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PRESENTATION / PRÉSENTATION

The Constitutional Right to Bargain Collectively: The Ironies of Labour History in the Supreme Court of Canada

Eric Tucker

READERS OF THIS JOURNAL are probably aware that in a judgement issued in June 2007, *Health Services and Support – Facilities Subsector Bargaining Association v. British Columbia*,¹ the Supreme Court of Canada (scc) held that the right to bargain collectively is constitutionally protected under the *Charter of Rights and Freedoms*' guarantee of freedom of association. Less well known is that the court cited the work of this journal's current editor, Bryan Palmer, and a number of past contributors,² as well as that of other progressive academics and activists.³ Not only is it unusual for labour history to make an appearance in scc judgements, but the court's reliance on the work of the critical labour historians is, to my knowledge, unprecedented.⁴

Arguably, this event should be cause for celebration. First, the work was put to a good cause. The court invoked Canadian labour history for the purpose of reversing a 29-year-old line of precedent holding that *Charter*-protected

1. *Health Services and Support – Facilities Subsector Bargaining Association v. British Columbia*, 2007 scc 27, online at <<http://scc.lexum.umontreal.ca/en/2007/2007scc27/2007scc27.html>> (18 December 2007).

2. These include Judy Fudge, Jacques Rouillard and Jeremy Webber.

3. These include John Calvert, Harry Glasbeek, Dan Glenday and Karl Klare.

4. In *Dunmore v. Ontario (Attorney-General)*, [2001] 3 S.C.R. 1016, the court cited the expert witness affidavit of Professor Judy Fudge for the proposition that farm workers have been unable to establish collective bargaining without the support of a facilitative statutory collective bargaining scheme. It should be noted that no labour historians were involved with the *Health Services* case as expert witnesses and, to my knowledge, none were retained to assist litigants with the preparation of their briefs.

Eric Tucker, "The Constitutional Right to Bargain Collectively: The Ironies of Labour History in the Supreme Court of Canada," *Labour/Le Travail*, 61 (Spring 2008), 151–180.

freedom of association does *not* extend to collective bargaining.⁵ Second, the court's extensive referencing of the work of critical labour historians gives it the legal equivalent of the *Good Housekeeping* seal of approval. At least for lawyers and law students, their interpretive claims have been officially validated.

But before we break open the champagne (okay, union-made Canadian beer), a more careful reading of the case shows the judgement to be replete with ironies, both in its use of historical writing and in its result. Moreover, there is much less here to celebrate than readers might have thought. Indeed, as I will argue, the truth the judgement validates is the historiography of the industrial pluralists, who see the development of labour law as a natural process of interest adjustment in the name of achieving the common good, rather than that of their critics, who see labour law developing out of class conflict in ways that reproduce and only somewhat ameliorate unequal power relations. While the court's cavalier use of sources may offend academic sensibilities, the more important problem with the judgement arises from the consequences of its failure to acknowledge, let alone appreciate, the critique of industrial pluralism made in the work that it relied upon. This contributes to a judgement that both exalts and constitutionalizes a deeply flawed regime of industrial legality at a time when its limits have become increasingly apparent. Thus, while the judgement provides public sector workers with some welcome relief from assaults on their collective bargaining rights, it also endorses a set of ideological and institutional commitments that serve workers poorly. Before delving more deeply into these ironies, however, it will be helpful briefly to first locate the case in its historical context and summarize the judgement.

Contesting the Neo-liberal Assault

The post-World War II regime of embedded liberalism, characterized by state policies designed to promote employment, economic growth, and the welfare of its citizens, and which included a commitment to union-based industrial relations and collective bargaining, began to unravel in the 1970s in the face of a crisis of accumulation. Employers in Canada and in other industrial capitalist countries responded by pursuing workplace and political strategies that enabled them to capture a larger share of the value of social production. In part, this has been accomplished directly by the adoption of labour management policies that include increased resistance to and, where possible, avoidance of collective bargaining, shifting from more to less secure employment forms by using more part-time, temporary, and so-called self-employed workers, and demanding more from, while paying less to, its current workforce.⁶ At the

5. The earlier cases were collectively referred to as the Labour Trilogy. See *Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313 ("Alberta Reference"), *PSAC v. Canada*, [1987] 1 S.C.R. 424, and *RWDSU v. Saskatchewan*, [1987] 1 S.C.R. 460.

6. For an overview, see Leah H. Vosko, ed., *Precarious Employment* (Montreal 2006).

same time, they have also adopted more decentralized organizational forms of production that enhanced employee insecurity and reduced regulatory protection.⁷ Finally, capital has sought to shift the direction of state policy from the weak Keynesian welfare regime that prevailed in Canada after World War II to a neo-liberal one that pursues the imperatives of global competition, including the negotiation of free trade agreements that restrict the capacity of elected governments to regulate capital; amendments to labour and employment laws that facilitate employer flexibilization strategies at the expense of working conditions and employment security; reductions in social spending that provide tax cuts for the wealthy and increase workers' labour market dependence; and direct attacks on public sector workers' collective bargaining rights and working conditions.⁸

The achievement of these objectives requires capital to overcome barriers erected by past struggles and sustained by continuing popular support. Nowhere has this been more evident than in the area of public health care, which continues to enjoy immense popular support notwithstanding ongoing attacks by conservative ideologues and corporate interests that stand to gain by its privatization. While frontal assaults on public health care have not been successful, governments have pursued a variety of policies that provide private enterprise with entry points into the system, such as through public-private partnerships (p3s) and contracting out of support services to the private sector. As well, governments have also emulated private sector employment policies, whether for the purposes of facilitating privatization or to control health care costs, usually at the expense of the least well-paid workers in the system, who are disproportionately women and new immigrants.⁹

This brings us to British Columbia under the Liberal regime of Gordon Campbell. Elected in 2001 with an overwhelming majority of seats, the government moved to restructure the health care system through a variety of measures, including a reduction of service and the launch of p3 projects. As

7. For a recent discussion of this phenomenon and its implications for labour market regulation, see Judy Fudge, "Fragmenting Work and Fragmenting Organizations: The Contract of Employment and the Scope of Labour Regulation," *Osgoode Hall Law Journal* 44 (2006), 609–48.

8. The literature is vast. A small selection includes, David Harvey, *A Brief History of Neo-liberalism* (New York 2005); Robert Johnson and Rianne Mahon, "NAFTA, the Redesign, and Rescaling of Canada's Welfare State," *Studies in Political Economy* 76 (Autumn 2005), 7–30; Eric Tucker, "'Great Expectations' Defeated?: The Trajectory of Collective Bargaining Regimes in Canada and the United States Post-NAFTA," *Comparative Labor Law & Policy Journal* 26 (Fall 2004), 97–150.

9. Pat Armstrong and Hugh Armstrong, *Wasting Away*, 2nd ed. (Toronto 2003); Pat Armstrong and Kate Laxer, "Precarious Work, Privatization, and the Health Care Industry: the Case of Ancillary Workers," in Vosko, ed., *Precarious Employment*, 115–38; Alina Gildner, "Measuring Shrinkage in the Welfare State: Forms of Privatization in a Canadian Health Care Sector," *Canadian Journal of Political Science* 39 (March 2006), 53–75.

well, in the middle of the night on 28 January 2002, with almost no notice to the affected unions and with little debate, the government enacted Bill 29. The law allowed for extensive privatization, transfers of service, and hospital closures without public consultation. As well, it also stripped the existing collective agreement covering support workers of important protections in relation to contracting out, successor rights, bumping, and job retraining and placement, and prohibited future collective bargaining over these issues.¹⁰ These changes had an enormous impact on the largely female and heavily immigrant and older workforce.¹¹

One reason the government may have been particularly keen to push through a privatization agenda was that the Hospital Employees' Union (HEU) had successfully fought a long battle to achieve pay equity for its largely female membership. Between 1991 and 2001, gendered wage differences had been significantly reduced and more pay equity adjustments were scheduled for 2002 and 2003. Because there is no pay equity legislation in British Columbia, the effect of privatization would not only be to relieve the government of having to pay higher wages to health care workers in female-dominated jobs, but also the private firms that were contracted to provide services could revert to paying discriminatory wages with little risk that their practices would be challenged.¹²

The HEU, which represented a majority of the affected workers, and the British Columbia Federation of Labour develop a two-pronged response. The first prong included public demonstrations against the cutbacks, mobilization of the HEU membership for a possible strike, and organizing towards a general strike in support of HEU, although the latter was largely the activity of grassroots activists rather than union leaders. The second prong was a legal one, including both a complaint to the International Labor Organization that the government's actions violated Convention 87 respecting freedom of association and the launch of a *Charter* challenge to Bill 29, on the grounds that it violated the affected workers' section 2(d) right to freedom of association and their section 15 right to equality. The outcome of the first prong of the strategy is well known. The government did not back down. When the next round of collective bargaining failed to produce an agreement, and the support workers struck on 25 April 2004, the government quickly enacted Bill 37, a draconian back to work law that imposed a retroactive wage cut, increased the work week without an increase in pay, and further weakened seniority rights. HEU workers defied the legislation and were joined on the picket lines by other unionized workers. As momentum toward a widening sympathy strike was building, top

10. *Health and Social Services Delivery Improvement Act*, S.B.C. 2002, c. 2.

11. Jane Stinson, Nancy Pollak and Marcy Cohen, *The Pains of Privatization* (BC 2005).

12. Marjorie Griffin Cohen, "Destroying Pay Equity: The Effects of Privatizing Health Care in British Columbia," (Vancouver March 2003), online at http://www.heu.org/~DOCUMENTS/Miscellaneous/Research/pay_equity_final_2.pdf (18 December 2007).

labour officials and government officials quietly negotiated a memorandum that slightly modified the terms of the back-to-work legislation, and the strike was called off. The memorandum was not put to a vote among the affected workers.¹³

While the first prong of the strategy was for the most part being played out very publicly on the streets, the legal strategy was quietly winding its way through the ILO offices and the courts. The ILO complaint was filed on 1 March 2002 and was upheld by the Committee on Freedom of Association in March 2003. The BC government ignored the ruling without suffering any political consequences, just as Canadian governments have previously done when the ILO has found them to be in violation of their international obligations.¹⁴ The constitutional challenge was first argued in August 2003, shortly after HEU members rejected a tentative contract to settle the first collective agreement after Bill 29. Not surprisingly, Garson J. dismissed the union's claims, based on earlier SCC decisions, holding that freedom of association did not protect collective bargaining. Garson J. also rejected the equality rights claim on the ground that the separate and unequal treatment of health care workers was based on their sector of employment and not on any personal characteristics.¹⁵ The case was appealed and, coincidentally, argument began on 3 May 2004, a day on which escalating strike activity in response to Bill 37 was expected, but which was avoided by the deal reached between the government and top union officials. Two months later the British Columbia Court of Appeal unanimously upheld the trial judge's judgement.¹⁶

Leave to appeal to the SCC was sought on 29 September 2004 and granted on 21 April 2005. By that time, the process of privatizing the jobs of health support workers was well advanced. Some 8,500 jobs were shifted from the public to the private sector and wages in the affected positions were cut by more than 40 per cent, benefits were slashed, workloads were increased and job security eliminated.¹⁷ Argument was heard on 8 February 2006. In the interim, the court issued two decisions that did not bode well for the appellants. The

13. David Camfield, "Neo-liberalism and Working-Class Resistance in British Columbia: The Hospital Employees' Union Struggle, 2002–2004," *Labour/Le Travail*, 57 (Spring 2006), 9–41; *Health Sector (Facilities Subsector) Collective Agreement Act*, S.B.C. 2004, c. 19. This pattern of derailing broadening strike movements is not unusual. For a detailed account of the 1983 solidarity movement in British Columbia, see Bryan D. Palmer, *Solidarity: The Rise and Fall of an Opposition in British Columbia* (Vancouver 1987).

14. 330th Report of the Committee on Freedom of Association, (Geneva March 2003), Case 2180, paragraphs 301–02. On Canada's dismal record before the ILO, see Ken Norman, "ILO Freedom of Association Principles as Basic Canadian Human Rights: Promises to Keep," *Saskatchewan Law Review* 67: 2 (2004), 591–608.

15. (2003), 19 B.C.L.R. (4th) 37.

16. (2004), 30 B.C.L.R. (4) 377.

17. Stinson, *Pains of Privatization*.

first, *Newfoundland (Treasury Board) v. Newfoundland and Labrador Assn. of Public and Private Employees (N.A.P.E.)*, held that while legislation infringing a pay equity agreement violated women's equality rights, the measure was demonstrably justified because of the fiscal crisis facing the Newfoundland government.¹⁸ The second, *Chaoulli v. Quebec (Attorney General)*, opened the door to privatization of the health system where it could be demonstrated that the public system was failing to provide timely access to necessary medical procedures.¹⁹ In combination, the result of these cases seemed to indicate that the court would be sympathetic to a government initiative whose stated aim was to improve the delivery of health care while addressing its rapidly increasing cost, making this case seem a poor choice for seeking a reversal of the court's longstanding position that collective bargaining was not protected under the *Charter*. So it was a surprise to most court watchers when the court issued its judgement doing just that.

The Judgement

This is not the place to offer an extensive legal analysis of the court's decision, but it is necessary to set out its basic argument.²⁰ The judgement begins with a thorough critique of the court's previous reasons for excluding collective bargaining from the ambit of freedom of association.²¹ In itself, this is quite unusual. The court then proceeds to make the case for including freedom of association based on Canadian history, international law, and *Charter* values. We will return to a more detailed examination of its labour history shortly, but it is worth saying a few words here about the other grounds. The international law argument is largely based on the interpretation of freedom of association in international conventions to which Canada is a party, and in particular to ILO Convention 87, which extends to collective bargaining. The court concludes that "s.2(d) of the *Charter* should be interpreted as recognizing at least the same level of protection" as is found in these international instruments.²²

The *Charter*-values justification offered by the court will make trade unionists blush. It is effusive in its praise of the benefits of collective bargaining: "The right to bargain collectively with an employer enhances the human dignity, liberty and autonomy of workers by giving them the opportunity to influence

18. [2004] 3 S.C.R. 381.

19. [2005] 1 S.C.R. 791.

20. For a more detailed analysis, see Judy Fudge, "The Supreme Court of Canada and the Right to Bargain Collectively: The Implications of the *Health Services and Support* case in Canada and Beyond," *Industrial Law Journal* (forthcoming 2008).

21. 2007 scc 27, paragraphs 22–37.

22. 2007 scc 27, paragraph 79. This part of their judgement has been subject to a withering critique by Brian Langille, "Can We Rely on the ILO? (Don't Ask the Supreme Court of Canada)," *Canadian Labour and Employment Law Journal* (forthcoming 2008).

the establishment of workplace rules and thereby gain some control over a major aspect of their lives, namely their work.”²³ “Collective bargaining also enhances the *Charter* value of equality. One of the fundamental achievements of collective bargaining is to palliate the historical inequality between employers and employees.”²⁴ “Finally, a constitutional right to collective bargaining is supported by the *Charter* value of enhancing democracy. Collective bargaining permits workers to achieve a form of workplace democracy and to ensure the rule of law in the workplace.”²⁵

But what exactly is the scope of the *Charter*-protected right to bargain collectively? Here the tone of the judgement changes from the expansive rhetoric found in the justifications to a much more defensive and tentative one. The court offers several different and inconsistent formulations of its bottom line. For example, in paragraph 2 the court states, “We conclude that the s. 2(d) guarantee of freedom of association protects the capacity of *members of labour unions* to engage in *collective bargaining* on workplace issues” [my emphasis]. This is substantially repeated at paragraph 19, with the added qualification that the right is to bargain over “fundamental” workplace issues, but further stipulations immediately follow. The *Charter* does not protect all aspects of collective bargaining; it does not ensure a particular bargaining outcome; and it does not guarantee access to any particular statutory scheme of collective bargaining. Somewhat oddly, after identifying these restrictions, the court articulates its broadest formulation of its holding: “What is protected is simply the right of *employees* to associate in a process of collective *action* to achieve workplace goals”²⁶ [my emphasis]. Unlike in the previous formulations, this one extends the *Charter*’s protection to all employees, not just trade union members, and to all workers’ collective action, not just collective bargaining. While the first extension remains in subsequent formulations of the holding, the second does not. Indeed, the majority is quick to state that its decision does not concern the right to strike.²⁷ The bottom line that eventually emerges is best stated in paragraph 87: “The preceding discussion leads to the conclusion that s. 2(d) should be understood as protecting the right of employees to associate for the purposes of advancing workplace goals through a process of collective bargaining.”

Having determined that the *Charter* right protects the process of collective bargaining and nothing more, the court then turns to the question of what

23. 2007 SCC 27, paragraph 82.

24. 2007 SCC 27, paragraph 84.

25. 2007 SCC 27, paragraph 85.

26. 2007 SCC 27, paragraph 19.

27. 2007 SCC 27, paragraph 19. It should be noted that the court does not specifically confirm its previous holding that the freedom of association does not protect the right to strike. Rather, it states that this judgement does not address this question. Presumably, the court will be asked to reconsider its position in the near future.

duties this right entails, but first several more qualifications follow. First, there must be state action, which occurs either when the government legislates or is the employer. The effect of this limitation, which flows from the structure of the *Charter*, is that the decision will have limited impact on private sector collective bargaining law.²⁸ Second, the court repeats its qualification that freedom of association does not guarantee the objectives sought by the association, but only the process through which those objectives are pursued.²⁹ Third, the court states that freedom of association does not protect all aspects of the associational activity of collective bargaining, but only against “substantial interference” with that activity, a matter which is subsequently discussed in greater detail.³⁰ What then is the duty that the right entails? “It requires both employer and employees to meet and to bargain in good faith, in the pursuit of a common goal of peaceful and productive accommodation.”³¹ The court is absolutely correct when it then concludes, “The right to collective bargaining thus conceived is a limited right.”³²

Lawyers will spend many hours (and lots of clients’ money) arguing over the precise meaning of all this, but the most fundamental point that comes through the judgement is that government has a duty to bargain in good faith with organized groups of workers. In this particular context, the constitutionally protected right to bargain collectively requires the government to negotiate with its unionized employees over any proposed changes to existing collective agreements. This does not mean that the government cannot eventually pass legislation that strips rights from existing collective agreements, but such legislation must be preceded by good faith consultation and bargaining over these rights. The court was unanimous in finding that several sections of Bill 29 infringed the workers’ collective bargaining rights.

Finally, the court considered the government’s section 1 argument that even if the government violated workers’ *Charter*-protected rights, its action was demonstrably justified in a free and democratic society. The majority held that the government’s argument failed because it neither considered less intrusive methods for achieving its goals, nor consulted with the unions involved. Deschamps, J. dissented on this point. As the author of the majority judgement in *Chaoulli*, she was perhaps more responsive to the BC government’s argument that its action was a defensible effort to address the crisis of sustainability in the public health care system and would have found that most of Bill

28. The impact of this decision on private sector labour legislation will undoubtedly be explored in future cases, but for the present it would seem that it will be limited to the claim that under-inclusive laws preclude workers from being able to exercise freedom of association. This claim was accepted in *Dunmore*.

29. 2007 SCC 27, paragraph 89.

30. 2007 SCC 27, paragraphs 94–109.

31. 2007 SCC 27, paragraph 90.

32. 2007 SCC 27, paragraph 91.

29's infringements of the process of collective bargaining were demonstrably justified.³³

The court briefly disposed of the equality rights argument, upholding a line of precedent that the unequal treatment of different sectors of the labour force does not violate s. 15 of the *Charter* because it is based on the type of work people do rather than on the personal characteristics of the workers.³⁴

Labour History in the Supreme Court of Canada

Before turning to the court's labour law history, it will be helpful to understand its role in the judgement. As noted, the court held in earlier judgements that the right to freedom of association does not protect collective bargaining. Several reasons were offered to justify that conclusion, one of which was the rights to strike and bargain collectively were "modern rights" created by legislation, not "fundamental freedoms."³⁵ As a result, they were not constitutionally protected aspects of freedom of association, and labour legislation was designated as an area in which the courts should be especially deferential to the legislature's balancing of competing claims. LeDain J.'s majority judgement, however, provided no historical evidence to support its conclusion that the right to bargain collectively was "modern" and so his methodology might be characterized as an example of what the American historian, Alfred H. Kelly, scathingly referred to as the creation of history by "judicial fiat" or "authoritative revelation."³⁶ One way of challenging the validity of this line of precedent, therefore, was to attack its historical premise.

A second way of undermining the strength of the earlier line of precedent was to argue that the framers of the *Charter* intended that freedom of association would protect the right to bargain collectively. This requires a different legal-historical argument, although one that might build upon the labour history argument. It also assumes that the framers' intent is relevant, which is a rather dicey proposition in Canada. Nevertheless, as we shall see, the SCC did enter onto this terrain, however tentatively.

The role of history, then, was twofold: first, to criticize the historical reasoning that underpinned the court's earlier exclusion of collective bargaining from constitutionally protected freedom of association and, second, to provide a justification for finding that it ought to be included. But how was the court to go about making its historical argument? A new historical fiat was possible, but because the view that collective bargaining was a modern right had

33. 2007 SCC 27, paragraphs 228–50.

34. 2007 SCC 27, paragraphs 162–67.

35. *Alberta Reference*, 391.

36. Alfred H. Kelly, "Clio and the Court: An Illicit Love Affair," *Supreme Court Review* (1965), 122.

already become the “common law of history”³⁷ the burden of proof implicitly shifted to those asserting a contrary position, and so it seemed advantageous to marshal some historical evidence to support the claim that the right to collective bargaining was longstanding and recognized as fundamental prior to 1982 when the *Charter* came into force.

Procedurally, there were several options for making this argument. An expert witness affidavit could have been prepared by an historian retained by one of the litigants, but this was not done. Rather, John Baigent and Randall Noonan, lawyers for one of the interveners, the British Columbia Federation of Teachers, prepared a factum, or statement of its argument and the sources on which it’s based, which contained a seventeen paragraph history of the development of collective bargaining in Canada. The gist of the argument was that the right of workers to bargain collectively was not a mere creation of modern statute, but rather was based on “pre-existing fundamental rights to trade unionism, collective bargaining and collective withdrawal of labour.”³⁸ The brief relied largely on work written within the industrial pluralist framework, including an article by Bora Laskin written during World War II and a standard labour law text.³⁹ The brief did not make an argument about the framers’ intent.

This is not the place to comment on the substance of the teachers’ brief, but a word about its methodology is in order. Essentially, it fits within the genre that Kelly described as “law-office” history, and that Horwitz described as “lawyers’ legal history.”⁴⁰ This is legal history written to generate data and interpretations that are of use in resolving modern legal controversies. To make this history effective, it is best told in a simple and appealing way. The nuance and complexity that is the hallmark of good historical work is not welcome in a legal brief prepared for instrumental reasons.⁴¹ Thus, while most labour historians would likely be reluctant to support the unqualified historical conclusion that the adoption of *Wagner Act* model legislation in Canada “does not create, but rather carries forward and is based on pre-existing fundamental rights to

37. Neil M. Richards, “Clio and the Court: A Reassessment of the Supreme Court’s Use of History,” *Journal of Law and Politics*, 13 (Fall 1997), 889.

38. British Columbia Teachers’ Federation, Brief to the Supreme Court of Canada in *Health Services and Support – Facilities Subsector Bargaining Ass. v. British Columbia*, (16 January 2006), paragraph 25.

39. Bora Laskin, “Collective Bargaining in Canada: In Peace and In War,” *Food for Thought, Journal of the Canadian Association for Adult Education*, 2:3 (November 1941), 8–17; George W. Adams, *Canadian Labour Law*, 2nd ed. (Aurora, ON 1993).

40. Kelly, “Clio,” 122; Morton J. Horwitz, “The Conservative Tradition in American Legal History,” *American Journal of Legal History*, 17 (July 1973), 276.

41. For similar observations, see John Phillip Reid, “Law and History,” *Loyola of Los Angeles Law Review* 27 (November 1993), 193–223.

trade unionism, collective bargaining and collective withdrawal of labour,”⁴² for the lawyers that was at least a facially plausible claim that supported their client’s case.

It might be argued that the use of history by judges is less likely to be driven by instrumental reasoning than is the case with advocates. Judges, after all, are not being paid handsomely to marshal arguments in favour of a client’s interest. Yet it would be naïve to envisage the judicial process as a disinterested search for truth. While we might speculate on what motivated the court to choose this case at this time to overturn its own precedents, we cannot know for sure. In its judgement, the court cites several reasons, including Canadian labour history, international law norms and *Charter* values, yet it is not clear why these considerations are being weighed only now when they were equally available in 1987 when the court rejected them. Indeed, in the interim, the historical trajectory of Canadian support for collective bargaining has been downwards, making it more difficult to say that collective bargaining is widely recognized as a fundamental right in Canada.⁴³ Similarly, the commitment of Canadian governments to adhere to ILO obligations also seems to have further eroded over the past twenty years.⁴⁴

Whatever its reasons for deciding a case in a particular way, once the outcome is determined, judges are likely to write their judgement instrumentally, like lawyers do, especially when they are overruling a previous decision, and so are likely to feel a heightened burden of justification.⁴⁵ In this context, the preference for lawyers’ history is likely to be just as strong for judges as it is for advocates. Nuanced and complex historical accounts will not do when the court needs to present a historical conclusion as unambiguously true and authoritative. Canadian historian Donald Bourgeois found this to be the case in a comment on the role of the historian as expert witness. “The historian should be aware that the purpose of litigation is to settle a dispute with finality. Whether or not the decision is historically ‘correct’ is, from one perspective

42. British Columbia Teachers’ Federation Brief, paragraph 25.

43. For an overview of developments, see Mark Thompson et al., eds. *Beyond the National Divide: Regional Dimensions of Industrial Relations* (Montreal 2003) and Leo Panitch and Donald Swartz, *From Consent to Coercion: The Assault on Trade Union Freedoms* (Aurora, ON 2003); Gene Swimmer, ed., *Public Sector Labour Relations in an Era of Restraint and Restructuring* (Don Mills, ON 2001).

44. Panitch & Swartz, *From Consent*, 54–7, 208–9; Norman, “Promises.” It is true, however, that the since 1987 the court has taken more account of international law in its interpretation of the *Charter*. See *Suresh v. Canada (Minister of Citizenship and Immigration)* [2002] 1 S.C.R. 3.

45. Reid, “Law and History,” 204, made the point quite sharply. “When [judges] tell their law clerks to find them some ‘history’ supporting a point of law they plan to promulgate, their interest lies in authority, not in evidence.... In almost every instance when history is employed, the decision has already been formulated. Unprofessional history is used to explain the decision, to make it more palatable, or, in most cases, to justify the decision.”

– that of the court – irrelevant.... The court, ideally, attempts to determine the ‘truth’ or ‘what really happened,’ but that determination is incidental to its role in society....⁴⁶ This context creates a high risk not only that the court will produce history that in the view of two other Canadian historians, G.M. Dickinson and R.D. Gidney, lacks “context and qualification” and reduces “a complex and sophisticated historical argument to the level of a crude and embarrassing parody,”⁴⁷ but also that it will make ironic use of historical sources, by which I mean the use of historians’ work to construct a narrative that their work actually discredits.

As we shall see, these risks materialized in the Supreme Court’s judgement. The judges were not content to rely on the Teachers’ brief for their history, but presumably instructed one or more of their clerks to conduct additional research. It was at this stage that the work of critical labour historians and labour law scholars was drawn into the process, even while their interpretations were ignored.

The historical “truth” that the court needed to prove is that collective bargaining is a fundamental right in Canada and not the creation of modern labour relations statutes. The court makes this claim in the preface to the labour history section of its judgement. “Association for purposes of collective bargaining has long been recognized as a fundamental Canadian right which predated the *Charter*. This suggests that the framers of the *Charter* intended to include it in the protection of freedom of association found in s.2(d) of the *Charter*.”⁴⁸ This is followed one paragraph later by a lengthy quote from the 1968 Woods Task Force Report, which the court identifies as providing the definitive summary of Canadian labour history.

[W]orkers began to join unions and engage in collective bargaining with their employers. Although employers resisted this development with all the resources at their command, it eventually became apparent that unions and collective bargaining were natural concomitants of a mixed enterprise economy. The state then assumed the task of establishing a framework of rights and responsibilities within which management and organized labour were to conduct their relations.⁴⁹

Having embraced an industrial pluralist historiography, which sees the development of collective bargaining in functionalist terms as a natural process of interest adjustment in the name of achieving a greater common good, the

46. Donald J. Bourgeois, “The Role of the Historian in the Litigation Process,” *Canadian Historical Review* 67 (June 1986), 197–98.

47. G.M. Dickinson and R.D. Gidney, “History and Advocacy: Some Reflections on the Historian’s Role in Litigation,” *Canadian Historical Review* 68 (December 1987), 582.

48. 2007 SCC 27, paragraph 40.

49. 2007 SCC 27, paragraph 42; *Canadian Industrial Relations: Report of Task Force on Labour Relations* (Ottawa 1969), 13.

court adopts the three stages of history approach associated with that school: repression, toleration, and recognition. At this point, the court acknowledges that this categorization “may not necessarily draw a perfectly accurate picture of the evolution of labour law in our country” and cites for that proposition an article of mine.⁵⁰ In that piece I argued that the three-stage historiography “served the function of justifying current collective bargaining schemes by showing them to be the progressive realization of political and industrial pluralism.” I then went on to state, “Confidence in the narrative is, however, eroding.”⁵¹ Well, maybe among labour historians, but apparently not for SCC judges, who immediately follow their acknowledgement of their narrative’s imperfection with a statement that hints at their instrumentalism in putting history to the service of defending an exalted and, with due respect, fantastic view of industrial pluralism. “However, for the present purposes, such categorization provides a sufficient historical framework in which to summarize the evolution of our law and to underline the flourishing of labour unions and collective bargaining as well as the historic openness of government and society to those organizations over the past century.”⁵²

The judgement then works its way through the three stages of history. In the period of repression, the court focuses on the English *Combination Acts* and the hostility of common law judges to workers’ collective action, while acknowledging the uncertainty surrounding the question of whether that body of law was applied in Canada. It concludes this section with Bryan Palmer’s summation in *Working-Class Experience* that at least prior to 1872 Canadian law “cast shadows on the legitimacy of trade unions....”⁵³ Next comes a brief discussion of the period of toleration, which covers from 1872 to about 1900. Here the court recounts the passage of the 1872 *Trade Unions Act* and quotes a summary of the law at the turn of the 20th century from Fudge and Tucker, *Labour Before the Law*, which states that workers enjoyed a legal privilege to form unions but not a state-protected right to do so.⁵⁴ The court also recognizes that workers enjoyed the legal freedom to strike under this regime and that most strikes were caused by the refusal of employers to bargain with the union.

The court turns to the period of recognition, beginning with the 1907 *Industrial Disputes Investigation Act*, which, relying on Jeremy Webber’s work and others, it characterizes as a failure because employers had no incentive

50. 2007 SCC 27, paragraph 44; Eric Tucker, “The Faces of Coercion: The Legal Regulation of Labour Conflict in Ontario, 1880–1889,” *Law and History Review* 12 (Fall 1994), 277–339.

51. Tucker, “Faces of Coercion,” 277.

52. 2007 SCC 27, paragraph 44.

53. 2007 SCC 27, paragraph 50; Bryan D. Palmer, *Working-Class Experience: Rethinking the History of Canadian Labour, 1800–1991* (Toronto 1992), 66.

54. 2007 SCC 27, paragraph 53; Judy Fudge and Eric Tucker, *Labour Before the Law* (Toronto 2001), 2.

to participate in the process.⁵⁵ The Depression and industrial “tension” in the 1930s “rendered” the laissez-faire model “inappropriate” in the United States, leading to the adoption of the *Wagner Act*.⁵⁶ The court extracts a statement of the objects of the *Wagner Act* from an article by the influential American critical labour law scholar, Karl Klare,⁵⁷ and turns to Canada and P.C. 1003, citing a description of its legal effects taken from an article by Judy Fudge and Harry Glasbeek.⁵⁸ The court accepts that P.C. 1003 was a political compromise that on the one hand granted workers the rights to organize without fear of unfair interference and to bargain collectively in good faith with their employers, while on the other, guaranteed employers a measure of stability by limiting the use of economic sanctions. Turning to public sector collective bargaining, the court also acknowledges that it came later, between 1965 and 1973, and that the rights conferred on public sector workers were more restricted. This is supported by a long passage from Fudge and Glasbeek.⁵⁹ The court also acknowledges, citing Joe Rose, that governments have frequently and unilaterally imposed terms and conditions on its public sector workers through legislation.⁶⁰ None of this detracts from the court’s conclusion, in the next paragraph, that there has been steady progress in the development of the right to collective bargaining, which was first exercised in the shadow of the law, then was asserted against employers through the strike weapon, and finally, was recognized as a “fundamental need” by the adoption of the *Wagner Act* model in Canada.⁶¹

The historical section of the court’s judgement concludes with a brief discussion of collective bargaining in the *Charter* era. The aim of this section is to argue that, by 1982, it was clearly understood that freedom of association in the labour context included a procedural right to collective bargaining. This is accomplished by referring again to the 1968 Woods Task Force Report, the 1972 amendments to the preamble to the *Canada Labour Code* that incorporated the Task Force’s recommendations, and a statement made by Robert Kaplan, the then acting Justice Minister, during the Parliamentary hearings that took place before the adoption of the *Charter*, that it was the government’s

55. 2007 scc 27, paragraph 55; Jeremy Webber, “Compelling Compromise: Canada Chooses Conciliation Over Arbitration, 1900–1907,” *Labour/Le Travail* 28 (Autumn 1991), 15.

56. 2007 scc 27, paragraph 56.

57. 2007 scc 27, paragraph 57; Karl Klare, “Judicial Deradicalization of the *Wagner Act* and the Origins of Modern Legal Consciousness,” *Minnesota Law Review* 62 (March 1978), 281–85.

58. 2007 scc 27, paragraph 59; Judy Fudge and Harry Glasbeek, “The Legacy of PC 1003,” *Canadian Labour and Employment Law Journal* 3 (1995), 358.

59. 2007 scc 27, paragraph 61; Fudge and Glasbeek, “Legacy,” 385.

60. 2007 scc 27, paragraph 62; Joseph B. Rose, “Public Sector Bargaining: From Retrenchment to Consolidation,” *Relations Industrielles/Industrial Relations* 59 (Spring 2004), 271–93.

61. 2007 scc 27, paragraph 63.

view that the freedom to organize and bargain collectively was covered by freedom of association.⁶²

The narrative of progress concludes by casting the protection enshrined in s. 2(d) of the *Charter* as “the culmination of a historical movement towards the recognition of a procedural right to collective bargaining,”⁶³ implying this occurred in 1982 rather than 2007, so that the court is not creating new constitutional rights but rather finding ones that are “in” the *Charter*.

The court also draws on a second line of historical analysis that is partly related to the first, and that is the claim in paragraph 40 that the “framers of the *Charter* intended to include [collective bargaining] in the protection of freedom of association found in s. 2 (d) of the *Charter*.” To a great extent, this conclusion is a bootstrap argument: if historically a right to bargain collectively has long been recognized as a fundamental aspect of the right to freedom of association, then it is arguable that the protection of freedom of association in the *Charter* was intended to cover collective bargaining without further evidence. The claim stands or falls with the strength of the court’s historical analysis, and that is the way it is made in paragraph 40. It is, however, somewhat surprising that the “intent of the framers” discourse makes an appearance in the court’s judgement, since up to this time the court has been quite explicit in rejecting this approach to *Charter* interpretation. For example, in *Re BC Motor Vehicle Act*, the court held that “fundamental justice” in section 7 had a substantive aspect notwithstanding that there was overwhelming evidence that during the process of drafting and debate everyone intended that it was procedural only. More recently, in *Re Same Sex Marriage*, the court explicitly rejected originalism in favour of the view that the constitution is a “living tree” to be interpreted progressively.⁶⁴ Perhaps for that reason, the court did not directly argue that Robert Kaplan’s statement, noted above, was evidence of the intent of the framers, but rather the court made the more modest claim that it was an indication that the right to collective bargaining was recognized at the time of the Parliamentary hearings.⁶⁵

The Ironic Use of Historical Scholarship

There are many problems with the judgement. My focus in this part is on its ironic use of history. But before proceeding, I first want to argue that the court’s historical analysis fails to support the two historical propositions that it seeks

62. 2007 scc 27, paragraphs 64–67.

63. 2007 scc 27, paragraph 68.

64. [1985] 2 S.C.R. 486; [2004] 3 S.C.R. 698, paragraph 22. One of the justices in the *Health Services* case, Ian Binnie, recently wrote an article opposing originalism. See Ian Binnie, “Constitutional Interpretation and Original Intent,” *Supreme Court Law Review* (2d), 23 (2004), 345–82.

65. 2007 scc 27, paragraph 67.

to defend, namely that “Association for purposes of collective bargaining has long been recognized as a fundamental Canadian right which predated the *Charter*” and the claim that “the framers of the *Charter* intended to include it in the protection of freedom of association found in s. 2(d) of the *Charter*.”⁶⁶

Part of the problem with the court’s labour history is that it elides the distinctions between collective bargaining as an activity in which self-directed workers engage regardless of its legal status, as a legally privileged activity or freedom in the sense that it is not prohibited by the state, and as a legally protected right with correlative duties on employers and the state to bargain in good faith. It is certainly true that there is a long-standing practice of Canadian workers associating for the purpose of bargaining collectively with their employers. Moreover, it is also true that, at the very least since 1872 and probably before, workers enjoyed a legal privilege or freedom to associate for the purpose of bargaining collectively with their employers without being prosecuted or sued simply for doing so. The establishment of a legal right for workers to associate for the purposes of forming a trade union, in the sense that employers are subject to a concomitant duty not to interfere with their organizing, however, can only be traced to the freedom of trade union association legislation passed in the 1930s, while the legal right for workers to bargain collectively, in the sense that employers have a positive duty to participate in a process of good faith negotiation with their workers’ chosen representatives, first appeared in British Columbia and Nova Scotia statutes enacted in 1937, but only became generalized for private sector workers in the 1940s and for public sector workers in the 1960s and 70s.⁶⁷

Thus while the court is on firm historical ground when it states in paragraph 66 that collective bargaining (understood here as a social practice) has long been recognized in Canada (in the sense that it could neither be repressed nor ignored) and that “historically it emerges as the most significant collective activity through which freedom of association is expressed in the labour context,” its further claim that a procedural *right* to collective bargaining has *long* been recognized as *fundamental* in Canada prior to 1982 is deeply problematic as a statement of historical fact.

To the extent that its second historical claim regarding the framers’ intent is based on its first claim about the long recognition of a right to collective bargaining by 1982, then it too is problematic, but the court tries somewhat elliptically to bolster its case for the framers’ intent by quoting Robert Kaplan’s statement, noted above. Upon closer examination, however, the statement is not nearly as probative as the court implies. The question of the scope of freedom of association arose when NDP member Svend Robinson proposed an amendment to s.2(d) that would specifically include “the *freedom* to organize and bargain collectively” (my emphasis) in the guarantee of freedom of

66. 2007 SCC 27, paragraph 40.

67. Fudge and Tucker, *Labour*, 205–27.

association. When introducing the amendment Robinson stated quite specifically that his amendment would not cover the right to strike. Nevertheless, some members including Jake Epp, a Progressive-Conservative member, were concerned about this possibility and so Epp asked Robinson to confirm that the amendment would not affect the right to strike, which he did, and then requested Robert Kaplan to provide the government's position. Kaplan's response was that the government was of the view that freedom to organize and bargain collectively is already covered in freedom of association. He also added that the government agreed with Robinson that the right to strike "would not necessarily be affected" by inclusion of the proposed amendment.⁶⁸

We can leave aside the question of the right to strike, except to note that any turn to originalism would detrimentally affect the possibility of unions successfully arguing in the future that it is included in *Charter*-protected freedom of association. Rather, the question is whether Kaplan's statement supports the view that the framers intended that freedom of association would protect a *right* to bargain collectively. Here again we see an elision between rights and freedoms. Neither Robinson nor Kaplan ever said what they actually meant by "the freedom to organize and bargain collectively." Did either or both of them truly just mean a "freedom" in the sense of a legal privilege, or did they mean a legal right, in the sense that it would impose a constitutional obligation on the state to protect organizing and to bargain in good faith with organized employees. Bryce Mackasey, a former Liberal federal minister of labour from 1968 to 1972, speaking on his own behalf, seemed to be getting at this distinction in his intervention on this issue, although he too did not make clear his understanding of what the phrase would mean. "The problem with the unions comes not from their freedom of association, but to be recognized legally for another particular purpose; for instance the right to bargain on behalf of long-shoremen.... This is something you must negotiate."⁶⁹

This is just one instance of the enormous difficulty that is encountered in making "framers' intent" arguments, and lends support to the view that, even apart from the question of whether in principle it would be a desirable approach, it requires historians to answer a question that in most instances cannot be resolved with any certainty.⁷⁰

I am not arguing that the court should not recognize a procedural right to collective bargaining as fundamental and, therefore, protected as an exercise of constitutionally protected freedom of association. That is a legal and nor-

68. Special Joint Committee of the Senate and House of Commons on the Constitution of Canada, *Minutes of Proceedings and Evidence*, Issue No. 43, January 22, 1981, at pp. 69–70.

69. Special Joint Committee, *Minutes*, pp. 71–72.

70. There is an enormous amount of literature on the subject. For a Canadian critique of originalism, see Katherine Swinton, *The Supreme Court and Canadian Federalism* (Toronto 1990), ch. 4. For an American, see Jack N. Rakove, *Original Meanings Politics and Ideas in the Making of the Constitution* (New York 1996).

mative claim for which legal and normative argument is required and, indeed, given elsewhere in the court's judgement, based on international human rights norms and *Charter* values. Rather, my argument here is much more limited: the court's historical claims are flawed.

This leads me then to the ironic use of history, which I defined earlier as the use of historical work to support a narrative that is inconsistent with the interpretation of that work (without acknowledging that difference of view). Unlike the Teachers' Brief, which relied on "safe" (industrial pluralist) sources, the SCC's judgement mines a much wider range of scholarly work, including the work of many academics who challenge the narrative of labour law's linear progress from repression to toleration to recognition, and who view the *Wagner Act* model not as the apotheosis of freedom of association but as a political compromise that allowed workers to make some gains while also severely limiting and more tightly controlling their self-directed activity. Here we might just briefly sample a few of the works cited by the court.

I may be forgiven for beginning with a book I co-authored with Judy Fudge, *Labour Before the Law*, but I do so because its time frame is crucial for the court's analysis, the period between 1900 and the enactment of "modern" statutory collective bargaining legislation. Tellingly, the court does not refer to our book for anything we have to say about this period, but rather quotes our summation of the legal regime of liberal voluntarism that existed earlier in the introduction at page 2.⁷¹ This is not surprising given what we say two pages later:

While the emergence of the regime of industrial pluralism is the culmination of our narrative, ours is not a tale of linear progress from dark beginnings to the triumph of industrial democracy and freedom of association. Rather, our story is a much more nuanced one in which coercive and accommodative elements operate synchronously, in a variety of combinations, and diachronically, as new laws do not supersede older ones, but often supplement them, producing a complex legal regime.⁷²

Admittedly, the prose is not sparkling, but the point is clear enough. Our book does not support the court's historical narrative. We use the construct of a regime because we wanted to show how, at different points in time, legal regulation combined elements of coercion, toleration, and support in different ways. Moreover, we applied that framework to our examination of the construction of industrial pluralism, arguing that the regime aimed to contain and shape the social practice of workers' collective action as much as it was about recognizing and encouraging it.⁷³ But rather than acknowledge this difference of interpretation, the court chose simply to ignore it.

This careless approach to sources recurs a few paragraphs later when the

71. 2007 SCC 27, paragraph 53.

72. Fudge and Tucker, *Labour*, 4.

73. Fudge and Tucker, *Labour*, chs. 10 & 11.

court quotes Karl Klare's listing of the multiple aims of the *Wagner Act*.⁷⁴ The court, however, does not consider the larger argument that Klare makes, which is summarized at the conclusion of the section of his article in which the list appears:

The remainder of this Article will attempt to demonstrate that, in shaping the nation's labor law, the Court embraced those aims of the Act most consistent with the assumptions of liberal capitalism and foreclosed those potential paths of development most threatening to the established order. Thus, the *Wagner Act's* goals of industrial peace, collective bargaining as therapy, a safely cabined worker free choice, and some rearrangement of relative bargaining power survived judicial construction of the Act, whereas the goals of redistribution, equality of bargaining power, and industrial democracy – although abiding in rhetoric – were jettisoned as serious components of national labor policy.⁷⁵

Again, rather than acknowledge Klare's critical perspective on the development of American labour law, and its implications for the story it wanted to tell of the forward march of labour history, the court ignores it.

In the court's defence, it might be said that they really do not need to follow the development of American labour law, but rather simply wanted to identify the goals of the *Wagner Act* because it provided the model for Canadian labour legislation. But they cannot escape so easily, for they ignore very similar points made by Fudge and Glasbeek's work, from which they extract a descriptive summation of the legal effect of PC 1003.⁷⁶ Immediately after that summation, though, Fudge and Glasbeek continue:

But, despite the progress represented by this step, PC 1003 was not intended to alter the balance of power radically, that is, to ensure trade unions better agreements and/or to guarantee strong constraints on managerial prerogatives. The underlying, unquestioned assumption of PC 1003 was that the touchstones of the then existing political economy were to remain intact. The enhanced right to collective bargaining was to detract as little as possible from the idea that individual private sector entrepreneurs – possessed of the legal right to deploy their property as they chose – were to remain *the* motor of the political economy. This starting point has had important consequences for institutionalized collective bargaining in Canada.⁷⁷

Later, the court quotes another paragraph from Fudge and Glasbeek on the more restrictive scheme of collective bargaining attained by public sector workers in the 1960s and 70s, and then, relying on an article by Joe Rose, identifies the increasing frequency during the 1980s and 1990s that those limited rights have been further restricted by legislation. This ought to create a problem for a narrative of linear progress, but the court makes no attempt to incorporate these observations into its analysis. Rather, it simply jumps to its summary: that by adopting the *Wagner Act* model "governments across

74. 2007 SCC 27, paragraph 57.

75. Klare, "Judicial Deradicalization," 292–93.

76. 2007 SCC 27, paragraph 59.

77. Fudge and Glasbeek, "Legacy," 359.

Canada recognized the fundamental need for workers to participate in the regulation of their work environment.”⁷⁸

I could go on through a discussion of Palmer’s work⁷⁹ and others, but I think the point is clear. The court ignores evidence and interpretations in the works that it cites that are inconsistent with the historical narrative it wishes to construct of linear progress toward the recognition of collective bargaining as a fundamental right in Canada and its realization in the *Wagner Act* model.⁸⁰

The Ironies of History

But so what if Supreme Court judges write lawyers’ history to produce a narrative in support of instrumental ends? Supreme Court judges are not academic historians writing for other academics, but rather are engaged in making, interpreting, and applying law. Arguably, then, their work should not be assessed by academic standards, but by its results, in this case the constitutional protection of the collective bargaining process. Is it just bad politics and, perhaps, sheer churlishness to criticize the court for writing bad labour history rather than to praise it for overturning bad precedents and providing workers with a constitutional shield against government assaults on trade union rights?

The problem with that argument is that an uncritical celebration of the court’s judgement fuels, to use Roy Adams’ phrase, coined in a different context, a “pernicious euphoria”⁸¹ based on an exaggerated understanding of what the decision accomplishes.⁸² The purpose of this section, therefore, is to

78. 2007 SCC 27, paragraphs 61–63; Fudge and Glasbeek, “Legacy,” 385. In that article Rose concludes (at 289) “Taken together, these forces suggest governments are not prepared to restore a genuine collective bargaining system and unions are not in a position to compel them to do so.”

79. In addition to his *Working-Class Experience*, which was cited by the court, readers may wish to consult Bryan D. Palmer, “What’s Law Got to Do With It? Historical Considerations on Class Struggle, Boundaries of Constraint, and Capitalist Authority,” *Osgoode Hall Law Journal*, 41 (Summer/Fall 2003), 466–90 for a clear statement of his position on the coercive dimension of industrial legality.

80. This is not the first time that the Supreme Court of Canada has cherry-picked an excerpt from academic work to support a conclusion opposite to the one drawn by the quoted author, without ever acknowledging the difference. A well-known instance occurred in *Harrison v. Carswell* [1976] 2 S.C.R. 200 where the majority judgement by Dickson, J. extracted an excerpt from an article by Harry Arthurs, “Labour Law – Picketing on Shopping Centres,” *Canadian Bar Review*, 43 (1965), 357–63, to support the absolute right of the shopping centre owner to exclude labour picketing when Arthurs was in favour of allowing limited picketing.

81. Roy J. Adams, “A Pernicious Euphoria: 50 Years of Wagnerism in Canada,” *Canadian Labour and Employment Law Journal* 3 (1995), 321–55.

82. For example, see Duncan Cameron, “Supreme Court rules that labour rights are *Charter* rights,” *The CCPA Monitor* (July/August 2007), 10 (“The Canadian labour movement can now look forward to a brighter future in pursuing collective bargaining rights on fundamental workplace issues.”)

explore the limitations of the judgement through two historical ironies. The first considers the historical irony of the court emerging as the defender of workers' collective rights at the beginning of the 21st century when for most of the previous two centuries it evinced enormous hostility to workers' collective action. The second is the irony of the court embracing the collective bargaining process at a moment in time when it is less likely than ever to secure the substantive values the court claims that it advances.

For almost any student of labour law or labour history, the court's positioning of itself as defender of the collective rights of workers against assaults by the legislative and executive arms of the state is a stunning development. This is not just the view of critical labour lawyers and historians. Industrial pluralists long viewed the courts and the common law as the enemy of workers' collective action, and an imperative of their blueprint for institutional reform was to limit their role. Moreover, there is ample historical evidence to support their view of the courts, both before and after the enactment of modern statutory collective bargaining schemes. Courts used the common law to limit narrowly the scope for worker collective action and later to contain the powers of labour relations boards and labour arbitrators. Although in its historical narrative, the Supreme Court refers to repressive common law doctrines in the 18th and 19th centuries, it makes no mention of the judiciary's intolerant attitude toward and repression of workers' collectives during the so-called periods of legal toleration and support.⁸³

How can we explain this rather remarkable development and what significance, if any, does it have for an assessment of the court's new role as self-proclaimed defender of workers' collective action? I do not intend to speculate on the court's motivation for shifting its position, but rather to draw attention to the context in which it has occurred. The emergence of the court as the protector of collective bargaining has taken place following a lengthy period of what Panitch and Swartz aptly described as "permanent exceptionalism," characterized by Canadian governments' retreat from support for collective bargaining in the private, and, even more so, in the public and para-public sectors.⁸⁴ Moreover, employers have gone on the offensive against organized labour, resisting unionization where no unions exist and demanding concessions where they do. In short, unions are weaker now than they have been in decades, suffering from declining political muscle and economic bargaining leverage. Not only does their weakness drive them to the courts for protection against the state, it is also arguable that it is a condition of the court's

83. For a discussion of role of the common law courts prior to the adoption of the *Wagner Act* model, see Fudge and Tucker, *Labour, passim*. For the post-World War II era, P.C. Weiler, "The 'Slippery Slope' of Judicial Intervention," *Osgoode Hall Law Journal* 9 (August 1971), 1-79; H.W. Arthurs, "Developing Industrial Citizenship: A Challenge for Canada's Second Century," *Canadian Bar Review* 45 (December 1967), 823-29.

84. Leo Panitch and Donald Swartz, *From Consent to Coercion*, 3rd ed., (Aurora, ON 2003).

shift from hostility toward support of collective bargaining. A strong labour movement was feared, while a weak one can safely be presented as a vehicle for advancing democracy and equality. Perhaps this change in union fortunes helps explain the difference between 1987, when the court denied that collective bargaining was protected freedom of association, and 2007. It may also help explain the difference between 1963, when the Ontario Court of Appeal held that secondary picketing was *per se* tortious, and 2003 when the Supreme Court held it was legal in the absence of independent wrongs.⁸⁵

If, ironically, legal victories are won because of union weakness rather than union strength, this should be cause for concern. The declining strength of the labour movement has undermined its ability to protect the interests of its members and of workers more generally through its traditional syndicalist and political strategies. This was amply demonstrated both in the events that gave rise to the BC Health Services case and in the events that followed it. While the turn to constitutional litigation may be understood as a continuation of the labour movement's post-World War II embrace of legality, the change in the *form* of legality is significant and potentially dangerous. Firstly, there is the general problem of the legalization of politics, which entails the shift from more to less democratic forms of governance. This clearly occurs when the locus of industrial law creation moves from the collective bargaining agreement and the legislature (and their respective interpreters, labour arbitrators and labour relations boards) to *Charter* litigation. In the former, although labour leaders generally counselled compliance with the contract and state law, they also understood that periodic mobilizations were necessary to win better collective agreements and stronger labour laws. The pursuit of legalized politics through *Charter* litigation leaves even less space for grassroots activism and struggle that uses a class-based discourse of rights. As many critics have argued, the *Charter's* underlying ideology is regressive, focusing not on the unequal distribution of property among private parties, but rather on restraining state power that might be used to redress such inequality.⁸⁶ Although the pursuit of legalized politics produced a legal victory in this case, it is arguable that in the long run the practice of syndicalism, or democratic politics built on a class-based discourse, is more likely to advance working-

85. *R.W.D.S.U., Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd.*, [2002] 1 S.C.R. 156 reversing *Hersees of Woodstock Ltd. v. Goldstein* (1963), 38 D.L.R. (2d) 449 (ON CA). Also, see Larry Savage, "Organized Labour and the Canadian Charter of Rights and Freedoms," *Supreme Court Law Review* (2nd Series) 36 (2007), 175–199 at 196 ("... [R]ecent *Charter* victories do not showcase organized labour's strength. In fact, in many ways, recent Supreme Court decisions have highlighted the labour movement's weakness in an era of neo-liberal economic restructuring.")

86. For example, see Andrew Petter, "Wealthcare: The Politics of the *Charter* Revisited," in Colleen M. Flood, Kent Roach and Lorne Sossin, eds., *Access to Care, Access to Justice* (Toronto 2005), 116–38; Michael Mandel, *The Charter of Rights & the Legalization of Politics in Canada*, rev. ed. (Toronto 1994).

class interests over the long run than is *Charter* litigation based on a liberal rights discourse. Of course, the pursuit of *Charter* remedies does not preclude syndicalist and popular democratic mobilizations, but it is likely to tilt labour movement practices even more strongly toward those associated with industrial pluralist legality.⁸⁷

Secondly, if judicial protection of workers' collective rights is premised on a view of unions as victims, it suggests that the moment that courts perceive unions to be powerful actors, then they will find ways to limit the rights they have recognized. This can be done in many ways. As this case itself indicates, the SCC can and does change its interpretation of the *Charter*. Moreover, even without any substantive change to *Charter* interpretation, the decision itself provides courts with ample wiggle room to uphold government legislation interfering with collective agreements if they wish to do so. First, remember that what is protected is a process of good faith bargaining. Arguably, a government that first negotiated in good faith with a union about contract concessions and then, having failed to reach an agreement, legislatively imposed them, would not be held to have violated *Charter*-protected collective bargaining rights. Moreover, even if this was found to be a violation, the government would still have a chance to argue that the violation was demonstrably justified under section 1 on the ground that it was pursuing a pressing and substantial objective, that there was a rational connection between the means adopted and the objective being pursued, that there was minimal impairment of the right affected, and that there was proportionality between the objectives and the infringement. The fact that the government negotiated in advance of the legislation would greatly strengthen its minimal impairment argument, and a court worried about labour militancy could easily find that the breach was demonstrably justified.⁸⁸

At the time of writing, the government and the affected unions just reached a tentative settlement that, unlike *Dunmore*, will provide workers with some tangible benefits, most notably in the form of monetary compensation (\$68 million) for workers whose jobs were contracted out and access to retraining funds (\$2 million). The agreement also establishes a \$5 million training fund for workers laid off as a result of future contracting out, but, significantly, the

87. I do not mean to imply that unions cannot influence the outcome of constitutional litigation. The long-term campaign of NUPGE and others to cast labour rights as human rights can certainly be viewed as a success in the aftermath of the *BC Health Services* case. For example, see Derek Fudge, *Collective Bargaining in Canada: Human Right or Canadian Illusion* (Nepean, ON 2005). The point rather is that the change in the form of politics and in the content of discourse moves the struggle onto a less favourable terrain for grassroots mobilization. For a sharper critique of legal strategies, see Jonah Butovsky and Murray E.G. Smith, "Beyond Social Unionism: Farm Workers in Ontario and Some Lessons from Labour History," *Labour/Le Travail*, 59 (Spring 2007), 69–97.

88. The SCC seemed to be particularly disturbed by the failure of the B.C. government to consult with the unions in advance of the legislation. For example, see paragraphs 156–61.

number of positions that can be contracted out has been limited. The agreement also provides that affected unions will receive notice of future plans to contract out with an opportunity to propose alternatives and/or labour adjustment measures, and will again have the opportunity to negotiate about these issues in future rounds of collective bargaining. In short, because workers suffered monetary damages as a result of the government's unconstitutional action, and because consultation and bargaining are now constitutionally required, and because unions in the health care sector remain vibrant, they were able to negotiate a meaningful remedy. The unanswered question is how well unions will be able to protect their members in future consultations and negotiations, and that will not depend on law but on bargaining leverage.⁸⁹

The second historical irony is that the judgement embraces an industrial pluralist faith that the process of collective bargaining will advance the goals of workplace democracy and economic equality at a time when the limitations of the *Wagner Act* model have become increasingly apparent, even to some industrial pluralists.⁹⁰ Here we can see how the failure of the court to read or understand the critique of industrial pluralism in the scholarship it cited contributed to a flawed judgement, even when assessed from the perspective of what the court said it was hoping to achieve. It allows the court to rely upon an idealized view of a model that is less suited than ever to achieve its stated objectives. Perhaps this decision is a classic example of the cliché that those who do not learn the lessons of history are condemned to repeat its mistakes.

Let us first turn to the value of democracy. Recall that in its presentation of Canadian labour law history the court states that by "adopting the *Wagner Act* model the Canadian government recognized the fundamental need for workers to participate in the regulation of their work environment." As well, the court identified the enhancement of democracy as a *Charter* value that supported the recognition of a constitutional right to collective bargaining. There is much that could be said about the limited form of workplace democracy that was ever contemplated by the *Wagner Act* model,⁹¹ or that is likely contemplated by the SCC, but that is not the focus here. Rather, the point is that even on its own terms, the application of the *Wagner Act* model resulted in a substantial and growing democratic deficit, which the SCC's constitutionalization of collective bargaining rights is unlikely to affect.

Most fundamentally, the model naturalizes a starting point in which

89. For updates, see <http://www.heu.org/home/> (29 January 2008).

90. John O'Grady, "Beyond the *Wagner Act*, What Then?," in Daniel Drache, ed., *Getting on Track* (Montreal 1992), 153–69; H.W. Arthurs, *The New Economy and the Demise of Industrial Citizenship* (Kingston, ON 1996). Of course, industrial pluralism is not without its modern-day defenders. For example, see Laurel Sefton MacDowell, *Renegade Lawyer* (Toronto 2001), 293–98.

91. The complicated relationship between the *Wagner Act* and industrial democracy is a large subject. For a recent overview and analysis, see Étienne Cantin, "The Poverty of Industrial Democracy," PhD dissertation, York University, 2007.

workers have no legal right to bargain collectively unless the majority of employees in an appropriate bargaining unit, determined by a labour relations board, choose union representation. In other words, workers begin from a legal position in which their need for a voice is not realized and no workplace democracy exists – or at least none is required. Surely, it might be argued, if collective bargaining is the means for meeting the fundamental worker need for, and *Charter* value of, democratic voice, then the regime's starting point is the reverse of what it should be. Just as there is no need for citizens to opt into democratic public governance, workers should not have to opt into the collective bargaining regime to gain access to workplace democracy. Rather, some form of workplace democracy should be constitutionally required, whether it be through mandatory works councils, as we already have in most Canadian jurisdictions for occupational health and safety, or compulsory collective representation, as exists in the Quebec construction industry.⁹²

Moreover, the application of the *Wagner Act* opt-in model never brought industrial democracy to the majority of Canadian workers and is increasingly ill-suited for doing so given the changing realities of the Canadian labour market. The scheme was initially designed to operate under labour market conditions that prevailed in the dominant sectors of the post-World War II economy: large workplaces with permanent, full-time, and predominantly male employees. The regime never worked well in secondary labour markets, which tended to be dominated by small, intensely competitive employers. Not only was it resource-intensive for unions to organize small bargaining units populated by insecure workers, who were disproportionately female, visible minority and/or new immigrant, but employer resistance to unionization tended to be particularly stiff. As a result, union density in this sector remained low.⁹³ More recently, the successful pursuit of neo-liberal strategies and labour market restructuring has led to a decline in the share of employment in the formerly dominant and unionized core of the economy, with a corresponding growth in the share of employment in historically non-unionized sectors of the economy where more precarious forms of employment tend to dominate. As a result, the *Wagner Act* model of opting into the collective bargaining regime bargaining unit by bargaining unit is less effective, and there has been

92. Generally, Roy J. Adams, *Labour Left Out* (Ottawa 2006). On worker participation in occupational health and safety regulation, see Eric Tucker, "Re-Mapping Worker Citizenship in Contemporary Occupational Health and Safety Regimes," *International Journal of Health Services* 37:1 (2007), 145–70. For a description of the Quebec scheme and its background, see *R. v. Advance Cutting and Coring*, [2001] 3 S.C.R. 209.

93. Daniel Drache and Harry Glasbeek, *The Changing Workplace* (Toronto 1992); Judy Fudge, "The Gendered Dimension of Labour Law: Why Women Need Inclusive Unionism and Broader-Based Bargaining," in Linda Briskin and Pat McDermott, eds., *Women Challenging Unions* (Toronto 1993), 231–48; Anne Forest, "Securing the Male Breadwinner: A Feminist Interpretation of PC 1003," in Cy Gonick, Paul Phillips & Jesse Vorst, eds., *Labour Gains, Labour Pains: Fifty Years of PC 1003*, (Winnipeg 1995), 139–62.

a steady decline in private sector trade union density that shows no sign of levelling off, notwithstanding recent efforts by trade unions to shift resources into organizing and to develop innovative organizing strategies.⁹⁴

Of course, this case was about government interference with the collective bargaining rights of unionized workers, not the problems of non-unionized workers who are either excluded by law from *Wagner Act* collective bargaining schemes or by the model's inefficacy in the present Canadian labour market. But the court's judgement touched on these issues in a manner that is unlikely to be helpful to workers who wish to challenge *de jure* or *de facto* exclusions. As noted earlier, the court was careful to specify that the right it was recognizing was a limited one. Specifically, it stated "the right is to a general process of collective bargaining, not to a particular model of labour relations, nor to a specific bargaining method."⁹⁵ While this does not preclude challenges to *de jure* exclusions from statutory schemes, such as the one successfully mounted by Ontario's agricultural workers in the *Dunmore* case, it also does not make it easier for those claims to succeed. Excluded workers will still have to show that absent a protective legislative framework they are unable effectively to pursue association activities such as union formation and collective bargaining.⁹⁶ At best, this will require the government to prohibit employer interference with organizing activity and require employers to bargain in good faith with groups of organized workers.⁹⁷ This is likely to benefit only a tiny fraction of unorganized private sector workers. Workers who are excluded because the scheme is poorly matched to emerging labour market realities will not benefit at all. In short, because the judgement adopts such an unrealistic view of the contribution made by the *Wagner Act* model to the achievement of workplace democracy in Canada, the court is blinded to the irony of its protection of that model in the name of democracy.⁹⁸

What about the advancement of the *Charter* value of equality? In its brief discussion of that value and its relation to collective bargaining, the court makes it clear that it is concerned with *substantive economic* inequality.

94. On the decline in trade union density, see Andrew Jackson, *Work and Labour in Canada* (Toronto 2005), ch. 9; on new initiatives, see Pradeep Kumar and Christopher Schenk, eds., *Paths to Union Renewal: Canadian Experiences* (Peterborough, ON 2006).

95. 2007 SCC 27, paragraph 91.

96. *Dunmore v. Ontario (Attorney General)*, [2001] 3 S.C.R. 1016.

97. The court's decision in *Dunmore* stopped short of imposing a duty to bargain in good faith and the Ontario government's parsimonious response did not require it either. Based on the *Health Services* case, it is likely that *Dunmore* will be extended to require the state to provide vulnerable workers with access to a collective bargaining process that imposes a good faith bargaining requirement on employers.

98. For a somewhat more optimistic assessment, see Roy J. Adams, "Is Collective Bargaining Now Really Free?," *CCPA Monitor* (September 2007), online at <http://www.policyalternatives.ca/MonitorIssues/2007/09/MonitorIssue1727/index.cfm?pa=DDC3F905> (18 December 2007).

Moreover, it quotes Dickson J.'s dissenting judgement in the *Alberta Reference* case, which while not naming capitalism, recognized that it produces inherent class inequality: "Historically, workers have combined to overcome the inherent inequalities of bargaining power in the employment relationship and to protect themselves from unfair, unsafe, or exploitative working conditions."⁹⁹

How well does the court's judgement actually achieve this goal? The answer is not very well at all. Here too the court begins from a highly idealized view of the *Wagner Act* model, ignoring the critical judgements contained in the literature it referenced. As a result, it neither addresses the limited ambition of the *Wagner Act* model, nor its increasing ineffectiveness. With regard to the former, as discussed earlier, both Klare and Fudge and Glasbeek argued that it was never intended that the *Wagner Act* model would shift the balance of power in a manner that would seriously challenge "the inherent inequalities of bargaining power in the employment relationship,"¹⁰⁰ which are the product of the underlying structure of capitalist relations of production.

But even if we hold the scheme to a lower standard of equality, one that was clearly contemplated by the model and presumably is embraced by the Supreme Court – the amelioration of the inherent inequality in the employment relation – its success historically was limited and is currently in decline. There are a number of reasons for this, one of which is the highly fragmented bargaining structure contemplated by the model, based on a group of employees of a particular employer at a particular location. As a result, historically the scheme principally benefitted predominantly male workers in dominant sectors of the economy, both because they were able to extensively organize their industries and because competitive pressure on wages could be reduced through collective action. These conditions did not prevail elsewhere and so the gains in bargaining leverage were lower, leading to poorer outcomes, even when workers were unionized. The failure of the scheme to boost bargaining leverage more generally left large numbers of workers, many of whom were women, new immigrants and/or visible minorities, dependent on minimum standards laws, which established floors that were significantly below the conditions that prevailed in the dominant unionized sectors of the economy.¹⁰¹

Even these limited gains, however, have become increasingly difficult to retain. In part this is a function of declining union densities, mentioned earlier, but it is also a result of the effects of neo-liberal policies that have exposed

99. 2007 SCC 27, paragraph 84, quoting [1987] 1 S.C.R. 313 at 334.

100. Dickson, [1976] 2 S.C.R. 200.

101. For example, see Anne Forrest, "Securing the Male Breadwinner: A Feminist Interpretation of PC 1003," in Cy Gonic, Paul Phillips and Jess Vorst, eds., *Labour Gains, Labour Pains: 50 Years of PC 1003* (Winnipeg/Halifax 1995), 139–162; Gillian Creese, *Contracting Masculinity: Gender, Class, and Race in a White-Collar Union, 1944–1994* (Toronto 1999); Leah Vosko, *Temporary Work: The Gendered Rise of a Precarious Employment Relationship* (Toronto 2001).

dominant sectors such as auto and steel to increased international competition, so that the potential gains from collective action – even if coordinated on a national level – are smaller.¹⁰² Even strong unions like the Canadian Auto Workers, which split from its American parent in the 1980s in part over contract concessions and which still rejects them in principle, are now making them in an effort to staunch the bleeding of jobs.¹⁰³ The recent deal with Magna in which the CAW concedes the right to strike and the right of workers to select their own representatives is the clearest evidence of this trend.¹⁰⁴ The weakening of bargaining leverage has contributed to the decline in labour's share of income and the corresponding growth in profit's share since the late 1970s.¹⁰⁵ In sum, the SCC's exaltation of the benefits that the *Wagner Act* model of collective bargaining has brought in advancing the goal of economic equality simply does not ring true in 2007.

Moreover, while the SCC cannot be expected to erect a constitutional shield that will protect workers against the structural forces of capitalism, its failure to consider the critical accounts of the historical development of the *Wagner Act* model in Canada and its current weakness, enables it to treat the collective bargaining *process* as the only form of self-directed worker activity that needs to be protected, while ignoring the salience of unequal power relations on its effectiveness as a means for realizing associational objectives. As the court makes clear, the constitutional right is to a process and does not guarantee a substantive or economic outcome. Moreover, it does not guarantee access to

102. James Townsend, "Do Tariff Reductions Affect the Wages of Workers in Protected Industries? Evidence From the Canada-U.S. Free Trade Agreement," *Canadian Journal of Economics* 40 (February 2007), 69–92 (tariff reductions result in wage reductions for affected non-union and union workers); Anil Verma and Tony Fang, "Union Wage Premium," *Perspectives on Income and Employment* (September 2002), 13–19 (union wage premium has declined since the late-1980s).

103. Sam Gindin, *The Canadian Auto Workers: The Birth and Transformation of a Union* (Toronto 1995) and "Concessions in Oshawa: The End of An Era?" online at <<http://mrzine.monthlyreview.org/gindin310306.html>> (18 December 2007); Donald M. Wells, "When Push Comes to Shove: Competitiveness, Job Insecurity and Labour–Management Cooperation in Canada," *Economic and Industrial Democracy* 18:2 (1997), 167–200; Michael Goldfield and Bryan D. Palmer, "Canada's Workers Movement: Uneven Developments," *Labour/Le Travail*, 59 (Spring 2007), 169–75; and Bruce Allen, "Inside the CAW Jacket," *New Socialist* 57 (Oct. 2006), online at <<http://newsocialist.org/newsite/index.php?id=994>> (18 December 2007). For a more positive assessment, see Jonathan Eaton and Anil Verma, "Does 'Fighting Back' Make a Difference? The Case of the Canadian Auto Workers Union," *Journal of Labor Research* 27 (Spring 2006), 187–212.

104. Sam Gindin, "The CAW and Magna: Disorganizing the Working Class," *Socialist Project, E-Bulletin No. 65* (19 October 2007). For an online posting of articles on this development, see <<http://www.socialistproject.ca/caw.html>> (18 December 2007).

105. Ellen Russell and Mathieu Dufour, *Rising Profit Shares, Falling Wage Shares* (Ottawa 2007).

a particular model of labour relations or bargaining method.¹⁰⁶ Nor for that matter does it guarantee that workers' freedom of association will protect their freedom to engage in collective action in support of their bargaining demands. Essentially, what is protected is access to some kind of process of good faith bargaining and the question for the court is whether a government's action has or is likely to significantly and adversely impair that process.¹⁰⁷ To determine whether this right has been violated, the court will inquire into the importance of the subject matter that has been interfered with and whether the government has respected the duty to consult and bargain in good faith.¹⁰⁸

What this means in practice is absent exigent circumstances that would justify a violation of the collective bargaining process, governments cannot unilaterally refuse to bargain in good faith, take important matters off the bargaining table, or nullify significant terms in existing collective agreements.¹⁰⁹ For public sector workers who have been subject to these practices, this is meaningful, if limited protection. The limit inheres in the superior bargaining power that employers, including public sector employers, enjoy, and which is not fundamentally reduced by the duty to bargain in good faith, a fact amply demonstrated in the private sector where employers have been able to wring concessions from unionized workers, sometimes even during the life of the collective agreement, notwithstanding that they are under a legal duty to bargain in good faith and have no legal power to re-open collective agreements.

Conclusion

The SCC's recognition of the right to collective bargaining as a protected aspect of freedom of association is a symbolic victory that will provide unionized public sector workers with a modicum of protection against government assaults on trade union rights. More generally, it also elevates the status of the right to collective bargaining from being a political right to being a fundamental right. The decision, however, is replete with ironies. On its own the court's ironic use of critical labour scholarship to construct an industrial pluralist narrative of Canadian labour history may not be of much interest to anyone apart from labour historians. However, the court's failure to learn the lessons of that critical literature enables it not only to position itself as the protector of collective bargaining rights, but also to present an idealized view of the contribution made by the collective bargaining process to the advancement of workplace democracy and economic equality at a time when its ability to deliver these goals is in steep decline. In short the decision delivers too

106. 2007 SCC 27, paragraph 91.

107. 2007 SCC 27, paragraph 92.

108. 2007 SCC 27, paragraphs 93–97.

109. 2007 SCC 27, paragraph 111.

little too late. The promise of industrial pluralism, even when constitutionalized, rings increasingly hollow. The labour movement and the Left, therefore, still face the same challenge they faced before this decision: how to rebuild a movement capable of achieving genuine workplace democracy and substantive economic equality through workplace and political action.

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