Foreword

Most of this issue of the *Queen's Law Journal* is devoted to the revised versions of papers presented at a conference at the University of Western Ontario on March 3, 2012, entitled *Faultlines and Borderlines in Labour Law: The Future of the* Wagner Act *in Canada and the United States*. The conference was co-sponsored by Heenan Blaikie LLP, which has a leading employer-side labour law practice, and by the UWO Faculty of Law. It was preceded on March 2, 2012 by the Koskie Minsky University Lecture in Labour Law, sponsored by the leading union-side labour law firm after which it is named. The *Journal* is grateful to this issue's Guest Editors, Dr. John Craig of Heenan Blaikie and Professor Michael Lynk of the UWO, for planning and organizing the conference, for inviting us to publish the resulting papers, and for their help in preparing these papers for publication. We are also grateful to the authors and to the many external referees.

The labour law systems of both Canada and the United States are largely based on the so-called Wagner model, named after the *National Labor Relations Act* (or *Wagner Act*) passed in the US in 1935. That model, which is quite unique by international standards, generally makes the expression of majority employee support for a trade union on a workplace-by-workplace basis a prerequisite to the acquisition of collective bargaining rights and (especially in Canada) the right to strike. The trade-offs embodied in the Wagner model were originally expected to encourage the growth of collective bargaining and discourage resort to industrial conflict. However, for reasons canvassed in the papers in this issue, those expectations have remained largely unrealized and the future of the Wagner model is being called into question from all sides in both countries. There is a widespread sense that reform is needed, but little agreement on what form it will or should take.

The Koskie Minsky Lecture was given by Wilma Liebman, who was a member of the US National Labor Relations Board from the late Clinton years through the Bush era and into the early Obama years, and who served as Chair of the Board for part of that time. Ms. Liebman provides a compelling account of the debilitating effect of decades of efforts by opponents of collective employee representation in the US to

undermine the Wagner model and the agency that administers it, and of the incapacity of the highly polarized American political system to bring about legislative reforms of any sort.

Brian Burkett, a senior management counsel at Heenan Blaikie LLP, reviews the history of the grafting of the Wagner model onto the earlier Canadian statutory model, which was characterized by compulsory conciliation. Mr. Burkett argues that although the Wagner model is widely thought to be less threatened in Canada than in the US, it faces different—but perhaps just as fundamental—challenges in this country. In particular, he details the supplanting of the role of labour relations boards by the *Canadian Charter of Rights and Freedoms* and the courts. He observes, however, that the courts have recently made it clear that Canadian legislatures are free to consider other models for ensuring good faith dialogue in the workplace.

Industrial relations scholar John Godard, from the University of Manitoba, offers a historical-institutionalist perspective on the differences between American and Canadian labour relations law. On his analysis, the Wagner model fits less easily with the American historical emphasis on freedom to seek economic gain than with the traditional Canadian "Tory paternalist" acceptance of more extensive state regulation. Although current domestic and international pressures, both economic and ideological, are subjecting the Canadian system to many of the same challenges facing the American system, Professor Godard argues that longstanding Canadian norms and traditions may well serve as a counterweight to those pressures.

Kevin Banks, Director of the Queen's Centre for Law in the Contemporary Workplace, offers a closely worked out challenge to the idea that Canadian governments need to downgrade labour and employment law protections in order to ensure economic competitiveness with the US. Professor Banks' review of the literature leads him to conclude that the effect of Canada's generally higher labour standards on the cost of exports is too small to make those exports non-competitive, especially in light of certain infrastructural advantages enjoyed by Canadian producers over their American counterparts. However, he warns that stagnant productivity levels in this country do demand attention from policymakers.

Elizabeth Shilton, Senior Fellow at the Queen's Centre for Law in the Contemporary Workplace and for many years a union-side counsel, examines the current state of the difficult interface between grievance arbitration and the human rights forum in resolving claims by unionized employees that they have been discriminated against on statutorily prohibited grounds. Dr. Shilton argues that the "hybrid" jurisdictional model currently favoured by Canadian courts leaves too much room for ambiguity and overlap, and runs the risk of foreclosing employee access to the forum that is of the most practical value to them—grieavance arbitration. That forum, she maintains, should have exclusive jurisdiction over human rights claims in the unionized sector in all cases, except those in which the claimant's union is itself alleged to have been a party to the discrimination in question.

David Doorey, a legal academic at York University, develops a concrete proposal to address the widespread concern that the Wagner model excludes the vast majority of workers and thus creates a barrier for those workers to acquiring any form of collective representation in the workplace. He argues that the Wagner model of majority-based representation should be supplemented by what he calls the Graduated Freedom of Association model. Under this scheme, workers without a certified bargaining agent could choose a "thinner" form of representation, which allows them to present collective demands to their employer and requires the employer to respond to those demands, all without either party being subject to a full Wagner-style duty to bargain. This thinner model, Professor Doorey suggests, would fit well with a trade union strategy of broadening their base by offering members-only services to workers not currently in certified bargaining units. It would also protect workers who remain vulnerable as a function of the operation of the Wagner model.

Paul Secunda, a faculty member at Marquette University Law School in Wisconsin, sets out several major weaknesses in American labour law that have resulted from the 1947 *Taft-Hartley* amendments to the *Wagner Act* and from restrictive judicial and administrative interpretation of that Act, to declare that the Wagner Model is irreparably damaged and deserves to be discarded. In coming to a recommendation for a replacement that remains faithful to the spirit of the *Wagner Act*, Professor Secunda reviews a number of approaches and options. He doubts that legislative reform

is likely in the foreseeable future, and argues that "new governance" or "reflexive regulation" approaches would do little to change the power imbalance in the workplace. He is somewhat more optimistic about other approaches that would make it easier for workers to gain access to the key components of the Wagner model (such as pre-recognition framework agreements) or would (as Professor Doorey suggests) enable unions to provide members-only services to workers for whom they do not have statutory bargaining rights.

In sum, this set of papers from the *Faultlines and Borderlines* conference offers important and timely insights into the problems that beset an area of law which has long been of the utmost social and economic importance in Canada and the US, and a variety of ideas on how it should evolve in the years ahead. The *Queen's Law Journal* is delighted to be able to present these papers to its readers.

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