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Article

**Whither Wagner? Reconsidering Labor Law and Policy Reform**

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INTRODUCTION

It is an interesting moment to contemplate the future of North American labor law and labor relations. Canada and the United States initially adopted similar labor relations legal frameworks, the Canadian framework a variation of the United States' 1935 National Labor Relations Act (generally referred to as the "Wagner Act" or the "Wagner model").<sup>1</sup> However, the Wagner model has played out very differently in the two countries. A key indicator of this difference is the divergent trajectories of changing union density over the last sixty years in Canada and the United States. In contrast with the severe, sustained decline in unionization in the United States, Canada experienced a longer period of growth, slower decline, and—in recent decades—a fairly stable level of unionization.<sup>2</sup> Will the labor relations experiences of these closely linked nations continue to diverge, or will Canada's labor relations landscape come to resemble that of the United States, and what might be the implications for labor law?

In addressing this question, this Article proceeds in six Parts. Part I briefly introduces the interconnected origins of United States and Canadian labor law frameworks. Part II surveys the unionization experience, and reviews possible explanations for the persistent and growing divergence in union

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1. National Labor Relations (Wagner) Act, 29 U.S.C. §§ 151–169 (2012).  
2. See generally Jeffrey Sack, *U.S. and Canadian Labour Law: Significant Distinctions*, 25 A.B.A. J. LAB. & EMP. L. 241 (2010).

density between the two countries. Part III introduces two alternative, but related, perspectives for explaining the different labor relations experiences of the United States and Canada, offering insights into their likely futures. These are John Godard's "Historical-Institutionalist" perspective, and Harry Arthurs' "Real Constitution."<sup>3</sup>

Focusing on challenges to union security arrangements, Part IV introduces relevant aspects of the Canadian labor relations system and considers why past efforts to introduce right-to-work (RTW) legislation have failed.<sup>4</sup> Part V provides an overview of significant contemporary changes directly affecting labor relations. These include: wide-ranging efforts by right-of-center parties to achieve anti-labor legislative changes directed at financially undermining unions, restricting unions' political voice, and promoting right-to-work legislation. Part V also considers the labor movements' recent countervailing efforts, including: union mergers, using broader community groups to amplify unions' political voice, and strategic voting.

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

## I. ORIGINS

Development of labor law in Canada has been indirectly and directly influenced by the United States since the early 20<sup>th</sup> century. Indirect influences include those of U.S. corporations and U.S.-headquartered unions ("international unions") operat-

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3. Harry W. Arthurs, *Labour and the "Real" Constitution*, 48 LES CAHIERS DE DROIT 43 (2007) [hereinafter Arthurs, *Real Constitution*]; John Godard, *Labour Law and Union Recognition in Canada: A Historical-Institutionalist Perspective*, 38 QUEEN'S L.J. 391 (2013) [hereinafter Godard, *Historical-Institutionalist*].

4. This Article employs a broad understanding of RTW, including challenges to union membership and dues payment protections, as well as requirements for union financial disclosure focusing on the purposes of unions' expenditures and time spent on matters other than collective bargaining.

ing in Canada and affecting the structures, institutions and practices of labor relations and the labor movement.<sup>5</sup>

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

The federal government continued to resist intervening in labor relations with statutory regulation, which it regarded as an essentially private matter, and sought to maintain what it regarded as a neutral stance toward labor relations.<sup>8</sup> However, growing labor militancy, the rapid and growing political success of the Co-operative Commonwealth Federation party (CCF) which had strong ties to the labor movement, and wartime demands prompted two provincial governments and, shortly thereafter, the federal government to adopt versions of the Wagner Act.<sup>9</sup> The federal legislation, Privy Council Order 1003 (PC 1003), passed in 1944, effectively became the template for post-war labor legislation across Canada.<sup>10</sup> As Mark Thompson has pointed out, neither at the time PC 1003 was passed, nor in the 1960s and 1970s when labor legislation in Canada was

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5. See H.W. Arthurs, *Labour Law Without the State?*, 46 U. TORONTO L.J. 1, 35 (1996).

6. H.A. LOGAN, STATE INTERVENTION AND ASSISTANCE IN COLLECTIVE BARGAINING: THE CANADIAN EXPERIENCE 1943–1954, at 9–10 (1956); Laurel Sefton MacDowell, *The Formation of the Canadian Industrial Relations System During World War Two*, 3 LAB./LE TRAVAIL 175, 180 (1978).

7. JAMES C. CAMERON & F.J.L. YOUNG, THE STATUS OF TRADE UNIONS IN CANADA 56 (1960); LOGAN, *supra* note 6, at 414–18.

8. MacDowell, *supra* note 6, at 180.

9. *Id.* at 189–90.

10. Wartime Labour Relations Regulations, Dominion Order-in-Council, P.C. 1003 (Feb. 17, 1944) (Can.).

modernized, was any serious consideration given to alternatives to the Wagner model.<sup>11</sup>

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

## II. DIVERGING UNIONIZATION EXPERIENCES

The development of union density followed similar paths in the United States and Canada between 1920 and 1965, after which point the experiences of the two countries abruptly diverged.<sup>13</sup>

### A. DIVERGING UNIONIZATION EXPERIENCES

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

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11. Mark Thompson, *Wagnerism in Canada: Compared to What?*, in PROCEEDINGS OF THE XXXIST CONFERENCE 59, 61–63 (Anthony Giles et al. eds., 1995).

12. See Godard, *Historical-Institutionalist*, *supra* note 3, at 400–02 (citing Bruce E. Kaufman, *Why the Wagner Act? Re-establishing Contact with Its Original Purpose*, in 7 ADVANCES IN INDUSTRIAL AND LABOR RELATIONS 15 (David Lewin et al. eds., 1996)); Daphne Gottlieb Taras, *Collective Bargaining Regulation in Canada and the United States: Divergent Cultures, Divergent Outcomes*, in GOVERNMENT IN REGULATION OF THE EMPLOYMENT RELATIONSHIP 295, 300 (Bruce Kaufman ed., 1997).

13. W. Craig Riddell, *Unionization in Canada and the United States: A Tale of Two Countries*, in SMALL DIFFERENCES THAT MATTER: LABOR MARKETS AND INCOME MAINTENANCE IN CANADA AND THE UNITED STATES 109, 109–14 & tbl.4.1, fig.4.1 (David Card & Richard B. Freeman eds., 1993).

density grew until the mid-1980s. The United States has continued to experience a steep decline to the present time, while the Canadian experience has been of moderate decline and stagnation.<sup>14</sup>

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

In recent decades, the Canadian experience has been one of stagnation in union density, in contrast to the steep and sustained decline seen in the United States. Current differences in unionization between the two countries are stark. In 2013, 31.2% of all Canadian employees, including 74.6% in the public sector and 17.5% in the private sector, were covered by a collective agreement.<sup>16</sup> In contrast, 2013 data for the United States indicate that, among employed wage and salary workers, 12.4% were represented by unions, with 7.5% of private sector workers and 38.7% of public sector workers represented by unions.<sup>17</sup>

#### B. EXPLAINING THE DIVERGENCE

A substantial body of research has sought to explain the diverging courses of unionization in the United States and Canada.<sup>18</sup> Most empirical studies indicate that the relatively

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14. *Id.*

15. *Id.*; see also John Godard, *Do Labor Laws Matter? The Density Decline and Convergence Thesis Revisited*, 42 *INDUS. REL.* 458, 461–64 (2003) [hereinafter Godard, *Do Labor Laws Matter?*] (regarding the variety of measures of union density and difficulties involved in consistently measuring and comparing this phenomenon).

16. Calculations of union coverage based on STATISTICS CANADA, LABOUR FORCE SURVEY ESTIMATES: TABLE 282-0078, Labour Force Survey Estimates (LFS), Employees by Union Coverage, North American Industry Classification System (NAICS), Sex and Age Group, Annual (Persons). Note that “union coverage” includes both employees who are members of a union and employees who are not union members but who are covered by a collective agreement. See *id.* Due to the prevalence of agency shop arrangements in Canada (discussed *infra*) under which union membership is not required, collective agreement coverage is a more meaningful statistic than union membership. Also note these figures include agricultural workers. See *id.*

17. Press Release, Bureau of Labor Statistics, U.S. Dep’t of Labor, Union Members—2013, tbls.1–3 (Jan. 24, 2014), available at <http://www.bls.gov/news.release/pdf/union2.pdf>. Note that these figures include agricultural workers. See *id.*

18. See, e.g., Sara Slinn & Richard W. Hurd, *Canada and US Labor Relations*, in *RESEARCH HANDBOOK OF COMPARATIVE EMPLOYMENT RELATIONS*

lower union density in the United States is a product of lack of access to unionization rather than a result of lower demand for union representation.<sup>19</sup> Many of these studies conclude that the level of worker demand for union representation in the United States is similar to, perhaps even greater than, that among Canadian workers,<sup>20</sup> and that density in the two countries would be similar if U.S. workers' desire for unionization was satisfied.<sup>21</sup>

Explanations for this divergence point to a wide range of factors including differences in political, governmental, and administrative environments; and differing managerial and labor strategies.<sup>22</sup> Some commentators identify Canadian labor's participation in federal and provincial social democratic parties, and the consequent political influence labor has enjoyed, with the development of a more labor-friendly legislative and policy environment.<sup>23</sup>

In addition, stronger labor laws in Canada, relative to the United States, are commonly identified among the key explanations for the dramatic decline in U.S. union density and the

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153 (M. Barry & A. Wilkinson eds., 2000); John Godard, *The Exceptional Decline of the American Labor Movement*, 63 INDUS. & LAB. REL. REV. 82 (2009); Riddell, *supra* note 13; Daphne G. Taras, *Explaining Canadian-American Differences in Union Density*, IRRRA 53RD ANNUAL PROCEEDINGS 153 (2001); Leo Troy, *U.S. and Canadian Industrial Relations: Convergent or Divergent?*, 39 INDUS. REL. 695 (2000).

19. *But see, e.g.*, Henry S. Farber & Bruce Western, *Accounting for the Decline of Unions in the Private Sector, 1973–1998*, 22 J. LAB. RES. 459 (2001) (identifying declining demand for union representation among U.S. workers as a significant explanation for falling U.S. union density).

20. *See, e.g.*, RICHARD B. FREEMAN & JOEL ROGERS, WHAT WORKERS WANT (1999); SEYMOUR MARTIN LIPSET ET AL., THE PARADOX OF AMERICAN UNIONISM: WHY AMERICANS LIKE UNIONS MORE THAN CANADIANS DO, BUT JOIN MUCH LESS (2004); Seymour Martin Lipset & Noah M. Meltz, *Canadian and American Attitudes Toward Work and Institutions*, 1 PERSP. ON WORK 14, 14–19 (1998); Rafael Gomez et al., *Frustrated Demand for Unionisation: The Case of the United States and Canada Revisited* (2001) (unpublished manuscript), available at <http://cep.lse.ac.uk/pubs/download/DP0492.pdf>.

21. *See generally* Gomez et al., *supra* note 20, at 8 (concluding that this unsatisfied demand for union representation accounted for about two-thirds of the Canada-U.S. difference in union density in the 1990s and that union density in the United States would have been twenty-three percentage points higher had this unmet demand been satisfied).

22. *See* Slinn & Hurd, *supra* note 18.

23. DONALD D. CARTER, LABOUR LAW REFORM: RADICAL DEPARTURE OF NATURAL EVOLUTION?, INDUS. REL. CENTRE PRESS CURRENT ISSUES SERIES 3–4 (1992), available at <http://irc.queensu.ca/sites/default/files/articles/carter-labour-law-reform-radical-departure-or-natural-evolution.pdf>; Sack, *supra* note 2, at 244–47.

persistent Canada-United States density difference.<sup>24</sup> Labor law is primarily a provincial responsibility under the Canadian Constitution. Consequently, the federal government has jurisdiction over labor and employment relations only for employees of the government, Crown corporations, and specified, federal-regulated industries. This diversity of regulation, together with the Parliamentary system of government, is credited with fostering a diversity of frequently changing labor law regimes.<sup>25</sup>

### C. THE CHARTER CONTRIBUTION TO THE DIVERGENCE

Recently, application of the Canadian Charter of Rights and Freedoms (Charter), adopted in 1982, has emerged as perhaps the most distinct legal difference between the United States and Canada.<sup>26</sup> The Charter constitutionally guarantees specific rights and freedoms including, most relevant to labor, the freedoms of association (FOA) and expression.<sup>27</sup> However, these are not absolute guarantees. Section 1 of the Charter provides that rights and freedoms are “subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”<sup>28</sup>

During the first twenty-five years of the Charter’s life it provided little protection to labor. Notably, the Canadian Labour Congress had opted out of participating in development of the Charter, and did not seek to have labor rights entrenched

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24. See, e.g., RICHARD N. BLOCK ET AL., *LABOR STANDARDS IN THE UNITED STATES AND CANADA* (2003); Richard N. Block, *Reforming U.S. Labor Law and Collective Bargaining: Some Proposals Based on the Canadian System*, in *RESTORING THE PROMISE OF AMERICAN LABOR LAW* 250, 255 (Sheldon Friedman et al. eds., 1994); Godard, *Do Labor Laws Matter?*, *supra* note 15. For a recent survey of relevant legal differences, see Sack, *supra* note 2.

25. See Paul C. Weiler, *Milestone or Tombstone: The Wagner Act at Fifty*, 23 *HARV. J. ON LEGIS.* 26, 31 (1986). *But see, e.g.*, Kevin M. Burkett, *The Politicization of the Ontario Labour Relations Framework in the 1990s*, *CAN. LAB. & EMP. L.J.* 161, 162–63 (1998) (identifying these features as fostering partisan and extreme changes rather than constructive evolution of labor law). Arthurs, discussed further below, contends that provincial supremacy over labor law has led to subordination of labor relations to trade and economic issues. Arthurs, *Real Constitution*, *supra* note 3, at 62.

26. See Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c.11 § 1, 2(d) (U.K.).

27. This Article focuses on FOA rather than the freedom of expression.

28. Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c. 11 § 1 (U.K.).

in the Charter.<sup>29</sup> Indeed, with the exception of mobility rights, the Charter includes no labor or social rights.<sup>30</sup>

In 1987 the Supreme Court of Canada (SCC) issued a “Labour Trilogy” of concurrent decisions, holding that the scope of the Charter’s FOA guarantee did not include collective bargaining or strike activity.<sup>31</sup> However, in its 2007 *Health Services* decision the SCC expressly rejected the reasoning in the Labour Trilogy, explicitly overturning its interpretation of the FOA.<sup>32</sup> Instead, the SCC declared that the FOA provides limited protection for the process of good faith collective bargaining. The SCC also indicated that labor policy was no longer to be treated as a judicial “no go” zone; that courts would no longer broadly defer to legislatures in labor matters; and that the Charter should, at a minimum, provide the level of protection found in international human rights instruments that Canada has ratified or to which Canada is a party.<sup>33</sup>

The SCC revisited the Charter FOA shortly thereafter in its 2011 *Fraser* decision.<sup>34</sup> Although the majority opinion in

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29. Arthurs, *Real Constitution*, *supra* note 3, at 45–46. Larry Savage characterizes this as a strategic choice to avoid conflict with labor supporters in the New Democratic Party and in the Quebec Federation of Labour (the FTQ), reflecting the fragmented nature of the Canadian labor movement and social democratic politics. Larry Savage, *Disorganized Labour: Canadian Unions and the Constitution Act*, 36 INT’L J. CAN. STUD. 145, 155–56 (2007). Arthurs surveys a variety of other explanations. The Canadian Labour Congress is the central labor organization in English Canada, established by the 1956 merger of the Trades and Labour Congress and the Canadian Congress of Labour.

30. See Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c.11 §§ 1, 2(d) (U.K.); *see also* Arthurs, *Real Constitution*, *supra* note 3, at 45–46. Larry Savage characterizes this as a strategic choice to avoid conflict with labor supporters in the New Democratic Party and in the Québec Federation of Labour (FTQ), reflecting the fragmented nature of the Canadian labor movement and social democratic politics. Savage, *supra* note 2, at 155–56.

31. The Labour Trilogy consists of: *In re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313 (Can.); *P.S.A.C. v. Canada*, [1987] 1 S.C.R. 424 (Can.); *R.W.D.S.U. v. Saskatchewan*, [1987] 1 S.C.R. 460 (Can.). The Supreme Court affirmed this position in *Professional Institute of the Public Service of Canada v. Northwest Territories (Commissioner)*, [1990] 2 S.C.R. 367 (Can.), and in *Delisle v. Canada (Deputy Attorney General)*, [1999] 2 S.C.R. 989 (Can.).

32. *Health Services & Support-Facilities Subsector Bargaining Ass’n v. British Columbia*, [2007] 2 S.C.R. 391, para. 26 (Can.).

33. *Id.* at paras. 26, 70, 79.

34. See *Ontario (Attorney General) v. Fraser*, [2011] 2 S.C.R. 3 (Can.).

*Fraser* professed to uphold *Health Services*,<sup>35</sup> subsequent interpretation and application of *Fraser* has reflected a more restricted view of Charter FOA protection for collective bargaining.<sup>36</sup>

*Health Services* was greeted in some quarters as a triumph for labor, and produced a surge of Charter litigation.<sup>37</sup> Although unions' turn towards litigation has been most marked since this decision, some commentators regard it as part of a broader strategic shift by unions towards using domestic and international litigation as an alternative to pursuing political and legislative change to combat legislative incursions on collective bargaining by governments that were increasingly hostile to labor.<sup>38</sup> This litigation strategy was common in the 1980s and early 1990s, although unions' interest in litigation had faded by the mid-1990s with consistently disappointing SCC decisions.<sup>39</sup>

### III. ALTERNATIVE PERSPECTIVES: THE HISTORICAL- INSTITUTIONALIST AND "REAL" CONSTITUTION MODELS

Another stream of literature fundamentally disagrees with the previously described explanations for the United States-Canada unionization difference. Although allowing that these other explanatory factors exist and may have some effect, these authors regard those factors as products of more fundamental,

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35. *Id.* at para. 97 ("*Health Services* is grounded in precedent, consistent with Canadian values, consistent with Canada's international commitments and consistent [with the] Court's purposive and generous interpretation of other *Charter* guarantees. In [the SCC's] view, [*Health Services*] should not be overturned.")

36. See, e.g., *Saskatchewan v. Saskatchewan Federation of Labour*, [2010] S.K.C.A. 27 (Can. Sask. C.A.), *leave to app. granted*; *Ass'n of Justice Counsel v. Canada* (Attorney General), [2012] O.N.C.A. 530 (Can. Ont. C.A.), *leave to appeal refused* [2012] S.C.C.A. No. 430 (Can.); *Mounted Police Ass'n of Ontario v. Canada* (Attorney General), [2010] O.N.C.A. 635 (Can. Ont. C.A.), *leave to appeal granted* [2012] S.C.C.A. No. 350 (Can.).

37. See generally Brian Etherington, *The B.C. Health Services and Support Decision—The Constitutionalization of a Right to Bargain Collectively in Canada: Where Did It Come From and Where Will It Lead?*, 30 COMP. LAB. L. & POL'Y J. 715, 721–22 (2009) [hereinafter Etherington, *Health Services*]; John P. McEvoy, *B.C. Health Services: The Legacy After 18 Months*, 59 U.N.B. L.J. 48, 50–58 (2009) (detailing various instances of Charter litigation).

38. Etherington, *Health Services*, *supra* note 37, at 721–22 (citing Judy Fudge, *The Supreme Court of Canada and the Right to Bargain Collectively: The Implications of the Health Services and Support Case in Canada and Beyond*, 37 INDUS. L.J. 25, 25–27 (2008)).

39. *Id.*

“real,” cultural, historical or institutional differences between the two countries. Two key examples of such alternative approaches are John Godard’s Historical-Institutionalist perspective and Harry Arthurs’ analysis of the “Real” constitution.

#### A. THE HISTORICAL-INSTITUTIONALIST MODEL

John Godard advocates a Historical-Institutionalist perspective, which looks to norms that have become entrenched in institutions through a nation’s particular formative history.<sup>40</sup> These norms become structurally embedded in institutions and power structures and cognitively embedded in how actors regard institutions.<sup>41</sup> This, in turn, leads to institutionalized differences in the law.<sup>42</sup>

Godard identifies the significant historical-institutional differences between the United States and Canada as the essential reason for the countries’ different unionization experiences.<sup>43</sup> Godard explains that the history of the United States reflects a highly-individualistic frontier experience, giving rise to norms focusing on property rights, freedom of contract, market rights, and distrust of state authority or intervention.<sup>44</sup> This, in turn, gave rise to a weak and conservative working class, conservative labor movement, general suspicion of “big labor,” and fierce employer anti-unionism.<sup>45</sup> In contrast, Canada’s formative historical experience was marked by Upper Canada elites’ concern for preserving order and stability, development led by the fur trade, smaller companies, and the Royal Northwest Mounted Police, rather than the entrepreneurial capitalist influence in the US; and, at least in Québec, the collectivist rather than individualist influence of the Roman Catholic Church.<sup>46</sup> Consequently, Canadian norms included greater acceptance of an administrative and interventionist state, valuing maintenance of the status quo, and social democratic and collectivist views.<sup>47</sup> Godard suggests that the institutional norms and traditions that developed in Canada are more consonant with the Wagner model than those of the United States,

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40. See Godard, *Historical-Institutionalist*, *supra* note 3, at 393–94.

41. *Id.* at 394 n.9.

42. *Id.* at 393, 399–401.

43. *Id.* at 400–01.

44. *Id.* at 394–95.

45. *Id.* at 395.

46. *Id.* at 397–98.

47. *Id.*

producing a more enduring labor relations system and supporting higher union density.<sup>48</sup>

However, Godard recognizes that these distinct institutions have been eroded, pointing to ongoing changes in Canadian political economy.<sup>49</sup> Looking ahead, Godard contends that current government attacks on labor will only have permanent implications if governments hostile to labor and the norms underlying Canada's labor relations system succeed in eroding these norms and replacing them with new beliefs, values and principles.<sup>50</sup> Otherwise, the Historical-Institutionalist perspective predicts that policies departing from fundamental, historical norms are unlikely to persist and in time will revert to the nation's historical trajectory.<sup>51</sup>

#### B. THE "REAL" CONSTITUTION MODEL

Harry Arthurs has developed taxonomy of constitutions including what he labels the "real" constitution and the "juridical" constitution.<sup>52</sup> Arthurs contends that a nation's history, political economy, demographics, and resources—what he labels the "real" constitution—are the key determinants of the system of labor laws and labor relations that ultimately develop.<sup>53</sup> The "juridical" constitution, including the Charter and constitutional litigation, are not likely to overcome these other forces, which he characterizes as the economy and societies' "deep structures."<sup>54</sup> Therefore, changes in labor relations are products of shifts in the "real" constitution—economic and social norms—not the result of changes in the law.

Arthurs argues that the primacy of social and political forces over legal mobilization means that the organization of

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48. *Id.* at 408, 410.

49. *Id.* at 413–14.

50. *Id.* at 416.

51. *Id.* at 415–17.

52. See Harry Arthurs, *The Constitutionalization of Employment Relations: Multiple Models, Pernicious Problems*, 19 SOC. & LEGAL STUD. 403, 405–09 (2010) [hereinafter Arthurs, *Multiple Models*] (describing rights-based litigation driven, valorizing, political, economic and enterprise constitutions). In Arthurs, *Real Constitution*, *supra* note 3, Arthurs labels the rights-based litigation driven constitution the "real" constitution.

53. Arthurs, *Multiple Models*, *supra* note 52, at 407; Arthurs, *Real Constitution*, *supra* note 3, at 61–64.

54. See Arthurs, *Multiple Models*, *supra* note 52, at 406; see also Harry Arthurs, *Constitutionalizing the Right of Workers to Organize, Bargain and Strike: The Sight of One Shoulder Shrugging*, 15 CAN. LAB. & EMP. L.J. 373, 379–80 (2010) [hereinafter Arthurs, *Shrugging*].

political and legal institutions become relevant as influences shaping these norms.<sup>55</sup> As Arthurs points out, in Canada, these institutions tend not to favour labor and social interests.<sup>56</sup> First, the distribution of powers between the federal and provincial governments gives the federal government considerable power to organize the economy but little responsibility over labor or social matters.<sup>57</sup> Arthurs' contends that this distribution of powers is ideally organized to subordinate labor and social policies to the interests of global trade.<sup>58</sup>

Second, Arthurs points to the "institutional architecture" of Canadian governments and, in particular, those branches and ministries responsible for setting and enforcing labor and social rights.<sup>59</sup> As labor ministries are diminished and reconfigured, responsibility for labor and social rights is shifted towards ministries of trade and finance such that labor and social rights are regarded as merely "residual by-product of economic policy" without inherent value.<sup>60</sup> Finally, Arthurs notes the power of domestic and international courts and tribunals to prevent legislatures and governments from implementing labor or social policies interfering with commercial interests.<sup>61</sup>

If the "real" constitution perspective holds, then Arthurs suggests that strong labor and social rights may be preserved if workers are sufficiently able to mobilize and protect rights through social and political campaigns. In short "'real constitutions' are what we make them."<sup>62</sup> Litigation, including constitutional litigation will not provide the protection workers seek.<sup>63</sup>

#### IV. HISTORICAL REJECTION AND RESISTANCE

This paper has introduced two perspectives addressing how labor law and policy develop, and the conditions necessary for substantial change. Although the Historical-Institutionalist

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55. Arthurs, *Shrugging*, *supra* note 54, at 387.

56. Arthurs, *Real Constitution*, *supra* note 3, at 62.

57. *Id.*

58. *Id.*

59. *Id.* at 62–63.

60. *Id.*; see also William D. Coleman, *Business, Labour, and Redistributive Politics*, in *INEQUALITY AND THE FADING OF REDISTRIBUTIVE POLITICS* 93, 94, 111 (Keith Banting & John Myles eds., 2013).

61. Arthurs, *Real Constitution*, *supra* note 3, at 63.

62. *Id.* at 64.

63. *Id.* at 63, 64; Harry Arthurs, *The Constitutionalization of Labour Rights: What Bliss in This Dawn to Be Alive* 14 (June 11, 2010) (unpublished manuscript), available at <http://ssrn.com/abstract=1634902>.

and “Real” Constitution perspectives differ in some regards, they share the view that the political economy is the crucial determinant. Both perspectives also recognize that attempted changes to labor and social policy may fail if they diverge too far from established norms or if changes are met with sufficient social or political resistance by citizens or workers.

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

RTW legislation has failed, to this point, to gain purchase in Canada despite repeated efforts by certain industry groups (primarily construction), anti-labor organizations, and certain elements in right-of-center governments and parties across the country since at least the 1970s. Unlike in the United States, where RTW legislation is widespread, no Canadian jurisdiction has yet adopted legislation limiting union membership or mandatory dues payment. Some commentators regard this, and the widespread application of “agency shop” or “Rand Formula” union security provisions in Canada, as a vital difference in the two countries’ labor laws and a central reason for the wide divergence in union densities.<sup>64</sup>

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64. See, e.g., Daphne Gottlieb Taras & Allen Ponak, *Mandatory Agency Shop Laws as an Explanation of Canada-U.S. Union Density Divergence*, 22 J. LAB. RES. 541, 553–57 (2001).

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

Some union security provisions only address dues payment. “Check-off” provisions don’t require employees to join the union, although the employer will deduct and remit dues for union members. Some versions of these clauses require individual union members’ authorization for dues check-off. “Agency shop” (as it is more commonly called in the U.S.) or “Rand Formula” provisions, as they are generally referred to in Canada, don’t require employees to join the union. However, all employees in the bargaining unit are required to pay union dues or the equivalent, whether or not they join the union. Commonly the Rand Formula provision is accompanied by a provision for automatic employer dues check-off for all employees in the bargaining unit. See 2 GEORGE W. ADAMS, *CANADIAN LABOUR LAW*, ¶¶ 14.200–230 (2d ed. 2013); MICHAEL MAC NEIL ET AL., *TRADE UNION LAW IN CANADA* ¶ 2.90 (2000).

RTW initiatives are commonly fueled by agitation over the perception of widespread “closed shop” and mandatory dues payment collective bargaining agreement provisions.<sup>65</sup> However, although all jurisdictions in Canada permit closed shop arrangements, evidence suggests that it is very uncommon and is likely concentrated in the construction industry.<sup>66</sup> Currently no labor legislation in Canada restricts the use of union dues although, briefly in the past, labor laws in some jurisdictions limited political uses of union dues.<sup>67</sup> In contrast, existing election laws in several Canadian jurisdictions do prohibit political contributions by unions.<sup>68</sup>

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65. See ADAMS, *supra* note 64, at ¶¶ 14.200–230.

66. See MAC NEIL ET AL., *supra* note 64, at ¶¶ 2.90, 2.100. Note that in this Article the terms “collective agreement” and “collective bargaining agreement” are used interchangeably. A 2007 review of union membership provisions in Canadian collective agreements covering 500 or more employees found 7.5% provided for closed shop, while 40.7% were “open shop,” containing no membership requirement provisions. Anthony Giles & Akivah Starkman, *The Collective Agreement*, in CANADIAN LABOUR AND EMPLOYMENT RELATIONS 283, 295 (Morley Gunderson & Daphne Taras eds., 6th ed. 2009). Notably an earlier, 1989, survey of major non-construction industry collective agreements found only 1.0% of agreements contained closed shop provisions. MAC NEIL ET AL., *supra* note 64, at ¶ 2.100 (citing DAVID ARROWSMITH & MELANIE COURCHENE, *THE CURRENT INDUSTRIAL RELATIONS SCENE IN CANADA 1989: COLLECTIVE BARGAINING REFERENCE TABLES* 75 (1990)). These findings suggest that closed shop arrangements are uncommon outside the construction industry. In terms of dues provisions, 46.9% of agreements contained a Rand Formula provision, while 46.5% contained another form of dues check-off provision. *Id.*

67. In Manitoba there existed a short-lived requirement that unions establish and apply a procedure to consult individual bargaining unit employees prior to using union dues for defined political activities. Labour Relations Act, C.C.S.M., c. L10, s. 29.1 (Can.) (enacted 1996, c. 32, s. 6; repealed 2000, c. 45, s.4), s. 76.1 (enacted 1996, c. 32, s. 15; repealed 2000, c. 45, s. 17); see ADAMS, *supra* note 64, at ¶ 14.370; see also MAC NEIL ET AL., *supra* note 64, at ¶¶ 3.370–3.380 (regarding prohibitions in labor legislation on use of union dues collected via dues check-off arrangements for political purposes that existed in the provinces of British Columbia and Prince Edward Island in the 1960s but were repealed in the 1970s).

68. See, e.g., Canada Elections Act, S.C. 2000, c. 9, s. 404(1) (Can.) (prohibiting trade unions from making financial contributions to election campaigns); The Election Financing Act, C.C.S.M., c. E27, s. 33 (Man.) (prohibiting election campaign contributions in Manitoba by “[a] person or organization, other than an individual normally resident in Manitoba”); Elections Act, S.N.S. 2011, c. 5, ss. 234(1), and 246(1) (N.S.) (prohibiting political contributions in Nova Scotia except as permitted by the Act; permits only “individuals,” the definition of which does not include unions, to make contributions); Election Act, R.S.Q., c. E-3.3, s. 87 (Que.) (limiting election contributions in Québec to “electors,” the definition of which does not include unions).

Right-of-center political parties in Canada have supported various RTW initiatives in discussion papers and platforms, and unsuccessfully introduced RTW bills. These are commonly introduced as private members' bills, even where the party is in power, likely as a means of distancing the government from the issue. However, the RTW issue has generally been regarded as too divisive and likely to alienate constituents and voters to become an issue these parties are prepared to seriously pursue. Right-of-center governments have declined to pursue RTW because of concern over the labor unrest doing so would provoke.<sup>69</sup>

Right-of-center government leaders have also decisively rebuffed RTW drives. For instance, at the 1977 party convention, Alberta Progressive Conservative Premier Peter Lougheed opposed a RTW resolution, stating that the province was not a "class society" and cautioning the Party that it must represent a "consensus" view of Albertans, rather than cater to a single occupational group.<sup>70</sup> The government also repeatedly assured the Alberta Federation of Labour that it did not intend to allow RTW in the province.<sup>71</sup> Nonetheless, Premier Lougheed was prepared to take strong positions on labor law that were viewed as anti-labor, if not contrary to the Charter.<sup>72</sup>

That same year a RTW resolution to ban closed shops failed to pass at the British Columbia Social Credit party con-

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69. For example, in 1977 the Manitoba government declined to study RTW proposals in the face of the Manitoba Federation of Labour's threat to call a general strike. See Errol Black & Jim Silver, *The Threat of Right-to-Work Laws and the Need for Social Solidarity*, CCPA REV. LABOUR NOTES, August 2012, at 4, available at <https://www.policyalternatives.ca/sites/default/files/uploads/publications/Manitoba%20Office/2012/08/Right%20to%20work.pdf>. In the mid-1970s the Ontario Progressive Conservative government examined U.S. RTW legislation and considered prohibiting closed shops, but preferred not to resort to legislation because it would alienate labor. *End to Closed Union Shops Studied*, LONDON FREE PRESS, Oct. 14, 1976, at 4.

70. Gordon Jaremko, *Tories Want Closed-Shop Practice Abolished*, CALGARY HERALD, Mar. 28, 1977, at 4.

71. ALB. FED'N OF LABOUR, POLICY STATEMENT, SO-CALLED RIGHT TO WORK (1978).

72. For example, in the mid-1980s, anticipating that the S.C.C. would rule the legislation to be contrary to the *Charter*, Premier Lougheed threatened to employ the notwithstanding clause in *Constitution* to protect provincial legislation denying Alberta public sector workers the right to strike. ALBERTA HANSARD NO. 69, at 1680 (Nov. 17 1983); Peter Lougheed, *Why a Notwithstanding Clause?*, POINTS OF VIEW/POINTS DE VUE (Ctr. for Constitutional Studies, Alb., Can.), no. 6, 1998, at 10, available at <http://ualawccsprod.srv.ualberta.ca/ccs/images/points-of-view/Lougheed.pdf>.

vention.<sup>73</sup> Both Social Credit Premier Bill Bennett and the Minister of Labour Allan Williams had publicly opposed RTW and the Minister vigorously opposed the convention motion, later stating that had the motion passed he still would not have recommended RTW legislation.<sup>74</sup> A subsequent leak of the Minister's letter to the Missouri Labor and Industrial Relations Commission enquiring about the state's RTW referendum threatened to be a "political bombshell" in the upcoming provincial election.<sup>75</sup> Concern over igniting labor unrest restrained this otherwise notoriously anti-union government from contemplating RTW.<sup>76</sup>

Meanwhile, in Ontario in the mid-1970s the Progressive Conservative (PC) government examined US RTW legislation and considered prohibiting closed shop collective agreement provisions. However, the Ministry of Labour indicated that it preferred not to resort to legislation because it would alienate labor, and would rather reach some agreement on the issue with unions.<sup>77</sup> Later that fall, a resolution supporting RTW was endorsed by delegates to the annual convention of Provincial Building and Construction Trades Council of Ontario.<sup>78</sup> However, by the end of that decade, and motivated by several bitter first contract disputes centering on union security, the PC government introduced an amendment to the province's general labor legislation imposing mandatory dues checkoff, the "Rand Formula" as the default union security provision.<sup>79</sup> RTW did not become an issue again in this province until the next century.

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73. *B.C. Socreds Reject 'Right-to-Work' Law*, VANCOUVER SUN, Nov. 28, 1976.

74. *Id.*; Rod Mickleburgh, *B.C. Fed Plans Campaign to Fight Right-to-Work Laws*, VANCOUVER SUN, Nov. 17, 1977.

75. John Clarke, *Leaked Right-to-Work Letter May be Political Bombshell*, GLOBE & MAIL, Mar. 17, 1979, at 8.

76. John Clarke, *Right-to-Work Battle Heats Up*, GLOBE & MAIL, June 10, 1978, at 8.

77. *End to Closed Union Shops Studied*, *supra* note 69.

78. *Trades Resist Right to Work*, DAILY COM. NEWS, Nov. 9, 1976, at A3.

79. Bill 89, An Act to Amend The Labour Relations Act, 1951 (Ont.); Jeffrey Sack & Howard Goldblatt eds., *Compulsory Dues Checkoff Now Law in Ontario*, LABOUR L. NEWS, June 1980, at 1. Notably, Dr. Robert Elgie, the former Labour Minister responsible for Bill 89, recently expressed dismay over current interest in RTW legislation in Canada, characterizing it as the first step in the destruction of free market collective bargaining. Tim Armstrong, *Remembering the Remarkable Bob Elgie*, HAMILTON SPECTATOR, May 9, 2013, <http://www.thespec.com/opinion-story/2556586-remembering-the-remarkable-bob-elgie/>.

The most serious consideration to date given to RTW in Canada occurred in Alberta in 1995.<sup>80</sup> Responding to a private members' bill asking the government to examine RTW, which passed by a single vote, the PC government established a committee of the Alberta Economic Development Authority to study the matter.<sup>81</sup> The Committee was headed by a former PC Minister of Labour, Elaine McCoy, and included government, business, and labor representatives.<sup>82</sup> Not only did the current Minister of Labour oppose labor law reform, but most employers and employer groups making submissions to the Committee opposed RTW on the basis that it would unnecessarily damage labor-relations stability.<sup>83</sup> The Committee unanimously rejected RTW. It concluded that introducing RTW offered few economic benefits, and would likely produce labor relations instability.<sup>84</sup>

On occasion, RTW proposals have been employed by right-of-center parties in election campaigns. However, these have not led to legislative change, even when that party won the election. For instance, the 2000 and 2003 re-election platforms of Mike Harris' PC government in Ontario included a variety of anti-union planks, including proposals targeting mandatory union dues, restrictions on use of dues, and union membership requirements.<sup>85</sup> Nonetheless, and even though the PCs won both elections, the PC government did not even introduce any such amendments to the province's labor legislation.

The positions taken by these right-of-center leaders and governments in response to RTW efforts can be interpreted as reflecting the "Red Tory" tradition in Canadian politics, a notion that has been described as "'alien' to the American mind."<sup>86</sup> As vividly explained by Gad Horowitz:

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80. See YONATAN RESHEF & SANDRA RASTIN, UNIONS IN THE TIME OF REVOLUTION 80–81 (2003).

81. *Id.*

82. *Id.* at 81.

83. *Id.*; Allen Ponak et al., *Alberta: Industrial Relations in a Conservative Climate*, in BEYOND THE NATIONAL DIVIDE: REGIONAL DIMENSIONS OF INDUSTRIAL RELATIONS 267, 287–88 (Mark Thompson et al. eds., 2003).

84. Ponak et al., *supra* note 83, at 288.

85. See, e.g., PROGRESSIVE CONSERVATIVE PARTY OF ONT., THE ROAD AHEAD: A WORKERS' BILL OF RIGHTS 1-2 (2003) (on file with the author); ONT. RED TAPE COMM'N, ENHANCING WORKER DEMOCRACY (2000), available at <http://ofl.ca/wp-content/uploads/2000.07.01-Submission-LabourLawReform.pdf> (document circulated among employer groups prior to 2000 election).

86. GAD HOROWITZ, CANADIAN LABOUR IN POLITICS 10 (1968). This suggestion will be contentious, particularly as regards identifying Bill Bennett or the modern Social Credit party with Red Toryism.

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

. . . The tory and socialist minds have *some* crucial assumptions, orientation, and values in common, so that *from a certain angle* they may appear not as enemies but as two different expressions of the same basic ideological outlook.<sup>87</sup>

Union security questions, raising the specter of RTW, have only been addressed twice by the SCC: the 1991 *Lavigne* decision and the 2001 *Advance Cutting* decision.<sup>88</sup> Notably, both cases were decided in the Trilogy era. *Lavigne* involved a claim that a statutory provision permitting negotiation of Rand Formula dues check-off provisions violated the Charter’s FOA and freedom of expression guarantees.<sup>89</sup> Considering the FOA claim only, the SCC unanimously found no FOA violation where dues would be used only for the purposes of collective bargaining.<sup>90</sup> Three justices held that a freedom of non-association is not Charter protected; while four recognized a freedom of non-association as a Charter protected freedom.<sup>91</sup>

However, the opinions reflected very different views of the importance of the purpose of dues expenditures among the justices recognizing a protected freedom of non-association. Justices LaForest, Sopinka and Gonthier held that in the context of use of union dues for purposes other than collective bargaining, the impugned provision constituted a violation of the freedom of non-association, but concluded that this violation was saved by Section 1 of the Charter on the basis that the infringement was minimally impairing, and made it possible for unions to participate in economic, social and policy discourse.<sup>92</sup> In contrast, Justice McLachlin held that the purpose of dues expenditures was not relevant because the purpose of the freedom of non-association is to provide freedom from ideological conformity, and regardless of the use to which the dues were put, simply

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87. *Id.* at 23.

88. *Lavigne v. Ontario Public Service Employees Union*, [1991] 2 S.C.R. 211 (Can.); *R. v. Advance Cutting & Coring Ltd.*, [2001] 3 S.C.R. 209 (Can.).

89. *Lavigne*, [1991] 2 S.C.R. at 212.

90. *Id.* at 213–18.

91. *Id.*

92. *Id.* at 213–15.

paying union dues did not demand ideological conformity.<sup>93</sup> In sum, the SCC's judgment found the provision to be constitutionally valid.

The *Lavigne* decision is notable for its explicit distinction between U.S. and Canadian constitutional guarantees of freedom of association including recognition of the importance of the Charter's Section 1, distinguishing the United States approach to union dues collection, recognition of the importance of industrial peace ensured by collective bargaining and union security, affirmation of unions as democratic organizations, and recognition of unions' role in Canadian democracy.<sup>94</sup>

The second decision, *Advance Cutting*, involved a challenge to Québec construction labor legislation that effectively imposed a "union shop" by making union membership a condition of employment in the industry, as violating the Charter FOA.<sup>95</sup> Although the SCC upheld the legislation in a 5 to 4 decision, the individual opinions were far less supportive of strong union security provisions than had been the case in the earlier *Lavigne* decision.<sup>96</sup> Eight justices recognized a freedom of non-association, and five held that mandatory union membership violated this freedom.<sup>97</sup> Four of these five found that this violation could not be saved by Section 1, while the fifth concluded that it was a reasonable limit justifiable under Section 1.<sup>98</sup> Therefore, this provision was upheld by the slenderest of margins.

Unlike *Lavigne*, the *Advance Cutting* decision produced unanimous recognition of a freedom of non-association.<sup>99</sup> Nonetheless, as in *Lavigne*, the *Advance Cutting* decision again explicitly affirmed unions' valuable and legitimate role in democratic discourse.<sup>100</sup>

In short, the historical experience in Canada has been that RTW and associated proposals to limit collection or expenditure of union dues have failed to take root. Industry and other groups have not succeeded in convincing governments, includ-

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93. *Id.* at 217–18.

94. *Id.*

95. *R. v. Advance Cutting & Coring Ltd.*, [2001] 3 S.C.R. 209, 210–11 (Can.).

96. *Id.* at 211–19.

97. *Id.*

98. *Id.* at 216–19.

99. *Id.*; *Lavigne v. Ontario Public Service Employees Union*, [1991] 2 S.C.R. 211 (Can.).

100. *Advance Cutting & Coring Ltd.*, [2001] 3 S.C.R. 209.

ing right-of-center governments responsible for other wide-ranging and significant anti-labor legislation, to pursue or implement RTW or restrictive dues legislation. The long history of such efforts indicates that even right-of-center governments and parties in Canada have a tradition of respecting a diversity of views on labor, the role of labor, and, especially, the value of labor peace and the labor movement's capacity to mobilize in protest. It was this "real" power of labor, and the power of social norms and institutions, including the Red Tory tradition, rather than legal or constitutional protections that has historically blocked adoption of US-style RTW legislation.<sup>101</sup>

## V. REVIVAL AND RESISTANCE

This Part provides an overview of significant contemporary changes directly affecting labor relations. These include wide-ranging efforts by right-of-center parties to achieve anti-labor legislative changes directed at financially undermining unions, restricting unions' political voice, and promoting right-to-work.<sup>102</sup> The following Part considers whether Charter litigation or the labor movement's recent countervailing efforts are likely to successfully resist this renewed wave of anti-union and RTW efforts. In short, despite the greater protection offered by Canada's juridical constitution, has its "real" constitution undergone greater, countervailing change reflecting a fundamental shift in the nation's norms and values underpinning Canadian labor law?

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

### A. FEDERAL LEVEL

The federal Conservative Party of Canada (CPC) government, a right-of-center government in power since 2004 and holding majority government since 2011, has recently intro-

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101. Although the Charter came into effect in 1982, the Bill of Rights existed and could have been applicable. *See generally* Canadian Bill of Rights, S.C. 1960, c. 44 (Can.).

102. Debra Parkes, *The Rand Formula Revisited: Union Security in the Charter Era*, 34 MAN. L.J. 223 (2010) (observing that "the Rand formula, while not under direct attack, is by no means sacrosanct in the political realm").

duced a succession of anti-union bills. These include: provisions fundamentally restructuring collective bargaining for Crown corporations to increase Treasury Board control over negotiating mandates, bargaining, and collective agreements embedded in a lengthy and complex omnibus bill;<sup>103</sup> a CPC private member's bill affecting many workers in the federal jurisdiction, replacing card-check certification with a mandatory representation vote, raising the threshold necessary for a successful certification vote, and resetting the default outcome of a decertification vote to termination of collective representation;<sup>104</sup> an omnibus bill including significant amendments to grievance and interest arbitration schemes, granting the government unilateral power to designate essential services, and limiting bargaining dispute resolution procedures.<sup>105</sup>

Although these bills met with some resistance from the labor movement and the opposition, they had the clear support of CPC members of parliament and senators. However, with a final piece of legislation, Bill C-377, there has been strong resistance from within the CPC party and from CPC statesmen such as Senator Hugh Segal.<sup>106</sup>

Bill C-377 is one of the most direct legislative attacks on unions Canada has seen and it is regarded as laying the groundwork for RTW legislation. The CPC government has been pursuing passage of Bill C-377 since fall 2011.<sup>107</sup> Introduced as a CPC private members' bill, it clearly has the Prime Minister's support. C-377 requires all "labour organizations" (including unions and other organizations such as councils and congresses) and "labour trusts" to report detailed financial

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103. Economic Action Plan 2013 Act, No. 1, S.C. 2013, c. 33 (Can.).

104. Bill C-525, Employees' Voting Rights Act, 2013 (Can.).

105. Economic Action Plan 2013 Act, No. 2, S.C. 2013, c. 40 (Can.).

106. 148 PARL. DEB., H.C. (No. 175) (June 17, 2013) pp. 4297-98 (Can.) (Statement of Hon. Hugh Segal), *available at* [http://www.parl.gc.ca/Content/Sen/Chamber/411/Debates/pdf/175db\\_2013-06-17-e.pdf](http://www.parl.gc.ca/Content/Sen/Chamber/411/Debates/pdf/175db_2013-06-17-e.pdf); Bill C-377, An Act to Amend the Income Tax Act (Requirements for Labour Organizations), 2011 (Can.).

107. Bill C-377 was introduced, in its first incarnation, as Bill C-317, An Act to Amend the Income Tax Act (Labour Organizations), 2011 (Can.), in October 2011. However, it failed at second reading because it was found to be improperly before the House. It was subsequently reintroduced as Bill C-377, in December 2011. *See* 146 PARL. DEB., Sen. (No. 44) (Nov. 4, 2011) p. 2984 (Can.) (Speaker's ruling), *available at* <http://www.parl.gc.ca/HousePublications/Publication.aspx?Pub=Hansard&Doc=44&Parl=41&Ses=1&Language=E&Mode=1>.

information to the Minister of Finance.<sup>108</sup> The Ministry will make this information publicly available, including in a searchable format on a Ministry website.<sup>109</sup> Contravention of these requirements would be a summary conviction offence, attracting a fine of \$1000 per day of non-compliance, to a maximum of \$25,000.<sup>110</sup> C-377 requires unions to disclose a great deal of information revealing how they spend their funds and the amount of time key individuals spend on different activities.<sup>111</sup> The clear purpose of C-377 is to provide anti-union groups and governments with detailed information about union activities and expenditures in order to challenge the legitimacy (and perhaps legality) of unions' use of union dues for purposes outside narrow labor relations purpose and, more broadly, the legitimacy of unions' participation in activities beyond the immediate workplace.

Although C-377 passed the House of Commons in December 2012 with no CPC Minister of Parliament voting against the Bill,<sup>112</sup> it met significant resistance in the Senate, including from prominent Senators in the CPC Caucus. Primary among these was CPC Senator Hugh Segal. Senator Segal strongly objected to C-377 in the Senate, denouncing it as “[b]ad legislation, bad public policy and a diminution of both the order and the freedom that should exist in any democratic, pluralist and mixed-market society” and contended that this Bill “is not who we are as Canadians. It is time this chamber said so.”<sup>113</sup> Senator Segal's remarks, set out at some length below, reflect and invoke the traditional Red Tory conservatism and recognition of unions as legitimate—and valuable—participants in democratic dialogue:

As a Tory, I believe that society prospers when different views about the public agenda, on the left and the right, are advanced by different groups, individuals and interests. Debate between opposing groups in this chamber, in [the House of Commons] and in broader society is the essence of democracy. Limiting that debate as to scope

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108. Bill C-377.

109. *Id.* at c. 149.01(4).

110. *Id.* at c. 149.01(2.31).

111. *Id.* at c. 149.01(3).

112. 146 PARL. DEB. H.C. (No. 197) (December 12, 2012) pp. 13250 (Can.) available at <http://www.parl.gc.ca/HousePublications/Publication.aspx?Pub=Hansard&Doc=197&Parl=41&Ses=1&Language=E&Mode=1>

113. 148 PARL. DEB., Sen. (No. 138) (Feb. 14, 2011) pp. 3291–92 (Can.) (statement of Hon. Hugh Segal), available at [http://www.parl.gc.ca/Content/Sen/Chamber/411/Debates/138db\\_2013-02-14-e.htm#41](http://www.parl.gc.ca/Content/Sen/Chamber/411/Debates/138db_2013-02-14-e.htm#41).

and breadth is never in the long-term interest of a free and orderly society.<sup>114</sup>

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

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

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

Conservatism in the Canadian Tory context is not about the protection of class or the oppression of labour by capital or capital by labour; it is about a freedom tied to mutual respect, whatever legitimate disagreements, between all the participants in the mixed free-market system. This bill before us, whatever may have been its laudable transparency goals, is really—through drafting sins of omission and commission—an expression of statutory contempt for the working men and women in our trade unions and for the trade unions themselves and their right under federal and provincial law to organize.<sup>115</sup>

In mid-June 2013 the Standing Senate Committee on Banking, Trade and Commerce reported to the Senate, noting “the vast majority of testimony and submissions raised serious concerns about this legislation.”<sup>116</sup> Five provinces, reflecting a

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114. *Id.* at 3291.

115. 148 PARL. DEB., Sen. (No. 175) (June 17, 2013) pp. 4297–98 (Can.), available at [http://www.parl.gc.ca/Content/Sen/Chamber/411/Debates/pdf/175db\\_2013-06-17-e.pdf](http://www.parl.gc.ca/Content/Sen/Chamber/411/Debates/pdf/175db_2013-06-17-e.pdf).

116. SENATE COMMITTEE ON BANKING, TRADE AND COMMERCE REPORT TO SENATE, OBSERVATIONS TO THE THIRTEENTH REPORT, June 13, 2013, Sen. 174, at p. 2648 (Can.), available at [http://www.parl.gc.ca/Content/Sen/Chamber/411/Journals/174jr\\_2013-06-13-e.htm](http://www.parl.gc.ca/Content/Sen/Chamber/411/Journals/174jr_2013-06-13-e.htm).

Numerous individuals (including law professors), organizations (including the Canadian Bar Association, the Federation of Law Societies, and the Canadian Association of Labour Lawyers), the Privacy Commissioner of Canada, and five provincial governments raised serious concerns with Bill C-377 before the Senate Committee. The Privacy Commissioner of Canada was among the objectors, citing privacy concerns over the scope of disclosure and provision of individual's names. PRIVACY COMMISSIONER OF CANADA, APPEARANCE BEFORE THE SENATE STANDING COMMITTEE ON BANKING, TRADE AND COMMERCE ON THE STUDY ON BILL C-377, AN ACT TO AMEND THE INCOME TAX ACT (REQUIREMENTS FOR LABOUR ORGANIZATIONS) May 29, 2013, Sen. 35 (opening

spectrum of political parties in power, brought objections to the Committee.<sup>117</sup> As described by the Honourable Senator Cowan, Leader of the Opposition in the Senate: “All [of these provinces] said that the bill is not constitutional, is not needed and would negatively disrupt labour relations in the province. Not one province wrote in or sent a representative to argue that the bill is a constitutional exercise of federal jurisdiction and should be passed.”<sup>118</sup>

Thereafter, Senator Segal successfully proposed amendments to C-377 limiting the Bill’s application with more than a third of the PC caucus voting in favor. However, the Prime Minister prorogued Parliament shortly thereafter, and reintroduced Bill C-377 in Senate, in its original form and without the Segal amendments, the day after the new session commenced in October 2013.<sup>119</sup>

The CPC’s fall 2013 convention provided more evidence that the values of the federal CPC party have shifted decisively away from Senator Segal’s Red Tory values. At the convention six anti-labor policy resolutions were passed.<sup>120</sup> Several overlapped but, in summary, included: supporting greater union financial reporting requirements, including requiring unions to detail budget allocations to “political donations, donations to media organization, and to political activism and campaigns”; permitting union members to opt out of union dues allocated to donations to media organization or political uses or activism; preventing mandatorily collected dues from being used to fund political causes unrelated to the workplace; modifying the Party’s statement of policy to provide that the CPC “believes that

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statement of Jennifer Stoddart, Privacy Comm’r) (Can.), *available at* [http://www.priv.gc.ca/parl/2013/parl\\_20130529\\_e.asp](http://www.priv.gc.ca/parl/2013/parl_20130529_e.asp).

117. Representatives of Nova Scotia and Manitoba (each with NDP governments) testified before the Committee. Minister of Labour from Ontario (Liberal government), New Brunswick (Progressive Conservative government), and Québec (Parti Québécois minority government) filed written submissions with the Committee. COMMITTEE ON BANKING, TRADE, AND COMMERCE, PROCEEDINGS ON BILL C-377, June 6, 2013, Sen. 36, (Can.), *available at* <http://www.parl.gc.ca/Content/SEN/Committee/411/banc/pdf/36issue.pdf>.

118. 148 PARL. DEB., Sen. (No. 176) (June 18, 2013) p. 4321 (Can.), *available at* [http://www.parl.gc.ca/Content/Sen/Chamber/411/Debates/pdf/176db\\_2013-06-18-e.pdf](http://www.parl.gc.ca/Content/Sen/Chamber/411/Debates/pdf/176db_2013-06-18-e.pdf).

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

120. CONSERVATIVE PARTY OF CANADA, POLICY FLOOR RESOLUTIONS: CANADA’S SOCIAL FABRIC, Res. 1-06-015; 1-15-159; 2-22-004; 3-01-066; 3-02-069; and 3-19-077 (2013), *available at* <http://www.scribd.com/doc/147373792/Policy-Resolutions-2013-Conservative-Party-of-Canada-Convention>.

mandatory union membership and forced financial contributions as a condition of employment limit the economic freedom of Canadians and stifle economic growth”; and explicitly calling for right to work legislation.<sup>121</sup>

#### B. ONTARIO

The PC Party of Ontario currently serves as the Official Opposition. The Liberal Party has formed the government since 2003, although only winning a minority government in the 2007 and 2011 elections. The PCs, under leader Tim Hudak, have adopted an aggressive anti-union approach, including explicit support for RTW and associated policies and a series of bills reflecting these priorities.<sup>122</sup>

The Party’s policy explicitly includes eliminating legislative support for union membership or dues as a condition of employment, employer dues check-off, and introducing statutory requirements for unions to publicly disclose detailed financial information.<sup>123</sup> Similarly, at the Party’s Fall 2013 policy conference, a resolution to seek to end mandatory union membership passed with the support of 53% of voting delegates, although some delegates were concerned about alienating voters with such anti-worker policies.<sup>124</sup>

The PC party has also introduced a series of bills (none of which passed) proposing anti-labor amendments to the OLRA centering on provisions dealing with union membership and dues.<sup>125</sup> These bills proposed restricting dues check-off provisions to funds used for the purpose of collective bargaining; removing explicit statutory permission for parties to negotiate

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121. *Id.*

122. Hudak subsequently retreated from this position, after months of intense pressure from the Party. Adrian Morrow, *Hudak Backs Down on Anti-Union Proposal*, GLOBE & MAIL, Feb. 6, 2014, <http://www.theglobeandmail.com/news/politics/ontario-tories-facing-internal-dissent-over-right-to-work-laws/article16725250/> (suggesting the PCs enthusiasm for right to work legislation was waning by early 2014).

123. ONT. PC CAUCUS, PATHS TO PROSPERITY: FLEXIBLE LABOUR MARKETS 19 (2012), available at <http://ontariopc.uberflip.com/i/103096>.

124. Maria Babbage, *Hudak Won’t Back Down on Controversial Union Policies, Despite Split in Party*, RECORD, Sept. 29, 2013, <http://www.therecord.com/news-story/4131181-hudak-won-t-back-down-on-controversial-union-policies-despite-split-in-party/>.

125. Bill 64, Defending Employees’ Rights Act (Collective Bargaining and Financial Disclosure by Trade Unions), 2013 (Ont.); Bill 78, Defending Employees’ Rights Act (Collective Bargaining and Financial Disclosure by Trade Unions), 2012 (Ont.); Bill 71, Defending Employees’ Rights Act, 2010 (Ont.).

certain union security and deeming any such terms provisions to be void; and requiring every union that is party to a collective agreement (whether certified or not) to file detailed financial information with the Minister of Labour which then would be made publicly available.<sup>126</sup>

The Ontario PCs also introduced bills proposing broader anti-labor amendments to the OLRA including eliminating unions' exclusive representation in bargaining by making collective agreements binding only on union members;<sup>127</sup> prohibiting card-check and remedial certification;<sup>128</sup> extending the campaign period in representation votes; restricting strikes in the construction industry; replacing the Ontario Labour Relations Board's (OLRB) authority to determine practice and procedures with regulations made by the Lieutenant Governor in Council; introducing a right to appeal OLRB decisions; making OLRB members and officers, the Minister of Labour, and any Ministry officials compellable witnesses before a court or tribunal;<sup>129</sup> shifting the burden of proof in all unfair labor practice complaints to the employer;<sup>130</sup> and limiting bargaining rights in the construction sector.<sup>131</sup>

### C. RESISTANCE: CHARTER LITIGATION

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

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126. See *supra* note 125.

127. Bill 64, Defending Employees' Rights Act (Collective Bargaining and Financial Disclosure by Trade Unions), 2013 (Ont.); Bill 78, Defending Employees' Rights Act (Collective Bargaining and Financial Disclosure by Trade Unions), 2012 (Ont.).

128. Bill 62, Defending Employees' Rights Act (Certification of Trade Unions), 2013 (Ont.); Bill 94, Labour Relations Amendment Act (Bargaining Units and Certification of Trade Unions), 2013 (Ont.).

129. Bill 63, Labour Relations Amendment Act (Ontario Labour Relations Board), 2013 (Ont.).

130. Bill 94, Labour Relations Amendment Act (Bargaining Units and Certification of Trade Unions), 2013 (Ont.).

131. Bill 73, Fair and Open Tendering Act (Labour Relations for Certain Public Sector Employers in the Construction Industry), 2013 (Ont.); Bill 74, Fairness and Competitiveness in Ontario's Construction Industry Act, 2013 (Ont.).

In a well-known 1992 article, Brian Etherington identified three streams of commentary regarding the Charter's prospects for reforming labor law: liberal romantics (optimistic about the Charter's potential to defend labor law from excessive government incursions); realists or skeptics (wary of neoliberal interpretation and application of the Charter to defeat existing protective labor legislation); and pragmatic pluralists (though concerned about appropriateness of courts as a forum for deciding labor policy issues, optimistic that courts would only intervene when appropriate).<sup>132</sup> He left it open whether the realists or pluralists would be proven right, concluding that only romantics were consistently disappointed by the Charter.<sup>133</sup>

Although *Health Services* was cause for some romantic revival, many commentators, including Etherington, remained skeptical and greeted the decision with strong criticism.<sup>134</sup> Harry Arthurs, among the most prominent Charter skeptics, may also be fairly described as skeptical of the prospects of constitutions in general—at least juridical constitutions—for advancing or protecting labor and social concerns.<sup>135</sup> He views courts and, therefore Charter litigation, as an undesirable forum for addressing labor issues, contrasting courts' belief in "normativity to transform reality" with the economic and social forces producing legal norms.<sup>136</sup>

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132. Brian Etherington, *An Assessment of Judicial Review of Labour Laws Under the Charter: Of Realists, Romantics, and Pragmatists*, 24 OTTAWA L. REV. 685, 688–95 (1992) [hereinafter Etherington, *Judicial Review*].

133. *Id.* at 726–28.

134. See, e.g., Beth Bilson, *Developments in Labour Law: The 2010–2011 Term—Was Health Services a Mistake? The Supreme Court Decision in Fraser v. Ontario*, 55 SUP. CT. L. REV. (2d) 285, 313–14 (2011) (criticizing the decision's lack of clear guidelines); Etherington, *Health Services*, *supra* note 37, at 732 (describing the majority's reasoning as "schizophrenic"); Fudge, *supra* note 38, at 34–36 (arguing that the majority's concept of the right to collective bargaining is too qualified); Brian Langille, *The Freedom of Association Mess: How We Got into It and How We Can Get out of It*, 54 MCGILL L.J. 177, 179–81 (2009) (arguing that the majority misunderstood Canadian labor law history, Canadian international labor obligations, and the Charter values themselves); Eric Tucker, *The Constitutional Right to Bargain Collectively: The Ironies of Labour History in the Supreme Court of Canada*, 61 LABOUR/LE TRAVAIL 151, 152 (2008) (criticizing the majority's description of the history of labor law in Canada).

135. See, e.g., Arthurs, *Multiple Models*, *supra* note 52, at 403; Arthurs, *Real Constitution*, *supra* note 3, at 45–46; Arthurs, *Shrugging*, *supra* note 54, at 375–78.

136. See Arthurs, *Shrugging*, *supra* note 54, at 379–80.

Moreover, Arthurs is critical of the juridification of public life through Charter litigation.<sup>137</sup> He contends the Charter has negatively affected social interests: diverting marginalized groups' scarce resources away from direct action and political solutions into Charter litigation, diverting public resources from social programs to legal proceedings, emphasizing adversarial over informal procedures, transforming corporations into rights and freedoms wearing citizens, weakening the activist state, and fostering neo-liberalism.<sup>138</sup> Arthurs also concludes (in part based on empirical research that constitutions don't produce significant social, economic or political change) that "constitutions count for something: but not that much."<sup>139</sup>

In addition, as outlined earlier, Charter rights and freedoms, including FOA, are not absolute. The tests courts apply when ruling on Charter rights and freedoms, and justifiable limitations on these, are suffused with social and cultural norms and value judgments.

Furthermore, they are subject to change as these norms and values develop. In *Health Services*, for instance, in rejecting the rationale underpinning the Labour Trilogy, the SCC stated that: "a review of the jurisprudence leads to the conclusion that the holdings in the [Labour Trilogy cases] . . . can no longer stand. None of the reasons provided by the majorities in those cases survive scrutiny. . . ."<sup>140</sup> In essence, the SCC was driven by a new conception of the role of labor relations to reverse two decades of jurisprudence.

Finally, Charter rights and freedoms are also subject to the Section 1 "saving" section, which provides that these rights and freedoms are "subject . . . to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."<sup>141</sup> Although vague, and granting the courts enormous discretion over fundamental freedoms, Section 1 has been described as "arguably one of the most important statements of

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137. See Harry W. Arthurs, *Governing the Canadian State: The Constitution in an Era of Globalization, Neo-Liberalism, Populism, Decentralization and Judicial Activism*, 13 CONST. F. 16, 21 (2003) [hereinafter Arthurs, *Governing*].

138. See *id.*

139. *Id.* at 16; Harry Arthurs & Brent Arnold, *Does the Charter Matter?*, 11 REV. CONST. STUD. 37 (2005) (empirical study of *Charter* effects).

140. *Health Services & Support—Facilities Subsector Bargaining Ass'n v. British Columbia*, [2007] 2 S.C.R. 391, para. 36 (Can.).

141. Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, *being* Schedule B to the Canada Act, 1982, c. 11 s.1 (U.K.).

[Canada's] democratic polity."<sup>142</sup> Notably, Section 1 was incorporated into the Charter in deliberate distinction from the absolute guarantees in the U.S. Bill of Rights, out of concern that excessive protection of liberty would jeopardize Canadian values of community and representative democracy.<sup>143</sup>

The "Oakes test" used to determine whether Section 1 is satisfied sets out a two-step test.<sup>144</sup> The first branch asks whether the violation has a pressing and substantial objective.<sup>145</sup> The second branch asks whether the means of achieving the objective is proportional, based on whether the means is rationally connected to the objective, whether it minimally impairs the right or freedom, and whether there is proportionality between the violation and objective.<sup>146</sup> The Oakes test is a factual, contextual inquiry with social and cultural norms engrained in each branch of the test.<sup>147</sup> Consequently, the Section 1 saving provision is a powerful mechanism which, in its grant of judicial discretion, may serve to incorporate values into the application of Charter protections.<sup>148</sup>

Recalling the *Lavigne* and *Advance Cutting* cases introduced earlier, a shift in the SCC's views towards favoring recognition of a freedom of non-association clearly developed in the decade between the decisions.<sup>149</sup> The decisions plainly (and often explicitly) incorporated social values into both the interpretations of the FOA and, most crucially, into application of the Section 1 saving provision.<sup>150</sup> It is not at all certain that if similar issues came before the Court today that they would be met with similar results.<sup>151</sup> In part, this may be due to shifting social values which could lead to a very different application of Section 1. Indeed, *Advance Cutting* would have had the oppo-

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142. Errol Mendes, *The Crucible of the Charter: Judicial Principles v. Judicial Deference in the Context of Section 1*, in CANADIAN CHARTER OF RIGHTS AND FREEDOMS 165, 166 (Gérald-A. Beaudoin & Errol Mendes eds., 4th ed. 2005).

143. *Id.* at 168.

144. *R. v. Oakes*, [1986] S.C.R. 103, 105–06 (Can.).

145. *Id.*

146. *Id.* at 106.

147. *See id.* at 105–06.

148. *See Mendes, supra* note 142, at 167.

149. *See supra* Part IV.

150. *See R. v. Advance Cutting & Corning Ltd.*, [2001] S.C.R. 209, at 211–14 (Can.), 216; *Lavigne v. Ontario Public Service Employees Union*, [1991] S.C.R. 211, at 214–16 (Can.).

151. *See Bilson, supra* note 134, at 313; Etherington, *Health Services, supra* note 37, at 744–45; Mendes, *supra* note 142, at 210–14.

site result—finding an unjustifiable violation of the freedom of non-association—had a single justice not concluded that the impugned provision satisfied the *Oakes* test.<sup>152</sup>

Therefore, Charter litigation is an uncertain strategy for labor to resort to in resisting the current tide of anti-union efforts.<sup>153</sup>

#### D. RESISTANCE: LABOR MOBILIZATION

A second form of labor resistance that has appeared is mobilization in the form of strategic union mergers. In August 2013 two of Canada's largest private sector unions, the Canadian Auto Workers union (CAW) and the Communications, Energy and Paperworkers Union of Canada (CEP) merged to create a new union, "Unifor."<sup>154</sup> Unifor is now the largest private sector union in Canada, representing over 300,000 workers across twenty sectors of the economy, and with a significant public sector presence.<sup>155</sup>

The overarching goal of this merger was to establish a strong, militant union with strategic organizing and bargaining strengths, and with social unionism as its animating philosophy.<sup>156</sup> Rather than a defensive move or "desperate act," CAW and CEP insist that this initiative is a "positive opportunity" to respond to the challenging economic and political climate and the associated decline in union power, and marks renewal and revitalization of the union movement.<sup>157</sup>

Unifor regards the breadth and depth of its presence across the country and across several key industries as a source of

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152. See *Advance Cutting*, [2001] S.C.R. at 216 (Iacobucci, J., arguing that the legislation violated Section 2(d) of the Charter, but was justified under Section 1 because of the legislation's promotion of "social and economic objectives" in a "unique and complex historical context").

153. Nonetheless, it is important to recognize that not all union security provisions will be subject to Charter scrutiny. Those existing in private sector collective agreements, for instance, will clearly be beyond Charter review. See *Health Services & Support—Facilities Subsector Bargaining Ass'n v. British Columbia*, [2007] 2 S.C.R. 391, at para. 88 (clarifying that the Charter applies only to state action).

154. Jeff Mackey, *Unifor, Canada's Newest Union, Formed as CAW, CEP Merge*, HUFFINGTON POST CAN., Aug. 31, 2013, [http://www.huffingtonpost.ca/2013/08/31/unifor-caw-cep-merger\\_n\\_3847388](http://www.huffingtonpost.ca/2013/08/31/unifor-caw-cep-merger_n_3847388).

155. CAW CEP PROPOSAL COMM., TOWARDS A NEW UNION: CAW CEP PROPOSAL COMMITTEE FINAL REPORT 9–10 (2012), available at <http://www.newunionproject.ca/wp-content/uploads/2012/08/Final.Report.pdf>.

156. *Id.* at 18–19.

157. *Id.* at 5–6, 8.

strength in bargaining power, in pursuing industrial and economic strategies promoting good jobs in these sectors, and in responding to government policy and initiatives relating to structural and technical changes in these industries.<sup>158</sup> Unifor regards this as crucial for certain federally regulated sectors undergoing significant reform.<sup>159</sup>

Unifor plans to focus on organizing, including prioritizing increasing representation in leading industries and geographic areas where it already has a substantial presence,<sup>160</sup> and emphasizing corporate campaigns<sup>161</sup> and use of neutrality agreements<sup>162</sup> which, to this point, have not been a prominent feature of the Canadian labor relations landscape. Another innovative strategy is the creation of “Community Chapters” open for membership to a broad array of “workers” who are not in a certified or voluntarily recognized bargaining unit.<sup>163</sup> Goals of the Community Chapter strategy include increasing Unifor’s membership, building its credibility with the public as benefiting all workers, providing a means for training future union leaders, and supporting organizing efforts among these workers.<sup>164</sup> In this way Unifor hopes to set the foundation for future successful organizing campaigns and “build a culture of collective action and union solidarity” within non-unionized workplaces and among unrepresented workers.<sup>165</sup>

A second significant union merger was also attempted in 2013. The Telecommunications Workers Union (TWU), representing about 13,000 workers, primarily in the federally regulated telecommunications sector,<sup>166</sup> arrived at a tentative merger agreement with the United Steelworkers of Canada

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158. *See id.* at 9–10.

159. *See id.* at 10.

160. *Id.* at 29; UNIFOR, UNIFOR ORGANIZING POLICY 6 (2013), available at <http://www.newunionconvention.ca/wp-content/uploads/2013/08/675-Organizing-Policy-fin.pdf>.

161. CAW CEP PROPOSAL COMM., *supra* note 155, at 33.

162. UNIFOR, *supra* note 160, at 7.

163. UNIFOR, *supra* note 160, at 11; *see also* CAW CEP PROPOSAL COMM., *supra* note 155, at 30 (asserting the union’s goal to organize workers who “cannot feasibly organize a certified bargaining unit”).

164. UNIFOR, BROADENING UNION CITIZENSHIP: UNIFOR’S MEMBERS IN COMMUNITY CHAPTERS 1–5 (2013), <http://www.newunionconvention.ca/wp-content/uploads/2013/08/676-Union-Citizenship-web-ENG.pdf>; UNIFOR, *supra* note 160, at 11–12.

165. UNIFOR, *supra* note 160, at 11.

166. *Updated Frequently Asked Questions*, TELECOMM. WORKERS UNION (Oct. 31, 2013), <http://www.twu-stt.ca/en/updated-frequently-asked-questions>.

(USW),<sup>167</sup> one of Canada's largest unions, representing approximately 225,000 workers predominantly in the private sector.<sup>168</sup> This merger was also motivated by the unions' desire to strengthen their bargaining power and political voice, and specifically to secure greater influence over federal labor policy.<sup>169</sup> However, the TWU membership vote on the merger failed by less than three percent.<sup>170</sup> Although the merger will not proceed, the unions will continue to participate in the strategic alliance they established in 2010.<sup>171</sup>

The lack of corporatist institutions has been identified as an important reason why Canada is more susceptible to the effects of globalization than are many other countries, and why labor is disadvantaged in addressing increasingly centralized government authority and policy making.<sup>172</sup> William Coleman points, in particular, to the failure of labor to create organizations that are vertically integrated, highly representative, and cross class boundaries.<sup>173</sup>

Although the Unifor and USW-TWU mergers may overcome some of the problems created by the mismatch between federal and provincial jurisdiction relevant to economic and labor relations issues identified by Arthurs,<sup>174</sup> it will likely only be effective in a few federally-regulated industries where the unions have a high degree of both breadth and depth of representation. It is unlikely to bring substantial benefits at the provincial level of law and policy making. Most fundamentally,

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167. *Telecommunications Workers Union and United Steelworkers Announce Merger Agreement*, UNITED STEELWORKERS (Aug. 29, 2013), <http://www.usw.ca/media/news/releases?id=0899> [hereinafter *Merger Agreement*].

168. *About the United Steelworkers: Making Lives Better for Workers*, UNITED STEELWORKERS, <http://www.usw.ca/union/who/about?id=0002> (last visited Apr. 1, 2014).

169. *Merger Agreement*, *supra* note 167; *Updated Frequently Asked Questions*, *supra* note 166.

170. *TWU-Steelworkers Merger Falls Just Short of 66 2/3% Approval Threshold*, TELECOMM. WORKERS UNION (Nov. 15, 2013), <http://www.twu-stt.ca/en/twu-steelworkers-merger-falls-just-short-66-23-approval-threshold>.

171. *Strengthening Our Strategic Alliance with the USW*, TELECOMM. WORKERS UNION (Nov. 22, 2013), <http://www.twu-stt.ca/en/strengthening-our-strategic-alliance-usw>. For the full text of motion, see TELECOMM. WORKERS UNION, *MOVING FORWARD WITH THE TWU-USW STRATEGIC ALLIANCE 1* (2013), [http://www.twu-stt.ca/pdf/13-11-22\\_Hotline\\_English.pdf](http://www.twu-stt.ca/pdf/13-11-22_Hotline_English.pdf).

172. See William D. Coleman, *Business, Labour, and Redistributive Politics*, in *INEQUALITY AND THE FADING OF REDISTRIBUTIVE POLITICS* 94 (Keith Banting & John Myles eds., 2013).

173. *Id.* at 93-94, 111.

174. Arthurs, *Real Constitution*, *supra* note 3, at 62.

neither merged union represents a substantial portion of the public sector.<sup>175</sup> Given that over seventy-five percent of unionized workers in Canada are in the public sector,<sup>176</sup> a union that does not represent a large proportion of these workers cannot be the type of highly representative, vertically integrated organization Coleman describes.<sup>177</sup> Therefore, while these mergers may marginally increase collective bargaining power, and perhaps substantially in certain sectors, they are not likely to mark a significant revitalization of the labor movement.

#### E. RESISTANCE: STRATEGIC POLITICS

A third dimension of labor resistance takes the form of strategic labor politics. Unions in Canada have been formally allied with federal and provincial level social democratic political parties since the founding of the CCF in 1932.<sup>178</sup> In recent decades, these political parties have primarily been the federal and provincial New Democratic Party (NDP), founded in 1961 as an alliance between the CCF and the Canada Labour Congress (CLC), and in Québec, the Parti Québécois (PQ).<sup>179</sup> Some commentators credit the political leverage these alliances provided with Canadian unions' success in obtaining a favorable legislative environment for labor.<sup>180</sup>

For a time, these appeared to be vital partnerships, particularly following the tensions of the 1970s and 80s, arising from government restraint and anti-inflation policies, when organized labor made great efforts to realize its political influence.<sup>181</sup> However, by the mid-1990s, these alliances showed

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175. See CAW CEP PROPOSAL COMM., *supra* note 161, at 9–10 (showing that members in public sectors like health, education, and transit make up less than a third of the union); *supra* notes 166–67 and accompanying text.

176. Notably, this is in a context where 24.1% of all workers in Canada are employed in the public sector. Calculations are based on STATISTICS CANADA, LABOUR FORCE SURVEY ESTIMATES: TABLE 282-0078, *supra* note 16.

177. Coleman, *supra* note 172, at 111.

178. HOROWITZ, *supra* note 86, at 61–62.

179. KEITH ARCHER & ALAN WHITEHORN, INDUSTRIAL RELATIONS CENTRE, QUEEN'S UNIVERSITY, CANADIAN TRADE UNIONS AND THE NEW DEMOCRATIC PARTY 1 (1993). However, the PQ maintained greater structural independence from labor organizations than did other social democratic parties in Canada. A. Brian Tanguay, *Radicals, Technocrats, and Traditionalists: Interest Aggregation in Two Provincials Social Democratic Parties in Canada*, in HOW POLITICAL PARTIES RESPOND: INTEREST AGGREGATION REVISITED 146, 161 (Kay Lawson & Thomas Poguntke eds., 2004).

180. CARTER, *supra* note 23, at 5–6; see Sack, *supra* note 2, at 242–43.

181. Donald Swartz & Rosemary Warskett, *Canadian Labour and the Crisis of Solidarity*, in RETHINKING THE POLITICS OF LABOUR IN CANADA 18, 26–

growing strain and even rupture.<sup>182</sup> There has been a growing view within parts of the NDP that, as one commentator describes it: “the NDP was doing labour a favour, that socialism could exist without labour and that labour, not socialism, was the problem in the NDP’s not being able to attract the working and common people.”<sup>183</sup> Notably, for its 2012 federal leadership convention the NDP eliminated its practice of reserving a quarter of votes for affiliated labor unions.<sup>184</sup>

At the same time, many within organized labor regard the NDP as having betrayed workers and unions and removed their political voice with a rightward shift on economic and social policies.<sup>185</sup> These divisions have produced strategic voting campaigns, new Liberal-union alliances, and public ruptures of NDP-union alliances.<sup>186</sup>

Beginning with Ontario labor’s rejection of the provincial NDP party after a disastrous term in government ending in 1995,<sup>187</sup> we have seen very public and determined repudiation by labor of its former political ally, including segments of labor breaking from their traditional support for the NDP and PQ in federal and provincial elections and urging members to engage in strategic voting for other parties and candidates.<sup>188</sup> Strategic voting campaigns attempt to avoid having the vote split among non-right-of-center parties.<sup>189</sup> Generally this involves supporting Liberal candidates where the NDP or PQ candidate is weak: in short, voting for the party most likely to defeat the right-of-center candidate in that riding.<sup>190</sup>

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27 (Stephanie Ross & Larry Savage eds., 2012) (describing the labor movement’s strong resistance to government restrictions on worker rights and security in the 1970s and 1980s).

182. Larry Savage, *Organized Labour and the Politics of Strategic Voting*, in *RETHINKING THE POLITICS OF LABOUR IN CANADA* 75, 77 (Stephanie Ross & Larry Savage eds., 2012).

183. Larry Zolf, *Alexa the Great*, CBC NEWS VIEWPOINT (June 6, 2002), <http://archive.is/0rJML>.

184. Joan Bryden, *Unions Still Influential in NDP Race*, CHRON. HERALD, Feb. 23, 2012, <http://thechronicleherald.ca/canada/66122-unions-still-influential-ndp-race>.

185. Savage, *supra* note 182, at 77; Swartz & Warskett, *supra* note 181, at 28–29.

186. Savage, *supra* note 182, at 75, 77–78, 80–81.

187. *See id.* at 77; Swartz & Warskett, *supra* note 181, at 28–29.

188. *See* Savage, *supra* note 182, at 77–78, 80–82.

189. *Id.* at 75–76.

190. *Id.* at 76.

A related strategy has been the formation of multi-union organizations to endorse Liberal candidates and engage in election advertising.<sup>191</sup> These include the Ontario Election Network, composed of the CAW, several public sector unions, and building trades unions;<sup>192</sup> and the Working Families Coalition (WFC), including teachers unions, the CAW, and several building trades unions,<sup>193</sup> which have been very active in recent provincial Ontario elections.

Not all of organized labor favors strategic voting, and this division was very apparent in the 2006 federal election.<sup>194</sup> The CLC chose not to formally support any party or candidate, instead urging members to vote based on issues that affect workers.<sup>195</sup> Meanwhile the British Columbia Federation of Labour continued its traditional support of the NDP.<sup>196</sup> In contrast, CAW President Buzz Hargrove publicly supported the incumbent Liberal government in most of the country while also urging Québec union members to vote for the Bloc Québécois as it was more likely than Liberals to defeat the Conservatives Québec.<sup>197</sup> In response, the NDP revoked Hargrove's party membership,<sup>198</sup> and the CAW then publicly broke with the NDP, directing its members not to support the party.<sup>199</sup> The USW has publicly criticized the CAW's action as short-sighted and has continued to support the NDP.<sup>200</sup>

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191. *Id.* at 78, 80.

192. *Id.* at 78.

193. *Id.* at 80 & n.1. The Ontario PC Party unsuccessfully challenged the legality of the WFC's advertisements in the 2007 Ontario provincial election, under the Election Finances Act, R.S.O. 1990, c. E.7 (Ont.), claiming it was effectively the agent of the Ontario Liberal party. *PC Ont. Fund v. Essensa*, 2012 CanLII 453, para. 1–2, 19 (Can. Ont. C.A.). The PCs recently introduced an unsuccessful private member's bill aimed at preventing election advertising by organizations such as the WFC by limiting third party election advertising expenses where the advertising takes a position on any issue with the legislature's competence. Bill 101, Special Interest Groups Election Advertising Transparency Act, 2013 (Ont.).

194. Savage, *supra* note 182, at 81–82.

195. Tom Barrett, *Labour Grapples with Harper's Surge: Ignoring Hargrove, BC Union Leaders Push the NDP*, TYEE, Jan. 19, 2006, <http://theyee.ca/News/2006/01/19/LabourGrapple/>.

196. *Id.*

197. *Id.*

198. Savage, *supra* note 182, at 83.

199. *Id.*

200. *Id.* at 77 (“[T]he United Steelworkers have remained steadfast allies of the NDP.”); Ken Neumann, *Why We Didn't Do What Buzz Hargrove Did*, GLOBE & MAIL, Jan. 31, 20015, at A15.

In addition to likely weakening the NDP, as Larry Savage points out, “the strategic voting approach demonstrated that the labour movement could not speak with a unified voice, let alone in its own voice, on the question of labour’s political vision.”<sup>201</sup>

## VI. CONCLUSION

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

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

Godard is optimistic about the durability and resilience of Canadian Historical-Institutionalist values that have determined how the Wagner model has played out in this country,<sup>202</sup> while Arthurs is more pessimistic about the overwhelming power of changes in the nation’s “real” constitution.<sup>203</sup> Although labor is engaged in an array of strategic resistance, it is not clear that it will be sufficient to once again succeed against anti-labor forces.

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

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201. Savage, *supra* note 182, at 79.

202. Godard, *Historical-Institutionalist*, *supra* note 3, at 415–16.

203. See Arthurs, *Real Constitution*, *supra* note 3, at 61–63.

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gone greater, countervailing change such that labor law will follow.