The Freedom to Strike in Canada: A Brief Legal History

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This paper looks at the "deep roots" of striking as a social practice in Canada, by providing an analytic framework for approaching the history of the right to strike, and then sketching the contours of that history. Focusing on the three key worker freedoms — to associate, to bargain collectively, and to strike — the authors trace the jural relations between workers, employers and the state through four successive regimes of industrial legality in Canada: master and servant; liberal voluntarism; industrial voluntarism; and industrial pluralism, the latter marked by the adoption of the Wagner Act model. On the basis of their review of those regimes, the authors argue that long before the modern scheme, workers enjoyed a virtually unlimited freedom to strike for collective bargaining purposes. Although government-imposed restrictions on the freedom have increased significantly, especially under industrial pluralism, legislatures have typically provided workers with compensating trade-offs, including rights enforceable against their employers. However, in contrast to the historical pattern, public-sector workers have with growing frequency been subjected to "exceptionalism," i.e. the suspension or limitation of freedoms without a grant of compensatory rights. In the authors' view, it is the imposition of such measures that will likely provide the context for consideration of whether the Canadian Charter of Rights and Freedoms *protects the right to strike.*

1. INTRODUCTION

> In the present state of society, in fact, it is the possibility of the strike which enables workers to negotiate with their employers on terms of approximate equality. It is wrong to think that the unions are in themselves able to secure this equality. If the right to strike is suppressed, or seriously limited, the trade union movement becomes nothing more than one institution among many in

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> the service of capitalism: a convenient organization for disciplining the workers, occupying their leisure time, and ensuring their profitability for business.[1]
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> Pierre Elliott Trudeau, *The Asbestos Strike* (1956)

Striking is a social practice that is deeply embedded in Canadian history. The essence of a strike is the concerted refusal to work, and it is typically a protest against economic exploitation or political oppression. In Canada, political strikes are rare events, the exception, rather than the rule; instead, the freedom to strike is typically regarded as the principal means of making freedom of association and collective bargaining effective. Unlike other mechanisms for resolving disputes between workers and employers, strikes enable workers directly to participate in the process of determining their wages and working conditions and the rules that govern their working lives.

In the aftermath of the Supreme Court of Canada's decision in the *B.C. Health*[2] case, it is only a matter of time until the courts will have to return to the question of whether the protection of freedom of association under the *Canadian Charter of Rights and Freedoms* extends to the freedom to strike. In *B.C. Health*, in answering the question of whether freedom of association extends to the right to collective bargaining, the Supreme Court considered the historical provenance of this right, international law and jurisprudence, and *Charter* values. Thus, it is likely that the history of the "right to strike" will be invoked by the parties to such litigation in order to support or to oppose recognition of a *Charter*-protected right to strike. The two principal purposes of this paper are: (1) to provide an analytic framework for approaching the history of the right to strike; and (2) to sketch out the contours of that history.

The freedom to strike has a long, albeit complex, legal pedigree in Canada. By 1872, it was clear that striking itself was not illegal, and thus there was a freedom to strike.[3] But the simple fact that

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1 P.E. Trudeau, *The Asbestos Strike* (Toronto: James Lewis & Samuel, 1974 [1956]), at p. 336, cited in L. Panitch & D. Swartz, *From Consent to Coercion: The Assault on Trade Union Freedoms*, 3d ed. (Aurora, Ont.: Garamond Press, 2003), at p. 25.

2 [2007] 2 S.C.R. 391 ("*B.C. Health*").

3 A.W.R. Carrothers, *Collective Bargaining Law in Canada* (Toronto: Butterworths, 1965), at p. 24.

striking was no longer an illegal activity does not tell us much about the scope and form of the freedom. In the labour relations context, the freedom to strike can only be understood in relation to the freedom to associate and the freedom to bargain collectively. These three employee freedoms, which are the fundamental components of collective labour law, are widely recognized and protected by liberal capitalist states. In fact, as A.W.R. Carrothers noted, "the legal framework of collective bargaining in Canada may be measured in two ways: by the degree to which the state intervenes to define the lawful limits of the three freedoms of employees in order to protect the interests with which those of organized labour conflict; and by the kind of legal substitute which it provides for the proscribed use of economic power."[4]

The broad pattern of Canadian labour history can be summarized in two propositions. The first is that the freedom to strike has deep roots in Canadian law. The second is that government-imposed restrictions on the freedom to strike have, at least until recently, been accompanied by *quid pro quos* for workers and unions — either in the form of immunities for workers or unions, or in the form of duties imposed on employers that facilitate the freedom to associate and bargain collectively. Indeed, from an historical perspective it is accurate to say that the right to bargain collectively (entailing a duty on employers to bargain in good faith with certified trade unions), which the Supreme Court recognized as constitutionally protected in *B.C. Health*, was given to workers as a trade-off for the restrictions imposed on the broad freedom that workers historically enjoyed to strike.

In Canada, as in other countries, the achievement of rights at work has been the outcome of complex, protracted struggles between different social groups.[5] The precise nature of the trade-offs, therefore, is contingent upon the history of those struggles, although the manner in which freedoms and rights were institutionalized at a particular point in time strongly influences the form of subsequent legal developments. In order to substantiate our claim that in Canada limitations on the freedom to strike have been accompanied by legal

4 *Ibid.*, at pp. 5 and 6.

5 B. Hepple, "Rights at Work," in D. Ghai, ed., *Decent Work: Objectives and Strategies* (Geneva: ILO and IILS, 2006) 34.

supports for the freedom of association, collective bargaining, and the protection of striking workers, we will briefly sketch the different legal regimes that predominated in different periods in Canadian history. Our focus is on the historical development of the legal regulation of strikes and not on the actions, such as picketing or boycotting, that striking workers may take to make their strike effective or successful. As such, our concern is with the collective withdrawal of labour and the development of the web of liberties, privileges, rights, duties, powers and immunities which envelop that activity and define the legal relations between striking workers, employers, and the state.

Before beginning our historical narrative, we will briefly explain what we mean by the right to strike, in order to better understand the different ways it has been institutionalized in Canada. To do this, it is useful to refer to W.N. Hohfeld's legal typology of jural relations, which allows us to map the complex and historically evolving legal relations governing the freedom of association, collective bargaining and striking.[6]

2. LEGAL TYPOLOGIES

> Typically a legal right is a complex cluster of legal liberties, claims, powers, and immunities involving the first party who possesses the right, second parties against whom the right holds, third parties who might intervene to aid the possessor of the right or the violator, and various officials whose diverse activities make up the legal system under which the first, second and third parties have their respective legal liberties, claims, powers, and immunities and whose official activities are in turn regulated by the legal system itself . . . . Any adequate analysis of a legal right must distinguish the several roles of the individual citizens living under the law (the roles of first, second and third parties) and of the officials (policemen, prosecutors, judges, jury men, legislators and administrators) whose activities transform what Llewelleyn called "paper rights" into real and functioning legal rights.[7]

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6 W.N. Hohfeld, *Fundamental Legal Conceptions as Applied in Legal Reasoning* (New Haven: Yale University Press, 1919).

7 C. Wellman, "Upholding Legal Rights" (1975), 86 Ethics 49, at p. 52, quoted in T. Campbell, *Rights: A Critical Introduction* (Abingdon and New York: Routledge, 2006), at p. 88.

As the above quotation from Carl Wellman indicates, legal rights are very complex. They involve a range of actors who engage in social practices that are contested to varying degrees and are clothed in different jural relations. In order to trace the legal treatment of the social practice of striking, it is useful to identify and to distinguish other, related social practices before describing the elements of the legal typology.

In Canada, the social practice of striking is primarily understood in relation to the attempts of workers to form themselves into associations, typically unions, and to engage their employer in bargaining with these associations. Historically, strikes were workers' most effective means of persuading employers to recognize their associations and to bargain collectively with them, and for these reasons workers went on strike even when the legality of such activity was uncertain. Even after the law formally recognized workers' freedom of association and freedom to bargain collectively, strikes remained important for the effective enjoyment of these freedoms. The simple recognition of the three key worker freedoms — to associate, to bargain collectively and to strike — does not necessarily support these social practices. As Carrothers put it, "to establish a system of collective bargaining it is not enough to declare the three freedoms to be forms of conduct which may be pursued unimpeded by legal restraint. So long as the freedoms are merely liberated from legal disability, and are not legally protected from the abrasion of competing interests, they may lose their strength and their reality."[8]

Hohfeld's typology of jural relations provides a helpful way to analyze and to evaluate the rules that shape the legal relationships between individuals and social groups.[9] The key concepts are claim rights, privileges, powers, and immunities that entail specific relationships between the rights holder and other people, who are subject to correlative duties, rights (or a lack thereof), liabilities, and disabilities.[10] Privileges, which are also referred to as freedoms and

8 Carrothers, *supra*, note 3, at p. 5.

9 Hohfeld, *supra*, note 6; Campbell, *supra*, note 7, at pp. 30-34; J.W. Singer, *Entitlement: The Paradox of Property* (New Haven: Yale University Press, 2000), at pp. 131-133.

10 The term "right" is used in two senses: a general one, to refer to the entire range of jural relations, and a specific one, to refer to rights claims that entail corresponding legal duties on others.

liberties, are legal permissions to act or to refrain from acting in a certain manner without being liable for damage to others, and without others having a right to summon state action to prevent those actions. Essentially, a freedom or liberty is the absence of a rule requiring or prohibiting behaviour. By contrast, a right is a claim that places another person under a positive duty to act or a negative duty to refrain from acting in a certain manner in relation to the rights holder and this claim is enforceable by the state. Thus, rights claims restrict the freedoms of others. It is possible that two people will have reciprocal rights claims against each other, and so they are in a position of relative legal equality, but in other cases the person against whom a right is asserted has no right to claim in response, and thus they are in an unequal legal relationship.

There are other rights, known as powers, that provide people with specific capacities. Powers are state-enforced abilities to change legal entitlements held by oneself or others. Power rights do not correlate with duties on others but they impact on people by making them liable to have their freedoms affected by the actions of power holders. A person who lacks a power is under a disability, in that they are unable to alter legal entitlements. Immunities are the fourth category of rights. Immunity rights exist when the rights holder is not liable to have her position changed by the action of another person utilizing a power or facilitative right. One example of an immunity is protection against prosecution or civil suit when pursuing ends that are otherwise defined as illegal. A person who lacks an immunity is liable to have her or his entitlements changed by the actions of others.

These analytic distinctions are helpful for understanding what is meant by the claim that someone has a legal right. However, as Tom Campbell points out, "in reality any actual situation will be covered by a number of these rights-relationships at the same time, so that any actual normative relationship between two people is often a complex combination of these types of rights."[11] Moreover, it is important to avoid being a formalist or overly positivist if we are to understand legal history; the level of legal enforcement is a significant dimension of the operation of any regime of legal regulation.

11 Campbell, *supra*, note 7, at p. 33.

Thus, the formal description of jural relations may not accurately reflect social and legal practice.

3. LEGAL REGULATION OF STRIKES UNDER FOUR REGIMES OF INDUSTRIAL LEGALITY

We have used the concept of a regime of industrial legality to capture the distinctive features of mechanisms that institutionalize conflict between employers and workers.[12] A regime of industrial legality describes a set of institutions that define and enforce a constellation of rights, understood in the complex sense described above, and a set of discourses about public order that govern and mediate relations between workers and employers. In relation to the freedom to strike, we have identified four legal regimes: master and servant (until 1877); liberal voluntarism (1877 to 1907); industrial voluntarism (1907 to 1943); and industrial pluralism (1943 to the present).[13] Each of the different regimes has a different combination of freedoms, rights, immunities, powers, and duties in relation to the social practice of strikes, as well as to the social practices of forming unions and bargaining collectively.

(a) Master and Servant Regime: 1800 to 1877

In its essentials, at least as it developed in England up to the early nineteenth century, the master and servant regime extensively regulated individual work relations through a web of statutes that set a number of terms and conditions of employment, criminalized employee breaches of contract, and provided workers with some legal means to enforce their statutory and contractual rights against their masters. Under master and servant law, individual workers might be subjected to legal punishment for breaching their contract of employment by, for example, quitting before the expiration or termination of the contract. While this liability was independent of

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12 J. Fudge & E. Tucker, *Labour Before the Law: The Regulation of Workers' Collective Action, 1940-48* (Toronto: University of Toronto Press, 2004), at pp. 10-14.

13 Here we are adapting our initial characterization of the regimes of industrial legality to add the master and servant regime, and to distinguish it from liberal voluntarism.

the collective nature of the quitting, there is evidence that English employers often used master and servant law to intimidate and discipline striking workers. Moreover, combination laws prohibited workers from engaging in collective action to improve their terms and conditions of employment. Since strikes inevitably entail collective action, they were formally illegal. However, this did not prevent workers from continuing to engage in the practice of striking.[14]

The extent to which these laws applied in the British North American colonies that became Canada is not entirely clear. On the basis either that English law was received or that local statutes were enacted, from time to time striking workers were prosecuted under master and servant law for quitting work in breach of their individual contracts of employment. However, it is important to emphasize that it was the individual breach and not the collective quitting that was the legal wrong.[15] The collective dimension of striking was covered by combination law, but just what that law was in early and mid-nineteenth century Canada is even more opaque than the status of English master and servant law. However, regardless of the formal law, historians have not identified a single case in which workers were successfully prosecuted under combination law simply for the act of striking.[16] It is also clear that the social practice of workers

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14 On master and servant, see D. Hay, "England, 1562-1875: The Law and its Uses," in D. Hay & P. Craven, eds., *Masters, Servants, and Magistrates in Britain and the Empire, 1562-1955* (Chapel Hill, N.C.: University of North Carolina Press, 2004) 59. On combination laws, see J.V. Orth, *Combination and Conspiracy: A Legal History of Trade Unionism, 1721-1906* (New York: Oxford University Press, 1991).

15 P. Craven, "Canada, 1670-1935: Symbolic and Instrumental Enforcement in Loyalist North America," in Hay & Craven, *ibid*., p. 175, especially at pp. 201-302; G.S. Kealey, *Toronto Workers Respond to Industrial Capitalism 1867-1892* (Toronto: University of Toronto Press, 1980), at pp. 133, 148-149.

16 E. Tucker, "'That Indefinite Zone of Toleration': Criminal Conspiracy and Trade Unions in Ontario, 1837-1877" (1991), 27 Labour/Le Travail 15. It should be noted that researchers have identified a small number of strike prosecution cases where the grounds for the prosecution have not been established. Also, striking workers under the jurisdiction of the Hudson's Bay Company were imprisoned on a number of occasions. See H. Foster, "Mutiny on the *Beaver*: Law and Authority in the Fur Trade Navy" (1991), 20 Man. L.J. 15.

striking to improve terms and conditions of employment became deeply rooted during this era.[17]

Thus, it is fair to state that under the master and servant regime, workers effectively enjoyed an unlimited freedom to strike (in the sense that employers did not prosecute them for participating in a collective withdrawal of their labour), but that some workers might be individually prosecuted if their refusal to work involved a breach of their contracts of employment. At the same time, it is also important to acknowledge that workers did not have a claim right to strike, in that the law did not impose duties on employers with respect to striking workers. At the very least, the employer was free to terminate a striking worker's employment contract, and there was no legal duty on the employer to rehire a striking worker at the conclusion of the strike. Whether, and on what terms, a striking worker returned to work depended entirely on the strike's outcome and not on a legal right to resume employment.

(b) Liberal Voluntarism: 1877-1907

The legal regime known as liberal voluntarism entailed two formal changes to the way the master and servant regime regulated strikes. First, the 1872 *Trade Union Act* provided that workers could not be prosecuted for criminal conspiracy merely because they were members of a trade union whose purposes were in restraint of trade. A companion statute, the *Criminal Law Amendment Act* (*CLAA*), restricted the actions workers could take in support of their strike, but also provided that workers could not be prosecuted for criminal conspiracy for actions taken for the purposes of a trade combination unless those actions were independently punishable under statute. Although phrased in the language of immunities which disabled employers and the state from prosecuting workers for criminal conspiracy for pursuing legitimate trade union objectives by otherwise lawful means, the effect of these provisions was to provide a firm

17 Bryan Palmer counted 203 strikes between 1815 and 1871. See B.D. Palmer, "Labour Protest and Organization in Nineteenth-Century Canada, 1820-1890" (1987), 20 Labour/Le Travail 61.

legal foundation for the freedom to strike which workers had enjoyed as a practical reality before 1872.[18]

The second change was the enactment of a federal statute that repealed the criminal breach of contract provisions of pre-Confederation master and servant legislation and substituted limited criminal liability for breaches of contract in situations where the breach endangered the public. As a result, except in fairly limited circumstances, individual striking workers no longer faced the threat of prosecution for breach of contract.[19]

While the practical effect of these two changes may have been limited, they removed any doubt about the legality of strikes *simpliciter*, and they deprived employers of one legal tool, criminal prosecutions under master and servant legislation, to use against striking workers. Moreover, during this period, almost no attempts were made to impose further restrictions on the privilege or freedom to strike. Although provincial governments began to be concerned by the potential economic damage that strikes might cause, with one minor exception they did not respond by limiting the freedom to strike.[20] Instead, they began enacting legislation that promoted voluntary, non-binding conciliation.[21] Canadian governments also did not impose restrictions on the freedom of public-sector employees,

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18 *Trade Union Act*, S.C. 1872, c. 30; *Criminal Law Amendment Act*, S.C. 1872, c. 31. The *CLAA* was amended in 1874 and 1875 to iron out conflicts over the scope of trade union criminal liability. For discussion, see Tucker, *supra*, note 16.

19 *Breaches of Contract Act*, S.C. 1877, c. 35; P. Craven, "'The Modern Spirit of the Law': Blake, Mowat, and the Breaches of Contract Act, 1877," in B. Baker & J. Phillips, eds., *Essays in the History of Canadian Law VIII, in Honour of R.C.B. Risk* (Toronto: University of Toronto Press, 1999) 142.

20 The minor exception was Nova Scotia, which legislated compulsory binding arbitration for the coal mining industry. Workers who struck or employers who locked out, before requesting arbitration, were liable for 14 days' pay. A subsequent amendment prohibited employers from reducing wages during a labour dispute, arguably providing striking workers with their first legal strike rights. See M.E. McCallum, "The Mines Arbitration Act, 1888: Compulsory Arbitration in Context," in P. Girard & J. Phillips, eds., *Essays in the History of Canadian Law*, vol. 3, Nova Scotia (Toronto: Osgoode Society, 1990) 303.

21 On the background to nineteenth-century Canadian conciliation legislation, see R. Mitchell, "Solving the Great Social Problem of the Age: A Comparison of the Development of State Systems of Conciliation and Arbitration in Australia and Canada, 1870-1910," in G.S. Kealey & G. Patmore, eds., *Canadian and*

including teachers and police, to strike, although it must be noted that there was little or no collective bargaining activity and no strikes by these groups of workers during this period. As well, at this time, the role of the judiciary with respect to strikes was largely limited to cases in which magistrates heard petty criminal charges arising from the conduct of a strike, and not from the act of striking itself. In the one instance when a Canadian court restrictively interpreted the scope of the *CLAA*'s immunity from prosecution for criminal conspiracy by holding that a strike for a closed shop was not a protected trade union purpose, the law was subsequently amended to override the decision.[22] As a result, criminal conspiracy was pretty much taken out of play. Moreover, during the period of liberal voluntarism, the courts evinced no appetite to develop a common law of civil liability for strikes, even when they found the purpose of the strike, such as the pursuit of a closed shop, to be distasteful.[23]

While workers enjoyed a wide freedom to strike under liberal voluntarism, it must also be emphasized that there was no claim right to strike that entailed an obligation on employers to treat striking workers as employees whose contracts were merely suspended and who were therefore entitled to have their jobs back when the strike ended. Workers who went on strike put their jobs on the line, although in many circumstances they may reasonably have anticipated that they would be able to resume their employment, either because the strike would be successful or because, even if they did not accomplish their objectives with the strike, their employers would re-hire most of them as a matter of practical necessity.

(c) Industrial Voluntarism: 1907-1943

The key legal innovation of the third regime for regulating the relations between workers as a group and employers was the 1907

Australian Labour History (n.p.: ASSLH/CCLH, 1990) 47; and W. Martin, "A Study of Legislation Designed to Foster Industrial Peace in Common Law Jurisdiction of Canada" (Ph.D. thesis, University of Toronto, 1954).

22 *R. v. Gibson* (1889), 16 O.R. 705; S.C. 1890, c. 37, s. 19; E. Tucker, "Faces of Coercion: The Legal Regulation of Labor Conflict in Ontario, 1880-1889" (1994), 12 L.H.R. 277, at pp. 308-329.

23 *Perault v. Gauthier* (1898), 28 S.C.R. 241.

Industrial Disputes Investigation Act (*IDIA*), which introduced compulsory conciliation prior to resort to strikes or lockouts.[24] The underlying policy rationale was that industrial conflict, although private in nature, became a matter of government concern when it harmed the public interest, thus justifying the use of compulsion and state interference with common law rights and privileges. It is important, however, to recognize both the limited nature of the restrictions that were imposed on workers' (and employers') freedom to engage in industrial action and the *quid pro quo* that workers received when restrictions were imposed.

The *IDIA*'s restrictions on the freedom to strike were limited in three ways: (1) the Act had a limited scope of application; (2) it postponed rather than prohibited industrial action; and (3) the legislation was rarely enforced if the parties did not comply with the Act. Initially, the *IDIA* applied only to employers of ten or more employees in the mining and public utilities sectors, and thus covered only a small fraction of Canadian employees. Moreover, in 1925 the Privy Council held in the *Snider* case that labour relations was primarily a matter of provincial jurisdiction. As a result, the *IDIA* was unconstitutional insofar as it purported to apply to employers and employees in industries, such as mining, that were not under federal jurisdiction.[25] Within a short time, however, the provinces passed enabling legislation making the federal statute applicable to public utility disputes within the province, thus restoring the *status quo* as it existed before the *Snider* decision. The legislation did not prohibit resort to strikes indefinitely, but only for a limited time to allow a conciliation board the opportunity to help resolve the strike through mediation, investigation, and the publication of a non-binding report. If the process failed to produce a solution, the common law privileges of

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24 S.C. 1907, c. 20 ("*IDIA*"). For a discussion, see Fudge & Tucker, *supra*, note 12, chap. 3; B. M. Selekman, *Postponing Strikes* (New York: Russell Sage, 1927).

25 *Toronto Electric Commissioners v. Snider* [1925] A.C. 396 (P.C.). For a discussion of the case, see B. Brown & J. Llewellyn, "'Capitalist "Justice" as Peddled by the "Noble Lords"': *Toronto Electric Commissioners v. Snider*," in J. Fudge & E. Tucker, eds., *Putting Law to Work: Canadian Labour Cases in Historical Context* (Toronto: Irwin and the Osgoode Society, forthcoming 2010). On the aftermath, see Fudge & Tucker, *supra*, note 12, at pp. 139-141.

the parties were restored. Finally, with few exceptions, the government adopted a policy of not prosecuting workers or employers when, in violation of the Act, they resorted to industrial conflict without invoking conciliation. Rather, it was left to the parties to initiate a prosecution, something that was rarely done. In effect, this meant that the prohibition could be violated with little risk of legal sanction, thus leaving the pre-existing common law privilege to strike practically unrestrained, even for workers and employers covered by the *IDIA*.

Significantly, the restriction on the freedom to strike was accompanied by claim rights for the affected workers. Employers were required to give 30 days' notice of an impending change of terms and conditions of employment, and where a dispute had been referred to conciliation, the employer could not unilaterally alter terms and conditions of employment until the process had been completed.[26] Thus, the *quid pro quo* for suspending the freedom to strike was a right to have existing terms and conditions maintained for the period of the suspension. However, as with the prohibition on strikes and lockouts before conciliation, the right to a freeze on terms and conditions of work was not vigorously enforced. Workers also obtained a second strike-related right in 1918, during the tumultuous period of labour conflict at the end of World War I, when the *IDIA* was amended to provide that workers maintained their employee status for "the purposes of the Act" during a strike or lockout. While the amendment did not protect striking employees for the purpose of the common law, it began to undermine the absolute privilege that employers enjoyed to treat a strike as an act that terminated employee status.[27]

Since the *IDIA* applied only to mines and public utilities, it did not cover government employees, teachers, firefighters, or police. In principle, therefore, those workers retained their common law freedom to strike, unless some other legislation prohibited strike action. They were also subject to having their employment terminated for going on strike. Police and firefighters did strike in some municipalities in the post-World War I era, but no legal action was taken

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26 *IDIA*, *supra*, note 24, s. 57.

27 S.C. 1918, c. 27, discussed by Fudge & Tucker, *supra*, note 12, at pp. 96-97.

against them and no strike bans were immediately enacted.[28] Some other public-sector workers also struck during this period, including railway mail clerks and teachers, again without legal action being taken against them or strike bans being legislated. However, on the whole, there was comparatively little public-sector strike activity during the period of industrial voluntarism.[29]

The courts were a second source of change to the legal regulation of strikes between 1907 and 1943. Some Canadian judges, particularly in western courts, were prepared to find trade unionists civilly liable when they struck for purposes that the judges did not accept as legitimate.[30] Overall, at this time, the focus of judicial involvement was on tactics that workers used when they were on strike, especially the legality of picketing, and not on the legality of strikes themselves. The courts developed the civil liability of strikers in the next period, known as industrial pluralism, at the same time that the legislature introduced a raft of strike-related rights.

In addition to the emergence of trade-offs between restrictions on the freedom to strike and the introduction of strike-related rights, the period of industrial voluntarism also saw the introduction of exceptionalism, by which we mean extraordinary state action to temporarily alter the prevailing legal regime.[31] Exceptionalism first occurred in the last year of World War I, which witnessed increasing levels of worker militancy and strike action as wage increases fell behind inflation under tight labour market conditions. For most of

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28 G. Marquis, "Police Unionism in Early Twentieth-Century Toronto" (1989), 81 Ontario History 109. In some cities, police who joined strikes were fired, but none were prosecuted either for participating in a collective work stoppage or for endangering the public, under the 1878 *Breaches of Contract Act* that had been incorporated into the 1892 *Criminal Code*.

29 H.W. Arthurs, *Collective Bargaining in the Public Sector: Five Models* (Ann Arbor Institute of Labor and Industrial Relations, University of Michigan-Wayne State University, 1971). There is a need for further research on this topic.

30 For an extended analysis, see I.M. Christie, *The Liability of Strikers in the Law of Tort* (Kingston, Ont.: Industrial Relations Centre, Queen's University, 1967), at pp. 89-95.

31 We draw on Leo Panitch and Donald Swartz's concept of permanent exceptionalism, *The Assault on Trade Union Freedoms: From Wage Controls to the Social Contract* (Toronto: Garamond, 1993).

the war, the federal government pursued conciliation, and took no measures to prohibit strikes, going so far as to exclude striking workers from Order-in-Council P.C. 815, the so-called anti-loafing law that made it an offence for an adult male not to be gainfully employed. By mid-1918, however, the tide began to turn. P.C. 1743, which was a declaration of the federal government's war labour policy, called for a ban on strikes and lockouts for the war's duration, but in exchange, it also offered support for collective bargaining, including the right to organize without employer interference. However, that Order was declaratory only. While the government never took additional steps to formalize worker rights, later that year it prohibited strikes for the duration of the war in industries covered by the *IDIA*, which had been expanded to include war production.[32]

The second instance of exceptionalism during this period was the response to the Winnipeg General Strike in 1919. No law was passed ordering workers back to work or prohibiting them from striking in the future. Strike leaders, however, were arrested and charged with seditious conspiracy, raising the question of whether a general strike was lawful. In the case of the Winnipeg General Strike, the answer depended on whether the strike had been called to advance legitimate collective bargaining objectives, as the strike leaders claimed, or whether, as the prosecution claimed, it had been called with seditious intent, which included an intent to change the government by unlawful means, to bring the constitution and laws into contempt, to promote class hatred, or to create public disturbances. In the first trial, R.B. Russell was convicted. The Manitoba Court of Appeal not only confirmed the conviction for seditious conspiracy but also suggested that all sympathy strikes were criminal conspiracies that fell outside the immunities granted by the *CLAA* (which had been incorporated into the 1892 *Criminal Code*), since they were not undertaken for "trade union" purposes. In reaching this conclusion, Perdue C.J.M. cited English case law that had been reversed legislatively in England but not in Canada. However, the discussion of sympathy strikes was *dicta* and not binding. Moreover, given the context — one where the local business and legal elite perceived a political insurrection — the case should be read more as an instance

32 Fudge & Tucker, *supra*, note 12, at pp. 93-103.

of exceptionalism than as providing strong support for the claim that secondary action or political strikes (general or otherwise) for constitutional political objectives had come to be understood as criminal conspiracies.[33]

(d) Industrial Pluralism: 1943 to the Present

As is well known, the key legal innovation that marked the change from industrial voluntarism to industrial pluralism was the adoption of the Wagner Act model of collective bargaining, initially during World War II through P.C. 1003, and, then, after the war's end, by the enactment of legislation along similar lines in all Canadian jurisdictions. The wartime regulations served as the model for the provinces, although key components were filtered through each province's distinctive regional political economy.[34]

The Canadian collective bargaining model entailed a series of trade-offs, one of which involved substantial restrictions on the freedom to strike. Not only did the scheme postpone strikes and lockouts until a conciliation process had been completed, as had been the case under the *IDIA*; it also added a further procedural requirement that there be a strike vote. Most importantly, the scheme prohibited strikes and lockouts during the life of the collective agreement and gave employers ample tools to enforce the restriction, including labour board orders that were enforceable in court, grievance arbitration, and prosecution. Strikes were defined broadly to include not only concerted cessations of work, but any concerted action, such as a slow-down or a refusal to work overtime. Moreover, in most provinces the statutory definition of a strike was given an expansive

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33 *R. v. Russell* (1920), 51 D.L.R. 1. For discussion, see R. Kramer & T. Mitchell, *When the State Trembled: How A.J. Andrews and the Citizens Broke the Winnipeg General Strike* (Toronto: University of Toronto Press, forthcoming 2010); and T. Mitchell, "'Legal Gentlemen Appointed by the Federal Government': The Canadian State, the Citizens' Committee of 1000, and Winnipeg's Seditious Conspiracy Trials of 1919-1920" (2004), 53 Labour/Le Travail 9.

34 Obviously there were variations on the model and the model was amended from time to time. For our purposes we will use as a template the current Ontario *Labour Relations Act, 1995*, S.O. c. 1, Sch. A.

interpretation by labour boards to include strikes called for non-collective bargaining purposes, such as protesting government wage control legislation.[35] Finally, these schemes were much broader in coverage than had been the case under the *IDIA* regime, applying to all sectors of the economy except the Crown and those occupations and groups of workers that were specifically excluded. Typically, domestic and agricultural workers were excluded from the general collective bargaining legislation, without being covered under another one, while public-sector workers such as police, firefighters and teachers were given their own statutory collective bargaining schemes.

In addition to the role of the legislatures in enacting express statutory restrictions on the freedom to strike and in providing statutory enforcement mechanisms, the courts became more involved than they previously had been in extending and giving effect to the restrictions. For example, in *Gagnon v. Foundation Marine Ltd.*, the Supreme Court of Canada held that a strike to force an employer to recognize and bargain with a union (a recognition strike) violated the New Brunswick *Labour Relations Act* because the strike had not been preceded by the required conciliation procedure.[36] In addition, the Court held that breach of labour relations legislation could constitute the unlawful means to support a common law action in conspiracy, thus providing employers with an extra-statutory mechanism to enforce a statutory obligation for which ample statutory remedies had been provided.

In short, there is no doubt that under industrial pluralism, the freedom to strike has been limited to a far greater extent than under the previous regimes. However, as in the previous regimes, it is essential that the regulation of strikes not be considered in isolation,

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35 *Domglas Ltd.*, [1976] O.L.R.B. Rep. (October) 569. British Columbia allowed such strikes. See *B.C. Hydro & Power Authority and I.B.E.W., Locals 258 & 213*, [1976] B.C.L.R.B.D. No. 71 (QL). More recently, the B.C. courts have held that the prohibition on mid-term political strikes found in the current B.C. *Labour Relations Code*, R.S.B.C. 1996, c. 244, s. 1, violates the *Charter* guarantee of freedom of expression but is demonstrably justified. *B.C.T.F. v. British Columbia Public School Employers' Ass'n*, (2009), 89 B.C.L.R. (4th) 96 (C.A.).

36 [1961] S.C.R. 435. For a stinging critique, see Christie, *supra*, note 30, at pp. 97-105.

lest we miss the important point that, historically, when legislatures restricted the freedom to strike they also gave workers something in exchange. In the case of industrial pluralism, workers received a bundle of rights that entailed enforceable duties against their employers. The loss of the freedom to strike for recognition was accompanied by a certification procedure that enabled employees to obtain union representation through a democratic process, and also imposed on employers a duty to recognize and to bargain in good faith with certified unions. The loss of the freedom to strike during the life of a collective agreement came with a right to enforce the terms of that agreement through binding arbitration. And, of course, the postponement of strikes until after conciliation, carried over from the *IDIA*, also came with a statutory freeze on terms and conditions. Finally, the new regime also gave workers a right to strike in the Hohfeldian sense, by prohibiting employers from terminating the contract of employment merely because the worker was on strike.[37] The scope of the right to resume employment varies from jurisdiction to jurisdiction, but it protects striking workers' jobs in most situations.[38] In effect, then, industrial pluralism granted workers a *claim right* to strike as a trade-off for the limitations imposed on the *freedom* to strike.

A similar pattern can be seen when we turn to public-sector collective bargaining under industrial pluralism. Since there are so many public-sector collective bargaining regimes across Canada, we must generalize. Police and firefighters were among the first public sector workers to be covered by collective bargaining legislation in the post-World War II era.[39] Typically, these statutes were much less elaborate than the collective bargaining legislation that applied generally in the private sector. The most notable difference is that public-sector collective bargaining regimes provided for binding arbitration to resolve bargaining impasses. Although not all police and

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37 *Canadian Pacific Railway Co. v. Zambri*, [1962] S.C.R. 609. For an extensive discussion, see M. Davidson, "The Royal York Hotel Case: The 'Right' to Strike – And Not Be Fired for Striking," in Fudge & Tucker, *supra*, note 25.

38 For a discussion of the nuances, see G.W. Adams, *Canadian Labour Law* (Aurora, Ont.: Canada Law Book, 1993), at ¶11:69 to ¶11:70.

39 For example, *The Fire Departments Act*, S.O. 1947, c. 37; *The Police Amendment Act*, S.O. 1947, c. 77.

firefighter statutes explicitly prohibited strikes, the legality of strikes by these workers was dubious, and in any event, back-to-work legislation was enacted quickly when they occurred. Teacher collective bargaining laws, which in most provinces were enacted in the 1960s and 1970s, typically do not prohibit strikes, but offer the parties the option of choosing some form of binding arbitration — sometimes in the form of final offer selection — in lieu of resort to industrial action.[40] As a rule, government employees were not included in collective bargaining statutes until the 1960s. In some jurisdictions they are prohibited from striking, but where this is the case they are given access to an alternative dispute resolution mechanism, typically binding arbitration.[41] Thus, although there were greater restrictions on the freedom to strike in the public sector than in the private sector, the pattern of providing workers and unions with compensating rights — in this case alternate dispute resolution by an independent and neutral third party — still applied.

Industrial pluralism's basic framework for regulating strikes, which (as we can see) is to match restrictions on the freedom to strike with duties on the employers or on the state, is woven into a scheme of collective bargaining which contains compromises that reflect the state's efforts to craft an industrial relations policy suitable for an industrial capitalist Keynesian welfare state. Despite dramatic changes in Canada's political economy and labour market, and despite a great deal of tinkering with the details, since 1944 the private-sector scheme has remained remarkably stable in its essential elements, including the web of restrictions and rights that regulate strike activity.

This stability has not held true in the public sector, which has been characterized by what Leo Panitch and Donald Swartz call permanent exceptionalism for much of the past 30 years.[42] This exceptionalism has taken many forms. In some instances, workers on a

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40 B.M. Downie, *Collective Bargaining and Conflict Resolution in Education* (Kingston, Ont.: Industrial Relations Centre, Queen's University, 1978).

41 For an examination of current dispute resolution processes, see G. Swimmer & T. Bartkiw, "The Future of Public Sector Collective Bargaining in Canada" (2003), 24 Journal of Labor Research 579; B. Adell *et al.*, *Strikes in Essential Services* (Kingston, Ont.: IRC Press, 2001).

42 Panitch & Swartz, *supra*, note 1.

legal strike are legislated back to work, typically (but not always) with outstanding issues to be resolved through binding arbitration by a neutral third party. More controversial are interventions that deny the freedom to strike and the right to bargain collectively without providing an acceptable substitute dispute resolution process. Such controversial interventions have included wage controls, collective agreement extensions, imposed days off without pay, the repeal of provisions in collective agreements, and the loss of the right to negotiate certain terms and conditions of employment. These are the kinds of measures — in addition to longstanding exclusions from collective bargaining statutes, such as the exclusion of agricultural workers — that have produced *Charter* challenges in the past and are producing them at present.

4. CONCLUSION

If the Supreme Court follows the precedent it set in *B.C. Health*, it will have to address the historical question of whether collective bargaining strikes have been recognized in Canada as a fundamental right that predates the *Charter*.[43] If the answer to this question depends on whether, "long before the present statutory labour regimes were put in place," strikes were recognized as a "fundamental aspect of Canadian society,"[44] then the answer is a resounding "yes." As we have seen, long before the modern scheme, workers enjoyed a virtually unlimited freedom to strike for the purpose of pursuing collective bargaining objectives as against their own employers. The historical twist is that since the turn of the twentieth century, and particularly since the advent of industrial pluralism during World War II, legal restrictions on the freedom to strike have grown. However, what is crucial is that rights to form and join unions, to bargain collectively, and to strike have matched these restrictions. Moreover, legal support for these three employee freedoms has coincided with their characterization as fundamental human rights at the international level.[45]

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43 *B.C. Health*, *supra*, note 2, at para. 40.

44 *Ibid*., at para. 41.

45 A. Jacobs, "Collective Labour Relations," in B. Hepple & B. Veneziani, eds., *The Transformation of Labour Law in Europe: A Comparative Study of 15 Countries 1945-2004* (Oxford and Portland: Hart, 2009) 201, at p. 206.

However, less than two decades after legislative support for collective bargaining was extended to the majority of public-sector workers in the 1960s, one or more of the freedoms of those workers have increasingly been suspended or limited, without giving them any compensating rights. It is the imposition of these "exceptional" limits on the freedom to strike, without compensating rights — or indeed, accompanied by employer unilateralism in the form of government-imposed terms and conditions of employment — that is likely to provide the context for a claim that the *Charter* protects the freedom to strike. From a historical perspective, there is a strong argument to be made that these kinds of measures are inconsistent with the pattern of all previous regimes of industrial legality in Canada — regimes that either gave workers nearly unlimited freedom to strike without rights (liberal voluntarism) or that limited workers' deeply entrenched freedom to strike but provided compensating rights, including a right to strike (industrial pluralism).[46]

46 Whatever else might be said about such a claim, there is probably a better historical case for recognizing a fundamental *freedom* to strike than there is for recognizing a fundamental *claim right* to bargain collectively that entails a duty on employers to bargain in good faith. For a critical account of the Supreme Court's use of labour law history in *B.C. Health*, see E. Tucker, "The Constitutional Right to Bargain Collectively: The Ironies of Labour History in the Supreme Court of Canada" (2008), 61 Labour/Le Travail 151.