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The Comparative Effects of U.S. and Canadian Labor Laws and Labor Environment in the North American Competitive Context: The Canadian View

*by Donald D. Carter**

An American visitor to Canada might not notice any distinct change in the labor relations climate after crossing the border from the United States. For one thing, a quick glance at Canadian newspapers would reveal that the names of many of the participants in the Canadian industrial relations system have a familiar American ring to them. Such union names as the United Food and Commercial Workers, the Teamsters, and the United Steelworkers of America and such employer names as General Foods, United Parcel Service, and Union Carbide would sound familiar, even though some of these names might also contain a parenthetic reference to Canada. Our visitor, quite understandably, might form a first impression that there were no sharp differences between the Canadian and American industrial relations systems.

If our visitor were seized by the impulse to glance quickly at Canadian labor legislation, such an exercise might only confirm this first impression. On the surface, the legislative framework that underlies the Canadian industrial relations system looks very much like the American collective bargaining structure; both have their roots in the Wagner Act. Given the similarities between American and Canadian collective bargaining legislation, our American visitor could be forgiven for leaving Canada with the impression that the Canadian industrial relations system was sufficiently similar to the American system so as to give Canada neither an advantage nor a disadvantage in the North American competitive context.

First impressions, however, are often deceiving and our casual visitor would be sadly mistaken if he or she were to leave Canada thinking that the Canadian industrial relations system is indistinguishable from its American counterpart. The Canadian industrial relations system is quite different from the system in the United States, and the differences between the two systems raise an important question as to how they affect Canada's position in the North American competitive context.

From its very inception, the Canadian industrial relations system has shown a tendency to drift away from its American progenitor and, in recent years, this tendency has become more pronounced. Let me put

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this continental drift in historical context by going back to the beginnings of Canada's present industrial relations system. This system can be traced to the collective bargaining regime introduced in Canada during World War II under the federal emergency powers¹ which, although owing a substantial debt to the Wagner Act, was not just a carbon copy of the American collective bargaining legislation.

From the very beginning, the Canadian regime provided more extensive restrictions upon economic sanctions by expressly prohibiting the use of strikes and lockouts during the term of the collective agreement. Since the parties were required to settle such disputes without stoppage of work, the alternative of grievance arbitration was also expressly provided by this legal structure. The legislated prohibition of mid-contract strikes and lockouts, and the substitution of an alternative procedure (usually grievance arbitration), have since become distinctive hallmarks of Canadian labor relations law. They also marked the beginning of a Canadian tendency to rely more heavily on legislated solutions to resolve its labor relations problems rather than to leave such matters to private ordering.²

Following World War II, there were further signs of continental drift as the Canadian labor relations structure began to grow further apart from its American progenitor. The end of the wartime emergency meant that the ten Canadian provinces were able to reestablish their constitutional claim to the largest part of labor relations jurisdiction in the private sector, so that today only some ten percent of private sector employees fall under federal jurisdiction. Only private sector employees employed in "federal undertakings" such as banking, interprovincial and international transportation and communications activities are regulated by federal labor laws, while the vast majority of private sector employees fall under provincial jurisdiction. Except for the occasional use of the federal emergency power, the existence of a national unemployment insurance scheme, and the limited application of federal criminal law, private sector labor relations is largely a matter for provincial regulation.³ This division of legislative authority has had important implications for Canada's industrial relations system.

The result of this constitutional arrangement is that Canada has eleven distinct labor relations jurisdictions - one federal jurisdiction and ten provincial jurisdictions. The federal jurisdiction, while still significant, is far from dominant and it is fair to say that the larger provinces each play just as important a role in regulating the Canadian industrial relations system as does the federal government. Canada's decentralized

¹ *The Wartime Labor Relations Regulations* (P.C. 1003).

² For a description of the Canadian legal framework for collective bargaining, see D.D. Carter, *Collective Bargaining Legislation in Canada* in J. ANDERSON AND M. GUNDERSON (eds.) *UNION-MANAGEMENT RELATIONS IN CANADA* (1982).

³ The Canadian constitutional framework is discussed in H.W. ARTHURS, D.D. CARTER, and H.J. GLASBEEK, *LABOR LAW AND INDUSTRIAL RELATIONS IN CANADA*, at 45-48 (2nd ed. 1984).

system of labor relations regulation, and the relative ease with which parliamentary governments can legislate are both factors that have contributed to frequent legislative intervention in the Canadian industrial relations system.

This legislative intervention in turn has given rise to a considerable amount of innovation and diversity as no one government plays a dominant role in the system.⁴ Each of the eleven Canadian jurisdictions has established its own detailed statutory framework within which industrial relations is conducted. This legislation not only provides a legal structure for collective bargaining, but also regulates directly such matters as minimum employment standards, worker health and safety, compensation for work injuries, and human rights at the workplace. While this direct regulation of conditions of employment by legislation is becoming an increasingly important aspect of the Canadian industrial relations system, collective bargaining still remains the pre-eminent industrial relations institution in Canada and has been recognized as such by Canadian legislators.

The general direction of this frequent legislative intervention has been to strengthen and reinforce the collective bargaining system, further contributing to the drifting apart of the American and Canadian industrial relations systems. The most important difference is that Canadian collective bargaining legislation has been far more supportive of trade union activity. In Canada, the acquisition of bargaining rights has been made easier by a relatively fast certification process which in most jurisdictions is based on union membership evidence rather than a vote,⁵ and even those Canadian jurisdictions that make certification votes mandatory still provide for expedited representation elections. The need for a strong financial base for trade unions has also received explicit legislative recognition by provision which authorize union security arrangements and, in some jurisdictions, make them mandatory. Some Canadian jurisdictions provide even more support for collective bargaining by providing for the arbitration of first agreement disputes. One jurisdiction has gone so far as to prohibit use of replacement labor during an industrial dispute. Collective bargaining in Canada is alive and well, and it has been estimated that close to 37% of all paid workers in Canada are union members and that 42% of all paid workers are covered by collective agreements.⁶

The healthy state of collective bargaining in Canada testifies to the strength and vigor of the Canadian trade union movement. Canadian

⁴ See P.C. WEILER, RECONCILABLE DIFFERENCES: NEW DIRECTIONS IN CANADIAN LABOR LAW (1980), at 9-11.

⁵ For a comparison of Canadian and American certification procedures, see P.C. Weiler, *Promises to Keep: Securing Workers' Rights to Self Organization Under the NLRA*, 96 HARV. L. REV. 1769 (1983).

⁶ See P. KUMAR, M. COATES, D. ARROWSMITH, THE CURRENT INDUSTRIAL RELATIONS SCENE IN CANADA 1986, at 58 (1986).

trade unions have been able to wield political power sufficient to obtain a favorable legislative environment for collective bargaining. Nowhere is this more clear than in the Canadian public sector where the federal government and all provinces now recognize the right of public employees to organize and bargain collectively. Even though most Canadian jurisdictions still impose some restrictions on the use of economic sanctions by public employees, public sector collective bargaining has become a dominant element in the Canadian industrial relations system.

The explosive growth of collective bargaining in the Canadian public sector during the late 1960's and early 1970's has had a lasting impact upon the Canadian industrial relations system. Unlike the United States, where trade unions were beginning to lose ground by the 1960's, Canadian trade unions—fed by an expanding public sector—continued to grow. Penetration of the Canadian public sector has enhanced the institutional and political strength of Canadian trade unions by providing them with bargaining rights with far more permanency than in the private sector where economic forces can more quickly erode trade union membership. This growth of collective bargaining in the public sector has also strengthened the hand of Canadian trade unions at the expense of American-based international unions. This growth has resulted in a growing “Canadianization” of the trade union movement in Canada.

Canada, at the beginning of the 1980's, although by no means a labor relations island, was beginning to resemble a peninsula with the isthmus connecting it to the American labor relations system being increasingly eroded. At this point, the Canadian and American labor relations systems appeared to be moving in opposite directions. The Canadian system reflected the growing strength of trade unions, especially in the public sector, while the American system reflected a continuing decline of union power.⁷ This divergence of the two systems became most apparent during the recession of 1982-83. Even though Canada suffered a more severe economic decline at that time, Canadian trade unions resisted concessions with far greater militancy and success than their American counterparts — a factor that led to a growing rift between Canadian and American trade unionists in some international unions. Moreover, in the Canadian public sector, many jurisdictions had to resort to legislated wage restraints to keep the growth of public sector wages in check.⁸ Canadian trade unions emerged from this recession with much of their political and economic influence still intact while the American trade union movement appeared to be even weaker.

A fundamental question that faces the Canadian labor relations community today is whether the Canadian and American industrial rela-

⁷ For an interesting analysis of this development, see T.A. KOCHAN, H.C. KATZ, R.B. MCKERSIE, *THE TRANSFORMATION OF AMERICAN INDUSTRIAL RELATIONS* (1986).

⁸ See D.D. CARTER, *INCOME RESTRAINT AND INDUSTRIAL RELATIONS: A COMPARATIVE STUDY OF THE CANADIAN AND AUSTRALIAN EXPERIENCES* (1986).

tions systems will continue to move apart. This question is difficult to answer as the Canadian industrial relations system now appears to be influenced by conflicting sets of pressures. One set of pressures is being asserted by a Canadian trade union movement which is clearly determined, not only to maintain, but to expand its role in the industrial relations system. The recent breakaway of Canadian autoworkers from the U.A.W. and the even more recent Canadian-American split within the I.W.A. and the U.F.C.W. is perhaps the most apparent indication of the determination of Canadian trade unionists to follow their own course. Canadian trade unions, moreover, continue to wield considerable political power through their alliance with the New Democratic Party and the use of this political power continues to yield benefits in the form of favorable labor legislation. As well, there are signs that the Canadian political pendulum is starting to move toward the left and that the political fortunes of the New Democratic Party and their trade union partners are on the rise.

At the same time that these pressures are being felt by Canada's labor relations system, a quite different set of pressures is also operating. The decline of trade union power elsewhere in the world, especially in the United States, has not gone unnoticed in Canada, nor have the economic changes that have occurred south of the border. The movement toward privatization and deregulation has gained momentum in Canada, and this development is bound to weaken the economic influence of Canadian trade unions. The health of the Canadian economy, moreover, still remains suspect. Canada now faces a more difficult task in maintaining its exports as it confronts both increased competition and more substantial trade barriers. A harsher economic climate is unlikely to provide much comfort to Canadian trade unionists, and painful adjustments to our economic and labor relations systems may still have to be made.

Even if adjustments are not forced by a deteriorating economy, changes may still occur as the result of new trading arrangements with the United States. Whatever the outcome of the current negotiations on bilateral free trade, it does appear that more than ever the Canadian economy is being increasingly influenced by our trade with the United States. As these trading ties become even tighter, the pressure upon Canadian institutions to conform to American patterns will increase. If Canada is to remain competitive within this trading relationship, its industrial relations system cannot create a cost structure that compares unfavorably to that of its American trading partner. This fact of life does not mean that Canadians are required to reproduce the American labor relations system, but it does place considerable pressure upon Canadians to insure that their own system can produce roughly similar economic results.

At the same time that Canada faces a changing economic climate its legal structure has undergone a fundamental change. The amendment of the Canadian Constitution which gave birth to a Charter of Rights and

Freedoms⁹ has fundamentally altered the relationship between the legislature and the judiciary. The Charter has enhanced the authority of Canada's nonelected judiciary at the expense of its elected legislatures. This fundamental alteration of the constitutional balance has already cast a long shadow over the Canadian industrial relations system.¹⁰

A number of challenges to existing labor relations legislation are moving through the Canadian judicial system on their way to the Supreme Court of Canada. At this time, the extent to which the Charter will reshape our labor relations system is still uncertain, and it is not yet clear whether Canadian courts will place a new emphasis on individual rights or take a more traditionally Canadian approach of giving precedence to collective responsibility. The interpretation given to the Charter's guarantee of freedom of association will be of utmost importance to the future shape of the Canadian industrial relations system. Does this guarantee, as the trade unions argue, extend constitutional protection to such incidents of our existing system of collective bargaining as strikes and picketing? Or will the guarantee of freedom of association be read, as it was by the Ontario Supreme Court in the recent *Lavigne* case,¹¹ as protecting the individual employee from being required by government to financially support trade union political activities to which that employee is opposed? The answers to these questions will have important implications for the Canadian industrial relations system.

One possibility is that the Charter could reshape the Canadian industrial relations systems into a form that more closely resembles the present American model. The Charter has greatly enhanced the authority of the Canadian judiciary at the expense of our legislatures, but the idea of judicial legislation is still somewhat foreign to Canadian judges who have been schooled in a system of parliamentary democracy. Canadian courts are new to the business of making such profound policy choices, and they may feel uncomfortable with their new role of conducting a searching analysis of the political and economic considerations which underlie our present labor relations legislation. There will be a natural temptation for the courts to fall back upon the tried and true legal technique of justifying their choice by reference to precedent. Given the lack of Canadian precedent to resolve the difficult issues raised by the Charter, Canadian courts may be inclined to look to the abundant American constitutional case law. If Canadian courts do come to rely on American case law to resolve Charter issues, then over the long run the Canadian labor relations systems, through judicial interpretation, could conform more closely to the American model.

The conflicting pressures now being felt by the Canadian industrial

⁹ See Constitution Act, (1982), as enacted in Canada Act (1982), Schedule B, ch. 11.

¹⁰ For a comment on this development, see D.D. CARTER, *THE CHANGING FACE OF CANADIAN LABOR RELATIONS LAW* (1985).

¹¹ *Lavigne v. Ontario Public Service Employees' Union*, 86 C.L.L.C. ¶ 14,039 (S.C.O. 1986).

relations system reflect a familiar Canadian dilemma. Canadians have distinct social and institutional values, and these distinct values have contributed to the drifting apart of the American and Canadian industrial relations systems. Canadians, through frequent legislative intervention, have created a more comfortable environment for trade unionism and collective bargaining. At the same time, Canadian legislators have also provided substantial protection to employees in general through other forms of labor legislation. Minimum standards legislation, workers compensation legislation, unemployment insurance legislation, human rights legislation, and occupational health and safety legislation provide Canadian workers with benefits equal to or greater than those provided to American workers.

On the other hand, the open nature of the Canadian economy, and its particular vulnerability to American economic influence, effectively restrains the Canadian industrial relations systems from drifting too far from the American model. The Canadian industrial relations system operates within the North American competitive context, and if Canadian labor laws deviate too far from American legislation, then Canada runs the risk of being put at a competitive disadvantage. The challenge for Canadians is to maintain the uniqueness of their own industrial relations system while at the same time insuring that this system produces economic results which compare favorably in the North American competitive context.

