Competition and Labour Law in Canada: The Contestable Margins of Legal Toleration

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In Canada, as in most advanced capitalist countries, the right of workers to engage in collective action has been partially immunised from competition law, one of the basic norms of capitalist legality. The ‘zone of toleration’, however, has been contested over time and poses a recurring regulatory dilemma that stems from labour’s commodity status in capitalism.¹ In the capitalist utopia, workers are atomised, each one competing against all others, the homo economicus par excellantes. But in capitalist reality, such an arrangement produces the tragedy of atomism.² In Polanyian terms, labour is a false commodity that is not produced for the market but is nevertheless bought and sold on labour markets as if it were a true commodity. Treating labour as a commodity results in dysfunctional consequences that produce a double or countermovement towards decommodification. In Marxist terms, labour is embodied in human beings who resist their commodification and atomisation, in part by uniting with other workers and acting collectively to improve their conditions and, perhaps, one day to create a different social order in which labour ceases to be a commodity and instead self-governing workers produce for their common needs.³ Viewed in either light, the zone of legal toleration within competition law is the product of recurring conflicts and struggles whose outcome is shaped and reshaped over time.

The core of the current zone of legal toleration confers workers with legal immunity from liability under competition law when they engage in approved collective action to improve or defend their terms and conditions of work. While that immunity was never absolute, it now protects union formation by most employees and a range of workplace-based collective actions to support collective bargaining objectives. The zone of legal toleration, however, has been contested at several margins. The first is the boundary between workers in the zone and those beyond it. Because this immunity was, for the most part, built on the contract of employment, it did not generally apply to workers who provided labour through other forms of contracting, such as self-employment. But drawing the line between employment and self-employment was always problematic at the margins and, in any event, some self-employed workers were so lacking in bargaining power that they fought for and sometimes secured coordination rights like those of Cameron Penn, third year law student at Osgoode Hall Law School provided excellent research and editorial assistance. My thanks to Stéphanie Bernstein and Harry Glasbeek for their comments on earlier drafts.


employees to enable them lawfully to bargain collectively. The second contested margin is between the sale of labour and the sale of products. In principle, the immunity is restricted to the sale of labour power, not to the sale of the commodities that labour produces, which are to remain the subject of competition laws. However, sometimes the two are not so easily separable. The wages that workers can secure are often intimately related to the price of the commodities they produce, so workers and their organisations may seek to influence product markets, sometimes in coordination with employers who are also interested in restricting competition to raise prices. Finally, a third contested margin is between the means that workers can lawfully use to make their combinations (and restraints of trade) effective and those that are prohibited. This issue manifests itself in many ways, but one that is particularly relevant to competition concerns is whether workers can engage in so-called secondary action that targets their employers’ customers and suppliers or whether they can only take action directly targeting their employers, such as picketing their employers’ business locations.

While this book is focused on competition law’s restriction of workers’ collective action, it is important to remember that competition law is only one of the ways in which law limits such action. For example, Canadian collective bargaining law is based on enterprise bargaining. Broader-based combinations by workers on an industrial, sub-national or national scale are not supported and efforts to make such combinations effective by, for example, conducting an industry-wide strike by multiple bargaining units whose collective agreements expire at different times would be enjoined and result in substantial penalties for the unions involved and discipline, possibly including job loss, for their members. None of this would be the direct result of competition law, but rather the application of labour, contract and tort law that already severely limits the scope of worker combinations. Competition law’s toleration of worker combinations is to a significant degree built on this underlying restrictive framework.

One final caveat is that this chapter does not address how competition law applies to employer combinations that set terms for the purchase of labour or to restrict workers’ access to employment as in the case of blacklists. The issue has rarely come up in Canadian competition law, but at the time of writing a class action is being brought by Tim Hortons’ employees alleging that an anti-poaching clause in the franchise contract prohibiting one franchisee from hiring employees at another violates competition law. The law, however, is far from clear. The Competition Bureau of Canada issued a statement in 2020 recognising that buy-side agreements, such as no-poaching agreements or wage-fixing agreements between employers, raise serious competition concerns, but ruled they do not violate the criminal side of the Competition Act, which only applies to supply-side agreements restricting competition. It also cautioned that buy-side agreements may not violate the civil side of the Act since such agreements must be proven to substantially prevent or lessen competition, which it states ‘is not a low threshold’. Moreover, even if a case succeeded under its civil jurisdiction, the most the Competition Bureau could do would be to bar any person from doing anything under the offending agreement. It does not have the power to impose administrative monetary penalties or award damages.4

This chapter begins with a brief history of the interaction between labour law and competition law, starting from a time in which neither of these terms had a well-defined legal referent. This is

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not to say that early modern English law was unconcerned with worker or producer combinations in restraint of trade. However, the fields of labour and competition law as they are now understood are largely the creature of statutory enactments in the late-nineteenth and twentieth centuries. Thus, it is important to understand the history of statutory enactments and their interaction, without losing sight of the common law, which retains a residual, but not unimportant, role through economic torts that impose civil liability for certain actions in restraint of trade.

However, before turning to these developments, it is necessary to clarify the Canadian constitutional framework within which labour and competition law operate. Canada is a federal state which distributes legislative authority between the national and provincial/territorial governments. At the time of confederation in 1867, however, neither labour nor competition law existed as legible categories and so were not specifically allocated to either level of government. It was only in 1925 that the courts finally determined that labour and employment law was primarily a matter of property and civil rights, a jurisdiction allocated to the provinces.5 When we turn to the law governing competition, the picture is more complex, since the law operates in three different registers. First, there is the common law, which creates civil liability for anticompetitive behaviour that it holds to be tortious. This common law may be modified by statute, and since civil liability is clearly a matter of property and civil rights, provinces have the jurisdiction to do so. However, that is not the end of the matter. Competition law in Canada also has a criminal register that originates in an amalgam of older English common and legislated law but which has now been superseded by Canadian statutory law. As criminal law is in the exclusive jurisdiction of the federal government, competition legislation has been upheld on that basis.6 Finally, there is a third register, regulatory law, which involved the creation of an investigatory commission system. Federal legislation enacted in 1919 that took this turn was held ultra vires by the Judicial Committee of the Privy Council and was replaced by legislation more in the criminal law register.7 However, when more recent federal competition law turned again toward the regulatory register, the Supreme Court of Canada upheld it on the basis of the federal trade and commerce power, a power that the court earlier read quite narrowly but which they have given broader scope in recent years.8 As a result, the federal Competition Act contains both criminal and civil or regulatory elements.

8.1 THE LABOUR EXEMPTION: HISTORY AND SCOPE

Since competition law operates in several legal registers, it is necessary to consider the labour exemption in each. For historical reasons, we begin with the criminal law. English law was received in Canadian colonies at different times but generally we can say that while the English Combination Acts of 1799 and 1800 probably never applied in Canada, it was an open question whether combinations of workers were criminal conspiracies at common law because their purpose was in restraint of trade. However, no Canadian worker was prosecuted simply for combining with other workers to increase wages or improve terms and conditions of employment. Rather, all criminal conspiracy prosecutions were for the use of unlawful means. The issue was brought to a head in 1872 when Toronto printers were charged with a criminal

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5 The Toronto Electric Commissioners v. Colin G. Snider and others (Ontario), [1925] UKPC 2, AC 396.
6 The Proprietary Articles Trade Association and others v. The Attorney-General of Canada and others (Canada), [1931] UKPC 11, AC 310.
conspiracy simply for combining, but before they could be tried, the federal government stepped in and enacted the Trade Unions Act (TUA),\(^9\) based on the English Act passed the previous year. It declared that trade union members could not be prosecuted for a criminal conspiracy merely because the purposes of the union were in restraint of trade. This sequence of events created the impression that legislative immunity was required for trade unions not to be criminal conspiracies in Canada, even though prior to the legislation no case ever held that they were.\(^10\)

While the TUA immunised union members from criminal conspiracy charges solely based on the purpose of their combinations, criminal liability remained for the use of proscribed means and, as in England, the enactment of the TUA was accompanied by the enactment of criminal legislation creating offences related to industrial conflict, such as watching and besetting.\(^11\) A detailed analysis of these laws is not required here,\(^12\) but they left trade unionists liable for criminal conspiracy charges based on the use of unlawful means, which could also include actions that were unlawful at common law. This hypothetical liability became real when Hamilton bricklayers resolved to boycott a construction project that was using stone from a quarry that locked out union members and hired a former union member who had been expelled for performing struck work. Three union members were arrested and charged with a criminal conspiracy because they used means that were allegedly unlawful at common law, even though not prohibited by statute. Following their conviction, the labour movement succeeded in getting legislation enacted that immunised workers against criminal conspiracy for a refusal to work with another worker or for an employer, unless the means used to make the boycott effective was punishable by statute.\(^13\)

To this point, we have focused on the law of criminal conspiracy, but in the late nineteenth century the common law shifted to a civil liability register through the development of economic torts, the most important for our purposes being civil conspiracies to injure. Leaving aside momentarily the branch of the law dealing with unlawful means, the position of the common law was that civil liability for combinations based on their purpose would only lie if the restraint of trade was, in the court’s view, unreasonable or undue. Therefore, not all combinations to restrain trade were tortious and the law was interpreted in Canada to permit a fair bit of coordination by industrial organisations, including punishing members who violated their restrictive agreements or boycotting traders who refused to be bound by them.\(^14\)

It was not until the late nineteenth century that Canadian employers brought common law actions against unions for damages and to secure injunctive relief. As with the criminal law, courts did not find that trade unions as such were civil conspiracies to injure. Rather, liability depended on the union’s goals and tactics. Courts held unions liable for boycotts to enforce the closed shop (requiring employers to only hire union members in good standing) and for what

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\(^9\) SC 1872, c. 30, s. 2: ‘The purposes of any trade union shall not, by reason merely that they are in restraint of trade, be deemed to be unlawful, so as to render any member of such trade union liable to criminal prosecution for conspiracy or otherwise.’


\(^11\) SC 1872, c. 31.

\(^12\) See Tucker (n. 1).


came to be characterised as secondary actions – pressuring employers by disrupting their relations with customers or suppliers. Although such actions were uncommon in the late nineteenth and early twentieth centuries, the threat of legal liability nudged unions toward an acceptance of legally defined norms of responsibility. Unions secured some immunity from civil liability through legislation, first enacted in British Columbia in 1902, and then in Ontario and Saskatchewan in the 1940s. The current scope of labour immunity from civil conspiracies and other economic torts interfering with trade will be discussed in more detail later.

The next stage in the development of Canadian competition law was the enactment of anti-combines legislation, which for historical reasons brings us back to the criminal law register. Canada’s first competition statute, enacted in 1889, weakly criminalised combinations that were unlawful at common law. Given the common law’s rather permissive treatment of combinations at the time, however, the law was replete with qualifications. It only criminalised combinations that ‘unlawfully’ and ‘unduly’ prevented, limited or lessened competition, or ‘unreasonably’ enhanced prices. Moreover, violations of the Act were misdemeanours. As such, the 1889 legislation was widely considered ineffective. For our purposes, however, section 6 of the Act dealing with labour was the most important. Rather obscure on its face, the section provided that the Act should be construed as if the section of the TUA immunising workers from prosecution for criminal conspiracies had not been enacted. Its meaning was the subject of much parliamentary debate. The Conservative government that introduced the bill insisted that section 6 was necessary to prevent commercial combinations from avoiding liability by forming themselves into trade unions, but insisted that unions of workingmen remained lawful and would not be liable to prosecution under the Act. Members of the Liberal opposition were not so sure and viewed the clause as a surreptitious measure repealing trade union immunity, which they emphasised, trade unions deserved. In the words of Senator John O’Donohoe:

Why should not the laboring classes, who have nothing but their labor for their capital, be denied protection? . . . Is not the poor man entitled to some privileges – to be something more than a mere hewer of wood and drawer of water? From what sources are the millions of capital drawn? From the bone and sinew of the poor man, and now we are asked, why should these men have any protection.

The Conservative government still insisted it did not intend to reduce, and nor would the law have the effect of reducing the TUA immunity, and the obscure language was retained.

In 1892, Canada consolidated and rationalised its criminal law into a code that incorporated the statutes discussed above. Section 516 defined a conspiracy in restraint of trade, while section 517 specified that the purposes of a trade union are not unlawful merely because they are in restraint of trade. Section 518 restated the immunity, previously enacted in 1890, protecting workers in a trade combination from being prosecuted merely for refusing to work with other workmen or for an employer, while section 519 defined a trade combination as a one between masters or workmen for the purposes of regulating their relations. Finally, section 520 created

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15 Eric Tucker and Judy Fudge, ‘Forging Responsible Unions: Metal Workers and the Rise of the Labour Injunction in Canada’ (1996) 37 Labour/Le Travail 8–120; SBC 1902, c. 6; SS 1944 (second sess.) c. 69; SO 1944, c. 54.
16 SC 1889, c. 41; Bliss (n. 14).
17 Canada, Senate Debates, 6–5, vol. 1 (29 April 1889) 646–47.
18 Canada, House of Commons Debates, 6–3, vol. 1 (6 February 1889) 19, and 6–3, vol. 2 (1889) 446–47, 1468. Although no attempts were made subsequent to the 1889 law to prosecute trade unions as criminal conspiracies, N. Clark Wallace, the law’s original promoter, introduced amendments in 1890 and 1891 to clarify that trade unions were legal. Neither was successful. See W. T. Stanbury, ‘The Legislative Development of Canadian Competition Policy, 1881–1981’ (1981) 2 Can Competition Pol’y Rec 1.

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various restraint of trade offences in relation to specified products and services, highlighting the boundary between the labour immunity and liability for restraints on trade in commodified products.\textsuperscript{19} Later, to remove any doubt that section 520 could apply to combinations of labour, the Liberal government amended the Code in 1900 to further stipulate that ‘Nothing in this section shall be construed to apply to combinations of workmen or employees for their own reasonable protection as such workmen or employees.’\textsuperscript{20} All this language remains in the Criminal Code with the exception of section 520, which was repealed in its entirety in 1960.\textsuperscript{21}

No new anti-combines legislation was enacted in Canada until 1910 when the Liberal government, under public pressure to address the growth of business combinations, enacted the Combines Investigation Act (CIA), which began the regulatory turn in competition policy. Essentially, the Act provided an investigatory process that could result in orders being issued that were enforceable by fines. But the Act was crafted to permit concentrations of wealth that were believed to benefit the public, restraining only those that were found to be harmful. Worker combinations were expressly exempt, however, through a provision stipulating that the Act shall not be construed to repeal or amend, or in any way affect, the TUA.\textsuperscript{22} The federal government’s approach to combines regulation underwent frequent amendments after 1910 and the wording of the trade union immunity was changed to accord with the immunity in the Criminal Code, which then included language that immunised from prosecution combinations of employees and workmen for their own ‘reasonable protection’.\textsuperscript{23}

The language of ‘reasonable protection’ remains in the Competition Act (although it was removed from the Criminal Code),\textsuperscript{24} but the statutory scope of the labour immunity has changed. The coverage issue arose in the mid-1950s at a time when trade unions had grown in size and strength under the auspices of Wagner Act model collective bargaining laws enacted during the Second World War and its immediate aftermath.\textsuperscript{25} These Acts applied to employees, but who was an employee? The boundary between employment and independent contracting was never sharply drawn, leaving the status of groups of workers at the margins open to interpretation. Moreover, many so-called ‘self-employed’ workers lacked bargaining power in their relations with the entities to whom they sold commodities, whether it be their services or the products they produced. As with employees, individual dependent commodity producers sometimes viewed collective action, including unionisation, as a way to overcome their weak economic position.

For example, in the 1950s, owner-operators of dump trucks engaged in hauling sand and gravel attempted to form a union affiliated with the Teamsters. Violence and disruption ensued and a commissioner, Judge Wilfred Roach, was appointed to investigate. His report, issued in

\textsuperscript{19} Criminal Code, SC 1892, c. 29.

\textsuperscript{20} SC 1900, c. 46, s. 3. The Senate removed the labour protection clause from the bill, stating that it was redundant, but Prime Minister Laurier insisted that it remain, see House of Commons Debates, 8–9, vol. 3 (3 July 1900) 8951.

\textsuperscript{21} SC 1960, c. 45, s. 21. For the current Criminal Code provisions, see RSC 1985, c. C-46, ss. 466, 467.


\textsuperscript{23} SC 1919, c. 45, s. 2(2). The meaning of ‘reasonable protection’ was raised briefly by opposition members in debates over the 1923 combines legislation, which used that language. Prime Minister Mackenzie King, who had been a key figure in crafting the 1910 legislation, replied that it had the same meaning it had always had and refused to further elaborate, because his interpretation would not, in any event, influence a court’s interpretation. See SC 1923, c. 9, s. 34; House of Commons Debates, 14–2, vol. 3 (11 May 1923) 2666; see also Mackenzie King, ‘The Canadian Combines Investigation Act’ (1912) Annals of the American Academy of Political and Social Science 149.

\textsuperscript{24} The language is in the current Competition Act, RSC 1985, c. C-34, s. 4(1).

1958, sought to reinforce the distinction between employees, who could lawfully organise, and the self-employed, who were bound by the norms of capitalist legality. He concluded that regardless of whether the drivers engaged in actions for their reasonable protection, they violated the combines laws because, as owner-operators, they were outside of the scope of the labour immunity.26

The scope of the labour immunity arose again in 1956 as the result of a complaint against a fishermen’s union in British Columbia, the United Fishermen’s and Allied Workers Union (UFAWU). Collective action by fishermen was not a recent phenomenon. Fishers on both coasts had a long history of associational activity in response to the long history of exploitation by the concentrated power of fish buyers and processors. Although their legal status varied, depending on the industry structure, some owned their own boats and were legally classified as self-employed, while others were categorised as ‘sharemen’ who were notionally partners of the boat owners. Yet it was only in 1956 that fish processors complained that the UFAWU (representing boat owners) was in violation of the CIA.27

By that time, however, many Canadian politicians had already embraced the idea that primary producers should be protected against larger buyers exercising monopsonistic power. Agricultural marketing schemes of various kinds, which licensed farm production and/or monopolised the purchase and sale of farm products by marketing boards on behalf of producers, had been enacted for many sectors across the country. These arrangements recognised that the incomes of primary producers were dependent on the price of the products they sold and that product markets needed to be administered for the benefit of primary producers and consumers rather than buyers and processors. This was restraint of trade to be sure, but these arrangements were immune from competition law because they were state-organised rather than privately arranged.28

The plight of fishing communities on both coasts also attracted attention from politicians in these regions, but fish marketing legislation had not been enacted. This left fishermen to self-organise for their own protection, making them legally vulnerable under competition law as they were outside the labour immunity. Thus, it became a political question whether the labour exemption should be extended to the fishing industry.

In 1959, the Conservative government introduced a bill to do just that. It exempted organisations of fishers and of fish processors, and their agreements regarding the price of fish and remuneration, from both competition law and the Criminal Code. The Liberal opposition made its support clear: ‘[W]e on this side of the house do not consider that this kind of collective bargaining represents a combine.’29 The Conservative government, however, was more cautious. Their legislation only provided immunity to fishermen’s bargaining in British Columbia and

28 Ontario Boys’ Wear Ltd. et al. v. The Advisory Committee et al., [1944] SCR 349. The case actually involved the Industrial Standards Act, which authorised wage orders binding on all employers within a sector and geographic zone.
was time limited to the end of 1960. Davey Fulton, the Minister of Justice, explained that the government wanted to await the outcome of the ongoing combines investigation before deciding on a Canada-wide and permanent policy.30 He seemed particularly concerned with whether this was a union of employees or an association of independent proprietors.

The investigation got bogged down in legal disputes that dragged on until the early 1980s, when the matter was apparently dropped.31 To address this situation, amendments extending the temporary fishermen immunity were enacted until 1975, when the exemption was made permanent and extended to all associations of fishermen and their agreements with fish purchasers and processors regarding the price of fish, remuneration or ‘like conditions under which fish will be caught and supplied’.32

Another group of workers directly immunised from the Competition Act by the federal government are artists, defined in the Status of the Artist Act (SAA) as authors of literary, dramatic or musical works, performers, and persons who contribute to the creation of artistic productions.33 The Act creates a framework that allows artists to form associations that can be certified as bargaining agents that can negotiate scale agreements with organisations that engage artists. As well, it allows producers to form organisations for purposes of bargaining with artist associations. To avoid conflict with the Competition Act, the SAA provides that for the purposes of the Competition Act’s labour exemption, artist associations certified to bargain on behalf of artists are deemed to be associations of employees, and agreements between producers pertaining to terms and conditions of artists’ engagement are also deemed to be exempted.34

While no other group secured direct immunity from the Competition Act,35 the issue of who should enjoy coordination rights has been addressed in provincial labour laws. As noted earlier, these Acts applied to employees, but the distinction between employees and self-employed was uncertain at the margin. Moreover, provinces were free, within limits, to extend collective bargaining rights to groups of workers who were not employees. Professor Arthurs, in an influential 1965 article, identified the problems faced by self-employed workers in these marginal positions and called for the recognition of a category of dependent contractors who would be deemed to be employees for the purposes of collective bargaining statutes.36 Over time, most Canadian jurisdictions enacted dependent contractor provisions, giving them collective bargaining rights.37

30 Ibid, 645–66 (Davey Fulton); SC 1959, c. 40.
31 The investigation has a long and tortuous history that should be the subject of a separate historical study. For a summary, see Couture v. Hewison, 1979 CanLII 705 (BC SC) <canlii.ca/t/6z4j8>, retrieved 29 August 2020. The judge held that the fishermen were exempt and the decision was upheld on appeal, see (1982) CanLII 500 (BC CA) <canlii.ca/t/23p4p>, retrieved 29 August 2020. The ruling apparently brought the inquiry to an end, twenty-six years after the initial complaint.
32 SC 1975, c. 76, s. 2. During the debate, some Conservative politicians objected to the trade union immunity or, more narrowly, demanded more restrictions on trade union activity. See House of Commons Debates, 30–1, 623, 631, 803, 824; no serious effort, however, was mounted then or since to remove the labour immunity. As to the story of agricultural combines in the US see Paul and Vaheesan, Chapter 7 in this collection.
33 SC 1992, c. 33, s. 6(2)(b); Cynthia Cranford, Eric Tucker and Leah Vosko, Self-Employed Workers Organize (McGill-Queen’s University Press, 2005) 149–83.
34 Ibid., s. 9(2).
36 Arthurs (n. 25).
37 Some platform workers, including Foodora couriers, have been recognised as dependent contractors covered by collective bargaining statutes. See Canadian Union of Postal Workers v. Foodora Inc. d.b.a. Foodora, 2020 CanLII 16750 (ON LRB) <canlii.ca/t/p3jm1>, retrieved 23 October 2020. At the time of writing, Uber Black drivers are seeking this status: United Food and Commercial Workers International Union (UFCW Canada) v. Uber Canada Inc., 2020 CanLII 54980 (ON LRB) <canlii.ca/t/94p3p>, retrieved 23 October 2020.
But did unions of dependent contractors violate competition law? After all, provinces do not have the constitutional authority to amend the Competition Act or the Criminal Code. The issue does not seem to have been judicially considered until 2006, perhaps because until then no one doubted that once the province deemed a group of workers to be employees for the purposes of its labour legislation they were also employees for the purposes of federal competition law. This was the view taken by the British Columbia Court of Appeal when the question was raised.38

8.2 THE LIMITS OF THE LABOUR EXEMPTION FOR COVERED WORKERS

The introduction to this chapter identified three margins where the scope of the labour immunity is in play. One of those was discussed in the previous section, the question of who is exempt, which is largely resolved by legislation. The focus here is on the other two margins, the boundary between restraint of trade in labour markets and product markets, and the boundary between what practices are permissible within the bounds of the immunity. However, it is also important to recall that the labour immunity exists in three registers – criminal law, regulatory law (the Competition Act) and tort law – and that the limits of the labour immunity can vary in each. Our focus will be on the domains of regulatory and tort law, since workers have rarely, if ever, been charged with criminal restraint of trade in the post–World War II era.

Beginning with the Competition Act, recall that the basic scope of immunity is limited to actions taken by workmen and employees for their ‘reasonable protection’, a term that was acknowledged by Mackenzie King to be a matter for interpretation by judges and other adjudicators. In fact, there is hardly any jurisprudence elaborating upon the meaning of that term. Professor Backhouse extensively reviewed Competition Act investigations involving labour from the 1930s to the 1970s and found relatively few.

By far, the most common reason unions were implicated in anti-combines investigations was because they entered into arrangements with employer/producer associations to control an industry in a geographic area for their mutual benefit or to limit competition from non-union firms. These arrangements were most common in construction and delivery services, and arguably were pursued as a form of broader-based bargaining, but without statutory cover, including an obligation on all employers in the sector to comply with the agreement. The enforcement of these agreements, however, was left up to the parties, for example, by refusing to do business with firms that did not abide by their terms. These agreements and the actions taken to enforce them, however, were not covered by the labour immunity both because they involved employers and because they restrained competition in goods and services, in addition to taking wages out of competition.39

The other arrangement that attracted attention from competition regulators involved attempts by unions to control product prices without the cooperation of employers. For example, in Winnipeg, Teamsters delivering bread to private homes experienced a drop in income when the price of bread in supermarkets declined. Other unionised drivers came to their aid by refusing to

38 Old Dutch Foods Ltd. v. Teamsters Local Union No. 213, 2006 BCCA 555 (CanLII) <canlii.ca/t/043w8>, retrieved 25 August 2020.
39 Constance Backhouse, ‘Labour Unions and Anti-Combines Policy’ (1976) 14 Osgoode Hall L.J. 113, 144–55. In 1999 the Competition Bureau issued an advisory opinion that a clause in a collective agreement barring unionised contractors from sub-contracting work to non-union contractors, without an agreement with the union, amounted to a ‘group boycott’ that was not covered by the labour exemption. Competition Bureau, ‘Applicability of the Collective Bargaining Exemption’ (last modified 5 November 2015) <www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/00880.html>.
deliver bread to supermarkets until they raised their prices. A combine investigation concluded the action of the drivers was not protected because it aimed to decrease price competition in the sale of bread. As well, the commissioner found the bounds of ‘reasonable protection’ had been exceeded, thus exposing the drivers to liability under the Act.40

There do not appear to be more recent combines investigations involving trade unions. In part, this may reflect the sharp decline in private sector trade union density since the 1960s.41 As a result, not only is a smaller percentage of the labour force covered by a collective agreement, but the unions that remain are weaker and less able to sustain the kinds of arrangements that once attracted regulators’ attention. Joint labour-employer regulation of an industry is rare and even pattern bargaining is on the decline. Most bargaining occurs exclusively at the enterprise level with little ability to coordinate within an industry and region.

Tort law has arguably played the greatest role in defining and enforcing the limits of the labour immunity, principally but not exclusively through the tort of civil conspiracies to injure, whether due to unlawful purposes or unlawful means. The topic is too large to cover in this overview,42 so we will touch on key developments in the post–World War II era, after the establishment of statutory collective bargaining regimes. Although collective bargaining statutes generally did not deal with strike activity, in some provinces, including Ontario, legislation was enacted that severely limited liability for civil conspiracies based on their purposes. The Rights of Labour Act, first enacted in 1947, provided that trade unions and their acts shall not be deemed to be unlawful only because one or more of its objects are in restraint of trade.43 The Act further provided that acts done by two or more members of a trade union in furtherance of a trade dispute are not actionable unless the acts would be actionable without an agreement or combination.44 However, in determining whether strikes were tortious, Canadian courts rarely relied on the statutory immunity since, in their view, the common law of civil conspiracy clearly permitted strikes against one’s own employer undertaken by trade unions for the interests of their members.45

Of course, neither statute nor common law provided trade unions with absolute immunity. Trade unions that engaged in unlawful actions to advance their interests were not protected, including strikes that were untimely according to collective bargaining statutes.46 Moreover, the judiciary was often unsympathetic to trade union activity and found ways to expand their liability by narrowing the repertoire of lawful means or re-characterising the trade union’s purposes. The locus classicus of this hostile approach was the Ontario Court of Appeals’ 1963 judgment in Hersees.47

Hersees arose out of a dispute between clothing workers recently organised by the Amalgamated Clothing Workers (ACW) and their employer, Deacon Brothers, a small


43 RSO 1990, c. R. 33, s. 2.

44 Ibid., s. 3(1).


47 Hersees of Woodstock Ltd. v. Goldstein et al., 1963 CanLII 151 (ON CA) <canlii.ca/t/gugfI>, retrieved 7 September 2020.
The ACW did not strike at Deacon Brothers to pressure them into accepting their demands, but rather sought to disrupt sales of their products through consumer boycotts and by pressuring retailers not to sell their products. The case arose when Hersees, a small clothing store in Woodstock, Ontario, then a heavily unionized town, did not honor the ACW’s request not to sell Deacon Brothers products. The union placed two informational pickets at the entrance to the Hersees store. This was clearly secondary action since it targeted a retailer, not the employer. But was it tortious? Hersees was not threatened and the picketing was peaceful, so there was no obvious use of unlawful means. There was also no current contract between Hersees and Deacon Brothers, so there was no tort of inducing a breach of contract. Finally, the goal of the action was not to harm Hersees but to pressure the Deacon Brothers into signing a collective agreement. On its face, the union’s actions seemed lawful and that was the view of McRuer, CJHC, the trial judge who dissolved an interim injunction and dismissed Hersees’ action.49

The Court of Appeal, however, saw matters differently. The court found the union had induced a breach of contract, notwithstanding the factual finding of the trial judge, and misapplied the tort of inducing breach of contract by allowing the party who had been induced (Hersees) to sue, in the absence of unlawful means. The court also found a civil conspiracy for an unlawful purpose since it was unable to see how the picketing of Hersees could be for the benefit of the employees at Deacon Bros. Finally, perhaps impatient with the technicalities of the economic torts, the court concluded that secondary picketing was per se tortious.

The right, if there be such a right, of the respondents to engage in secondary picketing of appellant’s premises must give way to appellant’s right to trade; the former, assuming it to be a legal right, is exercised for the benefit of a particular class only while the latter is a right far more fundamental and of far greater importance, in my view, as one which in its exercise affects and is for the benefit of the community at large.50

Although not all Canadian jurisdictions embraced the per se rule, most did, and even for those that did not, courts tended to prioritise the right to trade over concerted labour action and, therefore, were inclined to issue injunctions and find tort liability for most forms of secondary action by unionised workers. For example, picketing at a secondary site was held not to be an act in connection with a labour dispute and thus was not covered by legislation limiting the availability of labour injunctions.51

Admittedly, Hersees was the peak expression of the judiciary’s hostility to secondary action. Under the influence of the Charter, which does not directly apply to private disputes relying on the common law but which influences its development, the Supreme Court of Canada abolished the tort of secondary picketing in 2002, returning the common law to the wrongful action model in which picketing is only tortious when it involves tortious or criminal behaviour.52 How much scope for secondary action that leaves is uncertain since, as we saw in Hersees, a court may find the purpose of secondary picketing is to harm the business being picketed rather than to benefit the union in its dispute with an employer, leaving it liable for

49 1962 CanLII 175 (ON SC) <canlii.ca/t/gjgjbw>, retrieved 7 September 2020.
51 Domtar Inc. v. Lampi, 80 CLLC 14,025 (Ont. H.C.).
a civil conspiracy to injure, which can be enjoined even though the picketing is peaceful and otherwise lawful. On the other hand, it is possible courts will evince a more tolerant attitude since picketing is now recognised as constitutionally protected free speech. The courts have previously recognised consumer leafletting in support of a labour dispute as lawful and have held that consumer boycotts in general are lawful.

8.3 Competition Law and Workers Outside the Labour Exemption

Perhaps because of the dependent contractor provision and the extension of coordination rights to other dependent commodity producers, there are no cases under the Competition Act challenging collective action by self-employed workers. Franchisees on the other hand are not exempt from competition law; yet they too have not been subject to competition laws for engaging in associational activity. Indeed, in many provinces they enjoy a protected right to form and participate in associations. For example, in Ontario, legislation provides franchisees may join or form associations and that franchisors ‘shall not interfere with, prohibit or restrict, by contract or otherwise’ interfere with that freedom or ‘directly or indirectly, penalize, attempt to penalize or threaten to penalize’ a franchisee for exercising any right under the Act. In fact, disgruntled franchisees have formed associations and been active, including bringing lawsuits against franchisors. Tim Horton’s franchisees, for example, formed an association (now called the Alliance of Canadian Franchisees) and settled a lawsuit that required the franchisor to spend $10 million on regional and local marketing initiatives. These activities, however, have not attracted the attention of competition authorities.

Physicians are another group of workers who are mostly self-employed. Nevertheless doctors in Ontario are required by law to pay dues to the Ontario Medical Association (OMA), whether they are members or not, and by law any agreement related to compensation entered into by the OMA shall provide for dues deductions to be remitted to the association. As a matter of practice, the OMA negotiates doctors’ fee schedules with the province and disputes over the schedule are often resolved through voluntary binding arbitration. This arrangement has not attracted any attention from competition authorities, presumably because the association is bargaining with the province over provincially regulated fee schedules in a regime in which doctors are not permitted to compete over the price of their services.

56 Arthur Wishart Act (Franchise Disclosure), 2000, SO 2000, c. 3, s. 4.
59 This includes the most recent agreement which expired on 30 March 2021. See Theresa Boyle, ‘Doctors get new contract with province after 4-year battle’ Toronto Star (20 February 2019) www.thestar.com/politics/provincial/2019/02/19/doctors-get-new-contract-with-province-after-4-year-battle.html. Medical residents also bargain collectively with the Council of Academic Hospitals of Ontario, but they do so as employees and thus are within the labour exemption. The most recent agreement is available online at <myparo.ca/your-contract/#general-purpose-and-definition-of-parties>.
Another group of self-employed workers granted collective bargaining rights are home child care providers in Quebec. They are covered by a specialised regime that deems them, by law, to be self-employed. However, like Ontario doctors, they bargain over fee schedules with the province in a regime that does not permit price competition over the cost of their services to the public.\(^6\) Federal competition law therefore would not seem to be applicable.

Finally, I want to return to artists. As noted, federally regulated artists were given coordination rights and exempted from competition law. However, most artists do not fall under federal jurisdiction. Currently, only Quebec provides artists with collective bargaining rights, but unlike the federal parliament, Quebec does not have the constitutional authority to create an exemption from federal competition law.\(^6\) In theory, Quebec artists acting collectively could face liability for violating the Competition Act, but that is unlikely to occur.

### 8.4 Conclusion

It would be fair to conclude that for now the three margins where competition law and labour law meet are currently in stasis in all of competition law’s three registers. The scope of the labour exemption in the criminal and regulatory registers of competition law has changed little in recent decades. Dependent contractor provisions were enacted in most jurisdictions over fifty years ago and these provisions continue to provide labour boards with an ability to make collective bargaining available to some gig workers, as recently exemplified in the finding that platform-mediated Foodora workers were covered by the statutory collective bargaining scheme. A few other groups of workers have gained coordination rights, including federally regulated artists and homecare workers in Quebec, while doctors are able to negotiate fee schedules with the provinces and territories in most Canadian jurisdictions. There are no recent examples of self-employed workers attempting to bargain collectively outside of a statutory scheme authorising them to do so, or at least not in a way that has brought them into conflict with competition law.

It is also fair to conclude that the boundary between coordination in labour and product markets rarely arises. There are likely two reasons for this. The first is that private arrangements between unions and employers to jointly regulate a product market for their mutual advantage have largely disappeared, both because they are likely illegal and because of the decline in union strength. The second is most product market regulation is state-sponsored and therefore beyond the scope of prohibitions on restraint of trade.\(^6\)

The last margin, the actions that can be taken to make coordination rights effective, is arguably the one most in flux, but even here a fairly high level of certainty prevails. Courts have backed away from some economic torts, including the tort of secondary action, to a more traditional wrongful action approach, which nevertheless provides ample room for limiting militant trade union action. However, in recent years employers have not relied on economic torts to limit trade union actions, perhaps because unions have internalised the legal norms that limit secondary action or, perhaps, because strike frequency has sharply declined in recent


\(^{61}\) CQLR c. S-32.01.

\(^{62}\) For example, see Agricultural Products Marketing Act, RSC 1985, c. A-6.
decades. In any event, picketing disputes are more focused on the extent to which traffic can be impeded, than on the question of its location.

Of course, as history demonstrates, this stasis can be disrupted if and when groups of unprotected workers engage in coordinated market activity, or groups of organised workers attempt to control product markets or pressure secondary targets to gain bargaining leverage with their employers or hiring entities. For now, however, there is no sign of this kind of activity.