

Pennings, Feb 7, 2007



**Presentation to
Standing Committee of Human Resources, Social Development
and the Status of Persons with Disabilities
House of Commons, Canada**

Regarding

Bill C 257 – An Act to Amend the *Canada Labour Code*

By
Ray Pennings
Vice-President of Research
Work Research Foundation (www.wrf.ca)

February 7, 2007



Pennings, Feb 7, 2007



Thank you MISTER/MADAM CHAIR, and let me extend my thanks to all members of this committee for the invitation to appear as a witness, today. I also extend my thanks to the Clerk of the committee for the assistance extended in preparing to appear.

The 1996 task force which reviewed the *Canada Labour Code* and made recommendations which formed the basis for the last major re-write of that legislation was, appropriately enough, entitled *Seeking a Balance*. It is ironic that the only issue on which that commission was unable to reach consensus was the issue which is the focus of this committee – the use of replacement workers during a strike:

The majority view is that there should not be a general ban on the use of replacement workers, but that their use for the purposes of undermining a union's right to represent employees should constitute an unfair labour practice. Rodrigue Blouin's view is that there should be a total ban on the use of replacement workers. Despite this difference, we share the view that permanent replacements are inappropriate and the right to return to work at the end of a strike should receive statutory protection, as should the right to arbitrate discipline or dismissal imposed during a strike or lockout. We suggest several other ways of balancing rights during work stoppages.¹

In preparing for this presentation, I reviewed the testimony that you have heard to date. There is little doubt that the word “balance” was the most frequently appealed to standard by various presenters. However it would appear that balance, like beauty, depends on the eye of the beholder. Not surprisingly, most unions you have heard from support this amendment; most employers oppose it, and both have found statistics to buttress their respective cases

Instead of piling on, I thought it would be most helpful if I took the short time allotted to me first to put my background and bias on the table, and then to make three observations which I hope will of use in carrying out your responsibilities as Parliamentarians called upon to evaluate this legislation.

¹ Andrew Sims, Paula Knopf and Rodrigue Blouin. *Seeking a Balance* http://www110.hrdc-drhc.gc.ca/sfmc_fmcs/lcctr_tclcr/exec.html

Pennings, Feb 7, 2007

Background and Context

Like everyone else who has presented to this committee, I too have biases so let me start by putting them on the table. I grew up in an immigrant small town Ontario household and the perspective on unions was a negative one. My mother's workplace was unionized and it proved not to be a positive experience. There was concern about the use of union dues to support social causes with which my parents had strong disagreements. And the frequent postal strikes caused great difficulty for the continued operations of the small farming operation on which our family relied.

When I accepted a position as a union staff representative in 1991, many of my acquaintances were not impressed. For eleven years, I was involved in the front lines of labour relations. I negotiated agreements that sometimes involved dozens and, other times, thousands of workers. I represented my union at Ontario's social contract talks in the early nineties. I was a union nominee on a \$30 million Health Sector Training and Adjustment Program to assist workers dealing with structural reform. I have served on boards of arbitration under both Ontario's *Hospital Labour Disputes Arbitration Act* and under various collective agreements. I have publicly made "a conservative case for collective bargaining" arguing that the character of work in a modern economy creates a natural demand for worker-representative institutions, that many of the economic arguments used to suggest unions are harmful to the economy are mistaken arguments, and that unions can contribute significantly to workplace justice and democracy.²

I raise these points only to demonstrate that my bias favours unions and collective bargaining. There is no doubt that the restriction on replacement workers proposed in this legislation will strengthen the hand of unions in labour disputes and, having worked with union members in the pain of a strike situation, I appreciate the appeal that there is in seeing the "rules of war" changed in a way that would give an advantage. However, let me make three comments that I think should give pause to those who would support this legislation in the name of labour relations balance.

1. Balance in Labour Relations is about Process as well as Substance

Any experienced labour negotiator will tell you that difficult issues are always harder to resolve if there is only one issue on the table. When there are various issues that can be

² For an elaboration on each of these arguments, see my article "Collective Representation – A Conservative Defence" (Found at: <http://www.wrf.ca/comment/article.cfm?ID=77>, January 2007).

Pennings, Feb 7, 2007

dealt with simultaneously, there is room for a give and take which makes it more likely that the “losses” that one side feels on a given issue can be mitigated by a “gain” they experience elsewhere. At the end of the day, there is a package put forward which, although no one likes every part of it, everyone can live with it and feel a sense of justice and fairness.

There is a similar imperative in the process of labour law reform. The *Sims* report provided a package of reforms that represented significant degrees of consensus. The resulting legislation was generally accepted across the spectrum as balanced legislation, not just because of the content, but also because of the process.

I would respectfully suggest that whatever the merits or demerits the arguments regarding replacement workers might be, the very process of putting forward a single amendment to the labour code on such a controversial issue (the only issue in the *Sims* report on which the three commissioners could not reach consensus) is by its very nature an unbalanced and unwise approach to labour relations.

Union representatives know that when they go to a contract ratification meeting, they will frequently hear a voice urging that one or other controversial clause be taken out of the proposal and to be voted on separately. However, to take one controversial clause out of the package destroys the entire package, and the balance that overall package represents.

I respectfully suggest that a labour code amendment process that deals with only one controversial issue will always and inevitably lead to perceptions of imbalance and politicization of the labour relations process which is by definition unhealthy. The *Sims* report correctly reminded us of the “disadvantages of undue politicization of labour laws”:

First, it distracts the parties from their primary role of negotiating appropriate collective agreements, tempting them instead to seek political "fixes" for what should be mutually bargained solutions. Second, it introduces an element of political confrontation into bargaining relationships, which undermines the ability of the parties to communicate frankly and directly with each other. Third, it creates the habit of seeking legislative intervention into collective bargaining disputes. This has a long term corrosive effect and, in our experience, causes more labour disruption than it averts. Fourth, it implies that labour relations is simply a political question, which denies the fundamental compromises and self-determination inherent in our present legislative scheme. Finally, it leads to competition between jurisdictions, where one jurisdiction is pressed to minimize

Pennings, Feb 7, 2007

the impact of its laws to attract jobs from another. In Canada, in certain cases, this had led to a fragmentation of national bargaining structures and unnecessary variances in the various labour law regimes. This adds both cost and complexity to doing business in Canada.³

2. It is not just a labour-management balance, but also a majority-minority balance that needs to be preserved.

Some have argued for the ban on replacement workers on the grounds that replacement workers are an intrusion into the collective bargaining process and that the introduction of replacement workers changes a two-sided process into a three-sided process. What this argument fails to acknowledge is that a labour dispute inevitably has more than two sides to it. There are “third-parties,” be they suppliers, customers, or the broader public that are inevitably affected. Both parties to a labour dispute seek to rally public opinion to their sides and exert pressure, whether through boycotts, protests, or other means. Depending on the nature of the parties involved, a labour dispute inevitably involves a broad cross-section of society. When one considers the nature of the workplaces covered under the federal labour code, that is almost inevitably the case.

North America – unlike most countries in the world – uses a majoritarian system of labour relations. With the exception of narrow windows during which employees are free to select their union or during the internal cycle of union elections (which for understandable political reasons are almost always organized in a way that they do not coincide with the bargaining process), there are limited ways in which those who hold minority perspectives in the union can express them. Our system of collective bargaining contains relatively little practical opportunity for workers to dissent from the majority.

Many of the disputes that have taken place under the federal code involve large corporations, large unions, and industries that have a significant public impact. Some are industries in which there are oligopolies in place – a situation which provides significant clout and responsibility to all sides in a dispute. Disputes in labour relations are inevitable from time to time and as you have heard from the testimony to date, there is no perfect system to resolve such disputes. Just as you have heard arguments for and against replacement workers, you could equally have a discussion with the pros and cons of other dispute resolution mechanisms (such as binding arbitration, for example.) These alternatives also have their flaws, but certainly can be argued to be a way to mitigate the

³ Sims, p. 16.

Pennings, Feb 7, 2007

negative impact of a labour disruption, and a way to provide a greater respect for minorities. I am familiar with strike situations where the strike was driven at least as much by internal division within the union where a slim majority pushed through a strike over the concerns of a significant minority. While such situations are ugly and uncomfortable, we need to take care that we do not abuse the minority rights of workers.

Let me be very clear: I totally oppose the use of replacement workers as a management tactic to break the union. Workers have made democratic choices that deserve to be respected. However, the current law does provide for remedies against employers who use replacement workers to undermine the union as an unfair labour practice. While I understand that the replacement worker issue in law may be separate from the rights of workers to cross picket lines to do their own job, in practice, the issues are often closely related.

3. Progress in labour law is not achieved by returning to adversarialism but by focusing on more fundamental issues.

While those on both sides of the issue will parse the data in order to support their arguments, I think that most will concede that replacement workers is not the number-one issue that we need to face in terms of labour law reform. Allow me in closing to quickly enumerate a few issues which are just as polarized as the issues connected with replacement workers. These issues, too, are worthy of consideration as we seek to ensure a competitive and just industrial relations system capable of meeting the challenges of our changing economy.

a. Responding to the decline of union representation

Union representation has declined from approximately midway between 30% and 40% in the early 1990s to just over 30% today.⁴ As noted earlier, this decline is not a good thing either socially or economically.

At the Work Research Foundation, we have done some work trying to understand public attitudes toward unions. We conducted three surveys with major polling companies over a five-year period to track these attitudes. I was struck by the data from our 2002 study, based on a poll of 2030 Canadians as part of an Environics omnibus survey, which

⁴ The union density rate stood at 30.8% as of January 1, 2006.
(http://www.hrsdc.gc.ca/en/lp/wid/union_membership.shtml)

Pennings, Feb 7, 2007

showed that 64% of Canadians said they approved of labour unions while 32% disapproved. This approval rating was the highest found in known polls since 1961 when it stood at 61%.⁵ So if general questions about unionization elicit such strong support, public support, how do we explain the decline in membership? It is clear from the details of the surveys that while Canadians support unions, they disapprove of much of the confrontation and adversarialism associated with unionism.

The way forward in labour relations is not to spend time negotiating the rules of war, which is what I believe replacement worker legislation is. It would be a far better use of our energy to focus on systems and programs that would encourage labour peace, that would facilitate consultation and the development of training programs, skills development, and a workplace atmosphere which might guarantee Canadian workers have a voice through their unions in building a workforce which can compete globally and share in the rewards of that competition.

Commenting on this survey data, the University of Lethbridge sociologist Reginald Bibby noted: “Disenchantment with unions on the part of many former members and those who have never been members in part seems to be associated with some longstanding practices and approaches that are out of touch with the freedom and civility themes pervasive in today’s culture.”⁶

b. Alternative representative

Based on various data, I have previously estimated that there is as much as 16% of the Canadian workforce who have some form of collective representation but do not belong to certified unions.⁷

There are many reasons, including the various forms of work arrangements, for this development. I suggest that our focus in renewing labour movement should highlight future needs. The answer is not re-arming to re-fight yesterday’s battles. The fundamental flaw underlying much union renewal thinking is the premise that collective bargaining needs to take place through existing structures that currently define unions. The question needs to be reframed so that the focus is on the balance between the protection of the individual worker and the collective needs of a workplace to facilitate

⁵ The three studies published by the Work Research Foundation include *Canadians and Unions: A National Survey of Current Attitudes* (March 1997); *Canadians and Unions: A National Survey at the Turn of the Century* (May 1999), and *Canada and Unions: A National Reading at the Beginning of the New Century* (January 2002).

⁶ *Canadians and Unions: A national reading at the beginning of the new century*, p. 12.

⁷ “Beyond Unions?” <http://www.wrf.ca/comment/article.cfm?ID=6>

Pennings, Feb 7, 2007

the workers' working together. The focus of collective bargaining, then, is not exclusively on the protection of workers against the negative impacts of markets and abusive employers, but also the development of workplaces where trust, communication, influence, and commitment can flourish. Those are the workplaces where workers' job security is maximized, and the enterprise will be economically successful.

c. Group benefits and Portability

Combine the trend of change in workplace organization with the increased mobility of workers between employers, and significant issues regarding the provision of extended health care and retirement benefits emerge as questions within our existing social safety net.

These issues go way beyond our focus here. I simply raise them to highlight significant industrial relations policy issues for your consideration. These are key issues industrial relations policymakers must and should wade through in the next decade.

Respectfully, I suggest that the legislation before you is an unwise bill. In the name of balance, its passage will lead to perceptions of imbalance. It will expend political good will and energy toward defining the rules of war at a time when we need to steward our political capital to build positive infrastructure and to develop a democratic and respectful industrial policy that positions Canada for tomorrow's present and future challenges.

Thank you MISTER/MADAM CHAIR for this time to speak to the committee about this legislation.