Prospects for Non-Statutory Unionism in Canada

Non-statutory unionism is a term invented by the Supreme Court of Canada in its Dunmore v. Ontario decision. It refers to employee organizations seeking to protect and promote the interests of their members or of a class of workers to which their members belong but without government certification as an exclusive bargaining agent. Survey research by Lipset and Meltz found that there is a substantial amount of non-statutory unionism in Canada but it has attracted very little attention by researchers.

The object of this paper will be to explore a number of aspects of non-statutory unionism.

The following questions will guide the research.

What is the difference, if any, between non-statutory unionism and “non-union representation and what difference does it make?” The question will be addressed by a close reading of the Supreme Court’s use of the term and a comparison with Taras and Kaufman’s use of the term non-statutory unionism. It will be argued that the term “non-statutory union” implies a legitimate form of worker organization while the term non-union representation implies an employer-controlled process that does not conform to international labour standards.

To what extent does international law protect non-statutory unionism under regimes that allow for majoritarian exclusivity? This question will be addressed by a review of the relevant cases of the International Labour Organization’s Committee on Freedom of Association from a number of different countries.

To what extent does Canadian constitutional law protect non-statutory unionism in the public and private sectors? Although the Charter of Rights and Freedoms applies directly to governments in their roles as both regulators and employers, it does not apply to private sector employers. Nevertheless in its Dunmore case which was settled before BC Health Services, the Supreme Court ordered the Ontario government to introduce legislation protecting the rights of agricultural workers to associate. More recently the Ontario Court of Appeal, subsequent to BC Health Services, has ordered the Ontario government to introduce legislation protecting the right of agricultural workers not only to organize but also to bargain collectively within a system of majoritarian exclusivity. In its Fraser v. Ontario decision the Court of Appeal also asserted that the option of non-statutory unionism had to be eliminated in apparent contradiction to international and constitutional law. The case has been appealed to the Supreme Court and will be heard in December 2009. The Court’s decision, which should settle the legality of non-statutory unionism in Canada, may well be out in time for the Cira meetings in June, 2010.

To what extent might established Canadian unions attempt to organize non-statutory unions? This is a question that can be satisfactorily answered only on the basis of careful empirical research that cannot be completed by June 2010. Nevertheless, it is useful to review the known views of relevant actors as well as their relevant recent behaviour. For example, part-time and casual workers in Ontario colleges, who were excluded from the
coverenge of the Colleges Collective Bargaining Act, recently formed an independent association (non-statutory union?) but instead of seeking what might be called “constitutional recognition” from the Ontario government instead lobbied the government to change the law. RCMP officers who have been legislatively forbidden to organize and bargaining collectively are, subsequent to BC Health Services, seeking a Wagner Act Model regime of legislation instead of seeking Court support for a tailor-made regime of constitutional recognition.

What are the pros and cons of encouraging unorganized workers to organize themselves into non-statutory unions? The answer to this question must be largely speculative. Known concerns on the union side are the emergence of weak and employer-dominated worker organizations, and on the employer side the appearance of multiple unionism posing frequent risks of disruption.