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Abstract:
Although Canada and the US have both adopted labor relations legal frameworks based on the Wagner model, labor relations has played out very differently in the two countries. This is particularly evident in the countries’ divergent trajectories of changing union density. In recent decades the US has experienced a steep, sustained decline in unionization, while Canadian unionization has seen a slow decline and overall stagnation in union density. This prompts the question addressed in this paper: will the labor relations experiences of these closely linked nations continue to diverge, or will Canada’s labor relations landscape come to resemble that of the US? This paper focuses on two alternative, but related, perspectives for explaining the different labor relations experiences of the US and Canada, offering insights into their likely futures: John Godard’s Historical-Institutionalist perspective, and Harry Arthurs’ “Real” Constitution perspectives. Past and current efforts to introduce right-to-work measures (defined broadly) and the labor movements’ recent countervailing efforts are considered in light of these perspectives. This paper concludes by considering which perspective is likely to be borne out in the context of contemporary events and, specifically, whether these attempts are likely to succeed. In short, despite the protection offered by Canada’s juridical constitution, the question remains whether its “real” constitution has undergone greater, countervailing change reflecting a fundamental shift in the nations’ norms and values such that labor law will follow.

Keywords: Right to work, labor, unions, union security, freedom of association

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Introduction

It is an interesting moment to contemplate the future of North American labor law and labor relations. Canada and the United States initially adopted similar labor relations legal frameworks, with the Canadian framework a variation of the 1935 US Wagner Act (generally referred to as the “Wagner model”). However, the Wagner model has played out very differently in the two countries. A key indicator of this is the divergent trajectories of changing union density over the last 60 years in Canada and the United States. In contrast with the severe, sustained decline in unionization in the United States, Canada experienced a longer period of growth, slower decline, and—in recent decades—a fairly stable level of unionization. Will the labor relations experiences of these closely linked nations continue to diverge, or will Canada’s labor relations landscape come to resemble that of the United States, and what might be the implications for labor law?

In addressing this question, this paper proceeds in six Parts. Part I briefly introduces the interconnected origins of United States and Canadian labor law frameworks. Part II surveys the unionization experience, reviews possible explanations for the persistent and growing divergence in union density between the two countries. Part III introduces two alternative, but related, perspectives for explaining the different

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labor relations experiences of the United States and Canada, offering insights into their likely futures. These are John Godard’s Historical-Institutionalist perspective, and Harry Arthurs’ “Real” Constitution.  

Focusing on challenges to union security arrangements, the fourth Part introduces relevant aspects of the Canadian labor relations system and considers why past efforts to introduce right-to-work (RTW) legislation have failed. Part V provides an overview of significant contemporary changes directly affecting labor relations. These include: wide-ranging efforts by right-of-center parties to achieve anti-labor legislative changes directed at financially undermining unions, restricting unions’ political voice, and promoting right-to-work legislation. This Part also considers the labor movements’ recent countervailing efforts, including: union mergers, using broader community groups to amplify unions’ political voice, and strategic voting.

The paper concludes by considering whether the Historical-Institutionalist or “Real” Constitution perspectives are likely to be borne out in the context of contemporary events and, specifically, whether these attempts are likely to succeed. In short, despite the greater protection offered by Canada’s juridical constitution, the question remains whether its “real” constitution has undergone greater, countervailing change reflecting a fundamental shift in the nations’ norms and values such that labor law will follow.

**Part I: Origins**

Development of labor law in Canada has been indirectly and directly influenced by the United States since the early 20\textsuperscript{th} century. Indirect influences include those of US corporations and US-headquartered

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4 This article employs a broad understanding of RTW, including challenges to union membership and dues payment protections, as well as requirements for union financial disclosure focusing on the purposes of union’s expenditures and time spent on matters other than collective bargaining.
unions ("international unions") operating in Canada and affecting the structures, institutions and practices of labor relations and the labor movement.\(^5\)

The most important direct form of United States influence on developing Canadian labor law arose from efforts of Canadian unions with links to US-headquartered "international unions" to pressure the federal and provincial governments to adopt labor legislation similar to the Wagner Act. As a result of the numerous international unions operating in Canada, Canadian unions and the peak labor organizations (the Canada Congress of Labour (CCL) and the Trades and Labour Congress (TLC)) were acutely aware of the advantages the Wagner Act had brought to union organizing in the United States.\(^6\) In the late 1930s, several provinces responded to this pressure by enacting labor legislation, which appeared to have been derived in whole or in part from a model labor law bill the TLC had drafted and submitted to provincial governments.\(^7\)

The federal government continued to resist intervening in labor relations with statutory regulation, which it regarded as an essentially private matter, and sought to maintain what it regarded as a neutral stance toward labor relations.\(^8\) However, growing labor militancy, the rapid and growing political success of the Co-operative Commonwealth Federation party (CCF) which had strong ties to the labor movement, and wartime demands prompted two provincial governments and, shortly thereafter, the federal government to adopt versions of the Wagner Act.\(^9\) The federal legislation, Privy Council Order 1003 (PC 1003), passed in 1944, effectively became the template for post-war labor legislation across

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\(^7\) Logan at 414-418; J. C. CAMERON & FREDERICK J. L. YOUNG, *THE STATUS OF TRADE UNIONS IN CANADA* 56 (1960).

\(^8\) Sefton, *supra* note 6 at 180.

\(^9\) *Id.*, at 189-190.
Canada.\textsuperscript{10} As Mark Thompson has pointed out, neither at the time PC 1003 was passed, nor in the 1960s and 1970s when labor legislation in Canada was modernized, was any serious consideration given to alternatives to the Wagner model.\textsuperscript{11}

The motivations for adopting the Wagner model differed between the two countries. In the United States the Wagner model was framed as an economic tool to relieve the effects of the Great Depression, while Canadian governments adopted this model as means of securing industrial stability and order during wartime and in the post-war period.\textsuperscript{12}

\textbf{Part II: Diverging Unionization Experiences}

The development of union density followed similar paths in the United States and Canada between 1920 and 1965, after which point the experiences of the two countries abruptly diverged.\textsuperscript{13} Between 1920 and the mid 1930s unionization in both nations was in the low to middle teens, with Canadian unionization rates tending to be one or two percent higher than that in the United States. The density decline in the 1920s reached its nadir with the Great Depression, followed by moderate growth during the early 1930s. Beginning in 1935, the year the Wagner Act was passed, unionization steeply increased in both the United States and Canada. This trend continued to the early 1950s, at which point union density in the United States was at 31.7 percent and at 28.4 percent in Canada. Unionization then declined slightly in both countries until the early 1960s. At this point, and thereafter, union density in Canada and the United States has been on starkly diverging trajectories. Unionization has sharply

\textsuperscript{10} Wartime Labour Relations Regulations, Dominion Order-in-Council PC 1003 (1944) (Can.).


\textsuperscript{13} Craig W. Riddell, \textit{Unionization in Canada and the United States: A Tale of Two Countries}, in \textit{SMALL DIFFERENCES THAT MATTER}, 109, 109-114, Table 4.1 and Fig 4.1. (D. Card, R. Freeman, eds., 1993).
declined in the United States, while in Canada the decline reversed and union density grew until the mid-1980s. The United States has continued to experience a steep decline to the present time, while the Canadian experience has been of moderate decline and stagnation.\textsuperscript{14}

Union membership of paid, non-agricultural workers reached peak density in Canada of 38.1 percent in 1985, while in the United States it had peaked at 31.8 percent in 1955.\textsuperscript{15} Although the overall trend, post-peak, has been declining union density, the trajectories in the two countries have been very different.

In recent decades, the Canadian experience has been one of stagnation in union density, in contrast to the steep and sustained decline seen in the United States. Current differences in unionization between the two countries is stark. In 2012, 31.5% of all Canadian employees, including 74.5% in the public sector and 17.7% in the private sector, were covered by a collective agreement.\textsuperscript{16} In contrast, 2012 data for the United States indicate that, among employed wage and salary workers, 12.5% were represented by unions; with 7.3% of private sector workers and 39.6% of public sector workers represented by unions.\textsuperscript{17}

**Explaining the Divergence**

\textsuperscript{14} Id.

\textsuperscript{15} Id. See John Godard, *Do Labour Laws Matter? The Density Decline and Convergence Thesis Revisited*, 42 *Industrial Relations* 458, 461-4 (2003) [hereinafter *Do Labour Laws Matter?] regarding the variety of measures of union density and difficulties involved in consistently measuring and comparing this phenomenon.

\textsuperscript{16} Calculations of union coverage based on *Statistics Canada, Labour Force Survey Estimates, Table 282-0078*, available at http://www5.statcan.gc.ca/cansim/a05?lang=eng&id=2820078&pattern=2820078&searchTypeByValue=1&p2=35. Note that “union coverage” includes both employees who are members of a union and employees who are not union members but who are covered by a collective agreement. Due to the prevalence of agency shop arrangements in Canada (discussed below) under which union membership is not required, collective agreement coverage is a more meaningful statistic than union membership. Note these figures include agricultural workers.

A substantial body of research has sought to explain the diverging courses of unionization in the United States and Canada.\textsuperscript{18} Most empirical studies indicate that the relatively lower union density in the United States is a product of lack of access to unionization rather than a result of lower demand for union representation.\textsuperscript{19} Many of these studies conclude that the level of worker demand for union representation in the United States is similar to, perhaps even greater than, that among Canadian workers,\textsuperscript{20} and that density in the two countries would be similar if US workers’ desire for unionization was satisfied.\textsuperscript{21}

Explanations for this divergence point to a wide range of factors including differences in political, governmental, and administrative environments; and differing managerial and labor strategies.\textsuperscript{22} Some commentators identify Canadian labor’s participation in federal and provincial social democratic parties, accounting for about two-thirds of the Canada-US difference in union density in the 1990s and that union density in the United States would have been 23 percentage points higher had this unmet demand been satisfied).

\textsuperscript{18} See Sara Slinn & Richard W. Hurd, \textit{Canada and US Labor Relations}, in \textit{Research Handbook of Comparative Employment Relations} 153 (M. Barry & A. Wilkinson, eds., 2000) for a recent review of this literature. This section draws substantially on this earlier chapter.


\textsuperscript{19} In contrast, see \textit{e.g.} See H. Farber & B. Western (2001), \textit{Accounting for the Decline of Unions in the Private Sector}, 22 J. Lab. Res., 459 (2001) (identifying declining demand for union representation among US workers as a significant explanation for falling US union density).


\textsuperscript{21} Rafael Gomez, Seymour Lipset, and Noah Meltz (2001), \textit{Frustrated demand for unionisation: the case of the United States and Canada revisited, CEPD}, 492, London, UK: Centre for Economic Performance, London School of Economics and Political Science (a 1996 survey concluding that this unsatisfied demand for union representation accounted for about two-thirds of the Canada-US difference in union density in the 1990s and that union density in the United States would have been 23 percentage points higher had this unmet demand been satisfied).

\textsuperscript{22} See supra note 18.
and the consequent political influence labor has enjoyed, with the development of a more labor-friendly legislative and policy environment.\textsuperscript{23}

In addition, stronger labor laws in Canada, relative to the United States, are commonly identified as among the key explanations for the dramatic decline in US union density and the persistent Canada-United States density difference.\textsuperscript{24} Labor law is primarily a provincial responsibility under the Canadian Constitution. Consequently, the federal government has jurisdiction over labor and employment relations only for employees of the government, Crown corporations, and specified, federally-regulated industries. This diversity of regulation, together with the Parliamentary system of government, is credited with fostering a diversity of frequently changing labor law regimes.\textsuperscript{25}

\textbf{The Charter}

Recently, application of the Canadian Charter of Rights and Freedoms (Charter), adopted in 1982, has emerged as perhaps the most distinct legal difference between the United States and Canada.\textsuperscript{26} The Charter constitutionally guarantees specific rights and freedoms including, most relevant to labor, the freedoms of association (FOA) and expression.\textsuperscript{27} However, these are not absolute guarantees. Section 1


\textsuperscript{25} See e.g. P.C. Weiler, \textit{Milestone or Tombstone: The Wagner Act at Fifty}, 23 \textit{Harv. J. Legis.} 26,31 (1986); Sack, \textit{supra} note 23, at 242. Though note that other commentators identify these features as fostering partisan and extreme changes rather than constructive evolution of labour law. See, e.g., K.M. Burkett, \textit{The Politicization of the Ontario Labour Relations Framework in the 1990s}, \textit{Can. Lab. & Emp. L.J.} 161 (1998). Arthurs, as discussed further below, contends that provincial supremacy over labour law has led to subordination of labour relations to trade and economic issues.

\textsuperscript{26} Case \textit{Canadian Charter of Rights and Freedoms, Part I of the Constitution Act 1982}, being Schedule B to the \textit{Canada Act 1982} c.11 s. 1, 2(d) (UK).

\textsuperscript{27} This article focuses on FOA rather than the freedom of expression.
of the Charter provides that rights and freedoms are subject to “such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”

During the first twenty-five years of the Charter’s life it provided little protection to labor. Notably, the Canadian Labour Congress had opted out of participating in development of the Charter, and did not seek to have labor rights entreated in the Charter.\(^{28}\) Indeed, with the exception of mobility rights, the Charter includes no labor or social rights.\(^{29}\)

In 1987 the Supreme Court of Canada (SCC) issued a “Labour Trilogy” of concurrent decisions, holding that the scope of the Charter’s FOA guarantee did not include collective bargaining or strike activity.\(^{30}\) However, in its 2007 Health Services decision the SCC expressly rejected the reasoning in the Labour Trilogy, explicitly overturning its interpretation of the FOA.\(^{31}\) Instead, the SCC declared that the FOA provides limited protection for the process of good faith collective bargaining. The SCC also indicated that labor policy was no longer to be treated as a judicial “no go” zone; that courts would no longer broadly defer to legislatures in labor matters; and that the Charter should, at a minimum, provide the level of protection found in international human rights instruments that Canada has ratified or to which Canada is a party.\(^{32}\)

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\(^{28}\) The Canada Labour Congress is the central labour organisation in English Canada, formed by the 1956 merger of the TLC and CCL.

\(^{29}\) Arthurs, *Real Constitution*, 45-6. Larry Savage characterizes this as a strategic choice to avoid conflict with labor supporters in the New Democratic Party and in the Québec Federation of Labour (the FTQ), reflecting the fragmented nature of the Canadian labor movement and social democratic politics. See Larry Savage, *Disorganized Labour: Canadian Unions and the Constitution Act*, 36 INT’L J. CAN. STUD. 145, 155-156 (2007). Arthurs surveys a variety of other explanations.


\(^{32}\) *Id.* at paras. 26, 70, 79.
The SCC revisited the Charter FOA shortly thereafter in its 2011 Fraser decision.\(^{33}\) Although the majority opinion professed to uphold Health Services, subsequent interpretation and application of Fraser has reflected a more restricted view of Charter FOA protection for collective bargaining.\(^{34}\)

Health Services was greeted in some quarters as a triumph for labor, and produced a surge of Charter litigation.\(^{35}\) Although unions’ turn towards litigation has been most marked since this decision, some commentators regard it as part of a broader strategic shift by unions towards using domestic and international litigation as an alternative to pursuing political and legislative change to combat legislative incursions on collective bargaining by governments that were increasingly hostile to labor.\(^{36}\) This litigation strategy was common in the 1980s and early 1990s, although unions’ interest in litigation had faded by the mid-1990s with consistently disappointing SCC decisions.\(^{37}\)

**Part III: Alternative Perspectives**

Another stream of literature fundamentally disagrees with the previously described explanations for the United States-Canada unionization difference. Although allowing that these other explanatory factors exist and may have some effect, these authors regard those factors as products of more fundamental, “real”, cultural, historical or institutional differences between the two countries. Two key examples of such alternative approaches are John Godard’s historical-institutionalist perspective and Harry Arthurs’ analysis of the “real” constitution.

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\(^{33}\) *Ontario (Attorney General) v. Fraser*, [2011] SCC 20 (Can.) (‘Fraser’).


\(^{37}\) Id.
Historical-Institutionalist Perspective

John Godard advocates a historical-institutionalist perspective, which looks to norms that have become entrenched in institutions through a nation’s particular formative history. These norms become structurally embedded in institutions and power structures and cognitively embedded in how actors regard institutions. This, in turn, leads to institutionalized differences in the law.38

Godard identifies the significant historical-institutional differences between the United States and Canada as the essential reason for the countries’ different unionization experiences. Godard explains that the history of the United States reflects a highly-individualistic frontier experience, giving rise to norms focusing on property rights, freedom of contract, market rights, and distrust of state authority or intervention. This, in turn, gave rise to a weak and conservative working class, conservative labor movement, general suspicion of “big labor,” and fierce employer anti-unionism.39 In contrast, Canada’s formative historical experience was marked by Upper Canada elites’ concern for preserving order and stability, development led by the fur trade, smaller companies, and the Royal Northwest Mounted Police, rather than the entrepreneurial capitalist influence in the US; and, at least in Québec, the collectivist rather than individualist influence of the Roman Catholic Church. Consequently, Canadian norms included greater acceptance of an administrative and interventionist state, valuing maintenance of the status quo, and social democratic and collectivist views.40 Godard suggests that the institutional norms and traditions that developed in Canada are more consonant with the Wagner model than those of the United States, producing a more enduring labor relations system and supporting higher union density.

38 Godard, supra note 3 at 393, 399-401.
39 Id. at 395.
40 Id. at 397-98.
However, Godard recognizes that these distinct institutions have been eroded, pointing to ongoing changes in Canadian political economy.\textsuperscript{41} Looking ahead, Godard contends that current government attacks on labor will only have permanent implications if governments hostile to labor and the norms underlying Canada’s labor relations system succeed in eroding these norms and replacing them with new beliefs, values and principles. Otherwise, the historical-institutionalist perspective predicts that policies departing from fundamental, historical norms are unlikely to persist and in time will revert to the nation’s historical trajectory.\textsuperscript{42}

The “Real” Constitution

Harry Arthurs has developed taxonomy of constitutions including what he labels the “real” constitution and the “juridical” constitution.\textsuperscript{43} Arthurs contends that a nation’s history, political economy, demographics, and resources—what he labels the “real” constitution —are the key determinants of the system of labor laws and labor relations that ultimately develop.\textsuperscript{44} The “juridical” constitution, including the Charter and constitutional litigation, are not likely to overcome these other forces, which he characterizes as the economy and societies’ “deep structures.”\textsuperscript{45} Therefore, changes in labor relations are products of shifts in the “real” constitution—economic and social norms—not the result of changes in the law.

\textsuperscript{41} Id. at 413-14.
\textsuperscript{42} Id. at 415-17.
\textsuperscript{44} Arthurs, Multiple Models at 407; Arthurs, Real Constitution.
\textsuperscript{45} Arthurs Real Constitution; Arthurs Multiple Models at 406; Harry Arthurs Constitutionalizing the Right of Workers to Organize, Bargain and Strike: The Sight of One Shoulder Shrugging, 15 CANADIAN LAB. & EMP. L.J, 373,379 (2009-2010) [hereinafter Shrugging].
Arthurs argues that the primacy of social and political forces over legal mobilization\textsuperscript{46} means that the organization of political and legal institutions become relevant as influences shaping these norms. As Arthurs points out, in Canada, these institutions tend not to favour labor and social interests. First, the distribution of powers between the federal and provincial governments gives the federal government considerable power to organize the economy but little responsibility over labor or social matters. Arthurs’ contends that this distribution of powers is ideally organized to subordinate labor and social policies to the interests of global trade.\textsuperscript{47}

Second, Arthurs points to the “institutional architecture” of Canadian governments and, in particular, those branches and ministries responsible for setting and enforcing labor and social rights. As labor ministries are diminished and reconfigured, responsibility for labor and social rights is shifted towards ministries of trade and finance such that labor and social rights are regarded as merely “residual by-product of economic policy” without inherent value.\textsuperscript{48} Finally, Arthurs notes the power of domestic and international courts and tribunals to prevent legislatures and governments from implementing labor or social policies interfering with commercial interests.\textsuperscript{49}

If the “real” constitution perspective holds, then Arthurs suggests that strong labor and social rights may be preserved if workers are sufficiently able to mobilize and protect rights through social and political campaigns. In short “‘real constitutions’ are what we make them.”\textsuperscript{50} Litigation, including constitutional litigation will not provide the protection workers seek.\textsuperscript{51}

\textsuperscript{46}Arthurs, Shrugging, at 387.

\textsuperscript{47}Arthurs, Real Constitution, at 62.

\textsuperscript{48}Arthurs, Real Constitution, at 62-63. See also Coleman, infra, on this point.

\textsuperscript{49}Id., at 63.

\textsuperscript{50}Id., at 64.

Part IV: Historical Rejection and ‘Resistance’

This paper has introduced two perspectives addressing how labor law and policy develop, and the conditions necessary for substantial change. Although the historical-institutionalist and “real” constitution perspectives differ in some regards, they share the view that the political economy is the crucial determinant. Both perspectives also recognize that attempted changes to labor and social policy may fail if they diverge too far from established norms or if changes are met with sufficient social or political resistance by citizens or workers.

This Part provides an overview of the prevalence of different union security arrangements in Canada and historical campaigns to introduce right-to-work (RTW) legislation. It then considers why these past efforts failed in relation to the historical-institutionalist and “real” constitution perspectives.

RTW legislation has failed, to this point, to gain purchase in Canada despite repeated efforts by certain industry groups (primarily construction), anti-labor organizations, and certain elements in right-of-center governments and parties across the country since at least the 1970s. Unlike in the United States, where RTW legislation is widespread, no Canadian jurisdiction has yet adopted legislation limiting union membership or mandatory dues payment. Some commentators regard this, and the widespread application of “agency shop” or “Rand Formula” union security provisions in Canada, as a vital difference in the two countries’ labor laws and a central reason for the wide divergence in union densities.\(^{52}\)

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Regarding membership provisions: “closed shop” refers to collective agreement provisions wherein the employer has agreed to hire only members of the union. “Union shop” provisions require all employees to join the union once hired (variations on “union shop” include “maintenance of membership” provisions, simply require existing members to retain membership, or “modified union shop” which doesn’t require pre-existing non-members to join, but new employees must become members and pre-existing union members must maintain membership.

Some union security provisions only address dues payment. “Check-off” provisions don’t require employees to join the union, although the employer will deduct and remit dues for union members. Some versions of these clauses require individual union members’ authorization for dues check-off. “Agency shop” (as it is more commonly called
RTW initiatives are commonly fueled by agitation over the perception of widespread “closed shop” and mandatory dues payment collective bargaining agreement provisions. However, although all jurisdictions in Canada permit closed shop arrangements, evidence suggests that it is very uncommon and is likely concentrated in the construction industry. Currently no labor legislation in Canada restricts the use of union dues although, briefly in the past, labor laws in some jurisdictions limited political uses of union dues. In contrast, existing election laws in several Canadian jurisdictions do prohibit political contributions by unions.

in the US) or “Rand Formula” provisions, as they are generally referred to in Canada, don’t require employees to join the union. However, all employees in the bargaining unit are required to pay union dues or the equivalent, whether or not they join the union. Commonly the Rand Formula provision is accompanied by a provision for automatic employer dues check-off for all employees in the bargaining unit (See George W. Adams, Canadian Labour Law 14.200-230 (1993); Michael MacNeil, Michael Lynk & Peter Englander, Trade Union Law in Canada para. 2.90 (1994).

See Adams, supra note 52 at 14.200-230.

See MacNeil et al, supra note 52 at paras. 2.90, 2.100.

Note that in this article the terms “collective agreement” and “collective bargaining agreement” are used interchangeably.

A 2007 review of union membership provisions in Canadian collective agreements covering 500 or more employees found 7.5 percent provided for closed shop, while 40.7 percent were “open shop”, containing no membership requirement provisions. (Anthony Giles & Akiyah Starkman, Collective Agreement, in Canadian Labour and Employment Relations 283, 295 (Morley Gunderson & Daphne Taras, eds., 2009)).

Notably an earlier, 1989, survey of major non-construction industry collective agreements found only 1.0 percent of agreements contained closed shop provisions. These findings suggest that closed shop arrangements are uncommon outside the construction industry. In terms of dues provisions, 46.9 percent of agreements contained a Rand Formula provision, while 46.5% contained another form of dues check-off provision. (MacNeil et al, supra note 52 para. 2.100 Citing David Arrowsmith & Melanie Courchene, The Current Industrial Relations Scene in Canada 1989: Collective Bargaining Reference Tables 75 (1990)).

In Manitoba there existed a short-lived requirement that unions establish and apply a procedure to consult individual bargaining unit employees prior to using union dues for defined political activities (Labour Relations Act, C.C.S.M. c. L10, s.29.1 (en. 1996, c. 32; rep 2000, c. 45, s.4), s.76.1 (en. 1996, c. 32, s.15; rep. 2000, c. 45, s. 17) (Can.)). See Adams, supra note 52 at para. 14.370

Also see MacNeil et al, supra note 52 at para. 3.370-380 regarding prohibitions in labour legislation on use of union dues collected via dues check-off arrangements for political purposes that existed in the provinces of British Columbia and Prince Edward Island in the 1960s but were repealed in the 1970s.

See e.g. In the federal jurisdiction the Canada Elections Act, S.C. 2000, c. 9, s. 404(1) (Can.) (prohibiting trade unions from making financial contributions to election campaigns); in Manitoba The Election Financing Act, CCSM, c E32, s. 33 (Man.) (prohibiting election campaign contributions by “[a] person or organization, other than an individual normally resident in Manitoba”); the Québec Election Act, RSQ, c E-3.3, s.87 (Que.) (limits election contributions to “electors”, the definition of which does not include unions); and, the Nova Scotia Elections Act,
Right-of-center political parties in Canada have supported various RTW initiatives in discussion papers and platforms, and unsuccessfully introduced RTW bills. These are commonly introduced as private members’ bills, even where the party is in power, likely as a means of distancing the government from the issue. However, the RTW issue has generally been regarded as too divisive and likely to alienate constituents and voters to become an issue these parties are prepared to seriously pursue. Right-of-center governments have declined to pursue RTW because of concern over the labor unrest doing so would provoke.  

Right-of-center government leaders have also decisively rebuffed RTW drives. For instance, at the 1977 party convention, Alberta Progressive Conservative Premier Peter Lougheed opposed a RTW resolution, stating that the province was not a “class society” and cautioning the Party that it must represent a “consensus” view of Albertans, rather than cater to a single occupational group. The government also repeatedly assured the Alberta Federation of Labour that it did not intend to allow RTW in the province. Nonetheless, Premier Lougheed was prepared to take strong positions on labor law that were viewed as anti-labor, if not contrary to the Charter.

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SNS 2011, c 5, ss. 234(1) and 246(1) (NS.) (prohibits political contributions except as permitted by the Act; permits only “individuals”, the definition of which does not include unions, to make contributions).

57 For e.g.; in 1977 the Manitoba government declined to study RTW proposals in the face of the Manitoba Federation of Labour’s threat to call a general strike (Errol Black & Jim Silver, The Threat of Right-to-Work Laws and the Need for Social Solidarity, CANADIAN CENTRE FOR POLICY ALTERNATIVES (August 28, 2012), http://www.policyalternatives.ca/publications/commentary/threat-right-work-laws-and-need-social-solidarity); in the mid-1970s the Ontario PC government examined US RTW legislation and considered prohibiting closed shops, but preferred not to resort to legislation because it would alienate labour (End to closed union shops studied, LONDON FREE PRESS, Oct. 14, 1976 at 4).


59 ALBERTA FED’N OF LAB., SO-CALLED RIGHT TO WORK (1978)

60 E.g., in the mid 1980s, anticipating that the S.C.C. would rule the legislation to be contrary to the Charter, Premier Lougheed threatened to employ the notwithstanding clause in Constitution to protect provincial legislation denying Alberta public sector workers the right to strike (Alberta Hansard, No. 69 at 1680 (17 November 1983); The Honourable Peter Lougheed, Why a Notwithstanding Clause?, Points of View/Points de Vue, No. 6, 1998 at 10, available at http://ualawccsprv.ualberta.ca/ccs/images/points-of-view/Lougheed.pdf).
That same year a RTW resolution to ban closed shops failed to pass at the British Columbia Social Credit party convention.\textsuperscript{61} Both Social Credit Premier Bill Bennett and the Minister of Labour had publicly opposed RTW and the Minister vigorously opposed the convention motion, later stating that had the motion passed he still would not have recommended RTW legislation.\textsuperscript{62} A subsequent leak of the Minister’s letter to the Missouri Labor and Industrial Relations Commission enquiring about the state’s RTW referendum threatened to be a “political bombshell” in the upcoming provincial election.\textsuperscript{63} Concern over igniting labor unrest restrained this otherwise notoriously anti-union government from contemplating RTW.\textsuperscript{64}

Meanwhile, in Ontario in the mid-1970s the Progressive Conservative (PC) government examined US RTW legislation and considered prohibiting closed shop collective agreement provisions. However, the Ministry of Labour indicated that it preferred not to resort to legislation because it would alienate labor, and would rather reach some agreement on the issue with unions.\textsuperscript{65} Later that fall, a resolution supporting RTW was endorsed by delegates to the annual convention of Provincial Building and Construction Trades Council of Ontario.\textsuperscript{66} However, by the end of that decade, and motivated by several bitter first contract disputes centering on union security, the PC government introduced an amendment to the province’s general labor legislation imposing mandatory dues checkoff, the “Rand Formula” as the default union security provision.\textsuperscript{67} RTW did not become an issue again in this province until the next century.

\textsuperscript{61} B.C. Socreds reject ‘right-to-work’ law, VANCOUVER SUN, Nov. 28, 1977.
\textsuperscript{62} Id.; Rod Mickleburgh, B.C. Fed plans campaign to fight right-to-work laws, VANCOUVER SUN, Nov. 17, 1977.
\textsuperscript{63} John Clarke, Leaked right-to-work letter may be political bombshell, GLOBE AND MAIL, 17 Mar 1979, at 8.
\textsuperscript{64} John Clarke, Right-to-work battle heats up, GLOBE AND MAIL, Jun. 10, 1978.
\textsuperscript{65} End to closed union shops studied, THE LONDON FREE PRESS, Oct. 14, 1976 at 4.
\textsuperscript{66} Trades resist right to work, DAILY COMMERCIAL NEWS, NOV. 9, 1976, at A3.
\textsuperscript{67} Bill 89, An act to amend the Labour Relations Act (Ont.); Compulsory Dues Checkoff Now Law in Ontario, L.A.N. PUBLICATIONS, June 1980, Vol. 6, No. 6 at 1. Notably, Dr. Robert Elgie, the former Labour Minister responsible for Bill
The most serious consideration to date given to RTW in Canada occurred in Alberta in 1995. Responding to a private members’ bill asking the government to examine RTW, which passed by a single vote, the PC government established a committee of the Alberta Economic Development Authority to study the matter. The Committee was headed by a former PC Minister of Labour, Elaine McCoy, and included government, business, and labor representatives. Not only did the current Minister of Labour oppose labor law reform, but most employers and employer groups making submissions to the Committee opposed RTW on the basis that it would unnecessarily damage labor-relations stability. The Committee unanimously rejected RTW. It concluded that introducing RTW offered few economic benefits, and would likely produce labor relations instability.

On occasion, RTW proposals have been employed by right-of-center parties in election campaigns. However, these have not led to legislative change, even when that party won the election. For instance, the 2000 and 2003 re-election platforms of Mike Harris’ PC government in Ontario included a variety of anti-union planks, including proposals targeting mandatory union dues, restrictions on use of dues, and union membership requirements. Nonetheless, and even though the PCs won both elections, the PC government did not even introduce any such amendments to the province’s labor legislation.

89, recently expressed dismay over current interest in RTW legislation in Canada, characterizing it as the first step in the destruction of free market collective bargaining (Tim Armstrong, Remembering the remarkable Bob Elgie, The Hamilton Spectator, May 09, 2013.


69 Id. at 80-81; Allen Ponak, Yonathan Reshef and Daphne Gottlieb Taras, Alberta: Industrial Relations in a Conservative Climate, in BEYOND THE NATIONAL DIVIDE: REGIONAL DIMENSIONS OF INDUSTRIAL RELATIONS, 267, 287-88 (M. Thompson, J. Rose, and A. Smith, eds., 2003).

70 Id. at 288.

The positions taken by these right-of-center leaders and governments in response to RTW efforts can be interpreted as reflecting the “Red Tory” tradition in Canadian politics, a notion that has been described as “’alien’ to the American mind.”\footnote{Gad Horowitz, \textit{Canadian Labour in Politics} (1968) at 10. This suggestion will be contentious, particularly as regards identifying Bill Bennett or the modern Social Credit party with Red Toryism.} As vividly explained by Gad Horowitz:\footnote{\textit{Id.} at 23.}

...At the simplest level, [a Red Tory] is a Conservative who prefers the Co-operative Commonwealth Federation / New Democratic party to the Liberals, or a socialist who prefers the Conservatives to the Liberals, is a conscious ideological Conservative with some “odd” socialist notions ... or a conscious ideological socialist with some “odd” tory notions. The very suggestion that such affinities might exist between Republicans and socialists in the United States is ludicrous enough to make some kind of a point.

... The tory and socialist minds have some crucial assumptions, orientation, and values in common, so that \textit{from a certain angle} they may appear not as enemies but as two different expressions of the same basic ideological outlook.

Union security questions, raising the specter of RTW, have only been addressed twice by the SCC: the 1991 \textit{Lavigne} decision and the 2001 \textit{Advance Cutting} decision.\footnote{\textit{Lavigne v. OPSEU}, [1991] 2 S.C.R. 211 (Can.); \textit{Advance Cutting & Coring Ltd.}, [2001] 3 S.C.R. 209 (Can.).} Notably, both cases were decided in the Trilogy era. \textit{Lavigne} involved a claim that a statutory provision permitting negotiation of Rand Formula dues check-off provisions violated the Charter’s FOA and freedom of expression guarantees. Considering the FOA claim only, the SCC unanimously found no FOA violation where dues would be used only for the purposes of collective bargaining. Three justices held that a freedom of non-association is not Charter protected; while four recognized a freedom of non-association as a Charter protected freedom.
However, the opinions reflected very different views of the importance of the purpose of dues expenditures among the justices recognizing a protected freedom of non-association. Justices LaForest, Sopinka and Gonthier held that in the context of use of union dues for purposes other than collective bargaining, the impugned provision constituted a violation of the freedom of non-association, but concluded that this violation was saved by Section1 of the Charter on the basis that the infringement was minimally impairing, and made it possible for unions to participate in economic, social and policy discourse. In contrast, Justice McLachlin held that the purpose of dues expenditures was not relevant because the purpose of the freedom of non-association is to provide freedom from ideological conformity, and regardless of the use to which the dues were put, simply paying union dues did not demand ideological conformity. In sum, the SCC’s judgment found the provision to be constitutionally valid.

The Lavigne decision is notable for its explicit distinction between United States and Canadian constitutional guarantees of freedom of association including recognition of the importance of the Charter’s section 1, distinguishing the United States approach to union dues collection, recognition of the importance of industrial peace ensured by collective bargaining and union security, affirmation of unions as democratic organizations, and recognition of unions’ role in Canadian democracy.75

The second decision, Advance Cutting, involved a challenge to Québec construction labor legislation that effectively imposed a “union shop” by making union membership a condition of employment in the industry, as violating the Charter FOA. Although the SCC upheld the legislation in a 5 to 4 decision the individual opinions were far less supportive of strong union security provisions than had been the case in the earlier Lavigne decision. Eight justices recognized a freedom of non-association, and five held that mandatory union membership violated this freedom. Four of these five found that this violation could not be saved by Section 1, while the fifth concluded that it was a reasonable limit justifiable under

75 Id.
Section 1. Therefore, this provision was upheld by the slenderest of margins.

Unlike Lavigne this decision produced unanimous recognition of a freedom of non-association.

Nonetheless, as in Lavigne, the Advance Cutting decision again explicitly affirmed unions’ valuable and legitimate role in democratic discourse.\footnote{76 Advance Cutting, supra note 74.}

In short, the historical experience in Canada has been that RTW and associated proposals to limit collection or expenditure of union dues have failed to take root. Industry and other groups have not succeeded in convincing governments, including right-of-center governments responsible for other wide-ranging and significant anti-labor legislation, to pursue or implement RTW or restrictive dues legislation. The long history of such efforts indicates that even right-of-center governments and parties in Canada have a tradition of respecting a diversity of views on labor, the role of labor, and, especially, the value of labor peace and the labor movement’s capacity to mobilize in protest. It was this “real” power of labor, and the power of social norms and institutions, including the Red Tory tradition, rather than legal or constitutional protections that has historically blocked adoption of US-style RTW legislation.\footnote{77 Although the Charter came into effect in 1982, the Bill of Rights existed and could have been applicable.}

Part V: Revival and Resistance

This Part provides an overview of significant contemporary changes directly affecting labor relations. These include wide-ranging efforts by right-of-center parties to achieve anti-labor legislative changes directed at financially undermining unions, restricting unions’ political voice, and promoting right-to-work.\footnote{78 Writing in 2010, Debra Parkes addressed legislative and other developments at that time, observing that “the Rand formula, while not under direct attack, is by no means sacrosanct in the political realm” (Debra Parkes, The Rand Formula Revisited: Union Security in the Charter Era, 34 Man. L.J. 223.)} It is followed by a consideration of whether Charter litigation or the labor movement’s recent countervailing efforts are likely to successfully resist this renewed wave of anti-union and RTW efforts.

\footnote{76 Advance Cutting, supra note 74.}
In short, despite the greater protection offered by Canada’s juridical constitution, has its “real” constitution undergone greater, countervailing change reflecting a fundamental shift in the nation’s norms and values such that labor law will follow?

Recent years have seen a new wave of activist organizations and right-of-center political parties aggressively pursuing a variety of anti-union (including RTW) legislation and policies at the federal and provincial levels. Governments’ role in, and reception to, these initiatives are markedly different from past experiences.

Federal Level

The federal Conservative Party of Canada (CPC) government, a right-of-center government in power since 2004 and holding majority government since 2011, has recently introduced a succession of anti-union bills. These include: provisions fundamentally restructuring collective bargaining for Crown corporations to increase Treasury Board control over negotiating mandates, bargaining, and collective agreements embedded in a lengthy and complex omnibus bill; a CPC private member’s bill affecting many workers in the federal jurisdiction, replacing card-check certification with a mandatory representation vote, raising the threshold necessary for a successful certification vote, and resetting the default outcome of a decertification vote to decertification; an omnibus bill including significant amendments to grievance and interest arbitration schemes, granting the government unilateral power to designate essential services, and limiting bargaining dispute resolution procedures.

Although these bills met with some resistance from the labor movement and the opposition, they had the clear support of CPC members of parliament and senators. However, with a final piece of legislation,

80 Bill C-525, Employees’ Voting Rights Act, 2013 (Can.).
Bill C-377, there are has been strong resistance from within the CPC party and from CPC statesmen such as Senator Hugh Segal.

Bill C-377 is one of the most direct legislative attacks on unions Canada has seen and it is regarded as laying the groundwork for RTW legislation. The CPC government has been pursuing passage of Bill C-377 since fall 2011.\textsuperscript{82} Introduced as a CPC private members’ bill, it clearly has the Prime Minister’s support.

C-377 requires all “labour organizations” (including unions and other organizations such as councils and congresses) and “labour trusts” to report detailed financial information to the Minister of Finance. The Ministry will make this information publicly available, including in a searchable format on a Ministry website. Contravention of these requirements would be a summary conviction offence, attracting a fine of $1000 per day of non-compliance, to a maximum of $25,000. C-377 would require unions to disclose a great deal of information revealing how they spend their funds and the amount of time key individuals spend on different activities. The clear purpose of C-377 is to provide anti-union groups and governments with detailed information about union activities and expenditures in order to challenge the legitimacy (and perhaps legality) of unions’ use of union dues for purposes outside narrow labor relations purpose and, more broadly, the legitimacy of unions’ participation in activities beyond the immediate workplace.

Although C-377 passed the House of Commons in December 2012 with no CPC Minister of Parliament voting against the Bill, it met significant resistance in the Senate, including from prominent Senators in the CPC Caucus. Primary among these was CPC Senator Hugh Segal.

Senator Segal strongly objected to C-377 in the Senate, denouncing it as “[b]ad legislation, bad public policy and a diminution of both the order and the freedom that should exist in any democratic, pluralist

\textsuperscript{82} Bill C-377, An Act to amend the Income Tax Act (requirements for labour organizations), 2011 (Can.) was introduced, in its first incarnation, as Bill C-317 in October 2011. However, it failed at first reading because it was found to be improperly before the House. It was subsequently reintroduced as Bill C-377, An Act to amend the Income Tax Act (labour organizations), 2011 (Can.) in December 2011.
and mixed-market society” and contended that this Bill “is not who we are as Canadians. It is time this chamber said so.” Senator Segal’s remarks, set out at some length below, reflect and invoke the traditional Red Tory conservatism and recognition of unions as legitimate—and valuable—participants in democratic dialogue:

As a Tory, I believe that society prospers when different views about the public agenda, on the left and the right, are advanced by different groups, individuals and interests. Debate between opposing groups in this chamber, in [the House of Commons] and in broader society is the essence of democracy. Limiting that debate as to scope and breadth is never in the long-term interest of a free and orderly society.

Senator Segal objected to C-377 as contrary to the values of Canadian conservatism:

... The conservatism I absorbed and supported from leaders like Daniel Johnson—the father, not the son—Jean-Jacques Bertrand and Jean Charest in Québec; John Robarts and Bill Davis in Ontario; Bob Stanfield in Nova Scotia and Ottawa; Peter Lougheed in Alberta; Richard Hatfield in New Brunswick; Angus MacLean in Prince Edward Island; and Brian Mulroney and Stephen Harper in Ottawa is an inclusive view of society, where there is room in the debate about our economic choices, preferences and future in this country for all.

Hobbling one part of the debate is not what mainstream Conservatives should ever want to do to legislators at any time. There will be agreements, disagreements on occasion, difficult strikes and challenging choices. However, the civility of that debate is sustained by how open it is to all who are legitimate stakeholders in any economic

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84 Id.
outcome. Trade unions and public sector unions are part of those stakeholders, and they are legitimate.

Conservatism in the Canadian Tory context is not about the protection of class or the oppression of labour by capital or capital by labour; it is about a freedom tied to mutual respect, whatever legitimate disagreements, between all the participants in the mixed free-market system. This bill before us, whatever may have been its laudable transparency goals, is really—through drafting sins of omission and commission—an expression of statutory contempt for the working men and women in our trade unions and for the trade unions themselves and their right under federal and provincial law to organize.85

In mid-June 2013 the Standing Senate Committee on Banking, Trade and Commerce reported to the Senate, noting “the vast majority of testimony and submissions raised serious concerns about this legislation”. 86 Five provinces, reflecting a spectrum of political parties in power, brought objections to the Committee. 87 As described by the Honourable Senator Cowan, Leader of the Opposition in the


Numerous individuals (including law professors), organizations (including the Canadian Bar Association, the Federation of Law Societies, and the Canadian Association of Labour Lawyers), the Privacy Commissioner of Canada, and five provincial governments raised serious concerns with Bill C-377 before the Senate Committee. The Privacy Commissioner of Canada was among the objectors, citing privacy concerns over the scope of disclosure and provision of individual’s names (Jennifer Stoddard, Privacy Commissioner of Canada, “Appearance before the Senate Standing Committee on Banking, Trade and Commerce on the Study on Bill C-377, An Act to Amend the Income Tax Act (requirements for labour organizations).” May 29, 2013, available at [http://www.priv.gc.ca/parl/2013/parl_20130529_e.asp](http://www.priv.gc.ca/parl/2013/parl_20130529_e.asp)).

87 Representatives of Nova Scotia and Manitoba (each with NDP governments) testified before the Committee. Minister of Labour from Ontario (Liberal government), New Brunswick (Progressive Conservative government), and Québec (Parti Québécois minority government) filed written submissions with the Committee; Proceedings of the Standing Senate Committee on Banking, Trade and Commerce, Issue 36 - Evidence (Jun. 6, 2013), available at
Senate: “All [of these provinces] said that the bill is not constitutional, is not needed and would negatively disrupt labour relations in the province.... Not one province wrote in or sent a representative to argue that the bill is a constitutional exercise of federal jurisdiction and should be passed.”^88

Thereafter, Senator Segal successfully proposed amendments to C-377 limiting the Bill’s application with more than a third of the PC caucus voting in favour. However, the Prime Minister prorogued Parliament shortly thereafter, and reintroduced Bill C-377 in Senate, in its original form and without the Segal amendments, the day after the new session commenced in October 2013.^89

The CPC’s fall 2013 convention provided more evidence that the values of the federal CPC party have shifted decisively away from Senator Segal’s Red Tory values. At the convention six anti-labour policy resolutions were passed. Several overlapped but, in summary, included: supporting greater union financial reporting requirements, including requiring unions to detail budget allocations to “political donations, donations to media organization, and to political activism and campaigns”; permitting union members to opt out of union dues allocated to donations to media organization or political uses or activism; preventing mandatorily collected dues from being used to fund political causes unrelated to the workplace; modifying the Party’s statement of policy to provide that the CPC “believes that mandatory union membership and forced financial contributions as a condition of employment limit the


^89 At the time of this writing, Bill C-377 is at first reading (for the second time) in the Senate.

economic freedom of Canadians and stifle economic growth”; and explicitly calling for right to work legislation.91

Ontario

The PC Party of Ontario currently serves as the Official Opposition. The Liberal Party has formed the government since 2003, although only winning a minority government in the 2007 and 2011 elections. The PCs, under leader Tim Hudak, have adopted an aggressive anti-union approach, including explicit support for RTW and associated policies and a series of bills reflecting these priorities.

The Party’s policy explicitly includes eliminating legislative support for union membership or dues as a condition of employment, employer dues check-off, and introducing statutory requirements for unions to publicly disclose detailed financial information.92 Similarly, at the Party’s recent policy conference, a resolution to seek to end mandatory union membership passed with the support of 53% of voting delegates, although some delegates were concerned about alienating voters with such anti-worker policies.93

The PC party has also introduced a series of bills (none of which passed) proposing anti-labor amendments to the OLRA centering on provisions dealing with union membership and dues.94 These bills proposed restricting dues check-off provisions to funds used for the purpose of collective bargaining; removing explicit statutory permission for parties to negotiate certain union security and

91 Id.
94 Bill 71, Defending Employees’ Rights Act, 2010 (Ont.); Bill 78, Defending Employees’ Rights Act (Collective Bargaining and Financial Disclosure by Trade Unions), 2012 (Ont.); Bill 64, Defending Employees’ Rights Act (Collective Bargaining and Financial Disclosure by Trade Unions), 2013 (Ont.).
deeming any such terms provisions to be void; and requiring every union that is party to a collective agreement (whether certified or not) to file detailed financial information with the Minister of Labour which then would be made publicly available.

The provincial Ontario PCs also introduced bills proposing broader anti-labor amendments to the OLRA including eliminating unions’ exclusive representation in bargaining by making collective agreements binding only on union members;\(^{95}\) prohibiting card-check and remedial certification; \(^{96}\) extending the campaign period in representation votes; restricting strikes in the construction industry; replacing the Ontario Labour Relations Board’s (OLRB) authority to determine practice and procedures with regulations made by the Lieutenant Governor in Council; introducing a right to appeal OLRB decisions; making OLRB members and officers, the Minister of Labour, and any Ministry officials compellable witnesses before a court or tribunal; \(^{97}\) shifting the burden of proof in all unfair labor practice complaints to the employer,\(^{98}\) and limiting bargaining rights in the construction sector.\(^{99}\)

**Resistance: Charter Litigation**

As discussed earlier Charter litigation has been a tool labor has resorted to in the past in the face of hostile governments, policy, and legislation. While the early years of the Charter offered little support to labor, the 2007 *Health Services* decision reinvigorated the Charter as a possible means for protecting and perhaps even advancing labor rights.

\(^{95}\) Bill 64; Bill 78.

\(^{96}\) Bill 62, *Defending Employees’ Rights Act (Certification of Trade Unions)*, 2013 (Ont.); Bill 94, Labour Relations Amendment Act (Bargaining Units and Certification of Trade Unions), 2013 (Ont.).

\(^{97}\) Bill 63, *Labour Relations Amendment Act (Ontario Labour Relations Board)*, 2013 (Ont.).

\(^{98}\) Bill 94, Labour Relations Amendment Act (Bargaining Units and Certification of Trade Unions), 2013 (Ont.).

\(^{99}\) Bill 73, Fair and Open Tendering Act (Labour Relations for Certain Public Sector Employers in the Construction Industry), 2013 (Ont.); Bill 74, Fairness and Competitiveness in Ontario’s Construction Industry Act, 2013 (Ont.).
In a well known 1992 article, Brian Etherington identified three streams of commentary regarding the Charter’s prospects for reforming labor law: liberal romantics (optimistic about the Charter’s potential to defend labor law from excessive government incursions); realists or skeptics (wary of neoliberal interpretation and application of the Charter to defeat existing protective labor legislation); and pragmatic pluralists (though concerned about appropriateness of courts as a forum for deciding labor policy issues, optimistic that courts would only intervene when appropriate).\textsuperscript{100} He left it open whether the realists or pluralists would be proven right, concluding that only romantics were consistently disappointed by the Charter.

Although \textit{Health Services} was cause for some romantic revival, many commentators, including Etherington, remained skeptical and greeted the decision with strong criticism.\textsuperscript{101} Harry Arthurs, among the most prominent Charter skeptics, may also be fairly described as skeptical of the prospects of constitutions in general—at least juridical constitutions—for advancing or protecting labor and social concerns.\textsuperscript{102} He views courts and, therefore Charter litigation, as an undesirable forum for addressing labor issues, contrasting courts’ belief in “normativity to transform reality” with the economic and social forces producing legal norms.\textsuperscript{103}

Moreover, Arthurs is critical of the juridification of public life through Charter litigation.\textsuperscript{104} He contends the Charter has negatively affected social interests: diverting marginalized groups’ scarce resources


\textsuperscript{101} See \textit{e.g.}: Etherington, \textit{supra} note 3; Beth Bilson, \textit{Was Health Services a Mistake? The Supreme Court Decision in Fraser v. Ontario} 55 SUP. CT. L. REV. (2d) 285 (2011); Fudge, \textit{supra} note 35; Eric Tucker, \textit{The Constitutional Right to Bargain Collectively: The Ironies of Labour History in the Supreme Court of Canada}, 61 LABOUR/LE TRAVAIL 151, (2008); Brian Langille, \textit{The Freedom of Association Mess: How we got into it and how we can get out of it}, 54 McGILL LAW JOURNAL 177 (2009).

\textsuperscript{102} See, \textit{e.g.}, Arthurs, \textit{Real Constitution, supra} note 3 at 45-46; Arthurs, \textit{Shrugging}; Arthurs \textit{Multiple Models}.

\textsuperscript{103} Arthurs, \textit{Shrugging, supra} note 45 at 379-80.

away from direct action and political solutions into Charter litigation; diverting public resources from social programs to legal proceedings; emphasizing adversarial over informal procedures; transforming corporations into rights and freedoms wearing citizens; weakening the activist state; and fostering neoliberalism. Arthurs also concludes (in part based on empirical research that constitutions don’t produce significant social, economic or political change) that “... constitutions count for something; but not that much.”

In addition, as outlined earlier, Charter rights and freedoms, including FOA, are not absolute. The tests courts apply when ruling on Charter rights and freedoms, and justifiable limitations on these, are suffused with social and cultural norms and value judgments. Furthermore, they are subject to change as these norms and values develop. In Health Services, for instance, in rejecting the rationale underpinning the Labour Trilogy, the SCC stated that: “... a review of the jurisprudence leads to the conclusion that the holdings in the [Labour Trilogy cases]... can no longer stand. None of the reasons provided by the majorities in those cases survive scrutiny. ...” In essence, the SCC was driven by a new conception of the role of labor relations to reverse two decades of jurisprudence.

Finally, Charter rights and freedoms are also subject to the Section 1 “saving” section, which provides that these rights and freedoms are “subject ... to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.” Although vague, and granting the courts enormous discretion over fundamental freedoms, Section 1 has been described as “arguably one of the most important statements of [Canada’s] democratic polity.” Notably, Section 1 was incorporated into

105 Id.
107 Health Services at para. 36.
the Charter in deliberate distinction from the absolute guarantees in the US Bill of Rights, out of concern that excessive protection of liberty would jeopardize Canadian values of community and representative democracy.\textsuperscript{109}

The “\textit{Oakes test}” used to determine whether Section 1 is satisfied sets out a two-step test.\textsuperscript{110} The first branch asks whether the violation has a pressing and substantial objective. The second branch asks whether the means of achieving the objective is proportional, based on whether the means is rationally connected to the objective, whether it minimally impairs the right or freedom, and whether there is proportionality between the violation and objective. The \textit{Oakes} test is a factual, contextual inquiry with social and cultural norms engrained in each branch of the test. Consequently, the Section 1 saving provision is a powerful mechanism which, in its grant of judicial discretion, may serve to incorporate values into the application of Charter protections.

Recalling the \textit{Lavigne} and \textit{Advance Cutting} cases introduced earlier, a shift in the SCC’s views towards favoring recognition of a freedom of non-association clearly developed in the decade between the decisions. The decisions plainly (and often explicitly) incorporated social values into both the interpretations of the FOA and, most crucially, into application of the Section 1 saving provision. It is not at all certain that if similar issues came before the Court today that they would be met with similar results.\textsuperscript{111} In part, this may be due to shifting social values which could lead to a very different application of Section 1. Indeed, \textit{Advance Cutting} would have had the opposite result—finding an unjustifiable violation of the freedom of non-association—had a single justice not concluded that the impugned provision satisfied the \textit{Oakes} test.

\textsuperscript{109} \textit{id.}, at 166.

\textsuperscript{110} \textit{R. v. Oakes} [1986] 1 S.C.R. 103 (Can.).

\textsuperscript{111} See Mendes, \textit{supra} note 108; Etherington, \textit{supra} note 35; Bilson, \textit{supra} note 101.
Therefore, Charter litigation is an uncertain strategy for labor to resort to in resisting the current tide of anti-union efforts.\textsuperscript{112}

Resistance: Labor Mobilization

A second form of labor resistance that has appeared is mobilization in the form of strategic union mergers. In August 2013 two of Canada’s largest private sector unions, the Canadian Auto Workers union (CAW) and the Communications, Energy and Paperworkers Union of Canada (CEP) merged to create a new union, “Unifor.” Unifor is now the largest private sector union in Canada, representing over 300,000 workers across 20 sectors of the economy, and with a significant public sector presence.\textsuperscript{113}

The overarching goal of this merger was to establish a strong, militant union with strategic organizing and bargaining strengths, and with social unionism as its animating philosophy.\textsuperscript{114} Rather than a defensive move or “desperate act,” CAW and CEP insist that this initiative is a “positive opportunity” to respond to the challenging economic and political climate and the associated decline in union power, and marks renewal and revitalization of the union movement.\textsuperscript{115}

Unifor regards the breadth and depth of its presence across the country and across several key industries as a source of strength in bargaining power, in pursing industrial and economic strategies promoting good jobs in these sectors, and in responding to government policy and initiatives relating to structural and technical changes in these industries. Unifor regards this as crucial for certain federally regulated sectors undergoing significant reform.\textsuperscript{116}

\textsuperscript{112} Nonetheless, it is important to recognize that not all union security provisions will be subject to Charter scrutiny. Those existing in private sector collective agreements, for instance, will clearly be beyond Charter review.


\textsuperscript{114} \textit{Id.}, at 18-19.

\textsuperscript{115} \textit{Id.}, at 5-6, 8.

\textsuperscript{116} \textit{Id.}, at 10-11.
Unifor plans to focus on organizing, including prioritizing increasing representation in leading industries and geographic areas where it already has a substantial presence; and a new emphasis on corporate campaigns and use of neutrality agreements which, to this point, have not been a prominent feature of the Canadian labor relations landscape. Another innovative strategy is the creation of “Community Chapters” open for membership to a broad array of “workers” who are not in a certified or voluntarily recognized bargaining units. Goals of the Community Chapter strategy include increasing Unifor’s membership, building its credibility with the public as benefiting all workers, providing a means for training future union leaders, and supporting organizing efforts among these workers. In this way Unifor hopes to set the foundation for future successful organizing campaigns and “build a culture of collective action and union solidarity” within non-unionized workplaces and among unrepresented workers.

A second significant union merger was also attempted in 2013. The Telecommunications Workers Union (TWU), representing about 13,000 workers, primarily in the federally regulated telecommunications sector, proposed merging with the United Steelworkers of Canada (USW), one of Canada’s largest unions, representing approximately 225,000 workers predominantly in the private sector. This merger was also motivated by the unions’ desire to strengthen their bargaining power and political voice, and

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118 CAW CEP Proposal Committee, supra note 103 at 33; Unifor, supra at 7.
119 CAW CEP Proposal Committee, supra note 103 at 29; Unifor, supra note 117 at 11.
121 Unifor, *supra* note 117 at 11.
specifically to secure greater influence over federal labor policy.\textsuperscript{123} However, the TWU member vote on the merger failed by less than 3%. Although the merger will not proceed the unions will continue to participate in the strategic alliance they established in 2010.\textsuperscript{124}

The lack of corporatist institutions has been identified as an important reason why Canada is more susceptible to the effects of globalization than are many other countries, and why labor is disadvantaged in addressing increasingly centralized government authority and policy making. William Coleman points, in particular, to the failure of labor to create organizations that are vertically integrated, highly representative, and cross class boundaries.\textsuperscript{125}

Although the Unifor and USW-TWU mergers may overcome some of the problems created by the mismatch between federal and provincial jurisdiction relevant to economic and labor relations issues identified by Arthurs, it will likely only be effective in a few federally-regulated industries where the unions have a high degree of both breadth and depth of representation. It is unlikely to bring substantial benefits at the provincial level of law and policy making. Most fundamentally, neither merged union represents a substantial portion of the public sector. Given that nearly 75 percent of unionized workers in Canada are in the public sector, a union that does not represent a large proportion of these workers cannot be the type of highly representative, vertically integrated organization Coleman describes. Therefore, while these mergers may marginally increase collective bargaining power, and perhaps substantially in certain sectors, they are not likely to mark a significant revitalization of the labor movement.

\textbf{Resistance: Strategic Politics}

\textsuperscript{123} \textit{id.}


A third dimension of labor resistance takes the form of strategic labor politics. Unions in Canada have been formally allied with federal and provincial level social democratic political parties since the founding of the CCF in 1932. In recent decades, these political parties have primarily been the federal and provincial New Democratic Party (NDP), founded in 1961 as an alliance between the CCF and the Canada Labour Congress (CLC), and in Québec, the Parti Québécois (PQ). Some commentators credit the political leverage these alliances provided with Canadian unions’ success in obtaining a favorable legislative environment for labor.126 For a time, these appeared to be vital partnerships, particularly following the tensions of the 1970s and 80s, arising from government restraint and anti-inflation policies, when organized labor made great efforts to realize its political influence. However, by the mid-1990s, these alliances showed growing strain and even rupture. There has been a growing view within parts of the NDP that, as one commentator describes it: “the NDP was doing labour a favour, that socialism could exist without labour and that labour, not socialism, was the problem in the NDP’s not being able to attract the working and common people . . . .”127 Notably, for its 2012 federal leadership convention the NDP eliminated its practice of reserving a quarter of votes for affiliated labor unions.128 At the same time, many within organized labor regard the NDP as having betrayed workers and unions and removed their political voice with a rightward shift on economic and social policies.129 These divisions have produced strategic voting campaigns, new Liberal-union alliances, and public ruptures of NDP-union alliances.

Beginning with Ontario labor’s rejection of the provincial NDP party after a disastrous term in government ending in 1995, we have seen very public and determined repudiation by labor of its former political ally including segments of labor breaking from their traditional support for the NDP and PQ in federal and provincial elections, and urging members to engage in strategic voting for other parties and candidates. Strategic voting campaigns attempt to avoid having the vote split among non-right-of-center parties. Generally this involves supporting Liberal candidates where the NDP or PQ candidate is weak.\textsuperscript{130} In short: voting for the party most likely to defeat the right-of-center candidate in that riding.

A related strategy has been the formation of multi-union organizations to endorse Liberal candidates and engage in election advertising. These include the Ontario Election Network, composed of the CAW, several public sector unions, and building trades unions; and the Working Families Coalition (WFC), including teachers unions and the Ontario Nurses’ Association, which have been very active in recent provincial Ontario elections.\textsuperscript{131}

Not all of organized labor favours strategic voting, and this division was very apparent in the 2006 federal election. The CLC chose not to formally support any party or candidate, instead urging members to vote based on issues that affect workers.\textsuperscript{132} Meanwhile the British Columbia Federation of Labour continued its traditional support of the NDP.\textsuperscript{133} In contrast, CAW President Buzz Hargrove publicly supported the incumbent Liberal government in most of the country while also urging Québec union members to vote for the Bloc Québécois as it was more likely than Liberals to defeat the Conservatives

\textsuperscript{130} Id., at 76.

\textsuperscript{131} The Ontario PC Party unsuccessfully challenged the legality of the WFC’s advertisements in the 2007 Ontario provincial election, under the Election Finances Act, R.S.O. 1990, c. E.7 (Ont.), claiming it was effectively the agent of the Ontario Liberal party (\textit{PC Ontario Fund v. Essensa}, 2012 ONCA 453 (Ont.)). The PCs recently introduced an unsuccessful private members’ bill aimed at preventing election advertising by organizations such as the WFC by limiting third party election advertising expenses where the advertising takes a position on any issue with the legislature’s competence (Bill 101, \textit{Special Interest Groups Election Advertising Transparency Act, 2013} (Ont.)).


\textsuperscript{133} Id.
Québec. In response, the NDP revoked Hargrove’s party membership, and the CAW then publicly broke with the NDP, directing its members not to support the party. The USW has publicly criticized the CAW’s action as short-sighted and has continued to support the NDP.

In addition to likely weakening the NDP, as Larry Savage points out, “the strategic voting approach demonstrated that the labor movement could not speak with a unified voice, let alone its own voice, on the question of labor’s political vision.”

**Part VI: Conclusion**

John Godard’s historical-institutionalist, and Harry Arthurs’ “real” constitution perspectives offer a means of interpreting historical and current RTW initiatives and assessing whether, unlike in the past, anti-labor changes will succeed in taking root in Canada. Should this be the case, then Canada’s labor relations and unionization will likely come to resemble that of the United States, marked by sharp, continued decline. If, however, these efforts fail to establish lasting change Canada may continue to trace its own experience with the Wagner model.

The RTW issue is one that, especially in Canada, exists at the tension point between the juridical and “real” constitutions, and challenges some of the nation’s longstanding social, political, and institutional norms. It may prove to be an example of the overwhelming power of the “real” constitution, and shifts in values and norms to define our labor law and policy. This may be a point of historical departure for Canadian labor.

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134 *Id.*


137 Savage, *supra* note 129 at 79.
Godard is optimistic about the durability and resilience of Canadian historical-institutionalist values that have determined how the Wagner model has played out in this country, while Arthurs is more pessimistic about the overwhelming power of changes in the real constitution. Although labor is engaged in an array of strategic resistance, it is not clear that it will be sufficient to once again succeed against anti-labor forces.

It would be rash to attempt to predict the outcome of these simultaneously complex and subtle events. Godard’s optimism may be realistic; Arthurs’ pessimism may be warranted. As these events play out we will learn whether, despite the greater protection offered by Canada’s juridical constitution, a lingering Red Tory influence, and labor’s resistance, the nation’s “real” constitution, institutional norms, and values have undergone greater, countervailing change such that labor law will follow?