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Government's recent labour interventions highly unusual, experts say

Using back-to-work law in unprecedented ways

By Kazi Stastna, CBC News Posted: Oct 13, 2011 8:14 AM ET Last Updated: Oct 13, 2011 2:08 PM ET

As Labour Minister Lisa Raitt continued her efforts to thwart any chance of a strike by Air Canada flight attendants, and postal workers launched a court challenge against the government actions that ended their own labour dispute, experts said the government's recent use of back-to-work legislation is highly unusual and likely to change the face of labour negotiations in Canada significantly.

It's not that back-to-work legislation per se is unusual in Canada; it is used quite regularly both on a provincial and a federal level (federally, it has been applied more than 30 times since 1950). What is unusual is when and where the current federal government has been applying — or threatening to apply — it.

"Historically, back-to-work legislation was usually only enacted after a strike had gone on for at least some period of time and there was some evidence that the public interest was being seriously affected in a negative way," says Eric M. Tucker, professor of law at York University's Osgoode Hall Law School.

It has also almost always been directed at public sector workers such as teachers, nurses or garbage workers.

"It tends to be mostly the public sector because although the public is affected by all work stoppages, more of them are affected more directly with public services," says Laurel Sefton MacDowell, a labour historian at the University of Toronto at Mississauga.

But in the case of Air Canada, the government has threatened to use it against employees of a private company, which does not hold a monopoly or provide a public or essential service, and did so, in the case of the airline's ticket agents, a mere day into a strike and in the case of the flight attendants, even before a strike had begun while contract talks were still ongoing.

In the case of Canada Post workers, it applied the law to end not a strike but a lockout, also unusual, says Tucker, and then instead of following the normal procedure of having an arbitrator impose a collective agreement, imposed some of the provisions itself.

Almost everybody in the labour law business —whether they are on the union or management side of things — views this whole recent run of events as highly unusual," says Brian Langille, a professor of labour law at the University of Toronto. "There [are] clear rules of how collective bargaining is supposed to go, and there seems to be a wholesale departure from that. What should seem very aberrational and unusual is suddenly becoming very normal and constant."

Exception now the norm

Erin Kuzz of the Toronto law firm Sherrard Kuzz, agrees that under the current Conservative government, the unusual is becoming increasingly common, and while many have seen the government's intervention as favouring employers, Kuzz, whose firm represents employers in a variety of sectors, says it's not so clear-cut.

"From the perspective of an employer and somebody negotiating on behalf of an employer, it's a bit of a double-edged sword," she said. "It certainly … can help avoid a work disruption, which, obviously, most employers would very much like to do, and in that respect, it can provide a bit of leverage to the employer at the bargaining table because, of course, the whole system of collective bargaining is premised on both sides having certain power … so when one of those sides is effectively prevented from exercising the power they wield … it ups … the leverage that the other side has. So, that's obviously the part that employers like.

"I think it ultimately, though, can have an … unanticipated impact on bargaining in the future because the parties don't really necessarily understand what the landscape is anymore."

> **'It can be a destabilizing force.'** — Erin Kuzz, lawyer with Sherrard Kuzz

Not knowing whether employees will be able to exercise their right to strike makes it hard to plan bargaining strategies, said Kuzz.

"It can be a destabilizing force – not necessarily in any particular single round [of bargaining] but as things progress forward and those same parties are back at the table next time."
Also, once the back-to-work legislation is in place, the case is usually sent to binding arbitration, which according to Kuzz, "does not tend to favour employers."

"The interesting dynamic here is the avoidance of a work stoppage for Air Canada would seem to be more of a priority for that employer than the potential detrimental impact of an interest arbitration (the type of arbitration that occurs to work out a collective agreement).

"Normally, I would say to an employer, if you can get a deal reached by agreement rather than going to interest arbitration, that's always your better bet, because in an interest arbitration, the ultimate outcome is out of your hands, and that's never a good place for an employer to be."

The government used an economic argument when it first raised the prospect of using back-to-work legislation in the case of Air Canada flight attendants in mid-September and has repeated it since then, saying a work stoppage could threaten Canada's fragile economic recovery. That has possible implications for other federally regulated employers whose business impacts the economy, said Kuzz. She said given the types of precedents the government has been setting lately, the possibility of back-to-work legislation is sure to be a scenario she discusses with her clients.

"What I'd say to the client is, 'It's pure speculation whether the government would take the same approach, but let's come up with a Plan A on the assumption we're in a traditional strike or lockout regime and a Plan B on the assumption there's a chance the government would intervene'."

'Fragile economy' can't take strike: Raitt

There have been other unusual aspects to the way the government has applied labour law lately. Raitt's most recent move to refer the flight attendants' case to the Canada Industrial Relations Board "to ensure that the health and safety of the public will not be impacted" by a strike has been widely viewed as a stalling tactic to delay any potential work stoppage until Parliament resumes next week and government can pass back-to-work legislation. Some legal experts view it is an abuse of the provisions in the Labour Code that usually apply only to essential service workers such as hospital employees or firefighters.

"Air Canada has never been treated as an essential service," said Eric M. Tucker, professor of law at York University's Osgoode Hall Law School. "I don't know that there would be evidence to say that if there was an Air Canada strike that the lives and health of Canadian citizens would be put at risk. I think that’s an extraordinary claim. I would like to hear what the basis [is] to even suggest that that’s a likely outcome of the strike."

Raitt's office responded by email to a request from CBCNews.ca to explain the government's reasoning for raising the prospect of back-to-work legislation in the Air Canada cases and referring the flight attendants' case to the CIRB.

"There have been two full rounds of collective bargaining," the email response said. "The fact that no agreement has been reached makes it clear that there has been a breakdown in the process. Given our fragile economy, a work stoppage is unacceptable. The government has considered all its options, and that's why we refer this labour dispute to the CIRB."

In an official statement released Wednesday, Raitt said she has asked the CIRB "to consider

either imposing an agreement upon the parties or sending Air Canada and CUPE (the union representing flight attendants) to binding arbitration."

"Both the union and the employer must continue their normal work activities until the matter of maintenance of activities has been decided upon by the CIRB," the official statement said.
But MacDowell and other labour experts say the government's explanations do not justify the way it has dangled the threat of back-to-work legislation over the bargaining process.

"This intervention and threatening and warning from the beginning, it's not only unprecedented; it's almost as if they don't understand how the system works," MacDowell said. "It's being very disruptive, and it's actually creating problems, not solving problems."

MacDowell sees the government abandoning its traditional role of the neutral third party in labour negotiations and taking over a process better left to the people directly involved.
"In most cases, it's better if the parties can come to some kind of conclusion," she said. "In that way, they actually are creating their own collective agreement. They're the ones who know what's going on in the workplace, so it's going to be more effective."

Wage settlement in CUPW case an aberration

The government also departed from the script when it wrote the back-to-work statute that ended the Canada Post lockout in June and included a wage settlement in the actual legislation itself, one that was lower than the last offer made by the employer.

"Oftentimes," says Tucker, "when there is back-to-work legislation, the parties get another opportunity to negotiate before an arbitrator settles an agreement, but in this case, the parties cannot negotiate over the wage agreement, nor can the arbitrator modify it. It's set by the legislature. So, that is a very unusual provision."

Langille said there have been some circumstances in which the Industrial Relations Board, but not the government, has written in provisions of a collective agreement but "only in the most grim of circumstances."

In the CUPW case, the government also broke with tradition by appointing an arbitrator who was not from the usual cadre of arbitrators recognized by both sides as impartial and experienced in labour relations.

"The basic rule is if you take away the right to strike and lock out, you have to substitute it with some fair mechanism, and that means some neutral, respected party that both parties trust," said Langille.

The Canadian Union of Postal Workers (CUPW) is contesting the appointment of the arbitrator and on Wednesday launched aconstitutional challenge against the government's back-to-work

legislation in Federal Court. It will make the argument that the freedom of association guaranteed by the Charter of Rights and Freedoms safeguards the right to freely associate for the purposes of a strike and that the government's use of back-to-work legislation to thwart that right was unconstitutional.

Such a challenge is generally the only recourse for fighting the back-to-work legislation outside of filing a complaint with the International Labour Organization alleging the legislation puts Canada in violation of its international obligations. Labour groups have filed such complaints in the past, said Tucker, and although the ILO has often found in their favour, it has no power to impose any sanctions on the government.

> **'This is the big decision that everybody's been waiting for … is there a constitutional right to strike in Canada?'** — Brian Langille, law professor, University of Toronto

The legal community will be closely watching the Charter challenge because it will be the first test of a2007 Supreme Court of Canada decision that ruled that the freedom of association statute does protect the right to collective bargaining. That decision was in response to a challenge launched by B.C. health sector unions and reversed 20 years of past rulings that said bargaining was not covered by the freedom of association clause. However, in the 2007 ruling, the court explicitly said it would not rule on the question of whether the right to collectively bargain includes the right to strike.

"It's just been hanging out there and waiting for the right case to come along, and I think the people advising these unions may well be of the view this is the right case, because you have a clear statutory infringement of the right, and it clearly raises the issue, is there a right to strike, and if so, when can the government limit it?" Langille said.

"This is the big decision that everybody's been waiting for … is there a constitutional right to strike in Canada? It's the front-burner issue in Canadian labour law."