In the present state of society, in fact, it is the possibility of the strike which enables workers to negotiate with their employers on terms of approximate equality. It is wrong to think that the unions are in themselves able to secure this equality. If the right to strike is suppressed, or seriously limited, the trade union movement becomes nothing more than one institution among many in the service of capitalism: a convenient organization for disciplining the workers, occupying their leisure time, and ensuring their profitability for business.¹


I. Introduction

Striking is a social practice that is deeply embedded in Canadian history. The essence of a strike is the concerted refusal to work, and it is typically a protest against economic exploitation or political oppression. In Canada, political strikes are rare events, the exception, rather than the rule; instead, the freedom to strike is typically regarded as the principal means of making freedom of association and collective bargaining effective. Unlike other mechanisms for resolving disputes between workers and employers, strikes enable workers directly to participate in the process of determining their wages and working conditions and the rules that govern their working lives.

In the aftermath of the Supreme Court of Canada’s decision in the *BC Health Services*² case, it is only a matter of time until the courts will have to return to the question of whether

---


² [2007] 2 S.C.R. 391
Charter’s protection of freedom of association extends to the freedom to strike. In answering the question of whether freedom of association extends to the right to collective bargaining in Health Services, the Supreme Court of Canada considered the legal provenance of this right, international law and jurisprudence, and Charter values. Thus, it is likely that the history of the “right to strike” will be invoked by the parties to such litigation in order to support or to oppose recognition of a Charter-protected right to strike. The two principal purposes of this paper are to: 1) provide an analytic framework for approaching the history of the right to strike, and 2) sketch out the contours of that history.

The freedom to strike has a long, albeit complex, legal pedigree in Canada. By 1872, it was clear that striking itself was not illegal, and thus there was a freedom to strike. But, the simple fact that striking was no longer an illegal activity does not tells us much about the scope and form of the freedom. In the labour relations context, the freedom to strike can only be understood in relation to the freedom to associate and the freedom to bargain collectively. These three employee freedoms, which are the fundamental components of collective labour law, are widely recognized and protected in liberal capitalist states. In fact, as A.W.R. Carrothers noted, “the legal framework of collective bargaining in Canada may be measured in two ways: by the degree to which the state intervenes to define the lawful limits of the three freedoms of employees in order to protect the interests with which those of organized labour conflict; and by the kind of legal substitute which it provides for the proscribed use of economic power.”

The broad pattern of Canadian labour history is that as governments imposed restrictions on the freedom to strike they have always also granted *quid pro quos* for workers and unions – either in the forms of immunities for workers or unions or of duties imposed on employers that

---

facilitate the freedom to associate and bargain collectively. In Canada, as in other countries, the achievement of rights at work has been the outcome of complex, protracted struggles between different social groups. The precise nature of the trade offs, therefore, is contingent upon the history of those struggles, although the manner in which freedoms and rights were institutionalized at a particular point in time strongly influences the form of subsequent legal developments. In order to substantiate our claim that in Canada limitations on the freedom of strike have been accompanied by legal supports for the freedom of association, collective bargaining, and the protection of striking workers, we will briefly sketch the legal regime that predominated in different periods in Canadian history. Our focus is on the historical development of the legal regulation of strikes and not on the actions, such as picketing or boycotting, that striking workers may take to make their strike effective or successful. As such, our concern is with the collective withdrawal of labour and the development of the web of liberties, privileges, rights, duties, powers and immunities that envelope that activity and the legal relations between striking workers, employers, and the state.

However, before beginning our historical narrative, we will briefly explain what we mean by the right to strike in order to better understand the different ways it has been institutionalized in Canada. In order to do this it is useful to refer to W.N. Hohfeld’s legal typology of jural relations since it allows us to map the complex and historically evolving legal relations governing freedom of association and collective bargaining of which the freedom to strike is a part.6

---

5 Bob Hepple, “Rights at Work,” in Dharam Ghai, ed., Decent work: Objectives and Strategies (Geneva: ILO and IILS, 2006) 34
II. Legal Typologies

Typically a legal right is a complex cluster of legal liberties, claims, powers, and immunities involving the first party who possesses the right, second parties against whom the right holds, third parties who might intervene to aid the possessor of the right or the violator, and various officials whose diverse activities make up the legal system under which the first, second and third parties have their respective legal liberties, claims, powers, and immunities and whose official activities are in turn regulated by the legal system itself… Any adequate analysis of a legal right must distinguish the several roles of the individual citizens living under the law (the roles of first, second and third parties) and of the officials (policemen, prosecutors, judges, jury men, legislators and administrators) whose activities transform what Llewellyn called a “paper rights” into a real and functioning legal rights.7

As the above quotation from Carl Wellman indicates, legal rights are very complex. They involve a range of actors who are engaging in social practices that are contested to varying degrees, and which are clothed in different jural relations. In order to trace the legal treatment of the social practice of striking, it is useful to identify and to distinguish the other related social practices before describing the elements of the legal typology.

In Canada, the social practice of striking is primarily understood in relation to the attempts of workers to form themselves into associations, typically unions, and to engage their employer in bargaining with these associations. Strikes are workers’ most meaningful economic sanction in support of collective bargaining. Workers engaged in the practice of striking, even when it was illegal. However, the simple recognition of these key worker freedoms, to associate, to bargain collectively, does not necessarily support these social practices. As A.W.R. Carrothers put it, “to establish as system of collective bargaining it is not enough to declare the three freedoms to be forms of conduct which may be pursued unimpeded by legal restraint. So long as

the freedoms are merely liberated from legal disability, and are not legally protected from the abrasion of competing interests, they may lose their strength and their reality.”

Hohfeld’s typology of jural relations provides a helpful way to analyze and evaluate the rules that shape the legal relationships between individuals and social groups. The key concepts are privileges, claim rights, powers, and immunities that entail specific relationships between the “rights” holder and other people, which take the legal form of countering rights (or a lack thereof), duties, disabilities, and liabilities. Privileges, which are also referred to as freedoms and liberties, are legal permissions to act or to refrain from acting in a certain manner without being liable to damage to others and without others being able to summon state action to prevent those actions. Essentially, a freedom or liberty is the absence of a rule requiring or prohibiting behaviour. By contrast, a right is a claim that requires another person to act in a certain manner in relation to the rights’ holder and this claim is enforceable by the state. Rights impose correlative duties on others either to act in a particular way (a positive duty) or to refrain from acting (a negative duty) and, thus, they restrict the freedoms of others. It is possible that a person against whom a right is asserted has no right to claim in response. Thus, that person would lack the power to summon the aid of the state to alter or to control the behaviour of others. Or, an individual may have a duty that they owe to the person who claims a right. There are other rights, known as powers that provide people with specific capacities. Powers are state-enforced abilities to change legal entitlements held by oneself or others. Power rights do not correlate with duties on others but they impact on people. Having a power right means that others are liable to have their freedoms affected by the actions of power-holders. Moreover, disabilities correspond

8 Carrothers, supra note 3, 5.
to powers in that they are an absence of the power to alter legal entitlements. Immunities are the fourth category of rights. Immunity rights exist when the rights holder is not liable to have her position changed by the action of another person utilizing a power or facilitative right. Immunities provide protection against prosecution or civil suit when pursuing ends that are otherwise defined as illegal. Liabilities refer to the absence of an immunity from having ones own entitlements changed by others.

These analytic distinctions are helpful for understanding what is meant by the claim that someone has a legal right. However, as Tom Campbell points out, “in reality any actual situation will be covered by a number of these rights-relationships at the same time, so that any actual normative relationship between two people is often a complex combination of these types of rights.” Moreover, it is important to avoid being a formalist or overly positivist if we are to understand legal history; the level of legal enforcement is a significant dimension of the operation of any regime of legal regulation.

We have used the concept regime of industrial legality to capture the distinctive features of mechanisms that institutionalize conflict between employers and workers. A regime of industrial legality describes a set of institutions that define and enforce a constellation of rights, understood in the complex sense described above, and a set of discourses about public order that govern and mediate relations between workers and employers. In relation to the freedom to strike, we have identified four legal regimes: master and servant (until 1872); liberal voluntarism (1872 to 1907); industrial voluntarism (1907 to 1943); and industrial pluralism (1944 to

---

10 Campbell, supra note 7, 33.
Each of the different regimes has a different combination of freedoms, rights, immunities, and duties in relation to the social practice of strikes, as well as to the social practices of forming unions and bargaining collectively.

III. Master and Servant Regime: 1800 to 1870

In its essentials, at least as it developed in England up to the early nineteenth century, the master and servant regime extensively regulated individual work relations through a web of statutes that set a number of terms and conditions of employment, criminalized employee breaches of contract, and provided workers with some legal means to enforce their statutory and contractual rights against their masters. Under master and servant law, individual workers might be subject to legal punishment for breaching their contract of employment by quitting before the expiration or termination of the contract. While this liability was independent of the collective nature of the quitting, there is evidence that English employers often used master and servant law to intimidate and discipline striking workers. Moreover, combination laws prohibited workers from engaging in collective action to improve their terms and conditions of employment. Since strikes inevitably entail collective action they were formally illegal. However this did not prevent workers from continuing to engage in the practice of striking.

The extent to which these laws applied in the British North American colonies that became Canada is not entirely clear. However, on the basis either that English law was received...
or the enactment of local statutes, from time to time striking workers were prosecuted under master and servant law for quitting work in breach of their individual contracts of employment. However, it is important to emphasize that it was the individual breach and not the collective quitting that was the legal wrong. The collective dimension of strike action was covered by combination law, but just what that law was in early and mid-nineteenth century Canada is even more opaque than the status of English master and servant law. However, regardless of the formal law, historians have not identified a single case in which workers were successfully prosecuted under combination law simply for the act of striking. It is also clear that the social practice of workers striking to improve terms and conditions of employment had become deeply rooted during this era.

Thus, it is fair to state that under the master and servant regime, workers enjoyed an unlimited freedom to strike (in the sense that employers could not prosecute them for participating in a collective withdrawal of their labour), but that some workers might be individually prosecuted if their refusal to work involved a breach of their contract of employment. At the same time, it is also important to acknowledge that workers did not have a claim right to strike in the sense that the law did not impose duties on employers with respect to striking workers. At the very least, the employer was free to terminate a striking worker’s employment contract and there was no legal duty on the employer to rehire a striking worker at

---

the conclusion of the strike. Whether, and upon which terms, a striking worker returned to work depended entirely on the strike’s outcome and not on a legal right to return.

IV. Liberal Voluntarism: 1877-1907

The legal regime known as liberal voluntarism entailed two formal changes from the master and servant regime to the regulation of strikes. First, the 1872 *Trade Union Act* provided that workers could not be prosecuted for criminal conspiracy merely because they were members of a trade union whose purposes were in restraint of trade. A companion statute, the *Criminal Law Amendment Act* (CLAA), restricted the actions workers could take in support of their strike, but also provided that workers could not be prosecuted for criminal conspiracy for actions taken for the purposes of a trade combination unless those actions were independently punishable under statute. Although phrased in the language of immunities, which disabled employers and the state from prosecuting workers for criminal conspiracy for pursuing legitimate trade union objectives by otherwise lawful means, the effect of these provisions was to provide a firm legal foundation for the freedom to strike that workers had enjoyed as a practical reality before 1872.17

The second change was the enactment of a federal statute that repealed the criminal breach of contract provisions of pre-confederation master and servant legislation and substituted limited criminal liability for breaches of contract in situations where the breach endangered the public. As a result, except is fairly limited circumstances, individual striking workers no longer faced the threat of prosecution for breach of contract.18

---

17 *Trade Union Act*, S.C. 1872, c. 30; *Criminal Law Amendment Act*, S.C. 1872, c. 31. The CLAA was amended in 1874 and 1875 to iron out conflicts over the scope of trade union criminal liability. For discussion, see Tucker, *ibid*.

While the practical effect of these two changes may have been limited, they removed any doubt about the legality of strikes *simpliciter* and deprived employers of one legal tool, criminal master and servant act prosecutions, to use against striking workers. Moreover, during this period, almost no attempts were made to impose further restrictions on the privilege or freedom to strike. Although provincial governments began to be concerned by the potential economic damage that strikes could cause, with one minor exception, they did not respond by limiting the freedom to strike. Instead, they began enacting legislation that promoted voluntary, non-binding conciliation. Canadian governments also did not impose restrictions on the freedom of public sector employees, including teachers and police, to strike, although it must be noted that there was little or no collective bargaining activity by these groups of workers during this period and no strikes. As well, the role of the judiciary with respect to strikes during this period was largely limited to magistrates hearing petty criminal charges arising out of the conduct of a strike and not the act of striking itself. In the one instance that a Canadian court restrictively interpreted the scope of the CLAA’s immunity from prosecution for criminal conspiracy by holding that a strike for a closed shop was not a protected trade union purpose, the law was subsequently amended to

---


override the decision.\textsuperscript{21} As a result, criminal conspiracy was pretty much taken out of play. Moreover, the courts evinced no appetite during the period of liberal voluntarism to develop a common law of civil liability for strikes, even when they found that the purpose of the strike distasteful, such as pursuit of a closed shop.\textsuperscript{22}

While workers enjoyed a wide freedom to strike under liberal voluntarism, it must also be emphasized that there was no claim right to strike that entailed an obligation on employers to treat striking workers as employees whose contracts were merely suspended and who were, therefore, entitled to have their jobs back when the strike ended. Workers who went on strike put their jobs on the line, although in many circumstances they may reasonably have anticipated that they would be able to resume their employment either because the strike would be successful or because their employers would re-hire most of them as a matter of practical necessity even if they did not accomplish their objectives with the strike.

V. Industrial Voluntarism: 1907-1943

The key legal innovation of the third regime for regulating the relations between workers as a group and employers was the 1907 \textit{Industrial Disputes Investigation Act} (IDIA), which introduced compulsory conciliation prior to resort to strikes or lockouts.\textsuperscript{23} The underlying policy rationale was that industrial conflict, although private in nature, became a matter of government concern when it harmed the public interest, thus justifying the use of compulsion and state interference with common law rights and privileges. It is important, however, to recognize both

\begin{footnotesize}
\textsuperscript{22} \textit{Perault v. Gauthier} (1898), 28 S.C.R. 241.
\textsuperscript{23} S.C. 1907, c. 20. For a discussion, see Fudge and Tucker, \textit{supra} note 11, ch. 3; Ben M. Selekman, \textit{Postponing Strikes} (New York: Russell Sage, 1927).
\end{footnotesize}
the limited nature of the restrictions that were imposed on workers’ (and employers’) freedom to engage in industrial action and the trade-offs that were made.

The IDIA’s restrictions on the freedom to strike were limited in three ways: the Act had a limited scope of application; it postponed, rather than prohibited, industrial action; and if the parties did not comply with the Act, the legislation was rarely enforced. Initially, the IDIA only applied to employers of ten or more employees in the mining and public utilities sectors and, thus, covered only a small fraction of Canadian employees. Moreover, in 1925 the Privy Council held in the Snider case that labour relations was primarily a matter of provincial jurisdiction so that the IDIA was unconstitutional insofar as it purported to apply to employers and employees, such as mining companies, not under federal jurisdiction. Within a short time, however, the provinces passed enabling legislation making the federal statute apply to public utility disputes within the province, thus restoring the status quo ante prior to the Snider decision.24 The legislation did not prohibit resort to strikes indefinitely, but rather for a limited period of time to allow a conciliation board the opportunity to help resolve the strike through mediation, investigation, and the publication of a non-binding report. If the process failed to produce a solution, the common law privileges of the parties were restored. Finally, with few exceptions, the government adopted a policy of not prosecuting workers or employers when they did resort to industrial conflict without invoking conciliation, in violation of the act. Rather, it was left to the parties to initiate a prosecution, something that was rarely done. In effect, this meant that the prohibition was one that in practice could be violated with little risk of legal sanction, thus

leaving the pre-existing common law privilege to strike practically unrestrained even for workers and employers covered by the IDIA.

Significantly, the restriction on the freedom to strike was accompanied by rights for the affected workers. Employers were required to give thirty days notice of an impending change of terms and conditions of employment, and where a dispute had been referred to conciliation the employer could not unilaterally alter terms and conditions of employment until the process had been completed.25 Thus, the *quid pro quo* for suspending the freedom to strike was a right to have existing terms and conditions maintained for the period of the suspension. However, as with the prohibition on strikes and lockouts before conciliation, the right to a freeze was not vigorously enforced. Workers also obtained a second strike right in 1918, during the tumultuous labour conflict at the end of World War I, when the IDIA was amended to provide that workers maintained their employee status for “the purposes of the act” during a strike or lockout. While the amendment did not protect striking employees for the purpose of the common law, it began to undermine the absolute privilege that employers enjoyed to treat a strike as an act that terminated employee status.26

Since the IDIA only applied to mines and public utilities, it did not cover government employees, teachers, firefighters, or police. In principle, therefore, they retained their common law freedom to strike, unless some other legislation prohibited strike action. They were also subject to having their employment terminated for going on strike. Police and firefighters did strike in some municipalities in the post-World War I era, but no legal action was taken against

25 S.C. 1907, c. 20, s. 57.
26 S.C. 1918, c. 27, discussed by Fudge and Tucker, *supra* note 11, 96-97.
them and no strike bans were immediately enacted. 27 Some other public sector workers also struck in this period, including railway mail clerks and teachers, again without legal action or strike bans being legislated. However, on the whole, there was comparatively little public sector strike activity during this period. 28

The courts were a second source of change to the legal regulation of strikes between 1907 and 1943. Some Canadian judges, particularly in western courts, were prepared to find trade unionists civilly liable when they struck for purposes that the judges did not accept as legitimate. 29 Overall, during this period, the focus of judicial involvement was with respect to tactics that workers used when they were on strike, especially the legality of picketing and not the legality of strikes themselves. The courts developed the civil liability of strikers in the next period, known as industrial pluralism, at the same time that the legislature introduced a raft of strike-related rights.

In addition to the emergence of trade-offs between restrictions on the freedom to strike and the introduction of strike-related rights, the period of industrial voluntarism also saw the introduction of exceptionalism, by which we mean extraordinary state action to alter temporarily the prevailing legal regime. 30 Exceptionalism first occurred in the last year of World War I, which witnessed increasing levels of worker militancy and strike action as wage increases fell

27 Of course, if the police and firefighters had breached their contracts by stopping work then they could have been individually prosecuted for endangering the public, under the 1878 Breaches of Contract Act that had been incorporated into the 1892 Criminal Code.
28 H. W. A. Arthurs, Collective Bargaining in the Public Sector: Five Models (Ann Arbor Institute of Labor and Industrial Relations, University of Michigan-Wayne State University, 1971). There is a need for further research on this topic.
53 and there is a need for further research
29 For an extended analysis, see I.M. Christie, The Liability of Strikers in the Law of Tort (Kingston, ON: Industrial Relations Centre, Queen’s University, 1967), 89-95.
30 We draw on Leo Panitch and Donald Swartz’s concept of permanent exceptionalism, The Assault on Trade Union Freedoms: From Wage Controls to the Social Contract (Toronto: Garamond, 1993).
behind inflation under tight labour market conditions. For most of the war, the federal
government pursued conciliation, and took no measures to prohibit strikes, going so far as to
exclude striking workers from PC 815, the so-called anti-loafing law that made it an offence for
an adult male not to be gainfully employed. By mid-1918, however, the tide began to turn. PC
1743, which was a declaration of the federal government’s war labour policy, called for a ban on
strikes and lockouts for the war’s duration, but in exchange it also offered support for collective
bargaining, including the right to organize without employer interference. However, the Order
was declaratory only. While the government never took additional steps to formalize worker
rights, later that year it prohibited strikes for the duration of the war in industries cover by the
IDIA, which had been expanded to include war production.31

The second instance of exceptionalism during this period was the Winnipeg General
Strike trials in 1919. No law was passed ordering workers back to work or prohibiting them
from striking in the future. Strike leaders, however, were arrested and charged with seditious
conspiracy, raising the question of whether a general strike was lawful. In the particular case,
the answer depended on whether the strike had been called to advance legitimate collective
bargaining objectives as the leaders claimed or whether it had been called with seditious intent,
which included an intent to change the government by unlawful means, bring the constitution
and laws into contempt, promote class hatred, or create public disturbances, as the government
claimed. In the first trial, R.B. Russell was convicted. He appealed and the Manitoba Court of
Appeal not only confirmed the conviction for seditious conspiracy but also suggested that all
sympathy strikes were criminal conspiracies that fell outside the immunities granted in the
CLAA (which had been incorporated into the 1892 Criminal Code), since they were not

31 Fudge and Tucker, supra note 11, 93-103.
undertaken for “trade union” purposes. In reaching this conclusion, Perdue, C.J.M. cited English case law that had been reversed legislatively in England but not in Canada.32 However, the discussion of sympathy strikes was *dicta* and not binding. Moreover, given the context, where the elite perceived an political insurrection, the case should be read more as an instance of exceptionalism than as providing strong support for the claim that secondary action or political strikes, general or otherwise, for constitutional political objectives had come to be understood as criminal conspiracies.

VI. Industrial Pluralism: 1943 to the present

As is well known, the key legal innovation that marked the change from industrial voluntarism to industrial pluralism was the adoption of the Wagner-Act model of collective bargaining, initially during World War II through PC 1003 and then, following the war’s end, by the enactment of legislation along similar lines in all Canadian jurisdictions. The wartime regulations served as the model for the provinces, although key components were filtered through each province’s distinctive regional political economy.33

The Canadian collective bargaining model entailed a series of trade-offs, one of which was substantial restrictions on the freedom to strike. Not only did the scheme postpone strikes and lockouts until a conciliation process had been completed, as had been the case under the IDIA, but it also added a further procedural requirement that there be a strike vote. Most importantly, the scheme prohibited strikes and lockouts during the life of the collective

---


33 Obviously there were variations on the model and the model was amended from time to time, so for our purposes we will use the current Ontario act as a template.
agreement and provided employers with ample tools to enforce the restriction, including labour board orders that were enforceable in court, grievance arbitration, and prosecution. Strikes were defined broadly to include not only concerted cessations of work, but any concerted action, such as a slow down or a refusal to work overtime. Moreover, in most provinces the definition of strikes was interpreted by labour boards to extend to strikes called for non-collective bargaining purposes, such as protesting government wage control legislation. Finally, it should be noted that these schemes are much broader in coverage than had been the case under the IDIA regime, applying to all sectors of the economy except the Crown and those occupations and groups of workers specifically excluded. Typically domestic and agricultural workers were excluded from all collective bargaining legislation, and public sector workers such as police, firefighters and teachers were given their own statutory collective bargaining schemes.

In addition to the express statutory restrictions on the freedom to strike and their enforcement mechanisms, the courts became more involved than they previously had been in extending and giving effect to the restrictions. For example, in *Gagnon v. Foundation Marine Ltd.* the Supreme Court of Canada held that recognition strikes violated the labour relations act because they were not preceded by the required conciliation procedure. In addition, the Court also held that breach of the labour relations act could constitute the unlawful means to support a common law action in conspiracy, thus providing employers with an extra-statutory mechanism to enforce a statutory obligation for which ample statutory remedies had been provided.


In short, there is no doubt that under industrial pluralism, the freedom to strike has been limited to a far greater extent than under the previous regimes. However, as in the previous regimes, it is essential that the regulation of strikes not be considered in isolation, lest we miss the important point that historically when legislatures restricted the freedom to strike they also gave workers something in exchange. In the case of industrial pluralism, workers received a bundle of rights that entailed enforceable duties against their employers. The loss of the freedom to strike for recognition was accompanied by a certification procedure that enabled employees to obtain union representation through a democratic process and that imposed on employers a duty to recognize and bargain in good faith with certified unions. The loss of the freedom to strike during the life of a collective agreement came with a right to enforce the terms of the collective agreement through binding arbitration. And, of course, the postponement of strikes until after conciliation, carried over from the IDIA, also came with the freeze on terms and conditions. Finally, the new regime also gave workers a right to strike in the Hohfeldian sense by in effect prohibiting employers from terminating the contract of employment merely because the worker was on strike.\footnote{C.P.R. v. Zambri, [1962] S.C.R. 609. For an extensive discussion, see Malcolm Davidson, “The Royal York Hotel Case: The ‘Right’ to Strike – And Not Be Fired for Striking” in Fudge and Tucker, Work on Trial: Canadian Labour Cases in Historical Context (Toronto: Osgoode and Irwin, 2010).} The scope of the right to return varies, but it protects striking workers’ jobs in most situations.\footnote{For a discussion of the nuances, see George W. Adams, Canadian Labour Law (Aurora, On.: Canada Law Book, 1993) X.} In effect, then, industrial pluralism’s other innovation was to grant workers a “right” to strike as a trade off for the limitations imposed on the “freedom” to strike.

A similar pattern can be seen when we turn to public sector collective bargaining under industrial pluralism. Since there are so many public sector collective bargaining regimes we must generalize. Police and firefighters were among the first public sector workers to be covered by
collective bargaining legislation in the post-World War II era. Typically, these statutes were much less elaborate than the collective bargaining legislation that applied generally in the private sector. But, the most notable difference is public sector collective bargaining regimes provided for binding arbitration to resolve bargaining impasses. Although not all police and firefighter acts explicitly prohibited strikes, their legality was dubious and, in any event, back-to-work legislation is enacted quickly when they do occur. Teacher collective bargaining typically does not prohibit strikes, but does offer the parties the option of choosing some form of binding arbitration or final offer selection in lieu of resort to industrial action. Government employees were typically only included in collective bargaining statutes beginning in the 1960s. In some jurisdictions, they are prohibited from striking, but where this is the case they are provided access to an alternative dispute resolution mechanism, typically binding arbitration.  

This is industrial pluralism’s basic framework for regulating strikes, which as we can see, is woven into a scheme of collective bargaining that contains compromises that reflect the state’s efforts to craft an industrial relations policy suitable for an industrial capitalist Keynesian welfare state. Despite dramatic changes in Canada’s political economy and labour market and despite a great deal of tinkering with the details, the private sector scheme has remained remarkably stable in its essential elements, including the web of restrictions and rights regulating strike activity.

This has not been true of the public sector, which has been characterized by what Panitch and Swartz call permanent exceptionalism for much of the past thirty years. This

---


40 Pantich and Swartz, supra note 1.
exceptionalism has taken many forms. In some instances, workers on a legal strike are legislated back to work, typically (but not always) with outstanding issues to be resolved by binding arbitration by a neutral third party. More controversial are interventions that entail a denial both of the right to bargain collectively and to strike. Such measures include wage controls, collective agreement extensions, imposed days off without pay, repealing provisions in collective agreements, and the loss of the right to negotiate some terms and conditions of employment. In addition to longstanding exclusions from collective bargaining statutes, these are the kinds of measures that have produced Charter challenges in the past and are producing them at present.

VII. Conclusion

If the court follows precedent, then it will have to address the question of whether collective bargaining strikes have long been recognized in Canada as a fundamental right that predated the Charter.\(^41\) If the answer to that question hinges to any significant extent on the answer to the further question of whether “long before the present statutory labour regimes were put in place,” strikes were “recognized as a “fundamental aspect of Canadian society”\(^42\) then the answer is a resounding, “yes”. As we have seen, prior to the modern scheme, workers enjoyed a virtually unlimited freedom to strike for the purpose of pursuing collective bargaining objectives with their own employers. The historical twist is that since the turn of the twentieth century, and particularly since the advent of industrial pluralism during World War II, legal restrictions on the freedom to strike have grown. However, what is crucial is that rights to form and to join union, to bargain collectively, and to strike, have matched these restrictions. Moreover, legal support for


\(^{42}\) Ibid, para. 41.
these three employee freedoms has coincided with their characterization as fundamental human rights at the international level.\textsuperscript{43}

However, less than two decades after legislative support for collective bargaining was extended to the majority of public sector workers in the 1960s, increasingly one or more of public sector workers’ freedoms have been suspended or limited without compensating rights. From an historical perspective, the pattern of government restraint of the past thirty to thirty-five years is a marked departure from previous regimes that either gave workers nearly unlimited freedom to strike without rights (liberal voluntarism) or gave workers limited freedom to strike with compensating rights, including a right to strike (industrial pluralism). It is the imposition of these ‘exceptional’ limits on the freedom to strike, without compensating rights, or indeed, accompanied by employer unilateralism (imposed terms and conditions of employment) that is likely to provide the context for a claim that the \textit{Charter} protects the freedom to strike.\textsuperscript{44}


\textsuperscript{44} Whatever else might be said about such a claim, there is probably a better historical case for recognizing a fundamental \textit{freedom} to strike than there was for recognizing a fundamental \textit{right} to bargain collectively that entailed a duty on employers to bargain in good faith. For a critical account of the SCC’s labour law history in \textit{BC Health Services}, see Eric Tucker, “The Constitutional Right to Bargain Collectively: The Ironies of Labour History in the Supreme Court of Canada,” (2008) 61 \textit{Labour/Le Travail} 151.