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Cold Porridge:
The NDP Labour Law Policy Review

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The Saskatchewan New Democratic Party (NDP) policy review, "A Rooted and Growing Vision" has been released preparatory to the upcoming November election. Based on meetings held throughout the province and submissions received, it contains policy recommendations on a variety of matters (e.g.: education, health, agriculture, etc). Among its proposals are those impacting on the province's labour force.

Among its recommendations, the review suggests changes to the *Public Service Essential Services Act* as set out in Bill 5 that … "make sense," and repeal of the changes to the *Trade Union Act* contained in Bill 6. While the need for this legislation was barely mentioned in the preceding election, they were the first bills introduced by the then new Saskatchewan Party administration of Premier Brad Wall. The review also proposes amendments to the *Trespass to Property Act* (Bill 43) and the repeal of Bill 80, *The Construction Industry Labour Relations Act*. This policy review was tabled at the NDP policy convention in late March 2011. It is noteworthy that New Democratic Party and opposition leader Dwain Lingenfelter has publically stated his party's intention to repeal Bills 5, 6 and 80 should his party be successful in the forthcoming election.

The Wall amendments to the Saskatchewan *Trade Union Act* require that 45 percent of the employees in a proposed union must sign union cards before a vote can be taken to determine their wishes; the previous threshold was 25 percent. This, together with B.C., is the highest such vote threshold requirement in Canada. As well, a vote of the proposed membership must be taken in every case, even if 100 percent of the proposed membership signed union cards. Under the previous Act, if a majority of the proposed membership signed cards, union certification was normally automatic. The

latter arrangement exists in five other jurisdictions. As well there is no legally specified time within which the required vote must be taken.

A further revision permits employers to communicate its. "... facts and its opinions to its employees". While commonly understood to apply when a union is attempting to organize a group of employees, in fact this provision extends the employer's right to communicate on any aspect of the collective bargaining relationship subject only to the proviso that such communication is not intimidating, threatening or coercive .

The revised *Trade Union Act* sets a limit of 90 days within which a union could file an unfair labour practice (ULP) or make application to represent a group of employees. The previous act contained no time limits on filing of a ULP, but similar legislation , e.g.: labour standards, human rights, have a time limit of one year. The previous limit to file for certification to represent was six months.

The *Public Service Essential Services Act* (Bill 5) defines an essential service as one whose absence would threaten life, health or safety; result in the destruction of property; cause environmental damage or, interfere in the operation of the courts. It applies to the traditional public service departments, e.g.: highways, health etc. as well as crown corporations, the province's two universities, the Saskatchewan Institute of Applied Science and Technology (SIAST), regional health authorities and related agencies, municipalities and police. The act's application to Saskatchewan universities is the only such instance in the country; the act does not apply to K to 12 education. As well, the act permits the Government to extend its application to any another "... person, agency or body or class of person or bodies ..." As is evident, the act's application is very broad. Notably, while the act applies to unionized "public employers" who provide essential services, it does not apply to unionized private employers who provide essential services, e.g.: private ambulance services. The act also does not apply to members of professional associations who provide essential services, e.g.: the physician members of the Saskatchewan Medical Association.

Essentially, the act requires union and management, 90 days prior to negotiations, to meet and attempt to reach agreement on duties that will continue to be performed in the event of strike or lockout and the number of employees required to perform these duties. Where there is failure to agree the employer presents the union with the duties it considers essential and the classifications and number of employees required to perform these duties. The union can appeal the number of employees identified as essential to the Labour Relations Board (LRB). As well, the employer can unilaterally designate additional duties and employees as essential if subsequent strike action makes this necessary. This again, is subject to LRB challenge by the union on the number so designated.

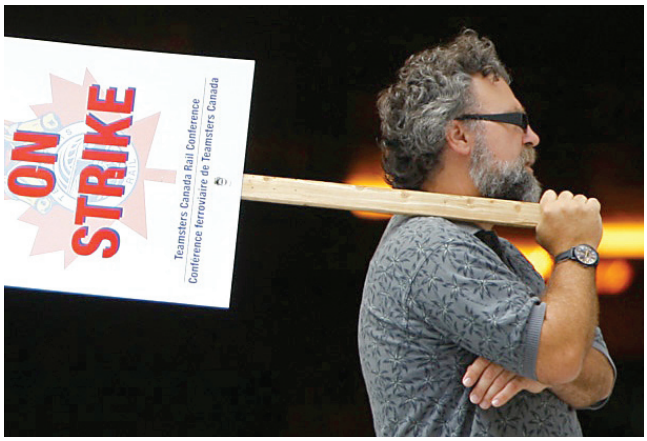
The Changing Landscape of Labour Rights in Canada

By way of background, in June 2007 the Supreme Court of Canada found *The Health and Social Services Delivery Improvement Act* (Bill 29) adopted by the British Columbia Government in 2002, was unconstitutional because it contravened the freedom of association provision, (2d) in the Charter of Rights and Freedoms. This ruling, that collective bargaining was a constitutionally protected right, overturned previous Supreme Court rulings, beginning with the late 80's "labour trilogy" line of case decisions. The latter stated section 2(d) did not include the right to collective bargaining.

Given the close time proximity of the Supreme Court's decision and the introduced Bills 5 and 6, it is unlikely the Government of Saskatchewan could give full consideration to the possible impact of the former on the latter.

Organized labour's initial response to Bills 5 and 6, spearheaded by the Saskatchewan Federation of Labour (SFL), was to file a complaint with the International Labour Organization (ILO) based in Geneva. This it did in June 2008 and Sept 2009. That complaint alleged Bills 5 and 6 contravened ILO conventions that had been ratified by Canada.

In its March 2010 report, the ILO recommended that the Government make amendments to both Bills 5 and 6. In reference to Bill 5 it recommended that the Labour Relations Board (LRB) be given more latitude in deciding the classifications and number of employees required to perform essential duties. As well, that the option of interest arbitration be made available to employees whose right to strike has been rendered ineffective as a result of the number of employees designated as essential. In regard to Bill 6, it recommended that the vote threshold of 45 percent be lowered and that the Government take steps to insure the LRB



enjoys the confidence of the management and union parties. Finally, that the Government undertake early consultation with union and management representatives when contemplating revisions to labour legislation.

In its response, the Government of Saskatchewan has noted that the ILO recommendations are non binding and that it is satisfied with the existing legislation.

As well, the SFL, on behalf of a number of its affiliated member unions, initiated court action in July 2008 (revised, Dec.2009) alleging Bills 5 and 6 contravene Canada's Charter of Rights and Freedoms, specifically sections 2(b), 2(c), 2(d), 7 and 15. In its arguments, section 2(d), freedom of association, is central to its case. This legal action is currently before the courts.

The policy recommendations contained in "A Rooted and Growing Vision" were discussed at the NDP March 2011 policy convention. The actual resolution passed demands that a future NDP provincial government repeal Bills 5, 6, 43 and 80. These policy resolutions have been referred to the NDP platform committee whose task it is to prepare the party platform for the up coming November 2011 election.

Given the resolution speaks of 'repeal" of the changes contained in Bill 6, the likely party platform will result in the reinstatement of the 25 percent vote threshold found in the previous Act. As well, the likely return of automatic certification if a majority of the proposed union members sign union cards, the restoration of the six month threshold for filing applications for certification and perhaps the clarification of the employers right to offer its "... facts and its opinions to its employees" to clarify that such behaviour can not be intimidating, threatening or coercive.

So, not much new; basically organized labour gets back what it had.

Return to the Status Quo?

However, in proposing repeal to Bill 5, the *Public Service Essential Services Act*, and to replace it with revisions that "make sense", the NDP seems to have closed the door on returning to the days of an unfettered right to strike in the Saskatchewan public sector. There is some indication that organized labour has accepted this reality in that it commonly acknowledges that services that threaten health, safety and security of persons must be maintained and that it has voluntarily provided such services during strikes in the past. So it really becomes an issue of a more effective process of determining what services are essential and the number of employees required to perform those services.

Likely amendments could include giving the Saskatchewan Labour Relations Board (LRB) power to resolve disputes over the nature of services considered essential and the number of employees required to perform those services where the parties cannot agree. Of the seven Canadian jurisdictions with essential service legislation, all but two grant labour relations boards this power. The application of these revisions will also likely apply to the Saskatchewan public service; currently its services considered essential can be "prescribed" i.e.: unilaterally set by government. As well, the determination of which duties are essential might occur at the point of impasse in bargaining; currently it is done at the outset of bargaining. With the latter, there is an incentive for management to maximize the number of employees considered essential thus limiting the union's bargaining power at the very outset of negotiations.

Finally, an arbitration option may be introduced if the union finds that the number of persons designated to perform essential services has made the strike weapon basically ineffective. Attractive but less certain would be the adoption of binding arbitration at the option of one or other of the bargaining parties where they were unable reach a collective agreement. The intent here is that, given its uncertain outcome, the parties, union, management and government, would be prompted to reach agreement.

The proposed revision to the *Trespass to Property Act* simply intends to make clear that the Act does not prevent peaceful picketing. The Act itself is not restricted to trespass on to "private property". In fact, it contains no reference to private property. There is reference to "premises" which includes "lands and structures" as well as a reference to an "occupier" i.e.: a person who has control over the premises, activities

carried on inside and control over who can enter. Thus the Act appears to apply to all public and private property as well as property commonly viewed as "public property", e.g.: shopping centre and strip mall parking lots, entire territories controlled by resource companies, even the legislative grounds.

This Act, as currently written, would not likely stand a court challenge. The Supreme Court of Canada, in RWDSU vs Pepsi Cola, stated unions have the right to engage in peaceful picketing on the public property of the customers of a struck employer. It is unlikely the courts would then turn around and rule that similar picketing is not permitted on the public property of that same struck employer. However, a revision to the *Trespass to Property Act* would make this explicitly clear.

So, in spite of the political debate that will no doubt ensue, and excepting changes to the essential services legislation, what we likely have is a return to the previous status quo. The question is, what has been missed?

Union membership has been in steady decline for a number of years nationally and indeed, internationally. Canadian union membership peaked in 1981 at approximately 38 percent of the non agricultural labour force; currently it stands at approximately 29 percent. In the private sector the percentage organized is concentrated in the goods producing industries, e.g.: 30 percent in manufacturing, 30 percent in construction, 22 percent in natural resources. About 56 percent of all union members are in the public sector. Organized labour has not enjoyed success in organizing the private service sector; here the percentage organized is low, e.g.: finance and banking, 8.3 percent; accommodation and food, 6.3 percent; professional, scientific and technical, 4.3 percent. Significantly, the service producing sector of the economy is more than twice the size of the goods producing sector and is expanding. In Saskatchewan union membership has stagnated over the last decade at approximately 33 percent. As well, approximately two thirds of this is concentrated in the public sector.

The reasons for this stalled union growth are known and varied. The traditional centres of union strength, e.g.: autos, steel, forestry, etc, have been organized. The growth of the service sector, with its many small employers and its large part time labour force, make it hard or even uneconomic for unions to organize. Other factors include management use of union avoidance strategies, both progressive and otherwise, as well as more restrictive labour legislation.

The previous *Trade Union Act* provisions did not redress the problem of organizing employees in the private service sector; the return of these same provisions holds no better prospect.

This decline in union membership commonly raises questions concerning the relevance of unions in the present economic and social environment and the appropriateness of adversarial collective bargaining. A more fundamental but less frequently raised question is, what degree of influence should non unionized employees have over their terms and conditions of work and, how have other jurisdictions addressed this issue?

The European Union has recently granted employees in its member nations, via employee counsels, the right to an advance knowledge of employer initiatives that will have an impact on employment and the right to make representations concerning those initiatives. Similar arrangements, with even more stringent conditions, already exist among some of its members, e.g.: Germany. The Supreme Court of Canada, in its decision on the BC *Health and Social Services Delivery Improvement Act* (Bill 29), ruled that employees, under the Charter of Rights and Freedoms freedom of association provision (2d), have a right to collective bargaining, i.e.: to meet and consult with the employer and to engage in good faith collective bargaining on terms and conditions of employment. The inclusion of such a permissive right in Saskatchewan *Labour Standards Act* would simply acknowledge what is now the fundamental law of the country. Indeed, the state is now obligated to establish legal mechanisms that would permit employees to exercise that right.

The present and sole legal arrangement for engaging in collective bargaining in Saskatchewan as defined by

the Supreme Court, is the *Trade Union Act*, which in application is inherently undemocratic. It requires that 50 percent plus one of those voting on the proposed bargaining unit must vote in favour of representation. Failing such a majority it leaves those remaining employees wishing some influence over their terms and conditions of work with nothing. An arrangement as proposed above would grant some "voice" to non unionized employees wanting what the union movement has been unable to provide and to which they have a constitutional right.

The recent Supreme Court ruling in *Fraser vs Ontario (Attorney General)* does not mandate the Wagner Act model of collective bargaining, common throughout Canada, which has been the objective of most of the legal initiatives taken by the labour movement citing 2(d) of the Charter. Rather it simply confirms the direction hinted at in its earlier *Health and Social Services* ruling, i.e.: the right of employees to meet and consult with the employer and to engage in good faith collective bargaining on terms and conditions of employment. Thus alternate and more comprehensive forms of employee representation are possible. It is not an issue of providing one or the other, both are possible.

An initiative in Saskatchewan to grant such powers directly to employees would likely be opposed by management representatives and by the more conservative members of the labour movement. That alone suggests it warrants consideration.

Finally, steps could be taken to end the constant and conflicted "data wars" between public sector bargaining parties, where each tries to convince a confused public that its wage offer or demand compares favourably to that received by similar employees in adjacent jurisdictions. Currently some wage research is conducted by the Saskatchewan Ministry of Finance which sets the collective bargaining financial mandate for a significant portion of the public sector (e.g.: the crowns, health care, education, the public service as well as boards and agencies). Unions may also conduct similar research. Settlements at this level influence settlements in the broader public sector, e.g.: municipalities and universities as well as the private sector.

The results of such research are questionable given the vested interests of the parties. This function could be conducted by a neutral administrative agency, possibly by the Saskatchewan Ministry of Labour. Such a body would carry out compensation surveys and conduct analysis on the information gathered to determine the comparative "market rate" for various types of public sector labour in adjacent jurisdictions. The bargaining parties would have input into the scope of such surveys. This proposal is based on the idea, generally accepted by unions, management and the public, that public sector compensation should be as good as, but not better than, comparable private and public sector employers. The results of this research would be made available to the bargaining parties and importantly, to the public. Again, it is likely union and management would be resistant to this initiative as it removes a much used bargaining tactic. However, the public is better served by a clearer indication of where the settlement likely resides; this is as it should be given it's the latter's money that is at stake.

In the debates of the legislature in 1944 preceding the passage of the Saskatchewan *Trade Union Act* there was much discussion about providing the working population of Saskatchewan with legal mechanisms that would give them more influence over their economic lives. Since then, Saskatchewan has often served as a forerunner in progressive labour legislation. It was the first province to introduce the Wagner labour relations model to Canada, the first to permit public sector bargaining and the first to legislate the co-regulation of workplace occupational health and safety. Thus while the proposed NDP labour law revisions described in its policy review may serve the labour movement, a key constituency, they do not appear to adequately serve a growing unrepresented working population with limited influence over their conditions of employment. Perhaps it's a loss of the vision of earlier days, perhaps a lost opportunity.

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