inequity under the law, it makes it easier for employers to induce workers to cross the picket line (often by threats and intimidation) and hence to continue operations, thereby reinforcing the negative implications associated with this right. Perhaps even more important, it is contrary to the principle of majoritarianism, for it effectively means that the percentage voting in favour of a strike must substantially exceed a mere majority before a strike can be considered feasible.

It is not entirely clear how the right to cross the picket line affected the faculty strike. However, had strike breakers been subject to meaningful sanctions for doing so, it is likely that fewer would have crossed, thus strengthening the union's position and reducing the level of divisiveness. It is also likely that the administration would have been less likely to view the continuance of classes as a viable strategy, thereby inducing it to make more concessions prior to the strike. Further, those who did cross the picket line could, in effect, have taken on the status of "conscientious objectors" rather than free riders, especially if they had been required to remit their pay. Finally, it is notable that, in the negotiations for the preceding agreement, a strike vote was also called, with 60 percent voting in favour. Although a clear majority, this was not viewed as sufficient for the union to mount a meaningful strike or strike threat. Had a mere majority been required, not only might the preceding negotiations unfolded differently, but the administration's willingness to achieve an earlier settlement in the 1995 negotiations may have been greater.

Finally, providing management with the legal right not only to continue operations, but also to hire replacement workers, can have major consequences for the likelihood, dynamics, and consequences of strike

activity. These have been addressed extensively elsewhere (e.g., Sims et al. 1996: esp. 138-150), and can include: (1) a further undermining of the right to strike and ultimately to bargain collectively, (2) a further increase in the levels of general acrimony and distrust both during and after the strike, and (3) substantially increased stress and disaffection for individual strikers and, in some cases, third parties. In the faculty strike, the extent of these consequences is unclear, especially as the use of replacement instructors was limited. But there can be no question that they had major effects on some faculty. For example, one faculty member was particularly exercised. Not only had they hired a replacement instructor for his course, but the course happened to be a third-year course in Industrial Relations, and it was designed around the faculty member's own book. To add insult to injury, the replacement worker had no academic qualification beyond high school, and though he had extensive experience as a management negotiator, had been fired from his previous job for sexual harassment. The faculty member now spends his time writing papers on the strike.

#### *SOME IMPLICATIONS*

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It is not altogether clear how well the specific findings of this paper can be generalized. Yet, despite some important differences, the overall system of labour law in Manitoba is generally consistent with that of other North American jurisdictions. So, although the laws specific to Manitoba may differ in some respects, the analysis is suggestive of generalizable implications for labour law.

First, the analysis suggests that the doctrine of residual rights should be eliminated. If so, the status quo could be considered as an implicit contract under the law, with both parties having to agree on any attempt to depart from it. This would place workers and their representatives on truly equal footing with management, and would greatly simplify the negotiating and contract administration processes. But failing such an arrangement, either the union could be provided with the legal right to call a strike during the term of an agreement, or substantial restrictions could be placed on management rights. The former could be restricted in a number of ways, as is now the case in most Canadian jurisdictions for legal strikes subsequent to the term of an agreement.<sup>10</sup> As for the latter, some possibilities include: (1) a requirement to consult with worker representatives (e.g., works councils) or to reopen the collective agreement

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10. For example, both a strike vote and a reasonable notice period might be required. The labour board might also be given the right to order some form of alternative dispute resolution procedure.



in the case of major changes to the status quo, as is now the case for technological change in a few Canadian jurisdictions, (2) the provision of some form of job rights and protections, or (3) some form of "fair administration" requirement, enabling workers to file a grievance if management violated certain pre-established criteria (also see Godard 1994: 301-302).

Second, the analysis in this paper suggests a need to eliminate management's right to disregard an expired agreement, thereby providing for a bridging period of indefinite duration. In effect, the expired agreement would take on common law status until such time that it was replaced by a new one. Not only would this reduce the likelihood of a stoppage, it would also put the union on an equal footing, and require the employer to declare a lockout if it was the aggressor. But failing the establishment of an indefinite bridging period, this period should at minimum be substantially longer than one year, and there should be no notice requirement for management. For example, a two-year period could substantially lessen any incentive for an employer to draw out negotiations, and, if it did so, the union would have little difficulty establishing what its intent was. The giving of notice would thus not be necessary, and so negotiations would not be tainted, at least initially, by the symbolic consequences of management's doing so.

Third, the analysis suggests that the legal right of employers to continue operations during a strike should be discontinued. Doing so would help to reduce the level of acrimony, and would preclude management from attempting to undermine the union. It would also eliminate the inequities and problems associated with the right of union members to cross a picket line, and with the use of replacement workers. Alternatively, employers could be allowed to continue operations, but with restrictions on the right of union members to cross the picket line and on management's ability to hire replacements. For example, union members should either be prohibited from crossing the picket line, or required to pay fines equivalent to any economic gains from doing so. In turn, replacement workers might either be banned altogether (as in the Canadian jurisdictions of Quebec and British Columbia), or allowed only under certain circumstances, subject to the approval of the labour board.<sup>11</sup> Such restrictions would at minimum help to remedy current imbalances under the law and to lessen the level of acrimony and distrust both during and after a strike.

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11. Under the Canada Labour Code, the labour board can ban replacement workers where these workers are being used to "break" a union (Sims et al. 1996). But this restriction is so vague that it seems unworkable.

The implementation of these or similar reforms would not only have positive consequences with respect to collective bargaining and strike activity, they could also create a more positive environment for union organizing. Two major problems faced by unions at present would appear to be, first, that they are unable to “deliver” in many workplaces, and second, that they all too often appear to be the aggressors relative to management. While the former generates a negative instrumentality perception, the latter generates a negative “big labour” perception. Both substantially affect the propensity of workers to unionize (Wheeler and McClendon 1991). Yet, under the reforms advanced in this paper, they might be substantially lessened over time.

It is of course unlikely that the proposed reforms could ever muster political support. Even if the current political environment was to change, they could be theorized as having a number of negative consequences for the economy. For example, economic analyses suggest that at least some of them (e.g., a ban on replacement workers) could result in higher wage settlements and even increase the likelihood and duration of strike activity (see Cramton, Gunderson, and Tracy 1995). From a critical sociological perspective, neither of these outcomes is necessarily undesirable, particularly if they reflect the positive consequences theorized in this paper (e.g., increased ability to mount a meaningful strike). But they could also have negative economic, and, in particular, employment effects, especially given the lack of parallel rights in other countries, and the unwillingness of governments to demand such rights in trade agreements. It would be mistaken to assume such effects, for the extent to which they would occur would depend less on union power than on how this power is used, and on broader institutional conditions. Nonetheless, they clearly represent an important consideration.

### *CONCLUSIONS*

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This paper has adopted a critical sociological approach to the analysis of strikes and the law, concerning itself primarily with labour laws in the province of Manitoba and their implications for a 23-day faculty strike. It has argued that the structure of labour law placed the union in a reactive, defensive position, with negative implications for the likelihood, dynamics, and consequences of the strike. In so doing, this paper has also generated recommendations for labour law reforms. These recommendations are based more on normative than on practical considerations. But in an era where scholars are often all too willing to sacrifice the former for the latter, doing so can serve as a useful strategy for inducing debate and critical analysis. It can also serve as a useful thought experiment, one

which could at least provide a starting point for devising meaningful labour law reforms at such time that they ever become possible.

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## RÉSUMÉ

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### Les grèves et la loi : une analyse critique

Cet article se veut une analyse sociologique critique des grèves et de la loi par l'examen de la façon dont la loi a encadré une grève de 23 jours dans une université canadienne à l'automne 1995. Pour ce faire, je me base sur mes travaux caractérisant les grèves comme des manifestations de la voix collective (Godard 1992a, 1992b). Je me base aussi sur la tradition des études juridiques critiques (v.g. Stone 1981, Klare 1982, Woo-

diwiss 1992) démontrant non seulement comment le contexte institutionnel de la négociation est biaisé contre les syndicats et donc contraire à la doctrine pluraliste orthodoxe de souveraineté conjointe, mais aussi comment ces biais influencent la probabilité, la dynamique et les résultats de l'activité de grève.

Le point en litige était les tentatives patronales pour affaiblir une clause pénale de sécurité d'emploi établie de façon telle à pouvoir licencier des individus à volonté en cas de crise financière. Les professeurs ont perçu que cela pourrait être utilisé pour cibler des individus et ne croyaient pas les propos de l'administration disant que cela n'arriverait pas. L'administration a tenté que le plus de cours possible se poursuivent durant la grève en embauchant des professeurs de remplacement dans certains cas et en invitant les professeurs à traverser les lignes de piquetage, ce qu'a fait environ le quart de ceux-ci.

La loi a contribué à cette grève de six façons. D'abord, la doctrine des droits résiduels implique que virtuellement tout ce qui n'est pas spécifiquement inclus dans la convention collective au Manitoba tombe sous le giron patronal. Cela signifie que l'employeur doit se battre pour différents droits et privilèges, qu'il ne peut pas compter seulement sur son autorité. Les implications étaient claires dans la grève ici examinée. Cette grève ne découlait pas d'un grief particulier des professeurs mais plutôt d'un manque de confiance eu égard à la façon dont l'administration agirait dans le futur si elle en avait l'occasion.

Une seconde implication, constituant ici un problème fort relié, est la prohibition de l'exercice du droit de grève pendant la durée de la convention collective. Cela signifie que les employeurs sont peu enclins à tenir compte des préoccupations des employés non couvertes par la convention collective, soulevant de sérieuses conséquences pour ceux-ci. Les négociateurs syndicaux doivent alors prévoir telles conséquences et tenter de négocier à l'avance une protection contre celles-ci plutôt que d'attendre que le problème survienne. Si cela n'avait pas été le cas, la grève des professeurs ne serait pas survenue avant que l'employeur tente en pratique d'imposer la limite de capacité financière, et encore seulement s'il l'avait fait de façon inappropriée.

Comme troisième implication, notons que, de par la loi manitobaine, l'employeur a le droit de ne plus être lié par une convention collective un an après son expiration. Cela place les travailleurs sur une position défensive de par laquelle ils n'ont à peu près d'autres choix que de faire la grève qu'ils soient ou non les agresseurs si une entente n'est pas atteinte à temps. C'est cela qui est arrivé dans la grève des professeurs. Sans cette disposition de la loi, les professeurs auraient eu peu de raison de faire la

grève étant satisfaits du contenu de la convention précédente. Il aurait alors appartenu à l'employeur de décréter un lock-out.

Une quatrième implication de la loi manitobaine relève de l'exigence pour un employeur de donner un préavis de douze mois de son intention de ne plus reconnaître une convention expirée. L'application de cette règle peut avoir l'effet non visé d'accroître le niveau de non-confiance et d'adversité chez les syndiqués. Cela a été particulièrement vrai ici, les professeurs percevant le préavis donné comme une intention de l'employeur de jouer dur et possiblement casser le syndicat.

Une cinquième implication vise le droit pour l'employeur de continuer ses opérations durant une grève. Cela permet à l'employeur de tenter de miner une grève et ultimement le syndicat impliqué. Cela provoque une escalade d'acrimonie et de non-confiance, tant avant qu'après la grève. Dans notre cas, ce droit de continuer les opérations fut exercé lançant ainsi le message que l'employeur n'avait non seulement pas respecté une décision de principe des professeurs de défendre l'intégrité de l'université, mais qu'il cherchait en fait à miner cette décision. Cela a durci les positions des professeurs.

Finalement, le droit des syndiqués de traverser les lignes de piquetage sans sanction représente une asymétrie dans la loi, puisque alors la minorité peut faire fi de la décision de la majorité de faire la grève. Cependant si une majorité vote contre la grève, une minorité ne peut pas faire fi de telle décision et faire la grève. Si ce droit n'était pas reconnu et s'il y avait des sanctions significatives, il est possible que moins de travailleurs traversent les lignes de piquetage. Alors, l'employeur aurait eu moins tendance à voir la poursuite des classes comme une stratégie viable et, par conséquent, cela l'aurait amené à faire plus de concessions avant la grève, ou au début de celle-ci.

L'identification de ces problèmes suggère de possibles révisions aux lois du travail. Il n'est certes pas clair que ces révisions seraient pratiques, surtout qu'elles peuvent avoir des effets économiques négatifs. Mais elles seraient plus compatibles avec le but avoué de la loi.

## RESÚMEN

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### La Huelga y las leyes : Un Análisis Critico

En este documento, Adopto un método sociológicamente critico para el análisis de como las leyes laborales contribuyeron al desarrollo de

una huelga de 23 días que se llevo acabo en una universidad del oeste canadiense en el otoño de 1995. Comienzo con una breve descripción de la alternativa sociológica. Después, presento una cronología de la huelga, seguida de un análisis breve de los modelos económicos y sociales que contribuyeron al entendimiento de la racionalidad de la huelga. Después discuto el impacto de las leyes laborales en esta racionalidad, extendiendo la tradición critica de los medios legales de manera ha establecer como las tendencias legales en contra de los sindicatos contribuyeron al desarrollo de las actividades de huelga. Concluyo con una discusión de las posibles reformas a las leyes laborales que se concluyen del análisis.