

## DISPROPORTIONATELY DISENFRANCHISED: GENDERED IMPACTS OF INTERFERENCE IN COLLECTIVE BARGAINING IN CANADA

*Hans Rollmann*  
PhD Candidate,  
School of Women's Studies,  
York University,  
Toronto, Ontario, Canada  
[hansnf@gmail.com](mailto:hansnf@gmail.com)

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### ABSTRACT

Much has been written about the growth of legislative interference in collective bargaining and the right to strike in Canada in the latter part of the 20<sup>th</sup> century. However, consideration of the specifically gendered impacts of this interference has been largely neglected. This paper argues that suspension of collective bargaining rights and the right to strike impacts women workers in unique and disproportionate ways. Two cursory case studies from Ontario and Newfoundland and Labrador provide examples of how suspension of bargaining rights has a differential impact on women. The paper calls attention to the need for a heightened focus on the specifically gendered impacts of neoliberal governments' growing propensity to suspend collective bargaining rights in Canada.

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A great deal has been written in recent years about the growing propensity of Canadian federal and provincial governments to employ legislative powers to curtail unions' collective bargaining rights. A recent study highlighted 179 instances of federal and provincial legislation curtailing labour rights between 1982 and 2008, fully 85 of them involving back-to-work legislation (NUPGE/UFCW 2008: 18). Panitch and Swartz, in their key study of attacks on trade union freedoms in Canada, reveal an intensification in the use of coercive tools such as back-to-work legislation in the past 30 years: 51 such pieces of legislation were adopted by federal and provincial governments between 1950 and 1980, and 73 pieces between 1980 and 2002 (Panitch and Swartz 2003).

The extensive literature on Canada's disproportionate use of legislation to suspend or restrict collective bargaining rights and trade union freedoms

predominantly focuses either on the economic outcomes and impacts of such legislation (i.e., in terms of wages), or on the implications of such legislation on workers' and unions' fundamental rights to organize (as reflected both in the Canadian Charter of Rights and Freedoms as well as in Canada's adherence to international conventions (see, for instance, Norman 2008, NUPGE/UFCW 2008, Fudge and Brewin 2005; Fudge 2004; Norman 2004; Panitch and Swartz 2003). What is less common in these analyses is consideration of the specifically gendered impact that these types of legislation have on the workers on whom they are imposed. This article argues that a critical assessment of the impact of restrictive legislation on women workers in particular is urgently needed in order to fully grasp the implications—both to trade union and workers' freedoms, as well as to women's equality more generally—of the use of this legislation in Canada. I do not presume to provide an exhaustive overview of the subject; my aim in this piece is to draw attention to the critical need to expand our analysis to encompass the specifically gendered impact of such legislation. While use of this legislation has complex gendered and racialized dimensions, my focus in this article lies in its disproportionate impact on women. I argue there is a link between collective bargaining and equality gains for women, and that suspension of collective bargaining rights—and most notably the right to strike—imperils these gains and disproportionately affects unionized women employees. I will demonstrate this argument with reference to case studies of the use of coercive legislation in two Canadian provinces: Ontario and Newfoundland and Labrador.

Despite unions' hopes that adoption of a freedom of association clause in the 1982 Canadian Charter of Rights and Freedoms would guarantee rights to organize, collectively bargain and strike, governments in subsequent years in fact intensified their use of coercive legislation suspending rights to freely bargain and strike. Until very recently, efforts by unions to defend and expand their associational rights before the courts proved largely unsuccessful (Panitch and Swartz 2003; Fudge 2004; Norman 2004; Fudge and Brewin 2005). The 2007 Supreme Court of Canada ruling declaring certain provisions of British Columbia's Bill 29 to be unconstitutional has been interpreted positively by many labour movement activists, but its full potential impact remains to be seen (Norman 2008).

The scale of legislative restrictions on free collective bargaining and trade union freedoms becomes particularly apparent at the international level, reflected in appeals by the Canadian labour movement to the International Labour Organization's (ILO) Freedom of Association Committee. Canada has seen its labour unions submit, since 1982, more complaints to the ILO than any other country in the world (Fudge and Brewin 2005). Fudge and Brewin put this in context:

Since the ILO Freedom of Association Committee was established in 1951, only unions from four other countries—Argentina, Colombia, Peru and Greece—have submitted more complaints than Canadian unions [...] Three-quarters of all complaints on restrictive labour legislation passed in Canada since 1982 (covering 70 pieces of legislation) that the ILO has investigated were found to be in violation of ILO freedom of association principles [...] (2005:65-6).

Of course, the sheer volume of complaints is not in itself a reflection of actual violations, and may in fact merely reflect a certain type of militancy. Nevertheless, the fact that such a large proportion of complaints were found upon investigation to violate ILO standards, and that the ILO adopted the relatively rare step of raising the matter with Canada's delegation as well as sending fact-finding missions to Canada on more than one occasion (Panitch and Swartz 2003), indicates the degree to which Canada's record has negatively distinguished itself in comparison to other ILO member states. Moreover, the significant escalation in complaints in recent years is itself noteworthy: between 1954-1973, complaints to the ILO by Canadian unions comprised a mere 3% of all complaints filed against G7 countries, while in the ensuing period from 1974-1991 that proportion rose to 34% (*Ibid.*).

## COLLECTIVE BARGAINING AND WOMEN'S EQUALITY

It would be erroneous in the extreme to state that labour unions have demonstrated an unwavering commitment to women's equality. A rich body of literature exists which is critical of labour unions' record on equality and equity related issues (i.e., Hartmann 1981; Briskin and McDermott 1993; Bentham 2007; Haiven 2007; Forrest 2007, 2009). Yet much of this literature also suggests that union revitalization initiatives in recent years have shown a great deal of promise when it comes to [re]prioritizing women's equality issues. This is in part due to a growing awareness on the part of unions that the success of revitalization initiatives will inevitably depend on the response of women and racialized workers.

Forrest (2007) distinguishes three 'equality regimes' in post-Second World War union history in Canada: a period of formal inequality lasting until the early 1970s, followed by a period of formal equality that lasted until the early 1980s, and then following the adoption of the Charter, an era of substantive equality which is the basis of today's feminist labour struggles. Yet she warns that despite redoubled efforts by labour unions in the 1970s and 1980s to prioritize economic equality for women in collective bargaining, major problems persist due to the fact that activist efforts were often predicated on a male breadwinner norm: "[...] union defence of the male breadwinner [norm] has cut short the growth and change that could have resulted from an unreserved commitment to gender

equality” (Forrest 2007:112). Other scholars note that even where this male breadwinner norm has ostensibly been abandoned, many of its characteristics persist in the form of a ‘Standard Employment Relationship’ which marginalizes a growing number of ‘non-standard’ workers, with particularly pernicious gendered and racialized effects (Vosko *et al.* 2003; Vosko *et al.* 2006).

Yates, while recognizing that “unions often fail women” (Yates 2006:103), also sees women as the only hope for a revitalized labour movement. She calls for a reassessment of the ‘gendering of organizing strategies’ which recognizes the unique and marginalized location of women both in the labour market as well as in society. Unions, she emphasizes,

[...] need to do more than add women into their activities as one more group of workers. Rather, unions need to shift the lens with which they see the workforce, so that they reveal the complex ways in which gender shapes workplace experience, relations with co-workers and employers, and labour market needs and concerns (*Ibid*:112).

This paper responds to Yates’ challenge by arguing that when collective bargaining rights are suspended, women are not just “one more group of workers” whose rights have been infringed upon; the impact is more complex. For while unionization is not an automatic panacea for inequality in the workforce, what is important about unionized workplaces is that the collective bargaining process provides a unique and particularly useful approach through which inequalities can be addressed (Briskin and McDermott 1993; Stinson 2006; Yates 2006; Forrest 2007, 2009). This is seen in collective bargaining gains in the areas of pay equity, in other wage factors (aside from pay equity, it has been shown that unionization is consistently associated with higher wages generally, and higher wages for women specifically, *i.e.*, Anderson *et al.* 2006), and in other benefits (anti-sexual harassment clauses; childcare clauses; flexible work schedules which address care needs; maternity leaves; and more, *i.e.*, Stinson 2006). It was the unionization of the public sector which initially brought large numbers of women into the organized labour movement and in which many gender equality gains were initially achieved (Bentham 2007). Insofar as it is the public sector which has also borne the brunt of back-to-work legislation and suspension of collective bargaining rights, suspension of bargaining rights poses particularly significant implications to gender equality.

Since improvements to wage and benefit levels are reflected in collective bargaining outcomes, legislative initiatives such as back-to-work legislation explicitly constrain the legal ability of unions to negotiate and advocate for these types of improvements. Indeed, out of 85 cases of back-to-work legislation reviewed in one study, the majority (45) involved imposition of the government’s offer, rather than third-party arbitration—under which gains might still have

been achieved (NUPGE/UFCW 2008:18). In another 35 cases that did not involve back-to-work legislation, government legislation featured the outright suspension of unions' rights to negotiate wages as part of the collective bargaining process (*Ibid.*) The result of imposed offers and legislated wage freezes or rollbacks alike is to either maintain the status quo or roll it back. Since women already earn less and have access to fewer benefits, this has the effect of entrenching pre-existing inequities, essentially barring women from their legal ability to lobby for equal access to wages and benefits (through the bargaining process and its weapon of last resort—the right to strike). As we shall see, in some cases—for instance the 2004 public sector strike in Newfoundland and Labrador—government-imposed settlements specifically target and reduce benefits predominantly accessed by women employees, not only maintaining but increasing the level of inequality between women and men.

Given that the use of back-to-work legislation by Canadian governments (federal and provincial) has increased over the past 30 years, and given that the proportion of women represented in the unions impacted by back-to-work legislation has also increased significantly, the result is a form of government interference which not only impedes women's struggle for equality in the workforce, but which impedes it with increasingly greater effect. In acknowledging this, it is important to recognize the impact not only on employees *generally* affected by back-to-work legislation, but the impact on women *as compared to* men. The relative impact, this paper argues, is greater on women.

In order to explore the impact of these processes in greater depth, the following sections provide case studies involving the use of back-to-work legislation in two Canadian provinces: Newfoundland and Labrador and Ontario.

## **GENDERED IMPACT OF COERCIVE LEGISLATION: TWO EXAMPLES**

### **NEWFOUNDLAND AND LABRADOR**

Provincial governments in Newfoundland and Labrador have implemented back-to-work legislation a total of nine times since confederating with Canada in 1949. Six of those instances occurred after 1990, demonstrating the growing tendency to use such legislation to resolve labour disputes (Panitch and Swartz 2003; Fudge and Brewin 2005). Use of back-to-work legislation in Newfoundland and Labrador has proven particularly volatile: its use during a public sector strike in 1985 resulted in the arrests of hundreds of defiant strikers, and several months in jail for union leaders as well as opposition legislators who supported them (*Ibid.*).

It is useful to take a closer look at the circumstances surrounding some of the legislation tabled by the provincial government in Newfoundland and Labrador. Of particular note is the 1991 *Restraint of Compensation in the Public Sector Act*, which did not legislate striking workers back-to-work but which voided or modified the outcome of a third-party arbitration to which both sides had agreed, and which also suspended collective bargaining. It not only featured language that froze wages for the duration of the period it was in effect, but also permitted the provincial government to

[...] renege on its previous commitment to provide retroactivity for pay equity agreements which were negotiated earlier, and by which the Government recognized that the systemic discrimination against women in the workforce needed to be remedied. These agreements were to be effective from 1 April 1988. By disregarding the pay equity agreement, the Act takes away what would have been greatly improved salaries for the women in the public service” (Committee on Freedom of Association Report: Case No. 1607).

The bill not only froze existing wages for all workers, but in fact rolled back equity gains.

Significantly, the 2004 public sector strike in Newfoundland and Labrador also demonstrated a government which was concerned with more than just wage-setting. The provincial government ended a 27-day strike by over 20,000 public service employees through the *Act to Provide for the Resumption and Continuation of Public Services*. That act, too, imposed the government’s final offer on the two unions which were jointly on strike. In addition to imposing salary increases far below the unions’ demands, however, the government’s imposed settlement also modified existing benefits, particularly sick leave. By halving the number of sick days for all new employees, the union accused the government of creating a “two-tier” system of benefits for employees. In their complaint to the ILO, the unions accused the government of bargaining in bad faith, stating that

[...] there would be very little, if any, monetary gain for the Government in having a two-tier sick leave plan for employees [...] there will be no opportunity for the Government to save any money from its proposal for at least the next four years [...] (Committee on Freedom of Association Report: Case No. 2349).

The provincial government’s reply defended its position to the CFA by emphasizing that “sick leave expenditure is one of the most significant and difficult to contain employee benefit expenses in the public service [...] this is a prudent, long-term approach [...]” (*Ibid.*).

While both sides focused their arguments on the fundamental fairness or bottom-line cost effectiveness of their positions, a closer look at the nature of employees’ use of sick days reveals a highly gendered picture. Statistics Canada

data reveals a divergence in use of sick days between male and female employees in the public sector in Newfoundland and Labrador. From 1988-1998 female public sector workers lost an average of 2.1 days more per year due to illness or disability than did male public sector workers (with an average of 6.9 days lost per year for males and 8.7 days lost per year for females). The difference increased in the subsequent decade. From 1998-2008 female public sector workers lost an average of 3.2 days per year more than their male colleagues, due to illness or disability (with an average of 7.9 days lost per year for males and 11.3 days lost per year for females). It is also worth noting that under the modified sick leave policy which government imposed along with back-to-work legislation, sick leave days were reduced to a maximum of 12 per year. The only group of employees who would predictably be affected by this modification—statistically—were female employees, who during that time period were accumulating average numbers of sick days equivalent to or slightly in excess of that amount (Statistics Canada 2008).

While one could speculate on the reasons for the significant—and rising—difference in usage of sick days between female and male public sector employees, what is significant here is the outcome of the settlement imposed by the government. It should be noted that their official communications, backgrounders and complaints did not indicate that either side saw the discrepancy as a gendered one. It is, furthermore, a matter of speculation as to what would have been the outcome of this policy had negotiations continued. Nevertheless the union had indicated in its brief to the ILO that this concession was one they were unwilling to make, and again the significant point is that the outcome of the settlement imposed through government legislation—which precluded further negotiation or analysis which might have revealed the differential gendered impact of the government's proposed modification—was one which impacted women differently than men.

## ONTARIO

The Province of Ontario passed a total of 24 pieces of back-to-work legislation between 1950-2004. Of these, six were passed in the period between 1950-1982, while 18 were passed between 1982-2004, further underscoring the growing compunction of governments to resolve disputes through legislation (Fudge and Brewin 2005; Panitch and Swartz 2003).

A significant number of the Ontario disputes revolved around the education sector. What is significant about these cases is that the provincial government not only legislated striking instructors and/or support staff back-to-work, imposing offers or sending disputes to severely constrained forms of third-party arbitration, but that the legislation also sometimes modified instructors' terms of employment such that activities which had previously been voluntary (for

instance, volunteer supervision, enrichment activities, field trips) now became mandatory terms of employment. An example is the *Educational Accountability Act* passed in 2000 by the Ontario government, which made mandatory previously voluntary activities

[...] having to do with school-related sports, arts and cultural activities [...] [these] duties may be assigned to teachers any time during the day, seven days a week, with no specified maximum number of hours of work. The assignment of duties may take place on school premises or elsewhere” (Committee on Freedom of Association Report: Case No. 2119).

The Act also specifically denied unions the right to negotiate these activities through the collective bargaining process (*Ibid.*).

Previously voluntary activities of this nature were, in the context of ongoing labour disputes, occasionally the focus of “soft” collective action on the part of union members (i.e., ‘work-to-rule’). By withholding their labour from activities which were not formally part of their terms of employment, but which the public had become accustomed to their providing as a courtesy, teachers were able to engage in relatively effective forms of collective action which, even if government passed back-to-work or essential services legislation, did not circumvent such legislation. By suddenly imposing these voluntary activities as formal terms of employment, however, governments were able to bring them under the scope of activities regulated by legislation curtailing workers’ rights to collective action (*Ibid.*).

The gendered implications of making previously voluntary extracurricular activities mandatory is immediately apparent. As indicated by the Ontario Secondary School Teachers’ Federation in its complaint to the ILO, teachers regulated the degree and timing of their extra-curricular involvement (that which took place outside regular working hours or on weekends) according to their domestic obligations, particularly care work for young children, elders or sick family members (*Ibid.*). In Canada, as other countries, such care work has predominantly fallen on women to perform (Parrena 2000; Martin 2004; Braedley 2006). It is, therefore, predominantly women who will face added burdens in light of the elimination of their control over their extracurricular, volunteer commitments at the workplace. Furthermore, the government closed all recourse toward negotiating this regulation, by not only removing it from the scope of collective bargaining but also by eliminating the right to strike of those affected by it (fortunately, the provisions relating to mandatory extracurricular activities were eventually repealed: CFA Report Case No. 2119).



## DISCUSSION

This paper has provided a cursory exploration of the gendered impact of back-to-work legislation on women as compared to men. The aim has been to demonstrate primarily that legislation suspending collective bargaining rights (including the right to strike) does not just affect workers' rights and their working conditions, but that it affects them differently, and that women are impacted in a different and in many ways more substantial manner than their male colleagues. The aim has been to demonstrate that the legitimate criticism of governments' use of such legislation—which is on the increase in Canada—should not only focus on the manner in which such legislation is in conflict with general human rights and freedom of association rights, but also the manner in which such legislation is in violation of fundamental equality principles. Our understanding of the impact of legislation of this nature and its repressive consequences can be expanded and enriched by consideration of the multiple dimensions of oppression it encompasses. Efforts to rectify ongoing injustices will be implicitly flawed and inadequate if they are not formulated in response to as full, holistic and intersectional an understanding of those injustices as we are capable of developing.

But recognition of the gendered impact of coercive labour legislation need not only have an analytical impact; practical and strategic considerations can flow from this analysis as well, and in closing I will highlight two examples. The first pertains to union strategy. When unions are making decisions about how to respond to coercive labour legislation, it is important for them to overtly recognize—and weigh in the decision-making process—that they are responding not only to legislative efforts to constrain workers' rights, but efforts to restrict women's equality. Camfield (2006), for instance, notes that in the case of the 2003 Hospital Employees' Union struggle in British Columbia, a tentative agreement negotiated between government and union leadership which would have undermined worker efforts to resist onerous coercive legislation (and which was ultimately rejected) was supported by some male-dominated locals which would not have been impacted as severely as those with greater female membership. The implication is that the male-dominated locals did not understand the precarious conditions being faced by those locals with larger female membership; it should not be ignored however that it is also possible for such tensions to be deliberately manipulated, by either employers or unions. Indeed, the decision to eventually abandon the fightback struggle against this legislation (the result of a deal struck between government and union leadership on the cusp of a general strike which both appeared determined to avoid) might have been more difficult for the union leadership to foist on the membership had there been greater awareness of the impact the coercive legislation would have on wider equality issues and on women workers. The second example pertains to,

for lack of a better term, the diversity of tactics employed by the labour movement in resisting the neoliberal assault on unions. Historically, unions have often strengthened society's commitment to equality and workers' rights by supporting initiatives outside of their own specific union struggles. Examples include pay equity, affirmative action and employment equity, and human rights legislation. There is—arguably—a more deeply entrenched acceptance of women's formal and substantive equality rights in Supreme Court jurisprudence than there is of workers' free collective bargaining rights. It makes sense therefore to use the connections and relationships between the two to bolster each other. Much of the 'union revitalization' effort has been predicated on a renewed appeal to forms of class struggle. Yet an invigorated understanding of neoliberalism not merely as a class struggle targeting the hard-won rights of workers, but also as a gendered struggle targeting the hard-won rights of women, stands to enhance the support labour activists could receive from the wider public on which it will have to rely if the rights of workers and women as workers and as women are to be upheld.

I will indulge in one final, and purely speculative, consideration. Throughout the past two decades, the proportion of women represented by and within unions has grown:

Levels of union density among men and women equalized during the 1990s. This change took place rapidly in just under 15 years. In 1989, union density among women workers was 29 per cent, while 38 per cent of men were unionized. In 2002 union density for women and men was nearly equal, at 30.2 per cent and 30.3 per cent, respectively [...] in the public sector, women have a higher level of unionization than men, at 77 per cent and 74 per cent, respectively. While equalization in union density has occurred, partly due to the increased labour force participation of women in the public sector along with layoffs of a primarily male workforce in the manufacturing sector, women's wages remain far below men's[...] and have access to fewer benefits (Anderson *et al.* in Vosko 2006: 303).

This growth has occurred at precisely the same time governments have increasingly demonstrated a tendency to interfere in the collective bargaining process. These dual trends share a common result: the workers increasingly affected by the increasing interference of governments in collective bargaining processes are women. Consider the intersection of these two trends: on the one hand, the growing propensity of Canada's governments to utilize legislation to suspend collective bargaining rights (including the right to strike); and on the other, the growing proportion of women represented by and in labour unions and the growing significance and prioritization of issues and initiatives of concern to women in the collective bargaining agenda. It would be presumptuous to propose any direct relationship between the two in the absence of any clear evidence of intent, and would certainly require much more research

and analysis to propose causal factors. Yet the question nevertheless arises: could the disinclination and relative reluctance of governments to interfere in collective bargaining processes—for the most part—prior to the early 1980s be related to the composition of the labour force under a predominantly male breadwinner structure? Could the growing fearlessness and lack of hesitation among governments in ignoring or overturning collective bargaining rights through legislative force be influenced not only by fiscal/market factors, or neoliberal ideology, but by the increasingly feminized composition of the labour force? This is pure speculation, but it is important to bear in mind that whatever the motivation underlying interference in the collective bargaining process, the result is that predominantly male legislatures eschew negotiation and exert dominance directly over an increasingly—and in some cases predominantly—feminized workforce. Whether Canada’s overwhelmingly male-dominated legislatures are, at some deeper level, driven by masculinist (and, let us be blunt: patriarchal) motivations in their determination to exert dominance and control over an increasingly female labour movement, is something worth consideration in future research.

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