Labour Rights and Labour Politics under the Charter

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This paper analyzes the impact of the Charter of Rights and Freedoms on the Canadian labour movement, identifying advantages and pitfalls in relying on constitutional law to advance labour rights.

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When the Canadian Charter of Rights and Freedoms1 was enacted in 1982, the impact it would have on progressive politics in Canada was uncertain. Would the Charter herald a new era of respect for human rights, or were the Charter’s promises only lip service? Questions of democracy loomed: unelected judges were granted new, far-reaching powers to review and overrule the legislative decisions made by the elected representatives of the people.2 For those who supported the Charter as an advancement of Canadian democracy, democracy meant more than just voting in elections: the Charter would promote democracy by protecting the central values at the core of the democratic project. That is, the Charter, despite its execution by unelected judges, would uphold fairness and equality, the essence of democracy, where the elected legislators failed to do so.

Thirty years later, it is not altogether clear whether the Charter has delivered on these promises. Charter jurisprudence has produced mixed results regarding political, legal, equality and, as I will discuss in this paper, labour rights. The Charter put in place stringent procedural protections for accused persons in criminal trials; yet, our rates of incarceration are at historic highs, and Aboriginal people continue to be vastly overrepresented in Canadian prisons. Freedom of speech, purported to be an essential feature of democracy, has been interpreted to include the rights to spread racist lies and to advertise to children.3 Our Charter right to “life, liberty and security of the person”4 has been interpreted extremely narrowly, yet somehow just

2 Prominent Charter skeptic Andrew Petter, for one, recounts harbouring concerns as a law student in the early 1980s that the Charter would both go too far, by granting too much power to unelected judges, and not far enough, “that its generalized rights would do little to improve conditions for the socially disadvantaged” (Andrew Petter, The Politics of the Charter: The Illusive Promise of Constitutional Rights (Toronto: University of Toronto Press, 2010) at 3).
4 Charter, supra note 1, s 7.
broadly enough to include a right to private medical care.\(^5\) In many areas of law and society, the Charter’s legacy thus far has been mixed at best, and it is difficult to find much to celebrate.

Labour rights provide a possible exception to this pattern. While the courts were initially slow to include labour rights in their interpretation of the Charter, in recent years the Supreme Court of Canada (the “Supreme Court”) has extended constitutional protection to picketing\(^6\) and to collective bargaining (in a limited form).\(^7\) In the context of the struggle between labour and capital, the courts seem to have shifted, ever so slightly, towards the side of labour. Has the Charter, then, delivered on its promises of democracy in the realm of labour rights?

Whether the Charter has been positive or negative for labour rights and the labour movement is a deceptively difficult question to answer. Comparing the status of labour in Canada before and after the Charter can’t sufficiently answer this question, since this approach fails to isolate the effects of the Charter from the myriad other political, economic, and social changes occurring in the past three decades. Narrowly examining the jurisprudence and tallying Charter decisions for and against labour is also inadequate: the legal meaning of a ruling in a court is not necessarily the same as the social and economic meaning of a ruling as it is implemented or responded to in the real world. Courts do not operate in a vacuum, and law is meaningless without its social context. To understand the impact the Charter has had on labour in Canada, a more nuanced approach and a more complex question are required.

Therefore, in this paper I seek not to superficially assess whether the enactment of the Charter has been good or bad for labour; instead, I take as a starting point that the Charter is a defining feature of the contemporary legal landscape, and ask, how has the Charter structured the legal and political terrain of labour politics in Canada? This inquiry has two parts: first, I examine Charter jurisprudence on the rights to bargain collectively and to strike; and second, I suggest wider implications of the adoption of Charter litigation as a strategy of labour’s struggle. I argue that the jurisprudence on labour rights under the Charter, while not overwhelmingly favourable, has offered some incremental advances to the labour movement, and more importantly, holds out the possibility of greater developments. Yet, in the latter part of my inquiry, I also note some of the potential pitfalls of pursuing Charter litigation as a labour movement strategy, including the possibility of de-radicalizing and bureaucratizing the struggle. Overall, I argue that Charter litigation offers a tool to unions in advancing labour rights, and that in this moment of relative weakness, any tool that can deliver results is a tool that should be used.

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I. CHARTER JURISPRUDENCE AND LABOUR RIGHTS

A. Context: Labour in the Time of the Charter

In the three decades since the Charter’s enactment, labour’s power in society has declined. Labour’s social power is distinct from, though related to, the legal status of labour rights: Professor Arthurs notes that although “labour’s legal fortunes under the Charter” have improved in recent years, this narrow legal improvement coincided with broader decline. The many indicia of this decline include falling rates of union membership, a decrease in labour’s bargaining power, declining job security and incomes for workers, ineffective labour market regulation by the state, and a decline in “labour’s political influence and cultural salience.” Union density peaked in 1982, the year of the Charter’s enactment, at 40 percent, and declined for two decades to plateau around 30 percent. Rates of job action have also declined, dropping more than seventy percent between 1980 and 2005. Of course, none of these points of data presents a complete measure of labour’s power in society, but it is widely apparent that the labour movement is at a moment of historic weakness, and that the turn in labour’s fortunes began just before or with the enactment of the Charter. This timing suggests that, legal rulings aside, the Charter was bad news for the labour movement: if not a death knell, at least an ill omen.

However, correlation is not causation: between 1982 and the present, many other aspects of Canadian society, equally or more determinative of the status of labour, have changed as well. Arthurs lists numerous changes, all integrally linked to the neoliberalization of our economic and political systems, that have weakened the power of labour vis-à-vis capital: key factors include the global division and redistribution of labour, technological change, the decline of the welfare state, the erosion of state regulation of markets and the increasing tendency towards non-standard and precarious employment relationships in many sectors. Arguably, these political, economic and social changes have had a far more significant impact on labour rights and the labour movement than the legal changes wrought by the Charter. This was especially true in the first two decades of the Charter, when no substantive legal changes had yet been wrought. Amid these changes, and in the face of the concerted attack on labour rights that they constituted, the courts declined to take any steps to interfere to uphold labour rights or check government attacks,

9 Ibid.
10 Judy Fudge, “Brave New Words: Labour, the Courts and the Canadian Charter of Rights and Freedoms” (2010) 28:1 Windsor YB Access Just 23 at 26 [Fudge, “Brave New Words”]. Note, however, that union density has lately remained steady at around 30 percent, and that total membership numbers have increased, though not quickly enough to keep pace with the growth of the Canadian labour market.
12 Arthurs, supra note 8 at 376.
but the courts did not change the legal status of labour rights as it stood pre-Charter, until more recently.

Even after recent, more far-reaching decisions, however, it remains the case that “[p]olitics still explains much more about labour law than constitutional law does.”13 In the context of the vast changes in Canadian and global political economy, it simply doesn’t make sense to attribute labour’s precipitous decline to the enactment of the Charter, especially when organized labour in other parts of the world has been hit as hard or worse by these same changes whether or not they have extended judicial review to labour rights. In the United States, union density has dropped to less than 12 percent,14 barely more than a third of the rate in Canada; this decline does not coincide with the advent of constitutional legislation of fundamental rights (i.e. the Charter) as it does in Canada. At worst, the Charter has done little or nothing to mitigate the deleterious effects of neoliberal globalization on the Canadian labour movement, standing on the sidelines as political and economic attacks on labour rights have continued unabated.

Professor Arthurs explains that it is no accident that politics explains more than law does about the status of labour rights: he points to labour’s long-standing “autonomy project”,15 whereby labour relations were regulated and disputes resolved in a parallel system of labour boards and statutes, outside the legal mainstream. The labour movement sought legal autonomy partly because individual judges tended to be hostile to the interests of workers, but also because the legal system functions within and in support of a social paradigm that positions workers as subordinate.16 Because of this intrinsic bias, the labour movement has long sought mechanisms and structures for managing disputes that can place workers’ interests on a more equal footing with their employers’. Arthurs further notes that the courts have long resited labour’s autonomy project, and sees the envelopment of labour rights into the Charter fold as another example of courts, with their inherent anti-worker bias, intruding in a way that can only lead to workers’ defeat.17

Therefore, it must be kept in mind that Charter jurisprudence is merely one factor, and not a deciding factor, in the power of labour and the status of workers in Canada. Nonetheless, in the present context, it is a factor with special importance. The avenues the labour movement has historically pursued to advance workers’ rights are increasingly being closed off: governments are reluctant to intervene in labour or other markets to protect workers, legislated employment standards are being eroded under pressure from powerful business interests and historically strong ties between the labour movement and the New Democratic Party have been

15 Arthurs, supra note 8 at 378.
16 ibid.
17 ibid.
weakened in recent years. When other avenues are closing, Charter litigation offers at least an opportunity to keep fighting while other forces—those that could make more substantial change—regroup.

B. Labour Rights Under the Charter: the First Two Decades

The Supreme Court considered labour rights twelve times in the first two decades of the Charter, on issues of collective bargaining, mandatory membership, and secondary picketing. Each decision, however, left labour rights largely untouched by Charter protection, hewing close to the status quo regarding each of these issues. Professor Pothier has observed of this conservative tendency that, over those twenty years, "there was a lot of ink spilled simply to stand still."

The early landmark decisions on labour rights under the Charter came in 1987, when the Supreme Court ruled on three cases (the “Trilogy”) that raised questions about collective bargaining. Each case turned on the issue of whether collective bargaining was a protected aspect of freedom of association within the scope of section 2(d) of the Charter. At the Special House-Senate Committee that deliberated on the constitutional amendment, the Minister of Justice assured the others that collective bargaining was so obviously implied in section 2(d) that there was no need to amend the section to make the guarantee explicit, and proceeded to vote down just such a motion. Of course, judges are not bound by intentions and promises of elected politicians, and the judges that decided the Trilogy held that collective bargaining was not included in section 2(d). A narrow majority of the court (four on a panel of six) held that only the specific act of associating, and not anything done in association, is protected by section 2(d).

Justice Le Dain wrote for the plurality, but it was Justice McIntyre’s concurring judgment that made the strongest impression on observers and later decisions. Justice McIntyre reasoned that section 2(d) protected only those activities done in association which would be protected if done individually. He famously


19 Pothier, supra note 13 at 400.

20 Alberta Reference, supra note 18; PSAC, supra note 18; Saskatchewan Dairy Workers, supra note 18. These are referred to collectively as the “Trilogy”.

21 Pothier, supra note 13 at 371.

22 Alberta Reference, supra note 18 at 391, 407.
likened a labour union to a gun club, whose members have no special constitutional right to own guns as an association since they have no such constitutional right as individuals. Critics have pointed out that not only is this an unduly narrow reading of the section 2(d) guarantee (the dissent said that it made the right to freedom of association “legalistic, ungenerous, indeed vapid”), it also misapprehends the nature of bargaining and striking: it is surely the case that an individual is legally permitted to decline to enter into an employment contract, holding out for a better deal.

Then-Chief Justice Dickson’s dissent, conversely, emphasized the unique nature and role of labour unions that puts them in a different position than hobby clubs. His impassioned defence of the social role of unions and importance of collective bargaining remained a touchstone for proponents of labour rights for many years:

> The role of association has always been vital as a means of protecting the essential needs and interests of working people. Throughout history, workers have associated to overcome their vulnerability as individuals to the strength of their employers. The capacity to bargain collectively has long been recognized as one of the integral and primary functions of associations of working people. While trade unions also fulfill other important social, political and charitable functions, collective bargaining remains vital to the capacity of individual employees to participate in ensuring fair wages, health and safety protections, and equitable and humane working conditions.

Despite this strong language, Justice Dickson reasoned that in two of the three cases that made up the Trilogy (PSAC and Saskatchewan Dairy Workers), the impugned statutes were saved as “reasonable limits” under section 1. Justice Wilson, also dissenting, would have found that none of the cases passed the Oakes test for section 1.

Two subsequent decisions, PIPS in 1990 and Delisle in 1999, affirmed the rule from the Trilogy that collective bargaining is not protected by section 2(d) of the Charter, since only the act of associating itself is protected and not the activities carried out by the association. Even Justice Dickson relented in PIPS and capitulated to Justice McIntyre’s reading that section 2(d) protected only those associational activities that are already protected when done individually.

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23 Ibid at 405.
24 Ibid at 363.
25 Ibid at 368.
26 PSAC, supra note 18 at 439ff; Saskatchewan Dairy Workers, supra note 18 at 475ff; Charter, supra note 1, s 1.
27 PSAC, ibid at 453ff; Saskatchewan Dairy Workers, ibid at 485ff.
28 Supra note 18.
29 PIPS, ibid at 373–74.
In refusing to extend constitutional protection to collective bargaining or striking, these decisions disappointed those who had hoped for a new era of labour rights under the Charter. However, it is important to note that although the Trilogy and subsequent affirmations did not extend any new protections, neither did they take away any rights that labour once had. Before the enactment of the Charter, unions relied on statutory and regulatory schemes to exercise their rights, complemented by political action. When the Supreme Court declined to constitutionalize collective bargaining, it did not close the door on any of these other avenues. It did indicate to governments that it would not step in to interfere with their legislative attacks on union rights; however, prior to the Charter it had not been stepping in to protect labour against government attacks either. Even in these early days, then, before recent and more promising developments, the Charter was at worst neutral for labour rights.

C. Opening the Door to Labour Rights: Lavigne to Dunmore

Unions did have some limited successes in obtaining positive results in court in the first two decades of Charter jurisprudence. In 1991, in Lavigne, a college teacher in Ontario objected to his mandatory union dues being spent on advancing political causes he did not support.30 With funding from the right-wing National Citizens’ Coalition, he argued in court that imposition of these mandatory dues violated his rights to freedom of expression and freedom of association. The Supreme Court justices unanimously agreed that there was no Charter violation, in four different sets of reasons. The plurality held that although freedom of association included the freedom not to associate, and the claimant’s freedom not to associate was violated, section 1 operated to justify the violation. The three other opinions concluded that there was no violation.31 Ten years later, in Advance Cutting, the Supreme Court upheld the rule from Lavigne that the right not to associate, though protected by section 2(d), is subject to internal limits in order to pursue valid associational goals such as the functioning of unions.32

Lavigne was widely heralded as a victory within the Canadian labour movement.33 Neither Lavigne nor Advance Cutting extended new constitutional rights to unions or workers; however, in both of them, the court had the opportunity to deliver a crippling blow to the labour movement. Majoritarian unionism is central to union organizing in the Canadian labour law regime; although critics have noted that it is not the only way, nor necessarily the best way, to pursue workers’

30 Ibid.
31 Ibid.
32 Advance Cutting, supra note 18.
collective action, it is the mechanism entrenched in Canada. To do away with it would wreak havoc on existing labour relations schemes, havoc that unions, in their moment of decline, would be unlikely to emerge from in good shape. Thus, while these decisions granted no new rights or powers to workers and their unions, they preserved a central mechanism that the court could have removed with the stroke of a pen. Nonetheless, it is worth noting that the challenge brought by Lavigne would not even have been possible prior to the Charter: critics have rightly noted that rather than protecting labour rights, the Charter opened unions up to new lines of attack.

It was not until the decisions in Kmart and Allsco, both decided in 1999, that the application of the Charter began to change the legal status of labour rights. In those cases, the courts extended constitutional protection to consumer leafleting at secondary sites, which had been prohibited at common law. Though positive for unions, this change was marginal: consumer leafleting is not central to union activity as compared to collective bargaining and striking. Nonetheless, it suggested a new direction for labour rights under the Charter, signalling that the courts’ longstanding deference to legislatures in the realm of labour law and policy had come up to its limits.

The first indication that the Supreme Court was open to revisiting its exclusion of collective bargaining rights from constitutional protection came in the Dunmore decision, where the Supreme Court held for the first time that union activities could be protected by section 2(d) of the Charter. In that case, the Government of Ontario had passed legislation excluding agricultural workers from the protection of Ontario’s labour relations regime. Farmworkers, supported by the United Food and Commercial Workers’ Union, contested the validity of this legislation, arguing that by denying statutory protection to farmworkers, the government made it impossible for farmworkers to fully exercise their section 2(d) rights. While this case did not deal directly with collective bargaining, and the court declined to comment specifically on collective bargaining, the judgment did affirm the “fundamental freedom to organize.” Thus, it signalled to hopeful and optimistic observers that the Supreme Court might be open to revisiting the refusal, in the Trilogy and afterwards, to recognize union rights under section 2(d). In the words

36 Pothier, supra note 13 at 392.
37 Ibid at 393.
38 Ibid at 398.
39 Dunmore, supra note 18.
40 Ibid at para 48.
of Professor Fudge, the Dunmore decision “opened the constitutional door a crack” for the labour movement.41

D. The High-Water Mark: Health Services

The opportunity to push the door open wider came shortly after Dunmore was decided, when, in 2002, the BC government passed legislation overriding parts of the collective agreement between hospital workers and their employers, and prohibiting future negotiation on key points in the voided agreements. Members and their unions alleged that the legislation violated the provisions of the Charter that guaranteed freedom of association (section 2(d)) and equality (section 15).42 The Supreme Court rejected claims under section 15, but in a dramatic about-face, ruled that the legislation violated section 2(d) because that section properly included protection for collective bargaining.43

In this decision, the Supreme Court explicitly overturned the reasoning in the Trilogy, holding that “the grounds advanced in the earlier decisions for the exclusion of collective bargaining from the Charter’s protection of freedom of association do not withstand principled scrutiny and should be rejected.”44 The Supreme Court held that the contention in the Trilogy that collective bargaining rights were of too recent a provenance to be considered “fundamental” and warrant constitutional protection was historically inaccurate.45 The majority also disagreed with the narrow interpretation of section 2(d) in the Trilogy, which held that only those activities that were protected when done individually could be protected when done in association.46 The decision relied heavily on Canada’s obligations under international law, agreeing with Chief Justice Dickson’s dissenting opinion in the Alberta Reference that “the Charter should be presumed to provide at least as great a level of protection as is found in the international human rights documents that Canada has ratified.”47

The court allowed the appeal in part, finding that parts of the legislation violated the right to engage in collective bargaining protected under section 2(d) of the Charter.

While the court’s reasoning directly overruled the Trilogy’s rejection of collective bargaining rights under section 2(d), the right to collective bargaining recognized in the Health Services decision remained narrowly circumscribed. The court was explicit that it was only the process of bargaining, and not its outcome, that was included in the scope of section 2(d). The court was also careful to exclude

41 Judy Fudge, “Eating Crow: The Emergence of a Charter Right for Workers and Unions to Engage in Collective Activities” (20 June 2007), The Court (blog), online: Osgoode Hall Law School <http://www.thecourt.ca> [Fudge, “Eating Crow”].
42 Charter, supra note 1, ss 2(d), 15.
43 Health Services, supra note 7.
44 Ibid at para 22.
46 Ibid at para 28.
47 Ibid at para 70.
any consideration of the right to strike,\textsuperscript{48} without which a right to a process of collective bargaining is much less meaningful. In essence, read most narrowly, the Health Services decision extended a constitutional guarantee to the right workers to a non-binding consultation process with their employers prior to any alterations to their employment contracts. Based on this narrow reading, the decision is more than a few steps short of constitutionalizing the right to collective bargaining. Professor Savage has warned that the ruling will merely “force anti-union governments to rethink their overzealous approach to labour relations” and not “prevent them from pursuing explicitly anti-union agendas.”\textsuperscript{49}

Nonetheless, in its own context, Health Services was a victory. It extended a right to workers that did not previously exist at law: though this right was limited, it was a significant step beyond what was previously protected. Further, its symbolic power was as effective as the Trilogy’s had been, but the courts were now sending the opposite message: as much as the Trilogy signalled to governments that courts would not interfere with their neoliberal attacks on labour, Health Services signalled a change of heart, and put governments on notice that their actions would be subject to Charter scrutiny. As well, the Health Services decision resulted in an $85 million settlement for healthcare workers, a detail often overlooked in the critical scholarship on the case. The workers who received this compensation were among the most marginalized in the British Columbian workforce: 85 percent of the affected workers were women, 57 percent were over 45 years old and 32 percent were born outside of Canada.\textsuperscript{50} For these workers, who had taken pay cuts or lost their jobs entirely, a cheque for several thousand dollars is neither mere symbolism nor meaningless rhetoric. The effect of Health Services was to provide a concrete, material benefit to workers who would not otherwise have gained this, and to increase the constitutional recognition of labour rights.

E. A Change in Direction?: Fraser

Four years after the Health Services decision, in its decision in Ontario (AG) v Fraser,\textsuperscript{51} the Supreme Court adopted the narrow reading of Health Services decision described above: that only a limited process is protected, in essence only a right to consultation and not negotiation.

Fraser revisited the issue in Dunmore: after the court in Dunmore ruled that the legislation excluding agricultural workers from the labour relations regime violated section 2(d), the Ontario government passed new legislation that only minimally adhered to the standard set in Dunmore: it protected agricultural workers’ right to

\\textsuperscript{48} Ibid at para 19.
\textsuperscript{49} Savage, supra note 34 at 72.
\textsuperscript{50} David Camfield, "Neoliberalism and Working-Class Resistance in British Columbia: The Hospital Employees’ Union Struggle, 2002-2004" (2006), 57 Labour/Travail 9 at 15.
\textsuperscript{51} Ontario (AG) v Fraser, 2011 SCC 20, [2011] 2 SCR 3 [Fraser].
organize and to make collective representations to their employers, and to have their employers listen in good faith, but went not a step further. It did not include these workers in the other aspects of the labour relations regime that are protected by statute for all other unionized workers, including majority representation and grievance-based dispute resolution.

The majority judgement ruled that the legislation in question did not violate section 2(d) since it provided just what section 2(d) requires and nothing less. The dissent would have overturned Health Services, but the majority explicitly opposed overturning such a recent and important decision. The decision emphasized that Health Services was not a radical break from the prior jurisprudence, but rather built logically and closely on Dunmore, and should not be lightly overruled. Nonetheless, the majority applied a narrow interpretation of the ruling from Health Services: that section 2(d) protects only “a process of engagement that permits employee associations to make representations to employers, which employers must consider and discuss in good faith.”

Despite this restrictive interpretation, Fraser nonetheless affirmed Health Services: it remains open to future decisions to return to the direction of incremental expansion of labour rights charted in that decision, and in Dunmore before it. The right to strike remains untouched by the Supreme Court, but, as Professor Fudge notes, “Fraser has cast a shadow over it.” The implications of Fraser remain to be seen; several cases are working their way through the courts presently that ask the courts to decide whether the Charter protects the right to strike.

After three decades of Charter jurisprudence, the legal and constitutional status of core labour rights to collective bargaining remains unclear. Initially hostile, courts opened up to the possibility of recognizing labour rights, and began a process of incremental expansion in the late 1990s. However, the Supreme Court more recently took a different turn, and now seems poised to claw back some of the protection that was, however tentatively, extended. Nonetheless, without a clear ruling that labour rights are excluded, there remains potential for the right case, with the right set of facts, to nudge the door—still open just a crack—yet again wider.

52 Ibid at paras 57, 368.
53 Ibid at para 38.
54 Ibid at para 56.
55 Ibid at para 2.
56 Judy Fudge, “Constitutional Rights, Collective Bargaining and the Supreme Court of Canada: Retreat and Reversal in the Fraser Case” (2012) 41:1 Indus LJ 1 at 22 [Fudge, “Fraser”].
57 Ibid at 26.
58 Air Canada Pilots Association v Canada, 12-53882 (Ont Sup Ct J); Canadian Union of Postal Workers v Canada, CV-11-436848 (Ont Sup Ct J); Elementary Teachers’ Federation of Ontario v Ontario, CV 12-465306 (Ont Sup Ct J); International Association of Machinists and Aerospace Workers v Canada, CV-12-430334 (Ont Sup Ct J); R v Saskatchewan Federation of Labour, 2013 SKCA 43, leave to appeal to SCC granted, 35423 (October 17, 2013).
II. THE LEGALIZATION OF LABOUR POLITICS

The jurisprudence on labour rights is confused at the present, but it remains open to the establishment of further gains. Yet, even if the legal status of labour rights under the Charter is clarified, it remains to be seen what those rights will mean outside of the courts and legal system. No area of law exists separately from its social context: this is especially true of labour law, where the conflicts that emerge and the relations between the disputing parties are heavily influenced by economics, electoral politics and public opinion. Thus, judicial decisions about labour rights under the Charter are only one of many factors that will determine how labour rights are or are not realized in Canadian workplaces and society.

In particular, the interplay between Charter litigation and the many other strategies of advancing labour power leaves open as many questions as do the narrower legal issues of Charter jurisprudence. While some participants in and commentators on labour struggles celebrate courtroom victories and applaud the courts for upholding rights where governments have trampled them, others point to the de-radicalization of the labour movement as struggle moves from workplaces and public spaces to courtrooms, and control shifts from the hands of workers to the hands of union bureaucrats and lawyers.59 While there are some indications of this latter trend, there is not yet clear evidence of how and why this is happening, and it is not clear what role the Charter has played or might play in this development. Therefore, the implications of the whole project of Charter litigation of labour rights for the labour movement remain as yet undetermined. Can the labour movement look to the courts to bolster labour’s position outside the courts?

Charter sceptics have raised two distinct concerns regarding Charter litigation of labour rights, even as the jurisprudence appears to be taking timid steps in more labour-friendly directions. First, some have questioned the timing of this shift in the jurisprudence. The courts have extended (limited) constitutional protection to collective bargaining at the same time that the post-war compromise between business and labour that gave rise to modern collective bargaining regimes is rapidly unravelling. Second, critics worry that when unions adopt Charter litigation as a strategy to advance workers’ rights, they abandon other, more democratic and radical—and effective—strategies. The focus of unions’ energies shifts away from engaging and empowering members, and the power to effect change is misapprehended as lying with lawyers and judges, instead of workers acting in solidarity. I will address each of these concerns in turn, arguing that the first is not truly reflected in the jurisprudence, and that the second, while real and pressing, does not require nor justify a wholesale abandonment of Charter litigation, but warns of a potential pitfall that must be avoided.

A. Constitutionalizing the Wagner Model at the Moment of its Decline

Scholars including Fudge, Savage and Tucker point out that the very system of labour relations that the courts are finally recognizing is waning in relevance and proving less and less effective in reconciling contemporary labour-capital conflict. Modern collective bargaining regimes in Canada and the United States (known as the “Wagner Model” for the US National Labor Relations Act,\(^{60}\) that introduced this scheme), with their distinctive feature of replacing recognition strikes with mandatory recognition and bargaining, are a balance struck at a unique and distinctive historical moment. They represent a compromise reached in a time of high employment, economic prosperity, a relatively robust social welfare system and a strong union movement based in the growing North American manufacturing sector. In the context of intense production demands during the Second World War, and economic growth in the subsequent decades, unions were relatively powerful vis-à-vis both capital and the state, and managed to secure compromises from both in exchange for a moderation of their more radical demands and elements. In essence, unions guaranteed (relative) labour peace, effected via mandatory recognition and regulated systems of negotiation and dispute resolution. In exchange, capital provided stable jobs and good salaries to male workers, and the state provided a relatively robust welfare system.\(^{61}\)

Today, however, unions and workers get diminished benefits from upholding their end of this bargain: wages have stagnated and jobs are increasingly precarious, even while strikes are at historically low rates.\(^{62}\) The system designed to bring about labour peace in exchange for benefits to workers continues to enforce labour peace while extracting fewer and fewer benefits for workers. Why, then, defend it in the courts? Why seek to uphold and even constitutionalize collective bargaining, when collective bargaining merely serves to sanitize and depoliticize labour-capital conflict?

Professor Fudge compares the Supreme Court on this issue to the owl of Minerva, having “grasped the inner logic and significance of industrial pluralism… at the moment of its waning.”\(^{63}\) She argues that the existing model of labour relations “has limited application to the new ‘Wal-Mart’ economy” and therefore “fails to provide effective collective bargaining to an increasing proportion of working people in Canada.”\(^{64}\) Professor Savage notes that “[i]n re-affirming the public policy environment of the post-war compromise, the Court has done little to advance the interests of workers.”\(^{65}\) Professor Tucker similarly observes that the Health Services judgment “both exalts and constitutionalizes a deeply flawed regime of industrial

\(^{60}\) 29 USC § 151 (1935).


\(^{62}\) Yates, supra note 11.

\(^{63}\) Fudge, “Brave New Words”, supra note 10 at 43.

\(^{64}\) Ibid at 50.

\(^{65}\) Savage, supra note 34 at 73.
legality at a time when its limits have become increasingly apparent." The shift in our economic and political organization from Fordist to post-Fordist structures and regimes appears nearly complete; yet, our labour relations regime remains stuck in that bygone Fordist moment. Professor Arthurs has likened constitutionalizing collective bargaining to having constitutionalized the ferry to Prince Edward Island: an anachronism, doomed to become a lingering relic of a bygone time. It is possible, though, that contemporary North American collective bargaining regimes may prove not merely anachronistic, but an impediment to the transformation that labour relations will have to undergo if labour law regimes are to effectively protect workers' rights in a "brave new world of work."

In its broad strokes, this critique is valid and important. However, it doesn’t quite match up with a more detailed and concrete analysis of the jurisprudence on collective bargaining. Courts have in fact been careful to explicitly avoid constitutionalizing the Wagner Model in its entirety, constitutionalizing a right to collective bargaining at its most abstract level, rather than a right to any particular regime of collective bargaining. Ironically, the very weakness of the current jurisprudence—i.e. its narrow circumscription of labour rights—is its strength against this critique. The jurisprudence has only narrowly recognized a right of workers to collectively make representations to their employers: essentially, the right to come together, discuss and develop a position on workplace issues, and then communicate this position to the employer.

The employer explicitly has no duty to bargain, and only nominally has a duty to even listen in good faith: although the Fraser decision claimed to interpret section 2(d) as including a duty on the employer to listen in good faith to employee representations, the majority ruled that legislation that did not require employers to listen in good faith still, somehow, adhered to section 2(d), in what Professor Fudge has described as a "judicial sleight of hand". The labour right recognized in this regard is analogous to the "duty to consult" with respect to Aboriginal claims that the Supreme Court recognized in Haida: something more than a mere right to express a position, but less than an obligation on the opposing party to accommodate this position.

The precise content of the employer’s obligation to listen in good faith is unclear, but whatever it is, it is not a duty to adhere to the Wagner model. Whatever future, post-Fordist, post-Wagner form labour relations will take, it certainly will have to include the process of workers coming together, collectively developing positions on workplace issues and communicating these to their employers. That is all that has been included in the scope of section 2(d) in the jurisprudence thus far.

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66 Tucker, supra note 34 at 152.
67 Fudge, "Brave New Words", supra note 10 at 43.
68 Arthurs, supra note 8 at 383.
69 Fudge, "Brave New Words", supra note 10 at 43.
70 Health Services, supra note 7 at para 91; Fraser, supra note 51 at para 54.
71 Fudge, "Fraser", supra note 56 at 18.
72 Haida Nation v British Columbia (Minister of Forests), 2004 SCC 73, [2004] 3 SCR 511.
Rather than providing an accurate critique of the current jurisprudence, this line of criticism suggests a pitfall to avoid, and the current jurisprudence indicates that it won’t be too challenging to avoid it. In pursuing further *Charter* litigation, unions will have to strike a balance between gaining real and enforceable recognition of rights that can be concretized in practice, and keeping the door open to the as yet undetermined forms that future labour relations systems may take. However, the challenge won’t be to steer the courts away from entrenching the Wagner model. With the courts presently refusing to constitutionalize even a right to good faith negotiation, there doesn’t seem to be much threat that courts will entrench an overly rigid system.

**B. The *Charter* and the De-Radicalization of the Labour Movement**

The second, more realistic concern raised by critics is that *Charter* litigation moves the locus of labour-capital conflict from workplaces to courtrooms and de-radicalizes the labour movement. Control of struggles is placed in the hands of lawyers, and the leaders and bureaucrats who direct them, and taken away from the members themselves. In the face of declining member engagement and the near-disappearance of class as a basis of politicization, Professor Tucker warns that “[t]he pursuit of legalized politics through *Charter* litigation leaves even less space for grassroots activism and struggle.”

In addition to this practical concern that lawyers and bureaucrats will take or are taking power away from members, there is a larger political question at stake. The *Charter* presents a fundamentally liberal, individualized conception of rights, at odds with the collectivist politics of worker activism. Critics worry that framing the demands of workers in the language of liberal human rights, as in *Charter* litigation, accepts and entrenches this individualistic conception of rights and thus undermines and depoliticizes collective worker action. Along these lines, Professor Savage argues that “the labour rights as human rights approach is flawed because it assumes that power flows from rights.” He contends, is based on the mistaken belief that an abstract, legalistic right won in court will mean anything at all of value in the workplace or in society. He notes, “[h]istory has demonstrated that the opposite is true”: rights flow from power, in the sense that whoever holds power in society, outside the legal process, is able to influence the legislative and judicial processes and set the terms by which rights disputes are resolved. Ultimately, his and others’ concern is that the liberal, individualistic discourse of human rights “undermine[s] class-based approaches to advancing workers’ rights.”

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73 Walchuk, supra note 59 at 116; Wright, supra note 59 at 876.
74 Tucker, supra note 34 at 172.
75 Ibid.
76 Savage, supra note 34 at 68.
77 Ibid.
78 Ibid.
Even if victories can be achieved in court, the concern remains that these victories are attained at an unacceptable price. To pursue these claims in the courts is to accept and buttress a paradigm fundamentally opposed to the organizing principles and political underpinnings of unionism.

I share these concerns. However, the evidence of this development is limited to anecdote; at this point we have no systematic understanding of the extent and nature of this potential depoliticizing effect of Charter litigation. There is no evidence that Charter litigation causes, rather than coincides with, the lack of radicalism and grassroots activism in Canadian unions: as with the legal questions explored in the first section of this paper, this is a matter more likely determined by extra-legal factors.

Attempts at empirical rather than theoretical consideration of the problem of de-radicalization of labour under the Charter have been limited in the academic literature. In one example, Professor Mandel cites postal worker strikes in 1978 and 1987 to demonstrate a purported connection between the Charter and the decline of radical political action in the labour movement. The two dates fall on either side of the Charter’s enactment, and the union’s responses in the two situations contrast starkly. In both strikes, the federal government enacted back-to-work legislation. In 1978, the union defied the legislation, and the union president, Jean-Claude Parrot, spent two months in jail as a result. In 1987, the union folded and, following the legislation’s dictates, ordered members back to work directly—and then launched a Charter challenge. Professor Mandel uses this contrast as evidence of the impact of the Charter on union strategies, making them more cautious and compliant by providing a face-saving out for union leaders who don’t want to go to jail, but don’t want to appear to concede either. He writes, “[i]nstead of waving a defiant fist, the union waved a writ.” Charter litigation “provided the union with a quick and politically costless way of appearing not to back down”, while also allowing the union to avoid the messy, time-consuming realities of more direct political action. Labour lawyer Michael Wright concurs with Mandel’s assessment, and argues further that taking no action at all would have been better, in the long run, than mounting a legal challenge: “workers’ anger at having rights they had struggled for denied would not be placated and the chances for real political change would be greater.”

However, both Mandel’s and Wright’s analyses overlook crucial contextual facts. First, the contexts of the two strikes differed in ways that went beyond the existence of the Charter. The 1987 legislation was much more draconian than that of 1978: not only were the fines enormously increased, the legislation provided that any union executive member who violated the legislation would be suspended from office for five years. In 1978, Parrot was able to continue to lead the union.

80 Ibid at 273.
81 Ibid at 278.
82 Ibid at 277.
83 Supra note 59 at 875.
from prison; in 1987, the union would have been left rudderless, stripped not only of its president but all higher leadership. Mandel suggests that this increase in the ruthlessness of government legislation was because of the Charter: he argues that the government must have known that their legislation would not stand up to Charter scrutiny and they would never be in a position to have to fully carry it out—to pull the trigger, as it were. However, Mandel provides no evidence that this was the case, and it is at least equally likely that the shift in government attitude and approach is explained by the larger political dynamics that unfolded over the course of the 1980s: the neoliberal attack on labour described earlier in this paper.

Second, CUPW in 1987 actually did engage in grassroots mobilization. As Mandel describes, CUPW organized demonstrations, boycotts, political actions and community activities, all aimed at uniting opposition to the privatization of Canada Post. This seems to be just the type of membership-based activism that critics worry Charter litigation supplants. Mandel notes that these activities “were not dramatic enough to merit a headline”: the vagaries of media and public attention are certainly something for unions to consider in their strategizing: for example, being careful not to feed into this imbalance by themselves overemphasizing litigation and deemphasizing grassroots mobilization. However, that the media ignore these activities is not evidence that unions are abandoning democratic member activism.

Walchuk similarly uses the hospital workers’ strike in 2002 in British Columbia, the basis of Health Services, as an example of unions shifting away from radical action when Charter litigation provides a face-saving exit strategy. However, as with the CUPW example, there are problems in his analysis such that it does not provide useful insight into the impact of the Charter on labour politics.

Walchuk argues that, as with the CUPW back-down in 1987, the avenue of Charter litigation allowed union leaders to avoid the messy but necessary tactics of grassroots mobilization. In particular, Walchuk focuses on the decision by the leadership of the health care unions to cancel a planned province-wide strike in May 2004, attributing this choice to the availability of legal, rather than political, action. However, the actual political context was more complex and somewhat different than Walchuk describes. It is not the case that the planned province-wide strike “by all accounts was widely supported by many of the provinces [sic] public and private sectors and their community allies.” Assuming Walchuk is referring to public and private sector unions, and not the sectors themselves, it is not accurate that other unions were wholeheartedly on board with the planned action. Labour scholar David Camfield has noted the particular reticence of private sector unions to commit to any large-scale or long-term actions. While some unions made their

84 Supra note 79 at 279.
85 Ibid at 273.
86 Ibid.
87 Walchuk, supra note 59 at 112.
88 Supra note 50 at 34.
support explicit and directed members to participate in sympathy strikes, others did not.\footnote{CUPE BC was on board, for example, but BCGEU notably refused to participate (Benjamin Isitt & Melissa Moroz, “The Hospital Employees’ Union Strike and the Privatization of Medicare in British Columbia, Canada” (2007) 71 Intl Labor & Working-Class History 91 at 101–02).}

It appears to be the case that union leadership was out of touch with grassroots support for a general strike. For example, on the May Day rally just prior to the proposed strike date, organizers with the BC Federation of Labour (“BC Fed”) struggled to maintain control of the messaging: attendees clamoured for a general strike while the leadership preferred a more cautious focus on electoral support for the NDP. The BC Fed also struggled to keep a lid on wildcat pickets in the lead up to May 3. At the same time, however, union leadership was concerned that internal polling showed the union members, and the general public, were swayed by government messaging against illegal striking, framing it as “Big Labor” holding hospital patients—and the public—hostage.\footnote{Ibid at 103.} Support was enthusiastic from some quarters, but generally fractured and disorganized.

Most significantly, there was never any coherent, province-wide plan about how the strike would happen and, importantly, how it would end. HEU foresaw a messy or even catastrophic end if the proposed strike went forward: President Fred Muzin explained that the union acted out of self-preservation in calling off the strike, stating, “[w]e didn’t want to become the sacrificial lamb for a government that was intent on making an example of HEU and destroying us as an organization.”\footnote{Interview of Fred Muzin by Benjamin Isitt & Melissa Moroz (15 September 2005), cited in ibid at 105.} He also recognized the necessity—and absence—of broader support, more organized and entrenched than grassroots enthusiasm: “[W]ithout a strong foundation for broader action, HEU members and their supporters would have become sacrificial lambs in the government’s effort to regain control. Under those conditions, we could not responsibly ask people to walk off and stay off their jobs, and face severe repercussions.”\footnote{Fred Muzin, “Wanted: A Culture of Protest”, Guardian (Summer 2004) 6, cited in Camfield, supra note 50 at 34.}

Union leadership made a judgment that it could not pull off a general strike. This judgment may well have been wrong, and a case can certainly be made (as Camfield and Walchuk do) that the leadership should have had more faith in the grassroots. However, the decision was based on the facts at the time and was not based on the ongoing Charter litigation.

It is also inaccurate to state, as Walchuk does, that the union leaders decided to launch a Charter challenge instead of the proposed general strike. In fact, the court case was already well underway at that time. The BC Supreme Court had ruled on the matter in 2003,\footnote{Health Services and Support — Facilities Subsector Bargaining Assn v British Columbia, 2003 BCSC 1379, 19 BCLR (4th) 37.} and the appeal at the BC Court of Appeal was heard
from May 3 to May 5, 2004, coinciding with the planned strike date. It remains possible that the already ongoing legal action gave union leadership the type of face-saving out that Mandel and Wright identify in the CUPW situation. However, Walchuk’s analysis hinges on the cancellation of the strike as a direct choice, posed against Charter litigation, which is simply not what happened. Further, the union was consistently engaged in ongoing grassroots action, including community organizing, arts-based activism, and targeted illegal strikes. Walchuk’s analysis isolates two avenues of union resistance and artificially places them in opposition: the general strike as the radical action, and Charter litigation as the de-radicalizing action. However, in reality, unions engage in a variety of tactics and strategies that have a variety of political implications.

Rather than going through with a province-wide general strike, the health care unions signed a deal with the government and called off job action. The deal only minimally improved upon the terms of the legislation. In taking the deal, perhaps the union leaders made a bad decision: it seems likely they did, considering, as Walchuk notes, that union activists were later quoted in the media saying that they felt “screwed by our own leaders.” It should also be noted that union leadership was re-elected in its entirety following the settlement. However, it is not clear how much that bad decision was influenced by or reveals about Charter litigation. Again, the realities of labour politics are shaped by political, economic and social contexts, not only law.

Notwithstanding the paucity of evidence, it is logical that the availability of Charter litigation leads unions to invest resources in legal action that could otherwise have gone to grassroots mobilization. This is a potential drawback of Charter litigation as a strategy for the labour movement, but there is no reason that

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95 On community organizing and arts-based activism, see e.g. Hospital Employees’ Union, Newsletter, “Seniors to March on Legislature in Victoria, November 26” (7 November 2002) online: HEU <http://www.heu.org>; Hospital Employees’ Union, Newsletter, “Tree of Hope to be raised to fight St. Mary’s closure” (4 December 2003) online: HEU <http://www.heu.org>; Hospital Employees’ Union, Newsletter, “Cavalcade of Hope drives message home” (22 October 2003) online: HEU <http://www.heu.org>; Hospital Employees’ Union, Newsletter, “Revelstoke not giving up fight to save Moberly Manor” (7 August 2003) online: HEU <http://www.heu.org>; Hospital Employees’ Union, Newsletter, “The HEU Grinch is on the move” (3 December 2002) online: HEU <http://www.heu.org>; Hospital Employees’ Union, Newsletter, “Children’s and Women’s day-long festivities honour fired health care workers” (18 July 2003) online: HEU <http://www.heu.org>; Hospital Employees’ Union, Newsletter, “Protest actions in Nanaimo and Chilliwack fuel opposition to Liberal privatization, cutbacks agenda”, Newsletter (21 February 2003) online: HEU <http://www.heu.org>. On illegal strikes, see e.g. Hipperson v Hospital Employees’ Union (19 October 2004) B315/2004, online: BCLRB <http://www.canlii.ca>; Health Employers’ Ass’n of British Columbia v HEU (2002), 87 CLRBR (2d) 70 (BCLRB); Canadian Forest Products Ltd v HEU (2006), 131 CLRBR (2d) 161 (BCLRB); and Health Employers’ Ass’n of British Columbia v HEU (2003), 92 CLRBR (2d) 126 (BCLRB).
96 Supra note 59 at 113.
97 Ibid at 117.
it should be fatal. It is not a reason to abandon Charter litigation altogether, but to proceed with caution: to use Charter litigation as one tool among many, not the only tool, in advancing workers’ rights. At a time when the labour movement is short on other options, any tactic that can bring advances is worth using. Further, abandoning Charter litigation would leave the field open to employer-side advocates, who are no less eager than unions are to push the Supreme Court in a direction favourable to their interests. For better or worse, the Charter is a front in the conflict between labour and capital, and while unions are wise to tread cautiously, they are better served by acting proactively and tactically and maximizing potential gains on this front.

III. CONCLUSION

While the effects of the Charter to date have been only limitedly in labour’s favour, there remains potential for further gains. Judicial decisions on labour rights have not been unqualified victories for labour—far from it—but they have not cut back on labour rights, either. At worst, they have been neutral in effect: sometimes delivering no improvement on the status quo and other times offering just a little bit more. Moreover, the jurisprudence is unsettled on central questions, including the status of the right to strike. Charter jurisprudence has not closed any doors to the pursuit of labour rights through legal avenues, and has opened some doors a crack. The labour movement now has the opportunity to press harder to open those doors wider.

Yet, in pursuing gains via the courts, unions must be careful not to do so at the expense of other, potentially more powerful strategies and tactics. While Charter litigation holds some promise for advancing labour rights and improving the position of workers in Canadian society, to pursue it also risks depoliticizing the labour movement and neglecting mass mobilization and solidarity, the true source of labour’s power. Charter litigation is a tool, and in a historical moment of relative weakness, any effective tool is valuable. Nonetheless, it must be wielded with discretion and care. While I don’t accept the contention that Charter litigation has been the cause of the de-radicalization of Canadian labour politics, I do note that there is a real risk, one that may already be materializing, that the legalization of labour politics could exacerbate rather than alleviate labour’s current woes. There is potential for significant gains to be made through Charter litigation, but unions must proceed with caution in order to ensure that any victories won through the courts are not, in the end, pyrrhic.