Canadian Supreme Court ruling in BC hospital dispute

A boost for the union bureaucracy

Keith Jones
27 June 2007

A ruling issued by Canada's highest court earlier this month is being hailed by the trade union officialdom as an "historic victory" for workers. It is nothing of the sort.

By a majority of 6-1, the Supreme Court partially upheld a legal challenge to the constitutionality of an anti-worker British Columbia law, striking down three sections of the law on the grounds that they violate the right of association guaranteed under Canada's Charter of Rights and Freedoms.

Adopted by BC's Liberal government in 2002, "The Health and Social Services Delivery Act" tore up a collective agreement between the BC Health Employers Association and the Hospital Employees Union that was to expire in 2004 and imposed a new contract by legislative fiat. The new contract gutted restrictions on the contracting out of work and gave management broad new powers in determining working conditions. In the months following the law's passage, some eight thousand hospital jobs were contracted out to private janitorial, laundry and catering companies.

In finding the BC law unconstitutional, the court stipulated that there was nothing wrong with the BC government seeking to reduce health care costs or engaging in "hard-bargaining."

It also reaffirmed the prerogative of federal and provincial governments to impose collective agreements through legislation in "exceptional circumstances" and to strip workers of the right to strike.

Writing on behalf of the court majority, Chief Justice Beverly McLachlin and Justice Louis Lebel affirmed that Canada's constitution permits "interference with the collective bargaining process on an exceptional and typically temporary basis, in situations, for example, involving essential services, vital state administration, clear deadlocks and national crisis."

But BC's Liberal government, they found, had effectively nullified the Charter's guarantee of a freedom of association by tabling legislation without first attempting to negotiate a settlement with the HEU, and by adopting that legislation in just three days, all the while rebuffing the union leadership's appeals for talks.

The government, said the court majority, did not consider whether it could reach its purported goal of "improving the delivery of health services" by using "less intrusive measures."

"A range of options were on the table, but the government presented no evidence as to why this particular solution was chosen and why there was no meaningful consultation with the union about the range of options to it."

In other words, rather than moving directly to rip up the existing contract and imposing a new one through legislative diktat, the government, said Canada's highest court, should have first explored whether its budget-cutting objectives could have been reached with the help of the HEU bureaucracy.

That the court's objection is with the manner in which BC's Liberal government proceeded—ripping up a contract and completely bypassing the legally recognized bargaining representative of the hospital workers—and not the government's reactionary goals is underscored by the court's affirmation that the right to collective bargaining is a "procedural right." This right "does not guarantee a certain substantive or economic outcome," nor is it specific "to a particular model of labour relations." It is a "limited right," a constitutional obligation for the state, except in exceptional circumstances, to foster a collective bargaining regime in which employer and employees "meet" and "bargain," "in the pursuit of the common goal of peaceful and productive accommodation."

The Supreme Court's ruling was unexpected, since it explicitly overturns arguments Canada's highest court made in three rulings issued in 1987, fives years after the Charter became part of Canada's constitution.

In its 1987 rulings the court had declared that the Charter's guarantee of a right to association does not mean that there exists a constitutional right to collective bargaining or a constitutional right to strike.

Beginning with the federal Liberal government's imposition of a three year wage-control program in 1975, governments across Canada—Liberal, Conservative, Parti Quebecois, NDP, and Social Credit—adopted a battery of anti-union laws, rendering strikes illegal, cutting wages, and imposing takeaway contracts. The 1987 Supreme Court judgments constituted a green light for an escalation of this state-employer offensive against the working class.

Only rarely does the Supreme Court directly overturn its previous rulings, for to do so risks undermining the Court's legitimacy and authority. But the current Court found that its predecessors had erred in ruling that the right of association does not imply a legally protected right of trade unions to bargain

collectively.

In 1987, while the majority of the Supreme Court justices had found that Canada's constitution provides no constitutional right to bargain collectively, they failed to agree on the legal reasoning for their ruling. Of the various arguments advanced, the most significant were that the legal recognition of unions was only recent and that the right to associate does not protect group activities or aims, only the right to establish, belong to, and maintain an association.

In striking down parts of the 2002 BC law, the Court majority goes to some lengths to rebut these arguments, particularly the claim made by Justices Le Dain, Beetz, and La Forest in 1987, that the right of unions to bargain collectively was a "modern right" and not a "fundamental freedom."

The decision of the court majority presents a potted history of trade union-employer-state relations in Canada and in the US and Britain, the two jurisdictions whose jurisprudence has most influenced Canada's. It argues that labor relations law has passed through three major eras: repression, toleration and recognition of trade unions, affirming that when the "*Charter* was enacted ... collective bargaining had a long tradition in Canada and was recognized as part of freedom of association in the labour context."

Although not stated bluntly, the animating argument of the majority's decision is that trade unions and collective bargaining have played an important role in reconciling the working class to the existing socio-economic order. "One of the fundamental achievements of collective bargaining," declares the Court, "is to palliate the historical inequality between employers and employees."

During the past decade the *National Post*, leading Conservative politicians, and other right-wingers have repeatedly denounced the Supreme Court, claiming that it has been captured by "activist liberals" who are bent on destroying the family (because of various rulings in favor of gay rights) and otherwise overturning traditional "Canadian values."

In reality, the Court has played a critical role in the ever-widening ruling class assault on worker and democratic rights. Especially significant was the Supreme Court's June 2005 ruling in the Chaouilli case. Under conditions where the public had repeatedly thwarted government attempts to privatize health care services, the court, through this ruling, presented the Canadian bourgeoisie with a mechanism to press forward with the dismantling of Medicare.

The Court, in keeping with its role as both an enforcer and ideological prop of capitalist rule, has at the same time exhibited a considerable degree of savvy and sophistication in many of its more contentious decisions. Thus in its ruling on the legality of a province seceding from the Canadian state, it found that to forcibly prevent secession would fly in the face of Canada's democratic traditions; then outlined a mechanism for secession that significantly increases the hurdles and costs—the borders of a seceding province would be subject to negotiations, for example—and gives the federal government great leeway in determining its response to any attempt at secession.

In it recent ruling on "national security certificates" (a mechanism that allows the state to indefinitely detain non-citizens without charge and label them security risks without their knowing the evidence against them), the Court issued a ruling that expressed angst over the affront to civil liberties that secret trials constitute; then proposed a procedure to effectively render them constitutional. (See "Canada's Supreme Court authorizes secret trials and arbitrary, indefinite detention")

With its affirmation that there is a constitutional right to bargain collectively, the court has issued a caution to governments: Do not needlessly dispense with the labor relations system the Canadian state erected during the 20th century, and which served to contain and constrain the class struggle within the narrow confines of contract negotiations predicated on the acceptance of the wage-capital relationship, and, above all, do not needlessly undercut the legitimacy of the trade unions, which have played and play a fundamental role in maintaining the existing order.

To be sure, in "exceptional" circumstances governments retain the right to use legislation to impose contracts. But first they should use the unions to present workers with "options," as countless employers have done—"options" like the choice between wage cuts or the loss of their jobs.

The court's ruling constitutes its recognition that in the twenty years since its predecessors found that there was no constitutional right to bargain, the unions have responded to the big offensive on the social position of the working class by moving decisively and irrevocably to the right. In Canada, as around the world, the union bureaucracy has increasingly integrated itself into management and served ever more directly as an instrument for imposing job and wage cuts and the dismantling of public and social services. When workers have nonetheless mounted challenges to the big business offensive, as in Ontario in 1997 or Quebec in 2003, the unions have moved decisively to suppress them.

In the case of the Hospital Employees Union, first it bowed before the job-cutting 2002 law, and then in 2004 it short-circuited a strike of 400,000 hospital workers that was threatening to become the spearhead of a working-class challenge to the hated Liberal government of Gordon Campbell.

The Supreme Court has given the BC government one year to bring its legislation into accordance with its June 9 ruling. The Campbell Liberals have not yet announced how they intend to proceed. They could simply set aside the court ruling, by invoking the "notwithstanding clause"—a clause in Canada's constitution that allows a government to pass a parliamentary motion declaring an action lawful even though it is in violation of the Charter. Alternately, they could undertake negotiations with the HEU bureaucracy to arrive at a settlement giving legal sanction to the massive job cutting carried out in 2002.