

LABOUR RIGHTS AS HUMAN RIGHTS? A RESPONSE TO ROY ADAMS

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In recent years, a number of leading industrial relations scholars, including Roy Adams, have endeavoured to link labour rights and human rights in an attempt to shift the debate about the nature of labour relations in the North American context. Specifically, Adams and others have argued that workers should not be viewed as economic interests, but rather as bearers of fundamental human rights (Adams 2006; Macklem 2006; Compa 2000, 2003, 2008; Swepston 2003; Gross 2003 and 1999; McIntyre and Bodah 2006; Friedman 2001). There is a certain appeal to the labour rights as human rights approach. Indeed, the normative weight associated with human rights discourse in liberal democratic societies has made it a popular political tool for social movements looking to press their demands.

Adams is correct, in my view, to argue that adopting such an approach raises important questions about the relationship between domestic labour law and international obligations, and the manner by which governments in Canada ought to interpret the rights of workers. However, I have serious reservations about Adams' larger argument about the practical application of a labour-rights-as-human-rights agenda. In this reply to Adams, I argue that the labour rights as human rights approach threatens to undermine class-based responses to neoliberal globalization by contributing to the depoliticization of the labour movement. I assert that the workers' rights as human rights approach tends to downplay or altogether ignore the material dimension of collective worker action and the central role of economic conflict in the employment relationship. In a sense, the labour rights as human rights approach is flawed because it assumes that power flows from rights. History has demonstrated that the opposite is true. Indeed, liberal human rights discourse does little to address the inequalities in wealth and power that polarize Canadian society along class lines. By shifting the focus of the employment relationship towards a liberal human rights understanding of labour management relations, we undermine class-based approaches to advancing workers' rights. As such, the labour rights as human rights approach, although popular in both theory and discourse, is a potentially

dangerous strategy for a labour movement which continues to fight a defensive battle in an era of neoliberal globalization.

UNIONS AND RIGHTS DISCOURSE

From a labour union perspective, the United Food and Commercial Workers (UFCW) and the National Union of Public and General Employees (NUPGE) have been at the forefront of promoting the labour rights as human rights agenda in Canada. Their campaign has highlighted Canada's dismal record at the International Labour Organization's (ILO) Committee on Freedom of Association in a bid to embarrass governments into complying with international labour rights (Fudge 2005: 65). In 2007, the National Teachers' Federation and the Canadian Professional Police Association joined these unions in calling on the federal and provincial governments to respect the right to organize and bargain collectively as elaborated by the ILO. However, it is unclear whether these unions support the theoretical idea of workers' rights as human rights, or their practical application as envisioned by Adams.

In light of recent national and international developments related to the human rights status of collective bargaining, Adams urges the labour movement to re-examine the appropriateness of the exclusive-agent certification model used to extend collective bargaining rights in Canada. Specifically, Adams advocates the development of a non-statutory unionism, characterized by independent, non-union, non-standard employee organizations operating alongside established labour unions. In his most recent contribution to *Just Labour* Adams argues that "Unions need to come to grips with the legitimacy of such independent organizations and non-traditional procedures which, survey evidence indicates, many employees prefer over certified exclusive agent representation." He goes on to argue that "In a truly human rights-compliant system employees should be able to establish a broader range of organizations and those organizations should be able to negotiate the sort of arrangements they want with the employer." Adams correctly notes that most unions would likely oppose the development of these non-standard employee associations. However, he tends to underestimate the threat these organizations pose to the relative strength of the labour movement. Not only are such organizations lacking the statutory strength of labour unions, but they are often organized at the behest of employers in attempt to dissuade unionization.

Adams offers up the McMaster University Faculty Association as an example of a how a non-statutory, non-union employee association can effectively engage in a form of collective bargaining. However, this example is somewhat disingenuous given the relative level of privilege enjoyed by university faculty vis-à-vis other groups of workers. In short, university faculty is in no way representative of Canada's existing or emerging labour force. Even

within the university sector, the situation at McMaster is the exception rather than the rule in Ontario. It is one of only a few non-union university faculty associations in the province. The vast majority of university faculty associations across Canada are *bona fide* labour unions that engage in legally-binding collective bargaining. Most recently, in May 2006, members of the University of Guelph Faculty Association voted overwhelmingly to become a certified union, largely because the non-union employee association model, trumpeted by Adams, had proven inadequate in addressing the needs and concerns of faculty members. Union density continues to grow in the university sector, and union decertification is almost unheard of in Canadian universities. All of this suggests that Adams' example of the McMaster University Faculty Association is both flawed and unrepresentative.

And what about the right to strike? According to Adams, "From a human rights perspective it is highly doubtful that effective denial of the right to strike to workers who prefer to organize in flexible, non-statutory formats meets international human rights standards." To be sure, the right of workers to strike is of equal importance to the right of workers to engage in collective bargaining. However, on this point, Adams seemingly abandons a consistent theoretical approach to the labour right as human rights model by constructing a set of exceptions to justify encroachments on the right to strike. His recent musings on the CAW-Magna deal are illustrative of this point. In 2007, the CAW raised the ire of the Canadian labour movement by entering into a much-publicized agreement with Magna International which involved, among other things, having the union give up its right to strike in return for a card-check neutrality agreement with Magna. In an editorial piece, Adams accused critics of the CAW-Magna deal of "overreacting" in condemning the deal as a paternalistic affront to workers' rights. Although Adams has argued that the right to strike is "a fundamental human right", he has also made specific exceptions for workers who deliver "truly essential" services and for workers, like those at Magna, who willingly give up their right to strike. In Adams' own words, "Independent, binding arbitration is not an ideal way to settle contract disputes. But it is not a total sellout either." (Adams 2007, Straightgoods.ca) How these exceptions conform to Adams' definition of fundamental human rights¹ is unclear at best.

SUPREME COURT OF CANADA

Although early judicial decisions in the field of labour law tended to favour an individualistic view of rights and freedoms, at the expense of fundamental collective rights for workers, the Supreme Court of Canada's recent and more generous interpretation of labour rights in the *Charter* has renewed interest in the relationship between workers' rights and human rights.

Adams has argued that the Supreme Court of Canada has taken important steps in recent years to bring the Charter's guarantee of Freedom of Association more in line with international norms established by the International Labor Organization. In *Dunmore v. Ontario* (2001), the Court struck down an Ontario law which prohibited agricultural workers from organizing into unions. The decision established that agricultural workers had a constitutionally protected right to organize under section 2(d) of the *Charter*. In coming to this conclusion, the Court determined that a union's collective activities may be central to freedom of association even though they are inconceivable on the individual level, and that the vulnerability of agricultural workers must be taken into consideration in assessing the scope of freedom of association. The Court also placed a great deal of emphasis on Canada's international obligations to the ILO in arriving at its decision (Burkett 2003: 265). According to some unions, the decision in *Dunmore* effectively opened the door to the ILO as a body of reference for understanding how to interpret the constitutional guarantee of freedom of association freedom in a labour context (NUPGE 2003).

In a creative anti-union response to the Court's decision in *Dunmore*, the Progressive Conservative provincial government enacted Bill 137— the *Agricultural Employees Protection Act*, which gave the province's agricultural workers the right to form unions, but not the right to bargain collectively or to strike. The UFCW challenged the constitutional validity of the new law, but the Ontario Superior Court ruled in January 2006 that Bill 137 did not violate the *Charter* because it provided agricultural workers with adequate protection of their right to freedom of association. The union subsequently appealed the decision and the case is currently making its way through the system. The Ontario government's response the *Dunmore* case points to the limits of the workers' rights as human rights approach in an era of neoliberalism.

In January 2002, the right-wing Liberal government of Premier Gordon Campbell enacted Bill 29, a law which allowed for hospital closures and extensive privatization of the province's healthcare system. In terms of labour relations, the *Health and Social Services Delivery Improvement Act* radically altered labour relations in the province's healthcare system by invalidating some provisions of existing collective agreements and by precluding bargaining on several aspects of the employment relationship (*BC Health Services* 2007). The Hospital Employees Union (HEU) responded with an unsuccessful grassroots mobilization that included the threat of a general strike (which ultimately was never pursued). The union simultaneously pursued a legal strategy, filing a complaint with the ILO and launching a *Charter* challenge to Bill 29 on the grounds that the law violated the *Charter's* equality provisions and guarantee of Freedom of Association.

In March 2003, the ILO's Committee on Freedom of Association upheld the HEU's complaint, but the BC government essentially ignored this ruling. In typical Canadian fashion, BC Premier Gordon Campbell simply stated that his government would not be swayed by the ILO's findings, affirming further, "I feel no pressure whatsoever. I was not participating in any discussion with the UN" (Steffenhagen 2003). Despite the government's decision to ignore the ILO's findings, the HEU continued to pursue its legal strategy.

Several months after the ILO's Committee on Freedom of Association passed judgment on Bill 29, the union's *Charter* challenge was rejected by a lower court based on jurisprudence which held that freedom of association did not protect the right to bargain collectively. The lower court also rejected the union's claim that Bill 29 violated the *Charter's* equality rights provision (*BC Health Services* 2003). The HEU appealed the ruling, but the British Columbia Court of Appeal upheld the trial judge's ruling. Undeterred, the union appealed its case to the Supreme Court of Canada, which finally rendered a decision in June 2007.

In a landmark decision, the Supreme Court struck down several sections of British Columbia's *Health and Social Services Delivery Improvement Act*. In reversing previous jurisprudence, the Court relied partially on international law, arguing that "s. 2(d) of the *Charter* [Freedom of Association] should be interpreted as recognizing at least the same level of protection" as is found in ILO Convention 87, dealing with the right to collective bargaining (*BC Health Services* 2007: 438; 79).

However, contrary to Adams' assertions, the Court was careful not to fully embrace the ILO's conception of freedom of association. It is here where the lines between Canada's international commitments and its domestic labour laws have become severely blurred from the perspective of workers' rights as human rights. Indeed, the Court suggested that the *Charter* only protects certain aspects of collective bargaining in certain contexts. In essence, the decision protects unions from substantial government interference with the process of collective bargaining without taking into consideration any of the objectives sought by the parties involved in negotiations. Although the decision makes clear that governments have a duty to bargain in good faith, there is nothing to stop a determined anti-union employer from rolling back union rights and freedoms in existing collective agreements, provided such roll-backs come at the conclusion of a process of consultation with the union. That is because it is the process, not the outcome of bargaining, that is protected by the *Charter*. At best, the *BC Health Services* decision will likely force anti-union governments to rethink their overzealous approach to labour relations, but it does very little to prevent them from pursuing explicitly anti-union agendas, which would include the continued erosion of collective bargaining rights. It should also be noted that the *BC Health Services* decision does not guarantee the right to strike (*BC Health Services* 2007: 411;19).

Although the Supreme Court of Canada's decision in *BC Health Services* drew upon international labour rights and standards in order to justify extending constitutional protection to collective bargaining, it is important not to overstate the decision's impact on labour relations. In re-affirming the public policy environment of the post-war compromise, the Court has done little to advance the interests of workers. Indeed, the fact that organized labour must rely on the courts, rather than the legislatures, to protect the last vestiges of the post-war compromise is a sad commentary on the political clout of unions in an era of neoliberalism. As such, the decision in *BC Health Services* showcases organized labour's weakness, not its strength. More importantly, as Eric Tucker has argued, "if judicial protection of workers' collective rights is premised on a view of unions as victims, it suggests that the moment that courts perceive unions to be powerful actors they will find ways to limit the rights they have recognized" (Tucker 2008).

WHICH WAY FORWARD FOR LABOUR?

Given the result of recent Supreme Court decisions, does the agenda of workers' rights as human rights represent a practical strategic path forward for organized labour? Adams' specific proposals, which revolve around the development of a tripartite consensus and codetermination, seemingly do not conform to the priorities of business, labour, or the state. The Canadian government, for its part, refuses to sign on to ILO Convention 98, which protects the right to collective bargaining. Employer groups are openly hostile to Adams' conception of labour rights, while organized labour is suspicious at best. Also, Adams readily admits that influential organizations like Amnesty International Canada and the Canadian Civil Liberties Association have largely ignored the perceived human rights gap in Canadian labour relations. As such, he will likely find it incredibly difficult to muster much support for his particular vision of labour rights as human rights. These considerations aside, Adams' proposals threaten to undermine the capacity of unions to build a movement which challenges the boundaries of liberal democracy. Extending collective bargaining rights is a laudable concept. However, workers in Canada are unlikely to realize that goal unless the labour movement is prepared to redouble its efforts in three key areas.

ORGANIZE THE UNORGANIZED

Most unions in Canada continue to devote only a scant amount of resources towards organizing new workers. Although increasing union membership does not directly translate into greater union power, it does unleash greater potential power for individual unions and the labour movement as a

whole. Particular attention needs to be paid to the private sector, where union density levels have dipped below 20%. Organizing precarious part-time workers in the service sector is not impossible, but does require a long-term strategic vision and plan involving multiple unions. Extending collective bargaining rights to workers through any number of non-statutory schemes is no replacement for organizing workers into real unions.

CONTESTING NEOLIBERALISM

A right-wing political project born out of the demise of the post-war compromise in the mid 1970s, neoliberalism, characterized in the public policy sphere by fiscal austerity, free trade, tax cuts, privatization, contracting out, restrictions on workers' rights, and eroded democratic institutions, has been embraced by governments of all political stripes in Canada. Organized labour must accept that Canada and its corporate elites are not victims of neoliberal globalization, but rather agents of neoliberal globalization. Only then can unions begin a process of challenging neoliberal restructuring in a way that is both meaningful and effective - by viewing their struggle as separate and distinct from the interests of business. (McBride, 2005)

RESISTING THE "LEGALIZATION OF POLITICS"

In recent years, Canadian unions have increasingly come to embrace what Michael Mandel refers to as "legalized politics" (Mandel 1994). Rather than focus their resources on political struggles against hostile politicians and anti-union employers, Canadian unions have, to some degree, retreated to legal institutions as an alternative strategy.

Labour's strategic shift towards embracing judicial rights discourse as a political strategy is unquestionably linked to its unprecedented post-war weakness. While Adams has uncritically celebrated the Supreme Court decisions in *Dunmore* and *BC Health Services* as a victory for labour rights as human rights, others have been far more cautious in interpreting the Court's new direction. Labour lawyers Valerie Matthews Lemieux and Steven Barrett (who acted as co-counsel for the Canadian Labour Congress in the *BC Health Services* case) have adopted a carefully nuanced analysis of the *BC Health Services* decision, arguing that the future impact of the case "will depend on the extent to which future courts take an unduly narrow reading of the decision as simply imposing a mere consultation requirement on governments before overriding collective bargaining rights, or more fulsomely and purposively view the decision as requiring governments to truly respect good faith bargaining by respecting negotiated collective agreements and avoiding legislation which limits the scope of bargaining." More importantly, Matthews Lemieux and Barrett concede that

“the labour movement should not lose sight of the ongoing need for organizing and mobilizing concerted political action and the development of political alliances, which have proven over time to be more effective than reliance on the courts to advance labour rights and freedoms.” (*Canadian Centre for Policy Alternatives Review*, Labour Notes December 2007, “Charter Protection Extended to Collective

Bargaining – How Far Does it Reach?”)

Historically, collective political action has been organized labour’s favoured and most successful vehicle for progressive change. Indeed, workers struggled and in some cases died to secure recognition of trade union rights. A new focus on a legalistic brand of rights discourse, which privileges legal institutions like the ILO’s Committee on Freedom of Association and the Supreme Court of Canada, threatens to undermine collective political responses to neoliberal assaults on trade union rights and freedoms. Although promoting labour rights as human rights has yielded symbolic victories along the way, it has done very little to change the balance of class forces in Canada. And although the recent *BC Health Services* decision proved that the *Charter* does have some progressive potential in the realm of labour law, at its core the *Charter* remains firmly committed to the principles of liberal rather than socialist democracy. In the end, no constitutional document or international treaty, however progressive, can replace the need for sustained political struggle to protect and enhance workers’ rights. Indeed, by buying into a liberal notion of human rights, labour may end up undermining class-based political responses aimed at addressing the vast disparities in wealth and power that exist in advanced capitalist countries.

NOTES

1. Adams defines a human right as “a right possessed by all human beings simply as a result of their being human. Such rights may neither be granted nor be taken away by governments. They are considered to be superior to rights established by statute.” (Adams 2006, 135)