

Graduated Freedom of Association: Worker Voice Beyond the Wagner Model

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The guarantee of freedom of association in section 2(d) of the Canadian Charter of Rights and Freedoms has been held to protect the right of workers to make collective representations to their employers without fear of reprisals, and to require employers to engage in meaningful dialogue about those representations. Wagner-style statutes such as the Ontario Labour Relations Act condition the right to collective bargaining on majority employee support for a trade union. Because that condition is impossible to meet in practice in a great many workplaces, large numbers of employees are left with no effective means of exercising their right of association.

In response to growing worker demand for new forms of collective voice, this paper puts forward a modest proposal called Graduated Freedom of Association. Under this proposal, a new “thin” model of freedom of association would serve as an alternative to the “thicker” Wagner model for workers who do not have collective representation under the latter. The thin model, which would have some parallels to the provisions of Ontario’s much-criticized Agricultural Employees Protection Act, would enable all workers to exercise at least the minimum bundle of rights and freedoms protected by the Charter without having to opt for a majority union as bargaining agent. Graduated Freedom of Association would impose few new substantive obligations on employers, but would help to address the large representation gap for employees who want a collective voice at work but cannot realistically acquire it under today’s labour relations statutes.

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Introduction

Policy itself should reflect *Charter* rights and values.¹

—Chief Justice of Canada Beverly McLachlin & Justice Puisse Louis LeBel

As a law student, I worked at a community advocacy clinic that provided legal services to workers in a poor section of downtown Toronto. For three short weeks near the end of each summer a large fair came to our community, and dozens of workers were hired to staff it. They would put in long hours and then their employment would end. At the clinic, we organized a “fair workers association” for these workers. This association was not a trade union, but an informal grass-roots community advocacy group organized around the narrow cause of addressing working conditions at the fair. Given the short term and seasonal nature of the employment, a traditional union organizing campaign would have made little sense.

To encourage workers to participate, we distributed information pamphlets to them as they entered the main gate to the fair. Most workers would take a pamphlet as they walked past but few would stop to engage us in conversation. Some came to our meetings at the clinic and became active in the association; others called the clinic after their employment had ended to complain about unpaid overtime, wages below the legal minimum or other working conditions. A common refrain we heard was that they were afraid to be seen speaking with the legal clinic workers for fear of retaliation, including possible termination. Sometimes an employer representative would approach us as we leafleted and inquire into our activities. We explained that we were encouraging workers to

1. *Health Services and Support – Facilities Subsector Bargaining Assn v British Columbia*, 2007 SCC 27 at para 26, [2007] 2 SCR 391, [*BC Health*].

join the association and attend informational meetings. At this point we would be told that all laws were being respected, and would be asked to leave.

The fair workers association had no legal right to speak to the employer on behalf of the workers, let alone engage in bargaining. Since no trade union was involved, the protections afforded to workers by labour relations statutes against employer interference with “trade union” activities would not protect anyone who supported our association. Therefore, we could not guarantee that the law would protect anyone who was fired for attending a meeting or participating in its activities. The employer was well within its legal rights to rebuff or ignore any representations the association might try to make on behalf of its members. This would have been true even if every single worker at the fair became a member.

The Canadian version of the Wagner model,² as reflected in statutes such as the Ontario *Labour Relations Act*,³ rests on an all or nothing proposition. Employees who choose to act collectively through a single trade union, and who can gather support for that union from a majority of employees in an appropriate bargaining unit, can obtain a government-issued certification order. This entitles them to a bundle of regulatory protections designed to promote collective employee voice, including a statutory right to bargain, government conciliation and a protected right to strike. These same protections are denied to employees who may wish to act collectively through some means other than a trade union, or who are unable to marshal majority support for a single union.

This paper explores whether, in light of the decline of majority trade unionism in Canada and recent pronouncements by the Supreme Court of Canada, it makes sense to consider a hybrid model of collective voice I call the Graduated Freedom of Association (GFA) model. The Supreme Court has found that the guarantee of freedom of association in section 2(d) of the Canadian *Charter of Rights and Freedoms* gives workers at least a right to make collective representations to their employer through an organization of their choosing without reprisals, and requires the employer to consider those representations “in good faith” and to

2. So called because of its origins in the 1935 American *National Labor Relations Act*, 29 USC §§ 151–169 (1935) [*NLRA*], also known as the *Wagner Act*.

3. SO 1995, c 1 [*OLRA*].

engage in “meaningful dialogue” with the collective representative.⁴ While lawyers continue to quarrel over the implications of this newly recognized constitutional right to collective bargaining, one outcome is evident and striking: only a very small proportion of Canadian workers in the private sector are able to exercise this right in practice.

In contrast, the GFA model would give all workers the realistic ability to exercise at least the minimum “thin” core rights and freedoms guaranteed by section 2(d). The “thicker” bundle of legal rights and responsibilities in a Wagner-style statute like the *OLRA* would continue to apply to workplaces where employees were represented by a majority union, and would include a right to strike and a duty to bargain in good faith. However, in a GFA model, workers not represented by a majority union would have a legal right to associate and to make collective representations to their employers through vehicles other than majority trade unions, and their employers would be required to engage in “meaningful dialogue” about those representations.

Ontario's much-maligned *Agricultural Employees Protection Act (AEPA)*⁵ could provide a starting point for building the GFA model into Canadian labour policy, as could some elements of the protections for “collective activities” beyond majority trade unionism found in the American *National Labor Relations Act (NLRA)*.⁶ The protections of collective activities not directed by a certified bargaining agent afforded by both the *AEPA* and the *NLRA*, when viewed as stand-alone regimes, suffer from serious deficiencies as mechanisms for encouraging collective voice. Yet when they are viewed not as *substitutes* for the traditional majority unionism model, but rather as *complements* to it, potentially useful mechanisms for collective voice begin to emerge.

This paper asks whether expanding rights of collective representation and voice to all (or most) workers as a supplement to the Wagner model would help address the “representation gap” identified in worker surveys—the gap between workers’ desire for some form of collective voice and the

4. As discussed later, this is the thrust of the majority reasons in *BC Health*, *supra* note 1, and *Ontario (AG) v Fraser*, 2011 SCC 20, [2011] 2 SCR 3.

5. SO 2002, c 16 [*AEPA*].

6. *Supra* note 2.

percentage of workers who can attain it in practice.⁷ For many workers, any realistic system of collective voice is unlikely to come in the form of traditional majority union collective bargaining. This does not mean that workers who prefer to be represented by a certified majority trade union should not continue to have that option, but it should, in my view, be supplemented by allowing other workers to have collective representation in the absence of a majority union.

The GFA model would, therefore, graft onto the thicker Wagner model the thinner bundle of rights and freedoms that the Supreme Court has held to be guaranteed by section 2(d) of the *Charter*. Whether this would improve the situation of workers in Canada is debatable—and so is its political viability—but I argue it has enough potential to warrant serious policy discussion. To fully tap this potential, unions and advocacy organizations have to rethink traditional approaches to employee organizing and representation. Employers would need to recognize the legitimacy of listening to their employees' collective concerns, even when those concerns are not backed by the threat of a legally-sanctioned strike. Such changes in culture can be difficult, but the GFA model is hardly revolutionary—it simply adds a secondary and more modest system of employee representation to the existing Wagner model. It is the modesty of the GFA model, and the fact that the Supreme Court of Canada has opened the door to it, that makes the timing right for the following discussion.

7. See e.g. Michele Campolieti, Rafael Gomez & Morley Gunderson, "What Accounts for the Representation Gap? Decomposing Canada-US Differences in the Desire for Collective Voice" (2011) 53:4 J Ind Rel 425 [Campolieti, Gomez & Gunderson, "Representation Gap"]; Richard B Freeman & Joel Rogers, *What Workers Want* (Ithaca, NY: Cornell University Press, 1999); Seymour M Lipset et al, *The Paradox of American Unionism: Why Americans Like Unions More Than Canadians Do but Join Much Less* (Ithaca, NY: Cornell University Press, 2004).

I. Collective Employee Voice in Labour Law

Labour law has always had as one of its central goals the facilitation of collective employee voice in the workplace.⁸ Industrial democracy—the idea that workers should have the means of participating in important decisions that affect their lives—is deeply ingrained in the Wagner model. Senator Wagner, its sponsor in the US, believed in the need for an institutional means through which this participation could occur:

[W]e must have democracy in industry as well as in government . . . democracy in industry means fair participation by those who work in the decisions vitally affecting their lives and livelihood; and . . . the workers in our great mass productions industries can enjoy this participation only if allowed to organize and bargain collectively through representatives of their own choosing.⁹

During the New Deal era in the US, encouraging collective employee voice was considered good labour policy for a number of reasons. It was believed that industrial democracy promoted broader political democracy, as workers who participated in democratic mechanisms at work were more likely to take part in the broader democratic process.¹⁰ Institutions to promote worker voice were also thought to build employee commitment to the employer and offer an alternative to “exit”, thereby improving efficiency by lowering turnover and encouraging employers to tap into

8. See e.g. Paul C Weiler, *Governing the Workplace: The Future of Labor and Employment Law* (Cambridge, Mass: Harvard University Press, 1990) (“there are two vital social functions to be performed by any instrument for workplace governance: protection of workers as well as participation *by* workers” at 29 [emphasis in original]). See also Guy Davidov, “Collective Bargaining Laws: Purpose and Scope” (2004) 20:1 Int’l J Comp Lab L & Ind Rel 81 at 86; Matthew W Finkin, “The Road Not Taken: Some Thoughts on Nonmajority Employee Representation” (1993) 69:1 Chicago-Kent L Rev 195; James B Atleson, *Values and Assumptions in American Labor Law* (Amherst: University of Massachusetts Press, 1983) at 41–42.

9. Senator Robert Wagner, *The New York Times* (13 April 1947), cited in Charles B Craver, “Why Labor Unions Must [and Can] Survive” (1998) 1:1 U Pa J Lab & Employment L 15 at 23.

10. See Davidov, *supra* note 8 at 85; Karl E Klare, “Workplace Democracy & Market Reconstruction: An Agenda for Legal Reform” (1988) 38:1 Cath U L Rev 1 at 4; Marion Crain, “Building Solidarity Through Expansion of NLRA Coverage: A Blueprint for Worker Empowerment” (1990) 74:5 Minn L Rev 953 at 968; Peter Levine, “The Legitimacy of Labor Unions” (2001) 18:2 Hofstra Lab & Empl LJ 529 at 567–68.

the expertise and knowledge of seasoned workers.¹¹ This latter point is at the heart of modern human resource management strategies such as work teams and quality circles, and helps explain why non-union employers often decide to set up employee committees to facilitate worker voice.¹² In addition, independent employee representation is tied to effective enforcement of employment laws, which has been given more emphasis as government inspections and enforcement of those laws disintegrate.¹³ As Cynthia Estlund has pointed out, the representation gap threatens not only employee voice in the workplace and the ability of workers to bargain above the minimum floor: “it threatens the floor itself”.¹⁴

For many years the Wagner model of majority unionism was considered adequate in promoting collective voice in both the US and Canada. Few believe this is still true. By the late 1980s, private sector union density in the US had fallen to about fifteen per cent, which is about where it stands in Canada today.¹⁵ It became clear to American labour law scholars then that the *NLRA* was failing on its promise to achieve workplace democracy. Debate began about how employee voice could be achieved through other legislative means. Some, like Paul Weiler, advocated mandatory, employee-elected participation committees or works councils, which employers would have to consult on important

11. See Davidov, *supra* note 8. See also Richard B Freeman & James L Medoff, *What Do Unions Do?* (New York: Basic Books, 1984); Federal Labour Standards Review, *Fairness at Work: Federal Labour Standards for the 21st Century* by Harry W Arthurs (Gatineau, QC: Human Resources and Skills Development Canada, 2006) at 129 [Arthurs, *Fairness at Work*].

12. See Monica Belcourt, George Bohlander & Scott Snell, *Managing Human Resources*, 5th ed (Toronto: Nelson Education, 2008) at 166–68. See also Michele Campolieti, Rafael Gomez & Morley Gunderson, “Say What? Employee Voice in Canada” in Richard B Freeman, Peter Boxall & Peter Haynes, eds, *What Workers Say: Employee Voice in the Anglo-American Workplace* (Ithaca, NY: Cornell University Press, 2007) 49 at 68.

13. See e.g. Arthurs, *Fairness at Work*, *supra* note 11 (reporting that seventy-five per cent of federally regulated employers admitted to being in non-compliance with employment standards laws, and that violations were more common in non-union workplaces at 192–93).

14. *Regoverning the Workplace: From Self-Regulation to Co-Regulation* (New Haven, Conn: Yale University Press, 2010) at 239.

15. Private sector union density in Canada in 2012 was 15.9%. See Karla Thorpe, “The State of the Unions in 2012”, *InsideEdge* Winter 2012 (7 February 2012) 6, online: Conference Board of Canada <<http://www.conferenceboard.ca>>.

work-related decisions.¹⁶ Others have advocated forms of minority union or members-only collective bargaining.¹⁷ More recently, deploying “new governance” insights, Estlund has called for reforms that would use a variety of legal carrots and sticks to induce employers to accept some form of independent employee representation.¹⁸

In Canada, less attention has been given to reforms that would promote new employee voice mechanisms.¹⁹ This is no doubt due to the greater resilience of the Canadian Wagner model. It has long been predicted, however, that the Canadian Wagner model will eventually follow the American trend towards irrelevance—a prediction that seems to be playing out today.²⁰ Consequently, the American debates about how to inject collective voice into non-union workplaces are more relevant than ever to Canadian labour policy.

Surveys of workers in both Canada and the US demonstrate high demand for some form of collective voice. Lipset et al surveyed Canadians at a time when overall (public and private sector) union density was at 36%, and found that 33% of non-union employees would vote for a union if given the opportunity.²¹ Unsatisfied desire for collective representation is highest in those sectors where unions have the lowest presence. For example, while the retail sector in Canada is only 11.6% unionized, over 31% of non-union workers indicated that they would vote for a union if asked. The financial sector unionization rate is only 3.5%, but over 33% of the non-union workers in that sector would vote for a union.²²

16. *Supra* note 8 at 285–89. Compare Jamin B Raskin, “Reviving the Democratic Vision of Labor Law”, Book Review of *Governing the Workplace: The Future of Labor and Employment Law* by Paul C Weiler, (1991) 42:4 *Hastings LJ* 1067.

17. See e.g. Finkin, *supra* note 8; Clyde Summers, “Unions Without Majority—A Black Hole?” (1990) 66:3 *Chicago-Kent L Rev* 531.

18. *Supra* note 14 at 213–36.

19. There are exceptions. Roy Adams has for decades advocated new forms of employee voice, including minority union collective bargaining and works councils. See *Industrial Relations Under Liberal Democracies* (Columbia, SC: University of South Carolina Press, 1995) ch 8 at 165ff; “Two Policy Approaches to Labour-Management Decision-Making at the Level of the Enterprise” in W Craig Riddell, ed, *Labour Management Cooperation in Canada* (Toronto: University of Toronto Press, 1986).

20. See Leo Troy, “Convergence in International Unionism, etc. The Case of Canada and the USA” (1992) 30:1 *Brit J Ind Rel* 1.

21. *Supra* note 7 at 99.

22. *Ibid* at 97.

Campolieti, Gomez and Gunderson found in a more recent survey that 42.2% of Canadian workers expressed “a preference for collective voice solutions” in the workplace.²³

In a survey of American workers in the 1990s, Freeman and Rogers found that 44% would have liked to have a form of collective representation that was “strongly independent” of the employer (workers would elect representatives and an outside arbitrator would resolve disputes).²⁴ An additional 43% would have liked representation that was “somewhat independent” from management (workers would elect representatives but management would make final decisions, or workers would volunteer for an employee committee).²⁵ Only 7% of those surveyed would have preferred no form of collective employee association. In all, Freeman and Rogers’ findings indicated that a large proportion of American workers desired collective voice, but not necessarily in the form of Wagner-style collective bargaining through majority unions. Many wanted a less adversarial system, but with independent representation nonetheless. Freeman and Rogers recommended that unions and worker advocates rethink the range of tools available to provide voice mechanisms and employee advocacy beyond the Wagner model, including “open-source unionism”, an idea which I will return to below.²⁶

These studies from both Canada and the US demonstrate an unsatisfied demand for collective representation—a demand that is unlikely to be satiated by a sudden resurgence of majority trade unionism. Governments are unlikely to spur such resurgence through incremental reforms to existing labour statutes designed to make union organizing easier. As many commentators have noted, the world of work that the Wagner model was designed to govern has long since faded, replaced by patterns of non-standard work that do not fit that model.²⁷ Workers are now more mobile, less attached to a single employer and more vulnerable; they are

23. “Representation Gap” *supra* note 7 at 443.

24. *Supra* note 7 at 175.

25. *Ibid.*

26. *Ibid.*, ch 8 at 184ff.

27. See e.g. Judy Fudge, “After Industrial Citizenship: Market Citizenship or Citizenship at Work?” (2005) 60:4 RL 631.

also more likely to work for small employers, or in the white collar or service sectors where collective bargaining has rarely reached.²⁸

II. Designing a Model of Graduated Freedom of Association

One way forward would be to adopt some of the proposals that have been bandied about for years, mostly in the US. Mandatory works councils of the sort proposed in Canada by Roy Adams, and in the US by Weiler, are a fairly obvious solution. Harry Arthurs proposed another system of employee consultation in his 2006 report to the federal government on reforming the employment standards model.²⁹ Arthurs cited the benefits of collective voice mechanisms as “[helping] to reduce workplace irritants that impair employee morale, engagement and productivity”.³⁰ He recommended that employers be required to consult with a collective organization of workers on matters relating to working time, and on any matters where departures from employment standards are permitted with employee consent.³¹

In a unionized workplace, the union would continue to act on behalf of the employees in these consultations. However, Arthurs proposed that, in non-union workplaces, a new “workplace consultative committee” would be required, comprised of worker representatives chosen in some manner that is independent of the employer’s influence.³² Workers would be protected from reprisals for participating in the consultative process, and all proposed variations from statutory standards would need to be approved by a secret ballot. To date, the Conservative federal government has yet to act on these proposals.

The GFA model described in this paper provides another option for introducing collective employee voice outside of the traditional Wagner model of majority, exclusive trade unionism. It does not involve mandatory employee committees, but it does recognize that all workers

28. See Harry W Arthurs, “Labour Law After Labour” in Guy Davidov & Brian Langille, eds, *The Idea of Labour Law* (New York: Oxford University Press, 2011) at 13.

29. *Fairness at Work*, *supra* note 11.

30. *Ibid* at 129.

31. *Ibid*, ch 7 at 107ff.

32. *Ibid* at 131–33.

ought to have the effective means to speak as a group to their employers if they so choose, without fear of reprisals, and that employers should have to listen to and discuss employee representations. The GFA model leaves intact the Wagner-based structure of Canadian labour relations statutes, so it would not affect current or future majority-union collective bargaining relationships conducted under those statutes, nor would it result in a sudden spike in such relationships. The GFA model would introduce legislative recognition of the “thinner” version of freedom of association that the Supreme Court has held to be guaranteed by section 2(d). This would at last give workers the effective ability to exercise a *Charter*-protected freedom. These next sections explore the main components of the GFA model.

A. Reprisals for Associational Activity

An effective model for protecting the right of workers to associate must ensure that those workers are protected from employer reprisals. Our existing laws do well enough at protecting trade union activists and supporters from employer reprisal, but pay little attention to other forms of collective action. Employment-related statutes often prohibit reprisals against employees for exercising statutory rights. These protections would also apply to collective employee action related to those statutes. For example, the Ontario *Employment Standards Act, 2000* provides for reinstatement of employees dismissed for requesting that their employer comply with the *Act*.³³ If a group of employees raises concerns about an employer’s noncompliance with the *Act*, then this section could lead to a remedy for each of the participating workers. However, if the employees act collectively without the participation of a trade union, or express concerns or demands that are not specifically tied to a statutory entitlement, the extent to which they are protected from reprisals is less clear.

In the US, the standard *NLRA* model protects “concerted activities” by employees and a right to “self-organization” in general and broad terms

33. SO 2000, c 41, ss 74, 104.

not tied to “trade union” association.³⁴ However, Canadian Wagnerism envisions a very singular form of employee association: trade unions. Consider the *OLRA* as an example. Section 5 introduces the overriding philosophy of the legislation, granting workers the freedom to “join a *trade union* of the person’s choice and to participate in its lawful activities”.³⁵ The rest of the *OLRA* is about filling in the derivative rights intended to give effect to that freedom.³⁶ All of those rights and obligations apply only in situations where the employees have chosen to exercise their freedom of association through a “trade union”.

The *OLRA* defines a trade union as an organization of employees formed for the “regulation of relations between employees and employers”.³⁷ The Ontario Labour Relations Board (OLRB) has long interpreted this definition as not being quite as flexible as it may appear. To be recognized as a trade union, an organization must demonstrate some formality, such as evidence of a constituting document, members, elected officers or a history of engaging in bargaining to regulate working conditions on behalf of employees who express a desire to be represented by the association.³⁸ My point is simply that Ontario’s version of the Wagner model does not support or promote freedom of association or

34. *Supra* note 2 (“[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection”, § 157 [emphasis added]).

35. *Supra* note 3, s 5 [emphasis added].

36. See Brian Langille, “The Freedom of Association Mess: How We Got into It and How We Can Get out of It” (2009) 54:1 McGill LJ 177 at 188 n 28, 188-89.

37. *Supra* note 3, s 1.

38. See *Forbes v Simcoe County Roman Catholic Separate School Custodians*, [1993] OLRB Rep Dec 1283; *IWA – Canada Local – 1-1000 v Hawkesbury Knitting Mills*, [1997] OLRB Rep Sept/Oct 862. For years, the OLRB applied a multi-part test requiring that the organization have a written constitution with quite precise content; the constitution had to be adopted or ratified at a meeting of employees who has been admitted to membership; and the organization’s affairs had to be elected pursuant to the constitution. See *Niagara Peninsula Beverage & Hotel Employees Union v Local 199 United Auto Workers Building Corporation*, [1977] OLRB Rep Jul 472. Although the Board no longer insists that all of these requirements be met, it still requires that a trade union be “more than just an informal joining together of individuals”. See *United Steelworkers of America v Kubota Metal Corporation Fabramet Division*, [1995] OLRB Rep Apr 467 at para 35; *Berry v Pulley*, 2002 SCC 40, [2002] 2 SCR 493. Steps must have been taken to formalize it as a representative

collective bargaining by workers per se. It deals only with one narrow form that we call “trade unionism”.

Workers who associate through means other than a trade union fall outside of the *OLRA*’s standard unfair labour practice provisions that protect against employer reprisals. For example, the fair workers association that opened this paper could not have met the definition of a trade union under the *OLRA*: it had no constitution, no written or verbal rules, no elected leaders or officers and no process for electing them. It was an informal attempt by a community legal clinic to bring workers together to share experiences, and possibly to consider strategies for bringing pressure on their employer to improve working conditions. We did not ask workers to sign formal membership cards and no dues were collected. If the association had encouraged workers to engage in picketing or in a public protest to press the employer to offer better conditions, the *OLRA*’s anti-reprisal provisions would not have applied.³⁹

of union members. See *National Organized Workers v ABC Climate Control Systems*, [2009] OLRB Rep Sept/Oct 639 at para 6:

[The issue is] whether or not two or more individuals have agreed to form an organization, the purposes of which include the regulation of relations between employees and employers, and be bound by an identifiable set of rules (which will almost always, if not invariably, be written down) governing that organization, and further whether that organization is viable, and therefore has at least one officer, official or agent through which it can act.

39. The key unfair labour practices that govern employers in the *OLRA* all deal with reprisals for “trade union activities”. *Supra* note 3, ss 70, 72, 76. Admittedly, there is little case law exploring the extent to which the prohibitions against discrimination for “trade union activities” can be stretched to cover reprisals for associational activities not involving a “trade union”. In *Alagano v Miniworld Management*, [1994] OLRB Rep Apr 455, a group of non-union daycare workers formed an employee association without the involvement of a trade union, then approached their employer with a list of concerns about working conditions. Their employer fired them. Some of the employees filed a complaint under the *OLRA* alleging a breach of the sections that prohibit discrimination for “trade union activity”. The employer argued that there was no *prima facie* case of a statutory breach, because there was no “trade union” involved. The OLRB said that it was “an interesting issue” whether the *OLRA* unfair labour practice sections applied in the absence of a trade union, but that there was at least an “arguable case” that it could be stretched to so apply. A panel could find, for example, that “these employees were engaged, in their own fashion, in attempting to establish an association *that might have acquired the characteristics of a ‘trade union’ under the Act*” (*ibid* at 16 [emphasis added]). Thus, if we assume that any employee collective activity or employee association could one day morph into a “trade union”, then

Contrast this to the US, where section 7 of the *NLRA* would protect such protests regardless of whether or not a trade union was involved. This is demonstrated by the famous *Washington Aluminum* case, where a group of non-union workers were dismissed after they engaged in a spontaneous collective protest over their working conditions.⁴⁰ Although no trade union or any other association was involved, the dismissals were found to violate section 7 of the *NLRA* because they were reprisals taken against employees for exercising concerted activities in relation to a work dispute. Unfair labour practice provisions within the *OLRA* would not have afforded such protection.

The Supreme Court of Canada has long recognized that to be in a position to exercise freedom of association, employees need protection from employer reprisals and interference. In the 1987 *Alberta Reference*, the Court said that section 2(d) protects workers' freedom to associate "without penalty or reprisal".⁴¹ In a 1999 decision, *Delisle v Canada (Deputy AG)*, the Court repeated its message that the *Charter* guarantees workers the freedom to establish "an independent employee association" of their choosing without reprisal.⁴² To emphasize the point, the *Delisle* judgement read into section 2(d) a prohibition against unfair labour practices.

In the same vein, the majority of the Court in *Dunmore v Ontario (AG)* wrote:

[H]istory has shown, and Canada's legislatures have uniformly recognized, that a posture of government restraint in the area of labour relations will expose *most workers* not only to a range of unfair labour practices, but potentially to legal liability under common law inhibitions on combinations and restraints of trade.⁴³

Quoting Harry Arthurs, the majority judgement went on to note that without protections against employer reprisals, "the freedom to organize

the *OLRA*'s unfair labour practices provisions could cover *any* collective activities, despite the fact that the legislation refers only to "trade unions".

40. *National Labor Relations Board v Washington Aluminum Co*, 370 US 9 (1962).

41. *Reference re Public Service Employee Relations Act (Alta)*, [1987] 1 SCR 313 at 391, 78 AR 1.

42. [1999] 2 SCR 989, 176 DLR (4th) 513 (if public sector employers interfere with the exercise of workers' right to associate into an organization of their choosing, "it is open to [them] . . . to challenge these practices directly by relying on s. 2(d)" at para 32).

43. 2001 SCC 94 at para 20, [2001] 3 SCR 1016 [emphasis added].

could amount 'to no more than the freedom to suffer serious adverse legal and economic consequence'".⁴⁴ The Court traced the need for strong protections against employer reprisals back to the dawn of modern Ontario labour legislation, noting that the 1943 *Collective Bargaining Act*⁴⁵ "reflected the legislature's awareness of employer unfair labour practices and its concomitant recognition that legislation was necessary to enable workers' freedom of association".⁴⁶

The Supreme Court's guidance on this point could not be clearer. Workers should not be exposed to the threat of losing their jobs for exercising their constitutional right to associate with their co-workers and make collective representations to their employer. Public sector workers are already protected, regardless of the form of their associational vehicle: their employers are subject to the *Charter*, which has been held to include a right of non-reprisal in section 2(d). As private sector workers cannot directly access the *Charter*, they must depend on governments to enact anti-reprisal legislation.

One way to do this would be to follow the American lead and prohibit employer reprisals against workers who engage in "concerted activities". This would not be a wholly novel concept in Canadian labour law: the unfair labour practice provisions found in the Ontario *Agricultural Employees Protection Act (AEPA)* are also linked to employee action taken in concert. The *AEPA* provides agricultural employees with rights to form "employees' associations", defined broadly as "associations of employees formed for the purpose of acting in concert".⁴⁷ Employees covered by the *Act* are protected against employer reprisals for supporting or participating in any such association, whether or not it is a trade union. A complaint of unlawful interference with associational rights can be filed with the Agriculture, Food and Rural Affairs Appeal Tribunal, which is given broad remedial authority to reinstate employees, issue monetary compensation or otherwise order the employer to do "anything" to remedy the breach.⁴⁸

44. *Ibid* at para 22, citing Harry W Arthurs et al, *Labour Law and Industrial Relations in Canada*, 4th ed (Markham, ON: Butterworths Canada, 1993) at para 431.

45. SO 1943, c 4.

46. *Dunmore*, *supra* note 43 at para 47.

47. *Supra* note 5, s 2(1).

48. *Ibid*, s 11(5).

The definition of an employees' association in the *AEPA*, because it uses the term "acting in concert", is broader than the definition of trade union in the *OLRA*, which refers to "regulation of relations" between employers and employees.⁴⁹ Trade unions that intend to achieve bargaining representative status under the *OLRA* would usually have the regulation of employment relations as their objective. Our fair workers association did not. It was formed for the purpose of "acting in concert", by educating workers about their legal rights, bringing workers together to share common experiences, and perhaps applying pressure on the employer to comply with legal regulations. Extending the right of non-reprisal to these forms of collective voice will require a broader view of associations, or a protected form of concerted activity, beyond what the Canadian variant of the Wagner model now has. This is what the GFA model provides.

B. Employees, Workers and Independent Contractors

In addition to the question of what is a protected association, an important threshold issue in crafting a broader model of employee associations relates to the types of workers that will be covered.⁵⁰

The *OLRA* protects "persons" from reprisals if they support a trade union or engage in trade union activities.⁵¹ This means that a person who is not an "employee" under the *OLRA*, such as a self-employed worker, is nevertheless protected from anti-union reprisals. Other collective rights in the *OLRA*, such as the right to collective bargaining and the right to strike, apply only to "employees" and to certified unions having the majority support of "employees" in a bargaining unit. In other words, an "employee" has a protected right to strike in Ontario in certain narrow circumstances, but a self-employed worker does not. However, the legislature has expressly expanded the *OLRA*'s definition of "employee" to include "dependent contractors".⁵² Thus, someone who may look like a self-employed worker can nevertheless be treated as an employee for the purposes of the *OLRA* if she is "in a position of economic dependence

49. *Supra* note 3, s 1(1).

50. The *AEPA* applies only to "agricultural employees", so that definition would be unhelpful in crafting a broader GFA model. *Supra* note 5, s 1(1).

51. *Supra* note 3, s 72.

52. *Ibid.*, s 1(1).

upon, and under an obligation to perform duties for, that person more closely resembling the relationship of an employee than that of an independent contractor".⁵³

As for employment standards legislation, it usually protects "employees", but what that term means is left to enforcement tribunals to decide. Because employment standards legislation is designed to protect vulnerable workers, it is often interpreted broadly to include, for example, workers who might be considered "dependent contractors" under the *OLRA*.⁵⁴

The limited application of the *OLRA*'s thick collective bargaining model has frequently been cited as an explanation for falling union density. Greater numbers of workers are being classified as "independent contractors", which takes them outside the scope of labour relations protections.⁵⁵ Some independent contractors are true entrepreneurs; many are employers in their own right. However, many people who work from home, or who are categorized as sole operators, are in fact among the most vulnerable in society.⁵⁶ A new, broader model of employee voice and association should cover them, since they have a strong interest in connecting with others who share their challenges and experiences. The new model should therefore make clear that it covers all workers who sell their labour from a position of economic dependence. At an absolute minimum, this should include "dependent contractors" as defined by the *OLRA*.

C. "*Thin*" and "*Thicker*" Freedom of Association: Complementary Models?

A broad definition of "employee" or "worker" and a right to associate free from employer reprisals are necessary, but not sufficient for the effective promotion of worker voice outside of majority union collective bargaining. The new model also needs a mechanism to induce employers to listen to and discuss their employees' concerns. Under the dominant *OLRA* model, only employees who act through a majority trade union

53. *Ibid.*

54. See generally Judy Fudge, Eric Tucker & Leah F Vosko, "Employee or Independent Contractor? Charting the Legal Significance of Difference in Canada" (2003) 10:1 CLELJ 193.

55. See *ibid.*

56. *Ibid* at 229.

have access to lawful ways to make an employer listen to their concerns, let alone respond to or discuss those concerns. The Ontario Court of Appeal recently spoke to this point:

In a Wagner labour regime, an association that represents a minority of the employees, as much as 49 per cent of them, has no right to collectively bargain with the employer. . . . An uncertified association has no right to bargain on behalf of workers, or so much as meet with employers to discuss the views of the workers they claim to represent.⁵⁷

In other words, the “49 per cent” lack any effective means of exercising even the basic minimal rights to collective bargaining that form the substance of freedom of association in the workplace in Canada. The objective of the GFA model is to address the yawning chasm between a theoretical and practical constitutional right to collective bargaining.

To do this, the GFA model would introduce a new thinner version of collective voice alongside the existing Wagner-style statutes that govern majority trade union collective bargaining, such as the *OLRA*. The GFA model consists of a legal system that instantiates *both* the “thin” and “thick” versions of freedom of association described in this section. In terms of practical design, the new thinner version could be introduced as a set of amendments to existing employment standards legislation, as a stand-alone statute similar in form to the *AEPA*, or as a new distinct part added to existing Wagner-style collective bargaining legislation.

Any individual employee could be governed by the thin or the thick versions of association, or neither—but not both at once. An employee association with thinner rights under the new GFA model would be supplanted by a successfully certified trade union under the *OLRA*, in much the same way as a non-union employee association now loses its right to represent its members once a union is certified under the *OLRA*. An employer could, however, find itself dealing with both versions of association at once. One group of its employees might be unionized under the thicker *OLRA* version, while other groups of employees fall under the new thinner version. This should not pose too much difficulty, as many employers already deal simultaneously with multiple unionized bargaining units, alongside non-union employees.

The components of the GFA model are demonstrated in Figure 1.

57. *Mounted Police Association of Ontario v Canada (AG)*, 2012 ONCA 363 at para 26, 350 DLR (4th) 261.

Figure 1: Graduated Freedom of Association—Thin and Thick Freedom of Association

<i>Charter Protected (CP) to Date</i>		Not <i>Charter</i> Protected (NCP)
(Rights that would be protected in the new "thin" version component of the GFA model)		(Core components of the "thick" version of FA found in Wagner-style labour legislation)
A—Thin Rights	B—Thicker Rights	C—Even Thicker Rights (Found in Wagner-Style Labour Legislation)
(1) Freedom to establish, join and maintain employee associations (trade union or otherwise)	(2) Unfair labour practice protections: right not to be punished, terminated or interfered with by the employer when exercising a right of association	(5) Right to full collective bargaining, including duties to bargain in good faith and make reasonable efforts to conclude a collective agreement
(See: <i>Alberta Reference</i> ; <i>Delisle</i> ; <i>Dunmore</i> ; <i>Fraser</i>)	(See: <i>Alberta Reference</i> ; <i>Delisle</i> ; <i>Dunmore</i>)	
	(3) Right to make "collective representations" to employer through employee association	(6) Right to access mediation and arbitration services to help with collective bargaining
	(See: <i>Dunmore</i> ; <i>BC Health</i> ; <i>Fraser</i>)	
	(4) Obligation on employer to receive collective employee representations, and to engage in "meaningful dialogue" and consider representations "in good faith"	(7) Legal right to strike and lockout (or to access interest arbitration) [†]
	(See: <i>BC Health</i> ; <i>Fraser</i>)	

[†] *Saskatchewan v Saskatchewan Federation of Labour*, 2012 SKQB 62, 212 ACWS (3d) 389 (finding that section 2(d) protects a right to strike). This decision has been appealed to the Saskatchewan Court of Appeal, but no decision has been issued at the date of writing.

As depicted, freedom of association operates on a continuum from thinner rights (the freedom to form, join and belong to an association of one's choosing) to thicker rights (the freedom to strike and the right to collective bargaining in good faith).⁵⁸ So far, the Supreme Court has read into section 2(d) those freedoms and rights found in columns A and B of Figure 1 (CP rights 1 to 4), but has not included those found in column C (NCP rights 5 to 7): the duty to bargain in good faith in the full sense as applied under the Canadian Wagner model of majority union collective bargaining; the right to access government mediation or conciliation services; and the right to strike or to have access to some alternative, independent means of bargaining dispute resolution.

The rights and freedoms that the Supreme Court has already recognized in its section 2(d) jurisprudence (CP rights 1 to 4) would be protected under the GFA model. It would provide workers with a legislatively-backed option to exercise their freedom to associate when full-fledged majority trade union bargaining was either not available or not desired.

Many, but not all, of the basic components of the thinner version within the GFA model can already be found in the Ontario *AEPA*. The *AEPA* establishes a far thinner model of freedom of association than what is available to workers represented by statutory bargaining agents under the *OLRA*. For this reason, it has been criticized, correctly in my opinion, as a ploy by the Ontario Conservative and Liberal governments to provide agricultural workers with the absolute minimum associational rights required by the *Charter*.⁵⁹ The GFA model, however, would not replace the thicker *OLRA* rights and freedoms with those minimal associational rights, as was done in the case of Ontario agricultural workers.⁶⁰ Instead, those minimal rights would exist in addition to the thicker rights available under the *OLRA* to workers who manage to organize into majority trade unions.

58. See Ian Bogg & Keith Ewing, "A (Muted) Voice at Work? Collective Bargaining in the Supreme Court of Canada" (2012) 33:3 Comp Lab L & Pol'y J 379 at 389-92.

59. See e.g. Judy Fudge, "Introduction: Farm Workers, Collective Bargaining Rights, and the Meaning of Constitutional Protection" in Fay Faraday, Judy Fudge & Eric Tucker, eds, *Constitutional Labour Rights in Canada: Farm Workers and the Fraser Case* (Toronto: Irwin Law, 2012) 1 at 7-8 [Fudge, "Farm Workers"].

60. The historical treatment of agricultural workers under Ontario labour legislation is reviewed by the Supreme Court in *Fraser*, *supra* note 4 at paras 5-7.

Consider again the rights found in the *AEPA*. It grants employee associations the right to a limited form of collective bargaining, though the content of that right remains somewhat uncertain. Section 5 provides as follows:

5. (1) The employer shall give an employees' association a reasonable opportunity to make representations respecting the terms and conditions of employment of one or more of its members who are employed by that employer.

(2) For greater certainty, an employees' association may make its representations through a person who is not a member of the association.

...

(5) The employees' association may make the representations orally or in writing.

(6) The employer shall listen to the representations if made orally, or read them if made in writing.

(7) If the representations are made in writing, the employer shall give the association a written acknowledgment that the employer has read them.⁶¹

In *Fraser*, the Supreme Court ruled that this section must be interpreted purposively to protect the essential rights and freedoms that the Court has read into section 2(d).⁶² More precisely, an employer must consider "in good faith" any collective representations presented by an employee association—the employer must consider the representations with an "open mind", while "engaging in a meaningful dialogue" with the employee association.⁶³ The *Fraser* majority summarized the requirements in section 5 of the *AEPA* this way:

There can only be one purpose for requiring the employer to listen to or read employee representations—to assure that the employer will in fact consider the employee representations. No labour relations purpose is served merely by *pro forma* listening or reading. To fulfill the purpose of reading or listening, the employer must consider the submission. Moreover, the employer must do so in good faith: consideration with a closed mind would render listening or reading the submission pointless.⁶⁴

61. *Supra* note 5.

62. *Supra* note 4 at para 41.

63. *Ibid*; *BC Health*, *supra* note 1 at paras 98, 100–01.

64. *Supra* note 4 at para 103.

The Court noted that the *AEPA* grants the tribunal charged with applying the statute considerable latitude to apply section 5 in a way that would give a robust reading to the duty to engage in “meaningful dialogue”.⁶⁵ Because the union had brought its *Charter* challenge in *Fraser* without having given the tribunal an opportunity to do that, it was, in the Court’s view, too soon to conclude that the statute did not respect the right to freedom of association.

The *AEPA* thus serves as a useful template for designing the GFA model. The *AEPA* offers no protected right to strike or lockout, or access to the state-supported mandatory mediation or conciliation facilities available to majority trade unions under the thicker *OLRA* model. On the other hand, the limited rights that the *AEPA* does offer to workers are not tied to trade union membership or to the attainment of majority support by a single trade union. Figure 1 helps us see how the *OLRA* and *AEPA* create very different bundles of freedoms and rights, either of which is acceptable under the *Charter*:

- The *AEPA* protects all of the “thin” and “thicker” rights and freedoms found in columns A and B, whether the association is a (majority or minority) trade union or some other form of association “formed for the purpose of acting in concert”. However, the *AEPA* does not recognize or protect any of the “even thicker” freedoms and rights in column C.
- The *OLRA* protects the “thin” right in column A to form, maintain and belong to an association, but only if that association is a “trade union”. The *OLRA* protects employees against reprisals (CP 2), provided that the reprisals relate to lawful “trade union activities”. The *OLRA* also protects all of the other rights and freedoms in columns B and C, but only if the employees associate through a statutorily recognized majority trade union. While a trade union that is not statutorily recognized can attempt to make collective representations on behalf of employees (CP 3), the employer has no legal obligation to receive, listen to or respond to those representations (CP 4).

Most of the criticism of the *AEPA* has been directed at the absence of the rights and freedoms in column C. Those critics find little or no value

65. *Ibid* at paras 108–13.

in the *AEPA*'s extension of the freedoms and rights in columns A and B to organizations that are not majority trade unions.⁶⁶ Other commentators, most notably Roy Adams, see useful or even "vast" potential in the expanded scope of the *thinner* rights in columns A and B.⁶⁷

The *AEPA* model opens the door to two new forms of employee representation not recognized in the *OLRA*: non-union statutory employee representation and minority trade union representation. Recall that the *AEPA* does not require an employee association to be a trade union, and that it does not rely on the twin principles of majoritarianism and exclusivity that are central in the *OLRA*. Assuming that this was a deliberate legislative choice, employees under the *AEPA* have the right to engage in meaningful dialogue with the employer through an association of their choosing, regardless of the level of support it enjoys. There is nothing in the *AEPA* to indicate that there can only be one association for a particular group of employees, so an employer may have to engage in meaningful dialogue with multiple employee associations. This is common in foreign industrial relations systems, though it is quite unfamiliar in Canada. While having majority support (or something close to it) would obviously increase an association's legitimacy and power, it is not a prerequisite to the employer's statutory obligation to listen and respond to collective representations.⁶⁸ The *AEPA* model thus gives employees a modest new mechanism—a small crack in the doorway—through which new forms of non-majority employee advocacy could gain a right of audience with the employer.

The *AEPA* does have some serious shortcomings, and remedying them could make it more effective as a thin system of collective voice. For example, the *AEPA* is enforced by the Agriculture, Food and Rural Affairs

66. See Fudge, "Farm Workers", *supra* note 58.

67. "Bewilderment and Beyond: A Comment on the *Fraser* Case" (2012) 16:2 CLEJ 313 [Adams, "Bewilderment"]. See also David Doorey, "Roy Adams on the Vast Potential of *Ontario v. Fraser*" (4 May 2011), online: Doorey's Workplace Law Blog <<http://www.yorku.ca>>.

68. This is only speculation, however, as there are no decisions interpreting the *AEPA*. It is possible that the tribunal or a court could read in some limitation that is not evident in the text of the statute. For example, the concept of the "most representative" bargaining agent is recognized in international labour law. The tribunal (or court) could read in some limitation on the number of employee associations with whom an employer is required to engage in "dialogue", though such a limitation is not explicit in the statute.

Tribunal, which has no record of specialized expertise in employment matters. Interpreting employment and labour law statutes requires specialized expertise that existing labour relations boards and other employment law tribunals already possess. These expert bodies should be assigned jurisdiction over models of employee association. The *AEPA* also has no provisions protecting the anonymity of association members, as the *OLRA* does for union members.⁶⁹ There may be situations in which the employer would need to know the identity of association members, but it should be the employees' decision whether to disclose their association membership to the employer. Absent voluntary disclosure, government administrators could keep track of association memberships, just as labour board officials confirm trade union membership without giving identifying information to the employer.

I have used the *AEPA* as an example of a statutory regime that recognizes the thin version of collective bargaining that the Supreme Court of Canada has said is guaranteed by section 2(d) of the *Charter*. With some modification, the *AEPA* could serve as a basic template for the GFA model, offering workers access to both the "thin" and "thicker" versions of collective bargaining. The next question to consider is whether the GFA model offers any real benefits to workers and employers, or imposes any prohibitive new costs or risks on either.

III. Evaluating the Graduated Freedom of Association Model

The GFA model described in this paper would introduce a new, secondary system of collective voice. Although modest in the obligations it imposes on employers, it would no doubt still face strong opposition from the business community. Many employers simply reject the notion that collective employee voice offers any economic benefit whatsoever. Others have established their own employee associations, with which

69. *Supra* note 3 ("[t]he application for certification shall be accompanied by a list of the names of the union members in the proposed bargaining unit and evidence of their status as union members, but the trade union shall not give this information to the employer", s 7(13)).

they may even engage in dialogue and consultation.⁷⁰ The GFA model threatens to take away control over those processes. Employers may fear, with some justification, that the GFA model is really full-fledged collective bargaining on training wheels: once employees get a taste of collective representation, they may acquire an appetite for thicker collective bargaining rights.⁷¹

For this reason, unions and other worker advocates may see some value in a GFA model, but they may also have at least three significant concerns. First, supporting a thinner version of freedom of association than the Wagner model could be perceived as the thin edge of the wedge that ultimately leads to the complete dismantling of that model. Therefore, rather than supporting a lesser alternative, it may be better to hold on to the dream that the Wagner model will one day be strengthened so as to facilitate the rebuilding of the labour movement, or that some new and stronger system of trade union rights will emerge. Second, unions may perceive the GFA model as a threat to their monopoly over collective employee representation. After all, unlike the *OLRA*, the GFA model does not prefer trade unions to other types of organization. Third, worker advocates may believe that the thinner version of collective bargaining introduced by the GFA model would be meaningless and would provide no benefit to workers or to their own advocacy organizations. For example, they may believe that absent a right to strike, the GFA model would only be able to introduce an institutionalized form of “collective begging”. In that case, there would be no reason to expend political capital or energy on a doomed and futile model.

These are all valid concerns that could kill the GFA concept right out of the gate. But there are also some good reasons to push forward with a deeper discussion of the GFA model. The first is that the model

70. Daphne Taras has studied non-union employee associations in the Canadian context. See Daphne Taras & Bruce Kaufman, “Non-union Employee Representation in North America: Diversity, Controversy, and Uncertain Future” (2006) 37:5 *Indus Rel J* 513; Daphne Taras, “Reconciling Differences Differently: Employee Voice in Public Policy Making and Workplace Governance” (2007) 28:2 *Comp Lab L & Pol’y J* 167.

71. Taras has described how non-union forms of employee association can morph into full-fledged trade union representation, especially when the non-union associations are perceived to be ineffective. See *ibid.* See also A Tarik Timur, Daphne Taras & Allen Ponak, “Shopping for Voice: Do Pre-Existing Non-Union Representation Plans Matter When Employees Unionize?” (2012) 50:2 *Brit J Ind Rel* 214.

is principally concerned with putting fundamental *Charter* values into practice for the entire workforce. The thrust of the argument in its favour is that all workers ought to have the effective ability to exercise at least those rights and freedoms that are minimally guaranteed by the *Charter*. As a normative claim, this proposition would be very difficult for politicians to oppose, and easy for the public to support. In *BC Health*, McLachlin CJC and LeBel J reminded lawmakers that “policy itself should reflect *Charter* rights and values”.⁷² Yet Canada’s dominant labour relations policy model advances those rights and values for only about fifteen per cent of the private-sector workforce. A legal reform that promotes the realization of *Charter* values in labour policy would open new channels to facilitate the exercise of basic *Charter* freedoms to workers who might want to exercise those freedoms but are unable to do so through the existing channel.

Second, adopting the GFA model would bring Canada closer to compliance with an important facet of its international legal obligations. Expert bodies of the International Labour Organization (ILO) have said that conditioning the granting of exclusive collective bargaining rights to a union upon demonstration of a reasonable level of employee support is permissible, *provided that workers have alternative means available for acting collectively when that threshold cannot be reached*.⁷³ The ILO’s Committee of Experts on the Application of Conventions and Recommendations has taken the position that in legal systems which use a majority-based system of union exclusivity, the law must ensure that “if no union covers more than 50 per cent of the workers, collective bargaining rights should be granted to all the unions in this unit, at least on behalf of their own members”.⁷⁴ This is a point that Roy Adams has been making for many years.⁷⁵ It now has greater resonance since the Supreme

72. *Supra* note 1.

73. *Freedom of Association and Collective Bargaining: International Labour Conference 81st Session, 1994* (Geneva: International Labour Office, 1994) at paras 97, 99.

74. *Ibid* at para 241. See also Mark Harcourt & Helen Lam, “Non-Majority Union Representation Conforms to ILO Freedom of Association Principles and (Potentially) Promotes Inter-Union Collaboration: New Zealand Lessons for Canada” (2011) 34:1 Dal LJ 115 at 119–20.

75. See e.g. Roy J Adams, *Labour Left Out: Canada’s Failure to Protect and Promote Collective Bargaining as a Human Right* (Ottawa: Canadian Centre for Policy Alternatives, 2006).

Court of Canada relied on ILO jurisprudence in *BC Health* as part of its justification for recognizing the *Charter* right to collective bargaining.⁷⁶

It is true that adopting the GFA model as outlined above would still leave Canada well short of compliance with ILO principles. For example, workers represented by non-majority associations would still be without a protected right to strike, as called for by the ILO's expert bodies.⁷⁷ However, by offering employees who do not have majority union representation an opportunity to associate and make collective representations without reprisals, the GFA model would represent a modest but important and symbolic step towards compliance with international law.⁷⁸

A third benefit of the GFA model is that it could be attractive to a significant segment of the voting population. As discussed in Part I of this paper, studies have shown that many Canadian workers who do not have collective voice would like to have it, even if (and sometimes especially if) it came in a form that was less adversarial than traditional Wagner-style majority union collective bargaining.

Fourth, while some in the business community would not welcome a new regime of collective worker voice, the overall employer response to the idea of a GFA model might not be uniformly negative. Unionized employers will mostly be unaffected by this model, since their workers are already governed by the thicker alternative within it. Some unionized employers might even support the GFA model, hoping either that their employees opt to "trade down" by decertifying their union in favour of the thinner option, or that the GFA model might facilitate some form of employee organization at their competitors. In any event, both the likelihood and the cogency of employer resistance to the GFA model must be measured not only against the potential contribution to the attainment of workers' fundamental freedoms, but also against the scarcity of the obligations it imposes on employers. No one argued that the *AEPA* imposed undue obligations on employers, and the new thin

76. *Supra* note 1 at paras 77-79.

77. Were the Supreme Court to recognize a *Charter* right to strike under section 2(d), then applying the logic of the GFA model presented in this paper, that right too should be extended to non-majority employee associations. However, that debate can be saved for a later date.

78. See Adams, "Bewilderment" *supra* note 67.

version of freedom of association introduced by the GFA model would share considerable common ground with the *AEPA*.

This leads us to a final and pressing question: would the GFA model really offer any benefits to workers? In the US, where scholars have been on a long-standing search for viable alternatives to Wagner-style majority union collective bargaining, a fair amount of hope has been expressed for thinner forms of collective representation. That hope seems to be contingent on whether unions, worker centres and other advocacy groups can find ways to offer value to workers outside of traditional collective bargaining. This began with the idea that unions and worker organizations should offer more “member services” not tied to a bargaining unit or an employer. For example, more than two decades ago, Weiler noted the burgeoning American Federation of Labor and Congress of Industrial Organizations model of “associate union membership”, which encouraged “associates” to join unions “not necessarily for purposes of collective bargaining, but rather to take advantage of a variety of attractive union services that workers can use, short of the negotiation of a collective agreement”.⁷⁹

Similarly, Freeman and Rogers advocated what they called “open source unionism”, whereby unions would provide a variety of members-only services not tied to any particular employer or bargaining unit.⁸⁰ Such services could reach the growing army of self-employed or contract workers, and the large and highly vulnerable corps of unemployed or underemployed workers.⁸¹ Freeman and Rogers also argued that American

79. *Supra* note 8 at 292–93:

Some of these services (volume consumer discounts, for example) are not work-related at all. Others are explicitly tailored to the variety of workplace trends . . . especially the rise of employment rights. . . . [F]or ordinary workers, at least, real access to regulatory programs (such as workers' compensation) depends to a considerable extent on their ability to draw on the resources, expertise, and backing of a broader organization of workers. Associate membership (at a somewhat lower dues level) offers unorganized workers the opportunity to avail themselves of the representation resources of the union movement in enforcing a broad array of new employment rights.

80. *Supra* note 7 at 193–209.

81. Among the services that could be provided to members (many of them quite cheaply through the internet) are: information on pay and working conditions in a particular industry, job training and skills certification, financial and pension planning, legal advice, job market information and training in negotiations. See *ibid* at 194.

unions should more aggressively explore how they can advocate on behalf of workers outside the majoritarian *NLRA* model: "An open-source union with 10 percent, 20 percent, or 30 percent of the workforce in a given workplace would be able to act on behalf of its members and show the value of collective organization, without collective bargaining to make that demonstration".⁸²

A massive body of American literature has explored how coalitions of unions and other worker advocacy organizations and networks are effecting positive changes in the working conditions of many of America's most vulnerable workers.⁸³ Cynthia Estlund has argued that American worker centres represent "the most promising new institutions for the representation of workers".⁸⁴ Janice Fine has documented how advocacy organizations, sometimes in coalitions with unions, have successfully deployed a variety of tools that have improved the lives of workers.⁸⁵

For the purposes of this paper, what is most pertinent in the vast literature on worker advocacy campaigns in the US is the fact that American unions and other advocacy organizations have been experimenting with forms of worker representation beyond formalized collective bargaining for some time, with varying degrees of success. In Canada, some unions

82. *Ibid* at 195.

83. See e.g. Seth D Harris, "Don't Mourn—Reorganize! An Introduction to the Next Wave Organizing Symposium Issues" (2005–06) 50:2 *NYL Sch L Rev* 303; Alan Hyde, "Who Speaks for the Working Poor?: A Preliminary Look at the Emerging Tetralogy of Representation of Low Wage Service Sector Workers" (2004) 13:4 *Cornell JL & Pub Pol'y* 599; Charles Heckscher, "Organizations, Movements, and Networks" (2005–06) 50:2 *NYL Sch L Rev* 313; Janice Fine & Jennifer Gordon, "Strengthening Labor Standards Enforcement Through Partnerships with Workers' Organizations" (2010) 38:4 *Politics & Society* 552; Maria L Ontiveros, "Labor Union Coalition Challenges to Governmental Action: Defending the Civil Rights of Low-Wage Workers" (2009) *U Chicago Legal F* 103.

84. *Supra* note 14 ("[w]orker centres have sometimes succeeded where traditional unions have failed and have managed to generate extraordinary organizational energy and collective human resources. The unions and major labor federations have taken notice and begun to form alliances with workers centres, or even form worker centres in some areas" at 181).

85. "Why Labor Needs a Plan B: Alternatives to Conventional Trade Unionism" (2007) 16:2 *New Labor Forum* 35. Among those tools are portable group insurance rates for self-employed and mobile workers, tax and retirement planning workshops, negotiated consumer discounts on products workers need for their families or jobs and stored value debit cards for workers who have difficulty opening bank accounts. These negotiations also do ongoing political lobbying for improvements to employment standards and immigration laws (*ibid* at 41–44).

have begun to recognize the need to become more relevant to workers beyond their traditional role as collective bargaining agents for members. For example, a recent strategy paper published by the Canadian Auto Workers and Communications, Energy and Paperworkers included in their vision for a future merger the need for a new union that would define itself as a force fighting for all workers, not just its own members. This would involve offering services and support to non-union workers engaged in struggles for improved working conditions.⁸⁶

The GFA model discussed in this paper would provide one more tool for such organizations that are searching for ways to support workers outside of standard collective bargaining. Consider again the requirements found in section 5 of the *AEPA* for employers to acknowledge representations from an employees' association, and to engage in meaningful dialogue about those representations. These simple requirements can be a conversation starter. Some employers will accept the representations respectfully and take them into consideration in setting future policies and practices. In some cases, this alone will satisfy the workers that their views are being heard. Other employers will find the representations bothersome, and be inclined to ignore them altogether. However, a creative and diligent union or worker advocacy organization might harness the representations in a way that puts pressure on an employer to alter its conduct in some manner. For example, a request for a small raise could be prefaced with a list of the employer's executive salaries and bonuses, or of higher wages paid by competitors. A request for a modest contribution to a health plan could be contrasted with dividends paid to shareholders, profit levels or tax breaks enjoyed by the company. The point of such representations would not be to "bargain" with the employer, but to communicate a message to workers that they are not being treated fairly. These communications could either be made publicly available, or available to "members only" online.

The *AEPA* requires an employer to acknowledge receiving employee representations and to engage in "meaningful dialogue" about them. The employer's response becomes part of the conversation. The response may consist only of a bald acknowledgement of the representations, and a cursory discussion before they are rejected. The association could

86. CAW CEP Proposal Committee, Final Report, "Towards a New Union" (1 August 2012) online: CAW-CEP New Union Project <<http://www.newunionproject.ca>> .

tell employees about that response as evidence of the employer's lack of concern with their interests, and perhaps as evidence that employees should consider opting for "real" union representation. Some employers would respond to the representations by insisting that the workers are treated fairly, to which the association could issue a rejoinder explaining why it believed this not to be true. In this way, the very modest tools offered by an *AEPA*-style regime could provoke worker voice outside of formal collective bargaining.

The right to make representations under the *AEPA* model, which would be included in the proposed GFA model, is not limited to making bargaining proposals. It also gives worker advocates an opportunity to police legal compliance and to put the employer on written notice that it may be breaking the law. If such an allegation is true, the employer will be under pressure to bring itself into legal compliance. It might be necessary to follow up the representation with a legal complaint, but these are just more ways that a worker association can provide a service to employees outside of formal collective bargaining.

Employee associations could also help police individual employment contracts and statutory requirements. They could represent or assist members if an employer proposes amendments to an employment contract. This role would be similar to collective agreement administration, but would involve monitoring contract terms and the common law of employment and perhaps helping workers to bring wrongful dismissal actions or other breach of contract claims. This could be a powerful organizing tool for associations, and could help improve overall regulatory and contract compliance. Employees would no doubt appreciate the employee association's advocacy skills and legal knowledge.

Additional legal reforms could more effectively harness employee associations to improve legal compliance with employment laws. For example, employers could be more harshly sanctioned if they had been warned by an employee association of non-compliance with a regulation or contract, yet fail to remedy the problem. This approach is similar in design to the long-standing Canadian civil litigation principle that higher legal costs will be assessed against a losing party if it had rejected an earlier offer to settle on terms at least as favourable to it as the terms of the court's judgment.⁸⁷ A request by an employee association for the employer to

87. See e.g. Rules of Civil Procedure, RRO 1990, Reg 194, rule 49.

comply with the law could be treated as analogous to a settlement offer. By attaching greater sanctions to a failure to respond to well-founded allegations of legal wrongdoing put forth by an employee association, the law could add substance to the “dialogue” required under the GFA model, while also capitalizing on the effectiveness of employee associations in the pursuit of greater legal compliance.

Employee associations could also be granted a more institutionalized form by weaving a role for them into existing legal regimes. Noted above is Harry Arthurs’ proposal for mandatory employee committees that would provide employee voice in discussions about flexible employment standards.⁸⁸ In a GFA model, the employee associations could represent their own members in these negotiations, and could provide advice to employee members of mandatory joint health and safety committees and pay equity committees. They could also represent their members in tribunal proceedings under (for example) employment standards and workers compensation legislation.

Conclusion

I do not intend to overstate the potential impact of a GFA model that would extend rights similar to those found in the *AEPA* to all workers alongside the thicker Wagner model of collective bargaining. This thinner model would only marginally alter the balance of power in employment relations. The best argument in favour of the GFA model from the perspective of worker advocates is that it offers one more tool in a larger struggle to inject worker voice into the workplace without formalized collective bargaining, and does so in a way that protects against reprisals for associational behaviour. Creative worker advocates might be able to use these thinner rights as part of a larger strategy of worker representation that includes providing valuable members-only services as a way to attract supporters. There are some signs from the US that these sorts of multifaceted tactics can improve the relevance of worker advocacy organizations and benefit workers who are not represented by certified majority union workplaces.

88. *Fairness at Work*, *supra* note 11.

Then again, employers may have little interest in worker advocacy organizations becoming more relevant. Employers want more flexibility to operate their businesses, not less. They want less outside representation for their employees, not more. Employers are likely to push back against labour law reforms that inject a new form of collective worker voice, even one that imposes little more than an obligation not to punish workers for associating and a requirement to engage in rational discussion with an association about employee concerns. Certainly, political parties that favour individual over collective employment relations will be unlikely to support any model that legitimizes collective worker action.

As in the US, political indifference or hostility towards trade unions in Canada renders any broad labour law reform designed to revitalize the trade union movement unlikely. That is why unions and labour activists are looking to the *Charter* and to “fundamental human rights” discourse to save the Wagner model. To date, that strategy has proven to be only marginally successful. In reading new substantive content into section 2(d), the Supreme Court of Canada has also made it clear that freedom of association can be instantiated in many ways other than through Wagner-style majority trade unionism. This is the irony in the labour movement’s recent foray into *Charter* litigation: by arguing for a constitutional right to the thicker bundle of rights and freedoms proffered in the Wagner model, unions are unwittingly educating unsympathetic governments on how to dismantle that model without running afoul of the *Charter*.⁸⁹

Attacks on the Wagner model are politically expedient. Its opponents have succeeded in characterizing it as a device for enhancing the power of trade unions and union “bosses”, not for promoting worker voice and freedom. That is why Paul Weiler argued twenty years ago that the key to moving labour law reforms forward in an era when unions are unpopular is to emphasize the benefits to *workers*, not to unions.⁹⁰ That

89. The greatest threat may be found in two recent decisions of the Court of Appeal for Ontario. In *Association of Justice Counsel v Canada (AG)*, 2012 ONCA 530 at para 39, 223 LAC (4th) 35, the Court ruled that the *Charter* protection of collective bargaining expires once the parties have reached a bargaining impasse, after which point the state can impose terms without violating section 2(d). In *Mounted Police Association of Ontario*, the Court ruled that while employees have a *Charter* right to choose their association, the state can nevertheless legislate that the employer bargain with a different association. *Supra* note 57 at para 142.

90. *Supra* note 8 at 301.

insight remains valid in Canada today. Proposals to reform the Canadian Wagner model in a way that will simply promote conventional unionism and collective bargaining are unlikely to gain any ground in the current political climate. The emphasis must be on promoting fairness to workers through mechanisms that will not at the same time impose onerous economic restraints on business.

The Graduated Freedom of Association model explored in this paper is not aimed at improving the fortunes of trade unions and their leaders. True, unions might be able to make use of the model, and could occasionally parlay advocacy efforts by “employee associations” into successful union organizing campaigns and statutory certification. But that is not the objective of the GFA model, nor realistically is that likely to occur very often. The main purpose of the GFA model is to give workers a more realistic chance to exercise at least the minimum freedoms that the Supreme Court has said are constitutionally guaranteed. As a concrete example, this model would have at least protected the employees who joined our fair workers’ association from employer reprisals, and would have allowed us an audience with the employer. We cannot know whether that opening could have led to some measurable benefits with some creative advocacy. What is clear, however, is that protecting vulnerable workers in the future will require both creative advocacy and new forms of collective organization.