UNILATERAL GOVERNMENT INTERVENTION IN COLLECTIVE BARGAINING CONTRACTS: *AD HOC* AND EMERGENCY LEGISLATION

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Introduction

Scholars regularly observe that Canadian governments make frequent and increasing use of *ad hoc* or emergency back to work legislation (AHL) to bring bargaining disputes to an end in both the public and private sectors.[1] The AHL mechanism has been used repeatedly by all senior governments in Canada, and since 1950 these governments have legislated striking employees back to work on at least 100 occasions and three-quarters of those instances involved employees who had been granted the unfettered right to strike by statute.[2] Since 2000, governments' use of AHL legislation has increased substantially.[3] It has also recently been noted that there appears to be a change in the nature of AHL legislation. Rather than simply bringing an end to a work stoppage or ongoing negotiations and referring matters to interest arbitration by a neutral third party, governments are increasingly resorting to unilaterally imposing contract terms on the parties.[4]

The nearly unfettered power of governments enjoying tremendous majorities in the legislature, a common feature of Canadian provincial governments since the mid-1990s, may be a factor encouraging to unilaterally intervene in bargaining disputes. As one commentator describes it, governments faced with a difficult bargaining dispute may find it relatively easy to:

> "[succumb] to the temptation to amend the statute in the context of immediate labour disputes, even worse, to do so in a way which was perceived as a punitive response against the union which was party to the crisis."[5]

The more acute global competitive pressures are to maintain certain private sector services critical to production and delivery, and to control costs in certain areas of the public sector, the more acute may be governments' temptation to resort to the AHL mechanism.

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[1] See e.g. Thompson, M. and Swimmer, G. "The Future of Public Sector Industrial Relations" (1995) in *Public Sector Collective Bargaining in Canada: Beginning of the End or End of the Beginning?*, eds. G. Swimmer and M. Thompson, IRC Press; Panitch, L. and Swartz, D. (2003) *From Consent to Coercion: The Assault on Trade Union Freedoms*, 3rd ed. Toronto: Garamond Press; Peirce, J. and Bentham, K.J. (2006) *Canadian Industrial Relations*, 3rd ed. Toronto: Pearson; Thompson, M. and Jalette, P. (2008) 'Public-Sector Collective Bargaining', in M. Gunderson D. Taras (eds) *Canadian Labour and Employment Relations*, 6th ed., at 421-422. Toronto: Pearson Addison Wesley; Joseph B. Rose, (2008) "Regulating and Resolving Public Sector Disputes in Canada" Journal of Industrial Relations 50(4) 545–559; Swimmer, G. and Bartkiw, T. (2003) 'The Future of Public Sector Bargaining in Canada', *Journal of Labor Research* 24(4): 579–95; Jeffrey Sack and Tanya Lee "The Role of the State in Canadian Labour Relations." Relations industrielles / Industrial Relations, vol. 44, no. 1, 1989, p. 195-223.

[2] Peirce and Bentham, *supra* note 1.

[3] Thompson and Jalette, *supra* note 1.

[4] Rose, *supra* note 1 at 554.

[5] Joseph M. Weiler & Peter A. Gall, eds., *The Labour Code of British Columbia in the 1980's* (Calgary: Carswell, 1984) at 31.

Use of AHL Legislation

A preliminary review of AHL legislation suggests it falls into several distinct patterns. In virtually all instances the legislation, of course, orders striking or locked-out workers back to work, including corresponding directions to the trade union and employer to permit and facilitate the return to work. In some cases the legislation goes no farther. In some instances, particularly in public sector disputes where there is limited or no access to striking, there is no return to work feature of the legislation. More commonly, it directs the parties to interest arbitration, sometimes with a cooling-off period or pre-arbitration mediation. In other cases, in addition to ordering return to work, the expired collective agreement is renewed for a term, sometimes with minor amendments to certain terms. In other cases, the return to work is accompanied by imposition of a contract distinctly different than the expired agreement.

Looking at governments' use of *ad hoc* legislation from 1950 to June 30, 2008 we see that, overall, provinces are more frequent users of AHL legislation than the federal government (see Tables 1 and 2 below). The federal, Quebec, and Ontario governments most frequently resort to *ad* hoc responses (32, 31 and 29 instances in the period studied, respectively), although the Federal government has only employed such legislation once since 1999.

Over time, we see that AHL legislation was little used during the 1950s and 1960s (3 and 11 times, respectively), that it was used frequently in the 1970s (35 times) and 1980s (37 times), and remained common through the 1990s (29 times). This trend seems to be continuing with 21 uses of *ad hoc* legislation in the first five years of the last decade. This is all the more striking given the context: work stoppages are at relatively low rates, and since 1976 Canada has seen an overall substantial decline in: number of work stoppages, number of persons days lost to work stoppages, and percentage of working time lost to work stoppages.[6] Nevertheless, the decline in strike activity has been more pronounced in the private sector, and the proportion of days lost to work stoppages arising form the public sector has gone up from the mid-70s.[7]

In the case of some bargaining relationships, government has repeatedly interfered in numerous rounds of collective bargaining contracts using AHL legislation. One prominent case is that of the British Columbia Teachers' Federation (BCTF). Representing all of the province's public school teachers, BCTF was unable to reach a freely negotiated collective contract with the government's employer bargaining agent, from 1994 until 2006, when a special process and substantial extra funding facilitated the first negotiated contract in over a decade. During that period, each of the earlier sets of negotiations ended in AHL legislation. First, in 1996, Bill 21, the *Education and Health Collective Bargaining Assistance Act*[8] provided that, for a defined period, until the Act self-repealed, that recommendations of an industrial inquiry commissioner or mediator to settle contract terms were deemed to be the collective agreement. In 1998, Bill 39, the *Public Education Collective Agreement Act* imposed a contract that the employer bargaining agent and many school boards objected to, but which the government and BCTF supported.[9] In 2002, Bill 27, the *Education Services Collective Agreement Act,* imposed a new contract opposed by BCTF, rolling-over the

[6] Harvey J. Krahn, Graham S. Lowe and Karen D. Hughes. *Work, Industry & Canadian Society*, 5th ed. Thomas Nelson 2007 at p. 391.

[7] Morley Gunderson, Bob Hebdon and Douglas Hyatt, "Strikes and Dispute Resolution" in Morley Gunderson and Daphne Taras, eds. *Canadian Labour and Employment Relations*, 6th ed. At pp. 339, 343.

[8] Bill 21, *Education and Health Collective Bargaining Assistance Act*, S.B.C. 1996, c. 1.

[9] *Public Education Collective Agreement Act*, S.B.C. 1998, c. 41.

expired agreement for over three years, and including all terms agreed to during negotiations, and a salary increase over the three years. [10] In 2004, Bill 12, the *Teachers' Collective Agreement Act*, was passed to bring an end to a 10 day unlawful teachers strike and deeming the collective agreement that had expired June 30, 2004 to constitute a collective agreement between the parties.[11]

The key private sector disputes culminating in AHL are those in transportation, particularly railways and ports, and construction. These industries, particularly the federal transportation industries, are vital to commerce and trade. The imperative for these services to continue, for the health of the national economy, are governments' often-cited reasons for imposing AHL in these instances.

This study focuses on imposition of contracts – either through renewing expired agreements, or imposing new contract terms – because this is the most extreme form of government intervention in collective bargaining and settled contracts.

Interpretations

This phenomenon has been interpreted in two ways. On the first view, use of the AHL mechanism and unilateral imposition of contract terms is regarded as part of a "fundamental retreat" by governments from endorsing a system of free collective bargaining system for certain employee groups.[12] This feature is a key contributor to what Panitch and Swartz refer to as a move from temporary intrusive measures to "permanent exceptionalism" in governments' approach to restricting and regulating workplace relations, and in collective bargaining, in particular. [13] A second perspective disputes that frequent use of the AHL mechanism signals the end of free collective bargaining, suggesting that it reflects increasing centralization of public sector bargaining structures, declining worker militancy, and greater access to public sector work stoppages.[14]

Though the use of AHL legislation is a frequent subject of comment, this phenomenon has not yet been subject to an in-depth analysis. Governments' increasing use of the AHL mechanism deserves closer examination for several reasons.

First, the 2007 Supreme Court of Canada decision in *BC Health Services* brings into question the ability of governments to legislatively intervene and end or substitute for collective bargaining with interest arbitration or unilaterally imposed contract terms.[15] The *BC Health Services* decision expressly overturned decades of jurisprudence to conclude that the *Charter* guarantee of freedom of association protected the process of collective bargaining. This raises the question of whether some forms of AHL legislation commonly used in the past, such as imposing whole contracts or contract terms, or otherwise ending collective bargaining, still pass constitutional muster.

Second, the AHL mechanism is most commonly, but not exclusively, applied in public sector disputes. Reliance on the AHL mechanism may have become a default policy

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[10] Bill 27, *Education Services Collective Agreement Act*, S.B.C. 2002, c. 1.

[11] Bill 12, *Teachers' Collective Agreement Act*, S.B.C. 2005, c. 27.

[12] Rose, *supra* note 1; Panitch and Swartz, *supra* note 1; Ponak and Jalette, *supra* note 1 at 422.

[13] *Supra* note 1.

[14] Thompson and Swimmer, *supra* note 1 at 435-7; Swimmer, *supra* note 1; Adell, Grant, and Ponak, *supra* note 1; Swimmer and Bartkiw, *supra* note 1.

[15] *Health Services and Support - Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27.

tool, substituting for failure to construct a viable public sector collective bargaining structure. Because the public sector is highly unionized (approximately 75% union density overall, and some sectors with over 90% union density), and the importance of public sector compensation to government budgets, public sector labour relations and governments' capacity to control the outcomes of negotiations and their costs is crucial to public policy.

Conclusion

This research project seeks to do the following. First, determine how reliant various governments have become on the AHL mechanism in various public and private sectors. Second, analyse AHL legislation to determine the various forms this mechanism has taken. Third, include contextual factors in this analysis, such as the nature of the dispute, type of work stoppage (strike or lock-out), length of work stoppage, and stage of negotiations at which the AHL intervention occurred, including data from other sources such as Human Resources and Services Development Canada. Consideration will also be given to whether pressures of the global economy, on protecting industries crucial to supporting Canada's trade, and on governments' public sector cost controls, appear to be key factors encouraging government use of the AHL mechanism. Fourth, consider whether, and to what degree, governments' ability to use the AHL mechanism is affected by the *BC Health Services* decision. Finally, this project will investigate the role of the AHL mechanism as a public policy tool and its future use through interviews with representatives of government which have frequently and recently resorted to using the AHL mechanism.

Table 1: Federal and Provincial *Ad Hoc* & Emergency Legislation: 1950 – June 30, 2008

	Federal		NL		ON		QC		BC		SK		NB		NS		AB	
Year	Public	Private	Pub.	Private	Public	Private	Public	Private	Public	Private	Public	Private	Public	Private	Public	Private	Public	Private
1950-54		1																
1955-59		1		1														
1960-64		2			1													
1965-69		2	1		1		4	1			1							
1970-74		4			2	1	2	2	1	1								
1975-79	2	4			6		5		4		1							
1980-84		1	1		3		7		1	1	2	2	1				1	
1985-89	2	3			2	2	3	1	1		3							
1990-94	2	3			3		1	1	1									
1995-99	3	1	1		2		1		2		2					1		
2000-04			1		5		1	1	8				1		1		1	
2005-08	0	1			1		1		2									
TOTALS	9	23	4	1	26	3	25	6	20	2	9	2	2	0	1	1	2	0
	32		5		29		31		22		11		2		2		2	

Table 2: Federal and Provincial *Ad Hoc* & Emergency Legislation: 1950 – June 30, 2008

Totals by decade and sector

	1950-59	1960-69	1970-79	1980-89	1990-99	2000 - June 2008	Total
Public	0	8	23	27	18	22	
Private	3	6	12	10	6	2	
Total	3	14	35	37	24	24	

Sources: updated from Human Resources and Development Canada, "Federal Ad Hoc Emergency Legislation", and "Provincial Ad Hoc Emergency Legislation" (online: http://www.hrsdc.gc.ca/en/lp/spila/clli/irlc/08federal_ad_hoc_emergency_legislation.shtml;

http://www.hrsdc.gc.ca/en/lp/spila/clli/irlc/09provincial_ad_hoc_emergency_legislation.shtml).