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Judy Fudge

Osgoode Hall Law School of York University

Harry Glasbeek

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ALBERTA NURSES v. A CONTEMPTUOUS SUPREME COURT OF CANADA

Judy Fudge and Harry Glasbeek

BACKGROUND

Whenever capital/labour conflict comes to court, the conventional portrayal of an even-handed rule of law administered by an autonomous above-the-fray institution comes under severe pressure. The story of the judiciary's involvement in these cases is one of hostility to the collective rights of labour; it sees the rule of law as a means to constrain the rights of labour in a class-divided polity. Its decisions tend to reveal the essentially conflictual nature of capital/labour relations. In part, this explains why liberal pluralist academics and policy-makers - who are keen to deny the existence of class relations - have put a great deal of intellectual and political effort into the creation of employer/employee regulatory schemes which, amongst other things, marginalize the role of the judiciary.

The resulting statutory collective bargaining regimes are presented as schemes in which labour has been granted sufficient legitimate countervailing power to do away with the grosser of the imbalances. The state's role in the schemes is characterized as that of a facilitator. It is to put the parties in a position where it can be said to be fair to leave them to determine their own fate. They are allowed to use economic warfare as a basis for the reaching of voluntary settlements in respect of the rules and conditions which are to govern work relationships. A shared ideology is to be the inevitable by-product of the web of rules so created.¹ The system, then, is pictured as one which promotes the sovereignty and autonomy of parties who are to resolve their disputes in a progressively reformed setting which they both accept. What this picture goes to great length to hide is that the employers' and the state's capacity to restrain and repress labour has never been abandoned.

This became clear in the 1960's when workers, playing catch-up after an economic boom and in political circumstances where self-assertion was common, found themselves disadvantaged by collective bargaining law's restrictions on their economic muscle. But, with a confidence which, in large part, stemmed from the legitimacy the scheme had supposedly bestowed upon their use of collective rights, workers were willing to step beyond the technical constraints of the governing statutes. They did not believe that, in this atmosphere, their extra-legal collective efforts would cause them to be treated as outlaws. They were wrong.

Employers and governments went to the courts to ask for restraining orders. The courts were only too happy to enforce those aspects of the rule of law which they had devised to restrain and repress labour prior to the advent of

statutory collective bargaining. Disobedience of the orders they made pursuant to these rules could be treated as contempt of court and lead to the imposition of fines and imprisonment.

Rapidly, the historically anti-labour courts were moving back from the margins to the centre of capital/labour regulation. Employers and governments had made this repositioning possible by their desire to exploit the judiciary's exclusive right to exercise legally-sanctioned coercive power. Simultaneously, however, they had created a dilemma: once again the rift between capital and labour was becoming visible, as was the fact that state institutions and the supposedly neutral rule of law had never ceased to favour capital's interests. The carefully-crafted labour relations regulatory mechanism was in danger of losing its legitimacy.

A spate of public inquiries resulted.² The conclusion of the ensuing reports was that the courts should be pushed back towards the periphery. To allow this to happen, the reports argued, it would be necessary to give the labour relations boards more remedial powers to take up the resulting slack.³ Recently, pressures have been put on the patched-up system.

The precipitous economic decline which began in the late 1970's has led to a drive to restructure the economy. This restructuring is based on the assumption that globalized competition and production is desirable and inevitable. The resulting local unemployment has made employers impatient with the rigidities which they claim statutory collective bargaining imposes on them. While liberal pluralists and policy-makers continue to espouse the rhetoric used to bolster the labour relations system they helped establish in the 1960's and the 1970's, larger employers and conservative governments are doing everything they can to undermine it.⁴

Coincidentally, during this period of restructuring and reassertion of late 18th century ideology, the judiciary has been given the *Charter of Rights and Freedoms* to administer. Amongst other things, the *Charter* empowers the courts to interpret and apply undefined rights, such as freedom of association, expression and political belief, with a view to constraining government action. These freedoms are those which are called into question every time collective labour seeks to challenge or to resist capital. At the time of the *Charter's* entrenchment, many of its more thoughtful liberal supporters could see that, given the history of labour law jurisprudence and the new approach of capital to labour relations, the courts' new discretionary powers might well be exercised by them in such a labour-unfriendly way as to

delegitimize the whole of the constitutional judicial review system and process.⁵ They were right about the judiciary's inability to overcome its anti-labour predilections. But their fears that the judiciary might thereby bring the Charter regime into disrepute were not shared by the courts.

The courts, especially the Supreme Court of Canada, have been vicious in their interpretation of the *Charter* when called upon to deal with the rights of labour. Prior to the *United Nurses of Alberta (UNA)* decision, the Supreme Court of Canada had been asked to pronounce seven times on the collective rights of labour and seven times it had defeated labour's claims.⁶ Apparently, if it is conscious of the larger issues at all, the Court has made a judgement that, in the new order and ideology of capital/state/labour relations, its anti-labour version of the rule of law will not undermine its legitimacy as much as it did in the more liberal years of the 1960's and early 1970's. The recently decided *United Nurses of Alberta* case makes this all too clear.⁷

THE FACTS OF THE CASE IN CONTEXT

In 1982, the UNA exercised its legal right to strike. The government passed back-to-work legislation which the union ignored. No sanctions were invoked and a collective agreement was concluded. By 1983, the government, which wanted to control government costs, passed legislation which prohibited workers in the broader public sectors from striking. Impasses were to be resolved by the imposition of an agreement by an arbitrator who was to have due regard to government fiscal policy, the state of the provincial economy and wages in both the private and non-union sectors. The government was taking the logic of economic restructuring seriously and undoubtedly hoped that its leaner and meaner approach to its employees would stiffen the backbone of recession-pressured private employers. In due course, this legislation - which took away the right to strike from unions such as the UNA - was challenged as a violation of the freedom of association guaranteed by the *Charter of Rights and Freedoms*. In the strike trilogy, the Supreme Court of Canada upheld the restricting legislation. It probably pleased the majority of the Court to let people think that, in upholding the view which courts had propounded for a century or more, namely, that the right to strike was a right which was secondary to individualistic rights, it was paying deference to legislatures which had belatedly come to the same view.

While the Charter challenge was going through the courts, the Alberta government got even leaner and meaner. Not content with having an arbitrator impose conditions after a hearing in which unions could participate, it unilaterally imposed a wage freeze for broader public sector workers in 1987.

The UNA felt it could not accept the freeze. Its leadership said it had no recourse but to call a strike and announced that it would convene a meeting of the members so that they could vote on the issue on January 22, 1988. Before this date,

the employers were before the Alberta Labour Relations Board to ask that it issue a directive to the union which would tell it to desist from threatening or from leading a strike. The employers based their request on the 1983 law which had made a nurses' strike illegal. It was an irresistible application.

The Board issued the directive. Nonetheless, the strike vote was held on January 22 as scheduled. The members supported the strike. The strike was to begin on Monday, January 25, 1988. On Sunday, January 24, the employers were back before the Labour Relations Board to obtain yet another directive. This time they were armed with the certain knowledge that the union was about to lead the strike. The Board issued a second directive. The employers rushed over to a clerk of the Queen's Bench of Alberta on that very same Sunday, with both directives in their hands to have them registered as orders of the Court.⁸ The strike began on January 25. Margaret Ethier, the leader of the union, told the press that she knew the directives had been filed as orders of the Court but said that the strike would go on anyway.

Four days later, on January 29, the Attorney-General of Alberta was before the Court asking that the UNA be held in criminal contempt because it was in breach of a court order not to strike. He asked the Court to impose a fine of \$1 million on the union and to sequester its property. On February 3, Sinclair J. found that the union was in contempt and, on February 4, he imposed a fine of \$250,000 to be paid within five days. Failure to pay within that time would lead to automatic sequestration of the union's funds. On February 9, as union officials were attending at court to pay the fine, they were served with notice of a second charge of contempt laid against UNA by the Attorney-General. Subsequently, the Attorney-General asked O'Byrne J. to convict the union for criminal contempt again because it was still on strike. On February 18, the judge did just that. Apparently the contempt was not as serious this time because the union was fined only \$150,000. In due course, the union paid this fine as well.

In short, the Alberta Labour Relations Board directives were treated as if they were court injunctions. Disobedience, therefore, demonstrated a flagrant disrespect for the rule of law. This attracted the ultimate sanction: a conviction of criminal contempt of court. In 1992, the Supreme Court of Canada, in a 4:3 decision, upheld these convictions.⁹

LEGAL ISSUES

Four points of law were in contention before the Supreme Court of Canada. We will address only two of these, and one of these only briefly.¹⁰ First, does a trade union have the kind of legal personality attributes which allowed the imposition of a criminal sanction on it? Second, is criminal or civil contempt the appropriate remedy in the circumstances which brought the union before the court in this case?

Legal Personality

One of the purposes of statutory regulation of labour relations has been to remove the legal hurdles which the common law imposed on trade unions. As unincorporated associations they had not been able to enter into enforceable agreements or have employers recognize them as legal partners. Courts in their anti-collectivism used the limited legal status subsequently bestowed on unions as a platform to make unions, as such, subject to duties and responsibilities imposed by the common law. Anti-collectivist remedies were rendered more effective in this way. This is the kind of manipulation which gave rise to the anti-judicial sentiments of modern collective bargaining proponents.

But precisely because, for so long, their own jurisprudence had treated unions as not having any legal personality, it always has been technically difficult for courts to justify their characterization of unions as legal persons.¹¹ Nonetheless, when the issue is whether or not a trade union can be held in contempt, the judiciary does not seem very troubled by legal technicalities. In *UNA*, the members of the Supreme Court of Canada who addressed the issue were unanimous.¹² For all of them - including Cory J., who differed substantially on the contempt issue - it was simply a matter of common sense, of evenhandedness: the statutory right to bargain collectively is a privilege; it is only fair that it should attract obligations.¹³

Criminal or Civil Contempt

In the abstract, the distinction between criminal and civil contempt is easy to maintain. Civil contempt is constituted by the disobedience of a judgment or a court order made to benefit a particular individual. The justification is the protection of an individual's interests. By contrast, criminal contempt is constituted by words, acts or writings which obstruct or discredit the administration of justice. Bribing a witness or a juror, attempting to influence a judge, accusing a judge of unacceptable bias or disobeying a court order made in a criminal case all may be treated as criminal contempt. The idea is that a sanction is warranted because society as a whole will suffer the consequences. Difficulties arise because disobedience of a judgment or a court order made in favour of an individual may well amount to wilful defiance of a court. At this point, civil and criminal contempt become conflated.

One of the more frequently recurring instances of this is the failure of workers and their unions to abide by a labour injunction which has been granted as an order favouring an employer's position during a strike. On the face of it, such an order is issued for the benefit of one individual - the employer. Defiance of such an order, however, can be characterized as public defiance of a court order and, therefore, as the kind of activity which strikes at the dignity of the rule of law. When will this be warranted? The Charter of Rights and Freedoms regime ought to have made this question more troublesome than it used to be. Section 7 of the *Charter* requires that a crime be defined with certainty, lest it violate fundamental due

process principles. This means that the *mens rea* of the offence needs to be spelt out clearly.

The McLachlin majority held that a criminal contempt was committed when an accused defied a court order¹⁴ with the intent or knowledge of, or recklessness as to, the fact that the public disobedience will tend to depreciate the court's authority in the public mind. She indicated that these guidelines were precise enough to satisfy the requirements of s.7. That is, given these criteria a citizen would be able to know when she was going to cross the line which separates legitimate dissent from criminal conduct. This is highly tendentious.

Cory J. did not address the question of whether the vagueness of the definition of criminal contempt of court offended s.7 of the *Charter* directly. However, he did have to face the issue of whether or not there had been the kind of public defiance which was the hallmark of criminal contempt. He went through the statements made by Margaret Ethier, the president of the UNA, when she acknowledged that she understood that a court order had been made, in great detail. He characterized her behaviour not to be the kind of defiance which amounted to a criminal discrediting of judicial authority. Rather, Cory J. thought that what the union and its leadership was doing was to exercise another Charter right: freedom of speech. He underlined the fact that the union leaders had clearly indicated that they were not quarrelling with the Court, but with their employers. Cory J. also emphasized that "both unions and management rely on publicity to raise public awareness of the issues involved in [a labour] dispute."¹⁵ He noted that unions had more trouble communicating with the public than employers generally do and suggested that speeches, picket lines and strikes were inherently legitimate tactics during an on-going dispute between *private* parties.

The fact that this analysis was possible suggests that McLachlin J. and her associates were overstating their case considerably when they argued that the elements of the *mens rea* of the offence of criminal contempt they had specified made for certainty in the law. After all, two wings of the Supreme Court of Canada were able to characterize the same words and events very differently. The incoherence and indeterminacy of rights and freedoms under the *Charter of Rights and Freedoms* is, once again, made evident. Clearly, the way in which a judge views labour relations and the appropriate content of freedom of speech will change the meaning given to the elements which need to be proved to make a criminal contempt charge stick.

This is made manifest by the way in which Cory J. wrote his judgment. He argued that, over time, the naked anti-labour attitude of the courts had brought the judiciary into disrepute. Public opinion and public policy had made it crystal clear that capital/labour relations regulation had to allow for a collective role for unions. The relative autonomy of the regimes created derived its justification from the conceptualization that private parties were reaching voluntary settle-

ments and that the law should be used to facilitate this and enforce the collective agreement which resulted. Cory J. pointed out that for the judiciary to use sanctions traditionally employed by it to smash unions would be to attack the legitimacy of the labour relations regime and, even more importantly, would threaten to bring the courts into the same kind of contempt they had been held in by policy-makers and labour relations participants in the 1960's and 1970's.¹⁶

Cory J.'s apparent sensitivity is not to be mistaken for softness on the issue of unruly worker behaviour. To the contrary, his approach mirrors that of a long line of liberal pluralist labour relations experts who see the statutory collective bargaining scheme as a way of co-opting and containing the collective power of workers.¹⁷ Thus, Cory J. goes to great length to point out that there were plenty of other ways to sanction the disobeying trade union:

The decision to violate the Board's order is repugnant. It left the union open to civil contempt proceedings as well as the penalties provided by the provincial *Labour Relations Act*. Yet those penalties were quite sufficient to punish any union's conduct and discourage any future disobedience of orders.¹⁸

Indeed, the Alberta *Rules of Court* provide that people in civil contempt are liable to imprisonment until they have purged their contempt, or to imprisonment for at least one year, or to pay a fine of \$1,000 per day and, in default thereof, to imprisonment for a year. In addition, the *Labour Relations Act* itself provides for penalties for breaches of the Board's order. The penalties are fines of up to \$10,000 a day for each day that a strike continues illegally, as well as fines of up to \$10,000 for officers or representatives of the trade union who encourage or condone illegal strikes. That is, there were plenty of other ways to repress workers and trade unions. Cory J. thought that it was quite inappropriate to use something as potentially delegitimizing of both labour relations and the judiciary as criminal contempt of court, at least as long as containment could be achieved by letting the administrative regime work:

The unrestrained use of criminal contempt proceedings in labour relations matters will once again give rise to the perception that the courts are interfering with the collective bargaining process and intervening on behalf of management. If that perception persists, the courts will no longer be seen as impartial arbiters but as the instrument used by society for imposing crushing penalties on unions and union members.¹⁹

His emphasis, then, was that, whenever possible, labour struggles should be treated as private realm disputes subject to private realm rules. Here it is to be noted that a number of individual nurses were held in civil contempt for refusing to work during the strike. This was a consequence of their

employers' application to a court for such an order, that is, the result of a private individual enforcing private rights. As much as \$27,000 was paid in fines by these convicted nurses, hardly a bagatelle. Obviously, Cory J. was right; effective restraint is possible without resort to the use of the criminal contempt power.

The distinction between the majority and the dissent is not one of goals. Both want trade unions to respect the law and the rule of law. Technique was the issue. Cory J. was concerned about the viability of industrial pluralism and the judiciary's integrity. McLachlin J. and her associates obviously felt none of these compunctions. From their perspective it was plain that in this case, unlike in the right to strike cases, a feigned deference to other regulatory bodies would not permit the reaching of a result which they deemed desirable. Consequently, there is not even a suggestion that the judiciary should be deferential to the supposedly autonomous administrative regime or that the Court should be truly careful about how it exercises its most repressive power. Perhaps it is a little too far-fetched to suggest that these members of the Supreme Court of Canada felt that, because they are the interpreters and appliers of the sacrosanct *Charter of Rights and Freedoms*, their prestige cannot be seriously undermined. Nonetheless, there is a good deal of confidence, if not arrogance, in the majority's decision in the *UNA* case.

Perhaps the real reason for this confidence lies in the fact that big business and conservative governments are abandoning the post-war liberal pluralist entente reached between the state, capital and labour. The judiciary, as an institution, never has accepted that entente and now may feel fortified by the elites' abandonment of it. Certainly, in the *UNA* case, the majority of the Supreme Court of Canada seems to have appreciated the opportunity to reassert the validity of the judiciary's ancient views. Cory J.'s nostalgia for the mediated labour relations system of the 1950's and 1960's seems almost radical or, at the very least, out of step with the much more brutish and primitive times in which we live and which apparently resonate with the views of the majority of the Supreme Court of Canada.

Judy Fudge and Harry Glasbeek, Osgoode Hall Law School, North York, Ontario.

1. The literature is voluminous. Representative works include: John T. Dunlop, *The Industrial Relations System* (New York: Holt, 1958); "The Report of the Task Force on Labour Relations" (The Woods Task Force) in *Canadian Industrial Relations* (Ottawa: Privy Council, 1968); and, P. Weiler, *Reconcilable Differences: New Directions in Canadian Labour Law* (Toronto: Carswell, 1983).

2. See, for example, A.W.R. Carrothers and E.E. Palmer, *Report of a Study on The Labour Injunction in Ontario* (Toronto: Ont. Dept. of Labour, 1966); "Woods Task Force", *supra*, note 1.

3. The 1973 British Columbia *Labour Relations Code* was the most far-reaching adoption of these social engineering recommendations. It attempted to oust the judiciary's jurisdiction altogether; see H.W. Arthurs, "The Dullest Bill: Reflections on the Labour Code of British Columbia" (1974) 9 U.B.C. L. Rev. 280. In Ontario, in the mid-1970's, the Ontario Labour Relations Board was given additional and much more sophisticated reme-

dial powers. This was a common response to the various reports' suggestion that the struggles between the parties would be better administered and controlled by labour relations boards than by courts.

4. L. Panitch and D. Swartz, *The Assault on Trade Union Freedoms* (Toronto: Garamond Press, 1988); D. Langille, "The Business Council on National Issues and the Canadian State" (1987) 24 *Studies in Political Economy* 41.

5. For an expression of sensitivity to this issue, see P.H. Russell, "Canada's *Charter of Rights and Freedoms: A Political Report*" [1988] *Public Law* 385 at 387-88.

6. *Reference Re Public Service Employee Relations Act*, [1987] 1 S.C.R. 313; *Public Service Alliance of Canada v. A.G. of Canada*, [1987] 1 S.C.R. 424; *Retail, Wholesale and Department Store Union, Local 544 v. Government of Sask.*, [1987] 1 S.C.R. 460; *Retail, Wholesale and Department Store Union, Local 580 v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573; *British Columbia Government Employees' Union v. Attorney General of British Columbia, Attorney General of Canada, Intervener*, [1988] 2 S.C.R. 214; *Newfoundland Association of Public Employees v. Attorney General for Newfoundland*, [1988] 2 S.C.R. 204; *Professional Institute of the Public Service of Canada v. Northwest Territories Commissioner* (1990), 90 C.L.L.C. 14,031.

7. *United Nurses of Alberta v. Attorney General (Alta.)* (1992), 92 C.L.L.C. 14,023.

8. Who says courts are not readily accessible?

9. The UNA plans to appeal the severity of the fines. The quantum apparently was not in issue in the described proceedings.

10. The first point not to be discussed related to the question of whether a provincial board's cease and desist order could attract a judicial ruling that contempt had been committed. The argument was that, by permitting this, provincial jurisdiction would be enlarged by effectively bestowing criminal law power on its agency. The second issue was whether or not the trial court judge had violated the *Charter of Rights and Freedoms'* provisions which promote fair trials when he refused to allow cross-examination on the affidavits filed by the Crown on the contempt hearing. To us, these arguments are subsidiary. They are merely ways in which lawyers argue about overt policy while cloaking themselves in technicalities. Predictably, the majority and minority split on these issues in the same way as they did on the more substantial policy points discussed in the case.

11. *International Longshoremen's Association v. Maritime Employers' Association*, [1979] 1 S.C.R. 120. See also *Teamsters v. Therien*, [1960] S.C.R. 265; and, D.J. Sherbaniuk, "Actions By and Against Trade Unions in Contract and Tort" [1958] *U. of T. L.J.* 151.

12. They relied on *United Fisherman and Allied Workers' Union v. The Queen*, [1968] S.C.R. 255.

13. Per McLachlin J. at 12,121; Cory J. at 12,130. Note that the Court was also faced with an argument as to whether or not criminal contempt under the *Criminal Code* was applicable to unions. This turned on the meaning of "societies" as defined in the *Criminal Code*. The Court held that a trade union was covered by the term "societies" in that Code.

14. It was actually a provincial labour relations board which had issued the directive to cease and desist, rather than a court. Both the McLachlin and Cory judgments assumed that, for jurisdictional purposes, the cease and desist order of the board, once registered with the court, was the equivalent of an injunction issued by the Court. Sopinka J. found that this had elevated the provincial agency's role to that of a judicial one and that this offended the constitutional provisions dealing with the division of power. He relied on this to avoid the major issues in the case. He did not have to address the question of whether or not civil or criminal contempt was warranted by the union's behaviour; he was able to hold that the criminal contempt conviction was unlawful because it was made without jurisdiction; see note 10.

15. *UNA, supra*, note 7 at 12,131.

16. This was echoing a position Cory J. had offered when he was on the Court of Appeal of Ontario; see *Re Ajax-Pickering General Hospital and Canadian Union of Public Employees* (1981), 139 D.L.R. (3d) 270 (Ont. C.A.).

17. See, for example, "Woods Task Force," *supra*, note 2; Weiler, *supra*, note 1; H.W. Arthurs, "Note" (1963) 41 *Can. Bar Rev.* 580; and, H.W. Arthurs and J. Crispo, "Industrial Unrest in Canada: A Diagnosis of Recent Experience" (1968) 23 *Relations Industrielles* 237.

18. *UNA, supra*, note 7 at 12,135.

19. *UNA, supra*, note 7 at 12,132.

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The Editor,
Review of Constitutional Studies / Revue d'études constitutionnelles
 456 Law Centre
 University of Alberta
 Edmonton, Alberta, T6G 2H5