Watson Burns Report

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Whatever Happened to the Right to Strike?!

Part I: Postal Workers - Deliver Me!

Our federal 'Harper' government continues its onslaught against organized labour. They have recently set their targets on one of our most powerful rights – the right to strike. After setting their sights on Air Canada's workers (discussed below), they turned their big-brother-run-amok eye on our postal workers at CUPW. We should all be concerned over these apparent attacks on the right to strike.

It has long been a beef of mine that our governments love to tout the so-called benefits of the 'free market' system so long as workers don't enjoy the upper hand. Invariably, however, when that balance tips and workers are having an impact, the government will step in and introduce back to work legislation. It is ironic that the very essence of the free market system they espouse should support the continuation of a labour disruption as the natural and appropriate mechanism by which workers exert their power. Under the free market theory, when workers enjoy the balance of power in that relationship, they ought to prevail. It is the epitome of hypocrisy, however, and fundamentally undermines the operation of a purported free market system when the government actively interferes every time workers are in a position to potentially take advantage of their 'economic' power.

It is particularly untenable, however, where as in the case of our brothers and sisters at CUPW, the government orders the workers back to work with a salary increase of LESS than that which was already on the table from the Employer. This is virtually unprecedented and our labour community should be up in arms and vocal about it. On what possible basis could it be considered appropriate to interfere with the lawful, statutory bargaining process and penalize the workers when the labour disruption was caused by an Employer lockout?!

We strongly encourage all trade unionists to speak up about this type of interference and to let the Harper government know that we will not sit back idly and allow them to undermine hard fought powerful rights without a fight.

Special Points of Interest:

- Big wins for Watson Burns
- Check out our new logo!
- New! Something to tickle your funny bone

Inside this issue:

Part II: Air Canada—Flight or Fancy?

In a recent and untenable move, the Federal Government announced it was going to pass "back to work legislation" for striking employees of Air Canada. As you may know, approximately 3,800 agents from the country's largest airline walked off the job in June, in the first major strike to hit Air Canada in nearly 13 years. The big issue was pensions: the Employer wanted to move from a defined benefit plan to a defined contribution plan for new hires. This would result in a vastly inferior pension plan for the newly hired Air Canada agents.

Why did the government get involved in this strike? The Union had done everything "by the book": bargained collectively with the Employer for 10 weeks, went through conciliation with a mediator as required by the *Canada Labour Code,* was in a LEGAL strike position.

Despite that, less than 24 hours into the strike, the government pulled the rug out from under the Union and announced its intent to pass a law ending the strike. Here's the lame excuse Lisa Raitt, Labour Minister gave:

> "We are concerned by the effect this strike will have on our economic recovery -which is still fragile - and on Canadians in general," Raitt said in the House.
>
> "Canadians gave us a strong mandate . . . to complete our economic recovery, so that's why we will put on notice (Tuesday night) legislation to ensure continuing air service for passengers."

Really? Line ups at the airport are now enough to put striking workers back to work? Striking workers who have followed EVERY step required by law to get into a LEGAL strike position? After mere hours of strike activity? It's absurd. And it's dishonest. At least have the honesty to tell Canadians why you are passing the legislation – because you don't like trade unions.

When you consider other facts, it makes the government's decision even more insupportable. For example, Air Canada has said repeatedly in its media statements that the strike was NOT having a big impact on operations. So, where is the impact on our "fragile" economic recovery? And for that matter, Air Canada is a PRIVATE company. What business does the government have getting involved in a labour relations matter for a private company? It's not even that we are dealing with an essential service - airline transportation has NEVER been considered an essential service. There are other airlines operating in Canada (non-union ones, which of course, we don't recommend!); travelers have other options.

The government's decision to legislate strikers back to work is the Conservative government's obvious attempt at union bashing. Minister Raitt comes from a family with strong trade union connections. The Globe and Mail reported

> "One of her earliest memories of her late father – a union organizer for what would become the Canadian Auto Workers – is watching him seated at their kitchen table leading a passionate debate with transit workers over whether to launch a bus strike."

Perhaps Minister Raitt should have listened a bit more closely. She has used a flimsy, deceitful excuse to get involved in a private labour relations matter, attempting to shut down a perfectly legal strike.

But worse, she has set a dangerous precedent. Some people may not like unions or collective action, but when a government can take away a statutory right on a whim, we should all be worried. What's next? What other rights do we all have that this government will wipe out, just because they don't like them because they're inconvenient to their right wing agenda.

Ultimately, the parties in this case reached an agreement on their own, so we don't know what the Supreme Court of Canada would say about the government's actions. But we do know this: we are all on notice that our rights are in jeopardy with this government. Sad, but true.

The Next Person Who Calls Me A Racist Is Fired

Recently, we secured a significant resolution in a challenging Human Rights case. Our client alleged that she had been discriminated against based on race, including threats of retaliation if she or anyone else made allegations of racism. The issue arose when the employer suspended the Applicant pending investigation of a purported complaint of misconduct. When the investigation disclosed no misconduct, the employer returned the Applicant to her former position, but some of her prior duties were assigned to other employees, and the employer continued to imply that there had been some impropriety by the Applicant. The employer's President was alleged to have stated "the next person who calls me a racist will be fired." The employer tried numerous tactics to limit the scope of the complaint and/or to outright preclude the Applicant's right to have key issues heard at all.

We were successful in beating back the employer's strategic efforts and after intensive negotiations, reached an agreement that went beyond what our client could reasonably have expected even if we had won in litigation. The employer was required to institute an anti-racism and anti-harassment policy with anti-racism and anti-harassment training for all management, including senior executive officers, and to hire an outside consultant to create the policy and training. The employer was also required to pay damages to the Applicant in an amount over twice what the Tribunal typically awards, to offer the Applicant a job for a newly created position dealing with Human Rights and to publically vindicate the Applicant via email to all staff.

The outcome was a great resolution for the Applicant and is a good example that mediation can be an effective tool in dispute resolution. At Watson Burns, we have a lot of experience assisting our clients in achieving positive results through the mediation process. If you would like further information or training on Human Rights issues and or mediation, we would be happy to assist.

Employer Delay Wins the Day!

Watson Burns recently won a termination case – without calling any evidence before the arbitrator!

We were representing a grievor who had been terminated for allegedly sabotaging the employer's e-mail system. It began in December 2008, when the employer claimed someone had breached its e-mail system and had sabotaged its payroll records. The employer suspected the grievor had done it, and put her on a paid leave of absence pending investigation.

The investigation took over a year to complete, with the employer finally terminating the grievor's employment in January 2010.

In addition to that outrageous delay, once the matter was grieved and sent to arbitration, the employer delayed even further. It failed to provide production to the union, even after we sought and secured an order from the arbitrator for such. In fact, for a time, the employer couldn't find a key piece of evidence – the computer hard drive.

Given the Employer's ongoing failure to give full production, we decided to argue, as a preliminary motion, that the delay in imposing discipline, along with delay in the arbitration process was unfair to the grievor and that the arbitrator ought to uphold the grievance on the basis of this preliminary motion.

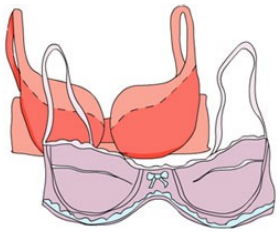
Arbitrator Crjlenica agreed. The grievance was allowed, and the Employer was ordered to reinstate the grievor with full back pay and no loss of seniority of benefits. Sometimes what goes around comes around. Because of its own delay, the Employer is now on the hook for 18 months of back pay!

What Next...?!

Travelers to Germany no longer have to worry about being hit by a flailing breast at their next airport pat-down after bosses in the country won the right to force employees to wear bras.

The ruling was announced in North Rhine—Westphalia's State Labour Court after airport security workers brought a case challenging the strict dress code in their employees' handbook—and lost. "Being told to wear a bra and to keep fingernails shorter than half—a-centimeter does not impinge on personal rights", said the published ruling, according to the *Daily Mail*. "It is not a disproportionate impairment of personal right."

Employees must wear bras "to preserve the orderly appearance of employer-provided uniforms," the court said. The type of bra, however, could be a problem. Employees are only allowed to sport colourful numbers if they are concealed by an undershirt. The judge didn't stop at women's underwear. The court also found it appropriate for supervisors to ensure that female employees have hair " that is always clean, never worn looking unwashed or oily" and that men's beards remained properly trimmed. The ruling is expected to have implications across the country. There was a glimmer of hope for airport-security personal desperate to express themselves. The colour of their hair and nails was left up to the individual's discretion. Bald employees were also given the right to wear wigs.



REMEMBERING THE TRIANGLE SHIRTWAIST FACTORY FIRE

It was the deadliest workplace accident in New York City's history. On March 25th, 1911, a deadly fire broke out in the Triangle Shirtwaist Factory in New York's Greenwich Village. The blaze ripped through the congested loft as terrified workers -- mostly young immigrant women -- desperately tried to make their way downstairs. By the time the fire burned itself out, 146 people were dead. All but 17 of the dead were women and nearly half were teenagers.

The workers in the Triangle Shirtwaist Factory were among the hundreds of thousands of New Yorkers who toiled in the city's garment factories at the time. They came from countries such as Italy and Russia in search of a better future, and all around them they saw the riches promised by the American Dream.

The dream seemed a long way off for the young workers who toiled 13 hours a day for $0.13 an hour at the factory, which was owned by New York's "Shirtwaist Kings, successful Russian immigrants Isaac Harris and Max Blanck. Though the factory was considered modern with its high ceilings and large windows, the working conditions were difficult.

Only a year before the deadly fire, New York's garment workers had begun agitating for shorter hours, better pay, safer shops and unions. To the horror of Harris and Blanck, the young women of the Triangle factory joined the crusade and called for a strike, becoming leaders in what became the largest women's strike in American history. Within 48 hours, more than 50 of the smallest factories gave in to their workers' demands, but the Triangle bosses organized other owners and refused to surrender, paying prostitutes and police to beat the strikers. Their terrible treatment brought the women an unexpected ally. Anne Morgan, the daughter of J.P. Morgan, and many of her powerful suffragist friends -- the so-called "mink brigade" -- took up their cause, and the press and public began to rally to the plight of the brave young seamstresses.

After the strike had continued for 11 weeks, the Triangle owners finally agreed to higher wages and shorter hours. But they drew the line at a union. Back on the job, the Triangle workers still lacked real power to improve the worst conditions of the factory floor: inadequate ventilation, lack of safety precautions and fire drills – and locked doors.

When a tossed match or lit cigarette ignited a fire on the eighth floor of the building, flames spread quickly. Blanck and Harris received warning by phone and escaped, but the 240 workers on the ninth floor continued stitching, oblivious to the flames gathering force on the floor below. When they finally did see the smoke, the women panicked. Some rushed toward the open stairwell, but columns of flames already blocked their path.

A few workers managed to cram onto the elevator while others ran down an inadequate fire escape, which crumbled under the weight, crashing to the ground almost 100 feet below. The only remaining exit was a door that had been locked to prevent theft. The key was tucked into the pocket of the foreman, who listened to the women's cries for help from the street. Hundreds of horrified onlookers arrived just in time to see young men and women jumping from the windows, framed by flames.

In the days that followed, a temporary morgue near the East River was set up for families to identify the bodies of their loved ones. Nearly 400,000 New Yorkers filled city streets to pay tribute to the victims and raise money to support their families. The ensuing public outrage forced government action. Within three years, more than 36 new state laws had passed regulating fire safety and the quality of workplace conditions. The landmark legislation gave New Yorkers the most comprehensive workplace safety laws in the country and became a model for the nation.

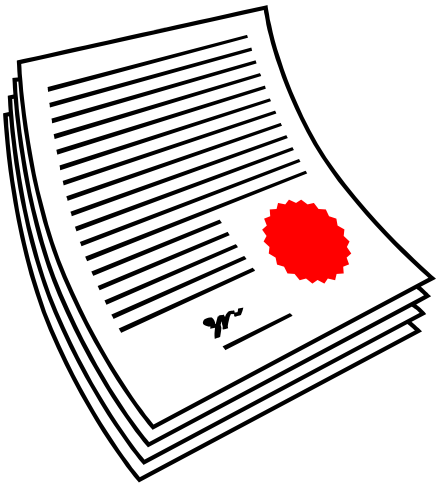
Today, 100 years later, in our global economy and with the resurgence of exploitative working conditions, we would do well to remember the lessons we learned in tragedies such as the TSF fire to make sure they did not die in vain .

Reinstatement of Driver Who Blew 3x the Legal Limit

We recently won reinstatement for a long service bus driver who had been convicted of impaired driving while at work. These cases can be difficult for unions, as many people still do not consider alcoholism a "real" disease.

In August 2009, at about 10:00 a.m. a passenger called the employer to report that a driver seemed impaired and had staggered while getting off the bus. The employer investigated the situation and then called the police, whose breathalyzer test showed that the grievor's blood alcohol level was 3x over the legal limit. Not good. He was taken to the police station, charged with impaired driving and was ultimately convicted of the offence. The employer terminated the grievor as well.

The grievor immediately contacted his doctor and started attending an alcohol addiction counseling program. He then checked himself into a residential addiction treatment program. When he was discharged from treatment, he continued alcohol addiction counseling and began attending Alcoholics Anonymous.



"These cases can be difficult, as many people do not consider alcoholism a real disease"

In the meantime, the grievor's union had filed a grievance on the grievor's behalf and argued throughout the grievance procedure that the employer was required to accommodate the grievor's disability.

At arbitration we argued the employer had no just cause for termination and that the grievor had a disability (alcohol addiction) which the employer was required to accommodate. The arbitrator found that a disability such as addiction does not necessarily excuse or explain all misconduct, but that she must look at whether there is a relationship between the addiction and the misconduct. Although the arbitrator found that driving while impaired is not always a manifestation of the disease of alcoholism, on the evidence before her that there was a causal connection between the grievor's disease and his actions.

She found the disability of addiction affected the grievor's decision-making and that the decision to drive while impaired could not be separated from his alcoholism. As a result, the arbitrator ordered the grievor be reinstated at work and that the employer accommodate his disability.

Here's a card from your employer. It says, "Get well soon. Your medical benefits have been terminated!"

New Faces Around the Office!

Heather Kindness has joined Watson Burns in the Toronto office as our legal assistant. Heather's career includes working in social justice and women's organizations, the private sector and government. On her own time, Heather volunteers, reads, gardens, enjoys theatre and spending time with her family. We are happy to welcome Heather to the team!

Benjamin Myers has joined our firm as our articling student. A graduate of the University of Toronto's Faculty of Law, Benjamin was a volunteer case worker at Downtown Legal Services and was also active with Pro Bono Students Canada. He is committed to social justice and employee rights and is looking forward to working on important workplace justice issues.

WATSON BURNS HELPS REINSTATE FIRED UNION ORGANIZER

"The employer's reasons for termination were not convincing and the timing of it was too coincidental."

We were recently called in to secure reinstatement of a union organizer, a para-transit driver with excellent safety and performance records. In the fall of 2010, this employee had been quietly handing out letters to colleagues, describing the benefits of unionizing. In November, he publicly advised his co-workers that he was trying to gather support for the union.

Two days later, the employer started following him on his route, taking photos of him loading and unloading passengers. He was terminated the next day.

We immediately filed an Application for Interim Relief with the Ontario Labour Relations Board, arguing that this employee was fired for his pro-union activity. The Board agreed and reinstated the employee, ruling that the employer's reasons for termination were not convincing and that the timing of it was too coincidental. The employee promptly got his job back, with back pay. Isn't it great when the system actually works?!

Supreme Court Weakens Freedom of Association

On April 29th, the Supreme Court released its long-awaited and much-anticipated decision in *Ontario (Attorney-General) v. Fraser*, on the constitutionality of the exclusion of farm workers from the *Ontario Labour Relations Act*. The decision was complex, with five judges forming the majority, three concurring in the result, and one dissent. The case was an appeal from the Ontario Court of Appeal, which had itself overturned the decision of the Ontario Superior Court of Justice.

The question before the courts was the constitutionality of a law introduced by the Ontario government in 2002. The legislation in question is the *Agricultural Employees Protection Act (AEPA)*, enacted after the Supreme Court ruled that an earlier Act, the *Labour Relations and Employment Statute Law Amendment Act* (*LRESLAA*), was itself unconstitutional.

What both of these Acts were meant to do was to create a separate labour relations regime for farm workers. Historically, farm workers have been excluded from the *Labour Relations Act*, and the rights and protections it provides. The traditional reason given for this exclusion, which dates back to 1943, is that farms, especially small family farms are particularly vulnerable to strikes. If workers, the argument goes, were to strike at harvest time, farms would be ruined, as their entire product depends on that small window of time. In 1994, however, the Rae government removed this exclusion, giving farm workers access to the OLRA. In fact, we argued and won one of the first Ontario certificates for an agricultural unit before the OLRB. A year later, the Harris government re-instated the exclusion. The law that re-instated the exclusion was the *LRESLAA*.

With the support of the UFCW, farm workers challenged the constitutionality of the *LRESLAA*. After winding its way through the courts, the Supreme Court decided that the exclusion of farm workers from the *OLRA* violated the freedom of association guaranteed the *Canadian Charter of Rights and Freedoms*. Specifically, the Supreme Court ruled that 2(d) requires that the right to organize must be protected. The Court did not, however, address the question of whether collective bargaining itself is protected by 2(d). The Supreme Court gave the government 18 months to craft an alternative regime labour relations regime for farm workers that did not violate the *Charter*. The *AEPA*, enacted in 2002, is what the government came up with.

The *AEPA* provides much weaker rights and protections than the *OLRA*. It does give farm workers the right to form employee associations, but it does *not* require employers to bargain in good faith. It also allows unions to represent less than half of the workers, which allows employers to "divide and conquer" the workplace. As far as bargaining goes, the *AEPA* gives employee associations the right to "make representations" to the employer, and have the employer "listen" to them, but nothing more.

This shift was caused by the Supreme Court's decision in the *Health Services* case, where the Court expanded the scope of the freedom of association, ruling that the *Charter* requires that employees be able to exercise the right to collective bargaining in a meaningful way. Employees are not entitled to have access to any *particular* labour relations regime (the *OLRA*, for example), but the basic components of the freedom of association must be protected.

Living in this new legal world, the Ontario Court of Appeal ruled that the *AEPA* no longer satisfied the requirements of the freedom of association. Specifically, unions representing a minority of workers are not permissible, and there must a requirement that bargaining be in good faith. The *AEPA* did not provide for either of these things, and was therefore unconstitutional.

The Supreme Court, however, reversed the Court of Appeal's decision. The core of the Court's decision is that what the *AEPA* protects – the right of employee associations to make "representations" and the obligation of the employer to "listen" – does provide a "meaningful process" of collective bargaining.

The lone dissent makes note of an obvious problem with the majority's decision. First, she points out, the majority's decision ignores the express intention of the Ontario legislature when it created the *AEPA*, which was to continue to exclude farm workers from collective bargaining. In other words, the *AEPA* was intended to do the bare minimum to satisfy the *old* requirements. Since then, however, the requirements have grown to include protection for a meaningful process of collective bargaining. The *AEPA* was intended to do no such thing, and yet the majority of the Supreme Court nevertheless ruled that it does.

Finally, the dissent also noted the fact that, other than Alberta, no other province excludes farm workers from its labour relations legislation, and nowhere have the apocalyptic predictions of Ontario employers come true.

At the end of the day, while the constitutional requirements established in *Health Services* still exist, it would appear that they can be satisfied much more easily than one would have expected before this decision.

Beware of Bill 168

When Bill 168 was introduced, the hair on the back of my neck was on full alert. While on its face the Bill seemed to be motherhood and apple pie – who couldn't get excited about guarantees to harassment free workplaces – something didn't sit quite right. A lot of people within the labour community thought I was being paranoid, but the conspicuous absence of an appropriate recognized role for trade unions in the process made me suspect another possible agenda.

Unfortunately, it seems that the concerns may have been well placed. We're finding an increasing number of our clients suffering the ill effects of employers using Bill 168 as a means to target particular employees in the workplace, to divide the membership, and/or as a means to undermine the trade union.

If you suspect that your employer is abusing Bill 168 feel free to contact our office for information. We also offer a seminar on the Bill and its implications. Likewise, if you have stories to share about your experiences under Bill 168, we'd love to hear them. As always, in the trade union movement, knowledge is power. As we share our experiences with our brothers and sisters and look to collective responses, we are stronger and can achieve greater results.

Watson Burns Helps Union Grow

Our experienced counsel recently helped guide the expansion of the Ontario Taxi Workers' Union. OTWU is welcoming over 500 new members from Blue Line taxi company, after the OLRB ordered that the results of a recent certification vote be counted and honoured.

Also in the taxi industry's labour relations, we were successful in defeating Hamilton Cab's argument that it was not actually the employer of its drivers. The OLRB ruled that the control the company exercises over the drivers makes it their employer.

IT PAYS TO BE IN A UNION!

Belonging to a union pays—literally. In addition to benefits such as employment security and seniority, union workers make more money on average, than non-union workers. Information from the Labour Statistics Division of Statistics Canada shows the following:

- Approximately 4.2 million Canadian employees (29.2%) belong to a union
- In the public sector (government, Crown corporations, publically funded schools and hospitals) 70.9% of employees belong to a union. This was more than four times the rate for the private sector (16.1%)
- A wage premium exists, which has been estimated at 7.7%
- Average hourly earnings of full-time unionized workers were $25.93 versus $22.35 for non-unionized workers
- Part-time unionized workers averaged $21.25 per hour versus $13.71 for non-unionized workers
- On average, full-time unionized female employees earned 95% of their male colleagues' wages, while non-unionized female employees earned only 80% of their male colleagues' wages

Clearly, having a unionized job is good for Canadian workers. Is this what Stephen Harper didn't want you to know when he scrapped the Census?

Laughter is the Best Medicine…

"This financial crisis is forcing the state and local agencies to make some tough decisions. If things continue much longer, there's a real risk that we may have to lay off Jose."

"I dread contract negotiations. I have to wear my 'poor' suit, drink cheap wine and eat sandwiches."

In the category of Best Employees, the award goes to…….Our Great Staff!

In Bracebridge: Laurel Brown and Sue Foley

In Toronto: Heather Kindness

Thanks so much for everything you do—we couldn't make it without you!

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WATSON BURNS LLP

Toronto Office:
Suite 304, 177 Danforth Avenue
Toronto M4K 1N2
Tel: 416-253-1967 Fax: 416-253-7660

Bracebridge Office:
Suite 4, 3 Manitoba Street
Bracebridge, Ontario P1L 1S4
Tel: (705) 646-5595 Fax: (705) 646-5586

www.watsonburns.ca