

## SHALL WAGNERISM HAVE NO DOMINION?<sup>1</sup>

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### ABSTRACT

The Wagner Act Model has formed the basis of Canada's collective bargaining regime since World War II but has come under intense scrutiny in recent years because of legislative weakening of collective bargaining rights, constitutional litigation defending collective bargaining rights and declining union density. This article examines and assesses these developments, arguing that legislatively we have not witnessed a wholesale attack on Wagnerism, but rather a selective weakening of some of its elements. In the courts, it briefly appeared as if the judiciary might constitutionalize meaningful labour rights and impede the erosion of Wagnerism, but recent judicial case law suggests the prospects for this outcome are fading. While the political defence of Wagnerism may be necessary when the alternatives to it are likely worse, holding on to what we've got will not reverse the long-term decline in union density. The article concludes that at present there are no legal solutions to the labour movement's problems and that innovative efforts to represent workers' collective interests outside of formal collective bargaining provide a more promising alternative.

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The theme of Wagnerism has been attracting increasing attention in Canada for several reasons. Perhaps the greatest stimulus for the debate recently is the controversy over the constitutionalization of labour rights and whether some elements of the Wagner Act model, particularly majoritarian exclusivity<sup>2</sup> should be established as a minimum requirement for a collective bargaining law to pass constitutional muster. But that is not the only reason for interest in considering the fate of Wagnerism. There are two additional developments that are driving this concern. The first is the legislative erosion of statutory collective bargaining schemes—the primary reason for seeking their constitutionalization—which has been taking place in fits and starts over the past forty years. However, it is important to make clear that these are

not attacks on Wagnerism *tout court* but rather on particular elements of the model, the ones that support collective bargaining, rather than the ones that fragment and limit it.<sup>3</sup> The second development is not a legal one, but a political-economic one. There has been a shift from an accumulation regime informed by weak Keynesianism, in which the dominant production model was the large integrated firm that made long-term commitments to their employees and in which the dominant gender contract had married women working in the home, to a Neoliberal one, in which production increasingly occurs through networks, in which employers make few commitments to workers and in which women's labour force participation approaches that of men. This change has transformed the landscape in which labour and employment laws operate, producing regulatory mismatches that undermine the labour law's effectiveness even in the absence of retrenchment by the state. Higher levels of employer hostility to trade unions and collective bargaining, and labour market and industrial restructuring in which fewer workers have full-time, full-year jobs, permanent jobs, and in which they are more likely to be employed in small workplaces or in globally competitive industries combine to produce conditions antithetical to the functioning of Wagnerism. If true, then even if Wagnerism was to survive as a legal regime, its domain in the 'Dominion' is likely to continue to shrink to nominal levels in the for-profit, capitalist sector of the economy.

The purpose of this article is to assess the state of the Wagner Act model (WAM) in Canada and to argue that that while its defence, whether through political action or constitutional litigation, may be a necessary objective given that under present conditions the alternatives to it are likely to be worse, it is not an adequate strategy for reversing the decline of collective bargaining, particularly in the private sector. I begin with an overview of trends in labour legislation and then focus specifically on Saskatchewan's controversial Bill 85, enacted in May, 2013 and on the Harper government's recent federal sector labour laws. I argue that although Canada has not witnessed an assault on statutory collective bargaining rights, there has been a marked erosion of them. In the next part I review attempts to constitutionalize collective labour rights and argue that the prospects for their protection—not just measured in terms of preserving WAM, but of setting a baseline that would protect meaningful collective bargaining—is dimming. In the third section I turn to the central argument that Wagnerism's survival would, in any event, leave it with a shrinking dominion. Finally, I conclude with a few thoughts on the limits of law and what else might be done.

Before proceeding, however, it will be helpful to clarify what Wagnerism is and the relation between Wagnerism and collective labour rights more broadly. Most obviously, Wagnerism is simply a specific model of collective labour rights and like all models of labour rights it addresses three key issues: 1) trade union formation; 2) bargaining structure; and 3) dispute resolution. However, the ways

in which Wagnerism addresses these key issues are not all distinctly Wagnerian. Some of its elements are common to most collective bargaining regimes and are recognized as such by the International Labour Organization (ILO) and other international institutions. Therefore, we need to be careful to distinguish between Wagnerian and non-Wagnerian elements of Canadian collective bargaining law, even though an erosion of any element may result in WAM becoming ineffective.

In the list below, I have made a preliminary attempt to identify the basic elements of the Canadian collective bargaining model, indicating which are distinctly Wagnerian (W) and which are more universal (U). In making this list, I appreciate that lines cannot always be drawn sharply and that, for example, the Wagnerian context within which a more universal element is located, may give it a particular form and content. Thus, in the recent Saskatchewan Court of Appeal judgment in *R. v. Saskatchewan Federation of Labour*,<sup>4</sup> the court explained its reluctance to recognize the right to strike as a free-standing dimension of freedom of association because the specific form that was being claimed was Wagnerian and the court was not prepared to constitutionalize a particular statutory model of labour rights. Nevertheless, I believe it is still useful to categorize these elements because it is possible to argue, for example, that some elements, like the freedom to strike, are more universally recognized than others, like majoritarian exclusivity.

1. Trade Union Formation:
  - a. Legal protection against state and employer interference with union organizing (U)
  - b. Majoritarian exclusivity (W)
  - c. State determination of appropriate certification units (W)
2. Bargaining Structure:
  - a. State determination of appropriate bargaining units, which for the most part track certification units (W)
  - b. Highly decentralized bargaining (essential enterprise bargaining as the norm) (W)
3. Dispute Resolution:
  - a. Terms and conditions of employment are determined by collective bargaining between the parties (U)
  - b. A legal duty to bargain in good faith is imposed on the parties (W)
  - c. Bargaining impasses are resolved by strikes and lock-outs, with the result largely determined by the relative bargaining power of the parties (U)

- d. Strikes and lockouts are prohibited while a collective agreement is in force and until negotiations have reached an impasse and conciliation has been completed (W)
- e. Disputes over the interpretation and application of collective agreements are to be resolved by binding arbitration (W)

Additionally, the effectiveness of WAM crucially depends on the existence of labour boards with the power to enforce its strictures and provide meaningful remedies when violations occurred. The erosion of this administrative apparatus would also significantly harm the model (Arthurs 2006; Slinn 2008), but this is not a matter addressed here.

It is important to keep all of these dimensions in mind because, as we shall see, legislative erosion is partial; some elements of WAM, particularly fragmented bargaining structures in the private sector, remain untouched or are expanded, while other, more universal elements, such as the freedom to strike, are being restricted.

## I. LEGISLATIVE EROSION OF LABOUR RIGHTS

While Americans sometimes may think that if they let their gaze follow the North Star to Canada they will find a more progressive version of Wagnerism, the fact of the matter is that the shine has been fading for many years, in both the private and the public sectors, as the result of the legislative erosion of labour rights. While it is true that compared to American ossification (Estlund 2002), Canadian labour law has been frequently amended, the trend in the more recent past has been towards the weakening, not strengthening of labour rights, and it is arguable that the pace of erosion may accelerate, depending the electoral fortunes of right-wing parties. Not surprisingly, there is a sense of foreboding about Wagnerism's future among many Canadian academics.<sup>5</sup>

The Canadian Foundation of Labour Rights (CFLR) maintains a database of labour laws restricting collective bargaining and trade union rights dating back to 1982, the year the *Charter* came into force. On a visit in early February, 2014, 207 laws were listed. The database does not distinguish between legislation targeting public and private sector unions, but it is well known that the public sector has been the primary target of what has aptly been characterized as 'permanent exceptionalism,' (Panitch and Swartz 2003) consisting of back-to-work statutes ending lawful strikes, imposed wage restraint, restrictions on the scope of bargaining, and the expansion of essential service worker designations. These are restrictions on Wagnerism's commitment to negotiated contracts determined by the bargaining power of the parties, and even though this principle was only partially embraced for the public sector in the best of times, its erosion in recent years is undisputed. Moreover, as we shall see, the principal

alternative, binding interest arbitration by a neutral third-party, is also being degraded.

Opposed to this view is a recent review of labour and employment law changes by Kevin Banks who has come to different conclusion (Banks 2013). His study is much broader in its focus, looking at minimum standards as well as collective bargaining legislation, but specifically in regard to the latter, Banks finds that “it cannot be said that there has been any trend across Canada over the past decade [2001-11] toward weaker protection of private sector rights to organize and bargain collectively” (ibid). In part, the difference between the CFLR study and Banks’ is his exclusive focus on the private sector. But even leaving that difference aside, because Banks’ study only begins in 2001, it misses the single most important change to private sector Canadian collective bargaining law, the shift away from card count certifications toward mandatory elections. Prior to 1977 all Canadian jurisdictions provided for card count certifications. Currently, the only ones that retain card counts are the federal jurisdiction, Manitoba, New Brunswick, Newfoundland, Prince Edward Island and Quebec. While the number of jurisdictions retaining card counts might seem high, it is important to note that these laws only cover about one-third of the labour force,<sup>6</sup> leaving about two-thirds under a mandatory voting regime. Most of these changes occurred before 2001, when Banks’ study begins.

The impact of this change has been the subject of a number of studies and while their findings differ on the extent of the impact, they are unanimous in its direction. The shift to mandatory elections has reduced the likelihood of certification success and negatively affected the unionization rate. The effect of the change is buffered to an extent by the tight timelines the legislation typically imposes between the filing of a certification application and the holding of an election, but a negative effect still remains (Warner 2012; Johnson 2004; Riddell 2004; Slinn 2004).

Another matter that Banks overlooked is that in the toing and froing of labour law that occurs when governments change, the restoration of labour rights previously stripped away is not always complete. So while it is true, as Banks says, that in 2005 the Liberal government in Ontario restored to labour boards the power to order remedial certifications where employer unfair labour practices prevent workers from freely expressing their wishes in a certification election and to order interim reinstatement of employees allegedly discharged for trade union activity, these measures only partially reversed the changes made by the previous Conservative government in 1995. For example, card count certifications were only restored in the construction sector. In short, labour rights in Ontario are weaker after 2005 than they were in 1990, before the NDP reforms of 1993.<sup>7</sup>

Still, I think Banks’ article provides an important corrective to those who might overstate the extent of legislative erosion and who fail to acknowledge that

some labour law reforms have either restored rights that were stripped away in earlier rounds of legislation or introduced new protections. For example, over the same period when card count certifications were being abolished, first contract arbitration (FCA) was being introduced. Although on its face, first contract arbitration might seem to be a departure from Wagnerism insofar as it provides for third-party imposition of terms and conditions when negotiations fail, the evidence shows that first contract arbitration laws increase the percentage of newly certified unions achieving first agreements by *negotiation*. Thus, FCA legislation should be viewed as remedying a weakness of Wagnerism—its reliance on bargaining in a context where employers are particularly resistant to unions and where unions lack the bargaining resources to induce employers to agree to minimally acceptable terms (Slinn and Hurd 2011).

To get a better sense of these trends, it is useful to look briefly at Saskatchewan's Bill 85, passed in May, 2013 and a series of federal labour statutes passed between 2011 and 2013.

#### SASKATCHEWAN, BILL 85

There was much trepidation when the Saskatchewan provincial government issued a consultation paper on the “renewal” of labour legislation in May, 2012 (Saskatchewan Ministry of Labour Relations and Workplace Safety). Nothing good could be expected from the ideologically conservative Saskatchewan Party that was elected in 2007, replacing an NDP government that had been in power for the previous 16 years, especially in light of its first foray into labour law reform. Shortly after its election, the government enacted Bill 5, which severely restricted the right of public sector workers to strike by the expansion of essential service designations and Bill 6, which eliminated card count certifications and expanded employer voice in union certification campaigns.<sup>8</sup> The questions raised in the paper suggested the government was interested in widening exclusions from the Act, increasing trade-union ‘accountability’, facilitating decertification, restricting picketing, limiting access to first contract arbitration, and, most ominously, perhaps moving towards a right-to-work regime by expanding the freedom of workers to opt out of the union and of dues payment. When Bill 85 was introduced in December, 2012, it turned out that the government was not going after collective bargaining law as aggressively as many had feared. Right-to-work type laws were not present; nor were restrictions on picketing. But the bill was not benign either. It proposed to:

1. Broaden the confidential employee exclusion and preclude supervisors from being in the same bargaining unit as those they supervise

2. Increase government involvement in dispute resolution and require a 14-day cooling-off period and 48-hour notice to the employer before a strike can occur
3. Provide for last-offer votes at the behest of employers, governments or employees
4. Provide for voluntary recognition
5. Increase decertification opportunities
6. Require consideration of economic conditions in first contract arbitration
7. Require unions to provide audited financial statements to members<sup>9</sup>

Trade unions and the NDP decried the proposed law and the rush to enact it (Stevens 2013). Although they did not prevent the law from being enacted,<sup>10</sup> the government agreed to some last minute amendments that lessened its impact, but did not change its fundamental thrust. One goal of the law is to protect managerial control from being compromised by trade union membership. This was accomplished through its treatment of confidential and supervisory employees. Most jurisdictions exclude workers employed in a confidential capacity in matters related to labour relations. The new Saskatchewan law is broader. It excludes workers whose primary duties include business strategic planning, policy advice and budget implementation and planning when that might impact on the bargaining unit (6-1(1)(h)(i)(B)). The new law also creates a new category of worker, supervisory employees, who are broadly defined to include people who independently assign and monitor work, schedule hours and provide comments used for work appraisals or merit increases and recommend discipline (6-1(1)(o)). Subject to certain exceptions, the bill prohibits supervisory employees being included in the same bargaining unit with the people they supervise (6-11(3)). This provision is in addition to the managerial exclusion, which does not allow managerial employees to bargain collectively. While the managerial exclusion is standard in Canadian Wagnerism, special treatment of an additional layer of supervisory employees, who presumably do not fall into the managerial exclusion, is not. The exclusion of these supervisory employees from all employee bargaining units will not only further fragment an already highly fragmented bargaining model, but in many cases will effectively prevent them participating in the collective bargaining regime at all. This is because in all but the largest workplaces, the number of supervisory workers is likely to be too small to support viable a viable bargaining unit. Moreover, the statutory exclusion of supervisory employees from larger bargaining units overrides the preference of supervisory and non-supervisory workers to bargain together, where such a preference exists.

The Saskatchewan government's treatment of worker voice in bargaining unit determination however is not uniform. Employee voice is given weight

when it can lead to more fragmentation. Thus, in regard to provisions around raiding, the Act provides that a union can apply to represent a portion of an existing bargaining unit, provided that the smaller bargaining unit is found to be appropriate and the majority of those in that smaller unit wish to be represented by the raiding union (6-10, 6-12). There is no equivalent that respects worker voice when it favours combining bargaining units post-certification, even where the combined unit would be an appropriate one. As well, worker voice is strengthened where it favours decertification (6-17). Unlike legislation in other provinces, which link open periods to the expiry of collective bargaining agreements, Bill 85 allows decertification applications to be brought any time after the first two years, providing only that there must be a 12-month waiting period after a failed application.

The changes to collective bargaining law made by Bill 85 are surprisingly tame given the tone of the Consultation Paper. However, the direction of the changes is clear: the government is not interested in promoting trade union formation or collective bargaining, but rather in making sure it does not compromise business interests, particularly in regard to managerial autonomy and authority.

#### **FEDERAL LABOUR LAW – HARPER STYLE**

The current Conservative federal government, which has jurisdiction over labour relations in the federal public sector and the federally regulated private sector (about 10 percent of the Canadian labour force), has not modified Part I of the Canada Labour Code regarding federal private sector collective bargaining, but it has intervened in several high-profile strikes (or threatened strikes) and is in the process of enacting legislation to impose burdensome reporting requirements on trade unions, reflecting its intolerance of labour disruptions in those few areas where workers retain an effective capacity to strike and its ideological dislike of trade unions.

The first intervention, Bill C-6, passed in June 2011, ended a nationwide lockout of postal workers that followed a series of one-day rotating strikes.<sup>11</sup> The government announced its intent to introduce back-to-work legislation the day after the lockout was announced, suggesting that the employer, Canada Post, and the government, had coordinated their actions. The law provided final offer selection (FOS) as the alternative dispute resolution mechanism; however, it did not simply leave it for an arbitrator to decide between two offers. First, the legislation imposed a wage settlement that was lower than the employer's final offer at the bargaining table and, second, it established guiding principles for the arbitrator to follow that included



[...] the need for terms and conditions of employment that are consistent with those in comparable postal industries and that will provide the necessary degree of flexibility to ensure the short- and long-term economic viability and competitiveness of the Canada Post Corporation, maintain the health and safety of its workers and ensure the sustainability of its pension plan [...]<sup>12</sup>

The government's intolerance of strikes was evidenced by the fact that they ended the job actions notwithstanding that there was little disruption to the postal service prior to the lockout and a protocol to maintain essential services was in place. For these reasons, the ILO upheld the union's complaint that the government's action violated Convention 87 respecting freedom of association (International Labour Organization 2013).

The second intervention was in response to a threatened strike by Air Canada's flight attendants in October, 2011. Air Canada, it is to be noted, is a private carrier, not a state carrier. Here, the government did not enact back-to-work legislation (there had been no strike and Parliament was not in session) but rather the Minister of Labour, Lisa Raitt, referred the dispute to the labour board, which had the effect of suspending the right to strike. The legal basis for the action was dubious. One referral was made under s. 87.4 of the Canada Labour Code, which allows the Minister to send a dispute to the labour board where it poses "an immediate and serious danger to the safety or health of the public,"<sup>13</sup> a standard that could not possibly be met in this scenario. The second referral was made pursuant to s. 107, an obscure and little used provision that gives the Minister an open-ended power to do anything she deems necessary to maintain or secure industrial peace. In statements to the press, the Minister implied that she would intervene whenever a strike threatened to be economically disruptive – in other words, whenever a strike would be effective (Employment and Social Development Canada 2011).

Air Canada and the flight attendants agreed to refer their outstanding disagreements for third party arbitration, but that was not the end of Air Canada's labour problems. It was also having trouble reaching an agreement with its pilots and mechanics. In March, 2012, to prevent a labour disruption, the Minister referred both disputes to the labour board pursuant to s. 87.4, but this was simply a pretext to give her time to introduce back-to-work legislation, which she did shortly thereafter (Employment and Social Development Canada 2012). Unlike Bill 6, Bill C-33<sup>14</sup> did not set any terms and conditions, but it did follow the precedent of using FOS and establishing guidelines for the arbitrator to follow:

[...] the need for terms and conditions of employment that are consistent with those in other airlines and that will provide the necessary degree of

flexibility to ensure (a) the short- and long-term economic viability and competitiveness of the employer; and (b) the sustainability of the employer's pension plan, taking into account any short-term funding pressures on the employer.<sup>15</sup>

The last piece of back-to-work legislation was enacted in May, 2012, in response to a strike of Canadian Pacific Railway (CPR) engineers, yard-workers and conductors. In this case, the government showed unusual tolerance, allowing the strike to continue for nearly a week before legislating an end to it.<sup>16</sup> In this case, the government provided for the appointment of interest arbitrators, without establishing guiding principles to be followed.

Given the frequency of federal interference with legal strikes, one might think Canada was facing a strike wave, but the reverse is true. Nationally, the number of hours lost due to strikes has declined sharply from 10.62 hours per employee in 1976 to 1.01 in 2011. In the federal jurisdiction, there were 10 strikes in 2011, admittedly an increase from 2010 in which there were 7, but hardly a crisis.

Not content to restrict the freedom to strike on an *ad hoc* basis, the Harper government has also decided to take more control over the collective bargaining process more generally. It has done this in two separate laws, both passed in 2013. The first deals with collective bargaining between Crown corporations and their employees.<sup>17</sup> Bill 60, passed in June 2013, contains an amendment to the Financial Administration Act that authorizes Cabinet to order a Crown corporation to have its bargaining mandate approved by Treasury Board, in which case any collective agreement it negotiates must also receive Treasury Board approval. It can also order that the Treasury Board have someone at the bargaining table. When questioned about the measure, Prime Minister Harper's Parliamentary Secretary, Pierre Poilievre explained: "I am not here to take marching orders from union bosses... It is for those taxpayers that we work. Not union bosses" (Curry 2013). In fact, arguably this is not legislation aimed at irresponsible 'union bosses' but rather targets the 'irresponsible' managers that the government appoints to run its Crown corporations.

The second legislative change was to the Public Sector Labour Relations Act, included in a massive budget implementation bill passed in December 2013.<sup>18</sup> The law makes many changes that are likely to very significantly undermine federal public sector collective bargaining. Briefly, the act expands the power of government to unilaterally determine what an essential service is and to designate which positions in the bargaining unit perform essential services. Second, the law takes away from unions the ability to elect between strikes and arbitration as the final dispute resolution mechanism. Now, arbitration is only available where the employer agrees or where 80 percent or more of the positions in the bargaining unit are declared essential. As a result, the employer can designate 79 percent of the positions as essential, with the result that the

union cannot effectively strike in order to back its bargaining demands. Finally, if disputes do go to arbitration, the law now requires the arbitrator to give preponderance to certain factors, including “Canada’s fiscal circumstances relative to its stated budgetary policies” (s. 148(1)(b)). In short, arbitrators are no longer independent but rather are bound to give effect to government policies in their awards.<sup>19</sup>

Finally, there is Bill C-377, a private member’s bill that passed the House of Commons but was amended by the Senate, leaving it, at the time of writing, in a state of limbo until further action is taken. The Common’s version of the bill amends the Income Tax Act to require unions to provide detailed financial statements, including itemized expenditures over \$5,000, which would be made publicly available. While the Act purports to be about transparency and accountability to members, the fact of the matter is that labour relations statutes in most provinces already require unions to provide audited financial statements to their members on request. So, rather than being a vehicle for promoting democracy in trade union affairs, the bill is better understood as ideological in its positioning of unions as unaccountable institutions that need to be subject to a disciplinary regime that would be condemned as unnecessary, intrusive and expensive government red tape if similar obligations were imposed on private corporations. These concerns, as well as the question of the bill’s constitutionality, gained considerable traction, even among Conservative senators, which led to the unusual step of the Senate adopting amendments that would loosen the reporting requirements.

In terms of Wagnerism, Bill C-377 represents a shift in its terms. Wagnerism historically treated unions as private associations whose internal governance was largely left for its officers and members. However, because unions were given an institutional role in the model, the law could not be completely indifferent to how they operated and so from the beginning there were provisions to make unions behave responsibly toward their members and the public. Unions were given legal status for the purpose of the collective bargaining statutes so that they could be sanctioned as institutions for breaching those statutes and the orders of labour boards and arbitrators. They were given a duty to fairly represent all members of the bargaining unit and were prohibited from taking certain actions against bargaining unit members in particular circumstances. And, as mentioned, they had to be financially accountable to their members. So Bill C-377 does not introduce a new element into Wagnerism, but rather strengthens its disciplinary control over trade union operations.

In sum, governments in Canada have not been engaged in a project of dismantling Wagnerism, but rather of reconstructing it by selectively strengthening some elements and weakening others, with the predominant intent of weakening the labour movement and undermining union bargaining strength. While these changes do not account for the entirety of the decline in

union density and weakening bargaining power, they have contributed to these outcomes and accelerated the trend toward Wagnerism's shrinking dominion in the Dominion. Moreover, in the near future, it is more likely that there will be further erosion of collective labour rights than strengthening of them. In Ontario, Tim Hudak, the leader of the provincial Conservative Party, had promised to introduce right-to-work laws if elected (although he recently pulled back from this position) and at the federal level of government on June 5, 2013, a member of the Conservative caucus, Mr. Calkins, introduced a private member's bill into the House of Commons, that would abolish card count certifications and replace them with a mandatory voting scheme that would require a union to win a majority of the members of the bargaining unit, not just of those who cast votes, to become certified and to remain certified if a decertification application is brought.<sup>20</sup>

## II. CONSTITUTIONALIZING LABOUR RIGHTS – A QUIXOTIC QUEST TO PROTECT LABOUR RIGHTS?

Labour unions have resisted the erosion of Wagnerism politically and, as we noted, have been partially successful, sometimes softening legislation, as in Saskatchewan, and other times getting some provisions repealed when more labour friendly parties take office, as in Ontario. However, those partial successes have not been adequate to prevent Wagnerism's erosion in a timely way. As a result, organized labour has also adopted a legal strategy aimed at constitutionalizing labour rights. In assessing this strategy we need to ask two questions. The first is whether the Constitution can require or protect Wagnerism. The second, and more important one, is whether the Constitution can require or protect meaningful labour rights more generally. I'm skeptical on both counts. But first, a short review.

As is well known, prior to the Charter of Rights and Freedoms, about the only role of Canadian constitutional law in the labour area was the determination that labour was a matter of property and civil rights and therefore primarily a matter of provincial jurisdiction.<sup>21</sup> Sometimes labour laws were struck down because one level of government exceeded its authority, but the courts' role was limited. It is perhaps fortuitous that the Charter came into force at the moment when the Canadian state began its turn towards neo-liberalism, but the fact that the Charter was in play as it happened made it almost inevitable that the labour movement would seek its protection when governments enacted back-to-work legislation. This produced the first labour trilogy in which the Supreme Court of Canada declared that freedom of association protects the freedom to form associations but not the freedom to engage in activities central to the association's purposes.<sup>22</sup> Therefore, while the government could not

prohibit trade union formation, it was free to restrict collective bargaining and strikes.

The first indication that the court was prepared to go beyond this very thin conception of freedom of association appeared in *Dunmore* where the court decisively held that freedom of association not only protects the freedom of individuals to do in association that which they were legally free to do individually, but also that it would protect some group activities that did not have an individual analog.<sup>23</sup> This included the freedom to make group representations, although not the freedom to bargain collectively. But a Charter of freedoms (and not rights) in the field of labour provides no protection at all for private sector workers who might face retaliation from employers for exercising their freedoms. Recognizing this, the SCC also accepted that in limited circumstances, where workers could not enjoy Charter-protected freedoms without rights, the Charter might also require the state to protect freedom of association with rights that imposed duties on employers not to interfere with associational freedoms. Farm workers were such a group and so one element of Wagnerism (although not an element unique to Wagnerism) was constitutionally required: the right not suffer adverse employment consequences for engaging in associational activities. As well, because the court recognized that a core associational freedom was the freedom to make collective representations that too was protected activity. This was not quite Wagnerism though because the court did not say that freedom of association protected collective bargaining, only the freedom to make collective representations.

The Ontario government responded by enacting the *Agricultural Employees Protection Act* (AEPA), which provided farm workers only with the minimum rights and freedoms that the court had stipulated, except in one regard.<sup>24</sup> The court had spoken only about the freedom to make collective representations. It had not attached a correlative duty on agricultural employers to respond to those representations, which was understandable given that the court was still unwilling to extend freedom of association to collective bargaining, a process that by its very nature requires some level of employer engagement. But the AEPA provided that employers were obliged to listen to oral representations and read written ones (call this *Dunmore* +). However, given the deep historical animosity of agricultural employers to trade unions, it was pretty obvious that the regime would not enable farm workers to establish collective bargaining relationships with their employers and that turned out to be the case in the few cases where farm workers tried to use the AEPA (Hanley 2012).

In the meantime, the SCC threw overboard its first trilogy in *BC Health Services* in 2007 and declared that freedom of association did protect a limited right to collective bargaining.<sup>25</sup> We need not parse the judgments here; it has been done elsewhere (e.g., Fudge 2008; Tucker 2008). The important point for our purposes was that the SCC not only found that freedom of association protects

the freedom to bargain collectively, but that for that freedom to be meaningful there must also be a duty on employers to bargain in good faith. This clearly embraced a core principle of Wagnerism: employers have a duty to bargain in good faith with unions and, perhaps, with associations of employees.

The SCC, however, was also quick to point out the limits of its holding. First, the Charter applied only to government, so while the government could not refuse to bargain in good faith, it was not necessarily the case that the government had a positive obligation to include such a duty in its private sector labour laws. Second, the Charter did not protect a right to a particular outcome, but rather to a process. Third, notwithstanding the court's finding that the process entailed a duty to bargain in good faith (arguably a very Wagnerian element) the court stipulated that the Charter protects a general process of collective bargaining, rather than a particular model (e.g., Wagnerism). Fourth, the Charter did not protect against all interferences with collective bargaining, but only substantial interferences. Finally, the SCC also made it clear that it was not deciding whether freedom of association protected the right to strike.

The immediate impact of the decision was to put government on notice that legislation prohibiting collective bargaining, abrogating collective agreements and unilaterally and peremptorily imposing terms and conditions on unionized employees were constitutionally suspect. So to a limited extent, the Charter seemed to protect public sector Wagnerism in the general sense that it required the state to bargain in good faith with groups of its employees and limited significant and unjustifiable state interference with the collective bargaining process. This was no small measure of protection in an environment in which governments have little patience with public sector unionism.

Whether the Charter will protect anything more than this, or even this much, remains to be seen. The courts have made one thing clear: the Charter does not require other elements of Wagnerism. In particular, in *Fraser*, the SCC overruled the Ontario Court of Appeal's (OCA) holding that the AEPA failed to pass constitutional muster after *Health Services* because it did not protect agricultural workers' right to bargain collectively.<sup>26</sup> The OCA had ruled that constitutionally valid farm worker collective bargaining legislation must provide for majoritarian exclusivity, which the AEPA did not. Of course, it is arguable that the OCA imposed that requirement not because they believed that Wagnerism in general was constitutionally required but rather because in the particular circumstances of agricultural workers in Ontario no other regime would enable them to enjoy collective bargaining. But the SCC did not have farm workers very much in mind in their *Fraser* judgments.<sup>27</sup> Instead, they used the case to emphasize, in the strongest terms, that Wagnerism generally is not constitutionally mandated.

The more troubling question though is what labour rights are constitutionally protected after *Fraser*? Presumably, the core of *Dunmore* remains unaffected. Freedom of association protects the freedom to form associations and to make

collective representations, and where it can be established that groups of workers cannot meaningfully enjoy those freedoms without rights the state will be obliged to provide them. Also, the SCC insisted that *Health Services* remains valid law, notwithstanding a spirited attack on the decision by two concurring justices who would have overruled it and another concurrence that would have read *Health Services* so narrowly as to achieve the same result. However, *Fraser* did introduce considerable uncertainty about the meaning of *Health Services*.

One question is the test that has to be met before the state's obligation to impose rights to protect freedoms kicks in. Arguably, a rights-seeker may have to demonstrate that it is "effectively impossible" to enjoy associational freedoms absent the statutory rights being sought. Hence farm workers lost in *Fraser* because they could not show it was impossible for them to enjoy their protected freedoms with the rights given to them under the AEPA (properly interpreted). The impossibility standard has also been imposed in the context of challenges to positive state action that allegedly limits associational activity. For example, the Federal Court of Appeal upheld the *Expenditure Restraint Act*, which rolled back previously approved pay increases for RCMP officers on the ground that it "did not make it impossible for members of the RCMP to achieve workplace goals."<sup>28</sup>

A second and, perhaps, more problematic feature of *Fraser* is what it has to say about the scope of freedom of association itself. While there were ambiguities in *Health Services*, it seemed fairly clear that freedom of association extended to collective bargaining, not merely to making collective representations. Moreover, since the court could not conceive of an effective freedom to bargain collectively without a correlative duty on employers to bargain in good faith as this was understood in Canadian Wagnerism, it imposed this duty as a constitutional requirement as well. It therefore followed that if private sector workers could not enjoy the freedom to bargain collectively without positive state support, then the state would be under a duty to legislatively impose a duty to bargain in good faith on private sector employers. That was the theory of the plaintiff's case in *Fraser*. After *Fraser*, this proposition is dubious. Rather, it seems, freedom of association protects the freedom to make collective representations and if it is effectively impossible for private sector workers to have their representations considered in good faith then the government has a positive obligation to impose such a duty. The AEPA, properly interpreted (pumped up to *Dunmore* ++), was found to impose such a duty and so it passed constitutional muster. Similarly, in cases alleging positive state interference, the courts have asked whether it was still possible to have collective representations considered in good faith.<sup>29</sup>

Of course, we do not know what it means concretely for employers to have a duty to consider collective representations in good faith. It is possible that this duty could be interpreted so that it is not substantially different from a duty to bargain in good faith as it is conventionally understood, but it may not be.<sup>30</sup> In that case, something less will pass muster and if that something less is that

employers must listen to oral representations and read written ones, and then can respond by saying, “thank you very much but having carefully considered your representations we are not prepared to accept them,” then the game will hardly be worth the candle. Not only would this be Wagnerism watered down to thin gruel, but the adoption of such an approach would also relieve government of any constitutional obligation to protect or provide meaningful collective bargaining in the Canadian context.<sup>31</sup>

How thin this gruel will be may ultimately depend on what the court does in the area of dispute resolution. Under Wagnerism (but not exclusively Wagnerism) the duty to bargain in good faith does not guarantee any particular outcome. Ultimately, the result of negotiations depends on bargaining power, which in the case of labour is contingent on the union’s ability to inflict significant economic harm on an employer by collectively withdrawing labour – striking. Collective bargaining without this power degrades into collective begging. No one believes that the Charter guarantees some level of bargaining leverage, but many argue that it does protect the freedom to strike because absent that freedom, the freedom to bargain collectively – or even to make collective representations – is meaningless.

The original Trilogy roundly rejected the claim that freedom of association protected the freedom to strike. *Health Services*, although not deciding the issue, disparaged the reasoning that supported the Trilogy’s holding, and so it is (or should be) an open question whether the Charter protects the freedom to strike. A trial-level judgment in Saskatchewan held that the *Charter* does protect the freedom to strike, but the Saskatchewan Court of Appeal overturned the judgment, holding that the Trilogy was still good law as it applied to strikes until the SCC ruled otherwise.<sup>32</sup> Leave to appeal to the SCC is going to be sought, and there are other right-to-strike cases in the works so it’s only a matter of time until the SCC will pronounce on this issue.

Given the vagaries of the SCC’s freedom of association jurisprudence, there is little point in speculating about what it might do. Nevertheless, it might be useful to think conceptually about the alternatives and their relation to Wagnerism. Of course, the SCC could confirm the Labour Trilogy as it relates to dispute resolution generally and strikes in particular and then there is nothing more to say. Indeed, it has been suggested by the Saskatchewan Court of Appeal that this is how *Fraser* should be read: freedom of association only protects the right to make representations to have those representations considered in good faith.<sup>33</sup> If that is the case, then collective labour rights generally, not just the Wagnerian version, will enjoy little meaningful constitutional protection. However, if the court is prepared to say that freedom of association requires some form of dispute resolution, then the door is open to a number of possibilities. As noted, in Wagnerism strikes and lockouts are the preferred mechanism for resolving bargaining impasses. It is the ability of a union to



threaten an effective strike that gives it bargaining power. Therefore, it might be said that the constitutionalization of the freedom to strike could properly be characterized as the constitutionalization of Wagnerism. But that is misleading in that the freedom to strike is not unique to Wagnerism but present in many, but not all, systems of industrial relations and is recognized in international law as a fundamental labour right. So the SCC could, if it chooses, protect the freedom to strike as a core feature of freedom of association, not because they are protecting a Wagnerian model of labour relations, but rather because freedom of association and the freedom to strike are intimately related in Canadian labour history (pre-dating the adoption of Wagnerism). The freedom to strike is the mechanism that makes collective bargaining effective in Canada, and the freedom to strike is recognized in international law.

Alternatively, the court may say freedom of association protects some mechanism of dispute resolution, but that the freedom to strike is only one of several possible ones and it is not the business of the court to constitutionalize any particular model of collective bargaining, Wagnerian or otherwise. But presumably the court would want to set out some principles about constitutionally acceptable dispute resolution principles, and presumably those principles would not permit the unilateral imposition of terms and conditions by the employer. Rather, we would expect to see the court say something about having a dispute resolution mechanism that provides workers with a meaningful opportunity to enjoy freedom of association, which includes the ability to influence the terms and conditions of their employment through collective bargaining. Neutral third-party binding arbitration might pass constitutional muster under this standard insofar as it provides workers with some leverage in bargaining, assuming employers would prefer not to have collective agreements written by third parties.

One last matter we might touch on briefly is whether the *Charter* would protect the labour movement against right-to-work laws. In Canada, the *Rand* formula, requiring all members of the bargaining unit to pay union dues but not be members of the union, is the Wagnerian standard. We know that the courts reject the view that freedom of association requires mandatory *Rand*.<sup>34</sup> It is also unlikely the court will hold that freedom of association prevents the state from prohibiting *Rand* or even stronger forms of union security. That element of Wagnerism will not be protected.

To conclude, it is important to recognize that not all elements that North Americans associate with Wagnerism are unique to it. Therefore, constitutionalizing particular requirements, such as the freedom to strike is not tantamount to constitutionalizing Wagnerism. Moreover, in some instances, it is appropriate to constitutionalize an element of Wagnerism, not because it is Wagnerism, but because that is what is minimally required for workers to enjoy freedom of association in the work context. That is the reason why the freedom

to engage in associational activities requires a duty imposed on employers not to engage in unfair labour practices.

But, even if the SCC upholds core elements of Wagnerism against legislative assault, or requires legislatures to enact them, it is unlikely to significantly alter the trajectory of collective bargaining in Canada. And the same conclusion also probably holds if the court rejects Wagnerism but constitutionally protects or requires some other set of fundamental labour rights, whether it be minority unionism or some bare-bones protection of concerted worker activity and the making of collective representations.

### III. WAGNERISM'S SHRINKING DOMINION

There is no shortage of articles in the United States and Canada that make the point that Wagnerism is not working well for workers (Burkett 2013; Goddard 2013; Goddard 2013). The conclusion is not new. Left critics of Wagnerism have been pointing out its limitations for decades (e.g., Fudge, Glasbeek and Tucker 1991) but were mostly ignored by industrial pluralist scholars who believed deeply in its promise. But the ranks of the believers are now so depleted that one would be hard pressed to find one. What went wrong? Again, there is a story about how the new political economy has radically changed the context in which Wagnerism operates, which hardly needs repeating. However, there is one additional point, which pluralists often resist, and that is the transformation from weak Keynesianism to strong neo-liberalism is best viewed as a class project, not the outcome of natural processes of adjustment (Harvey 2005). This has important implications for thinking about the future.

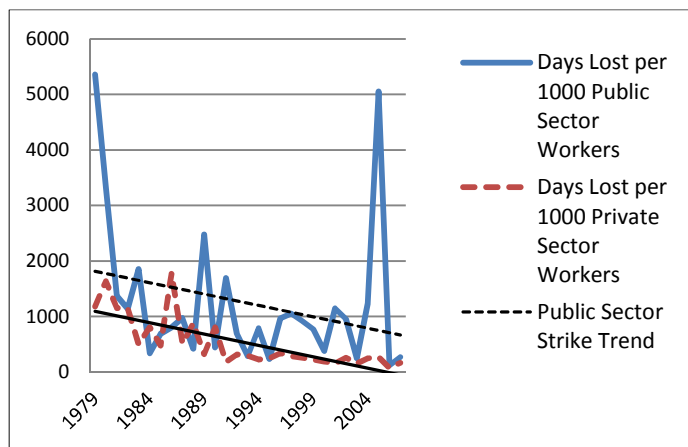
But first, Wagnerism. John O'Grady published an article in 1992, in which he predicted that private sector union density in Ontario would decline to between 16 and 17 percent by the end of the decade (O'Grady 1992). O'Grady was unduly pessimistic. In 2000, private sector unionism had only fallen to 18.1 percent. It took another four years until it dropped below 17 percent. O'Grady based his assessment on the gap between the growth in employment and the growth in union membership. He argued that the major reason why the growth of trade union membership lagged behind the growth in employment was to be found in WAM, and in particular in its definition of bargaining units and the radically decentralized process of organizing and bargaining that it entailed. Single workplace bargaining units created obstacles to organizing, especially in the small business sector where employer opposition was likely to be greater and more effective. Moreover, outside of large-scale enterprises (100 or more employees), whose share of the labour force had declined from 69 percent in 1978 to 61 percent in 1986, the costs of organizing and representing workers were large relative to the gains in membership and dues, and bargaining

strength was likely to be low, reducing the attractiveness of union coverage to potential members.

The situation for unions is now worse than when O’Grady wrote. Private sector unionization in Ontario dropped to 15.3 percent in 2012. In Canada it stands at 17.7 percent.<sup>35</sup> As well, trade union bargaining leverage has declined. While this is more difficult to document, one measure is the union wage premium. In January, 1997, the average hourly rate of unionized workers in Canada was 30.3 percent more than non-unionized workers, while in June, 2013, that had dropped to 23.7.<sup>36</sup> As well, the frequency of strikes and lockouts has plummeted, as is shown in Figure 1.

Some part of the decline can be attributed to the legislative erosion documented in the first part of this article. The shift from card-count certification procedures to mandatory elections in Ontario and much of Canada has had an impact. But even if we returned to card-counts and implemented other pro-labour reforms, including easier union access to workers, better regulation of anti-union tactics and improved remedies for unfair labour practices, it is unlikely that private sector unions could return to the densities they reached at their peak. The problems run deeper. It is the mismatch between the Wagner model in which the default is no union and in which workplaces become unionized on a site-by-site basis. The conditions that O’Grady identified have not improved significantly: the share of employment in the large business sector (100 and more) has rebounded slightly to 64 percent;<sup>37</sup> labour market churning has slightly declined (Morissette and Qiu 2013); the percentage of self-employed workers and workers holding part-time and temporary jobs has slightly increased.<sup>38</sup> Under these conditions, even when unions re-allocate resources into organizing, it is hard to gain density.

**Figure 1**  
Days Lost Per 1000 Workers, Public Sector and Private Sector, 1979-2007<sup>39</sup>



For example, in the fiscal year 2010-2011, the latest year for which data is available, private sector Ontario unions successfully certified 428 new units, bringing in 15,280 new covered employees, with an average of 35.7 employees per new bargaining unit. Of these, 48.4 percent of these newly certified units had less than 10 employees. Only 36 of these newly certified units had 100 or more employees and, of these, only 2 had more than 500 (Ontario Labour Relations Board 2011). Organizing such small units is clearly resource intensive and the likelihood of these newly certified bargaining units establishing strong and stable collective bargaining relationships is low. Moreover, over the same period of time, many unionized manufacturing firms were shutting down or shedding jobs. So the overall increase in the number of employees covered by collective agreements between 2010 and 2011 was about 8,900. Over this same period of time, the number of private sector employees in Ontario increased by about 58,900.<sup>40</sup> At the end of the day, the labour movement had just about been able to hold the line, getting 15.1 percent of the increase covered by collective agreements. Unions need to run hard just to stand still.

In short, Wagnerism's basic model—that workers must opt into collective bargaining, bargaining unit by bargaining unit, and that collective bargaining is to occur on an extremely fragmented basis—creates an organizing and bargaining model that poses severe problems for the establishment of effective trade unions. In the past, unions were often able to partially overcome these barriers in particular sectors of the economy, especially large manufacturing, resource extraction, construction and the regulated private sector. Their ability to do so today is diminished as jobs in the large manufacturing sector are being lost and fewer sectors of the economy are shielded from competition because of free trade and de-regulation. Under these conditions, fighting to preserve or strengthen Wagnerism, whether through political action or constitutional litigation may bring some amelioration, but it is not the long-term answer labour needs to reverse its declining dominion.

#### **IV. WHAT IS TO BE DONE?**

It is customary in articles announcing the death of Wagnerism to end with a section identifying legal reforms that point the way forward, but usually these efforts suffer from forced optimism. Here I come back to David Harvey's earlier observation that the ascendancy of neoliberalism is a class project not a natural process of adjustment (Harvey 2005). This is an important insight because if it is true then appeals for more labour-management cooperation or normative arguments that collective labour rights are a good thing are unlikely to have much traction. New governance theories call for big sticks to step in where self-regulation fails, but there is no prospect for big stick legislation (Estlund 2010); employer neutrality agreements are legal in Canada but are little used and the

most recent experiment with them, the Framework of Fairness agreement between the CAW and Magna, yielded nothing (Doorey 2013; Van Alphen 2011). Employee participation plans are also legal in Canada and some employers have made use of them (e.g., Magna, WestJet) but in general these arrangements have not spread much beyond joint health and safety committees that are legally required (Lewchuk and Wells 2007; Stephenson 2013); minority unions in Canada have no right to bargain for their members only (although they are free to try), but even if they gained such a right,<sup>41</sup> is there any prospect, outside perhaps of some small niches, that minority unions could bargain effectively in a decentralized bargaining regime and establish a beachhead from which strong unions could grow?<sup>42</sup>

I think a frank assessment must start from the premise that at present there is no legal solution to labour's difficulties that is within reach, politically or through constitutional litigation. We are more likely to witness legislative degradation of Wagnerism than to it being strengthened or replaced with laws that will better promote collective labour rights and constitutional litigation will likely, at best, protect thin labour rights, primarily in the public sector. This is not to say that efforts to protect existing labour rights against further degradation should be abandoned, but rather to recognize that holding on to what we've got will not fundamentally alter the trajectory of organized labour's decline.

More promising than are accounts of workers and unions trying to break out of the mould in which they have been shaped (or shaped themselves) under Wagnerism and experimenting with new ways of organizing and representing workers. In a recent article addressing the situation in the United States, Ruth Milkman has pointed growing experimentation with a diversity of organization forms and strategies that in some ways resemble the way the labour movement operated prior to the Wagner Act. Broadly defined as "alt-labour", these include worker centers, organizations of fast-food and retail workers like "Our Walmart", associations of independent contractors, etc. Notably, the immediate goal of these organizations is not to become certified bargaining agents, but rather to improve working conditions through media campaigns, boycotts and brief demonstration strikes to shame and pressure employers, and political campaigns undertaken in alliance with other community-based organizations and progressive activists to raise minimum wages to living wages or better enforce existing labour laws (Milkman 2013; Early 2013).

So it is not the case that alt-labour is abandoning legal and legislative change as a strategic objective. Rather, it is that the immediate goal is not the preservation of Wagnerism but the building of new organizational forms and strategic capacities through which workers' collective class interests can be represented and advanced outside of traditional collective bargaining. Traditional collective bargaining, of course, will continue in those sectors where

it is viable, as will struggles to protect it, but a single-minded focus on expanding union density through the Wagner Act model is no longer a viable strategy.

## NOTES

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- <sup>1</sup> With apologies to Dylan Thomas, “And Death Shall Have No Dominion,” in *The Collected Poems of Dylan Thomas* (1957).
- <sup>2</sup> Majoritarian exclusivity is the requirement that unions establish majority support of a bargaining unit to obtain bargaining rights and that once they do so they represent all members of the bargaining unit.
- <sup>3</sup> On the importance of Wagnerism’s limiting features, see Fudge and Glasbeek (1994-1995) and Adams (1994-1995).
- <sup>4</sup> *R v Saskatchewan Federation of Labour*, 2013 SKCA 43, paras. 61-65.
- <sup>5</sup> Other recent expressions of concern over the future of WAM include, Lynk (2014); Slinn (2014); Burkett (2013)(focusing on the expanded role of courts and government at the expense of labour boards); and Goddard (2013) (focusing on the strengths and weaknesses of Wagnerism that simultaneously undermine its effectiveness and the motivation of unions to seek fundamental reforms).
- <sup>6</sup> Calculated from Statistics Canada, The Labour Force Survey, June 2013. These data do not allow for a precise calculation because the percentage of the workforce in each province covered by federal law is not provided. The five provinces contain about 30 percent of the labour force, but this does not include the percentage of the labour force in the other provinces and territories that come under federal law. Overall, the federal jurisdiction is estimated to cover less than ten percent of the labour force.
- <sup>7</sup> For discussion of these changes and the current state of Ontario labour law as it affects organizing, see Bartkiw (2008). There is a further point that I will address in part 3. Banks’ is largely concerned with measuring the economic impact of free trade on labour rights, and argues that politics may be more important than economics in this regard. Leaving aside the question of the linkages between economics and politics, Banks’ discussion of economic influence fails to take into account the impact of the changing economic environment on the effectiveness of labour law. There has been a significant decline in trade union density, particularly in the private sector, during the free trade era, driven in part by changes in industry structure, employment practices and an increase in employer opposition to collective bargaining, all of which are arguably exacerbated by free trade. The fact that private sector trade union density and bargaining power is occurring without a legislative assault on trade union rights arguably reduces the demand for such action.
- <sup>8</sup> The current version of Bill 5 is Public Service Essential Services Act, SS 2008, c P-42.2 and Bill 6 was an amendment to The Trade Union Act, RSS 1978, c T-17.
- <sup>9</sup> To see Bill 85 as introduced, visit:  
<http://docs.legassembly.sk.ca/legdocs/Bills/27L2S/Bill27-85.pdf>
- <sup>10</sup> *Saskatchewan Employment Act*, S.S. 2013, S-15.1.
- <sup>11</sup> *Restoring Mail Delivery for Canadians Act*, S.C. 2011, c. 17.
- <sup>12</sup> *Ibid.*, s. 11(2).
- <sup>13</sup> *Canada Labour Code*, RSC 1985, c L-2.

- <sup>14</sup> *Protecting Air Service Act*, S.C. 2012, c. 2.
- <sup>15</sup> *Ibid.*, ss. 14(4) and 29(2).
- <sup>16</sup> *Restoring Rail Service Act*, S.C. 2012, c. 8.
- <sup>17</sup> *Economic Action Plan 2013 Act, No. 1*, S.C. 2013, c. 33, s. 229.
- <sup>18</sup> *Economic Action Plan 2013 Act, No. 2*, S.C. 2013, c. 40, Div. 17.
- <sup>19</sup> There are other changes not discussed here. For a more detailed survey, see Rootham (n.d).
- <sup>20</sup> See Benzie (2012); Brennan (2014); *An Act to amend the Canada Labour Code, the Parliamentary Employment and Staff Relations Act and the Public Service Labour Relations Act (certification and revocation – bargaining agent)*, Bill C-525. On 29 January 2014 the Bill received second reading and was referred to committee.
- <sup>21</sup> *The Toronto Electric Commissioners v Colin G. Snider and others* [1925] UKPC 2, [1925] AC 396 (20 January 1925), [P.C.](#) (on appeal from Ontario).
- <sup>22</sup> *Public Service Employee Relations Act (Alta.)*, 1987 CanLII 88 (SCC), [1987] 1 SCR 313; *PSAC v. Canada*, 1987 CanLII 89 (SCC), [1987] 1 SCR 424; and *RWDSU v. Saskatchewan*, 1987 CanLII 90 (SCC), [1987] 1 SCR 460
- <sup>23</sup> *Dunmore v. Ontario (Attorney General)*, 2001 SCC 94 (CanLII), [2001] 3 SCR 1016.
- <sup>24</sup> *Agricultural Employees Protection Act*, 2002, SO 2002, c 16.
- <sup>25</sup> *Health Services and Support - Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27 (CanLII), [2007] 2 SCR 391.
- <sup>26</sup> *Fraser v. Ontario (Attorney General)*, 2008 ONCA 760 (CanLII) and *Ontario (Attorney General) v. Fraser*, 2011 SCC 20, [2011] 2 SCR 3
- <sup>27</sup> See Tucker (2012). For the view that the OCA did not have empirical evidence of the need for majoritarian exclusivity, see Bartkiw (2009).
- <sup>28</sup> *Robert Meredith, et al v. Attorney General of Canada*, 2013 FCA 112, para. 90. The impossibility standard was also applied in *Mounted Police Association of Ontario v. Canada (Attorney General)*, 2102 ONCA 363. Leave to appeal to the Supreme Court of Canada has been granted in both cases.
- <sup>29</sup> *Ibid.*
- <sup>30</sup> The duty to bargain in good faith itself is notoriously difficult to enforce given the problematic distinction between hard bargaining, which is permitted, and bad faith bargaining, which is not (Langille and Macklem 1988). The meaning of a duty to consult in good faith is uncertain. For a recent judgment that gives that duty some teeth, see *British Columbia Teachers' Federation v. British Columbia*, 2014 BCSC 121 (CanLII). However, the case is under appeal and the lower court's declaration of unconstitutionality has been stayed. See *British Columbia Teachers' Federation v. British Columbia*, 2014 BCCA 75 (CanLII).
- <sup>31</sup> A compromise between the duty to bargain in good faith and simply a duty to listen might be that whatever process is provided it must not make it impossible for workers acting collectively to meaningfully influence workplace conditions. So, provided government action does not render a process of consultation "pointless" then it will pass constitutional muster. See Meredith, *supra.*, para. 92.
- <sup>32</sup> See *Saskatchewan v. Saskatchewan Federation of Labour*, 2012 SKQB 62 (CanLII) and *R v Saskatchewan Federation of Labour*, 2013 SKCA 43 (CanLII),

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- <sup>33</sup> See *R v Saskatchewan Federation of Labour*, 2013 SKCA 43 (CanLII) at paras. 58-59.
- <sup>34</sup> See Alberta LRB decision, *Old Dutch Foods*, <http://www.canlii.org/en/ab/ablr/b/doc/2009/2009canlii61316/2009canlii61316.html> required *Rand* as a constitutional guarantee. It was reversed on other grounds and the Alberta Court of Appeal declined to hear the constitutional argument since the case was moot. See *Alberta (Attorney General) v. United Food and Commercial Workers Union, Local No. 401*, 2010 ABQB 777 (CanLII), and 2011 ABCA 93 (CanLII) viewed on 2013-09-04
- <sup>35</sup> Calculated from Statistics Canada, CANSIM, Table 282-0078.
- <sup>36</sup> Calculated from Statistics Canada, CANSIM, Table 282-0073.
- <sup>37</sup> Calculated from CANSIM Table 281-0042.
- <sup>38</sup> Self-employment has grown from 14 percent in 1990 to 15.2 percent in 2012 (calculated from Statistics Canada, CANSIM Table 282-0012); part-time employment has grown from 17 percent to 18.8 percent over the same period (calculated from Statistics Canada, CANSIM Table 282-0002); and temporary employment increased from 11.3 percent in 1997 to 13.6 percent in 2012 (calculated from CANSIM Table 282-0080).
- <sup>39</sup> From Tucker (forthcoming).
- <sup>40</sup> Calculated from Statistics Canada, CANSIM, Table 282-0078.
- <sup>41</sup> Does anyone really expect that a Canadian legislature will enact a law compelling employers to bargain with minority unions, or believe that the courts will hold freedom of association requires private sector employers to negotiate with or consider representations from minority unions or requires government to enact legislation imposing such a duty?
- <sup>42</sup> For a positive assessment in the US context that also acknowledges the risks, see Fisk and Tashlitsky (2011).

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