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CONFERENCE

Back to the Future of Canadian Labour Law

David J. Doorey

The invitation to present the 2019 H.D. Woods lecture came with a proposed subject: *The Future of Canadian Labour Law*. A wiser person may have suggested something else, something less prone to fail the test of time. However, that person is not me, and while I will eventually address the question I was assigned, I will beg your patience because it will take me a while to get there. That is because I intend to start back in the 1980s, right around when Professor Harry Arthurs gave his 1984 H.D. Woods lecture[1], and work forward to my ultimate conclusion that important clues about "the future of Canadian labour law" lurk in two big debates that occupied legal and industrial relations scholars in Canada through that decade.

The first debate engaged comparative labour law and the question of how to restore access to collective voice for U.S. workers at a time when private sector union density there sat at about 15 percent, approximately the rate in Canada today. The second debate concerned the potential impacts on the laws of work of the newly enacted *Charter of Rights and Freedoms*. Two prominent former students of Arthurs will play prominent roles in my talk today. The first is Paul Weiler, a labour law legend here in British Columbia, where he helped draft the *Labour Relations Code* and then served as Chair of the B.C. Labour Board in the late 1970s, before leaving to become the first Canadian with a tenured position at Harvard Law School.[2] Weiler's proposals to create a sort of hybrid Wagner Model that combined features of the Canadian and U.S. versions may attract renewed interest on this side of the border as Canadian private sector union density continues its steady decline. The second is David Beatty, who presented

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For an extended exploration of the subject matter, see David J. Doorey (2020) "The Resurrection of David Beatty (and other Thoughts on the Future of Labour Law)." *University of Toronto Law Journal* (forthcoming).

the H.D. Woods Lecture in 1987 and taught me Labour Law in 1990. Beatty's predictions for a post-*Charter* labour law revolution were initially mocked. However, more recently, the arc of *Charter* jurisprudence has shifted towards Beatty's normative vision.

The First Debate: Paul Weiler and Comparative Labour Law

In 1984, Paul Weiler published his famous *Harvard Law Review* article "Promises to Keep: Securing Workers' Rights to Self-Organization under the NLRA" ("Promises to Keep").[3] That article, and related work, influenced a generation of U.S. labour law scholars and policy-thinkers. Weiler was writing at a moment when labour law and collective bargaining were widely recognized to be in crisis in the U.S. Private sector union density there had fallen from near 40 percent in the 1950s to about 15 percent in the early 1980s and Weiler predicted, correctly as it turned out, that union density would fall below 10 percent by the turn of the century.[4] His mission was to restore access to worker voice in the U.S. through collective bargaining, and he had some ideas on how to achieve this drawn from his extensive Canadian experience.

His thesis was straightforward. Weiler believed that much of the problem of declining collective bargaining coverage in the U.S. could be attributed to poorly designed labour laws. Therefore, he proposed a series of Canadian-inspired reforms to the *National Labor Relations Act* (NLRA). One batch of proposals aimed at improving the operation of the U.S. Wagner Model to enable easier access to union certification. For example, Weiler proposed Canadian style 'instant certification ballots' to replace the months' long pitched battles common in the U.S., and extending stronger protections for the right to strike, such as by replacing the right of employers to permanently replace strikers with a rule like the one in effect in Ontario, which protected jobs for the first six months of a work stoppage.[5]

However, Weiler recognized too that even if these reforms were implemented, the majority of U.S. workers would still never access full-fledged majority/exclusive trade union representation under that Model. Therefore, in a second strand of reforms, he urged that U.S. labour law no longer rely entirely on the Wagner Model as the sole mechanism for collective employee voice.[6] Referencing work by Canadian scholars Roy Adams and David Beatty, Weiler advocated for mandatory 'employee participation committees' (EPCs) designed loosely on the German works council model and joint health and safety committees, which were a relatively new innovation in some Canadian provinces.[7] EPCs would not be on par with 'full-blown union representation', but they could provide some worker voice where there presently was none, and they would give non-union workers a taste for collective voice and action.[8]

Weiler knew that in the U.S., section 7 of the NLRA protects a right of employees to engage in "concerted activities for mutual aid and protection", which includes a limited right to strike for non-union and union employees alike. If Weiler's proposed restrictions on the right of employers to terminate strikers were instituted, then non-union workers who were unhappy with their employer's response to the new EPCs could strike.[9] Moreover, if the prospect of striking without the protection of a union proved too daunting, as it often would, then the workers might just be tempted to join a real majority union.[10] Weiler anticipated that the application of Section 7 to concerted activities outside of formal majority trade unionism would grow more significant as union density fell below 10 percent, and he was right. More on this later.

As we know, none of Weiler's proposed reforms came to pass. In fact, things have gotten much worse from a labour law perspective in the U.S. since Weiler wrote his influential comparative law pieces. Private sector union density has fallen to a startling 6.2 percent (2019), and unions have all but abandoned the NRLA certification model in favour of alternative forms of self-help collective pressure and voluntary recognition.[11] Since the 1980s, the number of 'right to work' states that ban union security clauses has increased to 27 states, including northern industrial states like Michigan, Indiana and Wisconsin. In addition, a deeply divided U.S. Supreme Court last year ruled in *Janus v. ACSME* that employees in the public sector must opt-into the payment of union dues, effectively rendering the entire U.S. public sector "right to work".[12]

The Second Big Debate: On Romantics, Skeptics and Pragmatic Pluralists

The second big debate of the 1980s concerned the potential impacts on labour law of the newly enacted *Charter of Rights and Freedoms*. This debate engaged almost every labour law scholar in Canada, including Arthurs, Weiler and Beatty. The academic literature pigeon-holed commentators into three general camps with the following labels:

1. The "Sceptics", starring Harry Arthurs
2. The "Pragmatic Pluralists", starring Paul Weiler.
3. The "Romantic Liberals", starring David Beatty.[13]

Arthurs was a leading *Charter Sceptic,* who argued that the courts have been screwing over workers for so long that only a naïve dreamer would believe that they would suddenly use their newly found power of constitutional judicial review to chart a progressive way forward for workers.[14] Sceptics cautioned against attempting to use the *Charter* proactively to advance workers' rights, fearing it would backfire.

Weiler led the *Pragmatic Pluralists* camp, which shared the Sceptics' concerns about the historical record of judges.[15] However, more so than the Sceptics, they were prepared to give judges the benefit of the doubt. They doubted that the *Charter* would be used as a weapon to trample upon vulnerable workers and workers' rights, and argued that judges would "muddle through on a case-by-case basis", shy away from activism and mostly defer to legislatures, but intervene if they believed the state had clearly over-reached.[16] Weiler argued that the *Charter* offered a "potentially valuable restraint on politicians who may be tempted to appeal to popular emotions to try and win elections by enacting laws that deny fundamental rights of a minority," but also doubted that the *Charter* would ultimately reshape the law of work and argued that it should not.[17]

David Beatty was the leading, perhaps only voice in the *Romantic Liberal* camp.[18] In a series of publications, including the 1987 book *Putting the Charter to Work: Designing a Constitutional Labour Code,* Beatty argued that the *Charter* would, and should, lead to a fundamental redesign of the Canadian Wagner Model and of equality rights at work.[19] Beatty envisaged the *Charter* ushering in a more just labour market that better protected the least advantaged Canadian workers after *Charter* judicial review caused the dismantling of the principles of majoritarianism and exclusivity upon which the Wagner Model rests.[20] Only by abandoning the concepts of majoritarianism and exclusivity could labour law finally offer all workers access to collective bargaining.[21]

The Wagner Model of freedom of association (FOA) failed to protect both the positive and the negative freedom of association and, therefore, would not survive *Charter* scrutiny.[22] It failed to protect positive FOA because it excluded the majority of Canadian workers, both by expressed law in the case of the many statutory exclusions (think agricultural and domestic workers, among many other excluded occupations), and in practice, by creating insurmountable obstacles to achieving the majority, excusive trade unionism that the Wagner Model required as a precondition for the practical exercise of collective bargaining and the right to strike. It failed to protect the negative FOA because it compelled employees to support a single union preferred by a majority of workers as a condition of collective representation at work.[23] The negative FOA put a variety of features associated with the Wagner Model in the cross-hairs, including the principle of exclusivity, as well as union security provisions that required workers to join specific unions (closed-shop and union-shop) and pay union dues towards union activities unrelated to collective industrial governance. [24]

Beatty pointed to European systems of "plural" and "voluntary" collective representation, including German works councils, as examples of alterative models of collective bargaining that provide workers with genuine voice while compromising FOA less than the Wagner Model. In these alternative models,

workers have greater choice as to which employee associations to join, or not join, and have the means to participate in collective decisions regardless of their union status.[25] Beatty was not suggesting that in a post-*Charter* era the Wagner Model would suddenly be supplanted with one of the European models. Rather, the *Charter* would provoke a 'conversation' about labour policy that would eventually result in the dismantling of the Wagner Model and the evolution of a new *Labour Code* that included 'principles' drawn from the European experience.[26] That new *Code* would guarantee all workers a means to participate in workplace decisions that was not contingent on proving majority support in a single trade union.[27]

During the *Charter*'s first 15 years, Beatty appeared to be wrong on every account. The Supreme Court of Canada (SCC) behaved precisely as the sceptics had predicted. Beginning with *RWDSU v. Dolphin Delivery* in 1986[28], to the 1987 "Labour Trilogy" [29], to *PIPS v. NWT (Commissioner)*[30] and *McKinney v. University of Guelph*[31] in 1990, to *Lavigne v. OPSEU* in 1991[32], the SCC rejected Beatty's analysis wholeheartedly. I was a student in Beatty's Labour Law class in 1990 in the midst of this wave of cases rejecting his thesis. I recall a particular class, following the release of the *McKinney* decision and after some ribbing from students, Beatty declared defiantly to the class that one day he would be "redeemed". However, by 1991, Beatty had conceded defeat to the sceptics.[33] Professor Brian Etherington declared in 1992 that Beatty's "naïve" and "simplistic" predictions had been "soundly and repeatedly rejected".[34] The labour law academy, Beatty included, moved onto other endeavours, and the *Charter* entered a decade-long period of hibernation.

Then something unexpected happened. In a stunning reversal as a new century dawned, the SCC revisited its earlier narrow interpretation of FOA and embarked on a nearly two-decade long odyssey of reformation on freedom of association.[35] Beginning with the 2001 decision in *Dunmore v. Ontario (Attorney-General)*[36], through 2007's *Health Services and Support - Facilities Subsector Bargaining Assn. v. British Columbia*[37] and 2011's *Ontario (A-G) v. Fraser*[38], and concluding with 2015's *Saskatchewan Federation of Labour v. Saskatchewan (SFL)*[39] and *Mounted Police Association of Ontario v. Canada (A.G.)* (*MPAO*)[40], the SCC charted a new FOA blueprint. While it will take years to unpack what this new bundle of rights and freedoms under s. 2(d) of the *Charter* means for workers in practice, the SCC's unexpected change of direction shocked the labour law academy out of its *Charter* slumber. Some of us even dusted off Beatty's old work and noticed that the new blueprint shared a lot in common with Beatty's vision of a post-*Charter* labour law. Maybe Beatty was on the road to redemption.

It is true that the SCC rarely followed Beatty's reasoning in reaching its conclusions, but there is no denying that the labour law landscape today looks much

closer to Beatty's normative vision than at any time before. Occupational exclusions from collective bargaining legislation have been struck down; constitutional rights to collective bargaining and to strike have been recognized; negative FOA has been recognized by the SCC[41]; in *Pepsi-Cola Canada,* while the SCC did not overrule *Dolphin Delivery,* it did subject the common law to limited *Charter* scrutiny through the backdoor by striking down the common law rule that all secondary picketing was "unlawful *per se*" as being inconsistent with "*Charter* values".[42] All of these developments are consistent with Beatty's vision. However, the Wagner Model and its twin pillars of exclusivity and majoritarianism still reign as the dominant model of collective bargaining in Canada. Beatty's prediction that constitutional judicial review would result in the courts striking down the Wagner Model has not, and will not likely in the future, come to pass. The SCC has stamped its approval on the Wagner Model.

And yet there are cracks in the foundation. The SCC has emphasized repeatedly in its recent section 2(d) decisions that the principles of exclusive majority representation in the Wagner Model mold are not required by the *Charter*.[43] The *Charter* protects a "meaningful process of collective bargaining" that permits workers to associate and make collective representations to their employer. Exclusive, majority trade unionism in the Wagner mould is but one model though which governments can instantiate these collective goals. This leaves the door open to experimentation with different models of collective bargaining, and here is where I will tie the two big 1980s debates together around the subject I was assigned for this talk, *The Future of Labour Law*.

The Future of Canadian Labour Law: The Legal Foreshocks Coming Our Way

The climate in Canada today is similar to that which greeted Weiler upon his arrival at Harvard in the mid-1980s. Private sector union density is in decline and could well fall below 10 percent of Canadian workers. It is not surprising, therefore, that there is heightened interest in Canada, as in the U.S., in alternative models of collective bargaining that could bolster or even eventually supplant the Wagner Model. In the near term, familiar debates over modest reforms to the Wagner Model will continue. The pendulum will swing back and forth on the margins with occasional tweaks of the Wagner Model as governments come and go, as has become the norm since the 1990s. However, the push to identify alternatives to the Wagner Model will accelerate as private sector union density falls towards 10 percent as occurred in the U.S. beginning in the 1980s.

The big reform ideas will focus on models that build upwards from the Wagner Model, such as on broader-based and sectoral bargaining schemes[44], and downwards from that Model, such as on the prospects for minority unionism and

other forms of non-majority, non-exclusive employee representation.[45] Nothing new here; these ideas have been floating around policy discussions for decades. However, huge obstacles exist to reform that would fundamentally alter or even supplant the Wagner Model. Labour law reform is possible in Canada (unlike in the U.S.), but it has proven exceedingly difficult to make *sustainable* labour law reform. Recent experiences in Ontario and Alberta are demonstrative of a national pattern since the 1990s. In both provinces, even relatively modest labour law reforms aimed at facilitating collective bargaining were immediately repealed by newly elected Conservative and United Conservative Party governments in Ontario and Alberta, respectively. Conservatives have demonstrated no interest in facilitating greater private sector collective bargaining access and are more focused on weakening public sector collective bargaining, the last bastion of the Wagner Model. Labour law reform in Canada has become a deeply partisan exercise, as has long been the case south of the border.[46]

It is exponentially more difficult to make substantial labour law reform stick. Consider the recent expert report commissioned by the Ontario Liberals, *The Changing Workplaces Review*. The experts were specifically encouraged by the government to consider new labour relations models to better protect precarious workers who have not benefited from the Wagner Model. Yet the *Final Report* dismissed sectoral bargaining as unworkable in sectors without a history of collective bargaining, which of course is precisely where sectoral bargaining is most needed.[47] Baring a sudden, dramatic uptick in worker power and militancy prepared to challenge the political status quo such that even capital accepts the need for a new model of collective bargaining—similar to what occurred in the 1940s—it seems unlikely in the present polarized political climate that a lone provincial government would take a leap of faith and introduce a brand-new collective bargaining scheme that empowers workers and their associations. Even were that to happen, the lifespan of the model could be a single political term.

I am not suggesting that more fundamental collective bargaining reform, such as sectoral bargaining for example, will not eventually come to Canada. Every century re-invents labour law and we are two decades into this one. My point is that a safer bet is that a post-Wagner model of collective bargaining will emerge not by means of a sudden legislative tsunami, but in the wake of a series of smaller foreshocks. In the short time I have left, I will even hazard a guess at what some of those foreshocks might look like. There will be foreshocks that strike outside the boundaries of the Wagner Model, and one in particular that may soon rock the Wagner Model itself.

The first foreshock has already begun and will hit occupations presently excluded from the Wagner Model entirely. After the SCC's decisions in *Dunmore* and *Mounted Police Association of Ontario v. Canada (Attorney General)*[48], it

seems clear that the exclusion of entire occupations (such as agricultural, domestic employees) from protective collective bargaining legislation is no longer tenable, a result Beatty predicted.[49] The more interesting question is what sorts of collective bargaining models will emerge to cover previously excluded workers? Governments could sweep those workers into the Wagner Model.[50] However, we know from *Fraser* that they need not do so. The decidedly non-Wagner *Agricultural Employees Protection Act* (*AEPA*) that was upheld in that decision provides a potential roadmap for the design of a different sort of collective bargaining model that is *Charter* compliant, and yet much thinner than the Wagner Model.[51] The *AEPA* protects workers from reprisals for engaging in associational activities and recognizes a right of workers to be represented by minority unions or other "employee associations", but imposes on the employer nothing more than a duty to engage in a "meaningful dialogue" with whatever employee association comes knocking. The *AEPA* also lacks a right to strike. The elephant in the room, post *SFL,* is whether the *AEPA* model will withstand *Charter* scrutiny now that there is a constitutional right to strike.[52]

This absence of a right to strike in the *AEPA* may give rise to the next foreshock to hit Canadian labour law. The issue is already percolating up the judicial ladder.[53] For workers in jobs excluded from the Wagner Model, the absence of statutory protections against reprisals for collective withdrawals of their labour is a glaring hole in Canadian labour law. If, as the SCC pronounced in *SFL*, "the right to strike is constitutionally protected because of its crucial role in a meaningful process of collective bargaining", and the *Charter* guarantees a meaningful process of collective bargaining, then it is difficult to see how the complete exclusion of workers from protective labour legislation, and models such as the *AEPA* which do not protect a right to strike, can survive the next foreshock. What model will emerge to fill this legal void remains unclear. What is clear is that the future Beatty predicted, in which the *Charter* would necessitate a policy conversation about different models that could extend access to collective bargaining to all workers, is now upon us. Beatty's belief that this conversation would ultimately cast policy-makers' gaze east towards European models of "plural" and "voluntary" collective bargaining, including in the form of works councils, may just yet prove prescient.

A different foreshock may soon rattle the Wagner Model itself. It was foreshadowed in Weiler's earlier work on how to restore collective voice in the U.S. Crucial to his model was the broad reach of the NLRA section 7 right of all employees to engage in "concerted activities for mutual aid and support", which encompasses a limited right to strike for unionized and non-union workers alike. In the U.S., where some 94 percent of the private sector workforce is non-union, the application of section 7's right to engage in concerted activities outside of

full-fledged Wagner-style collective bargaining "is all that matters" for most workers in labour law terms.[54] In recent years, section 7 has provided important protections for hundreds of non-union workers participating in large-scale campaigns across the U.S., often with the aid of worker centres, including mass fast food strikes, the "Fight for $15", and campaigns by Amazon, Whole Foods, and technology workers.[55] This form of collective resistance will become more common, and more necessary, in Canada as union density continues to decline and as worker frustration with economic inequality and lack of control over their working lives grows. The lack of legal protections in Canada for workers who engage in concerted activities outside of traditional trade union organizing and collective bargaining will be noticed.

Whereas the NLRA builds up from a general right to engage in concerted activities, Canadian labour law is constructed upon a narrower right to engage in "trade union activities".[56] This difference is notable in cases involving non-union employees who are terminated in Canada for raising work-related concerns with their employers on behalf of themselves and coworkers.[57] In the U.S., such terminations amount to clear violations of NLRA section 7 with reinstatement as a likely remedy.[58] In Canada, it would take an expansive and purposive reading of "trade union activities" in our collective bargaining statutes to extend the reach of unfair labour practice provisions to scenarios in which non-union workers experience reprisals for acting in concert without any union involvement at all.[59] Even if the laws were interpreted in this manner, nothing in Canadian law would protect workers who strike to protest the employer's employment practices from reprisals.[60] While such a strike is protected by s. 7 in the U.S., a strike by non-union workers is never lawful under the Canadian Wagner Model.[61]

The absence of a general right to engage in concerted activities in Canada was rarely raised as a concern in labour law reform debates of the past. Weiler noted the absence of a s. 7 equivalent in Canada but did not propose adding it to the B.C. *Labour Relations Code* when he wrote about reforms in the 1980s.[62] However, when he turned his attention a few years later to reforming U.S. labour law, at a time when private sector union density there sat roughly at Canada's present levels, NLRA s. 7 loomed large, including its application to non-union workers. Similarly, the ongoing decline in private sector union density in Canada has drawn renewed interest in the need to protect workers who come together for mutual aid without the direct support of trade unions.[63] Some trade unions proposed the introduction of a "right to engage in concerted activities" in their submissions to the *Changing Workplaces Review*.[64] More recently, a federal government expert panel recommended "introducing a protection for concerted activities" into the labour standards section of the *Canada Labour Code*.[65] Momentum is growing.

The emergence of a Canadian "right to engage in concerted activities for mutual benefit and protection" would be a more substantial shift in Canadian labour law than the typical reforms we are used to, with uncertain implications. However, my guess is that it will emerge in some form anyways because it is a logical next step to ensure that workers have some basic protections when they come together to confront their employer in the manner the SCC envisions in its 21st century blueprint.[66] Regardless of the model that might eventually emerge to supplement or even supplant the Wagner Model, it must include the basic right of workers to associate with one another without being fired for doing so. Even the thin model of collective bargaining in the *AEPA* protects a general right of workers to associate through a union or otherwise, which demonstrates that recognition of a general right to engage in concerted activities is no guarantee of a more empowered workforce. We need only look south of the border to confirm that. An expanded right of workers to engage in concerted activities may not come about because enlightened governments decide to protect workers, although it might. It might happen as part of a larger set of reforms that actually thins collective bargaining rights overall. The devil, as always, will be in the detail.

Conclusion

To conclude, it is a safe assumption that the Wagner Model will be appear in the history sections of Canadian labour law texts a century from now, assuming labour law even exists as a category then. The substance of the law that will consume the rest of the text is anyone's guess. Textbooks of twenty or thirty years from now may be mostly about sectoral bargaining in some form, or some other form of broad-based bargaining. However, I have argued that in the nearer term we are likely to experience smaller foreshocks that rattle existing systems of collective bargaining in Canada without fundamentally overhauling them. Hints as to what those foreshocks might look like may be found in earlier writing of leading labour law scholars who long ago began thinking about a post-Wagner Model landscape.

Paul Weiler, the pragmatic industrial pluralist, believed that the road to renewed worker voice in the face of a failing Wagner Model must begin with a basic openness to alternative forms of collective bargaining that complement that Model and with effective protections of a right of workers to associate and strike when needed even when full-fledged majority trade unionism is unattainable. David Beatty, the romantic liberal, foresaw the end of the Wagner Model in Canada's post-*Charter* future and the positive evolution of a new improved model that would finally provide all workers an opportunity to participate collectively in workplace decisions through "voluntary" or "plu-

ral" models of collective bargaining. Meanwhile, their teacher Harry Arthurs, still the sceptic, recently shrugged and declared that, "collective bargaining as we know it will disappear" and be replaced by a focus on statutory standards "rather than industrial self-government".[67] It seems fitting for this talk to give Harry the last word.

Notes

1 Harry Arthurs (1984) "Understanding: Industrial Relations Research and Policy in Canada from 1969 to 1984… and Beyond." *Relations industrielles/Industrial Relations*, 39 (4), 753.

2 Weiler served as Chair of the BC Labour Relations Board from 1973-1978. In 1978, he took the position of Mackenzie King Visiting Professor of Canadian Studies at Harvard University Law School.

3 Paul Weiler (1984) "Promises to Keep: Securing Workers' Rights to Self-Organization under the NLRA." *Harvard Law Review*, 96 (1), 1769-1827. See also: Paul Weiler (1990) *Governing the Workplace: The Future of Labor and Employment Law*. Cambridge: Harvard University Press [*Governing*]; Paul Weiler (1984): "Striking a New Balance: Freedom of Contract and the Prospects for Union Representation." *Harvard Law Review*, 98 (2), 351 [hereinafter "New Balance"].

4 Weiler, *Governing*, 10.

5 Weiler, *Governing*, 268; Weiler, "New Balance", 393-394.

6 Weiler, *Governing*, 291.

7 Weiler, *Governing*, 282-295. See also: Paul Weiler and Guy Mundlak (1993) "New Directions for the Law of the Workplace." *Yale Law Journal*, 102 (8), 1907. In *Governing*, Weiler cited (note 73, p. 284), Roy Adams in Roy Adams (1985) "Should Works Councils Be Used as Industrial Relations Policy?" *Monthly Labor Review*, 25 (July); Roy Adams (1986) "Two Policy Approaches to Labor-Management Decision-Making at the Level of the Enterprise", in W. Craig Riddell, ed., *Labour-Management Cooperation in Canada*. Toronto: University Toronto Press,), p. 87; and Beatty, *Putting the Charter to Work*, as leading Canadian voices calling for experimentation with works councils.

8 Weiler, *Governing*, *ibid.* at 217-218.

9 Weiler, *Governing*, at 290.

10 *Ibid.*

11 See e.g. James Moore and Richard Bales (2011) "Elections, Neutrality Agreements, and Card Checks: The Failure of the Political Model of Industrial Democracy." *Indiana Law Journal*, 87 (5), 147-163, (citing AFL-CIO president Lane Kirkland, calling for repeal of NLRA and arguing workers would be "better off with the law of the jungle"); David Doorey (2006) "Neutrality Agreements: Bargaining for Representation Rights in the Shadow of the State." *Canadian Labour and Employment Law Journal*, 13 (1), 41-105.

12 *Janus v. ACSME, Council 31*, 138 S. Ct. 2448 (2018).

13 Bernie Adell (1988) "The Queens University Conference on Labour Law under the *Charter*", *Queens Law Journal*, 13, 2; Brian Etherington (1992) "An Assessment of Judicial Review of Labour Laws under the *Charter*: Of Realists, Romantics, and Pragmatists", *Ottawa Law Review* , 24, 685.

14 Harry Arthurs (1984) "The Right to Golf: Reflections on the Future of Workers, Unions and the Rest of Us under the *Charter.*" *Queens Law Journal*, 13, 17. Arthurs more recently conceded, in light of Supreme Court of Canada decisions expanding the scope of section 2(d) [freedom of association], that the "skeptics were wrong": H. Arthurs (2016) "Of Skeptics and Idealists: Bernie and Me and the Right to Strike." *Canadian Labour and Employment Law Journal*, 19, 327.

15 Paul Weiler (1990) "The *Charter* at Work: Reflections on the Constitutionalizing of Labour and Employment Law." *University of Toronto Law Journal*, 40, 117 [hereinafter "Charter at Work"].

16 Weiler, "*Charter* at Work", 151-155; Etherington, 693-694.

17 Weiler, "*Charter* at Work", 165.

18 Etherington, 693, fn. 27.

19 David Beatty (1987) *Putting the Charter to Work: Designing a Constitutional Labour Code*. Montreal: McGill-University Press; David Beatty and Steven Kennett (1988) «Striking Back: Fighting Words, Social Protest and Political Participation in the Free and Democratic Societies.» *Canadian Bar Review*, 67, 573; David Beatty (1989) "Shop Talk: Conversations about the Constitutionality of our Labor Law." *Osgoode Hall Law Journal*, 27, 381 [hereinafter "Shop Talk"].

20 Beatty, "Shop Talk," 425.

21 Beatty, *Putting the Charter to Work*, 152.

22 *Ibid*., especially Chapter 13.

23 *Ibid*., 122.

24 *Ibid*., 126-127.

25 *Ibid*., 144-155.

26 *Ibid*.

27 *Ibid*., 151.

28 *RWDSU v. Dolphin Delivery*, [1986] 2 SCR 573 (*Charter* does not apply to common law rules restricting picketing).

29 No *Charter* protected right to strike: *Reference Re Alberta Public Service Employee Relations Act*, [1987] 1 SCR 313; *PSAC v. Canada*, [1987] 1 S.C.R. 424 [hereinafter PSAC]; R-*WDSU v. Saskatchewan*, [1987] 1 SCR 460.

30 *Professional Institute of the Public Service of Canada v. Northwest Territories (Commissioner)*, [1990] 2 SCR 367 (No *Charter* right to collective bargaining)

31 *Mckinney v. University of Guelph*, 1990 Can LII 60 (SCC) [mandatory retirement not violation of *Charter*].

32 *Lavigne v. Ontario Public Service Employees Union*, [1991] 2 SCR 211 (union expenditures on non-collective bargaining related activities against wishes of dues payers not a violation of *Charter*).

33 David Beatty (1991) "Labouring Outside the *Charter*." *Osgoode Hall Law Journal*, 29 (4), 839, 842 [hereinafter "Labouring"].

34 Etherington, 726, 727.

35 For a summary, see David Doorey and Ben Oliphant (2020) "The *Charter* and the Law of Work", in David Doorey, *The Law of Work*, Second Edition, Toronto: Emond, Chapter 39.

36 *Dunmore v. Ontario (Attorney General)*, [2001] 3 SCR 1016.

37 *Health Services and Support - Facilities Subsector Bargaining Assn. v. British Columbia*, [2007] 2 SCR 391.

38 *Ontario (A-G) v. Fraser*, [2011] 2 SCR 3.

39 *Saskatchewan Federation of Labour v. Saskatchewan*, [2015] 1 SCR 245.

40 *Mounted Police Association of Ontario v. Canada (Attorney General)*, [2015] 1 SCR 3.

41 *R. v. Advanced Core and Cutting Ltd.*, [2001] 3 SCR 209.

42 RWDSU, *Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd.*, [2002] 1 SCR 156.

43 See, e.g., *MPAO*, para. 93.

44 Kate Adrias and Brishen Rogers (2018) "Rebuilding Worker Voice in Today's Economy." (August) Roosevelt Institute, at: <https://rooseveltinstitute.org/wp-content/uploads/2018/07/Rebuilding-Worker-Voices-final-2.pdf>; Diane MacDonald (1997) "Sectoral Certification: A Case Study of British Columbia." *Canadian Labour and Employment Law Journal*, 5, 243; Sara Slinn (2020) "Broader-based and Sectoral Bargaining Proposals in Collective Bargaining Law Reform: A Historical Review." *Labour/Le Travail,* 85; John Baigent, Vince Ready and Tom Roper (1992) *Recommendations for Labour Law Reform: A Report to the Honourable Moe Sihota Minister of Labour*, Victoria, Queens Printer; International Ladies' Garment Workers' Union and Intercede (1993) "Meeting the Needs of Vulnerable Workers: Proposals for Improved Employment Legislation and Access to Collective Bargaining for Domestic Workers and Industrial Homeworkers" (February).

45 See David Doorey (2013)"Graduated Freedom of Association: Employee Voice Beyond the Wagner Model." *Queens Law Journal*, 30 (2), 500 [hereinafter "Graduated"]; Roy Adams (2015-16) "Bringing Canada's *Wagner Act* Regime into Compliance with International Human Rights Law and the *Charter.*" *Canadian Labour and Employment Law Journal*, 19 (2), 365 [hereinafter "Canada's *Wagner Act*"]; Catherine Fisk and Xenia Tashlitsky (2011) "Imagine a World Where Employers Are Required to Bargain with Minority Unions." *ABA Journal of Labor and Employment Law*, 27, 1.

46 Kevin Burkett (1998) "The Politicization of the Ontario Labour Relations Framework in the 1990s." *Canadian Labour and Employment Law Journal*, 6, 161.

47 C. Michael Mitchell and John C. Murray (2017) *The Changing Workplaces Review, Final Report.* (Toronto, May), Chapter 11.6, at: <https://www.ontario.ca/document/changing-workplaces-review-final-report/chapter-11-access-meaningful-collectivebargaining-decision-unionize#section-5> [hereinafter *Changing Workplaces Review*].

48 *Mounted Police Association of Ontario v. Canada (Attorney General),* [2015] 1 SCR 3.

49 Beatty, *Labouring*, 850.

50 Although the Wagner Model is not an obvious fit for domestic workers who work alone in the employer's home.

51 Doorey, "Graduated".

52 See Adams, "Canada's *Wagner Act*".

53 *UFCW v MedReleaf Corp.*, 2018 ONAFRAAT 12 (Can LII), arguing that the absence of a right to strike in the AEPA infringes s. 2(d).

54 Benjamin Sachs and Sharon Block (2018) "Epic Fall Out: The Supreme Court and Concerted Activity." *On Labor* (23 May), at: <https://onlabor.org/epic-fall-out-scotus-and-concerted-activity/>.

55 See David Doorey (2020) "What Recent Strikes in U.S. at Whole Foods, Amazon Disclose about Canadian Labour Law." *Canadian Law of Work Forum* (April 1), at <http://lawofwork.ca/?p=12181>; Paul Secunda *et al.* (2014) *Mastering Labor Law*, Carolina Academic Press, at 69; Janice Fine (2011) "New Forms to Settle Old Scores: Updating the Worker Centre Story in the United States." *Relations industrielles/Industrial Relations*, 66 (4), 604.

56 See Doorey, "Graduated", 521-526; Brishen Rogers and Simon Archer (2016) "Protecting Concerted Action outside the Union Context." *Canadian Labour and Employment Law Journal*, 20 (1), 141; Alan Bogg and Cynthia Estlund (2014) "Freedom of Association and the Right to Contest: Getting Back to Basics." In Tonia Novitz and Alan Bogg, eds, *Voices at Work*. Oxford: Oxford University Press.

57 See *Burton v. Aronovitch McCauley Rollo LLP*, 2018 ONSC 3018 (Can LII); *Alagano v. Miniworld Management (North York Infant Nursery and Preschool),* 1994 Can LII 9887 (ON LRB).

58 See e.g. *Citizens Investment Service Corp v. NRLB* 430 F3d 1195 (DC 2005) [when an individual worker complains about pay practices, it is concerted activity if the complaint is shared by other coworkers].

59 *Alagano v. Miniworld Management* (OLRB ruled that there "was at least an arguable case" that the unfair practice provisions could extend in this manner).

60 See *Alagano v. Miniworld Management* (non-union employees struck in protest of the termination of a co-worker who had voiced collective concerns to the employer).

61 *NLRR v. Washington Aluminum Co.,* 370 US 9 (1962).

62 Paul Weiler (1980) *Reconcilable Differences: New Directions in Canadian Labour Law*.Toronto: Carswell, [hereinafter *Reconcilable Differences*], 69.

63 See Doorey, "Graduated"; Rogers and Archer.

64 See e.g. the submissions of the United Steelworkers, at: <https://cirhr.library.utoronto.ca/sites/cirhr-edit.library.utoronto.ca/files/ontario_workplace_review_phase2/United%20Steelworkers%20%281%29.pdf>, p. 2.

65 Employment and Social Development Canada-ESDC (2020) *Report of the Expert Panel on Modern Federal Labour Standards* (January), Recommendation 25: <https://www.canada.ca/en/employment-social-development/services/labour-standards/reports/expert-panel-final.html#h2.4>.

66 See Doorey, "Graduated", 524-525 and *Dunmore*.

67 Harry Arthurs (2018) "Labour Law in Post-Democratic and Post-Liberal Societies: A Case of Cognitive Dissonance." (June 7). Available at: <https://ssrn.com/abstract=3228089>, p. 3.