CCPA
CANADIAN CENTRE
for POLICY ALTERNATIVES
SASKATCHEWAN OFFICE

Saskatchewan Notes

Enhancing Employees Voices in the Workplace

By Dan Cameron

The changing nature of work toward precarious employment means employees have less ability to influence the terms and conditions of their employment. This article proposes actions governments could take so those workers can gain some of the benefits and decision-making power currently enjoyed only by union members.[1]

In the winter of 2022, Canadians were confronted by a virtual shut down of Ottawa by a truck convoy protest, with smaller protests opposing government-mandated COVID restrictions occurring throughout the country. The major complaint of the protestors in each was that the lives of individuals were being impacted by decisions over which they had little control or input. Yet there is one such constraint to our personal freedom that lies closer to home, attracts limited public scrutiny, and that happens daily: the diminished ability of employees to influence the terms and conditions of their employment. The reasons: the changing nature of work, how we do it, and our failure to respond to that reality.

That emergent reality is prompting political responses. The International Labour Organization (ILO) issued a report on "...the new forces transforming the world of work."[2] The

[1] The author would like to acknowledge the suggestions of Dr. Dionne Pohler, Associate Professor, University of Saskatchewan

[2] International Labour Office (2019) Work for a brighter future – Global Commission on the Future of Work Geneva.

United Kingdom has recently released a report criticizing the rise of temporary and self-employment and the absence of traditional employee benefits and protections.[3] The European Union has announced draft rules to provide benefits for those who work at on-line companies like Uber and Deliveroo.[4] In 2019, California passed legislation to protect independent contractors, designating them employees, entitling them to employee benefits and protections. However, as a result of Proposition 22 in 2020, a $200 million plebiscite largely funded by web-based companies (Uber, Lyft and DoorDash), such employees were exempted from the legislation.[5] Finally, the Federal Government is conducting a review of the Canada Labour Code that includes examining protections for those engaged in "nonstandard" employment.

In 2020, Canada's labour force numbered approximately 18.5 million.[6] Of these, 3.8 million were in the goods-producing sector (manufacturing, construction, agriculture, mining, etc.). The remaining 14.6 million were in the service sector (retail, finance, education, transport, real estate, health care, the public sector, etc).[7] The latter is the fastest growing

[3] House of Commons Work and Pensions Committee (2017). *Self-employment and the gig economy* Thirteenth Report of Session 2016–17.

[4] Sam Shead (2021). "Uber, Deliveroo and other gig economy firms face strict new rules in Europe." *CNBC*. December 9. https://www.cnbc.com/2021/12/09/uber-deliveroo-and-gig-economy-face-strict-new-rules-in-europe.html

[5] Suhana Hussain, Johana Bhutan and Ryan Menzies (2020). How Uber and Lyft persuaded California to vote their way. *Los Angeles Times*. November 13. https://www.latimes.com/business/technology/story/2020-11-13/how-uber-lyft-doordash-won-proposition-22

[6] Statistics Canada, Labour Force Survey 2020, Table 2, Employees by Class of Work and Industry.

[7] Statistics Canada, Temporary Employment in Canada, 2018.

component of the economy. And it is here where temporary contingent employment is most common.

Temporary employment can take a variety of forms; contract positions, which end at a specific date, part time as well as casual and seasonal jobs.

While the overall labour force is growing, the temporary labour force is growing faster; Statistics Canada reports that temporary employment has jumped 50% in the last 20 years while permanent employment increased 33%.[8]

In 2018, approximately 13% of the labour force, or 2.1 million, were employed temporarily.[9] They earn less than their permanent counterparts and may not have access to traditional employee benefits such as expanded health benefits, holidays, vacation leave, etc, or other mechanisms of redress. The Conference Board of Canada has stated this may be the nature of tomorrow's labour force. Welcome to the new “gig” economy.

Because of its precarious nature, temporary employees are often hesitant to raise employment concerns. Normally they might seek to gain some control via unionization, but there are barriers.

Legislation permitting collective bargaining throughout Canada is a product of the 1940s and 1950s. An import from the U.S., the “Wagner” model of collective bargaining has certain legal characteristics. Among them, majoritarianism ie: if the union can show it has the support of the majority of the proposed membership, it can be certified by the labour board to represent them all. As well, the labour board can decide, on the basis of negotiating efficiency, who can belong to the proposed union; which employees share a common “community of interest,” ie: similar training, working conditions, etc. This highly centralized form of collective bargaining has detailed collective agreements, dispute settlement processes and, the right to strike.

The Wagner form of collective bargaining was intended to apply to employment conditions that existed at the time of its 1930's origin; ie: large goods-producing plants and long-term employment by its largely male labour force. The service economy was a fraction of what it is today. It was the outcome of the struggle by organized labour for recognition and the product of the “great compromise;” management would accept that the union represented the employees, the union would accept the employer’s “right to manage” the enterprise, subject to negotiated constraints.

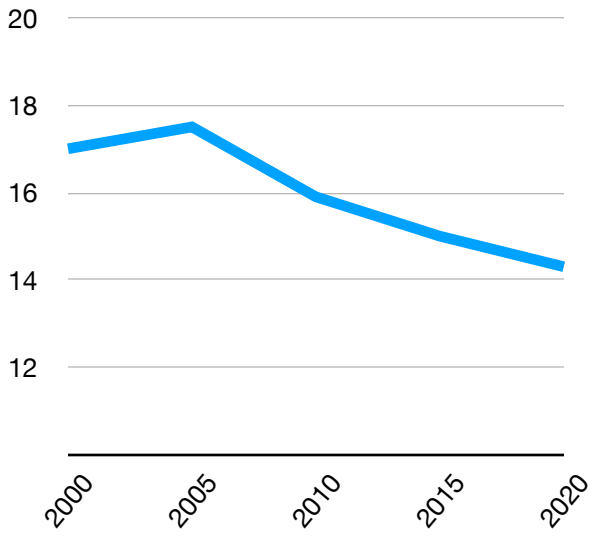
---

[8] CBC News. (2019). “Number of Temp Workers jumped 50% in last 20 Years Stats Can says.” May 14. https://www.cbc.ca/news/business/temporary-workers-employment-1.5135310

[9] Statistics Canada. Temporary Employment in Canada, 2018.

But that is not the reality of today's largely female, and often immigrant temporary labour force. With little permanent connection to

Private Sector Unionization Rate, Canada, 2000 to 2020



their smaller service economy workplaces, prospects for unionization can be limited. Thus, there exists a mismatch between existing collective bargaining legislation and today's temporary contingent labour force. These laws fit yesterday's world, not today's reality.

And while jurisdictions have not barred unionization to this new labour force, they have made it more difficult. In the 1980s, if the majority or more of the employees signed a union card that was enough for many labour boards to certify the union to represent them all. Now only five jurisdictions permit that option, (Federal, New Brunswick, PEI, Quebec and Alberta). As well, the number of cards that must be signed to request a certification vote has been increased. In Saskatchewan it is now 45% of the proposed membership from the previous threshold of 25%. Moreover, the period over which signed cards remain valid to request a vote has been shortened - in Saskatchewan now 90 days instead of six months.

The result has been the percentage of the total employed labour force who are union members has gradually fallen from 38% in 1980 to 28.6% by 2015. This has not been offset by unionization in the service sector which grew by only 0.6 %. In key service sectors like accommodation and food services, with its high temporary employee compliment, union growth was a negligible 0.1%.[10]

The reality is that employers resist unionization. Employers are at liberty to inform employees of their opposition to unionization so long as such communication does not intimidate or coerce. Indeed, in Saskatchewan, the right of employers to publicly express its "facts and opinions" on possible union certification has been enshrined in legislation. (Saskatchewan Employment Act, Unfair Labour Practices, 6-62(2)). An employer with deep pockets can simply wait out the union via legal challenges to

[10] Statistics Canada: Long Term Trends in Unionization. https://www150.statcan.gc.ca/n1/pub/75-006-x/2013001/article/11878-eng.htm

certification or through delays in negotiations. Others may covertly threaten to close or move the enterprise to another jurisdiction. Many service workplaces are small, with high employee turnover, and thus the cost for unions to organize and serve these workplaces is high. Unions may be viewed by these potential members - many recent immigrants - as large, distant, bureaucratic, and conflict prone.

At the Parliamentary hearings that preceded the adoption of the Canadian Charter of Rights and Freedoms in 1981, Justice Minister Robert Kaplan stated there was no need to identify collective bargaining as a separate right as it was already incorporated in Section 2(d), Freedom of Association. It was a statement the Supreme Court of Canada paid scant attention to in early Charter rulings. In three decisions in 1987 the Court stated that while section 2(d) preserved the right of a person to join a union it did not extend to that union's collective activities. Your right to join a union was protected but its raison d'etre was not. That was the law for 20 years.

In a 2007 turnaround, involving the British Columbia government and its health care workers, the Court stated that engaging in collective bargaining was a Charter protected right.[11] This means that, unlike the U.S., it is not simply a legal right that could be unduly restricted or legislated away; rather, it is a fundamental freedom. In a later case involving Ontario agricultural workers, the Court stated that in exercising the Charter right to bargain collectively, employees have the right to make written submissions to the employer, without fear of reprisals, who was required to consider and respond in good faith.[12] In two other Saskatchewan decisions, the Court found the right to strike and picket was also constitutionally protected.[13] Thus the core fundamentals of collective bargaining, the right to negotiate, picket and strike, are the Charter protected rights of all employees, with or without the union certification.

It is important to note what the Court did not say. It did not constitutionalize the Wagner form of collective bargaining; it constitutionalized collective bargaining as a process. Thus, varied forms, including Wagner, are possible. As well it did not adopt the majoritarian principle; any group of employees could combine to achieve their employment goals.

The Supreme Court has consistently stated that its Charter rulings should have broad application. This applies to

---

[11] Health Services and Support-Facilities Subsector Bargaining Association v. British Columbia

[12] Ontario (Attorney General) v. Fraser, 2011, SCC20

[13] RWDSU Local 558, Pepsi Cola 2002, SCC8; and Saskatchewan Federation of Labour v. Saskatchewan, 2015, SCC 4

its rulings on access to collective bargaining. But, under the Wagner system, in a labour board certification vote, 51% of employees can deny the remaining 49% of their Charter right to bargain collectively. Similarly, a labour board's use of community of interest criteria takes precedence over this constitutional right; it is denied merely on the basis of administrative efficiency. It is unlikely these administrative criteria would be saved by Section 1 of the Charter.[14]

If collective bargaining is a fundamental freedom, it cannot be restricted to those who have successfully navigated the costly Wagner certification labyrinth, with its employer challenges and legal appeals. Organized labour has not always been able to provide access to collective bargaining for many for the reasons stated above. Consequently, it should be made available and more easily accessible to employees by other means. This would require revisions to employment legislation, ie: employment standards and the trade union acts.

Collective bargaining type provision in labour standards would not break new ground. Federal and provincial occupational health and safety legislation has been the responsibility of joint employer - union/employee committees for decades. Indeed, Saskatchewan led the nation in the implementation of such legislation in the 1970's. It permits employee participation in determining health and safety practices and allows employees to refuse unsafe work without fear of a penalty. Similar arrangements exist federally in the case of mass layoffs. The Canada Labour Code, that applies to approximately 10% of the labour force, has permitted non-unionized employees access to binding 3rd party adjudication if they believe their termination was unjust.

Therefore it is proposed that legislation be introduced to permit employees the same rights in the application of labour standards that they presently have in the application of occupational health and safety legislation.

This would permit employees to participate in workplace committees to promote, monitor and ensure the implementation and application of labour standards, to examine contraventions and to make recommendations on the application of these standards. Employees would be permitted to refuse work, without fear of a penalty, where standards are contravened.

For some this may result in a working relationship with the employer somewhat similar to the Work Councils

---

[14] Section 1 of the Charter of Rights and Freedoms: 1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society. R. v. K.R.J., 1 SCR 906 and The Oakes Test, R. v. Oakes (1986). 1 S.C.R.103

operating throughout the 27member European Union.[15] These Councils deal with collective issues at the workplace, eg: work organization, training policy, wages, benefits and advance notice and input on strategic moves planned by the company.

But for other employees, depending on the employers' response to its participation and proposals, this would mean seeking union certification. For the union, the hard front end work of developing group solidarity would already be in place.

As well, while certification where the majority of the employees signed union cards could be adopted, more fundamental revisions to the Wagner system could be undertaken. This could include legislation removing the majoritarian principle and the community of interest criteria. Unions would simply be certified to represent a group of employees based on clear evidence it was their wish to be so represented. This would permit minority unions. The Wagner system, with its legal complexities and costs, creates barriers to the exercise of a fundamental Charter right and is a disadvantage to the labour movement and unorganized employees.[16]

Governments usually describe legislation restricting collective bargaining rights as impacting solely on "union bosses"; they would be less inclined to do so when such restrictions can be shown to impact the constitutionally protected rights of employees generally.

Including collective bargaining rights in labour standards and altering the Wagner system, gives unorganized employees additional options for levelling the power imbalance with the employer. Organized labour could direct efforts at organizing minority unions. It could advocate on behalf of specific service industry employees and advance the needs of particular groups, eg: big-box retailers, bank employees, food service employees, etc. It could advise employees on their legal entitlements and represent them in pursuing their constitutional rights; it could provide access to benefit plans. It would permit individual employee and unorganized employee groups union membership. This provides organized labour with the opportunity to move in a new direction.

By proceeding in this manner, organized labour would be returning to its roots. It advocated for and represented employees long before that right was granted legally. It provided benefit plans, it organized various classes of workers like

---

[15] See EOR Works Councils: https://www.youtube.com/watch?v=zQLtOPtDpCc

[16] For a paper proposing alternate means of implementing collective bargaining see, David J Doorey, Graduated Freedom of Association: Worker Voice Beyond the Wagner Model, 2013. 38-2 *Queen's Law Journal* 511, 2013.

carpenters, electrical workers, and all employees in certain industries. Unifor, Canada's largest private sector union, has taken some steps in this direction via its Community Chapters initiative.

While this proposal gives employees additional means to level the power imbalance with their employers it also supports a broader democratic ethic in society. It would likely be opposed by some governments, management and some unionists. But this proposal is grounded in constitutional law and therefore warrants consideration.

Dan Cameron is the former Director of Employee Relations of the Saskatchewan Public Service Commission. For nine years he was a lecturer in collective bargaining at the undergraduate and graduate levels at the Hill School of Business, University of Regina. As well, he has served as an adjudicator under the Canada Labour Code and as a guest presenter at collective bargaining conferences.