

# **‘CAN’T GET THERE FROM HERE’: THOUGHTS ON THE IDEA OF LABOUR LAW REFORM IN THE 21<sup>ST</sup> CENTURY<sup>1</sup>**

**[THE SEFTON-WILLIAMS LECTURE, UNIVERSITY OF TORONTO, NOVEMBER 2023]**

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## **INTRODUCTION**

It’s a great honour for me to be invited to give the Sefton-Williams lecture. I never met Larry Sefton of course, but I did meet Lynn Williams a few times, including at past Sefton lectures. It seems fitting that I should find myself back here at the University of Toronto giving a lecture named after two great leaders of the United Steelworkers. I completed my two degrees in labour relations at University of Toronto more years ago than I want to recount, including an M.I.R. degree at the Centre for Industrial Relations. Those degrees served as a launching pad to a legal career that led me to the Steelworkers’ legal department, where I worked as law student, then an articling student, and then eventually as Canadian legal counsel after some years at a labour law firm in Vancouver, where I also did legal work for District 3 of the Steelworkers. So, my roots dig deep with both the Centre and the Steelworkers.

I’d also like to acknowledge Leo Gerard, and the exciting new Leo Gerard Chair in Collective Bargaining that is being formally introduced tonight. Leo won’t likely recall this, but he once saved me from almost certain death or paralysis when he grabbed me by the scruff of my suit collar as my chair was falling backwards off an elevated stage at a Steelworkers’ national conference in Ottawa. That was probably 25 years ago, but I can still remember Leo muttering something about “damned lawyers” (he used more colourful language) as I gathered myself back on the stage. Brad James, former Director of the Steelworkers’ organizing department was there and insists to this day that Leo was saving the chair.

Finally, by way of introduction, I’d like to acknowledge that my mother is in the audience. We descend from a family of coal miners in north England, so she still hasn’t entirely come to grips that her son is a lawyer. About 30 years ago, my mom audited a history class in World War II at the University of Toronto, just down the street from here. She sat in the front row and tried her best not to interrupt the professor with stories of her childhood outside Manchester during the War and her time as a child labourer sewing military uniforms in her early teens, gas mask at her side. Mom is set to turn 95 early next year. In fact, my first experience with employment law came when we sued Eaton’s on behalf of my mom when the company downsized her after 25 years’ employment a few months short of her retirement date. Eaton’s caved and paid out her salary and

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<sup>1</sup> This essay is a fleshed out version of the Sefton-Williams Memorial Lecture, which was presented at the University of Toronto, Hart House, on November 30, 2023.

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benefits, but I learned an important lesson about the limits of law and the role of power in employment law. That experience led me into a life in labour and employment law.

### I. THE FAMILIAR STORY: RISE AND FALL OF THE WAGER MODEL

I’m also a labour law nerd, so I have been attending Sefton-Williams lectures for many years. I think the first lecture I attended was by Professor Paul Weiler in 1989, when I was still an undergraduate industrial relations student.<sup>2</sup> Weiler was home from Harvard to sound the alarm that the ongoing collapse of collective bargaining in the United States would soon migrate north. Private sector union density in the U.S. had fallen from nearly 35% in the 1950s to a mere 15% by 1989. Weiler predicted in his Sefton lecture that private sector union density would continue its decline in the U.S. until it leveled off at about 5% by 2020. This prediction turned out to be prescient. Today, private sector union density in the U.S. sits at about 6%.

At the time of Weiler’s Sefton lecture, private sector union density in Canada was approximately 24%, down from 34% in 1960 and falling. However, despite this trend, Weiler noted that there remained a “rather comfortable sense of self-satisfaction” in Canada that collective bargaining would avoid the hollowing out witnessed in the U.S..<sup>3</sup> Weiler argued that this belief was misguided, and he was correct, as he usually was on matters of comparative labour law. In the years since Weiler’s lecture, private sector union density has more than halved in Canada. Today, only about 15 percent of private sector workers in Canada are unionized, the same level of coverage in the U.S. when Weiler was describing American labor law as “an elegant tombstone for a dying institution” in the 1980s (Table 1).<sup>4</sup>

**TABLE 1: PRIVATE SECTOR UNION DENSITY, CANADA, 1961-2022**

Year	Private Sector Union Density
1961	33.8%
1970	32.2%
1980	29.3%
1987	24.2%
1998	19%
2009	16.2%
2014	15.9%
2022	15.1%

Source: B. Eiden, *Labor and the Class Idea in the United States and Canada* (Cambridge U. Press, 2018), 277-279.

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<sup>2</sup> P. Weiler, “The Representation Gap in the North American Workplace” (Sefton Memorial Lecture, 1989) (“Representation Gap”).

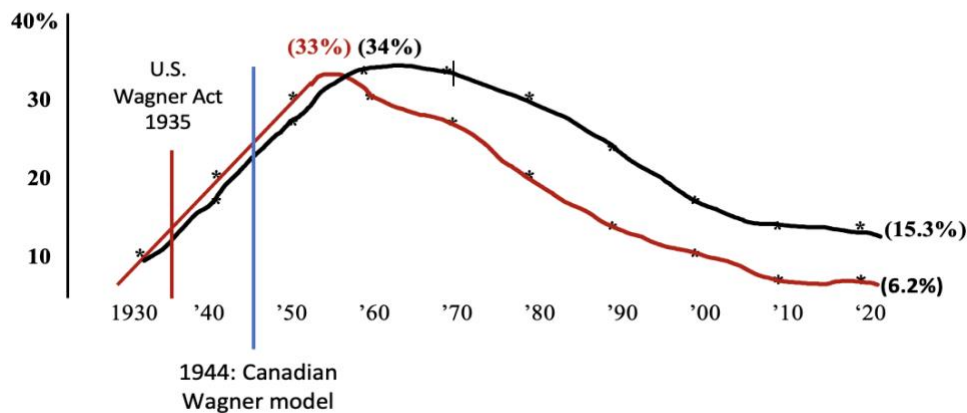
<sup>3</sup> *Ibid.*, at 8.

<sup>4</sup> P. Weiler, “Promises to Keep: Securing Workers’ Rights to Self-Organization Under the NLRA” (1983) 96 *Harvard L. Rev.* 1769, at 1769.

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The collapse of private sector collective bargaining in Canada has followed the same downward trajectory as in the United States (Figure 1). Simple extrapolation suggests that, barring a significant and unexpected transformation in the Canadian industrial relations system, Sefton-Williams’ lecturers in the future will be talking about private sector collective bargaining largely in historical terms, as an institution that used to be important. Collective bargaining will survive in the public sector and in some legacy industrial workplaces but will have little to no relevance anywhere else.

Figure 1: **U.S. AND CANADA: PRIVATE SECTOR UNION DENSITY, 1930-2020**



As this audience will know, Canada imported the American model of collective bargaining, known as the ‘Wagner model’, in the 1940s, but with some variations. In his influential scholarly work in the 1980s and 1990s on reforming the American Wagner model, Weiler argued that some Canadian-inspired reforms could dramatically improve collective bargaining’s fortunes south of the border. His thesis was that the Canadian version of the Wagner model was more resilient and favourable to union organizing and collective bargaining than the U.S. version. Weiler’s work inspired a movement in the U.S. to Canadianize the Wagner model, such as by speeding up the unionization process, giving teeth to labour board remedies, and strengthening the right to strike.<sup>5</sup>

However, speaking to a Canadian audience in his 1989 Sefton lecture, Weiler was much more pessimistic about the future of collective bargaining under the Wagner model in both countries. He noted that while it was not difficult to dream up “ingenious refinements” to the Wagner model, ultimately Weiler was “dubious” that any reforms to that model would reverse the downward trajectory in private sector union density in the two countries.<sup>6</sup> Weiler’s conclusion was that Canadian labour law should begin a transition towards something different and he focused on the idea of mandatory joint labour-management councils that would behave like our long-standing Joint Health and Safety Committees in Canada. In his proposed model, every workplace with

<sup>5</sup> Ibid. Also P. Weiler, *Governing the Workplace: The Future of Labor and Employment Law* (Harvard U. Press, 1990)

<sup>6</sup> Weiler, Representation Gap, *supra* note 1 at 25.

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greater than, say, 20 employees would be required to establish an “Employee Participation Committee” (EPC) that would consult over important matters related to working conditions. Weiler emphasized that it would be crucial that law ensure some meaningful employee participation in the workplace, since very few workers will be able to access Wagner-style majority, trade union collective bargaining.

In subsequent years, various other Sefton lecturers also addressed the decline of collective bargaining in Canada’s private sector. The next lecture I attended, in 1991, was by Professor George Adams, who would serve as Chair of the OLRB before becoming a judge and then one of Canada’s leading mediators.<sup>7</sup> Adams, like Weiler, noted the sharp decline in collective bargaining in Canada and he recommended that governments think about creating industry level associations that would meet with government and labour movement representatives in occasional “economic summits” to begin a movement away from the enterprise level bargaining structures that dominant North American labour relations. Yet, Adams and other Sefton lecturers in the 1980s and 1990s were still interested primarily in the question of how to strengthen the Wagner model so that more employees could gain access to meaningful collective bargaining.

## II. SEEING PAST THE WAGNER MODEL

However, debates over how to reform the Wagner model are no longer very interesting. These debates have largely degenerated into rote restatements of long-standing proposals that split largely along partisan political lines. I label these proposals the *Standard Reform Playbook* (SRP). A non-exhaustive list of SRP rules includes:

- Rules about how employee support for collective bargaining is measured (Card-check versus mandatory votes, etc.).
- Rules that strengthen or weaken the remedial powers of labour boards.
- Rules regulating the use of replacement workers during strikes and lockouts. (See current debates about the federal government’s proposed ban on replacement workers).
- Rules governing union access to workers for the purpose of organizing, including access to employee lists, employee contact information, and the workplace to conduct employee meetings.

The defining feature of SRP rules is that they tinker around the edges of the Wagner model while leaving the fundamental architecture of that model in place.

We have been arguing about SRP rules for decades. Noted labour neutral Kevin Burkett in his 1998 Sefton lecture identified the early 1990s as the moment when labour law reform became highly partisan and politicized and went off the rails.<sup>8</sup> Since then, the labour relations actors have anticipated that each newly elected government will reward their supporters by swinging the labour

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<sup>7</sup> G. Adams, “Towards a New Vitality: Reflections on 20 Years of Collective Bargaining Regulation” (1991), 20 Ottawa L. Rev. 139

<sup>8</sup> K. Burkett, “The Politicization of the Ontario Labour Relations Framework in the Decades of the 1990s” (1998), 6 CLEJLJ 170

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law pendulum back to one side or the other. Unions expect (small l) liberal governments to reform the Wagner model to strengthen collective bargaining while employers expect (small c) conservative governments to do the opposite, in an ongoing game of one-upmanship, all justified under the unhelpful and misleading political rhetoric of “restoring balance” to labour law.

This regressive pattern of law reform will probably continue for years to come, and people will behave as if the SRP reforms are hugely important. And at a micro-level, in terms of any individual union organizing campaign or round of collective bargaining, sometimes they will be. But as we have seen, when we step back and look at the big collective bargaining picture in Canada, what we see is a persistent and ongoing decline in the reach of collective bargaining since the 1980s under the Wagner model. In hindsight, all the big, heated debates that have preoccupied governments and the labour relations community in labour law reform for nearly a half century have barely made a lick of difference to the fortunes of Canadian private sector collective bargaining. We have lost sight of the forest for the trees.

The Wagner model long ago reached its apex as a legal mechanism to extend the reach of collective bargaining and has been in decline ever since. The challenge for labour law reform in the 21<sup>st</sup> century is not how to reform the Wagner model, but what comes next.<sup>9</sup> Every century develops its own labour laws and nearly a quarter way into the 21<sup>st</sup> century we continue to cling to a fading legal relic designed for a 1930’s era economy dominated by a predominantly male workforce employed full-time in large goods-producing industrial workplaces. Today, about 80 percent of Canadians work in services rather than the good-producing sector and the Wagner model is, predictably, irrelevant to most of them.

We have (finally!) reached the subject of my talk, which is *how do we get from here to there?* Although collective bargaining coverage in the private sector under the Wagner model today reaches only 15 percent of private sector workers in Canada and has never reached much more than a third of those workers, the model nevertheless holds a powerful normative grip on the psyche of governments and the labour relations actors.<sup>10</sup> This makes it hard to see past the model. Moreover, in these highly partisan times, when employers fiercely resist any reform intended to extend the reach of collective bargaining to more workers, and when even unions can’t agree on what new models of collective bargaining would or should look like, how could we expect any government to move forward with a dramatically new legal model of collective bargaining? And even if a government did have the vision and fortitude to introduce something novel into Canadian labour law, there’s good reason to believe that law would have a short shelf-life, probably lasting only until such time as a new political party assumes power with a different ideological outlook. Therefore, my talk is entitled *The Idea of Labour Law Reform* because I want to address not only

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<sup>9</sup> I have explored this theme in several publications, including especially D. Doorey, “Graduated Freedom of Association: Worker Voice After the Wagner Model” (2013) *Queens L.J.* 500; D. Doorey, “Reflecting Back on the Future of Labour Law” (2022) *U. of Toronto L.J.*

<sup>10</sup> B. Langille, “Why are Canadian Judges Drafting Labour Codes-and Constitutionalizing the Wagner Act Model?” (2010) 15 *Canadian Labour and Employment Law Journal* 101-128; R. Adams “The Agricultural Employees Protection Act is (Still) Not Working. Why?” *Law of Work* blog (July 3 2020): <https://lawofwork.ca/the-aepa-is-still-not-working-why/>.

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what the future of labour law might look like, but rather whether transitioning away from the Wagner model is a feasible political project at all.

### III. WHY COLLECTIVE BARGAINING? WHY NOW?

Of course, there are many people who would welcome the extinction of private sector collective bargaining. A segment of the corporate lobby and their allies have been preaching for decades that collective bargaining and laws that facilitate it are “job killers” and no longer needed or welcomed in these enlightened times of global trade. These arguments ignore fundamental historical lessons. Collective bargaining coverage is a bell weather for all sorts of important social, political, and economic measures. There are good reasons why in the aftermath of WWI and again after WWII the victorious allied nations, including Canada as a prominent participant, created the International Labour Organization (ILO) to promote collective bargaining as a cornerstone of a new world order with the mission of avoiding a repeat of the horrors of the past.

The 1919 Treaty of Versailles that established the ILO recognized that world peace can only be established “if it is based on social justice.” Following WWII, the 1944 ILO Declaration of Philadelphia declared that ‘Labour is not a commodity’ and that freedom of association and collective bargaining are essential to sustained progress that produces a healthy economy and society. In the proximity of war, the world’s leaders understood clearly that workplace democracy and strong collective bargaining structures were essential countermeasures to the rise of fascism, authoritarianism, and social and economic polarization. Collective bargaining was singled out as a necessary counterbalance to the tendency under capitalism for economic and political power to consolidate in the few at the expense of the many, a recipe for political instability, conflict, and authoritarianism.

Yet we appear, once again, to have forgotten these crucial historical lessons. Collective bargaining coverage has declined significantly throughout much of the world. In Canada, as in other countries, as collective bargaining coverage has declined, the share of wealth going to the top 1% of income earners has increased substantially (See Figure 2). The International Monetary Fund, the Bank of Canada, and the International Labour Organization are among the organizations that have acknowledged with alarm the relationship between declining collective bargaining coverage and expanding income inequality.<sup>11</sup>

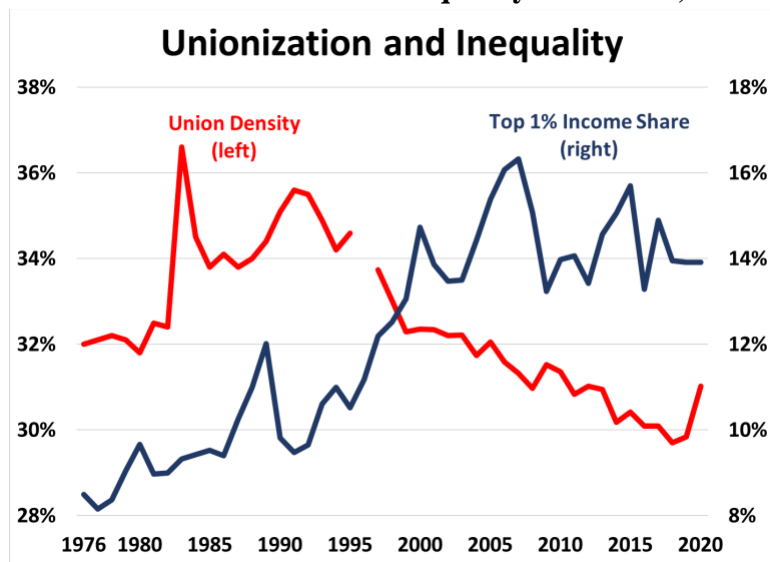
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<sup>11</sup> See e.g. Bank of Canada (2022), *Income Inequality in Canada* (Discussion Paper, 2022-16): <https://www.bankofcanada.ca/wp-content/uploads/2022/07/sdp2022-16.pdf>; Jaumotte, F. & Buitron, C. (2015). “Power from the People”. IMF, Finance and Development, <https://www.imf.org/external/pubs/ft/fandd/2015/03/pdf/jaumotte.pdf>; International Labour Organization (2008). *World of Work 2008: Income Inequalities in the Age of Financial Globalization*. [https://www.ilo.org/public/libdoc/ilo/1920/20B09\\_18\\_engl.pdf](https://www.ilo.org/public/libdoc/ilo/1920/20B09_18_engl.pdf)

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Rising economic inequality erodes confidence in core public institutions and contributes to an environment of alienation, anger, and social and political polarization. We are once again at a moment in history when democracy and freedom are threatened by the rise of authoritarianism fueled by growing popular alienation and feelings of anger and helplessness as the concentration of wealth and power consolidates in a declining proportion of the population. Social conflict and political and social polarization are on the rise. We are experiencing a crisis of collective voice, worker power, and civic agency, and a collective amnesia about fundamental historical lessons learnt. In this climate, governments should be encouraging greater collective voice and collective bargaining to counteract these dangerous forces, but there is little evidence that is happening. Certainly not in Canada.

**Figure 2: Unionization and Inequality in Canada, 1976-2020**



Source: D. Doorey & J. Stanford, “Union Density Lowers the Income Share Going to the Top 1%” *Jacobin* (October 16 2023)

However, the subject of my talk is not a defence of collective bargaining. Many others with greater credentials than myself have taken on that subject. For the purposes of my talk, I am going to ask you to engage in a thought experiment and accept as a thesis that Canadian governments want to encourage more collective bargaining in Canada’s private sector. I want you to imagine with me that Canadian governments were concerned about growing income inequality and political polarization and that they remembered the important lessons of history. *If we were consulted by our governments and tasked with dragging labour law into the 21st century with the goal of expanding the reach of private sector collective bargaining, what we would do and how would we do it?*

**IV. APPROACHES AND OBSTACLES TO 21<sup>ST</sup> CENTURY LABOUR LAW REFORM**

The subtitle of my talk, “*Can’t get there from here*”, is a reference to the herculean challenge confronting us. We must first come up with ideas about how law could be harnessed to achieve our goal of expanding collective bargaining beyond the mere 15 percent of workers who are unionized today. It seems to me that there are only three approaches we could take.

The first approach is to preserve the Wagner model but tinker with its details in the hope that a tweak here and there would be enough to solve our policy challenge. We can call this the “*reform approach*”. The second approach is to design a fundamentally different legal model to replace the Wagner model. Maybe we decide that a legal model designed in the early 20th century is no longer fit for purpose in the early 21st century. Maybe our governments believe it is time to jettison the Wagner model and try something entirely different. We can label this more radical approach the “*replacement approach*”. Finally, a third approach would preserve the Wagner model, possibly with some reforms, but then complement that model with additional layers of legal protections that add-on other forms or variations of collective bargaining to build a deeper foundation of freedom of association. I (and others) have labelled this approach the “*graduated approach*”, or ‘graduated freedom of association’.<sup>12</sup>

However, even if we can agree upon which of these approaches to take, the next, and arguably even more difficult challenge confronting us is how to move from here to there. That challenge is not very daunting if we stick to the reform approach. The history of labour law reform in Canada for the past 40 years has, with some notable exceptions, been limited to the reform approach and well-worn debates over the Standard Reform Playbook I mentioned earlier. I have already tipped off my opinion that the *reform approach* is a dead-end as a mechanism for revitalizing private sector collective bargaining. The Wagner model continues to function well enough in the types of workplaces for which it was designed, mainly large workplaces where substantial numbers of similarly situated employees congregate at relatively predictable times.<sup>13</sup> However, it is obvious now that we can’t rely entirely upon the Wagner model, even with occasional reforms, if we are to succeed in our mission to revitalize private sector collective bargaining for the 21<sup>st</sup> century economy.

If occasional reforms to the Wagner model of collective bargaining will not achieve our assigned mission, then we must take more seriously the *replacement* and *graduated* approaches. And this is where we run into problems. Remember that in our hypothetical, the government wants to build up collective bargaining in the private sector for all sorts of strong policy reasons. However, we know too that a very important constituent will not want new laws aimed at

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<sup>12</sup> See Doorey, “Graduated Freedom of Association”, supra note 9.

<sup>13</sup> Union density in workplaces with over 500 employees is approximately 52% in Canada, compared to just 13.1% in workplaces with fewer than 20 employees and 29.5% in workplaces with between 20-99 employees: Statistics Canada, Union Status by Establishment Size, Table 14-10-0133-01 (Ottawa: Statistics Canada, October 2023), online: <https://doi.org/10.25318/1410013301-eng>



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facilitating higher rates of unionization and collective bargaining. Almost certainly, employers and the corporate lobby will be vehemently opposed to our mission of collective bargaining restoration. This is the sensible presumption drawn from decades of employer contributions to labour law reform debates.

A review of employer submissions to every government-commissioned study of collective bargaining law since the Woods Task Force in the 1960s found that, almost without exception, employers united in strong opposition to any proposal intended to extend the reach of collective bargaining, including sectoral bargaining and even less dramatic proposals to promote broader-based bargaining ideas, such as granting labour boards the power to consolidate multiple bargaining units of the same employer, which I will discuss again shortly.<sup>14</sup> Frequently, this opposition is expressed in the form of an assertion, or threat, that harnessing legislation to promote more collective bargaining would result in serious or devastating harm to the economy. Some representative examples of the submissions from employer groups are reproduced in Table 2.

**TABLE 2:      SELECTED QUOTES FROM EMPLOYER SUBMISSIONS TO LABOUR LAW REFORM**

<b>Submitting Organization</b>	<b>Study and Year</b>	<b>Quote</b>
Ontario Hotel and Motel Association	Submissions to Ontario Labour Law Reform, Bill 40, 1992	<i>“The proposed ease of organizing a union will be a deterrent to investors and continue the exodus of many businesses out of Ontario.”</i>
Human Resources Professionals Association of Ontario	Federal government: <i>Seeking a Balance: Task Force to Inquire into Part 1 of the Canada Labour Code</i> , 1996 (“Sims Report”)	<i>“The notion that prosperity is best achieved through extending unionization to emerging jurisdictions and non-traditional areas is fraught with difficulty. ... Therefore, HRPAO questions the wisdom of any proposal which would serve to increase the rate of unionization.”</i>
Canadian Federation of Independent Business	Submissions to Ontario Changing Workplaces Review, 2017	<i>“Making it easy for all of a franchise’s franchisees to collectively bargain under a single unit with the corporate head office is nothing more than a quick and easy way for unions to increase their membership and money made through union dues”</i>

<sup>14</sup> My thanks to Sandrine Haentjens for her research assistance.

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Canadian Manufacturers and Exporters Association	Submissions to Ontario Changing Workplaces Review, 2017	<i>“We are opposed to options that would create any form of sectoral collective agreements”</i>
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There’s no need to belabour the point further. I am making what I believe is a non-controversial observation: that any attempt to move forward with either the replacement or graduated approaches to labour law reform *for the purpose of revitalizing collective bargaining* will be met with hostile employer resistance. Historically, strong employer resistance to labour law reform has meant either that the reforms do not move forward, or that if the laws are enacted, they are repealed the moment a more “business-friendly” government is elected, touting the need to “restore balance” to labour relations.

In the rare examples of private sector labour law reform that shifted away from the traditional decentralized model of collective bargaining under the Wagner model and then survived subsequent changes in government, employers either lead the charge for reform or were at least tolerant of the reform, hoping to bring order to a system they felt was not working well for employers. For example, in consultations preceding the adoption of province-wide, trade-based collective bargaining in Ontario’s industrial, commercial, and institutional (ICI) sector, it was the employer association that strongly advocated for new legal model.<sup>15</sup> Militancy and strategic striking by construction unions lead construction employers to advocate for broader-based bargaining. We can go back further to the introduction of the Wagner model itself in the 1940s. Certainly, employers were not clamoring for legislated collective bargaining rights, but the rash of strikes and growing labour militancy in a tight wartime labour market created an environment in which employers were open to government intervention to address the record levels of strike activity in the early 1940s.<sup>16</sup> Thus, an important historical lesson is that fundamental labour law reform tends to respond to labour militancy and power, rather than produce it. More on this point later.

So, we have come to the crux of the problem. If the future of collective bargaining depends on Canadian governments moving off the Wagner model as the dominant legal intervention supporting collective bargaining, how will such a dramatic transformation occur against the strong opposition of the business community and its political allies? And if dramatic, expansive collective bargaining reform occurs only in response to high levels of disruptive labour militancy, why would we expect any such reforms now? Despite recent media stories suggesting growing militancy amongst Canadian workers, strikes and labour militancy are near all-time lows. There were only 78 private sector strikes commenced in 2023, translating into just under 550,00 person-days lost,

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<sup>15</sup> *Report of the Industrial Inquiry Commission into Bargaining Patterns in the Construction Sector* (The Franks Commission, Ontario, 1976), Brief Submitted by the Construction Labour Relations Association of Ontario, 127-168. Also D. Doorey & J. Mandryk, “Mapping Ontario’s Distinctive Model of Construction Labour Law” (2022), 24 CLELJ 207.

<sup>16</sup> In 1943, the year preceding the introduction of PC 1003 (which would serve as the Wagner model template for provinces), there had been a record high of working days lost due to strikes: E. Tucker & J. Fudge, *Labour Before the Law: The Regulation of Workers’ Collective Action in Canada, 1900-1948* (2001), at 276.

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making this one of the lowest periods of strike activity ever recorded.<sup>17</sup> This is not a period in which rising worker militancy will drive corporations to demand novel labour law reform to bring order to labour chaos. In fact, workers may be more divided today than at any time in recent memory. The unifying mantra of class identity has been being overtaken by divisive social, cultural, and political chasms that push against worker solidarity.

### V. The IDEA OF LABOUR LAW REFORM IN THE 21ST CENTURY

I have been thinking about the daunting challenge of moving ‘from here to there’ in labour law in the context of my participation in two recent labour law reform projects. The first was a multi-year project exploring the future of U.S. labor law called *Clean Slate for Worker Power* organized by Harvard Law School’s Centre for Labor and a Just Economy.<sup>18</sup> I participated in that project in a very minor way, as the Canadian representative on the International Advisory Committee. The second project involved an invitation from the Institute for Research on Public Policy to write a report on the future of Canadian collective bargaining law, which is still in the drafting stages. Let me say a few words about the different approaches adopted in those studies.

The Clean Slate project brought together a wide range of academics, activists, union leaders, and practitioners and aimed to identify legal reforms that would empower greater collective voice and power for U.S. workers. Notably, participants at Clean Slate meetings were directed to ignore political feasibility in their brainstorming. This proviso was necessary because political polarization has made substantive labor law reform impossible in the US for the past 70 years, at least at the federal level. Political feasibility is a conversation ender in the U.S. when it comes to labor law reform debates. Therefore, the question put to Clean Slate participants was, if you could do anything to rebuild collective worker power, what would you do?

By setting aside political pragmatism, the Clean Slate project was able to put forward broad-sweeping reform ideas. It didn’t matter that there is little chance that those reforms would be enacted in the foreseeable future. The objective was to imagine what role law could play in creating a more prosperous and inclusive future for American workers. Clean Slate adopted the *graduated approach* introduced above. It recommended that the basic Wagner model be preserved, so that if a majority of workers in a workplace joined a particular union, that union would still be able to apply to be certified by the NLRB as the exclusive representative for all employees in the bargaining unit at the factory. The report recommended some reforms to the Wagner model, but the most interesting proposals considered novel reforms that would complement the Wagner model, including:

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<sup>17</sup> See Work stoppages in Canada, by jurisdiction and industry, 1947-2023, Private Sector: <https://doi.org/10.25318/1410035201-eng>. By comparison, in 1947, 217 private sector strikes commenced, resulting in over 4.5 million persons-days lost at a time when the population of Canada was substantially smaller than today.

<sup>18</sup> B. Sachs & S. Block, *Clean Slate for Worker Power: Building a Just Economy and Democracy* (2020): <https://clje.law.harvard.edu/app/uploads/2020/01/Clean-Slate-for-Worker-Power.pdf>

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- Every workplace would have an elected “workplace monitor” who would be trained and given time off and who would be tasked with monitoring compliance with employment statutes.
- A “works council” would be created if at least 3 workers request one and that council would consult with employer on various workplace issues including but not limited to health and safety.
- Minority “members-only” collective bargaining would be available if a workers’ organization could establish that it represents at least 25% of workers (but less than a majority).
- Finally, Clean Slate also proposed a model of sectoral bargaining. If 5000 employees or 10 percent of employees in a sector supported a union or unions, then the union(s) could apply to have a “sectoral bargaining committee” created, which would bargain working conditions and that agreement would be extended to the entire sector.<sup>19</sup>

The topic of the IRPP report that I was invited to write overlapped with the subject matter considered by Clean Slate, but there was an important difference in the parameters of the project. In contrast to the proviso in Clean Slate to ignore political feasibility to encourage brainstorming, my instructions were to put forward *pragmatic proposals* for law reform that could be brought to real life decision-makers in Canadian Ministries of Labour. After all, unlike in the U.S., labour law reform *does* happen in Canada, and quite regularly. Therefore, I was to start with essentially the same policy question as Clean Slate—*How can law be reformed to help expand the reach of collective bargaining and rebuild collective voice in Canada’s private sector?* However, my assignment was different, because I also needed to consider “*What is actually possible in today’s political climate?*” This is a more difficult and limiting question.

For example, consider the Clean Slate proposal to adopt sectoral or industry level collective bargaining. I may agree that the decentralized Wagner model makes it effectively impossible for most service sector workers to access meaningful collective bargaining and therefore that Canada should move towards sectoral bargaining. However, if I believe that it is not politically feasible to transition to sectoral bargaining in the present political and economic climate, then according to the parameters of my retainer, the question arises whether sectoral bargaining should be included in my study at all. I was not being asked what I think the law *should be* in an ideal world. My assignment was to put forward proposals that make sense and that could become law in today’s political climate.

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<sup>19</sup> Ibid. See also D. Doorey, “Clean Slate and the Wagner Model: Comparative Labor Law and the New Plurality” (2021) *Employee Rights & Employment Policy J.* 95

## VI. WHERE ARE WE GOING, AND CAN WE GET THERE?

In this lecture, I am more interested in the *how* of labour law reform than the *what*. However, to get to where I want to go, I need to provide some details about the sorts of proposals I will ultimately make in the public policy report. Therefore, I will provide a sort of trailer to that report, a quick overview of some of the key proposals.

As I’ve already discussed, the *reform approach* is a dead end. We spend 90 percent of our debates about labour law reform arguing about the minutia of a collective bargaining model that is entirely irrelevant to the vast majority of workers employed in private sector. I also reject the *replacement approach*. No one is asking for the Wagner model to be repealed in its entirety and replaced with something entirely different. Such a dramatic sea change to 80 years of an embedded labour relations system would be too great a shock, and it would be irresponsible to propose such a move. The Wagner model should remain in place. There are some changes we could make to help break the disruptive cycle of pendulum reforms with each new election, but the Wagner model still works relatively well in the types of workplaces for which it was designed. However, our mission to extend collective bargaining to places it has not reached before will not be advanced by relying on the Wagner model alone.

Therefore, it seems to me the only sensible and realistic approach is the *graduated approach* to legal reform. I propose what I call a three-level framework (Figure 3). In the middle is the Wagner model. I suggest some reforms to that model, but mostly we accept that the model will continue to operate as it always has, warts and all. Therefore, if a union obtains majority support, it can still apply for certification and all the normal rules presently found in our labour relations legislation governing the collective bargaining process remain. Consequently, for already unionized workplaces, the reforms I propose will have relatively little impact. We should avoid change merely for the sake of change.

The real action is found in the “graduated” elements that I propose should be grafted onto the Wagner model to help construct a more robust architecture of freedom of association in Canada. Conceptually, I describe the reforms we should be thinking about as both:

- “*descending*” from the Wagner model’s reliance on trade union majoritarianism and exclusivity as the sole collective bargaining structure to recognize other non-majority forms of collective action and collective representation; and
- “*ascending*” upwards from the Wagner model’s structural preference for workplace level bargaining towards broader based bargaining structures, including sectoral bargaining.<sup>20</sup>

It is crucial to emphasize that the new components suggested in the graduated model are complements to the Wagner model, not substitutes. We are talking about adding onto the Wagner

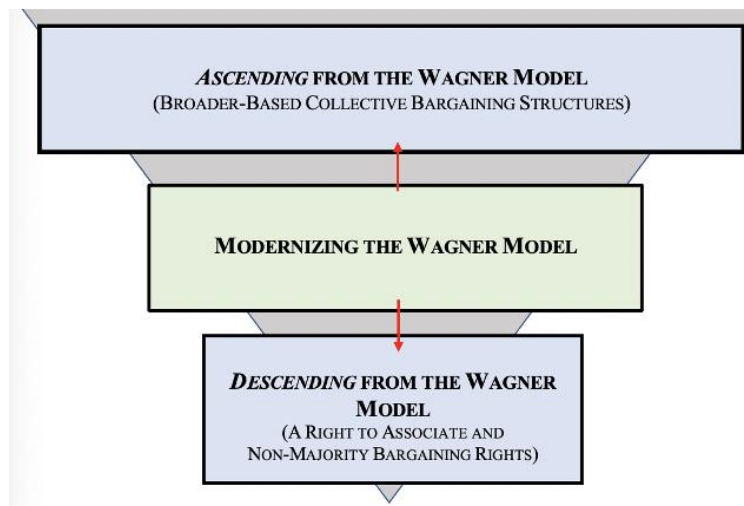
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<sup>20</sup> I elaborate on the “graduated” approach in *Reflecting Back and Graduated Freedom of Association*, *supra* note 9.

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model in the graduated approach to build a thicker model of freedom of association than presently exists. This is the difference between the graduated and the replacement approaches.

**Figure 3: Three-Level Framework for Thinking About Collective Bargaining Reform**



Let me now provide a quick overview of the main components of the graduated approach, followed by a discussion of our central dilemma of political feasibility: Why would a Canadian government ever move on any of these proposal ideas?

### *A. The Descension Strategy: Non-Majority Forms of Collective Action*

In a paper published a decade ago called “Graduated Freedom of Association”, I put forward a straightforward thesis: whatever else labour law might seek to achieve, it should at the very least, ensure that all workers can exercise the basic rights and freedoms that are guaranteed by the Charter of Rights and Freedoms.<sup>21</sup> It should not be a radical proposal to suggest that all employees should be able to exercise fundamental Charter-protected rights and freedoms without suffering reprisals at the hands of their employers. When I wrote that paper, in 2012, the Supreme Court of Canada (SCC) had ruled that freedom of association in section 2(d) of the Charter protected “at a minimum”:

- A right to form and join employee associations without reprisals; and
- A right of workers to join together to pursue workplace goals;
- A right of workers to make collective representations concerning working conditions to their employer, again without reprisals, and a corresponding duty on the employer to

<sup>21</sup> Doorey, Graduated Freedom of Association, *supra* note 9.

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engage in a meaningful dialogue about those proposals, including a means of recourse should the employer “not bargain in good faith”.<sup>22</sup>

The SCC had not yet ruled that FOA also includes a “right to strike”, but it did so in 2015.<sup>23</sup> Therefore, applying my rationale that labour law should protect the exercise of basic constitutionally protected rights and freedoms, I now need to add protection of a right to strike. I will address that prickly issue in a moment.

The “descension strategy” aims to put into practice the thesis that labour law should protect the exercise of constitutionally protected rights and freedoms. It is the reform strategy that puts rubber to pavement in the promise of Charter rights and freedoms. The descension strategy involves creating new legal rights that would be grafted onto the Wagner model to ensure that all workers, even the non-union workers who comprise some 85 percent of the private sector workforce, can exercise constitutionally protected rights.

### 1. A Right to Associate and to Act in Concert

The first area of reform in the descension strategy relates to a subtle change our governments made to the Wagner model when they imported it from the U.S. in the 1940s. At the core of the U.S. NLRA model was a legal right for workers to “self-organize” and to engage in “concerted activity for mutual aid and protection”. That right is still found in section 7 of the NLRA.<sup>24</sup> Over the years, the NLRB and the courts have interpreted this language to protect a broad range of worker actions, including coworkers speaking to one another about working conditions, workers raising collective concerns about working conditions with their employer, and workers participating in work-related collective protests. Section 7 also protects a right to strike that does not distinguish between unionized and non-union workers.<sup>25</sup> Notice the similarity between this list of collective activities protected by the “right to engage in concerted activities for mutual aid and protection” in the NLRA and the list of activities that the SCC has found are guaranteed by the Charter, described above.

Canadian governments could have simply adopted the language of NLRA section 7 and protected “concerted activities for mutual aid and protection.” That language was right in front of them. Instead, our governments chose to protect a narrower “*right to join a trade union and to engage in lawful trade union activities*”. That was the language used in Wartime Labour Relations

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<sup>22</sup> *Ontario (Attorney General) v. Fraser*, 2011 SCC 20; *Health Services and Support — Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27

<sup>23</sup> *Saskatchewan Federation of Labour v. Saskatchewan*, 2015 SCC 4

<sup>24</sup> *National Labor Relations Act*, 49 Stat. 449 (1935), s. 7, reads: *Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).*

<sup>25</sup> *NLRB v. Washington Aluminum Co.*, 370 U.S. 9 (1962)

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Regulations, Order-in-Council PC 1003 of 1944, the federal legislation that introduced comprehensive Wagner-style legislation into Canada, and in later provincial labour legislation that adopted PC 1003 as a template.<sup>26</sup> No one much noticed or cared about the language difference. Early Canadian labour law texts that compare the U.S. and Canadian versions of the Wagner model do not mention the narrower Canadian language.

This lack of interest in the different approaches to protecting freedom of association is likely explained by the fact that until relatively recently, people assumed that workers wouldn’t act collectively except through a “trade union”. However, now that 85 percent of private sector workers are non-union in Canada, the fact that our labour laws protect only one type of collective worker activity--*trade unionism*--becomes notable. Saskatchewan had it correct all those years when it named its collective bargaining legislation the *Trade Union Act* rather than the more common *Labour Relations Act* (or *Code*).<sup>27</sup> Canadian labour relations statutes don’t protect freedom of association *writ large*, as does the NLRA’s section 7. Our laws only protect workers’ right to associate if they associate through the institutional vehicle of a “trade union”. Moreover, collective bargaining rights, including the right to strike in support of collective bargaining, are only protected if a trade union obtains a government certificate after proving that it has majority employee support in an appropriate bargaining unit.

I can provide case law examples to demonstrate the significance of Canada’s narrower protection of freedom of association. In the first case, a group of non-union law clerks discussed their wages and then decided to raise collective concerns with their employer. One unfortunate clerk went forward on behalf of the group and passed along the employees’ concerns. She was terminated. In the wrongful dismissal lawsuit that followed, the judge concluded that she had been terminated “because she engaged in discussions regarding her salary with other employees in the firm.”<sup>28</sup> In the second case, a group of non-union childcare workers similarly decided to raise collective workplace concerns with their employer. The representative that spoke for the workers was fired. The following day, the other workers staged a walkout to protest the termination of their co-worker. They too were fired for failing to report to work.<sup>29</sup>

There is no question that the terminations in these two cases would violate section 7 of the NLRA, since the workers (including the strikers in the second case) were engaged in concerted activities for mutual aid and protection at work. It doesn’t matter that the workers acted alone without involvement of a “trade union”, because the NLRA is concerned with concerted activities and not just “trade unionism”. In Canada, on the other hand, whether the workers have legal

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<sup>26</sup> Wartime Labour Relations Regulations, Order-in-Council. PC 1003, s. 4(1): “Every employee shall have the right to be a member of a trade union or employees’ organization and to participate in the lawful activities thereof.”

<sup>27</sup> The Saskatchewan *Trade Union Act* was repealed in 2014 and replaced by the *Saskatchewan Employment Act*, SS 2013, c. S-15.1.

<sup>28</sup> *Burton v. Aronovitch McCauley Rollo LLP*, (2018) ONSC 5030 at para. 9. The decision on the merits is reported at *Burton v. Aronovitch McCauley Rollo LLP*, 2018 ONSC 3018. The issue in the lawsuit was the enforceability of a notice of termination clause. No one questioned whether the reason for the termination was unlawful.

<sup>29</sup> *Alagano v. Miniworld Management*, [1994] OLRB Rep. 455. The employees argued that they had been terminated for engaging in “trade union activities” contrary to the Ontario *Labour Relations Act*. The employer argued that the Act did not apply since there was no “trade union” involved. That issue was never decided because the case settled.



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recourse to challenge their terminations depends on them first persuading a labour board that they were engaged in “trade union activities”, even though there was no union in their story at all. I suppose it’s possible that a labour board could stretch the meaning of “trade union activities” to include any concerted activity by workers, but it is more likely that “trade union activities” requires if not an actual union to be involved, at least evidence that a union organizing campaign was in its germinal stages.

But the larger question is why should employees only be protected from reprisals if they act through a trade union? Workers frequently act collectively for their protection and benefit in more spontaneous sways, and they should be protected too. Workers sometimes wish join with similar situated workers in protests or campaigns to raise awareness of poor working conditions or to lobby for improved conditions. When non-union fast-food workers engage in national protests for a \$15 per hour minimum wage, the NLRA protects them from reprisals. In contrast, if a group of non-union Tim Horton’s employees in Canada joined those protests, they could be fired. This is a gaping hole in Canadian labour law that needs addressing as a first step towards our pursuit of a more robust model of labour law. My point here is that a model of freedom of association must protect, you know, freedom to associate!

Therefore, my first proposal is to make a simple but fundamental amendment to Canadian law that would introduce a new “right to associate” for the purpose of mutual aid and protection relating to working conditions.<sup>30</sup> We can use the NLRA language of “concerted activities” or come up with our own language. For my purposes today, I will just use “right to associate” to describe what I have in mind. The following amendment would work (using the *Canada Labour Code* as a template):

8(1) Every employee,

- (a) is free to join a trade union of their choice and to participate in its lawful activities, **and**
- (b) has a right to associate and to engage in lawful concerted activities for mutual aid and protection.**<sup>31</sup>

Other sections in the statutes that presently protect employees from reprisals for exercising “trade union activities” would be amended to protect employees who associate and engage in lawful concerted activities through forms other than trade unions. At a minimum, this new law would have protected the employees in the two cases described above. The employees could have filed complaints alleging discrimination for acting in a concerted manner. This new law would also protect employees from reprisals for participating in broader protests and campaigns for better industry working conditions, such as the Fight for \$15 campaigns.

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<sup>30</sup> See further, Doorey, “Graduated Freedom of Association”, supra note 9 at 525-529.

<sup>31</sup> *Canada Labour Code*, s. 8(1) presently reads: “Every employee is free to join the trade union of their choice and to participate in its lawful activities.”

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I go into more detail on how this new law would function in my policy report, but for my purposes today, the question we are concerned with is whether a government would ever take this step. I believe they will and that a statutory right to associate will be an early innovation in 21<sup>st</sup> century Canadian labour law. For one thing, we have begun to see recommendations for this step to be taken in policy reports.<sup>32</sup> More importantly, though, a right to associate (or act in concert) without reprisals is already required by the Charter and I believe it is only a matter of time before a legislature steps up to instantiate that right into law or a court orders them to do so.

The SCC long ago ruled that freedom of association protects a right of workers to come together and raise collective concerns with their employer without fear of reprisals.<sup>33</sup> Those cases involved employees who were trying to unionize, but the SCC has been very careful to emphasize that freedom of association protects worker association, not only “trade unionism”. Therefore, insofar as our existing laws protect employees who associate only if they do so through the singular form of trade unionism, those laws are arguably *under-inclusive*. At the risk of wandering too deep into the legal woods, let me demonstrate this point by returning to the facts in the two cases I mentioned above in which non-union employees were terminated for acting in concert and without any involvement of a trade union.

Imagine they filed a complaint at the OLRB alleging they were fired for engaging in “trade union activity”, because that is the only claim they can make under the *Labour Relations Act*. The OLRB rules that the LRA does not apply since the workers were not engaged in trade union activity and the LRA is, after all, the “trade union” statute. The result would be that no law protects workers from reprisals for acting collectively unless they act through a trade union. This scenario is similar to that confronted by the SCC in the *Dunmore* decision from 2001.<sup>34</sup> In that case, the SCC ruled that excluding agricultural workers from the protections against reprisals for trade union activities in the LRA violated Section 2(d) of the Charter. The law was “under-inclusive” because it carved out a group of vulnerable workers from crucial statutory protections available to others in labour relations legislation and this resulted in a substantial interference in the ability of those workers to access meaningful collective bargaining.

Similarly, the absence of any statutory protections from employer reprisals for acting collectively unless the workers act through a trade union *substantially interferes* with collective bargaining and association that occurs (or is attempted) through all other forms of employee association. The fact that the law clerks and childcare workers in our sample cases can be

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<sup>32</sup> ESDC, “Report of the Expert Panel on Modern Federal Labour Standards”, Chapter 6: Report of the Expert Panel on Modern Federal Labour Standards, Chapter 6: <https://www.canada.ca/en/employment-social-development/corporate/portfolio/labour/programs/labour-standards/reports/what-we-heard-expert-panel-modern-federal.html#h2.7>; B. Rogers & S. Archer, “Protecting Concerted Action Outside the Union Context”, (2017) 20(1) CLEJ 141; Ontario Assembly on Workplace Democracy (2022), *Closing the Voice Gap: A Better Future for Workers and Employers*. University of Toronto. <https://www.cirhr.utoronto.ca/sites/www.cirhr.utoronto.ca/files/OAWD%20Final%20Report%20-%20Dec%202022.pdf>

<sup>33</sup> See e.g. *Delisle v. Canada (Deputy Attorney General)*, 1999 CanLII 649 (SCC), para. 32

<sup>34</sup> *Dunmore v. Ontario (Attorney General)*, 2001 SCC 94

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terminated as a reprisal for raising collective workplace-related concerns with their employer is strong evidence of substantial interference with freedom of association. Either freedom of association in the Charter extends a positive obligation on the state to protect the most basic act of vulnerable employees joining together to raise collective concerns with their employer, *regardless of whether the employees act through a “trade union”*, or it only protects trade union activities. The latter outcome would be surprising given the lengths to which the SCC has gone to emphasize that Charter protections are not restricted to any specific form or model of collective bargaining.

So, one argument why a government might introduce a free-standing right of workers to associate and act collectively is that the Charter already requires it. A responsible government might proactively introduce such a law, or we may need to wait for a test case involving non-union workers terminated for acting in concert who can find no relief under existing labour legislation. My guess is that such a law would be popular with voters, since it will no doubt come as a surprise to many to learn that under existing law, they can be fired simply for discussing their pay with coworkers. A new right to act collectively aligns with the growing push for wage transparency laws by protecting workers who discuss working conditions. Finally, recognizing a new right to associate in Canada would hardly be revolutionary. After all, a similar law has existed in the U.S. for nearly a century, and *nobody* argues that the NLRA is unduly burdensome to employers. Rather, a narrow “right to associate” would simply provide a thin new layer of protection for non-union Canadian workers who combine, with or without the assistance of a formal trade union, in attempts to improve their working conditions. This is the most basic of protections for freedom of association.

## 2. A Non-Union Right to Strike?

Now things get more complicated. So far, I have avoided what I have called elsewhere the “elephant in the room” in discussions on the future Canadian labour law: *the right of non-unionized workers to strike*.<sup>35</sup> When I refer to ‘non-unionized’ workers I am including any worker who is not in a bargaining unit represented by a certified, majority trade union. We know that the “right to engage in concerted activities” in the U.S. protects a right to strike that applies equally to unionized and non-unionized workers. There are real problems with how that right is enforced in practice in the U.S. and lots of limitations have been read into the law by conservative courts over the years, but on paper the NLRA protects a much broader right to strike than does Canadian labour law. The decision of Canadian governments in the 1940s to protect a narrower right to engage in “trade union activities” charted Canadian strike law down a separate path from its southern neighbour.<sup>36</sup> Our laws protect “lawful” strikers, but only unionized employees can ever “lawfully” strike.<sup>37</sup>

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<sup>35</sup> See “Reflecting Back”, *supra* note 9 at 190.

<sup>36</sup> D. Doorey, “On Constructing a Stronger Right to Strike Through Comparative Labor Law” (2024), Harvard Law Review, Essay: <https://harvardlawreview.org/blog/2024/01/on-constructing-a-stronger-right-to-strike-through-comparative-labor-law/>

<sup>37</sup> This framework is created by provisions found in Canadian collective bargaining statutes which provide that participation in a lawful strike does not terminate an employment contract, that make it unlawful for employers to

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It is difficult to explain to my foreign labour law colleagues how it is that Canada’s constitution protects a right to strike and yet 85 percent of employees in the private sector can be terminated for striking. Yet that is the curious situation that has existed since the SCC’s 2015 decision in *Saskatchewan Federation of Labour*. Of course, there’s nothing new in the observation that the scope of Canada’s protection of the right to strike is among the narrowest of all economically advanced western nations. As Weiler long ago noted, “a characteristic feature of Canadian law is that we have been remarkably ambitious in our use of the law to limit collective employee action... [We] have gone about as far as we can go in legally regulating strike action.”<sup>38</sup> The question for 21<sup>st</sup> century labour law is whether the great divide between the promise of a constitutionally protected right to strike and the reality that most Canadians can be fired for striking is sustainable. I argue that it is not.

What a non-union right to strike would look like in the context of Canadian law is open to debate. I flesh out some proposals in my policy paper, but we are interested today in the question of political feasibility that has haunted us throughout this talk: Why would a Canadian government expand job right protections to non-unionized strikers?

There is a tendency to believe that extending a statutory right to strike to workers who are not in a certified majority trade union will fundamentally alter the Canadian labour relations landscape. However, that is more aversion to change and fear of the unknown than a realistic assessment of what would happen in practice. The fact that U.S. strike law does not distinguish between unionized and non-unionized workers should be all the evidence needed to allay fears that extending protections for non-unionized strikers would dramatically upset the labour relations cart in Canada. Strikes by non-union workers will still be rare and quick, as they are in the U.S. and other countries that do not limit strike protections to workers employed in unionized workplaces. However, protecting non-union strikers from dismissal because they participate in short, organized protests to improve working conditions would add one more layer to our pursuit of a thicker model of freedom of association in the 21<sup>st</sup> century. For example, a law providing that fast food employers can’t terminate their non-union employees because they participate in a North American wide one-day protest for a higher minimum wage would provide one more tool to rebuild worker power.

Still, Canadian governments will be reluctant to take this step. Employers certainly aren’t interested in this type of reform. Nor is an expanded right to strike for non-unionized workers high on the reform agenda of unions. Indeed, some union leaders may believe that extending a right to strike to workers not represented by a certified, majority trade union would undermine unions’ monopoly over strike protections. I think that is a mistake. As others have noted, basic legal protections for concerted action influence the risk analysis undertaken by employees considering whether to contest unfairness through collective action.<sup>39</sup> Some legal protection for a right to strike

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punish workers for engaging in a lawful strike, and that require employers to reinstate lawful strikers at the conclusion of a lawful strike.

<sup>38</sup> P. Weiler, *Reconcilable Differences: New Directions in Canadian Labour Law* (Carswell, 1980) at 68-69

<sup>39</sup> D. LeClercq, “Labour Strife and Peace”, unpublished manuscript: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4693051](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4693051); B. Rogers, “Passion and Reason in Labor Law”

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is better than none and a new protected right to strike as a form of workplace protest might mobilize workers by giving them a taste of collective action that may prime them for formal union organizing and collective bargaining. As noted earlier, if substantial labour law reform follows labour militancy, then there is good reason for the labour movement to support and advocate for a basic, foundational right to strike that is no longer the privileged domain of public sector workers and a small proportion of private sector workers.

However, if we assume that an expanded right to strike is unlikely to be high on the reform agenda any time soon, then given my direction to propose only politically pragmatic reforms, why even mention an expanded right to strike? One reason is that, in terms of our mission to build worker bargaining power by extending the reach of collective bargaining, strike law reform is a necessary part of the package. It does us no good to keep pretending that strike laws designed to reduce conflict in large manufacturing factories during World War II are well-suited to support the struggle of 21<sup>st</sup> century workers for workplace justice. It seems inconceivable that our 80-year-old strike laws will continue to govern Canadian collective bargaining 50 years from now, so it is past time that strike law reform is laid on the table for debate.

Another reason though why I intend to include a proposal for an extended right to strike by non-unionized workers in my policy paper is that I believe the issue will soon come to a head in Charter litigation, and governments should be prepared. I will be brief, but this claim requires some unpacking. First, we need to understand what the SCC has said about the right to strike. In *Saskatchewan Federation of Labour*, the Court explained that the right to strike is the “powerhouse of collective bargaining” and “an indispensable component” of meaningful collective bargaining, and that freedom of association “requires concomitant protection of [workers’] freedom to withdraw their services collectively.”<sup>40</sup> The SCC has also long recognized that “a posture of government restraint in the area of labour relations will expose most workers not only to a range of unfair labour practices, but potentially to legal liability under common law inhabitations on combinations.”<sup>41</sup>

Read together, these two SCC observations do no more than recognize what informed labour relations people know to be true: that collective bargaining by precarious workers has little chance of success unless accompanied by a right to strike, and to be effective the “right” to strike must include statutory protections that prohibit (at least to some degree) workers from being terminated for striking.<sup>42</sup> Wagner model legislation in Canada includes job protections for strikers, but as we’ve seen, those protections apply only to one narrow category of striker: one that is represented by a certified, majority trade union, a category that comprises just 15% of the private sector labour force. A looming question considering the SCC’s decision in *SFL* to constitutionalize

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(2012), 47 Harv. Civ. Rights-Civ. Lib L. Rev. 313; B. Sachs, “Law, Organizing, and Status Quo Vulnerability” (2017) 96 Texas L. Rev. 351

<sup>40</sup> *SFL*, *supra* note 23, paras. 3, 33, and 46.

<sup>41</sup> *Dunmore*, *supra* note 34, para. 20, 23. Also see *Haig v. Canada*, [1993] 2 S.C.R. 995 p. 1039

<sup>42</sup> The dissenting judges in *SFL* singled out this line of reasoning by the majority and objected to the majority constitutionalizing “a duty on employers not to terminate employees who have withdrawn their labour..”: *SFL*, *supra* note 23, para. 112.

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a right to strike is, *what about every else?* Can our governments continue to insist on protecting strikers only if they satisfy 80-year-old preconditions that hardly any 21<sup>st</sup> century workers can satisfy?

In stark legal terms, a question is percolating about whether our strike protection laws are now *underinclusive* in the Charter sense, because they protect only a very narrow category of worker while leaving the vast majority of Canadians to their own devices in the common law wilderness.<sup>43</sup> We learn in *Dunmore* that a constitutional claim of “underinclusion” must be grounded in a fundamental freedom “rather than access to a particular statutory regime.”<sup>44</sup> Therefore, while workers do not have a constitutional right to be covered by the Wagner model’s strike protection provisions, they may have a constitutional right to some protection from employer reprisals for exercising fundamental freedoms, including the right to strike. We can see glimpses of the tensions I’m describing in a recent action that challenged the absence of an expressed right to strike in the *Agricultural Employees Protection Act (AEPA)*.<sup>45</sup>

The AEPA provides protections like NLRA section 7 in the sense that it prohibits reprisals against workers who combine “for the purpose of acting in concert” and who make collective representations to their employer.<sup>46</sup> The Wagner model’s twin pillars of majoritarianism and exclusivity are dropped from the AEPA, which also imposes a shallow requirement on the employer to “bargain in good faith” over those representations, as the SCC explained in the *Fraser* decision. However, the AEPA is silent on the right to strike. It does not include express requirements like those found in other Canadian collective bargaining legislation that clarify that strikes do not terminate employment contracts, that it is unlawful for an employer to terminate an employee for engaging in a lawful strike, and that guarantee strikers their jobs back following a strike.

In *Aurora Cannabis Enterprises*, the UFCW argued that the absence of protections for strikers under the AEPA violated section 2(d) of the Charter. This argument was dismissed by the Agricultural, Food and Rural Affairs Appeal Tribunal and the Divisional Court on the basis that there was no evidence presented to demonstrate that the absence of an expressed right to strike in the AEPA had “substantially interfered” with the ability of agricultural workers to strike. The Tribunal found that, in fact, agricultural workers have “significant economic leverage because of the nature of their work and the limited pool of replacement workers.”<sup>47</sup> However, since the workers had not attempted to exploit this power by striking or even threatening to do so, the case was “premature”. In the subsequent judicial review decision that upheld the Tribunal’s decision, the Divisional Court wrote:

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<sup>43</sup> In *Dunmore*, *supra* note 34, para. 22, the SCC cited with approval a textbook passage recognizing that without statutory protections for collective worker action, the right to act collectively could amount “to no more than the freedom to suffer serious adverse legal and economic consequences”.

<sup>44</sup> *Dunmore*, *supra* note 34, para. 24.

<sup>45</sup> *United Food and Commercial Workers International Union v. Aurora Cannabis Enterprises Inc.*, 2021 ONSC 5611 (CanLII)

<sup>46</sup> *Agricultural Employees Protection Act*, 2002, SO 2002, c 16, s. 1(2), s. 2, s. 8-10.

<sup>47</sup> *Aurora Cannabis*, *supra* note 43, para. 73.

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The Tribunal found that the challenge to the validity of the AEPA was premature because the Aurora employees never tried to withdraw their services or to put economic pressure on their employer. Accordingly, the Tribunal has never been asked to deal with the propriety of a withdrawal of services or the use of economic pressure by employees. Thus, the Tribunal concluded that one cannot properly determine whether s.11 provides adequate protection to workers who withdraw their services. I agree with that conclusion.<sup>48</sup>

In this remarkable paragraph, written by a former University of Toronto labour law professor (Justice Swinton), the Court essentially dares the agricultural workers to strike to test whether the AEPA has any teeth to protect them. The suggestion is that the right to “act in concert” in the AEPA may in fact protect a right to strike after all, and that the Tribunal may have the authority to remedy employer reprisals against strikers in some manner (Reinstatement? Damages?).

If the AEPA protects a right a strike, that would come as a big surprise to almost everyone. Even the short-lived NDP legislation in the 1990’s that briefly gave agricultural workers a right to unionize and engage in collective bargaining mandated arbitration and the intent of the AEPA was clearly not to extend a statutory right to strike, for the first time ever, to Ontario agricultural workers.<sup>49</sup> However, the tortured reasoning in *Aurora Cannabis* reflects the new reality of the post-*SFL* legal landscape. Surely, given that there is now a constitutional right to strike, the historical discrimination in our labour laws between workers who are granted statutory protections if they strike (workers represented by certified majority trade unions) and those who are not (everyone else) is hanging by a thread. How can it be that relatively (economically) privileged men working in unionized car assembly factories have a protected right to strike but precarious, low-income, mostly racialized non-unionized workers employed in agriculture do not? Can governments continue to insist that they will only protect the constitutional right to strike for the small minority of Canadian workers who are fortunate enough to be represented by a certified majority trade union under the Wagner model?

At some point, a court may be asked to answer these questions and it’s possible the answer may require governments to revisit how we protect the right to strike in Canada. So, returning to our central question, as with the general “right to associate” discussed earlier, a government might introduce extended right to strike protections that reach beyond a mere 15 percent of the private sector workforce because the Charter eventually requires them to do so. A move in this direction would extend the reach of constitutionally protected rights, which is something one might think is a good thing. Perhaps a test case will come along in which a group of non-unionized workers are terminated for walking off the job in protest (like the childcare workers in the case I mentioned earlier<sup>50</sup> or agricultural workers accept the court’s challenge and walk off the job) and they challenge the absence of any statutory protections. In some way or another, the extremely narrow

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<sup>48</sup> Ibid. at para. 74.

<sup>49</sup> *Agricultural Labour Relations Act*, 1994, SO 1994, c 6

<sup>50</sup> *Alagano v. Miniworld Management*, *supra* note 29.

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scope of Canada’s protections for strikers will need to be addressed if we are to achieve our mission of strengthening collective bargaining rights in the 21<sup>st</sup> century.

### 3. Minority Worker Bargaining Committees

A final proposal falling under the Descension Strategy addresses the principle of majoritarianism in the Wagner model. There are good industrial relations reasons for supporting majoritarianism tied to employee power and solidarity and protecting employers from having to deal with multiple unions representing similarly situated employees. On the other hand, the “all of nothing” approach under the Wagner model has always been an international curiosity that is inconsistent with Canada’s obligations under core ILO Conventions that Canada has ratified. The ILO’s expert committees have stated that in majority-rules models, there needs to be a backup route through which non-majority unions are able to represent their own members in bargaining with the employer.<sup>51</sup>

Consider a recent attempt by Steelworkers to organize Starbucks employees in Alberta. The Steelworkers applied to represent employees in a bargaining unit comprised of 115 employees spread over all 5 stores in Lethbridge. A certification vote resulted in a tie, which means that the union lost and none of the Starbucks employees are entitled to collective bargaining or union representation. Or consider the campaign by Unifor to organize Toyota employees a while back. Unifor collected union membership cards on behalf of about 3000 employees, but Toyota claimed that there were 7500 employees.<sup>52</sup> Under the Wagner model, none of the Toyota employees are entitled to collective bargaining. The Steelworkers and Unifor could approach Starbucks and Toyota to demand an audience and a “good faith” discussion about working conditions on behalf of their members, but the employers can (and probably would) ignore the union with the full blessing of our labour laws. The exclusionary effect of the majoritarianism principle has long been noted and often criticized, but with rare exceptions (such as in the AEPA, discussed above), there have been no legislative attempts at facilitating complementary options for non-majority bargaining when no one union has proven majority support.

However, if we are serious about extending collective worker voice in 21<sup>st</sup> century labour law, then we need to explore how law can facilitate collective dialogue outside of formal majority unions. The idea of non-majority representation continues my central argument that labour law should, at a minimum, protect the exercise of constitutionally protected rights and freedoms. The Charter guarantees a right of workers to combine and to make collective representations to their employer, without reprisals, and a corresponding obligation on the employer to engage in a meaningful dialogue with the association of employees. Yet, as we have discussed, only a very

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<sup>51</sup> ILO Freedom of Association and Collective Bargaining, *General Survey of the Reports on Freedom of Association and Protection of the Right to Organize Convention, 1948*. Report III (Part 4B), International Labour Conference, 81<sup>st</sup> Session, 1994, *Freedom of Association*, 38: *Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO*, ILO, 5<sup>th</sup> (2006), para. 976.

<sup>52</sup> D. Doorey, “Unifor’s Toyota Campaign Demonstrates Flaws in Labour Law Model” *Law of Work Blog* (April 4 2014): <https://lawofwork.ca/unifors-toyota-campaign-demonstrates-flaw-in-labour-law-model/>



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small percentage of Canadians employed in the private sector can in practice exercise these rights. Moreover, as demonstrated earlier, non-union employees who confront their employer with collective concerns are at risk of being terminated. This is a deeply flawed model of freedom of association.

I propose a law that would require mandatory Worker Bargaining Committees (WBC) in any workplace in which between 25-50 percent of employees support collective representation. The level of support would be verified by the labour board using documentary evidence. The WBC would function in a similar manner to Joint Health and Safety Committees, which have been a mainstay of Canadian work law for decades, but would consider a broader range of issues, including compliance with statutory standards and other issues related to working conditions. There are other details, but we needn’t delve into them here. The point is that, in this model, Starbucks and Toyota would be required to meet periodically with the WBC to discuss working conditions and the WBC would be entitled to use a representative in those meetings who is not an employee (as is the case under the AEPA), such as union representative, although employee representatives on the WBC would also be entitled to time-off to receive training on statutory standards in Ministry of Labour approved programs.

Why would governments introduce Worker Bargaining Committees? Well, history would suggest they won’t. After all, academics have been proposing ideas like the WBC for decades with little to show for it. As I mentioned earlier, Paul Weiler proposed that mandatory employee representation committees be established in every workplace above a certain size. In 1984, Professor Bernie Adell proposed members-only bargaining when no single union had majority support.<sup>53</sup> Professor Roy Adams argued for members-only minority bargaining for decades.<sup>54</sup> More recently, mandatory bargaining committees conditioned on 25 percent or more support was proposed in the Harvard Clean Slate proposal and a similar idea appeared in the final report of the Ontario Assembly on Workplace Democracy here at the University of Toronto.<sup>55</sup> Few ideas, outside of the Standard Reform Playbook proposals, have been recommended more frequently over the years than some form of non-majority bargaining and collective representation grafted onto the Wagner model for workplaces where majority trade union support has not been established. Yet Canadian governments have declined to take this step.

Still, as advocates of non-majority collective representation have long noted, there are good reasons why labour law should facilitate collective voice at work. The notion that productivity is enhanced when workers can voice their opinions to their employers without fear of reprisal is a core insight of human resource management. In his report on federal labour standards, *Fairness at Work*, Professor Harry Arthurs emphasized that a “significant body of research” suggests that workplace consultations reduce workplace irritants and contribute to more productive workplaces

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<sup>53</sup> B. Adell, “Establishing a Collective Employee Voice in the Workplace: How Can Obstacles Be Lowered?” in *Essays in Labour Relations Law: Papers Presented at the Conference on Government and Labour Relations: The Death of Voluntarism* (1984).

<sup>54</sup> R. Adams, “A Pernicious Euphoria: 50 Years of Wagnerism in Canada” (1994-85) 3 CLELJ 321

<sup>55</sup> *Clean Slate for Worker Power*, *supra* note 18; Ontario Assembly on Workplace Democracy, *supra* note 32.

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with higher employee morale.<sup>56</sup> However, as I have noted, under our existing legal model, non-union workers can be terminated for voicing workplace related concerns. That is the antithesis of supporting dialogue at work. Legislatively required WBCs are a natural progression that builds upon our two other descension proposals to advance the strategy of thickening freedom of association in Canadian labour law. The right to associate would protect workers who express collective concerns and the right to strike would provide additional support for employees when their employers ignore those concerns.

A law requiring the establishment of Worker Bargaining Committees would formalize a new collective voice mechanism in workplaces where a substantial minority of workers desire some form of collective representation. WBC’s will lack the power of a majority trade union, even accounting for the fact that a new right to strike would arm employees with a source of leverage presently missing from Canadian labour law. However, as Weiler noted some 25 years ago when he proposed a similar model for the U.S.: “if it is the case, as I am sure it usually would be, that the purely persuasive efforts of [the committee] were not sufficient to move the employer to improve working conditions, then that is a reason for these employees to exercise their further legal right--to join a real union.”<sup>57</sup>

### ***B. The Ascension Strategy: Moving Upwards From the Wagner Model Towards Broader-Based Bargaining***

The *ascension strategy* refers to proposals to shift collective bargaining “upwards”, above the level of the individual workplace that is the norm under the Wagner model. For example, rather than require unions to organize and then negotiate with Starbucks stores one by one, why not have a model that produces a single sector level collective agreement that covers *all employees employed in coffee shops* in a city or province. Sector or industrial level bargaining is common in other countries and there are even scattered examples of its use here in Canada, in construction for example. However, unlike the descension strategies I just discussed, extending broader-based bargaining to historically underrepresented areas of our economy would constitute a fundamental rethinking of how we do labour law in Canada.

As with descension strategies, there are layers or levels of possible ascension strategies. For example, below the level of full-scale sectoral collective bargaining is a simple law that permits labour boards to consolidate *multiple bargaining units* of the *same company* provided that doing so will not cause significant labour relations problems. This type of law would permit the Steelworkers to organize one Starbucks at a time and then have the labour board consolidate the various stores into a single unit over time. Some folks in this room will recall that we had a law like this in Ontario briefly in the 1990s.<sup>58</sup> I spent a summer preparing consolidation applications

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<sup>56</sup> H. Arthurs, *Fairness at Work: Federal Labour Standards for the 21<sup>st</sup> Century* (Canada: 2006), 129.

<sup>57</sup> P. Weiler, *Governing the Workplace: The Future of Labor and Employment Law* (1990), 290.

<sup>58</sup> *Labour Relations Act*, RSO 1990, Ch. L.2, s. 7 (repealed Nov. 10, 1995). See discussion in D. Doorey, “A Canadian Proposal for Starbucks Collective Bargaining” *OnLabor Blog* (July 29 2022): <https://onlabor.org/a-canadian-proposal-for-starbucks-bargaining/>

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for the Steelworkers for stores like The Bay, only to have the Mike Harris Conservatives repeal the consolidation law and “de-consolidate” the combined units a couple of years later. Various law review commissions have recommended re-introducing consolidation powers as applied to multiple units of the same employer, including the Changing Workplaces Review (2017) and the Sims Report (1995) on federal labour law, and I recommend this model in my report as well. This is a sensible addition to labour law that discourages unnecessary and inefficient duplication of bargaining for unions and employers alike and that advances our objective of facilitating collective bargaining in sectors where it has not historically reached.

However, the more ambitious idea of adopting a new model of multi-employer sectoral bargaining poses a starker challenge. While it is trendy for collective bargaining advocates to argue that we need sectoral bargaining to overcome the erosion of union coverage in nations with decentralized collective bargaining models, there is little agreement on what an effective model might look like. Moreover, any such model introduced in Canada over the objection of employers would probably confront the familiar challenge we have discussed throughout this talk. Insofar as that model was successful in its core mission of dramatically extending the reach of collective bargaining in historically underrepresented sectors, we should expect a coordinated and well-funded campaign to discredit the model and promises from opposition political parties to dismantle it. We are witnessing this dynamic in real time right now in New Zealand, where the much-hyped Fair Pay Agreement sectoral collective bargaining introduced just a few years ago by the Labour Party is expected to be repealed by the newly elected National Party.<sup>59</sup>

These obstacles to experimentation with new forms of broader-based sectoral bargaining in historically underrepresented sectors have led experts retained by Canadian governments to reject sectoral bargaining as an option. The one exception was the proposal submitted by John Baigent and Vince Ready to the B.C. government in 1992, which recommended a model for historically underrepresented sectors that would have permitted a single union to obtain a sectoral bargaining certification that covered multiple employers in a sector.<sup>60</sup> However, the government did not move forward with that proposal. In other labour law reform commission reports that considered broader-based bargaining, the typical response has been to reject the concept *for now*, while encouraging the government to further study possibilities for sectoral bargaining moving forward, as summarized in Table 3. A reasonable inference is that the experts recognized that broader-based bargaining will be necessary to save collective bargaining in Canada, but that a

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<sup>59</sup> See Doorey, D. (2021). “How New Zealand’s New Sectoral Collective Bargaining Model Would Work in Canada” Canadian Law of Work Forum: <https://lawofwork.ca/nzsectoralbargaining/>

<sup>60</sup> Baigent, J., Ready, V., Roper, T., (1992). *Report to the Honourable Moe Sihota, Minister of Labour: Recommendations for Labour Law Reform*. Employer representative Tom Roper dissented to the proposal. See D. Doorey, “The Model of Sectoral Collective Bargaining Everyone is Whispering About” *Law of Work Blog* (May 6 2016): <https://lawofwork.ca/the-model-of-sectoral-collective-bargaining-everyone-is-whispering-about/>; D. MacDonald, ‘Sectoral Certification: A Case Study of British Columbia’ (1997) 5 CLELJ 243; S. Slinn, ‘Broader-based and Sectoral Bargaining Proposals in Collective Bargaining Law Reform: A Historical Review’ (2020) 85 Labour/Le Travail 13

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move of that magnitude needed first to be carefully studied with multi-stakeholder contributions and input.

**TABLE 3: EXPERT REPORT CALLS FOR FURTHER GOVERNMENT SUPPORTED RESEARCH INTO BROADER-BASED BARGAINING IN CANADA**

REPORT, YEAR	RECOMMENDATION REGARDING BBB
<p>Federal government, <i>Seeking a Balance: Task Force to Inquire into Part 1 of the Canada Labour Code</i>, 1996.</p>	<p>“We are not persuaded to recommend multi-employer sectoral bargaining for the federal jurisdiction at this time. It lacks any widespread consensus or even understanding. <u>However, the idea raises a point that in our view merits further consideration.</u>”</p> <p>(The Report then recommends the ascension strategy of consolidation of multiple bargaining units of the same employer, discussed below.)</p>
<p>Ontario, <i>Changing Workplaces Review</i>, 2017</p>	<p>“... the <i>Wagner Act</i> enterprise model is largely irrelevant to large groups of employees who work in smaller enterprises. Our recommendations with respect to multiple-location single-employer enterprises and the operations of franchisees provide some significant opportunity to broaden the enterprise model. If unionization did become more commonplace in chain restaurants, franchise operations and the retail sector, this would undoubtedly have a market impact affecting other employers, including an impact on market compensation rates, perhaps making sectoral bargaining more attractive for employers....</p> <p><i>In our view, this report should not be the end of the discussion on these issues. In our Conclusion, we recommend the creation of an Ontario Workplace Forum where leaders of the employer community, unions and employee advocates, together with government, could discuss important issues and opportunities regarding the workplace. <u>We recommend that this issue of sectoral bargaining and regulation be a standing issue in those discussions.</u>”</i></p>
<p>British Columbia, <i>Recommendations for Amendments to the Labour Relations Code</i>, 2018</p>	<p>While we recognize the problems and need for innovation, we did not receive sufficient information or analysis to make concrete recommendations for sectoral certification. <u>This issue should be examined in more depth, perhaps by a single issue commission.</u></p>

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Given the prominence of sectoral bargaining in labour law reform debates and the fact that expert panels commissioned by Canadian governments have repeatedly recommended that governments study the feasibility of broader based collective bargaining, it is striking that no such studies have taken place. Therefore, an important step in the process of working towards a 21<sup>st</sup> century collective bargaining model is for governments to finally initiate a serious multi-stakeholder roundtable dialogue about the future of sectoral collective bargaining. We should begin with those sectors where the Wagner model rarely reaches, including Accommodation and Food Services (4.4% union density), Professional, scientific, and technical services (4.2%), Finance, insurance, real estate, rental, and leasing (8.7%), Agriculture (2.7%), and Wholesale and retail services (11.9%). To this list, we should add: (1) homeworkers, who are isolated and vulnerable and whose work arrangements are not conducive to Wagner model style collective bargaining, and (2) private transportation and courier industries, including App-based transportation and delivery services, which are characterized by high turnover of geographically dispersed, low-wage workers who are difficult to locate and organize under the traditional Wagner model.

Most of these sectors are governed by provincial labour law, so it may be a task for provincial governments to strike these committees, or maybe the federal government could take a leadership role and create a national task force. Whichever level of government takes the lead, it will be crucial that a wide range of key stakeholders participate, including labour organizations and employers of all sorts that will be affected, such as franchisors and franchisees, small businesses as well as large corporations. However, the challenge, as always with labour law reform, will be to illicit meaningful and productive participation. Justice John Murray, one of Changing Workplaces Review experts, told my labour law class that they released an Interim Report to provoke a disinterested employer community to say something, anything, useful beyond “everything is fine, don’t change anything.” An expert commission tasked with proposing new models of sectoral bargaining that could revitalize comatose collective bargaining in Canada is likely to receive the same muted response from employers who, if history is any indication, will not be supportive of the project.

This is why, if governments are serious about moving forward with some form of sectoral bargaining, it is important that they create an incentive for stakeholders to participate in a meaningful way in the design of the model. Meaningful consultation does not mean a guaranteed veto over reforms a stakeholder would prefer not to be implemented. When Kevin Burkett described the breakdown of the historical compromise in labour law reform that occurred in 1990s Ontario, he was describing the process of consultations more than the substance of the reforms enacted by the NDP and the Conservatives. His concern was that the stakeholders perceived that there had not been *meaningful consultations* and that the reforms had been pre-determined by the governments answering to wish-lists submitted by their core labour and business constituents. Every labour law reform package ever introduced has come over the objections of one or more

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affected stakeholders. Consensus is not the reality of labour law reform, but meaningful consultation combined with unbiased research and careful analysis should be the goal.<sup>61</sup>

With this in mind, a government interested in finally tackling the idea of adding sectoral bargaining to the Canadian labour law landscape to give voice to workers long ignored under the Wagner model might adopt a process we can call ‘regulated self-regulation.’ In this approach to governance, the government advises key constituents that it intends to introduce legislation that would create a model of sectoral bargaining for historically underrepresented sectors. However, prior to drafting any statutory language, the government would strike a task force to conduct research, consult, and workshop the basic components of a sectoral bargaining model with the stakeholders. The task force would collect information about the concerns of stakeholders and acknowledge and identify possible solutions or compromises that recognize those concerns. For example, there are real questions about how sectoral bargaining in, say, the fast-food industry would be affected by pre-existing franchising arrangements and whether sectoral bargaining would advantage large corporations at the expense of small businesses. These concerns need to be taken seriously in the consultation process.

We don’t need to detail the entire process here, but the essential point is that a multi-stakeholder working committee is then created and tasked with the mission of drafting a model statute (or code). The government supports the process throughout by providing research, administrative resources, and mediation services as needed. At the end of a defined period, the working committee submits its proposal, which the government then studies and reforms if necessary. Perhaps the committee submits a complete legal model that the government then enacts as legislation, or maybe the working committee submits a partial model with some areas of disagreement left out and highlighted.<sup>62</sup>

The key to this type of regulated self-regulation approach is that important stakeholders who will be affected by the new model are given every opportunity to be actively involved in designing the model, aware that if no agreement on a model is reached, the government may move forward with its own model (presumably that considers concerns raised during the consultations process). Some stakeholders may still refuse to participate and reject any movement towards broader-based bargaining at all, holding out for a change of government and the hope that the now common pendulum will swing back and wipe out any new model that emerges from the process. That is the reality of the situation in which we find ourselves. For those actors uninterested in the decline of collective bargaining, the status quo works just fine.

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<sup>61</sup> See Burkett, *supra* note 8 at 4-5. See also B. Burkett, “Reflections on Tripartism and Labour Law Reform” 12 CLELJ 261 [noting that while consensus would be great, it is often not possible in labour law reform and that tripartism focuses on the process of consultations and assurances that “both workers and employers have an equal opportunity to be consulted and express their views”]

<sup>62</sup> This governance approach was adopted by the government of New South Wales in Australia when it legislated a Homeworker Code of Practice to address the problem of non-enforcement and non-compliance with labour standards by employers of homeworkers. The government tasked an industry-labour council to draft a code that was then legislated. See discussion in M. Rawling, “Cross Jurisdictional and Other Implications of Mandatory Clothing Retailer Obligations” (2014) 27 Aust. J. Labour Law 191, 199-201.

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However, we agreed at the outset to presume a government that is concerned about the erosion of collective bargaining and that wants to take steps to rebuild collective worker voice and power. In that world, the fact that some actors will stubbornly cling to an antiquated model and resist any movement towards the government’s goal cannot be allowed to prevent action. The best that can be offered is a fair accounting of those actor’s concerns in the design of the model. There is nothing inherent in a model of sectoral bargaining that undermines the goals of business. Indeed, a well-designed model may contribute to more productive and efficient workplaces by standardizing certain basic workplace conditions and removing them from competition so that businesses compete based on efficiency and quality, for example, rather than low labour costs. However, a lack of serious dialogue and research into these possibilities has impeded our understanding of the possibilities for broader-based bargaining in Canada.

### **Conclusion**

The Wagner model was a remarkable piece of socio-legal engineering that has survived nearly a century as the dominant collective bargaining model in Canada and the United States. However, it is widely recognized that the model is well past its best before date. Even at its peak of influence, the Wagner model extended the reach of collective bargaining to less than half of Canada’s private sector workers and those who benefited most were primarily men working in heavy industry. However, today only about 15 percent of private sectors workers benefit from collective bargaining. The erosion of collective bargaining is linked to a rise in income inequality in Canada and abroad, and growing inequality is tied to all sorts of concerning socio-political divisions that have the world on edge today. These are worrying times and I have argued that it essential that our governments take seriously the future of labour law and the revitalization of collective bargaining as an essential response to rising political tensions and economic precarity. History has demonstrated time and again that collective bargaining and democracy at work are necessary counters to political unrest and the rise of authoritarianism in nations.

However, recognizing the need to re-invent labour law for the 21<sup>st</sup> century is only the start. Identifying how to move forward is a daunting task given the powerful normative grip of the Wagner model. I have argued that the Wagner model should be preserved, but supplemented in important ways to build a thicker model of freedom of association that is not tied entirely to the singular model of majority/exclusive decentralized bargaining between individual trade unions and employers. This “graduated” approach requires us to think about *descending* from majoritarianism and exclusivity to construct a right to associate and act collectively that does not depend upon the present of a majority trade union. It also requires us to finally think seriously about supplementing decentralized collective bargaining in historically under-represented sectors with some form of broader-based sectoral bargaining (*ascending* from the decentralized Wagner model).

Still, dreaming up clever ideas about labour law reform is the easy part. A more daunting challenge is how to make those ideas real in a climate of deep political division and powerful opposition to any attempt to rejuvenate collective bargaining in Canada. The main subject of my

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talk has been how Canadian labour law might move *from here to there*, from the Wagner model to something else. In response, I have argued partially and perhaps naively, that a strong moral and political case can be made that labour law should protect, at least, the rights of all workers to exercise fundamental, constitutionally guaranteed rights and freedoms. Existing labour laws fall well short of this basic standard. For example, while the Charter guarantees workers a right to associate, to make collective representations to their employer, and to strike, the vast majority of Canadians can be fired for attempting to exercise any of these fundamental rights. Twenty-first century labour law will eventually respond to this glaring incongruence, either because a government moves on its own to align labour law more closely with the substance of Section 2(d) of the Charter, or because a court orders them to do so.

The idea of ascending from the Wagner model towards broader-based bargaining raises different implementation problems. The Charter does not require any particular collective bargaining model, so if 21<sup>st</sup> century labour law introduces sectoral bargaining to historically underrepresented sectors, it will be because governments legislated it. I can envision two ways that could happen. The first way is that a government finally decides that sectoral bargaining is necessary to extend collective bargaining to Canada’s most precarious workers and it legislates sectoral bargaining almost certainly over the objections of all or some of the affected businesses. I have argued that in this scenario it will be crucial that the government ensure that affected actors are given a full and fair opportunity to participate in the design of the model.

The second way that sectoral bargaining might come about in the 21<sup>st</sup> century is that labour unrest and militancy rises to such levels that employers come to see organized industry level collective bargaining as a solution. That is the story that proceeded province-wide bargaining in Ontario’s construction sector, for example, and the introduction of the Canadian Wagner model itself for that matter. We are a long way from that scenario right now. I have proposed an extended right to strike for non-unionized workers, which would provide at least some protection for workers who act in concert to protest poor working conditions. However, those protections won’t provoke a sudden wave of militancy by workers in historically underrepresented sectors. Unfortunately, history suggests that it often takes major political and civil upheaval and even war for politicians to finally be reminded of the importance of freedom of association and collective voice at work in the pursuit of sustained progress and peace. It is no longer unimaginable that a new 21<sup>st</sup> century labour law will emerge not from the healthy give and take of the political process, but from the ashes of large-scale conflict.