



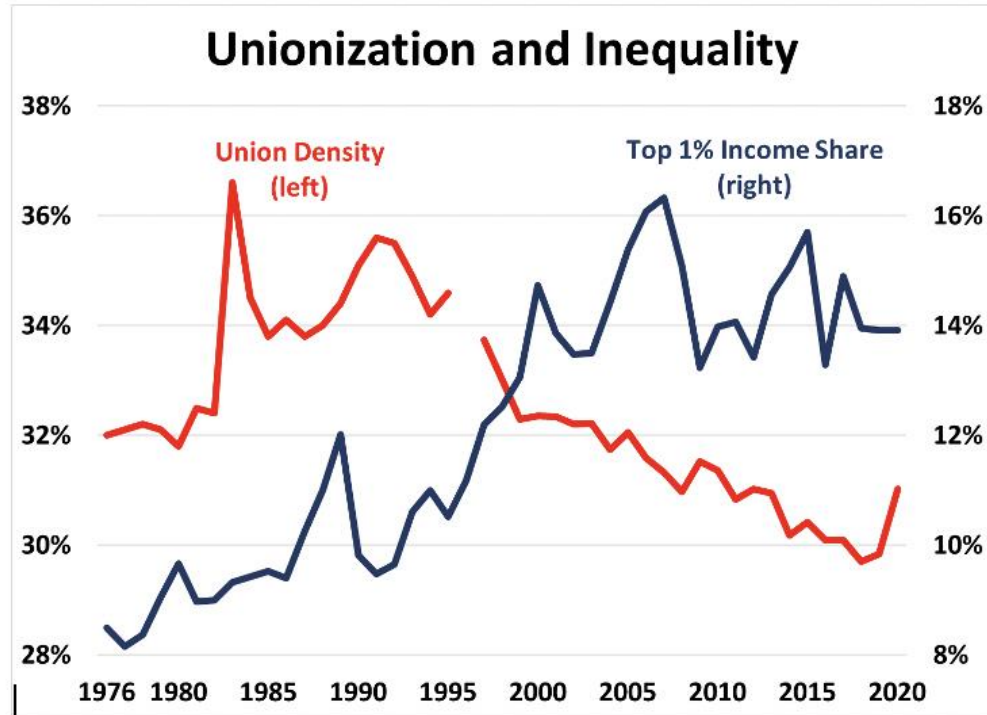
Sefton-Williams Memorial Lecture 2023

‘Can’t Get There From Here’:
Thoughts on the Idea of Labour
Law Reform in the 21st Century

David J. Doorey
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COLLECTIVE BARGAINING AS BELL WEATHER OF HEALTHY DEMOCRACY AND ECONOMY

Chart 1: Unionization and Inequality in Canada, 1976-2020



International Labour Organization

“Universal peace can only be established if it is based on social justice”

“Labour is not a commodity”

Freedom of association and collective bargaining are essential to sustained progress.

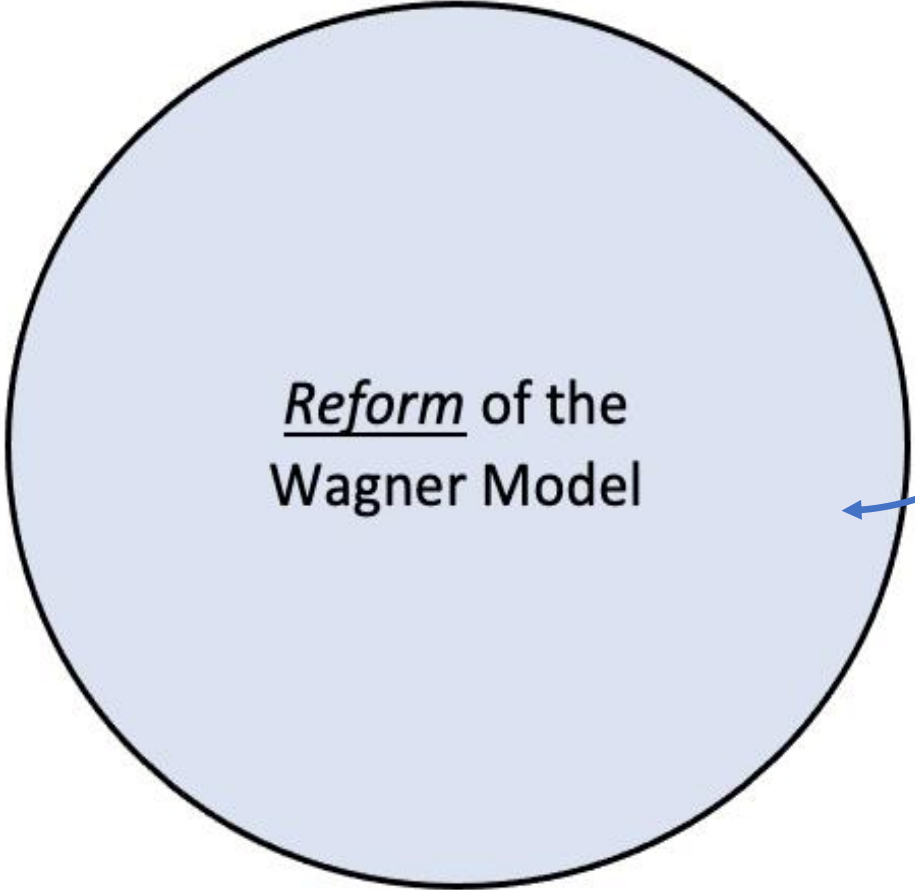
APPROACHES TO COLLECTIVE BARGAINING LAW REFORM IN THE 21ST CENTURY?

Reform Approach: Confine legal reforms to altering the details of the Wagner model.

Replacement Approach: Jettison the Wagner model that's guided collective bargaining since the 1940s and replace it without an entirely different legal model.

Graduated Approach: Retain the Wagner model, perhaps with some reforms, and graft additional layers of freedom of association onto it.

The Reform Approach to Collective Bargaining Reform



Reform of the
Wagner Model

Standard Reform Playbook

*Well-worn set of reforms that tinker
with details of the Wagner Model*

* * *

- Card-Check vs Mandatory Votes
- Labour Board remedial powers
- Replacement workers
- Access to first contract arbitration
- Union access / lists

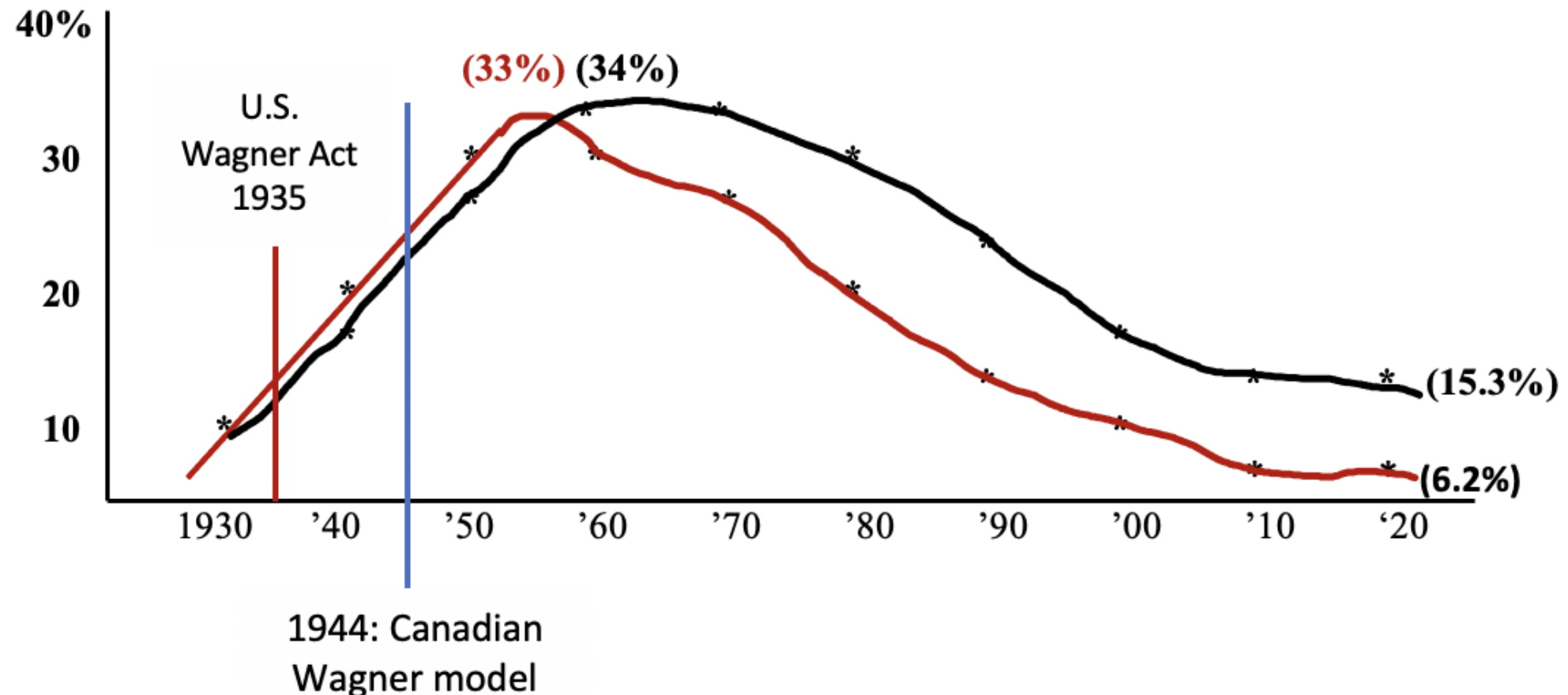
Et cetera

**THE POLITICIZATION OF
THE ONTARIO LABOUR RELATIONS FRAMEWORK
IN THE DECADE OF THE 1990s**

Kevin M. Burkett

The Rise and Fall of the Wagner Model of Collective Bargaining Law

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



EMPLOYER OPPOSITION TO LEGAL MODELS DESIGNED TO EXPAND COLLECTIVE BARGAINING

Canadian Manufacturers & Exporters Association:

“We are opposed to options that would create any form of sectoral collective agreements”

Canadian Federation of Independent Business:

“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”

Ontario Restaurant Hotel and Motel Association (ORHMA):

“The ORHMA opposes sectoral bargaining.... It will profoundly have a negative effect on small business with sustainment being an issue for many”

Human Resources Professionals Association:

“HRPAO questions the wisdom of any proposal which would serve to increase the rate of unionization..”

HARVARD CLEAN SLATE FOR WORKER POWER

Parameters: If you could enact any legislation to rebuild collective bargaining and worker power, what would you do?

Recommendations Included:

- Remove collective bargaining exclusions
- Extend collective bargaining coverage to contractors
- Introduce “graduated” collective bargaining rights:
 - Elected workplace monitors in every workplace
 - Works Councils if 3 or more employees request
 - Duty to bargain with minority unions if at least 25% of employees support
 - Maintain Wagner model exclusive / majority collective bargaining if > 50% employee support
- Sectoral Collective Bargaining thru “sectoral bargaining panels” if 5000 employees or 10% of employees in a sector support a worker organization.

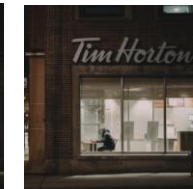


Decentralized versus Centralized (Sectoral) Collective Bargaining Models

Decentralized Wagner Model



Centralized Collective Bargaining Models



POLICY REPORT ON THE FUTURE OF CANADIAN COLLECTIVE BARGAINING LAW

Parameters: Present pragmatic policy proposals on collective bargaining law that a contemporary government would take seriously as a roadmap for labour law reform.

David J Doorey*

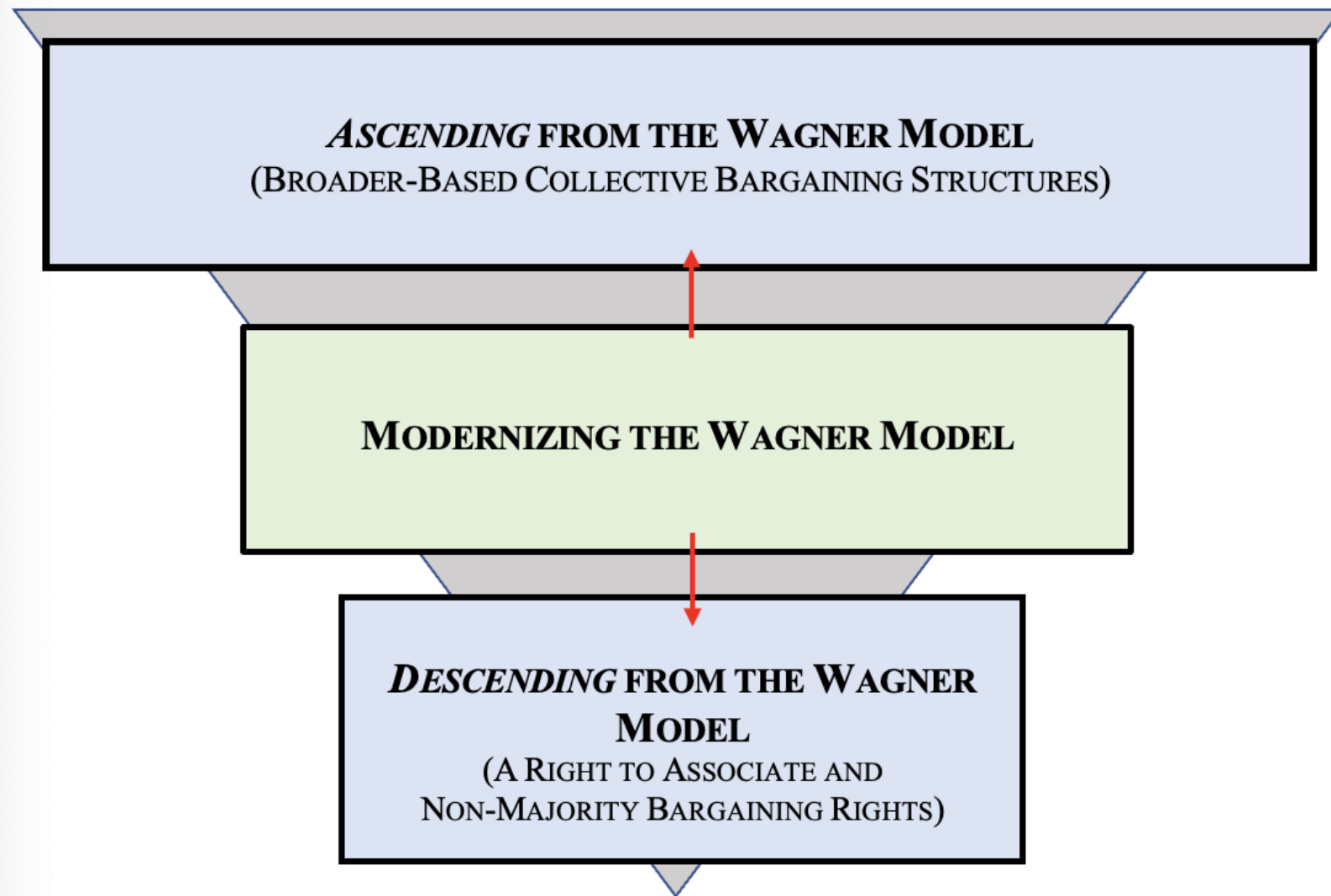
REFLECTING BACK ON THE FUTURE
OF LABOUR LAW†

Graduated Freedom of Association: Worker Voice Beyond the Wagner Model

*David J Doorey**

The guarantee of freedom of association in section 2(d) of the Canadian Charter of Rights and Freedoms has been held to protect the right of workers to make collective representations to their employers without fear of reprisals, and to require employers to engage in meaningful

FIGURE 2: COLLECTIVE BARGAINING REFORM: A THREE-LEVEL FRAMEWORK



THE DESCENSION STRATEGY: PROTECTING CONSTITUTIONAL RIGHTS AND FREEDOMS

Graduated Freedom of Association: Worker Voice Beyond the Wagner Model

*David J Doorey**

The guarantee of freedom of association in section 2(d) of the Canadian Charter of Rights and Freedoms has been held to protect the right of workers to make collective representations to their employers without fear of reprisals, and to require employers to engage in meaningful

Thesis: Labour Law should include protections that enable all workers to exercise at least the core fundamental rights and freedoms guaranteed by the Charter.

In 2013, this included:

- Right to form, join with other workers into associations without reprisals.
- Right to make collective representations to employer, and corresponding duty on employer to engage in a good faith **meaningful dialogue**.

In 2015, SCC added “right to strike”.

THE DESCENSION STRATEGY: BUILDING A FOUNDATION FOR FREEDOM OF ASSOCIATION BELOW THE LEVEL OF MAJORITARIANISM

THE *DESCENSION STRATEGY* AIMS TO BUILD A STRONGER FOUNDATION FOR FREEDOM OF ASSOCIATION FROM THE GROUND UP.

BEGINNING WITH A FOUNDATIONAL “RIGHT TO ASSOCIATE”, THE STRATEGY THEN PROPOSES A NEW APPROACH TO MINORITY COLLECTIVE BARGAINING IN THE FORM OF BARGAINING COMMITTEES WHEN AN EMPLOYEE ASSOCIATION REPRESENTS AT LEAST 25 PERCENT OF EMPLOYEES BUT LESS THAN THE MAJORITY NEEDED FOR FORMAL CERTIFICATION.

Wagner Model
(Majority/Exclusive)

Bargaining
Committees
(25-50% support)

“Right to
Associate” & to
Engage in
Concerted
Activities

DESCENSION STRATEGIES: RIGHT TO ASSOCIATE AND ACT COLLECTIVELY

WHEN CANADA IMPORTED WAGNER MODEL, IT MADE A
LITTLE NOTICED CHANGE:

Rather than protect a “right to associate” or to “engage in concerted activities”, Canadian politicians adopted a narrower “right to join trade unions and engage in lawful trade union activities”.

Canada does not protect a right to associate. This omission has become more glaring as formal, majority trade unionism falls out of reach for vast majority of Canadians.



WHY WOULD A GOVERNMENT ENACT A “RIGHT TO CONCERTED ACTIVITIES?”

1. *The Charter requires it.*

- The SCC long ago ruled that FOA protects a right of workers to associate “without reprisal” and that a posture of government restraint will expose workers to the threat of reprisals. But right now, only “trade union activities” protected.
- Therefore, our unfair labor practice laws are “**underinclusive**”. Waiting for a test case involving non-union workers terminated for collective activity.

2. *Public support would be high if people understood that law doesn’t protect them now.*

3. *It’s a sensible law for public policy purposes.*

4. *The United States has protected this right for nearly a century. It’s hardly radical.*

A NON-UNION RIGHT TO STRIKE IN CANADA?

- The Canadian Wagner model has a much narrower right to strike than the American NLRA.
- Non-union workers in Canada have no protected right to strike at all.
- The SCC has ruled that Canadians have a constitutional right to strike, yet more than 85% of workers in the private sector can be fired for striking!



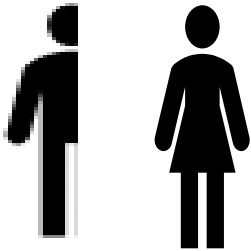
How Canadian Law Protects a 'Right to Strike'

Law says that an employment contract does not end on account of an employee engaging in a 'lawful' strike.

Law makes it illegal to punish an employee for exercising lawful union activities, which includes participating in a lawful strike.

Law requires employers to return lawful strikers to their jobs once the strike concludes (in Ontario, only for first 6 months of strike). No "permanent replacements" as in the USA.

THE CURIOUS ABSENCE OF FREEDOM OF ASSOCIATION IN CANADA



15% of private sector employees:

Have a limited right to strike provided they are in a certified majority trade union and various legal preconditions for a lawful strike are satisfied.



85% of private sector employees can be fired for striking and no law protects them.

WHY WOULD A GOVERNMENT ENACT A “NON- UNION” RIGHT TO STRIKE?

1. *The Charter may require it, but “Charter values” certainly do.*

- Fact that vast majority of Canadian employees have no legally protected right to strike is drastically misaligned with the state of freedom of association under the Charter.
- Providing basic protections for the exercise of core Charter rights and freedoms is the right thing to do.

2. *Canada is an outlier in having no protections at all for a right to strike unless workers are in a certified majority trade union.*

3. *Not Revolutionary, but it would thicken collective worker rights.*

- Relatively few nonunion will strike and when they do, the strike will probably be short.

“MINORITY” WORKER BARGAINING COMMITTEES

- Charter protects right of workers to make collective representations to the employer and to engage in a good faith, meaningful dialogue with employer about those representations.
- Right now, employers can terminate non-union employees who make collective representations and ignore those representations entirely.
- **Proposal:**
 - New **Worker Bargaining Committees** if between 25-50% of employees support collective bargaining.
 - New government office to provide support, training to workers and employers.
 - Defined range of subjects for mandatory dialogue.

WHY WOULD GOVERNMENT INTRODUCE NEW WORKPLACE BARGAINING COMMITTEES?

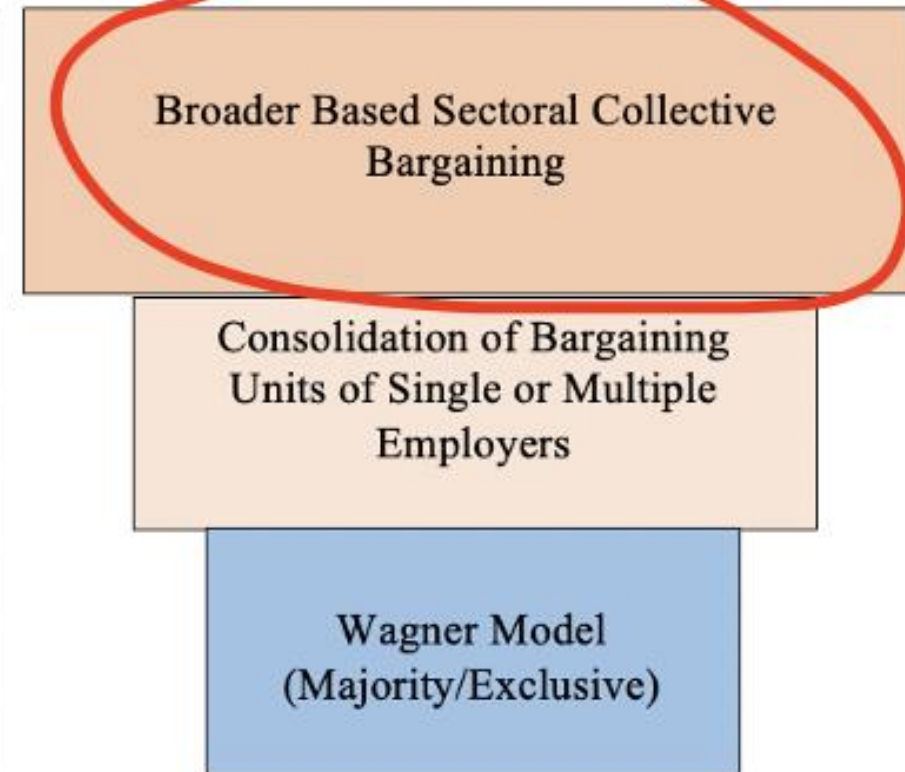
1. Minority Bargaining Committees implement Charter right to basic minimal collective bargaining rights.
2. Proposals for similar non-majority bargaining committees date back decades and are now mainstream.
3. Bargaining Committees mirror existing processes in Canada, such as Joint Health and Safety Committees & in the Ontario AEPA model.
4. Bargaining Committees support long-standing benefits of employee consultation and voice.
5. Burden imposed on employers is marginal, and consultations could help improve compliance with labour standards legislation.

THE ASCENSION STRATEGY: BUILDING UPWARDS FROM THE WORKPLACE LEVEL

THE *ASCENSION STRATEGY* FOCUSES ON STRATEGIES THAT CAN MOVE COLLECTIVE BARGAINING *UPWARDS* FROM THE LEVEL OF THE WORKPLACE COMMON UNDER THE WAGNER MODEL TO SECTOR LEVEL BARGAINING THAT CREATE BASIC STANDARDS OF EMPLOYMENT FOR ALL EMPLOYEES IN THE SECTOR.

THE FIRST STEP IS TO EMPOWER LABOUR BOARDS TO CONSOLIDATE BARGAINING UNITS INTO LARGER UNITS.

THE FINAL STEP IS DEVELOP MODELS OF INDUSTRY OR SECTOR LEVEL COLLECTIVE BARGAINING



Seeking a Balance, Federal Labour Law Reform Task Force, 1997

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. However, the idea raises a point that in our view merits further consideration.”

Ontario Changing Workplaces Review, 2017

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. We recommend that this issue of sectoral bargaining and regulation be a standing issue in those discussions.”

BC Recommendations on Labour Law Reform, 2018

While we recognize the problems and need for innovation, we did not receive sufficient information or analysis to make concrete recommendations for sectoral certification. This issue should be examined in more depth, perhaps by a single-issue commission.

ASCENSION STRATEGY:

TASK FORCE ON BROADER-BASED COLLECTIVE BARGAINING FOR THE 21ST CENTURY

- Broad-based set of stakeholders, wide consultations.
- Research budget.
- Defined parameters:
 - Focus just on traditionally ‘under-represented’ sectors?
 - How would sectoral bargaining be initiated?
 - How are bargaining reps selected?
 - What is scope of bargaining?
 - How are bargaining disputes resolved?



Regulated Self-Regulation

- The test for fair labour legislation reform is not absolute consensus. If it was, labour law reform would never occur.
- The important point is that affected parties are provided with a fair and meaningful opportunity to participate and voice concerns and have those concerns treated seriously.
- In *regulated self-regulation*, the state announces its intention to legislate in an area but then provides affected stakeholders with an opportunity first to draft their own model legal code that would become law.

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