THE DYNAMICS OF CANADIAN LABOUR LAW

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SUMMARY: I. *Introduction*. II. *An Overview of the Canadian Labour Law System*. III. *The Canadian Experience on some Common Themes*. IV. *Conclusion*.

I. INTRODUCTION

Before I begin, may I first offer my deep thanks to the organizers of this seminar for the kind invitation to attend and to speak on Canadian Labour Law. I offer my particular thanks to Professor Patricia Kurczyn Villalobos for all her hard work in putting this seminar together, and for giving us the opportunity to learn so much from each other. Let me also thank the Canadian government, and particularly the labour branch of Human Resources Development Canada, for arranging for me to be here. Finally, let me say how honoured I feel to be speaking on the same program as the range of distinguished speakers and academics that have gathered here from the United States, Mexico, Spain and Chile.

It is appropriate that the theme of labour law reform has brought us here, since labour and employment law systems have been learning from each other for decades. After all, my country's regulatory system for the workplace has borrowed heavily

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from the United States for its labour and human rights laws, and from England for its common law rules on employment law and wrongful dismissal. But never in the expansionist and social welfare period we have know since 1945 has there been such a desire to understand other labour law systems, and to creatively adapt our own systems to the interlocking world of law and work that globalization pushing us forwards. When I was a law student 20 years ago, we spend exactly 7 minutes in my three labour law courses on the world of work beyond the Canadian border. It is impossible to do that today. I teach significant sections of both my introductory and advanced labour law courses on the ILO, NAFTA, and the systems of labour law in the US, Latin America and Europe and my students want more. They know that the percent of trade to GNP in Canada has increased from 22% to 30% in the past decade, that a hemisphere-wide free trade zone is coming, and that international labour mobility, although still a long ways behind the fluidity of capital mobility, is steadily speeding up. So comparative and international labour law is becoming an area of study, exchange, debate and transformation all on its own.

So, what can I usefully tell you about the Canadian labour and employment law system in forty minutes in light of all this? The best way, I think, is to divide my talk into two sections. First, I will give you a brief overview of the structure of the Canadian labour market and the main features of our labour law and industrial relations system. And second, I will then turn to discussing the three themes on labour law regulation in Canada as they affect managerial workers, the unionized workforce and the general non-unionized workforce. In this second section, I also want to talk about several important trends in contemporary Canadian labour law, including the rise of human rights issues in labour law, and the surprising re-emergence of constitutional issues in Canadian labour law. After that, I would be happy to take questions.

II. An Overview of the Canadian Labour Law System

The first area I want to cover is the particular features of Canada's labour market and labour law system, because all that I have to say about the current pace of change within Canadian labour law must be understood within the context of these points. There are seven points that I would like to briefly discuss:

i) Our *labour market* is made up of approximately 13 million employees out of a total population of 31 million. Canada has an extremely low birth rate, and our population would be in actual decline were it nor for the approximately 215,000 *immigrants* who come to Canada every year. One in 6 Canadians today was born somewhere else, and the country is now perhaps the most multicultural in the world. Our population and our work force is also getting *older*, raising issues of serious shortages of skilled workers, an increasing number of persons over 65 to be supported by a shrinking workforce, and the question of whether to do away with mandatory retirement rules.

ii) The *Canadian economy* — like other highly developed economies has made a rapid transition from a heavy manufacturing and resource extraction basis to a *service economy*. In 1981, 34% of Canadian labour force worked in the service industry. Today, it is estimated that 79% do so. This has meant demands for a better educated workforce, more women in the workplace, and growing emphasis on lifelong training and re-training to match the surges in the economy. It also means a workforce that is better and better educated about its rights.

iii) While the *unionized Canadian workforce* has declined as a percent of total force over past 20 years, its decline has been much less severe than other industrialized countries.

At its peak, in 1980, unions represented 39% of the workforce. Today, that figure is 32%. This has been the result of significant cutbacks in public sector employment, a rapid decline in manufacturing jobs, and only slow progress by unions in organizing the new work force in the service sector. However, the decline has not been as severe as the United States, which now stands at a 14% unionization rate, or the United Kingdom, which has declined from 57% to 34% since 1980.

iv) Canadian is an *extremely decentralized federation*, perhaps the most decentralized organized state in the industrialized world. A significant number of constitutional powers are in the hands of the 10 provinces, including the regulation of labour and employment relations. The federal government only regulates a restricted number of national industries, such as broadcasting, banking, airlines, trains, trucking and nuclear power. Virtually everything else is provincial. This means that we have, effectively, 11 different labour law regimes the 10 provinces and the federal government. However, while labour laws do vary from jurisdiction to jurisdiction, they vary only in secondary detail. All 11 jurisdictions are modeled on a version of the United Stages Wagner Act of 1935, which we in Canada transplanted north after 1944.

v) Our *labour law system is highly regulated*, and it is one of the most *juridified* systems in the industrialized world. The fingerprints of labour lawyers are everywhere in our industrial relations system. One major feature that is common among all 11 jurisdictions are labour relations boards, which regulate the certification of unions, unfair labour practices complaints against employers, and in some jurisdictions, strikes by unions. A second major common feature is the widespread use of labour arbitrators — like myself — who decide difference between unions and employers on the interpretations and administration of col-

lective agreements. Arbitrators — who are almost all lawyers — have a growing range of remedial powers on law, and they have final and binding powers to interpret collective agreements. With the great reliance by unions and employers on labour relations board and labour arbitrators, there is only a very small role left for the Canadian courts in the regulation of industrial relations, which stems from the historical antipathy that unions have had towards the judiciary.

vi) *Collective bargaining* is also very *decentralized* in Canada, even though we have national unions and national employers. Organizing workers under Canadian law, much like American law, is done on a workplace-by-workplace basis. Consequently, bargaining for collective agreements is done the same way. As well, legal strikes are almost always local in nature, and rarely have a significant impact beyond the individual workplace. This localization of collective bargaining and strikes has two important consequences. First, Canadian unions have a harder time imposing bargaining trends on other employees in the same industry than their European counterparts. Yet, on the other hand, there is a much greater involvement by local rank-and-file members in selecting bargaining issues and strategies, and therefore, a much greater decentralization of power within unions.

vii) Finally, I want to say a word in *strikes*. Actually, two words. First, Canada has one of the most restrictive strike laws in the industrialized world. This is common across all Canadian jurisdictions. Unions can only strike when the collective agreement has legally expired, and only when certain statutory conciliation and notice provisions have been properly satisfied. A strike at any other time is illegal, and subject to heavy fines. Having said that, however, the paradox is that Canada has had, over the past twenty years, the highest rate of strikes among

the G7 countries. You may think that Italy owns that title, but, no, it is us. The Canadian labour movement has a history of militancy, particularly in the auto manufacturing and public service sectors, and it has fought more fervently and more successfully than its counterparts in the American labour movement against labour law restrictions and concession bargaining over the past two decades.

III. The Canadian Experience on some Common Themes

This gives you the context of Canadian labour law — now I want to turn to a brief discussions on three key issues in Canadian labour law that are also topics that this seminar will be addressing on Friday during the three roundtable sessions.

i) Labour rights at hiring and dismissal
ii) Collective bargaining: agreements and social rights
iii) Labour disputes: conciliation, mediation and social rights

1. *Labour rights at hiring and dismissal*

At the hiring stage, there are three points that are important to know.

First, *Canadian employers have a generally broad right* as to who to hire into their workplace. Unions are rarely overtly involved in hiring decision, and it is extremely uncommon for collective agreements to say anything about the employer's discretion on whom to hire. The only significant exception to this is in the construction industry, where unions run hiring halls, and the employer must have the carpenter or the plumber who the union sends them.

Second, one very important limitation on the employer's right to hire whom it wants is our *Canadian human rights laws*. The

general rule is this: Employers are free to hire whom they wish, so long as they do not use discriminatory attitudes or practices on the grounds of gender, race, religion, disability, age, sexual origination, among others.

Let me give you an illustration. An employer in an office wants to hire a receptionist. He has it is his mind to hire a very good looking, very young female, since many of his customers are male. The best applicant is a 52 year old grandmother. She has superior experience, she has advanced computer skills, and she possesses a pleasant manner. She happens to look her age. Well, the employer hires the younger, much less experienced and less qualified applicant. If the facts can be proven that the employer did not hire the older applicant because of her age and appearance, then that would likely violate our human rights laws on age discrimination, which apply to all public and private workplaces.

My third point on hiring has to do with *employment equity legislation*. Canada has had a limited, but useful, experience with employment equity laws. These laws are our rough equivalent to the American employment laws on affirmative action.

Presently, only the federal sector (which comprises roughly 10% of national workforce) and Quebec (approximately18% of Canadian workforce) have Employment Equity laws. These laws encourage employers to hire employees from four historically disadvantaged groups: (i) women; (ii) persons with disabilities; (iii) visible minorities; and (iv) aboriginal peoples.

These laws have had a very mixed record so far, even as our workforce is becoming more diversified and no longer has a distinctly white and male face. Obviously, one reason for its mixed record has been its limited legislative life: only two jurisdictions have it on the statute books (Ontario had employment equity laws for two years in the mid 1990s, before a conservative provincial government repealed them). Secondly, the laws that have been enacted encourage, but do not insist, that employers hire more employees from these employment groups. Employ-

ment equity statistics accrued by the Canadian Human Rights Commission do show that three of the groups women, visible minorities, and aboriginals are increasing their presence in the federally-regulated workplace, although there is still marked underrepresentation compared to their size in the general population.

2. *Dismissal*

This is an important area, because one of the real measures of how much protection a labour law system offers is how strong the laws on dismissal are.

In Canada, we can use the basic measure of employment strength — bargaining power — to look at these different categories of employers, and how useful our laws on dismissal are.

First: *Managerial employees* — non-unionized employees who perform senior managerial and supervising responsibilities in the workplace — have access to the common-law courts when they are terminated. If the courts find that they have not been fired or terminated for just cause — *i. e*., serious misbehaviour in the workplace — then the employee is entitled to damages. This is generally measured by a month for every year worked. So if a manager was laid off after 12 years of service — he or she would normally be entitled to 12 months of salary in damages. However, they are not entitled to reinstatement or their job back. So an employer could fire the best employee for the worst of reasons, and the most that employee would receive is damages, never reinstatement.

The Supreme Court or Canada, in an important 1997 ruling — *Wallace v. United Grain Growers* — has given managerial employees an important additional right. The Court ruled that employers must always act fairly towards all of its employees, and a failure to do so for example, by wrongly accusing an employee of dishonest behaviour, or being particularly rude

when firing the employee — can lead to extra damages awarded against the employer.

In this regard, we are different than the American employment law system, which is based on employment-at-will. An American non-unionized employee can be fired for the worst of reasons, and, unless he or she can fit their claim under one of the civil rights statutes (race, sex, disability, age), he or she would have no viable legal action in the courts.

The second group of employees are *unionized employees*. If a unionized employee is fired, he or she has a right under the collective agreement to challenge the dismissal through the union. If the employer won't take the employee back, the dispute can be taken to labour arbitration. The hearings are legally based, evidence is given and tested, lawyers make legal arguments to the arbitrator, and the arbitrator has the power to reinstate the employee and award back pay. This happens all the time, and the remedy of reinstatement has proven to be an effective tool to get employers and employees to change their behaviour.

And third — what about *non-unionized majority wage-receiving employees* of the workforce? With no union to represent them, and without the affluence that senior manager have to hire their own lawyers, the rights that a non-unionized semi-skilled or unskilled employer has at dismissal are actually quite minimal. Their available rights would be found in employment standard legislation (found in each jurisdiction), or in human rights legislation, if discrimination was a factor in their dismissal. Their rights under employment standards legislation would give a non-unionized employee a week of severance pay for every year of employment, up to a maximum ceiling of 8 weeks. There is no right to reinstatement.

So you can see the financial discrepancy between the senior manager and his non-unionized secretary. Let's say that they have each worked 20 years when they both lose their jobs. The standard legal claim for the senior manger would be 20 months

of salary, while his secretary is essentially limited to 8 weeks or 2 months in many cases.

3. *Collective Bargaining: Agreements and Social Rights*

Because unions in Canada still represent one-third of the total workforce, the Collective Agreement remains a very important legal and social agreement. Let me briefly mention two significant trends that collective agreements represent:

First, they are the primary wage-setting instrument in the Canadian economy. Because most of the key economic sectors (with the important exception of the private service sector) are heavily unionized — such as telecommunications, heavy manufacturing, mining, the public sector, transportation, and energy production the wages and benefits won by unions through collective bargaining in these sectors become the economic trendsetter in the rest of the economy.

Second, the arena of social rights had been considerably influenced by collective agreement bargaining over the past 20 years. Most of the major important human rights and social rights victories in law — and there have been many — have come out of the unionized Canadian workforce. Let me give you a few examples.

In *women's rights* — the issues of sexual harassment protection, pay equity, maternity leave, work in non-traditional jobs, and publicly-funded daycare — are now firmly established social rights in most significant parts of the Canadian economy, primarily because Canadian unions successfully fought at the negotiation table and sometimes on the picket line to win these rights. The way was led primarily by public sector unions, where women generally make up the majority of the union membership.

Respecting the *rights of employees with disabilities*, the Supreme Court of Canada has established the duty to accommodate as a legal right and obligation. This means that employers must

make major changes to the workplace though technology, through policies, through hiring and retention practices, and through changing attitudes — to allow employees with disabilities to act as productive workers in the workplace. Over the past decade and more, there has meant a revolution in the employment rights of persons with disabilities.

Other types of workers who have traditionally faced disadvantages — older workers, gay and lesbian workers, workers with minority religious beliefs, and so on — have all found significant protection by the human rights provisions in collective agreements, and through important arbitration and judicial victories. It can be said with some certainty that the collective agreement has become today as important as human rights statutes in protecting and promoting human and social rights at work in Canada.

4. *Strikes and Industrial Conflict in Canada*

I have already told you that Canada has the highest strike rate among the G7 countries. I should also say that we had the highest rate 20 years ago as well, but that strikes are only a third as common as they were 20 years ago. Among the reasons that account for this decline are: (i) Better, more sophisticated relations between employers and unions; (ii) More recognition by unions of the highly competitive nature of national and international economies, and the dependency of the Canadian economy upon trade; (iii) More recognition by employers of the importance of fairness in the workplace, reinforced by new developments in the law; and (iv) More sophistication in mediation and conciliation techniques by both private and government mediators.

But in the midst of this long-term decline in the national strike rate, there have been, over the past 4 years, a dramatic increase in large-scale public sector strikes at the provincial and federal levels, as teachers and civil servants try to win back wages, bene-

fits and job security provisions that governments in the early and mid 1990s had legislated away.

One other point on strikes in Canada. Canada adopted a constitution in 1982 — the *Canadian Charter of Rights and Freedoms* — which contains a guarantee of freedom of association. However, the courts — and particularly the Supreme Court of Canada — have refused to extend the freedom of association guarantee to protect the right to strike and the right to *freely bargaining collectively.*

This meant that governments could change labour laws, or temporarily suspend them to remove the legal right to strike, or say that certain issues could not be bargained, and unions could not rely upon the *Charter* to challenge or strike down the legislation.

However, there are signs that the Supreme Court of Canada may be slowly changing its mind on the virtually complete separation of labour law and the *Charter*. Where it had steadfastly refused to use the freedom of association guarantee to protect any rights in labour legislation, beginning late last year, the SCC has issued three successive rulings where the freedoms of association provisions have been used by unions to strike down restrictive labour legislation, including allowing unions a wider right to picket during legal strikes, and to strike down an absolute prohibition against the ability of agricultural workers to unionize. We will have to wait and see if the SCC continues to make the freedom of association guarantee more and more meaningful, and closer to the standards called for in ILO conventions.

IV. CONCLUSION

Let me conclude by saying three things:

First, like any country, Canada's labour and employment law system is shaped in large part by its own particular political,

social, labour and legal history and therefore some of its experiences are planted in Canada and cannot be transplanted.

But my second point is the flop side of this point — the other important feature of Canadian labour and employment law is the ongoing search for the creative balance between employment fairness and industrial efficacy, and because this second point is common, or should be common, to all modern industrial relations systems worthy of the name, Canada is a system that offers lessons to elsewhere, and equally, it is looking to learn from abroad.

And third, what Canada can offer as exportable labour law lessons to other countries include: (i) the importance of efficient, expert and relatively quick systems of administrating labour law; (ii) the importance of applying human rights law in an industrial relations and labour law setting, so that the two areas of law reinforce each other; and (iii) the importance of an experience and effective mediation system for resolving, or at least turning the temperature down on, collective bargaining and individual disputes.

My thanks again to the organizers and best wishes for a successful seminar.