

The Future of the Wagner Act: A Canadian-American Comparison

*Brian W Burkett**

Although the Wagner model has served as a basis for both Canadian and American labour law since the 1950s, recent political and legal debates have questioned its continued viability in each country. These debates give the impression that while the Wagner model is virtually obsolete in the United States, it remains quite viable in Canada. The author challenges this impression and suggests that the Wagner model may not be as well-entrenched in Canada as it seems to be.

The author first traces the development of Canadian and American labour law in the twentieth century and the different circumstances surrounding the Wagner model's adoption in the two countries. The author then compares the current state of the model in both countries, highlighting such important differences as Canada's much broader acceptance of public sector collective bargaining and of labour relations boards as an impartial and effective adjudicative forum.

In support of this concern about the Wagner model's future in Canada, the author points to recent jurisprudence under the Canadian Charter of Rights and Freedoms to the effect that although the right to freedom of association protects the right of workers to a meaningful workplace dialogue with their employer, it does not constitutionalize the specific elements of the Wagner model. The author argues that these cases and certain recent government initiatives suggest that courts and legislatures may be displacing labour relations boards as the primary forum for resolving labour disputes. Even more importantly, jurisprudence has made it clear that legislators are free to consider alternatives to the Wagner model, thereby adding to the uncertainty about the model's future role in Canadian labour law.

* Partner, Heenan Blaikie LLP. The author would like to thank Rhonda Shirreff, Christopher D Pigott, Sarvie Kermanshahi and John DR Craig for their contributions to this paper.

Introduction

I. Where Have We Been?

A. *The Pre-Wagner Era in Canada*

- (i) Federal Labour Law Before the First World War
- (ii) The Interwar Years

B. *The Advent of the Wagner Model in the United States*

C. *The Wagner Model Comes to Canada*

II. Where Are We Now? Comparing the State of the Wagner Model in Canada and the United States

III. Where Are We Going? The Future of the Wagner Model in Canada

Conclusion

Introduction

Almost eighty years ago, the Roosevelt Administration and the United States Congress took on the daunting task of rethinking how workplace relationships could be transformed from an often disruptive force into a source of economic strength that would help lift the United States out of the Great Depression. Their solution was the *National Labor Relations Act*¹ or the *Wagner Act*—so named after its congressional sponsor, Senator Robert F Wagner of New York.

When the *Wagner Act* was passed by Congress in 1935, it immediately transformed labour relations in the US. Perhaps most notably, it created a process through which an employer could be compelled to recognize a union as the legitimate bargaining agent for its employees; placed restrictions on industrial action; and established administrative machinery to monitor the collective bargaining relationship on an ongoing basis. In so doing, the *Wagner Act* created the first comprehensive model for governing workplace relations between American employers and trade unions.

Within a decade of the passage of the *Wagner Act*, the Canadian federal government had enacted labour relations legislation based on the key elements of the “Wagner model”. All of the Canadian provinces soon followed suit, and within a few years of the end of the Second World War, labour legislation in virtually all Canadian jurisdictions established a trade union certification process, a duty to bargain in good faith and a prohibition of unfair labour practices. By the 1950s, it was accurate to

1. 29 USC §§ 151–169 (1935).

say that the Wagner model provided the basis for both Canadian and American labour law.

In more recent years, political and legal debates have erupted on both sides of the border over how and to what extent key elements of the Wagner model should be implemented in North American workplaces, and over whether the model needs significant change. Broadly speaking, these debates may give the impression that the Wagner model is in the midst of a fierce existential crisis in the US but not in Canada.

In my view, however, that impression may not be accurate. I believe that Canadian labour relations are currently undergoing fundamental changes which raise serious questions about how the Wagner model can and should operate in Canada. Although this debate has just begun, it could soon challenge certain basic tenets of that model as it has been implemented in Canada. It is fair to say that while the trajectories of Canadian and American labour law and relations have diverged, the future of Wagnerism in both countries is far from settled.

I. Where Have We Been?

A. *The Pre-Wagner Era in Canada*

(i) Federal Labour Law Before the First World War

Before 1900, Parliament enacted only two laws that directly addressed labour relations: *The Trade Unions Act, 1872*² and *An Act to amend the Criminal Law relating to Violence, Threats and Molestation*.³ These two pieces of legislation, which were passed on the same day, exempted union members from restraint of trade doctrines that criminalized concerted activity resulting in labour disruptions.⁴ This reflected an attempt by Parliament to bring the law into line with the realities of the late-nineteenth-century economy, which had seen a profound growth in union—and strike—activity. While the legislation simply created a narrow

2. SC 1872, c 30.

3. SC 1872, c 31.

4. See Mark Chartrand, "The First Canadian Trade Union Legislation: An Historical Perspective" (1984) 16:2 *Ottawa L Rev* 267 at 272–74.

exception to the application of the common law, it greatly empowered trade unions by liberating them from criminal sanctions related to strike activity.⁵ It represented only a tentative step by Parliament into the realm of industrial relations, but a noteworthy one.

Parliament became far more active in the labour relations realm in the first decade of the twentieth century, when it first enacted legislation that sought to manage strikes and lockouts and reduce their numbers across Canada.⁶ Between 1900 and 1907, Parliament passed three statutes aimed at resolving industrial disputes between employers and unions: the *Conciliation Act, 1900*,⁷ the *Railway Labour Disputes Act, 1903*⁸ and the *Industrial Disputes Investigations Act, 1907 (IDIA)*.⁹

During that period, the federal government's policy priority was to prevent strikes and lockouts, which were perceived as being significantly disruptive to the national economy.¹⁰ The government was not interested in regulating collective bargaining between trade unions and employers, in managing the collective bargaining process or in dictating the content of collective agreements. Consequently, early legislation did not establish any means through which a trade union could be certified as the bargaining agent for a group of employees. Nor did it lay down any rules designed to maintain a productive collective bargaining relationship, such as a duty to bargain in good faith or the prohibition of unfair labour practices.¹¹ Rather, those early laws were aimed almost exclusively at assisting and encouraging the parties to reach agreement in order to avoid disruptive work stoppages.¹² In other words, until 1907, voluntarism was the governing principle in the collective bargaining context; while Parliament

5. *Ibid* at 272.

6. See Judy Fudge & Eric Tucker, *Labour Before the Law: The Regulation of Workers' Collective Action in Canada, 1900–1948* (Toronto: University of Toronto Press, 2004) at 3.

7. SC 1900, c 24.

8. SC 1903, c 55.

9. SC 1907, c 20.

10. See Fudge & Tucker, *supra* note 6 at 3.

11. See Jeremy Webber, "Compelling Compromise: Canada Chooses Conciliation over Arbitration 1900–1907" (1991) 28 *Labour/Le Travail* 15 at 15. See also Judy Fudge & Harry Glasbeek, "The Legacy of PC 1003" (1995) 3 *CLEJ* 357 at 359. The Supreme Court emphasized the primacy of voluntarism during this period. See *Health Services and Support—Facilities Subsector Bargaining Association v British Columbia*, 2007 SCC 27 at para 55, [2007] 2 SCR 391 [*BC Health*].

12. Webber, *supra* note 11.

was more than willing to intervene in specific labour disputes, it would not “interfere” in the legal relationship—or lack thereof—between employers and unions. As a result, the parties remained free to decide for themselves whether to engage in collective bargaining, and were also free to engage in self-help measures such as strikes and lockouts to pressure each other in this regard.

The Conciliation Act, 1900 was predicated on the idea that any distrust or animosity between an employer and a trade union could be reduced or hopefully eliminated if a neutral third party—a conciliation board—was introduced into a dispute *before* a strike or lockout occurred. The hope was that this would put the parties in a better position to reach a settlement without resorting to a work stoppage.¹³ Notably, the thrust of the *Conciliation Act* was entirely voluntary; a conciliation board could only be appointed if both parties agreed. This proved to be the *Act*’s fatal weakness; in practice, one of the parties would often refuse to participate in the conciliation process. So, although this model had worked well in Britain,¹⁴ where it was drawn from, ultimately it was not viable in the Canadian context.

The next stage in the development of federal labour law saw the introduction of a *compulsory* “investigation” model of labour disputes.¹⁵ This approach was first used in the 1903 *Railway Labour Disputes Act* dealing with labour disputes in the railway industry. Then, in 1907, Parliament enacted the *Industrial Disputes Investigation Act (IDIA)*, which applied the compulsory investigation approach to the mining industry and more broadly to industries connected to public utilities.¹⁶ Under the *IDIA*, a labour dispute in a regulated industry had to be referred to a three-person conciliation and investigation board before a strike or lockout was permitted. Although the conciliation and investigation board could not impose an agreement on the employer and trade union, the parties were required to participate in the conciliation process, in contrast to the *Conciliation Act*. The *IDIA* also gave more power to conciliation and

13. See Canada, Human Resources Development, *Seeking a Balance: Canada Labour Code, Part I – Review* (Ottawa: Minister of Public Works and Government Services, 1995) at 10 [Seeking a Balance].

14. *Conciliation Act, 1896* (UK), 59 & 60 Vict, c 30.

15. *Seeking a Balance*, *supra* note 13 at 10.

16. See Donald D Carter et al, *Labour Law in Canada* (The Hague, Netherlands: Kluwer Law International, 2002) at 308.

investigation boards than the *Conciliation Act* had, particularly the power to summon witnesses, take evidence under oath and examine the parties' records and premises.¹⁷

The *IDIA*'s conciliation process envisaged that the employer and employees would each appoint one conciliator, and the two conciliators would choose a third, who was to serve as chair. If a party refused to nominate a conciliator, the Minister of Labour would make the nomination.¹⁸ Once a board of conciliation was constituted, it was hoped that "by a process of give and take and the recognition, frequently for the first time, of the real difficulties in each other's situation, very many of the matters in dispute may be disposed of in conference".¹⁹ The board would then adjourn and issue a public report that set out a "decision" and framed an award. It was then left to the parties to decide whether to bend to public pressure (or perhaps self-interest) and accept the conciliation board's award, or to continue negotiations or to resort to economic warfare.²⁰

Thus, while the *IDIA* introduced an element of compulsion into federal labour law, voluntarism remained the primary operating principle. A conciliator or conciliation board would intervene in the parties' dealings and urge them to settle their differences. If that effort failed, the conciliator or conciliation board would issue a public report with *non-binding* recommendations. If this did not result in a settlement, it was hoped that public opinion would pressure the parties into settling. Where the conciliation process failed to bring about a resolution to the dispute—as it often did—the parties could resort to a strike or lockout.

(ii) The Interwar Years

While the legislative framework established by the *IDIA* remained fairly constant during the interwar period, the broader labour relations

17. *IDIA*, *supra* note 9. See especially ss 5, 7, 30, 56–71.

18. See Adam Shortt, "The Canadian Industrial Disputes Act" (1909) 10:1 *American Economic Association Quarterly* (3d) 158 at 160 (noting that in his experience, a settlement was rarely reached where a party refused to nominate a conciliator).

19. *Ibid* at 163.

20. *Ibid* at 164.

landscape in Canada changed dramatically. Perhaps most importantly, the end of the First World War marked the beginning of a period in which there was a growing sense that labour unrest threatened the existing order of Canadian society. Indeed, the federal government became preoccupied with the socially and politically disruptive implications of Canadian labour relations within months of the end of the war. In April 1919, it appointed a Royal Commission on Industrial Relations that was, among other things, to “consider and make suggestions for securing a permanent improvement in the relations between employers and employees”.²¹

The Royal Commission’s report was drafted between April and July 1919 (a period punctuated by the Winnipeg General Strike). Its content and tone were notably sympathetic to what the Royal Commission saw as the motivations and goals of the labour movement. It noted that Canadian labour relations were in a period of “unrest”, but subtly dismissed the notion that the primary cause of increased union activity was—as many employers argued—alien European ideological forces that had taken hold among workers.²² Rather, the Royal Commission found that the “chief causes of unrest” were the harsh socio-economic conditions facing Canada’s workers after the war.²³ Those conditions included: unemployment; the high cost of living; long hours of work; the denial of the right to organize and the refusal to recognize unions; the denial of collective bargaining; a lack of confidence in government; insufficient and poor housing; restrictions on freedom of the press and speech; ostentatious displays of wealth; and a lack of equal educational opportunities.²⁴

The Royal Commission’s largely sympathetic approach to labour is even more evident in its recommendations. Its report argued that, among other principles, employers should recognize the right of workers to organize and should recognize unions as legitimate employee representatives in negotiations over terms and conditions of employment:

21. PC 1919–670, (1919) C Gaz II, 40.

22. Commission to Inquire into and Report upon Industrial Relations in Canada, *Report of the Commission appointed under Order-in-Council (PC 670) to Enquire into Industrial Relations in Canada together with a Minority Report* (Ottawa: King’s Printer, 1919) at 5–6.

23. *Ibid* at 6.

24. *Ibid*.

On the whole we believe the day has passed when any employer should deny his employees the right to organize. Employers claim that right for themselves and it is not denied by the workers. There seems to be no reason why the employer should deny like rights to those who are employed by him.

...

Not only should employees be accorded the right of organizing, but the prudent employer will recognize such organization, and will deal with the duly accredited representatives thereof in all matters relating to the interests of the employees, when it is sufficiently established to be fairly representative of them all.²⁵

Despite the Royal Commission's broad mandate and sympathetic recommendations, its report did not result in immediate legislative action on workers' organizing or bargaining rights, or on employers' duties in this regard. Indeed, where the federal government did take legislative action in the realm of labour relations in the years immediately after the war, those actions were sometimes reminiscent of a nineteenth century approach to labour law. For example, during the Winnipeg General Strike in June 1919, the federal government introduced legislation that broadened the range of penalties for sedition in an apparent attempt to facilitate the arrest of striking workers and labour organizers.²⁶ For the most part, however, the legislative approach to labour relations remained premised on voluntarism, and this legal status quo largely prevailed through the interwar period.

B. The Advent of the Wagner Model in the United States

During the 1920s and 1930s, unemployment and socio-economic distress grew dramatically in Canada and the US, spurring increasing labour unrest in both countries. In contrast to the Canadian approach, the US took dramatic, although arguably belated, legislative action in response.

Beginning in 1933, the Roosevelt administration, with the help of a Democratic Congress, introduced a series of legislative and policy initiatives. This so-called New Deal was geared toward promoting industrial stability and addressing what many saw as significant inequities in the distribution of wealth and opportunities in American society at

25. *Ibid* at 11.

26. See Peter MacKinnon, "Conspiracy and Sedition as Canadian Political Crimes" (1977) 23:4 McGill LJ 622 at 628.

the time. At the heart of the New Deal was legislation that established a comprehensive set of legal rules for the *creation* and *maintenance* of a collective bargaining relationship between an employer and a trade union.

In 1935, after a lengthy fight in Congress and in the courts, the *Wagner Act* was passed. Its objectives went beyond simply reducing labour unrest and marginally improving the economic position of the working class. Indeed, Senator Wagner and the other principal drafters of the legislation, such as Secretary of Labor Frances Perkins, believed that the labour movement played a positive role in American society. They also saw the *Wagner Act* as a policy tool that could help pull the US out of the Great Depression. Arthur Schlesinger has argued that “behind the bill lay Wagner’s belief that economic stability could be achieved only through a wider distribution of the proceeds of industry”.²⁷

These were radical goals. It is therefore not surprising that the *Wagner Act* fundamentally changed the regulation of relations between employees and employers in American workplaces. Perhaps most importantly, the legislation provided for a legal process that would compel an employer to recognize a union as the legitimate bargaining representative for its employees and contemplated the regulation of the collective bargaining relationship on an ongoing basis. Key mechanisms in this process included: (1) a certification procedure through which a trade union could win the right to represent workers in collective bargaining; (2) the regulation of strike activity; (3) tools for resolving disputes over the interpretation or application of collective agreements without resort to a work stoppage; (4) a duty to bargain in good faith; and (5) prohibitions of unfair labour practices. To administer this scheme, the *Wagner Act* created the National Labour Relations Board (NLRB)—an independent, administrative tribunal that would have principal responsibility for coping with labour disputes in the workplace.²⁸ Today, these mechanisms are still the basic elements of the Wagner model of labour relations regulation.

27. Arthur M Schlesinger Jr, *The Age of Roosevelt: The Coming of the New Deal*, vol 2 (New York: Mariner Books, 2003) at 401–02.

28. *Ibid.*

C. *The Wagner Model Comes to Canada*

Although these dramatic developments in American labour law took place in the early to mid-1930s, Canadian labour law did not undergo similarly far-reaching changes until the onset of the Second World War. When this process began, the Wagner model, in combination with the pressures of wartime and the legacy of the *IDIA*, shaped how the federal government reformed labour law.²⁹

When war broke out, the *War Measures Act*³⁰ gave the federal government jurisdiction over labour relations in industries related to war production. The federal cabinet used this authority to introduce a variety of orders-in-council that dealt directly with labour relations. In broad terms, the government's approach reflected the principles of Wagnerism, tempered by the need to ensure stability in wartime production.

For example, in November 1939, the federal government introduced PC 3495, which extended the *IDIA* to all industries involved in war production.³¹ Then, in June 1940, PC 2685 declared that the government was in favour of union recognition and collective bargaining in principle.³² In December 1940, PC 7440 established a system of voluntary wage controls for industries covered by the *IDIA*.³³ In June 1941, PC 4020 allowed for the appointment of Industrial Disputes Inquiry Commissions, which were mandated to conduct preliminary investigations into labour disputes, to try to reach a settlement between the parties and report back to the government.³⁴ In October 1941, PC 8253 created a permanent administrative tribunal, the National War Labour Board, to replace the ad hoc boards of the *IDIA*.³⁵ Only three weeks later in November 1941, PC 7307 made strike action unlawful unless a majority of employees in

29. For a detailed and critical review of the impact of the Wagner approach in Canadian labour law, see Roy J Adams, "A Pernicious Euphoria: 50 Years of Wagnerism in Canada" (1995) 3 CLEJ 321 at 326 [Adams, "A Pernicious Euphoria"].

30. RSC 1927, c 206.

31. See Jeremy Webber, "The Malaise of Compulsory Conciliation: Strike Prevention in Canada during World War II" (1985) 15 Labour/Le Travail 57 at 64 [Webber, "Malaise"].

32. *Ibid* at 65.

33. *Ibid* at 65–66.

34. *Ibid* at 66–68.

35. HA Logan, *State Intervention and Assistance in Collective Bargaining: The Canadian Experience 1943–1954* (Toronto: University of Toronto Press, 1956) at 13.

a workplace voted in favour of such action in a government-supervised vote.³⁶ Although tailored specifically for a wartime economy, this legal architecture served as the foundation for the introduction of the Wagner model into Canada.

Federal labour law continued to develop dramatically over the next few years, largely due to years of political pressure from the labour movement and its political allies. In fact, as late as the early 1940s, the federal government refused to situate collective bargaining within a legislative regime. It maintained this position for several reasons, one of which was the perceived need to preserve warm relations with the business community during wartime.³⁷

Notwithstanding the federal government's position in that respect (and perhaps because of it), the labour movement increased its calls for legislative recognition of collective bargaining. In 1942, the Trades and Labour Congress (one of the predecessor organizations of today's Canadian Labour Congress) passed a series of resolutions demanding the adoption of the Wagner model in Canada. In support of this position, it cited examples of the government's inability to deal effectively with wartime labour relations.³⁸ Another labour organization, the Canadian Congress of Labour, expressed similar support for the Wagner model, most notably at its 1942 convention. Peter Heenan, who at the time was Ontario's Minister of Labour, attended that convention and used it as an opportunity to announce that the Ontario government intended to enact a collective bargaining statute which would essentially adopt the labour movement's position.³⁹

Ultimately Ontario passed labour legislation that embraced the key elements of the Wagner model in 1943. The *Collective Bargaining Act*,⁴⁰ represented the first time that a Canadian government removed the jurisdiction to resolve labour disputes from the courts and gave it to an administrative body—in this case, a "Labour Court".⁴¹

36. PC 7307 was repealed on September 1, 1944.

37. Laurel Sefton MacDowell, "The Formation of the Canadian Industrial Relations System during World War Two" (1978) 3 *Labour/Le Travail* 175 at 186.

38. Logan, *supra* note 35 at 13.

39. MacDowell, *supra* note 37 at 190.

40. SO 1943, c 4.

41. Webber, "Malaise", *supra* note 31 at 69. See also Logan, *supra* note 35 at 14.

As Ontario took legislative action, the federal government, led by Liberal Prime Minister Mackenzie King, began to grasp the political implications of the strengthened labour movement's calls for labour law reform. In August 1943, a provincial election in Ontario made the social democratic Co-operative Commonwealth Federation (CCF) the Official Opposition. Of the thirty-four member CCF legislative caucus, nineteen were prominent members of the Trades and Labour Congress or the Canadian Congress of Labour. Then, just five days after the Ontario election, King's federal Liberal Party lost four by-elections, two of which were won by the CCF. In the words of Jack Pickersgill, a top aide in the Prime Minister's Office, King "felt the loss of labour's support was the greatest threat to the chances of the Liberal Party winning the next election".⁴²

It is worth highlighting the fact that King had a deep background in labour relations, much of it in the US. He had been Canada's first Deputy Minister of Labour (1900 to 1908) and first full-time Minister of Labour (1908 to 1911). He was deeply involved in shaping the labour relations legislation enacted by the federal government during that period. In 1914, the New York-based Rockefeller Foundation hired King as Director of Industrial Relations Investigation. He spent significant time working with John D Rockefeller on the investigation of labour issues in the US (and of course, in the Rockefeller businesses). Among other things, King played an important role in shaping Rockefeller's response to the Ludlow Massacre in April 1914, in which thirteen strikers were killed during a strike at a Colorado mine owned by the Rockefeller family. King's experiences in American labour relations served as the basis for his 1919 book, *Industry and Humanity*, which set out his thoughts and prescriptions on the future of labour relations.⁴³ Perhaps as a result of those experiences, King recognized that it was politically prudent to embrace the labour movement in the wake of the August 1943 elections, and he was well positioned to do so.⁴⁴

An opportunity presented itself as a result of public hearings on Canadian labour relations held before the National War Labour Board.

42. MacDowell, *supra* note 37 at 193.

43. William Lyon Mackenzie King, *Industry and Humanity* (Boston: Houghton Mifflin Company, 1918).

44. See MacDowell, *supra* note 37 at 193.

Interested groups had been invited to make representations earlier in 1943. The hearings led to a comprehensive report, which the federal government reviewed from August 1943 to January 1944.⁴⁵ It is unlikely that the report would have resulted in legislative change had King not been caught off guard by the CCF's electoral surge in August 1943, which made such change a political necessity. After further hearings with unions, employer representatives and the provinces, the federal cabinet issued order-in-council PC 1003 in February 1944.⁴⁶

PC 1003 established an employee right to organize and bargain collectively. It also created a permanent administrative board, the National Wartime Labour Relations Board, to determine appropriate bargaining units and certify trade unions as exclusive bargaining representatives, and it prohibited unfair labour practices.⁴⁷ In these respects, PC 1003 borrowed from the *Wagner Act*. However, there were also important differences between the Canadian and American regimes. Perhaps most significantly, PC 1003 prohibited strikes during the term of a collective agreement, while the *Wagner Act* did not.⁴⁸ Moreover, the members of the Wartime Labour Relations Board sat part-time and were chosen by employers and trade unions; in contrast, the National Labour Relations Board established under the *Wagner Act* was a body of neutral experts, sitting full-time.⁴⁹ Despite these differences, it is generally agreed that PC 1003 "imported" the Wagner model into Canada.⁵⁰

45. See Logan, *supra* note 35 at 16–18.

46. See MacDowell, *supra* note 37 at 194.

47. See Fudge & Glasbeek, *supra* note 11 at 364, 370. See also *Seeking a Balance*, *supra* note 13 at 11. Fudge and Glasbeek have argued that although these new "protections" for labour were beneficial to workers, they were aimed at preserving an emphatically capitalistic order. *Supra* note 11 at 370. This argument received tentative support in the Supreme Court's decision in *BC Health*. *Supra* note 11. But others have argued that the Court's historical analysis on this point was extremely superficial. See Eric Tucker, "The Constitutional Right to Bargain Collectively: The Ironies of Labour History in the Supreme Court of Canada" (2008) 61 *Labour/Le Travail* 151.

48. See e.g. Patrick Hardin et al, eds, *The Developing Labor Law: The Board, the Courts, and the National Labor Relations Act*, 4th ed (Chicago: American Bar Association, 2001) vol 2 at 1470–86.

49. See George W Adams, *Canadian Labour Law*, 2d ed, loose-leaf (consulted on 14 February 2013) (Toronto: Canada Law Book, 2012) vol 1 at para 1.230 [Adams, *Canadian Labour Law*].

50. Adams, "A Pernicious Euphoria", *supra* note 29 at 322, 328.

The key elements of the Wagner model adopted in PC 1003 were preserved in the *Industrial Relations and Disputes Investigation Act (IRDLA)*,⁵¹ which replaced PC 1003 in 1948. Most provinces also enacted legislation that was very similar to the *IRDLA*.⁵² Specifically, each provincial labour relations statute provided for a process to certify a trade union as the exclusive bargaining representative for a group of employees, a duty to bargain in good faith and a ban on unfair labour practices. Each statute also created a labour relations board to administer the legislation.⁵³ In general terms, this represented the adoption of most of the American Wagner model in Canada.

Thus, during the Second World War, Canada leapt from a labour relations system based on conciliation to a largely “imported” regime centred on compulsory collective bargaining—a regime that had been designed to introduce economic stability and greater fairness into the American economy in the context of the Great Depression. After the war, Canada continued to embrace the Wagner model. In George Adams’ words, there was “no turning back”,⁵⁴ and this model continues to serve as the foundation for the regulation of Canadian labour relations.

II. Where Are We Now? Comparing the State of the Wagner Model in Canada and the United States

Given the extent to which Canada embraced the Wagner model after the Second World War, it is worth underscoring the fact that important differences have persisted between the two regimes. For example, Canada has maintained its tradition of requiring the parties to engage in compulsory conciliation before a strike or lockout can be initiated.⁵⁵ Moreover, Canadian unions and employers remain prohibited from engaging in strike or lockout action during the term of a collective agreement.⁵⁶ With

51. SC 1948, c 54.

52. See Adams, “A Pernicious Euphoria”, *supra* note 29 at 324. See also Adams, *Canadian Labour Law*, *supra* note 49 at para 1.250.

53. See *ibid*.

54. *Ibid* at para 1.240.

55. See e.g. *Labour Relations Act*, 1995, SO 1995, c 1, Schedule A, s 79(2) [*LRA*].

56. See *ibid*, s 46.

respect to the administration of labour law, until very recently Canadian courts have played a minimal role in labour relations issues. This job had been left primarily to labour relations boards, which exist in all provinces and at the federal level, and to grievance arbitrators, who have exclusive jurisdiction to interpret and apply collective agreements.⁵⁷

In addition to the significant statutory differences, Canadians and Americans are currently engaged in different debates on the present and future roles of the Wagner model and the labour movement. In the US, these debates are being conducted primarily in the political realm and are calling into question the basic elements of the Wagner model, as well as the continued viability of the labour movement in American society. In contrast, in Canada, the basic elements of the Wagner model seem to be accepted by most labour relations practitioners and politicians; it is the *extent* of the basic protections for collective bargaining and strike activity that are now in issue. For most of the past decade, this debate has occurred primarily through constitutional litigation in Canadian courts. At least on the surface, the current American debate appears to question the very foundations of the Wagner model, while Canadians seem preoccupied with relatively more technical debates about the scope of otherwise uncontroversial basic labour relations protections and obligations.

An illustrative example of the differences between Canada and the US can be found in the ongoing political debate in the US over the role of the NLRB. As has already been mentioned, a labour relations board is at the heart of the Wagner model and has been at the centre of both the Canadian and American approaches to regulating labour relations ever since the model was first adopted in each country. In Canada, the role of these boards is largely uncontroversial. The most active ones—including the Canada Industrial Relations Board (CIRB) and the Ontario Labour Relations Board (OLRB)—are generally respected by both labour and management for their impartiality. For example, during a recent dispute over the negotiation of a new collective agreement for flight attendants, Air Canada and the Canadian Union of Public Employees (CUPE) *agreed* to submit to a binding interest arbitration process before the Chair of the CIRB. Acting as arbitrator, the Chair ultimately found in favour of the terms offered by Air Canada, but CUPE did not impugn her

57. The growing role of the courts in Canadian labour relations will be discussed at length below.

independence or accuse her of being motivated by ideology. Rather, the union expressed “profound disappointment” with her decision, and then attacked management’s bargaining proposals and approach.⁵⁸ Although only an anecdotal example, this is fairly typical of both union and management reactions to the CIRB.

The current debate in the US on the role of the NLRB contrasts starkly with the situation in Canada. In recent years, business groups and political figures have regularly questioned the impartiality and the political leanings of the NLRB and its members. Even the survival of the NLRB has become a significant political issue since President Obama was first elected. For example, during her campaign for the Republican presidential nomination, Representative Michelle Bachmann stated that she would shut down the NLRB if elected president.⁵⁹ 2012 Republican presidential nominee Mitt Romney’s policy platform alleged that the NLRB was composed of “Big Labor cronies” of President Obama who were “wreak[ing] havoc on the law”.⁶⁰

More concretely, some Republican Senators—most recently, Lindsey Graham of South Carolina—placed “holds” on the Obama Administration’s nominees to the NLRB in the Senate, stalling their confirmations indefinitely.⁶¹ Given a fairly recent US Supreme Court decision which found that the NLRB could not render decisions without a quorum of three members,⁶² these procedural hurdles, in combination with the expiration of several NLRB members’ terms of office, posed a serious threat to the Board’s survival. Ultimately, in January 2012, President Obama was forced to make recess appointments to circumvent the Senate confirmation process and to ensure that the NLRB had quorum. In light of the fact that the NLRB is the primary administrator of the

58. Brent Jang, “Air Canada union calls arbitrator ruling ‘profoundly disappointing’”, *The Globe and Mail* (7 November 2011) online: *The Globe and Mail* <<http://www.theglobeandmail.com>>.

59. See Steven Greenhouse, “Labor Board’s exiting leader responds to critics”, *The New York Times* (29 August 2011) B1.

60. Vote-USA, *Positions and Views of Mitt Romney on Labour Wages & Unions*, online: <<http://vote-usa.org>> citing Mitt Romney, online: <www.mittromney.com/issues/labor>.

61. See Steven Greenhouse, “Labor Board drops case against Boeing after union reaches accord”, *The New York Times* (9 December 2011) B3.

62. *New Process Steel v National Labor Relations Board*, 130 S Ct 2635 (2010).

Wagner Act, it is fair to say that these events reflect deep divisions over how the Wagner model is being implemented in American workplaces.⁶³

There are also some differences in the Canadian and American debates over whether terms of employment in unionized workplaces should be determined through free collective bargaining, which is another central precept of the Wagner model. This has recently been illustrated by the different approaches taken by Canadian and American governments in public sector labour relations in response to calls for fiscal restraint.

In the American context, of particular note have been efforts by several state governments to curtail collective bargaining rights for state public sector workers—notably in Wisconsin under the leadership of Republican Governor Scott Walker. Legislation enacted in that state in March 2011 limited collective bargaining to wage issues alone and capped increases at the marginal increase in the Consumer Price Index (subject to approval of higher increases in a public referendum), among other things.⁶⁴ Governor Walker has consistently taken the position that this reform was needed to rein in Wisconsin's budget deficit. The introduction of the legislation triggered one of the most high-profile political battles in American politics in 2011. Governor Walker faced (and won) a recall election in June 2012 that was initiated by a campaign led by the labour movement.⁶⁵

Although governments in Canada have faced similar budgetary pressures to those in the US, they have taken a more conciliatory approach to public sector unions. For example, in March 2010, the Ontario government enacted the *Public Sector Compensation Restraint to Protect*

63. See e.g. William B Gould IV, "Crippling the right to organize", Editorial, *The New York Times* (16 December 2011) A25.

64. US, AB 10, *An Act relating to: state finances, collective bargaining for public employees, compensation and fringe benefits of public employees, the state civil service system, the Medical Assistance program*, 2011, Spec Sess, Wis, 2011, (enacted). It should be emphasized that on September 14, 2012, Wisconsin Circuit Court Judge Juan Colas struck down a number of provisions in Act 10 on the basis that they violated affected employees' constitutional rights to freedom of expression and association. Judge Colas' determination in this regard was driven primarily by his finding that the legislation encumbered the expression and association rights of union members solely because they chose to associate through unions. See *Madison Teachers v Walker*, No 11CV3774 (Wis Cir Ct 2012). The Wisconsin Government subsequently announced its intent to appeal this decision.

65. See Monica Davey, "Governor who took on unions may face a closely watched recall election", *The New York Times* (15 January 2012) A12; Monica Davey & Jeff Zeleny, "Walker survives Wisconsin recall vote", *The New York Times* (5 June 2012) A1.

Public Services Act, 2010,⁶⁶ which legislated a two-year, across-the-board compensation freeze for non-unionized public sector employees. As for unionized public sector workers, Ontario's 2010 budget included a policy statement admonishing public sector employers and unions to, among other things, refrain from negotiating collective agreements that included net compensation increases over a period of two years.⁶⁷ In contrast to the case of non-unionized employees, the Ontario government took no steps to impose all or part of this compensation freeze on unionized public sector employees or to establish a mechanism that would enforce it in those workplaces. Similar approaches, such as policies stating that the government would not fund negotiated wage increases for a certain period, have been adopted in other Canadian provinces, including British Columbia.⁶⁸ These policies have had mixed results; in Ontario, for instance, some large public sector employers (such as the Ontario Provincial Police) have nevertheless negotiated wage increases that simply "back-end load" the collective agreement.⁶⁹

There have, however, been a few instances where a Canadian government has imposed wage terms in unionized public sector workplaces. A notable example is the Ontario *Putting Students First Act, 2012*,⁷⁰ which effectively froze unionized public school teachers' compensation for a two-year period starting August 31, 2012. But no Canadian government has introduced restrictions on collective bargaining that go nearly as far as the law enacted in Wisconsin in 2011, despite facing significant budget deficits. This would seem to suggest that there is no serious appetite for limiting Canadian public sector workers' collective bargaining rights on a permanent basis.

66. SO 2010, c 1, Schedule XXIV.

67. Ontario, Ministry of Finance, *2010 Ontario Budget: Budget Papers* (Toronto: Queen's Printer for Ontario, 2010) at 51–52.

68. British Columbia's "voluntary" compensation freeze initiative is known as the "net zero" policy, which refers to freezing overall compensation increases for a two-year period. See e.g. Dirk Meissner, "B.C. public-sector unions look for pay raises after 'net-zero' contracts", *The Globe and Mail* (18 March 2012) online: The Globe and Mail <<http://theglobeandmail.com>>.

69. Karen Howlett & James Bradshaw, "The Ontario public-sector freeze that wasn't", *The Globe and Mail* (23 August 2012) online: The Globe and Mail <<http://theglobeandmail.com>>.

70. SO 2012, c 11.

The relative strength of the Wagner model in Canada is probably best illustrated by comparing the relative position of Canada's labour movement to that in the US. In 2011, just 11.8% of the overall American workforce belonged to a union—37% of public sector workers and only 6.9% of private sector workers.⁷¹ Meanwhile, in Canada, 29.7% of the total workforce was unionized—16% of the private sector and 71% of the public sector.⁷² Although the rate of private sector unionization in the two countries is so different today, it was quite similar until the 1970s.

The labour movement in the United States is widely thought to be significantly weaker than its Canadian counterpart, and some believe that the standard of conduct expected of American employers toward their unionized employees is lower than in Canada. An illustrative example of this dynamic arose recently in a labour dispute between the Canadian Auto Workers and an American multinational company, Caterpillar, which owned and operated the Electro-Motive Diesel locomotive assembly plant in London, Ontario. After a period of failed collective agreement negotiations in 2011, during which management reportedly asked the union to accept deep wage cuts, the employees were locked out on January 1, 2012. On February 3, 2012, Caterpillar announced that the factory would be closed permanently and employees would be laid off.⁷³ Meanwhile, on February 1, 2012, Governor Mitch Daniels of Indiana signed into law the first right-to-work statutes passed in the US since 2001, prohibiting collective agreements from requiring bargaining unit employees who are not union members to pay union dues.⁷⁴ In contrast, most Canadian jurisdictions effectively *require* employers to deduct and

71. See US, Bureau of Labor Statistics, *Union Members – 2011: News Release* (USD12-0094) (2012) at 1; Steven Greenhouse, "Union membership rate fell again in 2011", *The New York Times* (27 January 2011) B3.

72. See Statistics Canada, "Unionization 2011" by Sharanjit Uppal (Ottawa: Statistics Canada, 2011) at 3.

73. See Tavia Grant, "In the Electro-Motive shutdown, an unsettling message for Canadian industry", *The Globe and Mail* (21 February 2012) online: The Globe and Mail <<http://theglobeandmail.com>>.

74. US, HB 1001, *An Act to amend the Indiana Code concerning labor and safety*, 117th Gen Assem, Reg Sess, Ind, 2012; Monica Davey, "Indiana Governor signs a law creating a 'right to work' state", *The New York Times* (1 February 2012) A12. It is worth noting that support for right-to-work laws was an important element in Mitt Romney's policy platform. See Vote-USA, *supra* note 60.

remit union dues from all bargaining unit employees.⁷⁵ Within days of the Caterpillar plant closure in London, both Canadian and American media were reporting that jobs from that plant would be moved to Muncie, Indiana.⁷⁶

Caterpillar's collective bargaining strategy and the closure of the London factory led some Canadians to *presume* that labour relations operate differently in the US and Canada. A number of Canadian media commentators suggested that Caterpillar's reported attempt to negotiate wage cuts of up to 50% with the Electro-Motive workers reflected a typical American refusal to engage seriously in collective bargaining. Several also portrayed Caterpillar's decision to close the London plant as the flight of a greedy American company to a business-friendly jurisdiction with right-to-work legislation. One such column, by Michael Babad in *The Globe and Mail*, was emphatically titled "A message for Caterpillar: this is Canada, not Indiana".⁷⁷

III. Where Are We Going? The Future of the Wagner Model in Canada

The brief overview above of some current labour relations issues in Canada and the US leaves the impression that the two countries have parted ways in their approaches to labour relations. The evidence does seem to suggest that important elements of the Wagner model are in steady decline in the US but remain relatively stable in Canada. However, this may not be a totally accurate indicator of the future of that model in either country.

75. See e.g. *LRA*, *supra* note 55, s 47. It should be noted that the Ontario Progressive Conservative Party, the Official Opposition in the Ontario legislature, recently issued a policy white paper that advocated the amendment of the *LRA* along "right-to-work" lines by, among other things, prohibiting mandatory payment of union dues by all employees in a bargaining unit. See Ontario PC Party, *Paths to Prosperity: Flexible Labour Markets* (Toronto: Progressive Conservative Party of Ontario, 2012).

76. See e.g. Ian Austen, "Caterpillar to close assembly factory in Canada", *The New York Times* (3 February 2012) B6; Michael Babad, "A message for Caterpillar: this is Canada, not Indiana", *The Globe and Mail* (6 February 2012) online: *The Globe and Mail* <<http://theglobeandmail.com>>.

77. *Ibid.*

In Canada, a series of constitutional challenges over the past decade have significantly transformed our labour law, and also appear to have had at least some practical impact on the institutional arrangements that have governed Canadian labour relations since the advent of the Wagner model. This transformation began in 2007 with the Supreme Court of Canada's well-known decision in *BC Health*,⁷⁸ which Canadian labour relations scholars and practitioners almost universally viewed as "remarkable" when it was issued.⁷⁹ In that decision, the Court reversed twenty years of its own jurisprudence and held that the guarantee of freedom of association in section 2(d) of the *Canadian Charter of Rights and Freedoms*⁸⁰ "protects the capacity of labour unions to engage in collective bargaining on workplace issues".⁸¹ *BC Health* also clearly stated, however, that collective bargaining had only a limited protection under the *Charter*, and that section 2(d) did not guarantee employees a specific "model" of collective bargaining or access to a particular labour relations regime.⁸² The Court also found that even if a government took action that interfered with an important aspect of the collective bargaining process, that action would not violate section 2(d) if it preserved a process of consultation and good faith negotiation between employers and employee representatives.⁸³

Importantly, the majority opinion in *BC Health* linked the process of consultation and good faith negotiation with the statutory duty to bargain in good faith that is central to the Wagner model, and which is found in all general Canadian labour relations statutes.⁸⁴ In Canada, the statutory duty to bargain in good faith applies to any matter at issue in collective bargaining, and it obliges the employer to engage in a meaningful negotiation process with the union in an effort to reach a collective agreement. For the majority of the Court, the statutory duty to

78. *Supra* note 11.

79. See e.g. 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" (2008) 37:1 *Indus LJ* 25 at 26.

80. *Canadian Charter of Rights and Freedoms*, s 2(d), Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

81. *BC Health*, *supra* note 11 at para 2.

82. *Ibid* at paras 19, 91.

83. *Ibid* at paras 94–95.

84. *Ibid* at paras 98–107.

bargain in good faith, and in particular, an employer's duty to respond to and negotiate with a union, was a key animating principle underlying the protection of collective bargaining under section 2(d).⁸⁵

However, characterizing the new *Charter* protection for collective bargaining in this way had an important unintended effect: it linked the new constitutional protection directly to the *statutory* model of compulsory collective bargaining that prevails in Canadian labour relations legislation. In doing so, and despite its statements to the contrary, the Supreme Court left many observers with the distinct impression that it had "constitutionalized" the Wagner model of labour law.

The effects of this aspect of *BC Health* quickly manifested themselves in lower court decisions. In *Fraser v Ontario (AG)*,⁸⁶ the Ontario Court of Appeal relied on *BC Health* to find that the statutory exclusion of agricultural workers from Ontario's general labour relations regime was unconstitutional, and that the provincial government was required to enact legislation that would enable those workers to engage in collective bargaining. The Ontario Court of Appeal went even further by stipulating the specific legislative protections that the province was required to enact.⁸⁷ Those protections included many key aspects of the Wagner model: a duty to bargain in good faith; a requirement that there be an exclusive employee representative selected by the majority of the bargaining unit; a mechanism for resolving impasses in collective bargaining; and a mechanism for resolving disputes over the interpretation and administration of collective agreements. Although the Court of Appeal was not entirely clear in its reasons, it appeared to suggest that section 2(d) of the *Charter* generally requires labour relations statutes to have these features.

The Ontario government appealed *Fraser* to the Supreme Court, and the Court took the opportunity to try to clarify its ruling in *BC Health*. In an 8-1 majority decision, it held that the Court of Appeal had significantly overstated the scope of the constitutional protection for collective bargaining articulated in *BC Health*.⁸⁸ In particular, the majority

85. *Ibid* at para 90.

86. 2008 ONCA 760, 92 OR (3d) 481.

87. *Ibid* at para 80.

88. *Ontario (AG) v Fraser*, 2011 SCC 20, [2011] 2 SCR 3. As in *BC Health*, the majority reasons were written by McLachlin CJC and LeBel J.

said, Canadian legislatures are not constitutionally required to enact a particular labour relations model or specific statutory requirements in order to comply with the *Charter*'s guarantee of freedom of association.⁸⁹ Accordingly, the specific aspects of the Wagner model embraced by the Ontario Court of Appeal were not entitled to constitutional status. Section 2(d), the majority emphasized, requires only that employee associations (including unions) be able to participate in a meaningful workplace dialogue with an employer. This includes the right to make representations and to have those representations "considered" by the employer in good faith. Only if legislation "makes good faith resolution of workplace issues between employees and their employer effectively impossible" will it violate freedom of association.⁹⁰

Since the Supreme Court issued its decisions in *BC Health* and *Fraser*, lower courts across Canada have been called upon to apply section 2(d) of the *Charter* in a variety of labour relations contexts, including federal "wage restraint" legislation enacted in the wake of the 2008 economic crisis⁹¹ and the distinctive statutory regime governing labour relations in the Royal Canadian Mounted Police.⁹² Many of these decisions are currently under appeal, and it is fair to say that this part of the constitutional foundation of Canadian labour law is in a state of flux.

In my view, this ongoing round of constitutional litigation is also linked to changes in certain basic "Wagnerian" characteristics of Canada's labour relations system, including the institutional arrangements that have governed labour relations disputes in Canada since the mid-twentieth century. As courts and governments insert themselves into labour disputes with increasing force and frequency, labour relations boards may be losing their privileged position as *the* primary decision-making bodies in day-to-day labour relations. If this is true, it would represent a marked departure from the Wagner model. The administrative approach to the

89. *Ibid* at paras 44–47.

90. *Ibid* at paras 98–99 [emphasis added].

91. See e.g. *Meredith v Canada (AG)*, 2011 FC 735, 392 FTR 25; *Association of Justice Counsel v Canada (AG)*, 2012 ONCA 530, 295 OAC 147, leave to appeal to SCC requested.

92. *Mounted Police Association of Ontario v Canada (AG)* (2009), 96 OR (3d) 20, 188 CRR (2d) 225 (Sup Ct J), rev'd 2012 ONCA 363, 111 OR (3d) 268, leave to appeal to SCC granted, 34948 (December 20, 2012).

regulation of labour relations is an essential characteristic of that model—indeed, in Roy Adams' view it is *the* essential characteristic.⁹³

In a similar vein in the late 1980s, Rosalie Abella, then Chair of the OLRB, noted the centrality of labour boards in the collective bargaining process in Canada, and the importance of their functions in relation to those of other state actors in shaping the rules in this area. Drawing from her experience as a judge and as Chair of the OLRB, Abella pointed out that of the three principal regulatory actors in labour relations (legislatures, courts and tribunals), it was the boards that dealt with the crucial day-to-day business of creating and managing collective bargaining relationships, and that they operated at arm's length from the government in its role as legislator. While the legislature was, in her words, both "free and indeed required" to periodically modify the legislation empowering and governing those tribunals, the authority of government effectively ended there.⁹⁴ More specifically:

[I]n consigning to adjudicative bodies exclusive responsibility for decision-making in specialized areas, [the legislature] has declared that to the extent that a decision is within the mandate of that tribunal, it is no longer the government's responsibility. . . . *The government makes the law that the tribunal is bound to implement; the tribunal makes the decision about the appropriate application of the law.*⁹⁵

This passage captures the key insight that in the late twentieth century, the power to create *and* enforce labour law was effectively shared between the legislative branch and the administrative bodies that it ultimately—but ideally only periodically—would hold to account.

The third actor in Abella's formulation—the courts—in her view should (and did) wield little influence either in adjudicating labour

93. Adams, "A Pernicious Euphoria", *supra* note 29 at 322:

The essence of the *Wagner Act* Model was what Cameron and Young . . . called "the administrative approach." This concept encompassed a range of mechanisms and procedures for making the principles effective: [especially] the establishment of labour relations boards whose function it was to compel collective bargaining and to right any wrongs done to employees in the context of establishing a bargaining relationship.

94. Rosalie Abella, "Courts, Boards and Labour: Reconciling Competing Cultures" (The Sefton Memorial Lecture, delivered at Woodsworth College, University of Toronto, 8 March 1988) at 6.

95. *Ibid* at 6–7 [emphasis added].

disputes or in informing labour law and policy, at least in comparison to legislators and labour boards. As she indicated in the passage quoted above, she saw the courts' role in labour relations as being limited to reviewing the occasional patently unreasonable decision.⁹⁶

It is not clear to me that this vision accurately reflects the institutional framework within which Canadian labour relations operates today. Governments across Canada appear to be increasingly willing to assume direct and interventionist roles in specific labour disputes, including private sector disputes. A notable example of this shift is provided by the fact that four times in a twelve-month period between 2011 and 2012, the federal government introduced back-to-work legislation to prevent strikes or lockouts in private sector collective bargaining disputes (in the postal, airline and rail industries).⁹⁷ This was markedly more often than such legislation had been used during the preceding sixty years.⁹⁸

As for the courts, they are being called upon more and more frequently to apply the *Charter* in the context of collective bargaining disputes. This stands in rather stark contrast to the pre-*BC Health* status quo, which rested on the Supreme Court's conclusion in the 1987 Labour Trilogy that the protection for freedom of association in section 2(d) of the *Charter* did not extend to collective bargaining.⁹⁹ As Jamie Cameron has noted, a consequence of that conclusion was that section 2(d) had "virtually no impact on labour relations" until *BC Health*.¹⁰⁰ In fact, in the *Alberta Reference*, the key decision in the Labour Trilogy, a majority of the Supreme Court specifically asserted that collective bargaining

96. *Ibid* at 24, 31. Justice Abella noted that in practice, Canadian courts had increasingly deferred to labour boards during judicial review in the period between the 1950s and 1980s. She noted that during this time, courts shifted from granting 33% of judicial review applications of board decisions to granting only 3%.

97. Bill C-5, *Continuing Air Service for Passengers Act*, 1st Sess, 41st Parl, 2011 (first reading 16 June 2011). See also *Restoring Mail Delivery for Canadians Act*, SC 2011, c 17; *Protecting Air Service Act*, SC 2012, c 2; *Restoring Rail Service Act*, SC 2012, c 8.

98. See e.g. "Federal Back To Work Legislation: 1950 to Date", online: Parliament of Canada <<http://www.parl.gc.ca/parlinfo/compilations/HouseOfCommons/legislation/LegislationBackToWork.aspx>>.

99. *Reference Re Public Service Employee Relations Act (Alberta)*, [1987] 1 SCR 313, 51 Alta LR (2d) 97; *PSAC v Canada*, [1987] 1 SCR 424, 38 DLR (4th) 249; *RWDSU v Saskatchewan*, [1987] 1 SCR 460, 38 DLR (4th) 277.

100. "Due Process, Collective Bargaining, and s. 2(d) of the *Charter*: A Comment on *B.C. Health Services*" (2006–2007) 13 CLEJ 233 at 234.

and the right to strike were matters that should be dealt with only by the legislature, and that it was not a court's place to interfere in labour relations.¹⁰¹ Only a few years ago, John Craig and Henry Dinsdale noted that while the Supreme Court had always been deeply divided on the proper role of the judicial branch, the majority of the Court had consistently taken the position that "judges should defer to legislators on labour relations matters".¹⁰²

In *BC Health*, the Supreme Court revisited and rejected that position. It explicitly overturned the substantive principles articulated in the Labour Trilogy;¹⁰³ it also made the broader pronouncement that "[i]t may well be appropriate for judges to defer to legislatures on policy matters expressed in particular laws . . . [b]ut to declare a judicial 'no go' zone for an entire right on the ground that it may involve the courts in policy matters is to push deference too far".¹⁰⁴ In practice, it appears that *BC Health* did open the door to a larger role for Canadian courts in the field of labour relations. As noted above, since that decision was handed down, workers' representatives across Canada have launched numerous section 2(d) challenges to legislation and other government action in the collective bargaining context. Many of these challenges have asked the courts to consider a specific collective bargaining process in detail, and to decide whether the government's action with respect to that process violated workers' constitutional rights.¹⁰⁵ In making such a decision, Canadian courts have accepted a major role in prescribing what is acceptable government activity in the labour realm. As Brian Langille

101. *Ibid* at 236–37.

102. John DR Craig & Henry Y Dinsdale, "A 'New Trilogy' or the Same Old Story?" (2003) 10 CLEJ 59 at 60.

103. *BC Health*, *supra* note 11 at paras 22–23.

104. *Ibid* at para 26.

105. A recent example is the Ontario Court of Appeal's decision in *Justice Counsel*, *supra* note 91. In that case, the Court conducted a detailed examination of a two-year collective bargaining process. It found that "wage restraint" legislation, which unilaterally set maximum wage levels, did not violate certain government employees' rights under section 2(d) of the *Charter*, because their bargaining agent had an opportunity to present their wage demands to the employer and to have those demands considered in good faith. Notably, an appendix to the decision contained a detailed chart describing the collective bargaining process.

put it, *BC Health* “boxed [the courts] into the task of designing a set of labour codes”.¹⁰⁶

What impact have these developments had on the Wagner model in Canada, and what might they mean for its future? First, if the shift to a more “judicialized” model of labour relations persists, it is unclear what the impact will be on outcomes in labour disputes. Judy Fudge, among others,¹⁰⁷ has argued that the move to the courts in Canada is part of a long-standing and international trend toward recognizing labour rights as human rights, and that this is a positive development from organized labour’s perspective. Fudge does recognize, however, that litigation can result in lengthy delays of court proceedings, a defensive and resistive posture on the part of respondents and a corresponding application of human rights principles in a way that may work against union interests.¹⁰⁸

Harry Arthurs has expressed more concern with the courts’ increasing involvement in labour law, especially through the *Charter*. Arthurs argues that as constitutional freedoms have come to play a greater role in labour relations, disputes have become more adversarial, costs have increased and lengthy review and appeal proceedings have become more likely.¹⁰⁹ In his view, though, it is not the judges and the constitutions that are the problem, but the adjudicative process itself. To Arthurs, resolving constitutional labour conflict requires trade-offs that “involve power, not just logic or ethics”, and are polycentric and dynamic; such issues cannot be dealt with by simply declaring a winner and a loser.¹¹⁰ “[T]he result of all this Charter-related litigation”, Arthurs suggests, “is that labour tribunals have lost forever their ability to deal rapidly, informally, knowledgeably and effectively with complex and fast-moving employment disputes”.¹¹¹ From this perspective, the growing role of the *Charter* and the courts represents a serious challenge to the Wagner model’s administrative approach to labour dispute resolution.

106. “Can We Rely on the ILO?” (2006–2007) 13 CLEJ 273 at 300 [emphasis added].

107. See e.g. Keith Ewing, “The Implications of the ASLEF Case” (2007) 36:4 Indus LJ 425.

108. *Supra* note 79 at 46–47.

109. “The Rights Stuff: Labour and the Constitution: If Labour Were Charged With Possessing Constitutional Rights, Would There Be Enough Evidence To Convict It?” (The Sefton Memorial Lecture, delivered at Woodsworth College, University of Toronto, 19 January 2005) at 8.

110. *Ibid* at 12.

111. *Ibid* at 9.

More broadly, the Supreme Court's explicit finding in *Fraser* that the constituent elements of the Wagner model are not constitutionally required may well open the door to a reconsideration of how Canadian labour relations should be governed. To be sure, *Fraser* makes it clear that legislators can consider alternatives to the Wagner model, and can draft labour relations legislation and regulations that adopt such alternatives as long as they lay the foundation for good faith dialogue.

In that vein, some Canadian labour law scholars have suggested that the Wagner model should indeed be revisited. Beth Bilson, among others, has argued that requiring a union to obtain majority support in a unit of employees in order to acquire any bargaining rights gives employers a strong incentive to vigorously oppose organizing efforts, and therefore serves to discourage unionization.¹¹² As Bilson notes, even if a union can achieve a "significant" level of support among bargaining unit employees, it will have no representation rights or standing of any sort if it does not reach the majority threshold.¹¹³ The ultimate result, she says, is that it has been impossible to achieve a key goal of the early supporters of the *Wagner Act*: to make collective bargaining "universal", or at least widespread.¹¹⁴

Conclusion

Despite the important differences in the focus of the debates on labour law and policy in Canada and the US, the uncertain future of the Wagner model is a common thread. Asking difficult questions about its successes and failures is a necessary way of gaining insight into the challenges that are common to both countries and those that are not.

112. "Future Tense: Some Thoughts about Labour Law Reform" (2005) 12 CLELJ 233 at 242.

113. *Ibid* at 245.

114. *Ibid* at 243. For a similar critique that comments extensively on the *Wagner Act* model's failures, both in the context of union organizing and broader societal goals in both Canada and the US, see Adams, "A Pernicious Euphoria", *supra* note 29.