

I-MODE, THE NEW LANGUAGE OF WORKERS' RIGHTS: A REJOINDER TO LARRY SAVAGE

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In his contribution to this edition of *Just Labour*, the central fault that Larry Savage finds with my championing the human rights nature of labour rights is that “the labour rights as human rights approach threatens to undermine class-based responses to neoliberal globalization by contributing to the depoliticization of the labour movement.” It has that effect Savage asserts because it “tends to downplay or altogether ignore the material dimension of collective worker action and the central role of economic conflict in the employment relationship” and because it “assumes that power flows from rights.”

Savage writes as if the “workers’ rights are human rights” theme is the creation of intellectuals musing in their ivory tower isolated from the struggles of workers and their organizations. Nothing could be further from the truth. The international labour movement itself has been a central force promoting the workers’ rights theme.

In its 2004 report *A Trade Union Guide to Globalisation*, the International Confederation of Free Trade Unions (now the International Trade Union Confederation) had this to say¹:

The fundamental concern of the trade union movement has been the struggle to secure the right of workers to form and join independent trade unions and to bargain collectively with their employers. This is the very basis of trade union organization and is still its highest priority. Defending trade unions and trade union rights under attack from any government is a main activity for the international trade union movement.

The basic trade union rights are the right to form or join a trade union, the right to bargain collectively and the right to strike. **These trade union rights are human rights** (emphasis added) and, as all human rights, they are universal and indivisible. General rights for trade unionists are enshrined in the Universal Declaration of Human Rights, its covenants as well as in most national constitutions and labour codes. For example, article 23 of the Universal Declaration of Human Rights includes the following: ‘everyone has the right to form and to join trade unions for the protection of his interests.’

The most important trade union rights are defined in the ILO conventions No. 87 on freedom of association and No. 98 on the right to collective bargaining.

International trade union organizations have been fighting since their inception to get these rights recognized by all governments and employers. **Conventions No. 87 and No. 98 are integral parts of what is needed to combat the excesses of globalization** (emphasis added): a strong set of labour standards securing the principal labour rights that can be used to confront the social actors with their responsibilities. (p.27)

Workers' rights as human rights do not "depoliticize" trade unions. Achieving acceptance and protection of workers' rights as human rights is, as the statement above indicates, a top political priority of the labour movement. Achieving acceptance and protection of the human right to bargain collectively does not "downplay or altogether ignore the material dimension of collective worker action." Collective bargaining is an essential element of the labour movement's strategy to combat the negative effects of globalization on workers' standards of living. Workers' rights as human rights do not deny the "central role of economic conflict in the employment relationship." Achieving acceptance of the human right to strike is essential to allow workers to confront economic injustice.

In order for me to effectively respond to some of Savage's additional criticisms it is first necessary to make some preliminary remarks about the Wagner Act Model Mode of Employment Regulation (WAM)². As developed by French Regulation theorists, a mode of regulation is a pattern of thought and behaviour shaped by norms, habits, laws and other regulating networks³. Savage, along with most other Canadian experts on employment relations, are steeped in the ideas and concepts of WAM. They see the world through the prism of the Wagner Act Model. They interpret the Supreme Court's recent BC Health decision constitutionalizing collective bargaining from the perspective of WAM. In my writings, however, Canadian employment relations are viewed through what might be designated the International Labour Organization's (ILO) Mode of Regulation (I-Mode). I-Mode is not so much a set of practices on the ground as a vision of employment relations embedded in ILO conventions, jurisprudence, declarations and the promotional work of the ILO staff. WAM and I-Mode are not entirely at odds with each other. Indeed, much of what we do in Canada is consistent with I-Mode. On the other hand WAM contains bells and whistles that are not essential to I-Mode and some notions and practices that are entirely contrary to it. In a sense WAM and I-Mode have brought forth different languages or different dialects of the same language that make it difficult for speakers of one or the other to fully understand each other. Some key concepts, given the same name in both dialects, are defined quite differently.

Most fundamentally WAM and I-Mode differ on the definition of collective bargaining. According to the ILO, collective bargaining is defined as:

...all negotiation which take place between an employer, a group of employers or one or more employers' organizations on the one hand and one or more workers' organizations on the other for determining working conditions and terms of employment, for regulating relations between employers and workers and for regulating relations between employers and their organizations and a workers' organization or workers' organizations⁴

In Canada, on the other hand, we commonly consider collective bargaining to be something done by government-certified exclusive bargaining agents. Workers become "unionized" by certifying exclusive agents. Non certified employee associations that engage in a process that meets the above definition are considered something other than unions and the process in which they represent their members' interests to their employer is considered to be something other than collective bargaining. The result is much confusion and discourse at cross-purposes.

For example, according to Savage:

Adams urges the labour movement to re-examine the appropriateness of the exclusive-agent certification model used to extend collective bargaining rights in Canada. Specifically, Adams advocates the development of a non-statutory unionism, characterized by independent non-union non-standard employee organizations operating alongside established labour unions.

This statement is one of many in Savage's essay that might be characterized as WAM-think. By interpreting my writing through notions inherent in the Wagner Act Model Savage misrepresents my argument. In none of my writings have I ever suggested that we abandon the exclusive-agent system in favour of "independent non-union, non-standard employee organizations." What I have said is that, consistent with I-Mode, where Canadian workers have chosen not to certify an exclusive agent they retain their right to organize and bargain collectively through organizations of their choice independent of employer control. In I-Mode such organizations are "trade unions" not "non-union, non-standard employee organizations." The WAM norm is to reserve for certified employee organizations the designation of "established labour union." In order to be considered a legitimate union, an employee organization must be certified by the state. That is a notion that is, as the definition above indicates, alien to I-Mode and to most of the world's labour movements. Indeed the notion that state-certification is necessary for union legitimacy is directly contrary to the notion of "free trade union."

WAM fosters acceptance of the idea that employers have a right to retain complete control of the employment relationship if the relevant employees choose not to certify an exclusive agent. That is a notion that is thoroughly contrary to I-Mode. The end goal towards which the ILO is moving in its promotional work is independent collective representation for all workers with few exceptions. The norm under WAM is that workers should have a choice between exclusive agent certification and no representation at all. In short, WAM legitimizes no worker representation and thus complete employer control of employment as an option⁵. What I have been advocating, consistent with I-Mode and international human rights standards, is that the appropriate choice for Canadian workers is between exclusive agent representation and representation by non-statutory employee organizations that meet all of the international standards for being considered legitimate, independent unions. WAM imposes a particular brand of bargaining structure and process with representation by a particular sort of employee organization; I-Mode encourages workers to create any sort of employee organization they want within the bounds specified by international human rights standards and to negotiate with employers whatever bargaining structure and process they prefer again within the bounds of international standards.

In a further comment on this issue Savage says “Not only are such organizations lacking in the statutory strength of labour unions (note that, contrary to international concepts, Savage characterizes independent employee organizations as something other than labour unions), but they are often organized at the behest of employers in attempt to dissuade unionization.” From the perspective of I-Mode, any organizations that are set up at the behest of employers are not trade unions. They are not legitimate employee organizations at all. Employer controlled organizations are company unions and company unions are something quite different from independent, employee-controlled non-statutory unions. WAM blurs the distinction between company union and independent non-statutory union but in I-Mode the distinction is quite clear.

Savage is critical of my example of the McMaster Faculty Association as a non-statutory union. He offers up the fact that several faculty associations have sought legal certification as evidence that my proposals are flawed. I totally disagree. Indeed, the history of unionization and collective bargaining in the Canadian university sector illustrates my argument very well. As I noted in “From Statutory Right to Human Right,” faculty and staff associations in the university sector generally began as non-statutory organizations. Over time there has been a movement towards certification because of the several advantages that certification offer to employee organizations. I have never denied those advantages. Indeed, I discuss them at some length in *Labour Left Out*. Nor have I ever discouraged employee organizations from moving towards certification if they consider that move to be advantageous. What I have argued is that a non-

statutory relationship such as the one between the McMaster's administration and the McMaster University Faculty Association (MUFA) is an option for those who prefer not to certify an exclusive agent.

Shortly after I arrived at McMaster, MUFA established a committee, of which I was a member, to investigate the advisability of certifying the association as an exclusive bargaining agent. We recommended against it for several reasons. Maintaining an informal and collegial relationship with the administration was important to us and it was feared that certification would introduce a more distant and adversarial relationship. We wanted to be able to go to the administration at any time over issues we considered important but we feared that the WAM tradition of negotiating only at contract expiry while allowing management free rein during the course of the agreement would be to our disadvantage. Certification would have probably meant introducing the notion of management's reserved rights into the relationship and we did not want to do that. Many McMaster faculty members wanted to retain their ability to negotiate individually over particular aspects of their relationship with the university. They did not want to give up their right to negotiate to an exclusive agent.

In short, we considered that a non-statutory relationship had several advantages. However, we realized that our relationship depended on the continuing good will of university administrators. Should they turn tyrannical the advantages of non-certification would disappear. Our committee considered it prudent to prepare for the worse. We recommended that MUFA's constitution be rewritten to ensure that the association met the legal definition of an independent union so that we could certify in a hurry should that course become necessary. As Savage notes, many faculty and staff associations have decided over the years to certify an exclusive agent largely because of dissatisfaction with the conduct of their administrations. Certification made sense in their particular situations. At McMaster, the so-called McMaster Model - which has been revised several times over the years - continues to function sufficiently well that the faculty have not considered it necessary to move to certification. For most McMaster faculty members the benefits of the Model continue to outweigh the costs.

Certainly university faculty, as Savage notes, are not representative of the unorganized in Canada. But that observation is entirely beside the point it seems to me. The situation at McMaster illustrates a way in which employers and employees with good will on both sides may negotiate a satisfactory and enduring collective relationship without resort to government imposed structure and process. Were Canadian employers to recognize their moral duty, either voluntarily or under pressure from the state and the labour movement, to recognize and bargain in good faith with employee associations the McMaster Model would, it seems to me, be broadly viable. Indeed, the negotiation of

bargaining structure and process by independently organized worker organizations is the industrial relations norm throughout much of the world (see, for example, Adams 1995b). In international perspective we are extraordinary as a society in the extent to which we have allowed government to define and constrain free collective bargaining.

Survey evidence that I reported in *Labour Left Out*, suggests that nearly all Canadian workers want some version of representation in the establishment of their terms and conditions of work. Many are not yet ready to certify an exclusive agent. However, those workers should be encouraged, I believe, to organize in whatever format they are comfortable. They should, consistent with international standards, be encouraged to negotiate an appropriate structure and process for bargaining their conditions with their employers. Employers should be pressured, again according to international standards, “voluntarily” to recognize and bargain in good faith with such organizations. Should employers continue to refuse recognition, governments should be exhorted to introduce legislation forcing them to behave in a manner consistent with international human rights standards. And finally, whether certified or not, all Canadian workers have a human right to strike and governments should, consistent with international standards, effectively protect that right.

Developing a strategy to meet those goals would be, it seems to me, much to the benefit of established Canadian unions. Instead of suffering the indignity of what was once referred to as wage slavery (selling subjugation to the will of another for a price), workers would gain experience in dealing democratically with their employers. Should their tailor-made arrangements falter they could move to certify. As have associations in the university sector, many of them would, no doubt, eventually seek to amalgamate with established unions. Were non-statutory unionism the norm in the private sector, union density, as defined in the traditional WAM manner, could be expected, through amalgamation, to expand significantly over time. It is almost certainly much easier to bring independent associations into the fold than it is to organize the totally disorganized. Indeed, the organization of the public sector in Canada is largely a story of employee associations converting into what are considered, in WAM-think, to be genuine trade unions. Unfortunately, Canadian unions have expressed no interest whatsoever in pursuing such a strategy. They are steadfastly wedded to WAM and its benign acceptance of mass disorganization. The biggest losers are the 80+% of Canadian private sector workers whose status at work depends almost entirely on the paternal benevolence of the boss.

Savage asserts that I am theoretically inconsistent in proposing that the right to strike is a fundamental human right while refusing to join with other prominent Canadian commentators in condemning the CAW-Magna deal under which the union agrees to forego the right to strike in favour of arbitration in return for the company agreeing not to oppose union efforts to organize Magna's

workforce. That assertion is another product of WAM-think that is inconsistent with I-Mode. Under the international norms workers and unions have a fundamental right to strike but they also have the right to forego the strike in favour of arbitration if they consider that to be to their advantage⁶. I have some serious reservations about the specifics of the CAW-Magna deal but not from an international human rights perspective. The workers at Magna have choices. They may join CAW and thus forego the strike-right in favour of arbitration; they may join another union and certify an exclusive agent; they may also set up a non-statutory union and negotiate through it an appropriate structure and process with Magna.

What I do have a problem with, from an I-MODE perspective, is legislation that removes the right to strike and imposes arbitration in its stead. The international norms are clear that the only workers for which arbitration may be legislatively substituted for the right to strike are those whose withdrawal of work would endanger health and safety (Gernigon et al. 1998). The ILO has developed a very rich jurisprudence that identifies the jobs that qualify. It is a very restricted list. In Canada we blatantly offend the international standards by denying about 50% of public sector workers the right to strike and effectively denying that right to the uncertified in the private sector. Moreover, despite the indignation expressed about the CAW-Magna deal, Canadian unions are conflicted about their position with respect to arbitration. There has, for example, been no Magna-like outcry against the United Food and Commercial Workers' proposal that agricultural workers' legislation in Ontario should substitute arbitration for the right to strike.

Savage is not happy with my positive reaction to the Supreme Court's 2001 *Dunmore* decision. He mistakenly asserts that the decision "struck down an Ontario law which prohibited agricultural workers from organizing into unions." That is not what the law did. Instead, it removed agricultural workers from statutory protection⁷. The lack of statutory protection is not the same as prohibition. Prior to positive legislative protection introduced by an NDP government in the early 1990s agricultural workers in Ontario had the same right to organize as did Canadian workers generally prior to the introduction of the Wagner Act Model at the end of World War II. However, one of the misperceptions created by WAM is that the lack of legislated protection is equivalent to prohibition.

What the Supreme Court found to be unacceptable about the Ontario government's initiative is that the removal of agricultural workers from statutory protection was accompanied by statements about the inappropriateness of collective bargaining for such workers. The government's actions, in effect, created an atmosphere that made it, in the SCC's words, "nearly impossible" for agricultural workers to organize. The SCC ordered Ontario to introduce legislation that secured agricultural workers constitutional rights.

In response, the Ontario government introduced an Act that it believed minimally met the constitutional standard. It explicitly stated that agricultural workers had a right to organize and develop a program of action to defend and forward their interests. It established that agricultural workers had a right to make demands on their employers and that the employers had a legal duty to recognize the worker representatives so that they might present their claims. The *Agricultural Employees Protection Act* (AEPA) was widely condemned by organized labour because it did not specifically require bargaining in good faith and because it did not impose any dispute resolution mechanism.

Savage asserts that the Ontario Superior Court ruled that the Act did not violate the Charter because it provided agricultural workers with “adequate protection of their right to freedom of association.” But that is not what the court said. It said, instead, that the Act was consistent with Canadian constitutional law as that law stood after *Dunmore* when there was no constitutional duty to bargain and no right to strike⁸. In *BC Health* the SCC did establish a duty to bargain in good faith and, on appeal, it is likely that the Ontario government will be ordered to alter the AEPA accordingly.

BC Health, as Savage notes, did not establish a right to strike. Nor did it overtly deny constitutional protection to that right. Instead the Court refused to pronounce on the right because the facts of the case did not concern that issue. However, if the Court remains true to its standard that Canadian workers are entitled, at a minimum, to rights embedded in international human rights treaties that Canada has ratified, it must grant constitutional protection to the right to strike (Fudge 2008). If that happens, the AEPA will have to be revised again and when it is it will protect the essential worker rights specified in international human rights law: the rights to organize, bargain collectively and to strike.

Although in conformity with international standards, that regime will be considerably different from WAM in that there will be no certification and no requirement for the union to demonstrate majority support to be recognized. A revised AEPA illustrates just one of the options that Canada has in bringing its law and practice into line with the international standards to which the SCC says all Canadian workers are entitled.

According to Savage, in the *BC Health* case the SCC “was careful not to fully embrace the ILO’s conception of freedom of association.” He follows up that assertion by saying that “the Court suggested that the Charter only protects certain aspects of collective bargaining in certain contexts.” This is another mix-up resulting from a confusion of WAM and I-Mode. The SCC did, in fact, strongly embrace the ILO’s conception of freedom of association. But the ILO’s conception is not the same as WAM’s conception.

What the Court said is that not all aspects of collective bargaining, as that term is understood in Canada, are protected by the Charter. What the Court was

saying is that many aspects of Canadian collective bargaining are legislatively idiosyncratic and cannot be justified as deserving constitutional protection or as universal human rights. For example, a grievance procedure leading to binding arbitration is an essential feature of collective agreements in Canada. But grievance arbitration is not a human right or a constitutional right. As the revised AEPA example above illustrates, there are many ways to ensure fundamental worker rights. What the Court has said is that workers are entitled to have their basic rights protected but they are not entitled to any particular legal approach to providing that protection.

Savage asserts that, in its BC Health decision, the SCC reaffirmed the “public policy environment of the post-war compromise.” But that is almost certainly what it did not do. Many aspects of WAM, in which the post-war compromise is supposedly embedded, are out of step with international norms. What BC Health apparently says is that those aspects of WAM will have to change. They will have to be brought in line with Canada’s international human rights obligations. If that is in fact what the courts will require in future, the result will be a new Mode of Regulation much different from WAM.

As put forth in “From Statutory Right to Human Right,” I believe that the most sensible way forward is not to allow the courts to create, piecemeal, a new labour code but rather for labour, business and government to pro-actively negotiate a new Mode of Regulation that is both consistent with international norms and is also mutually satisfactory to all three of them. As documented in my *Industrial Relations Under Liberal Democracy* such grand deals were done in several European countries in the first half of the twentieth century. Although that would be the most sensible way to proceed, I am not at all optimistic that it will happen in the near future. At this point all three actors appear to be in a state of shock waiting for the next judicial bomb to go off. It may require several explosions before they are ready to negotiate.

Although I disagree with much of Savage’s critique I agree with one of his fundamental points: “no constitutional document or international treaty, however progressive, can replace the need for sustained political struggle to protect and enhance workers’ rights.”

Unfortunately Savage fails to appreciate that BC Health contains language that could be put to work to make significant gains for Canadian workers. In writing that decision the SCC was expansively laudatory of collective bargaining and its potential for helping to realize values that Canadians consider fundamental. Collective bargaining deserves constitutional protection, the Court said, because it “reaffirms the values of dignity, personal autonomy, equality and democracy that are inherent in the Charter.”

Unions ought to be able to make use of that language to attack employer opposition to collective bargaining and to pressure governments to move off of their neutral stand towards support for collective bargaining. If collective

bargaining is a human right then opposing its institution is tantamount to opposing employment equity, or equal pay or the ban on child labour. The notion of the union-free workplace is as morally reprehensible as “separate but equal” and “a woman’s place is in the home.” Drawing on international human rights standards, the civil rights movement and the women’s rights movements were able to mount vigorous campaigns against those discredited notions. Eventually, court decisions and legislation helped turn things around. But without mobilization on the ground it is unlikely that the job would have gotten effectively done. Human rights ideals and rhetoric could help the labour movement mount a campaign that would drive the Wal-Marts of the world away from their defence of the union-free workplace just as it helped drive racist, sexist and homophobic notions from the field of respectable discourse. To date, however, no such campaign has emerged.

Finally, I would like to express my thanks to Larry Savage for instituting this dialogue. If we are to have a productive exchange about the implications of workers’ rights at human rights we have to reach a common understanding about the differences between the way we think of labour issues here in Canada and the way they are conceived of by the international community. Hopefully this exchange will move us more quickly towards that goal than would have happened in the normal course of academic discourse.

NOTES

1. Available online at <http://www.icftu.org/pubs/globalisation/globguide.html>
2. I first developed this concept in Adams 1995a.
3. On French Regulation theory see Adams 1992 and Lipietz 1987
4. Quoted in Adams 2003
5. This argument is developed more completely in Adams 2001 and 2007
6. For an excellent treatment of international standards as they impact Canadian and U.S. practices see Atleson, et al. 2008
7. On *Dunmore* see Adams 2003
8. The Superior Court decision - *Fraser v. Ontario (Attorney General)* - may be found online at <http://www.lancasterhouse.com/decisions/2006/jan/OSCI-Fraser.HTM>.

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