AND WAGNERISM SHALL HAVE NO DOMINION

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The theme of Wagnerism has been attracting increasing attention in Canada for several reasons. Perhaps the greatest stimulus for the debate recently is the controversy over the constitutionalization of labour rights and whether some elements of the Wagner Act model, particularly majoritarian exclusivity, should be established as a minimum requirement for a collective bargaining law to pass constitutional muster. But that is not the only reason for interest in considering the fate of Wagnerism. There are two additional developments that are driving this concern. The first is the legislative attack on collective bargaining rights - the primary reason for seeking their constitutionalization – which has been taking place in fits and starts over the past forty years. However, it is important to make clear that these are not attacks on Wagnerism *tout court* but rather on particular elements of the model, the ones that support collective bargaining, rather than the ones that fragment and limit it. There has not been a frontal legislative assault on majoritarian exclusivity, but rather on other elements of the model, which among other things negatively affects trade union formation in a regime of majoritarian exclusivity. The other development is not a legal one, but a political-economic one. The shift from a regime which was informed by weak Keynesianism to one that is driven by the imperatives of neo-liberalism has vastly changed the landscape in which labour and employment laws operate, producing regulatory mismatches even in the absence of retrenchment by the state. It is hardly necessary to recite for this audience the extent of these changes, but we have seen a dramatic shift away from the so-called standard employment relation to precarious employment and from integrated production within single firms in oligopolistic industries to intensely competitive global supply chains, which have combined to create high levels of employer hostility to trade unions and collective bargaining and labour market and industrial structures that are antithetical to the functioning of Wagnerism. This is the Dylan Thomas sense of the title – that the preservation of Wagnerism under these conditions would so shrink collective bargaining and its effectiveness in the Dominion to nominal levels in the for profit, capitalist sector of the economy.

So in this brief presentation, I want to touch on all three of these themes. I begin with a brief discussion of recent labour legislation, focussing on Saskatchewan's controversial Bill 85, enacted this past May, and on Federal legislation enacted over the past year or so by the Harper government. I then will talk about the attempts to resist legislative attacks on collective bargaining rights – or the failure to provide them in the first place – through constitutional litigation, arguing that the prospects of what can be accomplished – not measured in terms of protecting Wagnerism but in terms of raising the constitutional baseline that states must respect –

[1] With apologies to Dylan Thomas

is dimming. I then briefly turn the Dylan Thomas theme that Wagnerism's triumph would, in any event, result in it having 'no' d(D)ominion and conclude with a few thought on the limits of law.

Before proceeding, however, it will helpful to identify some key elements of Wagnerism, the regime of collective bargaining that prevails in the USA and Canada, emphasizing its Canadian variation. Wagnerism has distinctive ways of addressing three key areas of any collective bargaining regime.

1. Trade Union Formation: a) legal protection against employer interference with union organizing; b) majoritarian exclusivity, which means that a union gains bargaining rights for the entire bargaining unit, not just its members, but only when a majority of the members of the bargaining unit indicate their desire to have the union recognized as their bargaining agency; c) state determination of appropriate certification units

2. Bargaining Structure: a) state determination of appropriate bargaining units; and b) extreme fragmentation – baseline is all employees of an employer in a geographic area subject to further fragmentation if different groups of workers have different communities of interest

3. Dispute Resolution: a) terms and conditions of employment to be determined by collective bargaining, failing which the parties can resort to strikes and lock-outs; b) strikes and lockouts prohibited while a collective agreement is in force and until negotiations have reached an impasse; c) binding arbitration of disputes over the interpretation and application of the collective agreement.

It is important to keep all of these dimensions in mind because, as we shall see, legislative erosion is partial; some elements of Wagnerism – particularly fragmented bargaining structures in the private sector – remain untouched. As well, it is important to remember that some elements of Wagnerism are not unique to this legal regime.

I. Legislative Erosion of Labour Rights

While Americans sometimes think they might follow the North Star to find progressive Wagnerism in Canada, the fact of the matter is that the shine has been fading for many years, particularly in the private, but also in the public sector. We will return to the issue of trade union density in the penultimate section of this talk, but for now we also want to focus on the legislative erosion of labour rights over the past several decades. So while it is true that compared to American ossification, Canadian labour law has been frequently amended, the trend in the more recent past has been towards erosion, not strengthening of labour rights, and it is arguable that the pace of erosion is quickening and may accelerate.

The Canadian Foundation of Labour Rights maintains a data base of labour laws restricting collective bargaining and trade union rights dating back to 1982, the year the *Charter* came into force. On a visit in mid May, 2013, 201 laws were listed. The data base does not distinguish between legislation targeting public and private sector unions, but it is well known

that the public sector has been the primary target of what has aptly been characterized as 'permanent exceptionalism' consisting of back-to-work statutes ending lawful strikes, imposed wage restraint, restrictions on the scope of bargaining, and the expansion of essential service worker designations. These are restrictions on Wagnerism's commitment to negotiated contracts determined by the bargaining power of the parties, and even though this principle was only partially embraced for the public sector even in the best of times, its erosion in recent years is undisputed. Moreover, as we shall see, the alternative, binding interest arbitration by a neutral third-party, is also being degraded.

If we focus on private sector collective bargaining law, the most important legislative change has been the end to card count certifications and the imposition of mandatory elections in their place. Prior to 1977 all Canadian jurisdictions provided for card count certifications. Currently, the only ones that retain card counts are the federal jurisdiction, Manitoba, New Brunswick, Prince Edward Island and Quebec. The impact of this charge has been the subject of a number of studies and while their findings differ on the extent of the impact, they are unanimous in concluding that the change has reduced the likelihood of certification success and negatively affected the unionization rate. The negative effect of the change is buffered by the tight timelines the legislation typically imposes between the filing of a certification application and the holding of an election, but an negative effect is still detected in these studies.

On the other hand, and perhaps in contradiction to the general trend, over the same period when card count certifications were being abolished, first contract arbitration was being introduced. Although on its face, first contract arbitration might seem to be a departure from Wagnerism insofar as it provides for third-party imposition of terms and conditions when negotiations fail, the evidence shows that where first contract arbitration is available, the percentage of newly certified unions achieving first agreements by *negotiation* actually increases. Thus FCA legislation should be viewed as remedying a weakness of Wagnerism – its reliance on bargaining in a context where employers are particularly resistant to unions and where unions lack the bargaining resources to induce employers to agree to minimally acceptable terms.

In what follows, I provide a brief overview of the most recent legislative degradation of labour rights, focusing on Saskatchewan's Bill 85's changes to collective bargaining law, and the Federal government's legislation ending strikes and imposing reporting requirements on unions.

A. Saskatchewan, Bill 85

There was much trepidation when the government issued a consultation paper on the "renewal" of labour legislation in May, 2012. Nothing good could be expected from the ideologically conservative Saskatchewan Party that was elected in 2007, replacing an NDP government that had been in power for the previous 16 years, especially in light of its first foray into labour law reform. Shortly after its election, the government enacted Bill 5, which severely restricted the right of public sector workers to strike by the expansion of essential service designations and Bill 6, which eliminated card count certifications and expanded employer voice in union certification campaigns. The questions raised in the paper suggested the government was interested in widening exclusions from the act, increasing trade-union accountability, facilitating decertification, restricting picketing, limiting access to first contract arbitration, and,

most ominously perhaps, moving towards a right to work regime by expanding the freedom of workers to opt out of the union and of dues payment. When Bill 85 was introduced in December, 2012, it turned out that the government was not going after collective bargaining law as aggressively as many had feared. Right-to-work type laws were not present; nor were restrictions on picketing. But the bill was not benign either. It proposed to:

1. Broaden the confidential employee exclusion and preclude supervisors from being in the same bargaining unit as those they supervise.
2. Increase government involvement in dispute resolution and required a 14-day cooling-off period and 48 hour notice to the employer before a strike can occur
3. Provide for last-offer votes at the behest of employers, governments or employees
4. Provide for voluntary recognition
5. Increase decertification opportunities
6. Require consideration of economic conditions in first contract arbitration
7. Require unions to provide audited financial statements to members

Trade unions and the NDP decried the proposed law and the rush to enact it. Their efforts did not prevent the government from going ahead, but it did succeed in some moderation and refinements.

The broadened exclusion of confidential employees remains, so that unlike most jurisdictions that exclude employees employed in a confidential capacity in regard to labour relations, the Saskatchewan provision also excludes employees whose duties include activities of a confidential nature in matters relating to labour relations, business strategic planning, policy advice and budget implementation and planning (6-1(1)(h)(i)(B)). The Act also excludes managerial employees, but on top of that makes special provision to, subject to certain exceptions, prohibit another group, supervisory employees, from being included in the same bargaining unit with the people they supervise (6-11(3)). Supervisory employees are defined broadly to include folks who assign and monitor work, schedule hours and provide comments used for work appraisals (6-1(1)(o)). Apart from the uncertainty about the distinction between a supervisory and a managerial worker, this provision will further fragment bargaining units in an already fragmentary system, especially in a world where employers have constructed internal hierarchies in which low level workers exercise some supervisory authority over other low level workers. It also overrides the preference of workers to bargain together, where such a preference exists. "Worker solidarity – almost never!" is perhaps the slogan that animates these provisions.

The lack of respect for the democratic wishes of a group of employees (a feature of standard Wagnerism, which makes worker preference merely a factor to be considered in determining appropriate bargaining units) is also evident in the law's treatment of voluntary recognition (6-18). While voluntary recognition is permissible in most Canadian jurisdictions, the law typically protects against its misuse to foist a union onto a group of workers who do not want it by allowing any affected employee to apply to have the union's bargaining rights terminated within a year. The burden of proving that the union had majority support rests with the employer and the voluntarily recognized union. No such protections are present in Bill 85. The bill provides a mechanism that allows employers to terminate their voluntary recognition, but it makes no provisions for employees to challenge the recognition. Indeed, it is not even

clear they can bring a decertification application, because the act stipulates that such an application can only be brought "to cancel a certification order" (6-17) and there is no such order where a union has been voluntarily recognized.

But even here there is some unevenness. Worker voice is given weight when it can lead to more fragmentation. Thus in regard to provisions around raiding, the act provides that a union can apply to represent a portion of an existing bargaining unit, provided that smaller bargaining unit is found to be appropriate and the majority of those in that smaller unit wish to be represented by the union (6-10, 6-12). There is no equivalent that respects worker voice when it favours combining bargaining units post-certification, even where the combined unit would be an appropriate one. As well, worker voice is strengthened where it favours decertification. Unlike legislation in other provinces, which link open periods to the expiry of collective bargaining agreements, Bill 85 allows decertification applications to be brought anytime after the first two years, providing only that there must be a 12 month waiting period after a failed application.

In the area of dispute resolution, the legislation creates more impediments to getting into a legal strike position. Most bizarrely, the act provides that strikes are not permitted until conciliation has failed (which is standard in Canada) but in order to get to conciliation "the employer and the union shall provide a notice to the minister that they have reached an impasse." (6-34(1)). If this literally means that strikes and lockouts only become lawful when the parties agree they are at an impasse, then either party can prevent lawful resort to economic weapons by refusing to agree and give notice to the minister that they have reached an impasse. If this is true, the freedom to strike only arises with the employer's consent, which may be withheld indefinitely. Other procedural hurdles include a strike vote (standard) and 48 hour notice to the employer (unusual in Canada, I believe) and the minister.

Apart from the impasse provision, the Bill 85 changes to collective bargaining are surprisingly tame given the tone of the Consultation Paper, which appeared to signal the government's willingness to consider more major degradations. However, the direction of the changes is clear: the government is not interested in promoting trade union formation or meaningful collective bargaining. But some elements of Wagnerism have been enhanced: worker voice is strengthened when it comes to decertification and bargaining unit fragmentation, and more measures have been put in place to avoid strikes, all goals that have been historically embedded in Wagnerism.

B. Federal Labour Law – Harper Style

The current Conservative federal government, which has jurisdiction over labour relations in the federal public sector and the federally regulated private sector (about 10% of the Canadian labour force), has not modified Part I of the Canada Labour Code regarding collective bargaining, but it has intervened in several high profile strikes (or threatened strikes) and is in the process of enacting legislation to increase trade-union accountability, reflecting its intolerance of strikes in those few areas where workers retain an effective capacity to strike and its ideological dislike of trade unions.

The first intervention, Bill C-6, passed in June 2011 (S.C. 2011, c. 17), ended a nationwide lockout of postal workers that followed a series of one-day rotating strikes. The government announced its intent to introduce back-to-work legislation the day after the lockout was announced, suggesting that the employer, Canada Post, and the government, had coordinated their actions. The law provided final offer selection (FOS) as the alternative dispute resolution mechanism; however, it did not simply leave it for an arbitrator to decide between two offers. First, the legislation imposed a wage settlement that was lower than the employer's final offer, and second, it established guiding principles for the arbitrator to follow that included "the need for terms and conditions of employment that are consistent with those in comparable postal industries and that will provide the necessary degree of flexibility to ensure the short- and long-term economic viability and competitiveness of the Canada Post Corporation, maintain the health and safety of its workers and ensure the sustainability of its pension plan..." The government's intolerance of strikes was evident in that they ended the job actions notwithstanding that there was little disruption to the postal service prior to the lockout and a protocol to maintain essential services was in place. For these reasons, the ILO upheld the union's complaint that the government's action violated Convention 87 respecting freedom of association.

The second intervention was in regard to a threatened strike by Air Canada's flight attendants in October, 2011. Air Canada, it is to be noted, is a private carrier, not a state carrier. Here, the government did not enact back to work legislation (there had been no strike and Parliament was not in session) but rather the Minister of Labour, Lisa Raitt, referred the dispute to the labour board, which had the effect of suspending the right to strike. The legal basis for the action was dubious. One referral was made under s. 87.4 allows the minister to send a dispute the labour board where it poses "an immediate and serious danger to the safety or health of the public," a standard that could not possibly be met in this scenario. The second referral was made pursuant to s. 107, an obscure and little used provision that gives the minister an open-ended power to do anything to she deems necessary to maintain or secure industrial peace. In statements to the press, the Minister seemed to imply that she would intervene whenever a strike threatened to be economically disruptive – in other words, whenever a strike would be effective.

Air Canada and the flight attendants agreed to refer their outstanding disagreements for third party arbitration, but that was not the end of Air Canada's labour problems. It was also having trouble reaching an agreement with its pilots and mechanics. In March, 2012, to prevent a labour disruption, the Minster referred both disputes to the labour board pursuant to s. 87.4, but this was simply a pretext to give her time to introduce back-to-work legislation, which she did shortly thereafter. Unlike Bill 6, Bill C-33 (S.C. 2012, c. 2) did not set any terms and conditions, but it did follow the Bill 6 precedent of using FOS and establishing guidelines for the arbitrator to follow: "the need for terms and conditions of employment that are consistent with those in other airlines and that will provide the necessary degree of flexibility to ensure (*a*) the short- and long-term economic viability and competitiveness of the employer; and (*b*) the sustainability of the employer's pension plan, taking into account any short-term funding pressures on the employer" (ss. 14(2) & 29(2)).

The latest piece of back-to-work legislation was enacted in May, 2012, in response to a strike of CPR engineers, yard-workers and conductors. In this case, the government showed unusual tolerance, allowing the strike to continue for nearly a week before legislating an end to it

(Bill C-39, S.C. 2012, c. 8). In this case, the government provided for the appointment of interest arbitrators, without establishing guiding principles to be followed.

Given the frequency of federal interference with legal strikes, one might think Canada was facing a strike wave, but the reverse is true. Nationally, the number of hours lost due to strikes has declined sharply from 10.62 hours per employee in 1976 to 1.01 in 2011. In the federal jurisdiction, there were 10 strikes in 2011, admittedly an increase from 2010 in which there were 7, but hardly a crisis.

Not content to restrict the freedom the strike, the Harper government has also decided to take more control over the collective bargaining process between Crown corporations and their unionized employees. Bill 60, introduced on April 29, 2013, contains an amendment to the Financial Administration Act that authorizes Cabinet to order a crown corporation to have its bargaining mandate approved by Treasury Board, in which case any collective agreement it negotiates much also receive Treasury Board approval. It can also order that Treasury Board have someone at the table. When questioned about the measure, Prime Minister Harper's Parliamentary Secretary, Pierre Poilievre explained: "I am not here to take marching orders from union bosses....It is for those taxpayers that we work. Not union bosses" (G&M, 1 May 2013). In fact, arguably this is not legislation aimed at irresponsible 'union bosses' but rather targets the 'irresponsible' managers that the government appoints to run its Crown corporations.

Finally, there is Bill C-377, a private member's bill that has passed through the Commons and is currently being considered by Senate. The bill, which amends the Income Tax Act, would require unions to provide detailed financial statements, including itemized expenditures over $5,000.00, which would be made publicly available. While the act purports to be about transparency and accountability to members, the fact of the matter is that labour relations statutes in most provinces already require union to provide audited financial statements to their members on request. So rather than being a vehicle for promoting democracy in trade union affairs, the bill is better understood as ideological in its positioning of unions as unaccountable institutions and its imposition of paperwork requirements that would be condemned as unnecessary, intrusive and expensive government red tape if similar obligations were imposed on private corporations.

In terms of Wagnerism, Bill C-377, assuming its passage through Senate, represents a shift in its terms. Wagnerism historically treated unions as private associations whose internal governance was largely left for its officers and members. However, because unions were given an institutional role in the model, the law could not be completely indifferent to how they operated and so from the beginning there were provisions to make unions as institutions behave responsibly toward their members and the public. Unions were given legal status for the purpose of the collective bargaining statutes and could be sanctioned as institutions for breaching those statutes and the orders of labour boards and arbitrators. They were given a duty fairly represent all members of the bargaining unit and prohibited from taking certain actions against bargaining unit members in certain circumstances. And, as mentioned, they had be financially accountable to members. So again, Bill C-377 is not a dismantling of Wagnerism, but a strengthening of one of its elements.

In sum, governments in Canada have not been engaged in a project of dismantling Wagnerism, but rather of selectively strengthening some elements (e.g., worker voice to

decertify and fragment bargaining units, financial accountability) and weakening others (e.g., freedom to strike, worker voice to become certified), all with the intent of weakening the labour movement and undermining union bargaining strength. While these changes do not account for the entirety of the decline in union density and weakening bargaining power, they have contributed to these outcomes and in that way accelerate the trend toward Wagnerism having a shrinking dominion in the Dominion.

II. Constitutionalizing Labour Rights – A Quixotic Quest to Protect Labour Rights?

There are two intermingled questions here. The first is whether the constitution can require or protect Wagnerism. The second, and more important one, is whether the constitution can require or protect meaningful labour rights. I'm skeptical on both counts. But first a short review.

As is well known, prior to the Charter of Rights and Freedoms, about the only role of Canadian constitutional law in the labour area was the determination that labour was a matter of property and civil rights and therefore primarily a matter of provincial jurisdiction. It is perhaps fortuitous that the Charter came into force at the moment when the Canadian state began its turn towards neo-liberalism, but the fact that the Charter was there when it happened made it almost inevitable that the labour movement would seeks its protection when governments enacted back-to-work legislation. This produced the first labour trilogy in which the Supreme Court of Canada declared that freedom of association protects the freedom to form associations but not the freedom to engage in activities central to the association's purposes. Therefore, while the government could not prohibit trade union formation, it was free to restrict collective bargaining and strikes.

The first crack in this approach occurred in *Dunmore* where the court held freedom of association not only protects the freedom of individuals to do in association that which they were free to do individually, but also that it would protect some group activities that did not have an individual analog. This included the freedom to make group representations, although not the freedom to bargain collectively. But a charter of freedoms and not rights in the field of labour provides no protection at all for private sector workers who might face retaliation from employers for exercising their freedoms. Recognizing this, the SCC also accepted that in limited circumstances the Charter might also require the state to protect freedom of association with rights that imposed duties on employers not to interfere with associational freedoms. Farm workers were such a group and so one element of Wagnerism was constitutionally required: the right not suffer adverse employment consequences for engaging in associational activities. As well, because the court recognized that a core associational freedom was the freedom to make collective representations that too was protected activity. This was not quite Wagnerism though because the court did not say that freedom of association protected collective bargaining, only the freedom to make collective representations.

The Ontario government responded by enacting the *Agricultural Employees Protection Act* (AEPA), which provided farm workers only with the minimum rights and freedoms that the court had stipulated, except in one regard. The court had spoken only the freedom to make collective representations. It had not attached a correlative duty on agricultural employers to

respond to those representations, which was understandable given that the court was still unwilling to extend freedom of association to collective bargaining, a process that by its very nature requires some level of employer engagement. But the AEPA provided that employers were obliged to listen to oral representations and read written ones (call this *Dunmore* +). However, given the deep historical animosity of agricultural employers to trade unions, it was pretty obvious that the regime would not enable farm workers to establish collective bargaining relationships with their employers and that turned out to be the case in the few cases where farm workers tried to use the AEPA.

In the meantime, the SCC threw overboard its first trilogy in *BC Health Services* in 2007 and declared that freedom of association did protect a limited right to collective bargaining. We need not parse the judgments here; it has been done elsewhere *ad nauseam* (*mea culpa* – and just about every labour academic). The important point for our purposes was that the SCC not only found that freedom of association protects the freedom to bargain collectively, but that for that freedom to be meaningful there must also be a duty on employers to bargain in good faith. This clearly embraced a core principle of Wagnerism: employers have a duty to bargain in good faith with unions, and perhaps associations, of employees.

The SCC, however, was also quick to point out the limits of its holding. First, the Charter applied only to government, so while the government could not refuse to bargain in good faith, it was not necessarily the case that the government had a positive obligation to include such a duty in its private sector labour laws. Second, the Charter did not protect a right to a particular outcome, but mere a right to a process of good faith bargaining – the essence of Wagnerism's approach to collective bargaining. Third, the SCC made it clear that its decision did not constitutionalize a particular model of labour relations (e.g., Wagnerism) so that the state still enjoyed the freedom to design labour laws, provided they adhered to the constitutional principles articulated by the court. Fourth, the SCC also made it clear that it was not deciding whether freedom of association protected the right to strike. Finally, the SCC did not make it clear to whom that duty was owed. Was it a duty that was only owed to a certified bargaining unit or was the government obliged to bargain in good faith with any group of public sector workers who wished to do so?

The immediate impact of the decision was to put government on notice that legislation prohibiting collective bargaining, abrogating collective agreements and unilaterally and peremptorily imposing terms and conditions on unionized employees were constitutionally suspect. So to a limited extent, the Charter seemed to protect public sector Wagnerism in the general sense that it required the state to bargain in good faith with groups of its employees and limited unreasonable state interference with the collective bargaining process. This is no small measure of protection in an environment in which governments tend to have little patience with public sector unionism.

Whether the Charter will protect anything more than this, or even this much, remains to be seen. The courts have made one thing clear: the Charter does not require other elements of Wagnerism. In particular, in *Fraser*, the SCC overruled the Ontario Court of Appeal's holding that the AEPA failed to pass constitutional muster after *Health Services* because it did not protect agricultural workers' right to bargain collectively. In particular, the OCA had ruled that constitutionally valid farm worker collective bargaining legislation must provide for majoritarian exclusivity, which the AEPA did not. Of course, it is arguable that the OCA imposed that

requirement not because they believed that Wagnerism in general was constitutionally required but rather because in the particular circumstances of agricultural workers in Ontario no other regime would enable them to enjoy collective bargaining, but the SCC did not have farm workers very much in mind in their *Fraser* judgments. Instead, they used the case to emphasize, in the strongest terms, that Wagnerism generally is not constitutionally mandated.

The more troubling question though is what labour right are constitutionally protected after *Fraser*. Presumably, the core of *Dunmore* remains unaffected. Freedom of association protects the freedom to form associations and to make collective representations, and where it can be established that groups of workers cannot meaningfully enjoy those freedoms without rights the state will be obliged to provide them. Also, the SCC insisted that *Health Services* remains valid law, notwithstanding a spirited attack on the decision by two concurring justices who would have overruled it and another concurrence that would have read *Health Services* so narrowly as achieve the same result. However, *Fraser* did introduce some uncertainty about the meaning of *Health Services*. One question is the test that has to be met before the state's obligation to impose rights to protect freedoms kicks in. Arguably, a rights seeker may have to demonstrate that it is "effectively impossible" to enjoy associational freedoms absent the claimed statutory rights. Hence farm workers lost in *Fraser* because they could not show it was impossible for them to enjoy their protected freedoms with the rights given to them under the AEPA, properly interpreted (don't get me started).

A second and, perhaps, more problematic feature of *Fraser* is what is has to say about the scope of freedom of association itself. While there were ambiguities in *Health Services*, it seemed fairly clear that freedom of association extended to collective bargaining, not merely making collective representations, and, therefore, it entailed a duty on the government to bargain in good faith, in the sense the term is understood in traditional labour law. It therefore followed that if private sectors workers could not enjoy the freedom to bargain collectively without positive state support, then the state would be under a duty to legislative impose a duty to bargain in good faith on private sector employers. That was the theory of the plaintiff's case in *Fraser.* After *Fraser*, this is dubious. Rather, it seems, we are at *Dunmore* ++. Freedom of association protects the freedom to make representations, with a correlative duty on employers not only to listen or read those representations but also to consider them in good faith. If it is effectively impossible for private sector workers to have their representations considered in good faith then the government has a positive obligation to impose such a duty. The AEPA, properly interpreted (pumped up to *Dunmore* ++), was found to impose such a duty and so it passed constitutional muster.

Of course, we have no idea what it means concretely for employers to have a duty to consider collective representations in good faith. It is possible that this duty could be pumped up again, so that it is not substantially different from a duty to bargain in good faith as it is conventionally understood, but it may not be. In that case, something less will pass muster and if that something less is that employers listen to oral representations and read written ones, and then respond by saying "thank you very much but having considered your representations and we

are not prepared to accept them," then the game will hardly be worth the candle. This would be Wagnerism watered down to thin gruel indeed.[2]

But how thin this gruel will be may depend on what the court does in the area of dispute resolution. Under Wagnerism (but not exclusively Wagnerism) the duty to bargain in good faith does not guarantee you particular outcome. Ultimately, the outcome of negotiations depends on bargaining power, which in the case of labour is contingent on the union's ability to inflict significant economic harm on an employer by collectively withdrawing labour – striking. Collective bargaining without this power degrades into collective begging. No one believes that the *Charter* guarantees some level of bargaining leverage, but many argue that it does protect the freedom to strike because absent that freedom the duty to bargain in good faith – or to consider collective representations in good faith - is meaningless.

The original Trilogy roundly rejected the claim that freedom of association protected the freedom to strike. *Health Services*, although not deciding the issue, disparaged the reasoning that supported the Trilogy's holding, and so it is (or should be) an open question what the law is. A trial level judgment in Saskatchewan held that the *Charter* does protect the freedom to strike, but the Saskatchewan Court of Appeal overturned the judgment, holding that the Trilogy was still good law as it applied to strikes until the SCC ruled otherwise. Leave to appeal to the SCC may be sought, but even if it is not other right to strike cases are in the works so it's only a matter of time the SCC will pronounce on this issue.

Given my track record, there is little use in me predicting what the SCC will do, but it might be useful to think conceptually about the alternatives and their relation to Wagnerism. Of course, the SCC might confirm the Labour Trilogy as it relates to dispute resolution generally and strikes in particular and then there is nothing more to say. Collective labour rights generally, not just the Wagnerian version, will enjoy little effective constitutional protection. However, if the court is prepared to say that freedom of association requires some form of dispute resolution, then the door is open to a number of possibilities. As noted, in Wagnerism strikes and lockouts are the preferred mechanism for resolving bargaining impasses. It is the ability of a union to threaten an effective strike that gives it bargaining power. Therefore, it might be said that the constitutionalization of the freedom to strike could properly be characterized as the constitutionalization of Wagnerism. But that is probably a bit misleading in that the freedom to strike is not unique to Wagnerism but present in many, but not all, systems of industrial relations and is recognized in international law as a fundamental labour right. So the SCC could, if it chooses, protect the freedom to strike as a core feature of freedom of association, not because they are protecting a Wagnerian model of labour relations, but rather because freedom of association and the freedom to strike are intimately related in Canadian labour history (pre-dating the adoption of Wagnerism), the mechanism that makes collective bargaining effective in Canada, and recognized in international law.

Alternatively, the court may say freedom of association protects some mechanism of dispute resolution, but that the freedom to strike is only one of several possible ones and it is not the business of the court to constitutionalize any particular model, Wagnerist or otherwise. But presumably the court would set some principles about what is constitutionally acceptable, and

[2] The duty to bargain in good faith as conventionally interpreted can be pretty thin gruel, especially in a context when labour lacks a credible threat to strike.

presumably it has to be something more than the unilateral imposition of terms and conditions by the employer after the duty to bargain or consider representations in good faith has been satisfied. In this scenario, we would expect to see the court say something about having a dispute resolution mechanism that provides workers with a meaningful opportunity to enjoy freedom of association, which includes the ability to influence the terms and conditions of their employment. Neutral third-party binding arbitration might pass constitutional muster under this standard.

One last matter we might touch on briefly is whether the *Charter* would protect the labour movement against right to work laws. In Canada, the Rand formula, requiring all members of the bargaining unit to pay union dues but not be members of the union, is the Wagnerian standard. We know that the courts reject the view that freedom of association requires mandatory Rand. It is also unlikely the court will hold that freedom of association prevents the state from prohibiting Rand or even stronger forms of union security. That element of Wagnerism will not be protected.

To conclude, it is important to recognize that not all elements that North Americans associate with Wagnerism are unique to it. Therefore, constitutionalizing particular requirements, such as the freedom to strike is not tantamount to constitutionalizing Wagnerism. Moreover, in some instances, it is appropriate to constitutionalize an element of Wagnerism, not because it is Wagnerism, but because that is what is minimally required for workers to enjoy freedom of association in the work context. That is the reason why the freedom to engage in associational activities requires a duty imposed on employers not to engage in unfair labour practices.

But, even if the SCC upholds core elements of Wagnerism against legislative assault, or requires legislatures to enact them, it is unlikely to significantly alter the trajectory of collective bargaining in Canada. And the same conclusion also probably holds if the court rejects Wagnerism but constitutionally protects or requires some other set of fundamental labour rights, whether it be minority unionism or some bare-bones protection of concerted worker activity and the making of collective representations.

III. Labour Law and Context

There is no shortage of articles that make the point that Wagnerism is not working well for workers. The conclusion is not new. Left critics of Wagnerism have been pointing out its limitations for decades (we told you so) but were mostly ignored by industrial pluralist scholars who believed deeply in its promise (and some of whom profited handsomely as participants in the system). But the ranks of the believers are so depleted that one would be hard pressed to find one. What went wrong? Again, there is a story about how the new political economy has radically changed the context in which Wagnerism operates, which hardly needs repeating. However, there is one point, which may not be widely accepted, and that is the transformation from weak Keynesianism to strong neo-liberalism is best viewed as a class project, not the outcome of natural processes. This has important implications for thinking about the future.

But first, Wagnerism. Numerous scholars have identified the obstacles to a union becoming certified in a regime of majoritarian exclusivity. Elections are more difficult than card

counts. Employer resistance has increased and often crosses the boundary into unfair labour practices for which labour boards lack timely and effective remedies. All of this is true. But even if we returned to card counts, provided unions with easier access to workers, better regulated employer anti-union tactics and improved the remedial capacities of labour boards to address unfair labour practices, it is unlikely that private sector unions could return to the densities they reached at their peak. This would require them to organize workers at a rate that they were unable to achieve even before the degradation of labour rights.

The problems run deeper. It is the mismatch between the Wagnerian model in which the default is no union and in which workplaces become unionized on a site by site basis and a world in which small and medium sized workplaces proliferate, churning increases and precarious employment relations are on the rise. Under these conditions, even when unions re-allocate resources into organizing, it is hard to gain density.

Another issue is bargaining power. Wagnerism contemplates a baseline of extreme fragmentation. In the past, unions in a few select industries (large scale manufacturing, the regulated private sector and the public sector) were able to overcome this fragmentation by organizing industry-wide and imposing forms of broader-based bargaining such as pattern bargaining. In the new economy, these structures have either been dismantled or are eroding, with the result that union bargaining power is diminished. This is reflected in the near disappearance of the strike, a phenomenon that back-to-work legislation does not begin to explain. Preserving the legal freedom and right to strike will not solve this problem.

In short, Wagnerism's basic model does not directly assist unions to do what they need to do and creates barriers to the construction of broader-based bargaining and solidarity that is needed. Fighting to preserve or strengthen Wagnerism, whether through political action or constitutional litigation may bring some amelioration, but it is not the answer.

IV. What is to be Done

It is customary in articles announcing the death of Wagnerism to end with a section identifying legal reforms that point the way forward, but usually these efforts suffer from forced optimism. New governance theories call for big sticks to step in where self-regulation fails, but there is no prospect for big stick legislation; employer neutrality agreements are legal in Canada but are little used and the most recent experiment with them, the Framework of Fairness agreement between the CAW and Magna, yielded nothing; employee participation plans are also legal in Canada and some employers have made use of them (e.g., Magna, WestJet) but in general these arrangements have not spread much beyond joint health and safety committees that are legally required; minority unions in Canada have no right to bargain for their members only (although they are free to try), but even if they gained such a right (and does anyone expect that in Canada legislation will be enacted compelling employers to bargain with minority unions, or believe that the courts will hold that freedom of association requires private sector employers to negotiate with or consider representations from minority unions or that governments must enact legislation imposing such a requirement) is there any prospect, outside perhaps of some small niches, that minority unions could bargain effectively in a decentralized bargaining regime, thereby establishing a beachhead from which strong unions would grow?

I think a frank assessment must start from the premise that at present there is no legal solution to labour's difficulties that is within reach, politically or through constitutional litigation. We are more likely to witness legislative degradation of Wagnerism than its strengthening or replacement by a regime that better promotes labour right and constitutional litigation will likely, at best, preserve and protect thin labour rights, and those will operate primarily in the public sector.

What is more interesting are accounts of workers and unions trying to break out of the mould in which they had been shaped (or shaped themselves) under Wagnerism and experimenting with new ways of organizing and representing workers. These include worker centers, associations of independent contractors, organization of workers at large (the IWW model), transnational formations, etc., all of which have a burgeoning literature. But the central lesson of these efforts is that they are not state or law centric, but rather aim at creating organizations through which workers can re-build a movement that can take them beyond Wagnerism. Will some kind of labour insurgency materialize in response to global capital's project of recommodifying labour and if so will it find a way to sustain itself? . There is no predicting how these nascent movements will unfold, but it is their development, more than legal reform, that I believe will determine the future of collective worker voice. Vision is necessary, but vision without leverage will not produce change in a world in which capital's class project does not support collective worker voice.