

Labour Law and Union Recognition in Canada: A Historical-Institutionalist Perspective

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Despite the fact that the American Wagner model is the foundation of labour law in both Canada and the United States, that law has evolved in different ways in the two countries. The author argues that this can be accounted for by adopting a historical-institutionalist perspective, which explains differences by looking at formative historical conditions and the institutional norms and traditions to which they gave rise. The conditions and norms the author identifies in each country lead him to conclude that the Canadian and American Wagner models are driven by different underlying rationales: the American version is predominantly concerned with economic gain and limited state interference, whereas the Canadian version seeks to maintain order and stability through the exercise of state control. For the time being, Canada's version has proved more effective at sustaining higher levels of union density.

The paper then asks what these differences might tell us about the future of labour law and unionization in Canada. The author argues that Wagnerism in Canada has been a double-edged sword. While it has given unions greater institutional security, that same security has discouraged labour leaders from pursuing meaningful reforms to avoid union decline. The author also observes that there has been an erosion of the distinct institutional norms and traditions that have historically prevailed in Canada, brought on by an ideological shift towards neo-liberalism and globalization. From a historical-institutionalist perspective, however, policies that deviate too far from a nation's historical trajectory are unlikely to survive for long.

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Introduction

The striking feature about labor law's evolution has been its sheer inevitability.

—David Brody¹

Although Canadian and American labour law are both largely based on the Wagner model,² Canadian law has remained substantially more favourable to union recognition.³ Union density in Canada is more than twice as high as in the United States, and has declined only marginally in recent decades.⁴ In this paper, I adopt a historical-institutionalist

1. *Labor Embattled: History, Power, Rights* (Urbana: University of Illinois Press, 2005) at 153.

2. The term “Wagner model” originated with the *National Labor Relations Act*, 29 USC § 153 (1935), which is also commonly referred to as the *Wagner Act* after its main sponsor in the US Congress, Senator Robert Wagner. For present purposes, it is considered to include seven main components: (1) the right to organize and form unions; (2) the certification of a union as the sole representative of workers in a particular work unit if it has been able to demonstrate majority support; (3) the requirement that unions and employers engage in good faith collective bargaining; (4) the right to strike or to third party dispute resolution should collective bargaining fail; (5) compulsory arbitration of differences during the life of a collective agreement; (6) prohibitions on the right to strike or lockout during the term of an agreement; and (7) the administration of laws pertaining to these rights by a labour board or equivalent body.

3. See John Godard, “Does Labor Law Matter? The Density Decline and Convergence Thesis Revisited” (2003) 42:3 *Indus Rel* 458 [Godard, “Does Labor Law Matter?”]; John Godard, “The U.S. and Canadian Labour Movements: Markets vs. States and Societies” in Mark Harcourt & Geoffrey Wood, eds, *Trade Unions and Democracy: Strategies and Perspectives* (New Brunswick, NJ: Transaction, 2006) 159 [Godard, “Labour Movements”].

4. See Godard, “Does Labor Law Matter?”, *supra* note 3; John Godard, *Industrial Relations, the Economy, and Society*, 4th ed (Concord, Ont: Captus Press, 2011) at 77–78 [Godard, *Industrial Relations*]; Sharanjit Uppal, “Unionization 2011” (2011) 23:4 *Pers Lab & Inc* 3, online: Statistics Canada <<http://www.statcan.gc.ca>>.

perspective to address the primary reasons for these differences and their implications for the future of labour law and unionization in Canada.

The historical-institutionalist perspective is rooted in the work of historical-institutional analysis,⁵ particularly as applied in the fields of political studies and economic sociology.⁶ From that perspective, particular institutions and institutional designs (such as trade unions and the Wagner model) can be accounted for by deeply rooted institutional norms—that is, beliefs, values and principles which have been embedded in those institutions as a result of particular formative historical conditions. Those norms are reflected, for example, in the strength of property rights, freedom of contract, freedom of speech and perceptions of the role of the state. They are cognitively embedded in the way actors think about institutions, and are structurally embedded in the design of institutions and the distribution of power resources. Although they may allow considerable scope for interpretation and politics,⁷ and may undergo some evolution over time, they give rise to long-run biases that privilege certain institutional alternatives over others.⁸ This substantially limits the

5. See e.g. William H Sewell Jr, “Three Temporalities: Toward an Eventful Sociology” in Terrence J McDonald, ed, *The Historic Turn in the Human Sciences* (Ann Arbor: University of Michigan Press, 1996) 245; Paul Pierson, *Politics in Time: History, Institutions and Social Analysis* (Princeton: Princeton University Press, 2004); James Mahoney, “Path Dependence in Historical Sociology” (2000) 29:4 *Theory & Society* 507; Jamie Brownlee, *Ruling Canada: Corporate Cohesion and Democracy* (Halifax: Fernwood, 2005).

6. The variant of historical-institutional analysis adopted in this paper has been developed more fully elsewhere. See John Godard, “An Institutional Environments Approach to Industrial Relations” in Charles J Whalen, ed, *New Directions in the Study of Work and Employment: Revitalizing Industrial Relations as an Academic Enterprise* (Northampton, Mass: Edward Elgar, 2008) 68; John Godard, “The Exceptional Decline of the American Labor Movement” (2009) 63:1 *Indus & Lab Rel Rev* 81 [Godard, “The Exceptional Decline”]; Carola Frege & John Godard, “Cross-National Variation in Representation Rights and Governance at Work” in Adrian Wilkinson et al, eds, *The Oxford Handbook of Participation in Organizations* (Oxford: Oxford University Press, 2010) 526.

7. See Gregory Jackson, “Contested Boundaries: Ambiguity and Creativity in the Evolution of German Codetermination” in Wolfgang Streeck & Kathleen Thelen, eds, *Beyond Continuity: Institutional Change in Advanced Political Economies* (Oxford: Oxford University Press, 2005) 229.

8. See Peter Bachrach & Morton S Baratz, “Two Faces of Power” (1962) 56:4 *Am Pol Sci Rev* 947; Steven Lukes, *Power: A Radical View* (London, UK: Macmillan Press, 1974).

prospects for institutional strategies that do not “fit” with such norms and with the institutional environment in which they are embedded.⁹

This paper argues that the different fates of labour law and trade unionism in Canada and the US essentially reflect differences in the formative historical conditions and deeply held institutional norms in each country. Part I applies a historical-institutionalist perspective first to the American context and then to the Canadian. Part II discusses how the historical conditions and norms identified in Part I have led to institutionalized differences through law. Part III explains the differing rationales driving the development and functioning of Wagnerism in the two countries: a liberal-economic rationale in the US, and an order and stability rationale in Canada. Part IV argues that despite the relative strength of Canadian Wagnerism, it has been a double-edged sword for the union movement, bringing significant advantages but also very important disadvantages. Part V considers the possible implications of recent developments in Canadian labour law for the future of the Wagner model.

I. The Roots of Difference: Historical Conditions and Institutional Norms

A. In the United States

Based on a historical-institutionalist perspective, I have argued elsewhere that while various explanations have been or might be given for the decline of the American labour movement and the gutting of the *Wagner Act* in the US, those developments largely reflect formative economic, social and political conditions in that country and the institutional norms to which those conditions gave rise.¹⁰ The US has a history of individualist, frontier development, in which the state played only a limited role. The country

9. As well as reflecting broader public norms and values that are often identified with “culture”, institutional norms may indirectly shape those broader norms and values, thereby influencing the ability of actors in positions of power to continue the public promulgation of the norms from which their power derives. In other words, rather than simply being explained by culture, institutional norms may also be seen as offering a structural explanation for culture.

10. See Godard, “The Exceptional Decline”, *supra* note 6.

was originally settled by Puritans fleeing persecution in Britain, and was born out of a revolt against the British state's taxation of the American colonies and its refusal to give them democratic representation rights. Those stylized conditions are commonly seen as giving rise to a number of dominant norms and values, including: "possessive individualism"; a strong, Lockean conception of the sanctity of property and ownership rights; a corresponding belief that authority derived from property rights should not be interfered with, and that it entails few if any obligations to workers or to society; a distrust of centralized political power and the administrative state; an emphasis on freedom of contract and hence on "free" labour and product markets; and a comparatively weak and conservative working class.¹¹

The formative conditions referred to above, and the norms and values to which they gave rise, largely explain the conservatism of the US labour movement throughout the twentieth century, as well as the typically intense employer opposition to collective bargaining and the widespread distrust of "big labour" in that country. All of these have helped to form the context in which labour law has developed, and to explain such core features of the Wagner model as majoritarianism and workplace-level bargaining units.

Until the early twentieth century, freedom of contract was the dominant legal ideology in the US. It assumed that workers as individuals were on an equal footing with their employers and did not want collective representation, so it envisaged little or no legal basis for such representation or for other forms of voice at work.¹² The *Wagner Act* was supposed to depart from that ideology by giving workers a right to self-organization, but from the very beginning the cards were stacked against that right.

11. See e.g. Alexis de Tocqueville, *Democracy in America* (Hertfordshire: Wordsworth Editions, 1998); Selig Perlman, *A Theory of the Labor Movement* (New York: Augustus M Kelley, 1949); Louis Hartz, *The Liberal Tradition in America* (New York: Harcourt, Brace & World, 1955); Seymour Martin Lipset, "Canada and the United States: A Comparative View" (1964) 1:4 *Can Rev Soc* 173 [Lipset, "Comparative View"]; Seymour Martin Lipset, *The First New Nation: The United States in Historical and Comparative Perspective* (New York: Basic Books, 1963); Seymour Martin Lipset & Noah Meltz, "Canadian and American Attitudes Toward Work and Institutions" (1998) 1:3 *Pers Work* 14; Sanford M Jacoby, "American Exceptionalism Revisited: The Importance of Management" in Sanford M Jacoby, ed, *Masters to Managers: Historical and Comparative Perspectives on American Employers* (New York: Columbia University Press, 1991) 173 at 173; Will Hutton, *The World We're In* (London, UK: Little Brown, 2002).

12. See Victoria C Hattam, *Labor Visions and State Power: The Origins of Business Unionism in the United States* (Princeton: Princeton University Press, 1993).

The predecessor to the *Wagner Act* (the *National Industrial Recovery Act* of 1933¹³) was struck down as representing, among other things, an unconstitutional intrusion of federal power into the economy.¹⁴ The *Wagner Act* was widely expected to suffer the same fate, but it passed muster with the US Supreme Court in 1937,¹⁵ after President Roosevelt threatened to “pack” the Court with new appointees.¹⁶ By 1938, the Court had already ruled that employers had the right to hire permanent replacements for strikers.¹⁷ Over the next decade, because of a series of rulings by the National Labor Relations Board (NLRB) and the courts,¹⁸ and because of the passage of the *Labor Management Relations Act, 1947*,¹⁹ the simple right to “self-organization” through card checks was replaced with a mandatory balloting process. The new reality featured lengthy, contentious and legalistic organizing campaigns, extensive speech and propaganda rights for employers, and extremely limited enforcement powers for the NLRB.²⁰

Not by coincidence, the labour movement was never to exceed the level of density it attained by 1946. By the end of the 1950s, it had begun its long decline.²¹ Subsequent attempts to restore the promise of the *Wagner Act* failed—in 1977 under President Carter and in 2009 under President Obama.²² Efforts to extend the Wagner model to American public sector

13. 15 USC § 703 (1933).

14. *Schechter Poultry Corp v United States*, 295 US 495 (1935).

15. See *National Labor Relations Board v Jones & Laughlin Steel Corp*, 301 US 1 (1937).

16. See Noah Feldman, *Scorpions: The Battles and Triumphs of FDR's Great Supreme Court Justices* (New York: Twelve, 2010) at 119–21.

17. *National Labor Relations Board v Mackay Radio & Telegraph Co*, 304 US 333 (1938).

18. See Karl E Klare, “Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937–1941” (1978) 62:3 Minn L Rev 265.

19. 29 USC § 141 [*Taft-Hartley Act*].

20. For a detailed review and analysis of these events, see Craig Becker, “Democracy in the Workplace: Union Representation Elections and Federal Labor Law” (1993) 77:3 Minn L Rev 495.

21. See Godard, “Does Labor Law Matter?”, *supra* note 3.

22. The *Labor Law Reform Act* passed in the House of Representatives on October 6, 1977. US, Bill HR 8410, *Labor Reform Act*, 95th Cong, 1977. The Senate bill failed after a lengthy filibuster. US, Bill S 2467, *Labor Law Reform Act*, 95th Cong, 1977. The *Labor Law Reform Act* bills included measures to expedite NLRB procedures and increase union access to employees, and strengthened remedies to deter employer unfair labour practices and bad faith bargaining during first collective agreement negotiations. In 2003, 2005, 2007 and 2009, efforts were made to amend the *Wagner Act* through the *Employee Free Choice Act*: US, Bill S 1925, *Employee Free Choice Act*, 108th Cong, 2003; US, Bill HR 3619, *Employee*

workers over the years have been uneven at best, and are now under direct attack. Most of those workers have even weaker rights to union recognition and collective bargaining than their private sector counterparts, and a great many have no such rights at all.²³

There might be alternative explanations for these developments (for example, political power imbalances disadvantaging trade unions), but they are all consistent with the institutional norms and traditions which have come to define the US, and which have been drawn on extensively in the courts of both law and public opinion.²⁴ Paradoxically, although the Wagner model was generally adopted later and in a somewhat weaker form in Canada than in the US, labour laws were gradually strengthened in most Canadian jurisdictions until roughly the mid-1990s and remain considerably stronger than their US counterparts.

B. In Canada

There are a number of historical conditions that explain why the Canadian Wagner model has endured in comparison to its American counterpart. It is well known that Canada has historically been dominated by Upper-Canadian elites concerned largely with maintaining order and stability. The country has never had a revolution, and there is little history of Puritanical religious settlements or of the Calvinist “spirit

Free Choice Act, 108th Cong, 2003; US, Bill S 842, *Employee Free Choice Act*, 109th Cong, 2005; US, Bill HR 1696, *Employee Free Choice Act*, 109th Cong, 2005; US, Bill HR 800, *Employee Free Choice Act of 2007*, 110th Cong, 2007; US, Bill S 1041, *Employee Free Choice Act of 2007*, 110th Cong, 2007; US, Bill S 560, *Employee Free Choice Act of 2009*, 111th Cong, 2009; US, Bill HR 1409; *Employee Free Choice Act of 2009*, 111th Cong, 2009. The proposed amendments sought to promote union recognition and collective bargaining by introducing card-based certification, greater remedies for employer unfair labour practices and first contract arbitration. However, each bill was met with ferocious employer opposition and none were passed.

23. For commentary on the recent decline of public sector labour rights, see Martin H Malin, “The Legislative Upheaval in Public-Sector Labor Law: A Search for Common Elements” (2012) 27:2 ABA J Lab & Empl L 149; Joseph E Slater, “Lessons from the Public Sector: Suggestions and a Caution” (2011) 94:3 Marq L Rev 917; Joseph E Slater, “Public-Sector Labor in the Age of Obama” (2012) 87:1 Ind LJ 189.

24. See Frege & Godard, *supra* note 6; Godard, “The Exceptional Decline”, *supra* note 6.

of capitalism” associated with the US.²⁵ Religion has indeed played an important role in Quebec through the Roman Catholic Church, but that Church does not envisage an individualistic relation to God and may actually have fostered a stronger sense of a social contract than is found in the rest of Canada. In addition, Canada was less marked by individualism than the US because its early economic development was driven by large fur trading companies and the Royal North West Mounted Police, and Canadian employers have historically tended to be smaller than their American counterparts and more reliant on the state.

As a result of these historical conditions, Canadians are generally thought to have more trust in and respect for state authority than Americans, and a more collectivist, social democratic orientation.²⁶ Like the US, Canada has a “liberal market” economy, but one which has historically been characterized by more tolerance for concentrated market power and state intervention, including a greater acceptance of administrative regulation.²⁷ The term “Tory paternalism” has been used to refer to the combination of elite rule and a more socially and economically interventionist government that has prevailed in Canada—an approach less concerned with the sanctity of property rights and “free” markets than with maintaining the status quo.²⁸ In contrast to the American constitutional commitment to “life, liberty, and the pursuit of happiness”,²⁹ the *British North America Act, 1867*, now known as the *Constitution Act, 1867*, speaks of “peace, order, and good government”.³⁰ Such differences between the two nations may have been muted over time, but they remain embedded in institutional norms and designs and have served as a medium through which “cultural” or “value” differences have been produced and reproduced.

25. Max Weber, *The Protestant Ethic and the Spirit of Capitalism*, translated by Talcott Parsons (New York: Charles Scribner’s Sons, 1930).

26. See Lipset, “Comparative View”, *supra* note 11.

27. See Daphne Gottlieb Taras, “Collective Bargaining Regulation in Canada and the United States: Divergent Cultures, Divergent Outcomes” in Bruce E Kaufman, ed, *Government Regulation of the Employment Relationship* (Madison, Wis: IRR, 1997) 295.

28. See John Godard, “The New Institutionalism, Capitalist Diversity, and Industrial Relations” in Bruce Kaufman, ed, *Theoretical Perspectives on Work and the Employment Relationship* (Cornell: Cornell University Press, 2004) 229 at 242.

29. The Declaration of Independence para 2 (US 1776).

30. (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, App II, No 5.

In line with those historical and institutional distinctions, the Canadian labour movement has traditionally differed from its US counterpart in important ways.³¹ Although the Canadian movement was largely dominated by American-based unions throughout the first six decades of the twentieth century, it has been less accepting of the narrower “business unionism” typically associated with its US counterpart.³² As early as 1906, Canadian unions began to support the establishment of labour parties at the provincial level, and have maintained institutional ties with such parties ever since.³³ The Canadian labour movement has never had to justify its existence primarily in terms of economic gains, as has generally been the case in the US. Nor, arguably, has it faced quite the same level of employer hostility as the American movement, and it has probably enjoyed a broader legitimacy and appeal.³⁴

II. The Legal Institutionalization of Difference

Canada’s institutional norms and labour movement traditions have also led to greater state intervention in industrial relations than in the US, and in more recent decades to stronger labour laws. The Canadian state has more readily intervened to repress strike activity and has been more willing to enact laws and establish institutions designed to maintain industrial peace, even at the cost of limiting freedom of contract.³⁵ In the early 1900s, the federal government, through the *Industrial Disputes Investigation Act*,³⁶ imposed compulsory conciliation and a cooling-off period as prerequisites to a strike or lockout in certain key industries, thereby implicitly recognizing a right to strike while substantially

31. See Roy J Adams, *Industrial Relations Under Liberal Democracy: North America in Comparative Perspective* (Columbia, SC: University of South Carolina Press, 1995).

32. See Bryan D Palmer, *Working-Class Experience: Rethinking the History of Canadian Labour, 1800–1991*, 2d ed (Toronto: McClelland & Stewart, 1992).

33. See Adams, *supra* note 31 at 52.

34. See Ian Robinson, “Organizing Labour: The Moral Economy of Canadian-American Union Density Divergence, 1963–1986” in *Queen’s Papers in Industrial Relations* (Kingston: Queen’s University Industrial Relations Centre, 1992); Ian Robinson, “NAFTA, Social Unionism, and Labour Movement Power in Canada and the United States” (1994) 49:4 *RI* 657.

35. See Stuart M Jamieson, *Times of Trouble: Labour Unrest and Industrial Conflict in Canada, 1900–66* (Ottawa: Information Canada, 1972).

36. SC 1907, c 20 (1907).

restricting it and bringing it within state control. This form of restriction on strikes was strengthened over the next thirty years, and was grafted onto the Canadian version of Wagnerism adopted in the 1940s.³⁷

In the US, the Wagner model was sold as a means to achieve economic recovery and stabilization during the Great Depression.³⁸ In Canada, it was adopted somewhat later as a way to ensure order and stability during and after the Second World War.³⁹ Since the 1920s, labour law in Canada has been primarily within provincial legislative jurisdiction,⁴⁰ and it has varied to some degree across the country. In 1937, Nova Scotia became the first province to adopt some elements of the Wagner model. In response to a wave of employee organizing by the Canadian Labour Congress that was seen to threaten political stability during the war, the federal government in 1944 used its wartime emergency powers to override provincial jurisdiction and proclaim nationwide Wagner-style collective bargaining rights.⁴¹ After a period of recognition strikes in the latter half of the 1940s, when the federal government's wartime powers had expired, these rights became legally entrenched across the country in federal and provincial labour relations statutes based on the Wagner model.

There has never been much concern in Canada that the enactment of collective bargaining rights would be an undue intrusion into the economy or an unacceptable infringement on freedom of contract. As a result, in contrast to the US, there has been no perceived need to restrict the powers of labour boards or to sell labour law protections in terms of "free" collective bargaining for fear that they would otherwise be struck down by the courts. Canadian courts were historically not friendly to the labour movement, but were seldom as hostile as the US courts.⁴² In part this is because of slightly different common law traditions, but also

37. See Taras, *supra* note 27 at 297–99.

38. See Bruce E Kaufman, "Why the Wagner Act? Re-establishing Contact with its Original Purpose" in David Lewin, Bruce E Kaufman & Donna Sockell, eds, *Advances in Industrial and Labor Relations* (Greenwich, CT: JAI Press, 1996) vol 7 at 15.

39. See Taras, *supra* note 27 at 300; Mark Thompson, "Wagnerism in Canada: Compared to What?" in Anthony Giles, Anthony E Smith & Kurt Wetzell, eds, *Proceedings of the XXXIst Conference* (Quebec: Canadian Industrial Relations Association, 1995) 59 at 63.

40. In Canada, more than eight in ten employees fall under the labour law jurisdiction of the ten provinces, with the remainder falling under federal jurisdiction.

41. See *Wartime Labour Relations Regulations*, PC 1003 (1944).

42. See Hattam, *supra* note 12; Brody, *supra* note 1.

because until the 1980s Canada's Constitution imposed few substantive limitations on governmental regulation. The *Canadian Charter of Rights and Freedoms*⁴³ is now a part of the *Constitution Act, 1982*, but unlike the US Constitution (and in line with Canadian historical-institutional norms), it does not include the entrenchment of property rights, which served as a barrier to proactive labour laws. The *Charter* does not explicitly entrench labour rights, but it does have "freedom of expression" and "freedom of association" clauses that have been interpreted by the Supreme Court of Canada in recent years as protecting rights to secondary picketing and collective bargaining.⁴⁴ There is also a fairly widespread expectation that before long it will be held to give some degree of protection to the right to strike. In marked contrast, US Supreme Court decisions have historically tended to restrict and even negate statutory labour rights.⁴⁵

In short, formative conditions have become embedded in institutional norms and traditions in Canada and the US in ways that have had important implications for the role of the state in industrial relations and for labour law. Although the Canadian labour law system is largely based on the same Wagner model as the US system, differences in dominant institutional norms led to important differences in the impetus for the adoption of that model in each country: in how the model has changed over time, in the stated objectives associated with it and in the assumptions underlying its administration.⁴⁶

III. Same Model, Different Rationale

Although the Canadian and American labour law systems share a common structure, their development and functioning has differed because they are driven by different rationales. In the US, the main rationale has been a liberal-economic one; workers were given the right to seek economic gains through concerted action, with less state involvement and

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

44. See more detailed discussion below.

45. See Hattam, *supra* note 12.

46. See Taras, *supra* note 27; John Logan, "How 'Anti-Union' Laws Saved Canadian Labour Law: Certification and Striker Replacements in Post-War Industrial Relations" (2002) 57:1 RI 129 [Logan, "'Anti-Union'"].

less interference with freedom of contract.⁴⁷ In contrast, the main rationale in Canada has been to maintain order and stability by bringing labour-management relations “within the law”, affirming the basic right of workers to collective bargaining but subjecting its exercise to extensive state control. The emergent Canadian system of labour law was justified more in terms of industrial pluralist principles than the *Wagner Act* was.⁴⁸ Some Canadian

47. This is not to suggest that all proponents of the Wagner model have adhered to this perspective. Senator Robert Wagner, the main author and sponsor of the *Wagner Act*, had conceived of a more corporatist outcome in which collective bargaining would foster a high trust, cooperative relationship by equalizing power relations. See Mark Barenberg, “The Political Economy of the Wagner Act: Power, Symbol, and Workplace Cooperation” (1993) 106:7 Harv L Rev 1379; James A Gross, “Conflicting Statutory Purposes: Another Look at Fifty Years of NLRB Law Making” (1985) 39:1 Indus & Lab Rel Rev 7. The main rationale for the *Wagner Act* was stated in economic terms, emphasizing the need for the “free flow of commerce”. The institutional norms driving it were more consistent with liberal norms (i.e. “free” collective bargaining) than with corporatist norms. Any chance that the latter might come to prevail was quickly undermined by changes in board composition, by court decisions and by legal reforms which came to ensure a narrow adversarialism driven by economic interests. See e.g. the *Taft-Hartley Act*, *supra* note 19. For an examination of board composition, see Christopher L Tomlins, “The New Deal, Collective Bargaining, and the Triumph of Industrial Pluralism” (1985) 39:1 Indus & Lab Rel Rev 19. In light of US institutional traditions, Wagner’s vision seems to have been misguided, as the failure of the “high performance” paradigm to achieve a similar promise has demonstrated more recently. See John Godard & John T Delaney, “Reflections on the ‘High Performance’ Paradigm’s Implications for Industrial Relations as a Field” (2000) 53:3 Indus & Lab Rel Rev 482; John Godard, “A Critical Assessment of the High-Performance Paradigm” (2004) 42:2 Brit J Indus Rel 349. Not only was the *Wagner Act* initially sold as a means to economic recovery; so were reforms proposed during the Clinton administration. See John Logan, “The Clinton Administration and Labor Law: Was Comprehensive Reform Ever a Realistic Possibility?” (2007) 28:4 J Lab Res 609 at 619.

48. Industrial pluralism is a doctrine that seeks to achieve a working balance of power between labour and management by establishing a system of labour laws to support collective bargaining, in the belief that this both ensures a meaningful and orderly resolution of conflict and introduces a system of democratic rights into the workplace. Although this doctrine has been popular in the US as well as Canada, the actual passage of the *Wagner Act* was primarily justified by economic rationales. In Canada, labour law has tended to be justified more in terms of addressing conflict. See Kaufman, *supra* note 38.

labour codes explicitly affirmed those principles, and various federal review bodies have noted that they formed the basis of the Canadian system.⁴⁹

As Daphne Taras has argued,⁵⁰ a key feature of Canadian labour law has been a stronger presumption than in the US that the employee is in a subordinate position to the employer and is susceptible to intimidation,⁵¹ the result being that the decision to join a union has been seen as the employee's alone, with little room for employer involvement. For example, in 1981, the Canada Labour Relations Board said:

[W]e cannot stress enough the unique relationship that exists between an employer and his employees and the privileged position that puts the employer in to influence those employees. . . . Any involvement by the employer in the exercise by the employee of his/her basic right to join a union puts unfair pressure on the employee. An employee joining a union must not be put in a situation of second class citizen who is adhering to a secret society and being ashamed of it. Either the right is recognized or it is not: if it is, it must be exercised in full light and without fear.⁵²

Although Canadian labour laws were considered to be weaker at their inception in the late 1940s than those in the US, they were gradually strengthened throughout much of the post-WWII era,⁵³ typically in ways which restricted aggressive electioneering by both labour and management, and protected employees against employer reprisals. By the mid-1980s, the Canadian statutes included most of the features associated with the early (pre-1938) Wagner model in the US, including provisions for card-check certification in all but one province (with a fall-back ballot if the

49. See e.g. *Canadian Industrial Relations: The Report of the Task Force on Labour Relations* (Ottawa: Privy Council Office, 1968); HD Woods, *Labour Policy in Canada*, 2d ed (Toronto: Macmillan Press, 1973) at 64–70; Andrew CL Sims, Rodrigue Blouin & Paula Knopf, *Seeking A Balance* (Ottawa: Minister of Public Services, 1995).

50. *Supra* note 27 at 304–18.

51. This assumption has also prevailed in the US. However, it has been weaker and more controversial, especially since the passage of the *Taft-Hartley Act*. See Gross, *supra* note 47. There are also legal precedents dating as far back as the seventeenth century that assume individuals to be on an equal footing with employers. See e.g. Brody, *supra* note 1. Contrast this with the Supreme Court of Canada's explicit recognition of inequality of bargaining power. See *Machtinger v HOJ Industries Ltd*, [1992] 1 SCR 986, 91 DLR (4th) 491.

52. *Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees, CLC-AFL-CIO (BRAC) v American Airlines Inc* (1981), 43 di 114, [1981] 3 Can LRBR 90.

53. See Logan, "Anti-Union", *supra* note 46.

union failed to sign up enough workers), a prohibition on the permanent replacement of strikers, and a de facto ban on open shop arrangements.

Labour laws in Canada have since been weakened somewhat, with only six jurisdictions now offering card-check certification (and another two permitting it only in the construction industry).⁵⁴ Yet most of the jurisdictions with mandatory certification votes strictly limit (usually to five days) the time from the filing of a certification application to the holding of the vote.⁵⁵ Employer speech rights are also much more restricted than in the US,⁵⁶ although some provinces have recently relaxed these restrictions. Canadian labour boards have stronger remedial powers, typically including the authority to grant certification as a remedy for employer unfair labour practices even if the union cannot demonstrate majority support.⁵⁷ Most Canadian labour statutes also provide for first contract arbitration, and all of them make open shops virtually illegal and ban the use of permanent striker replacements.⁵⁸ Canadian labour board decisions are not subject to appeal to the courts but only to judicial review on jurisdictional grounds, and the fact that they remain in force unless and until they are overturned on judicial review sharply limits the opportunity to use court proceedings to undermine union organizing drives. The possibility of using challenges to the scope of bargaining units

54. For an overview of these differences and their implications, see Stephen Wood & John Godard, "The Statutory Union Recognition Procedure in the Employment Relations Bill: A Comparative Analysis" (1999) 37:2 *Brit J Indus Rel* 203. For a more thorough analysis, see John Godard, *Trade Union Recognition: Statutory Unfair Labour Practice Regimes in the USA and Canada* (London, UK: The Department of Trade and Industry Employment Relations Research Series, no 29, 2004) at 11–48.

55. Saskatchewan is the exception, lacking a statutory time limit within which certification elections must be held. See *Trade Union Act*, RSS 1978, c T-17, ss 6–8.

56. See Logan, "Anti-Union", *supra* note 46; Sara Slinn, "Captive Audience Meetings and Forced Listening: Lessons for Canada from the American Experience" (2008) 63:4 *RI* 694.

57. The NLRB may issue what is known as a "Gissel bargaining order" as a remedy for employer unfair labour practices that make a fair election unlikely. However, this remedy is only available in circumstances where the union can demonstrate that it has majority support among employees in the proposed bargaining unit—for example, by showing signed membership cards. See *NLRB v Gissel Packing Co*, 395 US 575 (1969). Remedial certification remedies available under Canadian labour laws do not include a majority support requirement.

58. Quebec and British Columbia also ban the use of temporary replacements, and in the federal jurisdiction it is an unfair labour practice to use permanent replacements as a union-breaking tactic.

as a delaying tactic is reduced by the authority of most Canadian labour boards to order that certification votes be held before such challenges are adjudicated.

Of the many factors to which these differences between Canadian and American labour law can be attributed,⁵⁹ some are political or constitutional in nature: the broader legitimacy of Canada's unions as "social" unions; the heightened militancy of its labour movement since the 1960s;⁶⁰ the existence of a social democratic political party with which many unions have institutional ties; the opportunity for greater experimentation in Canada's multiple jurisdictions; and a parliamentary system that makes legislative reform easier than in the US.⁶¹

At their core, however, these differences in labour law reflect the institutional norms discussed above. Canada has traditionally had a greater tolerance for state intervention and more respect for administrative decision making, allowing labour boards to have much stronger powers than in the US.⁶² State elites in Canada have been more concerned with maintaining order and stability, and hence with regulating industrial conflict in its various manifestations. This underlies the longstanding use of mandatory conciliation, and the substantially greater restrictions on the right to strike than are found in the US.⁶³ It is noteworthy that not only these more restrictive aspects of the Canadian system, but also those aspects that are widely seen as making it more favourable to collective bargaining, were designed to minimize confrontation and conflict, no matter what overt political justification was offered for their adoption. Card-check certification, time limits on organizing campaigns, and restrictions on employer speech help to avoid the antagonism generated by long, full-fledged US-style campaigns, and (in theory, at least) bring more harmonious relations once a union has acquired bargaining rights. Agency shop provisions, requiring all employees in a bargaining unit to

59. See Taras, *supra* note 27 at 304–18.

60. See Michael Goldfield & Bryan D Palmer, "Canadian Workers Movement: Uneven Developments" (2007) 59 *Labour/Le Travail* 149.

61. See Peter G Bruce, "Political Parties and Labor Legislation in Canada and the U.S." (1989) 28:2 *Indus Rel LJ* 115.

62. See Taras, *supra* note 27 at 295–342.

63. See Logan, "Anti-Union", *supra* note 46 at 144–48; Godard, *Industrial Relations*, *supra* note 4 at 337.

pay the equivalent of dues but not to join the union,⁶⁴ help to ensure union stability and avoid internecine conflicts among employees. First contract arbitration and restrictions on the use of replacement workers can also be seen as attempts to avoid unduly long or disruptive strikes. All of these rules would conflict to varying degrees with dominant American institutional norms, which place greater emphasis on property rights, freedom of contract, freedom of speech and the limitation of state involvement. Although Canadian employer groups have pressed governments to weaken labour laws in various ways, they have historically had less success in this regard than US employers.⁶⁵

Shoring up these differences has been Canada's tradition of Tory paternalism. The element of Toryism in that tradition was reflected in the fact that when modern Canadian labour laws were first passed in the late 1940s, they were significantly more conservative than the American laws they were modelled upon—for example, by requiring a super-majority of fifty-five to sixty-five per cent of all eligible employees for card-check certification, compared to the US requirement of a simple majority of those who actually voted.⁶⁶ The element of paternalism in the Canadian tradition was reflected in the stronger restrictions that legislatures and labour boards put on employers⁶⁷ because employees in Canada were seen as being less able to fend for themselves.

Differences in institutional norms, especially the prevalence of Tory paternalism and the acceptance of a greater role for the state, may also be responsible for the lower level of employer hostility to strong labour laws in Canada. Free market ideologies and property rights have generally not resonated as well in Canada as in the US; historical links between business and state elites are closer in Canada, and the state has traditionally had more of a role in economic development. Although there is little evidence that these factors have translated into a concrete willingness on the part of Canadian employers to recognize unions or to accommodate them where

64. This arrangement is commonly referred to as the Rand Formula. These payments by non-union member employees in the unit are regarded as a fee paid to the union for the services it is legally obligated to provide pursuant to its statutory and common law duty of fair representation.

65. See Logan, ““Anti-Union””, *supra* note 46 at 144–48.

66. See *ibid.*

67. See *ibid.*

recognized,⁶⁸ a government-commissioned review of federal labour law conducted in 1995 disclosed little pressure for change from the business community.⁶⁹ Employers operating in the federal jurisdiction seemed to be relatively satisfied with the status quo, or at least to have adapted to it well enough to give the appearance of being satisfied. This is in marked contrast to the findings of the Dunlop Commission in the US, which reported in the same year.⁷⁰

Largely because of the factors just outlined,⁷¹ union recognition since the 1950s has been less problematic in Canada than in the US.⁷² Overall union density in Canada continued to grow until the mid-1980s, when it reached thirty-three to thirty-seven per cent.⁷³ Since then, it has dropped somewhat, to around thirty per cent overall,⁷⁴ which is roughly where it was in the US in the early 1960s, before starting its long decline. In addition to the fact that Canadian union density today is more than twice as high as in the US, the Canadian labour movement does not suffer from the same profound internal divisions as its American counterpart. There is indeed significant inter-union rivalry in Canada,⁷⁵ and separate union federations have long represented workers in Quebec, but open discord has been more limited than in the US.⁷⁶

68. See Godard, "Does Labor Law Matter?", *supra* note 3.

69. See Sims, Blouin & Knopf, *supra* note 49.

70. See John Logan, *The Dunlop Commission and the Elusive Search for Consensus on Labour Law Reform* (undated) [unpublished, archived at London School of Economics].

71. See Godard, "Does Labor Law Matter?", *supra* note 3.

72. See Godard, "Labour Movements", *supra* note 3.

73. The exact percentage depends on the statistical series used. See Godard, "Does Labor Law Matter?", *supra* note 3.

74. See Uppal, *supra* note 4.

75. See Charlotte AB Yates, "Missed Opportunities and Forgotten Futures: Why Union Renewal in Canada Has Stalled" in Craig Phelan, ed, *Trade Union Revitalization: Trends and Prospects in 34 Countries* (New York: Peter Lang, 2007) 57.

76. In recent years, the strongest instances of discord have involved the Canadian Auto Workers, which was sanctioned by the Canadian Labour Congress for raiding a Service Employees International Union local in 2000 and whose leader, Buzz Hargrove, threw his support behind the Liberal Party rather than NDP in the 2006 federal and 2007 Ontario provincial elections. In response, the NDP revoked Hargrove's party membership. This would appear to reflect the tribulations of one union's leadership and not a broader split. However, the disputes between the Canadian Auto Workers and the Steelworkers' Union regarding the Magna framework agreement do speak to more fundamental differences in views of the role of unions. See *infra* note 83.

IV. Canadian Wagnerism: A Double-Edged Sword

To this point, I have argued that Wagnerism is stronger today in Canada than in the US, mainly because of differences in institutional norms and traditions. These differences are explained by the economic, social and political conditions under which each country was formed. Yet there is good reason to believe that for Canadian unions and workers, Wagnerism is a double-edged sword.

Structural features inherent in the Wagner model limit the proportion of the labour force that is likely to become organized or covered by collective bargaining. Because of the majority principle and the fact that the determination of the election unit tends to be restricted by specific criteria, a large portion of the labour force (roughly one third) that desires union representation is unable to get it. Moreover, union representation is rendered impractical in smaller workplaces where servicing costs tend to be higher and gains smaller because of competitive constraints and employer resistance.

These limitations are reinforced by specific attributes of Canadian labour law. For example, the lack of union access rights to the workplace make organizing substantially more difficult. The requirement of a vote as a prerequisite to certification in many jurisdictions substantially lowers the likelihood of union success, despite statutory requirements that the vote be held quickly.⁷⁷ Although there is much less scope for court challenges to labour board decisions than in the US,⁷⁸ a number of gaps in the law make it possible for determined employers to frustrate labour board decisions and make organizing more difficult. For example, remedies for employer unfair labour practices do not as a rule include the

77. See Chris Riddell, "Union Certification Success Under Voting Versus Card Check Procedures: Evidence from British Columbia, 1978-1998" (2004) 57:4 *Indus & Lab Rel Rev* 493; Susan Johnson, "Card Check or Mandatory Representation Votes? How the Type of Union Recognition Procedure Affects Union Certification Success" (2002) 112:479 *Econ J* 344; Sara Slinn, "An Empirical Analysis of the Effects of the Change from Card-Check to Mandatory Vote Certification" (2004) 11:3 *CLELJ* 259. See also Sara Slinn, "An Analysis of the Effects on Parties' Unionization Decisions of the Choice of Union Representation Procedure: The Strategic Dynamic Certification Model" (2005) 43:4 *Osgoode Hall LJ* 407.

78. See *British Columbia (Workers' Compensation Board) v Figliola*, 2011 SCC 52, [2011] 3 SCR 422.

indemnification of unions for additional organizing costs, which reduces the incentive to organize in the face of employer resistance and lowers the cost to employers if they are found guilty of unfair labour practices.⁷⁹ Statutes often provide for interim remedies and expedited hearings into allegations of employer unfair labour practices during organizing campaigns, but these provisions are seldom effective at dealing with pre-election employer pressures. Despite stronger good faith bargaining requirements than in the US, which is backed up by first contract arbitration in most jurisdictions, employers can exploit the elusive distinction between hard bargaining and surface bargaining.⁸⁰ The most common remedies of cease and desist orders and directions to bargain in good faith are weak deterrents to bad faith bargaining.

These limitations on the effectiveness of the statutory protections for union organizing are particularly valuable to large employers that have the sophistication to exploit them—and most of all to employers with many small, geographically dispersed workplaces. Such sites are harder for unions to organize, and as the experience with Walmart Canada has shown, large employers can readily tolerate the shutting down of an individual site (through a strike or an employer-initiated closure) without substantially harming the bottom line.⁸¹ Employers of that sort are unlikely to suffer much instability from industrial conflict at a few of their sites, and if conflict does occur, it is likely to be of less political or economic consequence.

This bias toward focusing organizing efforts on larger workplaces is likely to be reinforced by efforts to impose more extensive reporting requirements on unions under federal Bill C-377.⁸² Those requirements would be most burdensome for small union locals, as they would disproportionately increase the cost of representing smaller units. American-style right-to-work laws, which have recently been advocated

79. See Sara Slinn, “No Right (to Organize) Without a Remedy: Evidence and Consequences of the Failure to Provide Compensatory Remedies for Unfair Labour Practices in British Columbia” (2008) 53:4 McGill LJ 687.

80. See Brian A Langille & Patrick Macklem, “Beyond Belief: Labour Law’s Duty to Bargain” (1988) 13:1 Queen’s LJ 62.

81. See especially *United Food and Commercial Workers, Local 1400 v Wal-Mart Canada Corp*, 2012 SKCA 2, 385 Sask R 130.

82. *An Act to Amend the Income Tax Act (Requirements for Labour Organizations)*, 1st Sess, 41st Parl, 2011 (first reading 5 December 2011).

by the Progressive Conservative Party in Ontario, could have a similar effect by reducing the dues that unions can collect, with particular consequences for smaller and even mid-sized units, where effective representation is especially likely to become economically unviable. Right-to-work laws could indeed lead to more instability in workplaces that “matter” politically and economically as well as in those that do not, but it may be that Canadian unions have been so weakened that they could not take effective advantage of any such instability.

In sum, the Canadian version of Wagnerism has resulted in substantially higher union density and coverage than in the US, and in stronger representation rights and protections for workers. Yet it has also put those rights beyond the effective reach of a very large and probably growing portion of the Canadian workforce. The result has been an institutional regime that has offered meaningful representation rights only in those workplaces and sectors where collective action is likely to lead to instability that threatens peace, order and good government. Even there, such rights are structured in a way that tightly controls and limits conflict. In cases where those controls and limits have not worked, the state has typically had little compunction about taking legislative action to suspend the rights in question.

The Canadian version of Wagnerism has, however, also given unions enough institutional security to discourage serious consideration of possible alternative forms of regulation. The labour movement has by no means been complacent; it has always sought, and continues to seek, improvements to labour law that will bring stronger rights and protections for working people in general. Moreover, individual unions have continued to display a strong commitment to new organizing. They continue to make extensive efforts to organize such notoriously anti-union employers as Walmart Canada, and the United Food and Commercial Workers has even pursued certification for agricultural guest workers in Manitoba and British Columbia. Those efforts have, however, remained within the framework of Wagnerism and have met with limited success, perhaps for that reason. A partial exception has been a framework agreement between the Canadian Auto Workers and Magna International through which the union has essentially given up certain traditional rights in return for ease of access to other groups of employees for organizing purposes. This agreement has been highly controversial among union

supporters,⁸³ and it appears to have only led to the organization of a few units of employees.⁸⁴

The Canadian union movement's efforts at labour law reform have also been limited in both intensity and scope. Unions have tended to confine their demands to the restoration of repealed rights and protections—card-check certification, for example—rather than seeking reforms that go beyond the confines of the Wagner model, such as the granting of universal consultation and representation rights. The relative security enjoyed by the Canadian labour movement under existing laws may have led to an institutional conservatism that works against the development of alternative strategies for recognition or representation.

Just as the Canadian version of Wagnerism can be accounted for by the institutional norms and traditions discussed above, so may the conservative attitude of the Canadian labour movement. That attitude reflects the deeply ingrained Canadian version of (moderate) social unionism, and the requirement that unions operate within the constraints of Wagnerism. Unions as institutions are defined by complex formal and informal rules and assumptions that developed over a long period and involve substantial layering and self-reinforcing feedback processes. From a historical-institutionalist perspective, it is hard for unions to depart from these norms in any substantial way without risking institutional collapse—unless, as is now the case with the American labour movement, institutional collapse is

83. See e.g. Tony Van Alphen, "Hargrove gambles with Magna Deal" *Toronto Star* (20 October 2007) online: Toronto Star <<http://www.thestar.com>>; Tony Van Alphen, "Key CAW leader opposes Magna Deal" *Toronto Star* (29 October 2007) online: Toronto Star <<http://www.thestar.com>>; Ed Broadbent, "No place for phoney, defanged unions" *The Globe and Mail* (30 October 2007) online: The Globe and Mail <<http://www.theglobeandmail.com>>.

84. There have been a few other, albeit rather tepid, attempts to move beyond the Wagner model. Most notable are union-established storefront operations in a number of cities (e.g. Winnipeg) to assist unorganized workers who have been subject to a violation of employment law. These initiatives have received little support within the labour movement as a whole.

imminent without such departure.⁸⁵ Any attempt by labour leaders to move away from the Wagner model or from traditional unionism is thought to risk weakening the labour movement.⁸⁶ Government attempts to develop new bargaining structures (such as through sectoral councils⁸⁷) have done little to strengthen the position of unions, except possibly in Quebec. In the absence of a strong push from the Canadian labour movement for more fundamental changes in labour law, it is highly unlikely that there will be much change to the current system. Attempts at union renewal, such as the innovative “New Union Project” of the Canadian Auto Workers and the Communications, Energy and Paperworkers Union, are not likely to make much of a difference unless they offer an alternative to Wagnerism that can be convincingly sold as compatible with Canadian traditions of peace, order and good government.

V. The End of Canadian Wagnerism?

Although Canadian-style Wagnerism has so far proven to be largely compatible with Canadian norms and traditions, there is reason to question whether it is still as secure as my thesis suggests. A shift toward more neo-liberal economic policies has combined with the forces of globalization and with the limitations of the Wagner model to weaken the

85. The “organizing” model of unionism has had such limited success in the US in part because it is generally inconsistent with the traditions of the labour movement and the orientations of its members and their front-line representatives. See e.g. Richard W Hurd, “The Rise and Fall of the Organizing Model in the US” in Harcourt & Wood, *supra* note 3 191; Richard W Hurd, “The Failure of Organizing, the New Unity Partnership and the Future of the Labor Movement” (2004) 8:1 Working USA 5. The provision of minority representation rights would also likely require a major and potentially disastrous adjustment to Canadian union traditions and operations.

86. I have recommended the adoption of certain minority representation rights. John Godard, “Labour Unions, Workplace Rights and Canadian Public Policy” (2003) 29:4 Can Pub Pol’y 449 [Godard, “Labour Unions”]. Although it is argued that these rights would give unions expanded opportunities to represent workers and would be consistent with Canadian traditions, they would be substantially weaker than the rights that accompany collective bargaining under the current system. There is always a risk that they would undermine the system rather than supplement it. Perhaps for this reason, the Canadian labour movement has had no interest in minority representation rights.

87. See Morley Gunderson & Andrew Sharpe, eds, *Forging Business-Labour Partnerships: The Emergence of Sector Councils in Canada* (Toronto: University of Toronto Press, 1998).

power of Canadian unions and to force compliance from workers. This has led to the weakening of labour laws in several Canadian jurisdictions—especially in Ontario—and an ever-increasing government willingness to rely on back-to-work orders and prohibitions on strike activity in the public sector (and occasionally in the private sector).⁸⁸ Canadian governments also continue to intervene directly in public sector labour relations by statutorily removing matters from the scope of bargaining and by imposing collective agreement terms.⁸⁹

This shift can be explained by a number of developments, including global economic instability, a state fiscal crisis beginning in the mid-1980s and a neo-liberal onslaught originating from the business community.⁹⁰ However, it may also be explained in part by a failure of the Wagner model to fully achieve the state's objectives. Canadian labour laws have long been designed to effectively control the exercise of the right to strike, and they place substantial restrictions on that right. Yet, although days lost due to strike activity dropped in the 1990s to roughly one quarter of what they were in the 1970s and are still at historically low levels, Canada

88. See Leo Panitch & Donald Swartz, *From Consent to Coercion: The Assault on Trade Union Freedoms*, 3d ed (Aurora, ON: Garamond Press, 2003); Derek Fudge, *Collective Bargaining in Canada: Human Right or Canadian Illusion?* (Toronto: NUPGE and UFCW, 2005); "Internationally Recognized Core Labour Standards in Canada: Report for the WTO General Council Review of the Trade Policies of Canada" (March 2007), online: International Trade Union Confederation <<http://www.ituc-csi.org>>. For a detailed discussion of the Harper government's recent direct interventions, see Brian A Langille, "Why the Right-Freedom Distinction Matters to Labour Lawyers—And to All Canadians" (2011) 34:1 Dalhousie LJ 143 at 145–46.

89. See e.g. *Education Improvement Act*, SBC 2012, c 3 (back to work legislation which imposed a collective agreement, effectively affirming earlier statutory removal of class size and composition from the scope of bargaining); *Expenditure Restraint Act*, SC 2009, c 2, s 393 (wage control legislation); *Protecting Air Service Act*, SC 2012, c 2 (back to work legislation); Bill C-5, *An Act to provide for the resumption and continuation of air service operations*, 1st Sess, 41st Parl, 2011 (first reading 16 June 2011); *Restoring Mail Delivery for Canadians Act*, SC 2011, c 17 (back to work legislation); *Putting Students First Act*, 2012, SO 2012, c 11 (back to work legislation, including the potential for imposition of terms or entire agreements).

90. See Jamie Brownlee, *Ruling Canada: Corporate Cohesion and Democracy* (Halifax, NS: Fernwood, 2005).

has the highest percentage of working time lost due to strikes of any major developed nation.⁹¹ Its labour relations generally remain adversarial.⁹²

In policy documents and processes, Canadian state elites (especially at the federal level) have come to increasingly marginalize labour unions and collective bargaining, and support for the unions has increasingly been viewed as “old thinking”.⁹³ In the 1990s, emphasis began to shift towards more managerialist policies, designed to promote alternative forms of work and human resource practices associated with the high performance paradigm on the one hand, and with enhanced human capital on the other. This new paradigm allows some role for unions, but only if they are willing to discard their traditional adversarial approach in favour of a more cooperative, partnership-oriented model, typically on management’s terms. With the election of a Conservative federal government, and with politics in some provinces (such as Saskatchewan and Ontario) taking a more conservative turn, even that paradigm has been giving way to one that is characterized by less respect for labour rights.

It is possible to argue that these developments signal the potential demise of the Wagner model in Canada, and that the level of union recognition will face the same disastrous decline it has suffered in the US. Even though different institutional traditions and norms may have made a difference in Canada historically, that difference is slowly disappearing thanks to globalization, to a perceived failure of Wagnerism as a means to industrial peace, and possibly to shifting policy goals. The increasingly contemptuous attitude of some governments toward unions and collective bargaining, and ongoing changes in the Canadian political economy, may gradually be bringing to the fore a strategy of outright coercion. For the

91. See Dominic Hale, “International Comparisons of Labour Disputes in 2006” (2008) 2:4 *Econ and Lab Mkt Rev* 32; Peter Annis, *Work Stoppages in the Federal Private Sector: Innovative Solutions* (Ottawa: Human Resources and Skills Development Canada, 2008) at 16–23 (offering some caveats about the methodology and conclusions of the Hale study and an alternative analysis addressing some weaknesses of that study, and providing a better comparison with US work stoppage rates).

92. See Roy J Adams, “A Pernicious Euphoria: 50 Years of Wagnerism in Canada” (1995) 3 *CLEJLJ* 321 at 340–41 (contending that a key reason Canadian governments have found relatively high work stoppage rates to be acceptable is that the Wagner model ensures that stoppages will “generally occur in an orderly and predictable fashion” and will therefore be less disruptive than under other policy frameworks).

93. See Godard, “Labour Unions”, *supra* note 86.

majority of workers who lack meaningful access to union representation under Canadian Wagnerism, this strategy has long prevailed in practice. It has, however, been gradually extended even more broadly over the past few decades, as witnessed by the substantial decline in private sector union density.

From a historical-institutionalist perspective, policies that deviate too far from a nation's historical trajectory are unlikely to survive for long. To an extent, this is demonstrated by the failure of the Wagner model in the US. The opposite may be the case in Canada, where the Wagner model has been, and continues to be, far more consistent with institutional norms and traditions than the more coercive regime portended by recent developments. While the level of working time lost to strikes in Canada is indeed high compared to other nations, Canadian law tightly controls strike activity,⁹⁴ and informed observers seldom identify it as a serious economic problem or source of instability. Even if a more coercive strategy may now be even better suited to stability than the Wagner model is, such a strategy could have a variety of unintended economic and political consequences, especially as it is inconsistent with institutional norms favouring collectivism, social inclusion and state intrusion into the economy, all of which underpin not just Canadian Wagnerism, but Canadian society as well.

In *BC Health*,⁹⁵ the Supreme Court of Canada held not only that collective bargaining is protected by the freedom of association clause in the *Charter*, but that it is "a fundamental aspect of Canadian society" and that giving it constitutional recognition "reaffirms the values of dignity, personal autonomy, equality and democracy that are inherent in the *Charter*".⁹⁶ Optimistic interpretations of this ruling suggested that it not only affirmed the Wagner model but also created an opening for moving toward a system that mandated minority unionism in some form.⁹⁷

94. See Godard, *Industrial Relations*, *supra* note 4 at 337.

95. *Health Services and Support-Facilities Subsector Bargaining Association v British Columbia* 2007 SCC 27, [2007] 2 SCR 391.

96. *Ibid* at paras 41, 86.

97. See e.g. Roy J Adams, "From Statutory Right to Human Right: The Evolution and Current Status of Collective Bargaining" (2008) 12 *Just Labour* 48; Roy J Adams, "Collective Bargaining as a Minimum Employment Standard" (2011) 22:2 *Econ & Lab Rel Rev* 153.

The fact that *BC Health* was the Supreme Court's response to coercive labour policies of the British Columbia government also suggested that it might serve as a deterrent to such policies in future. That optimism may have been misplaced; more recent Supreme Court decisions have not only weakened the *BC Health* ruling, but may have opened the door to undermining the Wagner model. *BC Health* may turn out to be less important for its interpretation of freedom of association under the *Charter* than for its affirmation of deeply held norms and its repudiation of governmental coercion as inconsistent with these norms. The question is whether, contrary to a historical-institutionalist perspective, a federal government and like-minded provincial governments that hold those norms in contempt can manage to erode them. If those norms do remain intact, current government policies that run counter to them can be expected to lead to longer-term social and economic instability, as conflict normally voiced through collective representation at work becomes diverted into less visible but more pernicious forms.⁹⁸ This could in turn lead to a correction back in favour of the Wagner model or another system of collective representation. For a more coercive institutional regime of the sort favoured by neo-liberal ideology to take firm root, it would not be enough just to erode the existing norms that support the Wagner model; they would have to be replaced with a different set of norms which would be a better fit with a regime of that sort. Such norms might already be predominant in the US, but this is because they are embedded in that country's institutions and traditions and they reflect more than two centuries of its history. It is unlikely, at least in the short run, that they could be replicated and institutionalized sufficiently in Canada to sustain a labour law regime similar to that which has developed in the US. If this is so, the erosion of the current regime and the norms which underpin it could have long-term costs for Canadian governments that far exceed any short-term benefits.

Conclusion

This paper has argued that Canadian institutional norms and traditions have been more conducive to Wagnerism than has been the

98. See John Godard, "What Has Happened to Strikes?" (2011) 49:2 *Brit J Indus Rel* 282.

case in the US, in part because they have allowed for the development of a more state-controlled form of union-management relations and for stronger laws designed to ensure stability. This has been something of a double-edged sword for the labour movement. The Wagner model has given trade unions a degree of institutional security and membership strength, but it has effectively trapped them under the law, precluding them from representing most workers and giving rise to institutional conservatism. This raises the prospect of stagnation or gradual decline of the labour movement. From a historical-institutionalist perspective, however, that prospect is not inevitable, for it would require overcoming strong institutional norms and traditions that reflect formative historical conditions.

