Global Workplace Law & Policy

The politics of public sector labour relations: a long Covid effect?

David Mangan (Maynooth University (Ireland)) · Wednesday, December 7th, 2022

Are public sector workers called upon to subsidise public sector services?

As attention turns away from the Covid-19 pandemic and towards the economic challenges it created, a familiar discussion point arises: how do governments now reduce and/or restrain public spending?

Drawing from the immediate past

The reduction/restraint approach was adopted in response to the Great Recession. The circumstances, though, are quite different. The Great Recession arose more as a private sector

action, than one of public sector spending. However, governments did use significant sums of public money to deal with the immediate crisis. One estimate of the cost of the bailouts in the US is $498 billion. There are arguments that lessons can be drawn from that experience.

The Covid-19 pandemic also prompted vast sums of public money to be spent on a variety of efforts ranging from income support to vaccine purchases. The estimate in the UK is between £310 and £410 billion as to the cost of government measures.

The question is how to effect the spending reduction/restraint aim? The Canadian Province of Ontario offers one example that provides labour law/relations implications.

Public Sector Labour Relations & Covid-19

On 3 November 2022, the Government of Ontario passed the *Keeping Students in Class Act, 2022*. This Act attracted widespread local and national attention, as well as international news coverage. This Act was quickly repealed (only a few days after its passage and with retroactive effect to 3 November 2022). The negative coverage of the Act certainly did not put forward a strong case for the Act's continuation. While the Act may been in the past, the underlying approach which it represented remains quite alive.

The Keeping Students in Class Act

The title of the introducing bill (Bill 28 – *An Act to resolve labour disputes involving school board employees represented by the Canadian Union of Public Employees*) was telling. This legislation focused on members of the Canadian Union of Public Employees (CUPE) who work in Ontario's publicly-funded schools (both elementary and secondary). Teachers are not part of this union. Instead, membership includes support staff such as, secretaries who staff school offices, early-childhood education workers, and janitors.

CUPE was the first union to attract the government's attention as all public-sector education workers are currently in a period of collective bargaining for new collective agreements. That CUPE was the first suggests the deployment of pattern bargaining by the Ontario government: an attempt to set the stage for negotiations with the teachers' unions, anticipated to be acrimonious.

The context of this *Act*'s passage should be noted. It was passed before any industrial action had been undertaken by CUPE members. In fact, it was passed the day before a deadline date set by the union by which time if there was no agreement, its members would take industrial action. The *Keeping Students in Class Act* was 'back-to-work legislation' in advance of there being a back-to-work situation. In response to the legislation, CUPE members staged a walkout starting on the same day that the union originally proposed to take action in relation to negotiations.

The headline points of the Act

There were two key points that emerged from this *Act*.

1. It imposed terms and conditions for a new four-year collective agreement (expiring 31 August 2026, Cl.C3.1) upon passage of the act (s.5).
2. It prohibited union members' strike action (s.7), making it an offence to undertake such action (with fines of $4000 per day per person, or $500,000 each day (s.9).

The constitutional implications of the *Act* elevated this legislation's notoriety. The Ontario government invoked the "notwithstanding clause" in s.33(1) of the *Canadian Charter of Rights and Freedoms*. Section 13 of the *Keeping Students in Class Act, 2022* stated that the Act was "declared to operate notwithstanding sections 2, 7 and 15 of the" *Charter*. Amongst others, this provision purported to limit these CUPE members' freedom of association in s.2(d) of the *Charter*. Under the *Canadian Charter of Rights and Freedoms*, provincial governments may opt to use this provision to avoid the effect of a court decision regarding application of the *Charter*. Invoking the notwithstanding clause is not indefinite because the decision must be revisited every five years after its invocation.

The "notwithstanding clause" has been enacted at a few points in Canadian history. For example, Quebec has used it to maintain French language only signage in the province (Canada is officially a bilingual country). Its use for this issue continues in the province. More pertinent to the present circumstance, the same Ontario Government used it in 2021 to enforce a law, limiting third-party election spending to $600,0000, which had been declared unconstitutional by a court.

Freedom of Association and the Canadian Constitution

The Canadian Supreme Court has used a purposive approach to adjudicating freedom of association (s.2(d) of the *Charter*) in the labour relations context:

Freedom of association is most essential in those circumstances where the individual is liable to be prejudiced by the actions of some larger and more powerful entity, like the government or an employer. Association has always been the means through which political, cultural and racial minorities, religious groups and workers have sought to attain their purposes and fulfil their aspirations; it has enabled those who would otherwise be vulnerable and ineffective to meet on more equal terms the power and strength of those with whom their interests interact and, perhaps, conflict.[1]

The *Keeping Students in Class Act, 2022* posed a significant threat to CUPE members' freedom of association under the *Charter*.

The Supreme Court of Canada in *Health Services and Support – Facilities Subsector Bargaining Association v British Columbia* ruled that "the concept of freedom of association [was interpreted as including the] notion of a procedural right to collective bargaining"[2] pursuant to s.2(d) of Canada's Charter of Rights and Freedoms.[3] The Supreme Court of Canada in *Saskatchewan Federation of Labour v Saskatchewan*[4] established that s.2(d) of the *Charter* also gave effect to a right to strike, thereby overruling its decision from 1987 that freedom of association was an individual right which was accorded a limited interpretation.[5]

What is a Meaningful Pursuit of Workplace Goals?

A question posed by the *Keeping Students in Class Act, 2022* is its constitutionality. The opinions in each of *Mounted Police*, *Meredith v Canada (Attorney General)*[6] and *Saskatchewan* together suggested that governments can affect public sector labour relations without necessarily violating the freedom of association.

The Supreme Court of Canada's 2015 decision of *Mounted Police*[7] commented on the "meaningful pursuit of workplace goals". The majority's opinion centred on two aspects for this

discussion: first, disrupting the balance between employees and employers; and second, disruption that substantially interfered with meaningful collective bargaining.[8]In *Mounted Police*, the threshold to be met was that employees retained sufficient choice over workplace goals and sufficient independence from management to ensure meaningful collective bargaining. The guidance can be categorised in the terms process and outcome where the former constitutes the content of freedom of association and the latter is viewed as sitting outside of the freedom. The decision omitted guidance on the apparatus of labour relations, particularly the expanse between interference and substantial interference. It is this area that remains relatively uncharted.

Amongst other provisions, s.14 of the *Keeping Students in Class Act, 2022* did not allow the Ontario Labour Relations Board (OLRB) to "inquire into or make a decision on whether" (1) a part of the legislation or "the new central terms" or (2) any action by the government under this legislation is constitutional or in conflict with the *Human Rights Code*. Section 15 precluded any cause of action against the government. This included an application to the OLRB to allege an unfair labour practice stemming from the *Act* (s.15(8), (9)).

The unilateral authority exercised by the Ontario Government – i) imposing a collective agreement upon the recognised bargaining agent of workers (which includes terms and conditions such as pay), and ii) placing the matter beyond judicial scrutiny (by precluding the OLRB from adjudicating the matter as well as invoking the notwithstanding clause) – arguably interfered with the meaningful pursuit guaranteed for freedom of association by the *Charter.*

In comparison to the *Keeping Students in Class Act, 2022,* the Supreme Court of Canada in its 2008 decision of *Saskatchewan* found the *Public Service Essential Services Act*[9] to be unconstitutional because the provincial government granted itself unilateral authority to declare any public sector workers as "essential service employees", thereby prohibiting them from participating in strike action. The Act also contained no meaningful mechanism for resolving bargaining impasses.[10] The identification of essential service employees was even beyond adjudication by the provincial labour relations board.

Can a government interfere with public sector labour relations?

In short, it can. The question is the degree of interference.

The *Keeping Students in Class Act, 2022* stood out for its direct circumscribing of the collective bargaining process. Whether the possibility of changes to the agreement at a later date would be part of a meaningful pursuit would have been one of many questions had the *Act* remained in effect. The *Act* seemed to rely upon the idea that legislatures require deference from courts, particularly in matters of public sector labour relations.

While he was a justice of the Supreme Court of Canada, Mister Justice Rothstein valued deference to the legislative branch; particularly with regards to socio-economic policy[11] which he submitted required flexibility because court decisions may "expand C*harter* rights in such a way as to prevent governments from responding to new information or changing social and economic conditions."[12] This meant courts should not trench upon labour law but instead "must respect that concerns such as maintaining 'the balance between employees and employer' and attaining 'equilibrium' in labour relations … fall within the proper role and expertise of governments and legislatures, not the judiciary."[13] The now retired Madam Justice Abella (for a 5:2 majority) in the same decision of *Saskatchewan* retorted*:* "If the touchstone of *Charter* compliance is

deference, what is the point of judicial scrutiny?"[14]

In *Meredith*, set within the context of the Great Recession, Royal Canadian Mounted Police officers challenged the imposition of a 1.5% limit on wage increases in the public sector for the 2008 to 2010 fiscal year, pursuant to s.2(d). Both the (December 2008) decision of the Treasury Board as well as relevant legislation the Expenditure Restraint Act (ERA)[15] imposed a limit of 1.5% on wage increases in the public sector for the 2008 to 2010 fiscal years. The majority of the Supreme Court ruled that rolling back wages without consultation did not violate s.2(d) of the Charter because "the level at which the ERA capped wage increases for members of the RCMP was consistent with the going rate reached in agreements concluded with other bargaining agents inside and outside of the core public administration and so reflected an outcome consistent with actual bargaining processes."[16] One wonders, however, whether the outcome would have been different if nothing came out of further talks.

In *Saskatchewan Federation of Labour*, the Supreme Court of Canada upheld the *Trade Union Amendment Act, 2008*. Several provisions narrowed the parameters for trade union certification: increasing the level of written support from 25% to 45% for certification; reducing from 6 to 3 months the time for receiving such support; eliminating automatic certification where over 50% of employees have provided written support; excluding an employer's communication (regarding facts and opinions) with workers during a certification drive from the scope of an unfair labour practice. Decertification could be achieved with the written support of 45% of membership (down from 50%). These changes were found "not [to] substantially interfere with the freedom to freely create or join associations".[17] The Supreme Court laid down a clear distinction: it would not go so far as ILO bodies in interpreting the mechanisms for protection of freedom of association. Overall, the highest court would permit government-initiated changes to the labour relations system that could interfere to some extent with freedom of association.

The decisions speak of degrees of interference. RCMP officers' collective bargaining rights were not infringed by the imposition of a pay increase which was extended to other bargaining agents; even though there was no consultation (*Meredith*). The BC Government was required to dialogue with public sector unions (*Health Services*). A non-Wagner Act system may be a sufficient framework for workers to make representations (*Ontario (Attorney General) v Fraser*, 2011 SCC 20). The unilateral power a government vested in itself to determine what constituted essential services (including the absence of any framework for review by a labour board) failed to meet a minimum threshold for s.2(d) (*Saskatchewan*). A labour relations system must have "a degree of choice and independence sufficient to enable [members] to determine and pursue their collective interests".[18] Beyond these thresholds, the notion of balance has not been meaningfully engaged, thereby leaving open the question of to what extent Canadian courts will find whether a meaningful process has been substantially inferred.

The Canadian Supreme Court has set out some of the details of freedom of association, but it has left scope for political and economic compromise, providing for a spectrum of conduct for government. The Ontario Government's *Keeping Students in Class Act, 2022* was alarming in what it did, namely: imposing a collective agreement, and using the "notwithstanding clause" in the labour relations context. As of 5 December, these same CUPE members voted to ratify the agreement negotiated by their bargaining team and the government.

Is this bargaining round suggestive of public sector labour relations strategies of governments?

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References

[1] *Reference Re Public Service Employee Relations Act (Alberta)* [1987] 1 SCR 313, 365-366; cited in *Mounted Police Association of Ontario v. Canada (Attorney General)*, 2015 SCC 1, [57] (emphasis added in *Mounted Police*).

[2] *Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia* 2007 SCC 27 [*Health Services*], [66].

[3] *Canada Act 1982*, c. 11, Sched. B (U.K.) [*Charter*].

[4] 2015 SCC 4 [*Saskatchewan*].

[5] *Reference Re Public Service Employee Relations Act (Alberta)* [1987] 1 SCR 313 [*Alberta Reference*].

[6] 2015 SCC 2 [*Meredith*].

[7] 2015 SCC 1 [*Mounted Police*]. The Royal Canadian Mounted Police are a national police force with jurisdiction over matters crossing provincial borders. Where no other exists, it is also the local police force.

[8] *Mounted Police* [72].

[9] S.S. 2008, c.P-42.2.

[10] *Saskatchewan* [89]-[90].

[11] *Saskatchewan* [161].

[12] *Ibid.*

[13] *Ibid* [162].

[14] *Ibid* [76].

[15] S.C. 2009, c. 2 [ERA].

[16] *Meredith* [28].

[17] *Saskatchewan* [100]. Abella J. also noted the trial judge's assessment that these 'requirements [were] not an excessively difficult threshold'.

[18] *Mounted Police* [5].

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