The Ghosts of Wagnerism: Organized Labour, Union Strategies, and the Charter of Rights and Freedoms

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Abstract

Wagnerism has been at the centre of Canadian labour relations since the end of World War II. Wagnerism rests on a so-called balance between workers and employers. Between 2007 and 2015, the Supreme Court of Canada has ruled that the constitution includes protections for good faith collective bargaining and to strike. In these cases, the Court stated that it is not constitutionally enshrining Wagnerism, yet it also leaned heavily on Wagner principles in arriving at its decisions. Building on interviews with national union leaders, I argue that the ambiguity between the Court's decisions and Wagnerism has left workers uncertain about how these rights alter the material conditions of unions. I conclude that the court's embrace of labour freedoms will only have material benefit if workers are willing to use these newfound freedoms to build working class capacities to directly confront ongoing attacks by governments and employers on core union freedoms.

Keywords: labour rights, freedom of association, strikes, Charter of Rights and Freedoms

Résumé

En 2007, la Cour suprême du Canada a statué que la Charte canadienne des droits et libertés prévoyait la négociation collective de bonne foi. En 2015, la Cour a déterminé que la Charte protégeait le droit de grève. Ce faisant cependant, la Cour déclarait qu'elle n'entendait pas constitutionnaliser les politiques canadiennes en matière de relations de travail inspirées de Wagner. Ironiquement, la jurisprudence de la Cour suprême a toutefois été fortement influencée par les politiques de Wagner. L'ambiguïté entre les décisions de la Cour suprême et le wagnérisme lui-même a ainsi créé une série de questions pour les militants syndicaux et les chercheurs en politiques du travail. Quelles sont, par exemple, les implications de cette décision pour les lois canadiennes en droit du travail s'inspirant de Wagner? De plus, comment les syndicats qui s'appuient actuellement sur les protections de Wagner réagissent-ils à ces nouvelles libertés constitutionnelles? Le présent article répond à ces questions en suggérant que la Cour suprême a créé une jurisprudence ambiguë qui amplifie les tensions au sein du mouvement syndical actuel.

Mots clés : Chartes des droits et libertés, droits syndicaux, négociation collective, droit de grève, wagnérismes, lois syndicales

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Since the end of the Second World War, Canada's system of labour law has been based on an amalgamation of past laws and policies designed to constrain workers' capacity to strike and the American Wagner model. As passed by the U.S. Congress in 1933, the *National Labour Relations Act* (Wagner Act) guaranteed workers the legal right to select their own independent union through a government-supervised majority vote. The Act also outlined and protected the rights of workers to collectively bargain, to strike, to participate in secondary boycotts, and to picket.[1] After hundreds of strike actions pressured Canadian authorities to adopt a version of the Wagner model in 1944, workers were granted similar statutory freedoms to join a labour union of their own choosing, and the union then had exclusive rights to collectively bargain once it demonstrated majority support in a workplace (Carter et al. 2002, 265; Tucker 2014b, 3–4). Once it is certified, employers have a legal duty to bargain in good faith with the union, and, if collective bargaining fails to reach a settlement acceptable to bargaining unit members, workers can then legally strike. While strikes and picketing continued to be tightly regulated by the common law, at the centre of Canadian Wagnerism, the Supreme Court of Canada has acknowledged, is "the fundamental need for workers to participate in the regulation of their work environment" (*Health Services and Support—Facilities Subsector Bargaining Assn. v. British Columbia* 2007, at para 63, hereafter *BC Health Services*).

As this article will demonstrate, recent jurisprudence surrounding the Charter of Rights and Freedom's associational protections (s. 2(d)) has uncovered a friction between Canadian Wagnerism, workers' constitutional rights, and worker perceptions of what these rights signify with regard to contemporary class struggles. That friction emerged from recent constitutional decisions regarding labour freedoms. In *Saskatchewan Federation of Labour v. Saskatchewan* (2015, hereafter *SFL v. Saskatchewan*), Justice Abella wrote for the majority of the Supreme Court declaring that the Charter protected the right to strike. This conclusion built on the court's decisions in *Mounted Police Association of Ontario v. Canada* (2015, hereafter *MPAO*), *Ontario v. Fraser* (2011), and *BC Health Services* (2007), which jointly constructed a two-fold definition of freedom of association in the Charter: individuals have the freedom to collectively organize (or combine), and that group has the freedom to collectively engage in bargaining and to strike. Arriving at these decisions, the majority of Supreme Court justices made a series of normative claims about the importance of good faith collective bargaining and the freedom of unions to strike for stable and peaceful labour relations, two central components of Wagnerism. Yet the court has also consistently stated that it is not "constitutionally enshrining" the Wagner model (*Ontario v. Fraser* 2011, at paras 77–78, also 44–45; *BC Health Services* 2007, at para 91).

The ambiguity between the constitutional freedoms of workers and the Wagner model of labour relations has unearthed a series of important questions for workers

[1] In 1947, the United States Congress passed the Taft-Hartley Act, which limited the ability of labour unions to utilize the strike weapon for non-collective bargaining purposes.

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and their unions. For instance, do recent Charter victories alter the relationship between long-standing statutory protection for workers and their newfound constitutional rights? Moreover, given that the majority of Charter challenges are arising from public sector unions, what are the actual material openings for workers in this sector? Perhaps equally important, has government's consistent usage of back-to-work legislation and essential service designations for public sector workers (Canadian Foundation for Labour Rights 2017; Panitch and Swartz 2003) weakened Wagnerism in this sector, making recent Supreme Court decisions more important to expand workers' freedoms? If so, are workers now more willing to use their constitutionally protected ability to strike for more pro-active purposes, either inside or outside of the collective bargaining process? And, finally, do these decisions make any difference for workers in the private sector? The answers to these questions are complex because there has been little research examining how constitutional decisions shape or alter the legal foundations of Wagnerism and how workers internalize these constitutional decisions in shaping the broader class struggle.

Building on a series of twenty semi-structured interviews with both provincial and national union leaders in both the public and private sectors, this article argues that the implications of the constitutional decisions for unions are ambiguous and sector dependent.[2] For instance, public sector unions are far more likely to see the Supreme Court decisions as enhancing their collective power and influence and are especially hopeful that it will limit government abilities to unilaterally impose collective agreements or end legal strikes through back-to-work legislation. By contrast, private sector unions see little in the decisions to expand union power. These diverging opinions, as this article will argue, reflect a particular tension between public and private sector unions with regard to the constitutional right to strike in the current era. Almost all union officials interviewed recognized that the rights to collectively bargain and to strike have long existed as core Wagner freedoms. That being the case, most private sector union leaders interviewed did not see the Supreme Court's jurisprudence as dramatically changing the material conditions for their unions. These responses were somewhat surprising given that the patchwork of Charter jurisprudence that the court outlined between 2007 and 2016 has promoted several normative principles that have the potential to provide unions with the tools to help organize the working class as a whole, arguably creating new legal and political space for unions. This includes the legal ability for independent organizations to offset economic power imbalances by accessing an effective means to collectively bargain and to strike. The article concludes that the constitutional rights of workers will only have material benefit if workers are willing to use their freedom to strike to confront ongoing attacks on core union freedoms.

[2] Interviews were conducted with union officials (and some union staff representatives) in the summer and fall of 2017. While some interviews were conducted in person, many were done over the phone and through e-mail. Many follow-up questions were done by e-mail. The author conducted all of the interviews using an interview template. Participants were selected through a broad national mailout to union officials and staffers across the country. Workers were also chosen based on their role in their unions and the respondents reflected a cross-section and even distribution of public (ten interviews) and private (ten interviews) sector union leaders.

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Such actions would seek to use these freedoms proactively to defend public sector rights against government imposed back-to-work legislation while simultaneously challenging governments determined to undermine the ability of private sector workers to exercise their long-standing Wagner freedoms.

Wagnerism and Worker Militancy in Canada: A (Brief) History

Throughout the 1930s and the early 1940s, Canadian authorities resisted union pressures to replicate a Canadian version of the Wagner model of labour relations (Sefton-MacDowell 1978, 177–78). During World War II, the federal Liberal government continued to promote its 1907 *Industrial Disputes Investigation Act* (IDIA), which restricted the associational freedoms of workers by imposing mandatory conciliation and cooling off periods before strikes could occur in numerous sectors (Fudge and Tucker 2001; Russell 1990). Wartime conditions of full employment, however, gave added economic power to the labour movement. By the end of 1943, increased strike action and rising public support for labour's political allies pressured the Liberals to pass Wartime Labour Relations Regulations, Order in Council PC 1003 (PC 1003), the country's first fully Wagner-inspired collective bargaining framework (Panitch and Swartz 2003, 11–13). In 1948, PC 1003 was replaced with permanent legislation, the *Industrial Relations and Disputes Investigations Act* (IRDIA). Similar in nature to the Wagner Act, PC 1003 and the IRDIA were premised on the notion that the state could construct a legal balance between capital and labour. In so doing, PC 1003/IRDIA constructed a decentralized system by which employers were legally required to recognize unions and bargain in good faith. PC 1003/IRDIA also made it illegal for employers to discriminate against employees for participating in labour union activity, while limiting the ability of employers to create company unions. Scholars recognized at the time that, in adopting the Wagner-inspired framework, the government was promoting "the maintenance of industrial peace and the promotion of collective bargaining satisfactory both to employers and to employees" (Logan 1956, 26–27). In 1967, the federal government responded to the militant demands of the Canadian postal workers by extending Wagner freedoms to all federal public sector workers, although the right to strike was severely constricted for several decades (Palmer 1992, 320–25). Similar changes were soon enacted for public workers in the provinces.[3]

Unlike its American counterparts, however, Canadian Wagnerism placed significant restrictions on the abilities of workers to strike (Fudge and Tucker 2000, 276–78; Russell 1995; Slinn 2014; Heron 2012). For instance, the federal government's long-term priority regarding strikes was designed with the policy goal of limiting strike action to preserve "public peace and order" (Pierce 2003, 339). Under PC 1003/IRDIA, workers were forbidden from engaging in recognition or political strikes. Workers were also legally forbidden to strike during the life of a collective agreement or during collective bargaining. Even collective action

[3] Saskatchewan was an anomaly in this history, as its public sector workers had won the right to collectively bargain and to strike in 1944.

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such as production slowdowns or a refusal to work overtime were eventually deemed by policy makers as strikes and thus illegal (Fudge and Tucker 2010, 348–49; Braley-Rattai 2014, 330). Moreover, in a holdover from the IDIA, PC 1003 forbade workers from engaging in strike actions until fourteen days after a conciliation board issued a report (PC 1003, s. 21, at paras a–b). When labour relations returned to the provinces after 1950, most governments adopted similar restrictions on the associational freedoms of workers, including the introduction of mandatory strike votes and cooling off periods before a legal strike could occur.

After PC 1003, strikes became defined by their legality. As Figure I demonstrates, the vast majority of strikes since 1946 have been legal in nature. In other words, almost all strikes in Canada transpire after the break-down of collective bargaining between a single certified union and a single employer. More often than not, these strikes occurred over bread and butter union issues such as wages, benefits, or working conditions. Often, these strikes were lengthy, sometimes characterized by intense conflicts because their timing was largely predictable and because they were structurally designed to be an economic war of survival between the two parties (Huxley 1979, 230–31). To be sure, there were periods when workers occasionally did step outside the Wagner rules and engage in wildcat (illegal) strike action (Figure 1).

Yet, since the 1970s, both legal and illegal strikes have declined precipitously. In fact, since the state routinely intervenes in illegal strike action through its administrative labour boards or through legislation imposing excessive fines, penalties, or even imprisonment, wildcat strikes can be punitive for the union involved. In the public sector, unions are routinely legislated back to work for engaging in

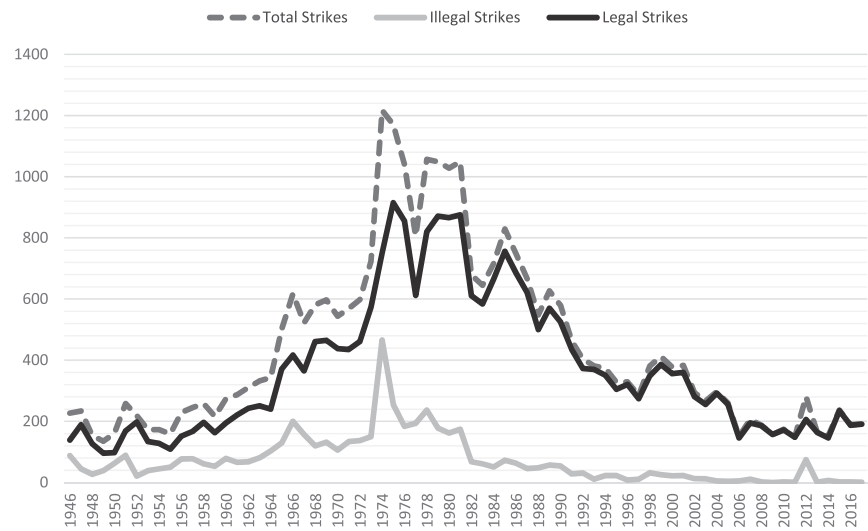

Figure 1 Total Strikes in Canada, Legal and Illegal, 1946–2017. Sources: Statistics Canada, Table 14-10-0352-01 (formerly CANSIM 278-0015). Work stoppages in Canada, by jurisdiction and industry based on the North American Industry Classification System (NAICS); *Employment and Social Development Canada, Work Stoppage Directory, 1946–2018.*

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legal strike activity (Canadian Foundation for Labour Rights 2017; Panitch and Swartz 2003).

State intervention only partially explains the decline in strikes. Throughout the post-war period, militant strike action was largely driven by workers in the private sector. Since the 1990s, however, private sector strikes are increasingly rare and now occur just as frequently as those in the public sector (Figure 2). The decline in private sector strikes has occurred for a variety of reasons but has much to do with the overall decrease in manufacturing employment and thus the weakening of the unions in those sectors.

This change is a result of the restructuring of the economy from one based primarily on labour-intensive exports in manufacturing and natural resource extraction in a period of Keynesian state-led growth to a neoliberal service-based economy driven by lean states, deregulated markets, precarious work relationships, and automation in the workplace (Albo, 2010; McBride 2017). The period of neoliberalism has also been defined by the highly mobile nature of capital, which has placed downward employment pressure on workers, leading to a vast increase in the precarious workforce, labouring for one or more employers for static wages and destabilizing families and communities in the process (Lewchuk, Procyk, and Shields 2017). Taken together, these multiple pressures suggest that workers' collective freedoms in the early years of the twenty-first century are under direct assault from employers, governments, and broader macro-economic forces. Moreover, the very tool that workers once used to resist such pressures—the collective withdrawal of labour—is no longer being utilized to challenge power imbalances in society.

These large macro-economic shifts have had dramatic implications for the Canadian labour movement. Historically, unions in the auto industry, steel, mining, forestry, utilities, and oil and gas dominated the labour movement and much of the strike militancy during WWII and throughout the post-war period derived from struggles in these sectors. By 2018, these unions no longer represented the face of the labour movement. For instance, in 2015, the Canadian Union of Public

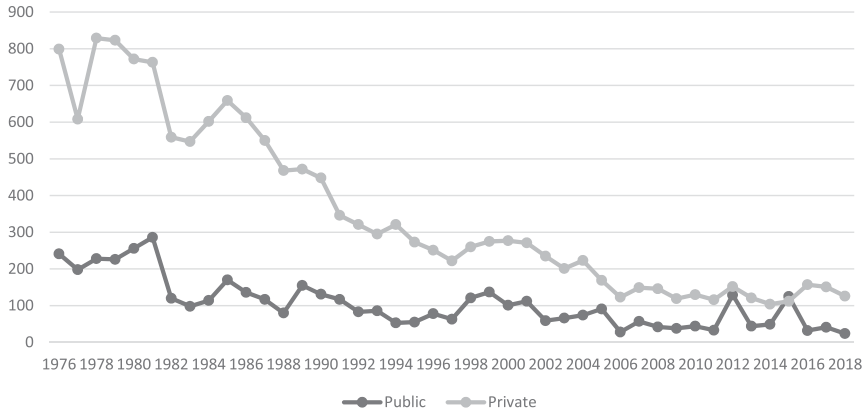

Figure 2 Public and Private Sector Strikes, 1976–2018. Source: Statistics Canada, Table 14-10-0352-01 (formerly CANSIM 278-0015). Work stoppages in Canada, by jurisdiction and industry based on the North American Industry Classification System (NAICS).

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Employees (CUPE) was by far the largest union in the country, representing over 635,000 workers, an increase of 100,000 members since 2004. By contrast, the largest private sector union, the Canadian Auto Workers (CAW), grew by only 40,000 members. The CAW growth, however, masks a large decline in membership until 2012, which rebounded after a merger with the 100,000-member Communications, Energy and Paper Workers Union (CEP), creating the new union, Unifor (Employment and Social Development Canada, 2004–2015). The merger between the two represented a trend within private sector unionization, as numerous long-standing private unions in various sectors merged with larger bodies in order to survive. Put another way, the merger trend by private sector unions reflects a decline in overall influence, as fewer and fewer workers are organized in the union movement, especially in the private sector (Figure 3).

For all of these reasons, strike numbers in Canada have fallen since the end of the 1970s. This decline has eroded workers' ability to challenge governments and employers and helps explain why many unions have become more willing to defensively guard past institutional victories in court.

The Charter and the Wagner Model: Workers' Uneven Collective Rights

As Wagnerism took hold across the Canadian employment landscape, the labour movement maintained its long-held position that any disputes arising from employer–union conflicts be adjudicated by third-party experts and not by courts

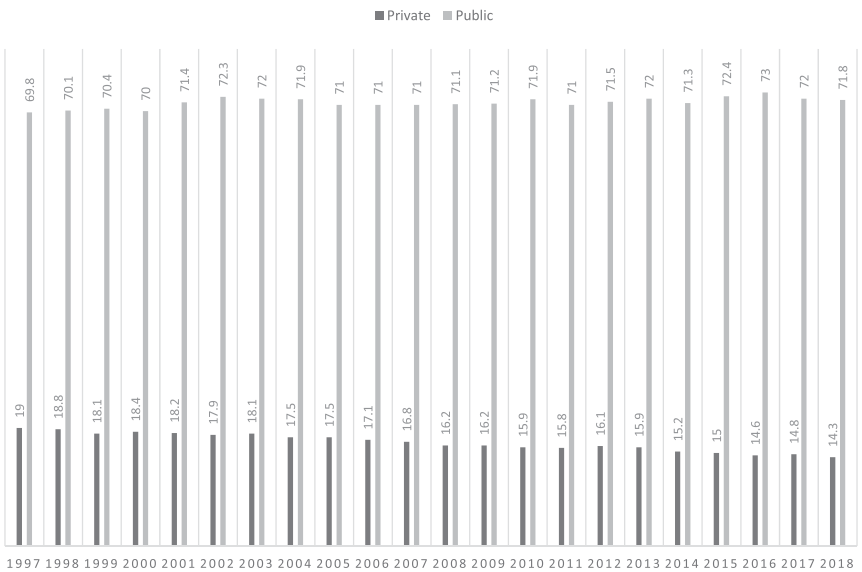

Figure 3 Percentage of Workers in a Union, Public and Private Sectors, 1997–2018. Sources: Statistics Canada, 14-10-0130-01 (formerly CANSIM 282-0221). Labour Force Survey estimates (LFS), employees by union status, sex, age group and education level, annually; Table 14-10-0132-01 (formerly CANSIM 282-0223). Union status by industry, annually.

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(Smith 2008). That position grew out of a long-held opinion by unions that courts and judges favoured the individual property rights of employers over the collective rights of workers (Fudge and Tucker 2001; Savage and Smith 2017).

By the 1980s, the increased use of back-to-work legislation by governments restricting public sector strikes, combined with a legislative intrusion in private sector bargaining through a cap on collective bargaining outcomes (the so-called "6-and-5 program"), contributed to the decline in union militancy. These coercive government actions pushed many unions to test the Charter's protection of fundamental freedoms, which included freedom of expression (the ability to picket) and freedom of association (the ability to collectively bargain and to strike). Unions were given some encouragement to test these freedoms in the constitution during the joint all-party committee hearings leading up to the creation of the Charter in 1980 and 1981. Notwithstanding the committee's defeat of a New Democratic Party (NDP) motion to have the Charter explicitly protect the right to organize and to bargain, the Liberal Attorney General, Robert Kaplan, did concede that these freedoms were integrated within his understanding of the broader definition of "association" (Savage and Smith 2017, 66–67).

Advocates of Charter-protected labour rights were soon disappointed. In five cases over four years, the majority of justices on the Supreme Court ruled that the Charter's protection of freedom of expression did not include protection for unions to engage in secondary picketing[4] (*Retail, Wholesale and Department Store Union, Loc. 580 v. Dolphin Delivery Ltd.* 1986); and that freedom of association did not protect a right to strike (*Reference Re Public Service Employee Relations Act*, 1987; *PSAC v. Canada* 1987; *Retail, Wholesale and Department Store Union v. Saskatchewan* 1987). At the centre of the union arguments in these cases was that freedom of association had a two-fold definition that included "an element of combination" and an "element of common purpose or common action " (*Reference Re Public Service Employee Relations Act* 1987, Alberta Union of Public Employees Factum, at para 15). In other words, associational freedoms included the individual right to associate for a common cause, but also recognized the legitimacy of the group itself performing collective activities. The Supreme Court, however, disagreed. For the majority, "modern rights to bargain collectively and to strike" (at para 144) were not deserving of constitutional protection. In a stinging indictment of the unions' arguments before the court, Justice McIntyre stated that freedom of association had a collective dimension that "advances many group interests and … cannot be exercised alone" but, ultimately, is a "freedom belonging to the individual and not to the group formed through its exercise" (*Reference Re Public Service Employee Relations Act* 1987, at para 155). Similar attitudes convinced the majority of justices in *Professional Institute of the Public Service of Canada v. Northwest Territories (Commissioner)* in 1990 that the Charter did not protect collective bargaining.

[4] Secondary picketing is a common tactic that unions will use to pressure employers during a strike. During a strike, unions will picket a secondary business that does business with the primary employer engaged in the labour dispute. The union goal is to have other businesses put pressure on the primary employer to end the dispute. As Smith explains, this tactic is often used when an employer brings in replacement workers to continue operating during a strike (2014).

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The 1990s witnessed an increase in anti-union politics, which resulted in a series of governments chipping away at traditional Wagner freedoms. These limitations were especially noticeable in the public sector, as conservative governments in Ontario, British Columbia, and Saskatchewan passed far reaching anti-union legislation that restricted workers' ability to access collective bargaining or to strike. These attacks on union freedoms by right-wing governments began to shift the Supreme Court's reasoning on freedom of association in 2001. In *Dunmore v. Ontario* (2001), the court ruled in favour of a group of private sector "vulnerable agricultural workers" who had lost their legal abilities to organize when the Conservative government repealed the NDP's *Agricultural Labour Relations Act* in 1995 (at para 55). While the court did not overturn its earlier decisions, it did recognize for the first time that there are "qualitative differences between individuals and collectivities" in which a group or community "assumes a life of its own and develops needs and priorities that differ from those of its individual members" (*Dunmore v. Ontario* 2001, at para 17). In coming to this conclusion, the court reasoned that contextual factors, such as worker vulnerability, may place positive constitutional obligations on governments to protect "certain union activities … collective representations to an employer" (at para 17).

In *BC Health Services* (2007), a coalition of healthcare unions argued that freedom of association safeguarded their right to collectively bargain. *BC Health Services* originates from a truculent 2002 decision by the British Columbia Liberal government to hastily enact Bill 29, *The Health and Social Services Delivery Improvement Act*. Bill 29 was introduced with little consultation with the province's health care unions and unilaterally transferred to the employer numerous powers to restructure the workplace free from existing (or future) collective bargaining agreements. In ruling in favour of the unions, the court specified for the first time that s. 2 (d) of the Charter protects the "capacity of members of labour unions to engage, in association, in collective bargaining on fundamental workplace issues" (at para 19). In arriving at this conclusion, the court leaned heavily on Canada's international commitments to protect collective bargaining and the evolving concept of "Charter values," which enhanced "the human dignity, liberty and autonomy of workers by giving them the opportunity to influence the establishment of workplace rules and thereby gain some control over a major aspect of their lives, namely their work" (at para 82).

Yet the court was also clear that the constitution did not protect the entirety of collective bargaining "as the term is understood in the statutory labour relations regimes that are in place across the country." For instance, the Charter "did not ensure a particular outcome in a labour dispute, or guarantee access to any particular statutory regime" (at para 19). What the constitution does protect is the right of employees "to unite, to present demands to health sector employers collectively and to engage in discussions in an attempt to achieve workplace-related goals" (at para 89). Government employers, meanwhile, have "corresponding duties … to agree to meet and discuss with [unions]" (at para 89), which includes examining whether the "*effect* of the state law or action is to *substantially interfere* with the activity of collective bargaining, thereby discouraging the collective pursuit of common goals" (at para 90, emphasis in original). Perceived in this light,

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the constitutional freedom to collectively bargain fortifies a meaningful "process" of dialogue making it "a limited right" (at para 91).

The court's recognition of constitutional protection for good faith negotiations poses a problem for the Supreme Court because the duty itself cannot be easily separated from the Wagner model of labour relations. Throughout *BC Health Services,* however, the court observed that collective bargaining itself predates Canadian Wagnerism. In other words, collective bargaining is not a "modern right" as the Court had decided in the *Alberta Reference,* but rather it had long been a "fundamental aspect of Canadian society" (*BC Health Services* 2007, at para 41). In making this historical case, the court divorced the Charter's associational freedoms from a specific statutory model and instead embraced a more generalized "procedural right to collective bargaining" (at para 66). This historical revelation was crucial because the court was then able to demonstrate that it was not creating new rights for unions but rather was aligning constitutional protections with long existing freedoms (Tucker 2008, 165–66). The duty to bargain in good faith and the corresponding legal requirements for employers to recognize and respect workers' bargaining proposals, however, is at the centre of Canadian Wagnerism (Langille 2009, 190–94; Tucker 2008). Prior to the passage of PC 1003, employers were under no legal requirement to recognize the union or bargain in good faith, and the only way workers could engage in a process of meaningful collective bargaining was through strike action.

The court's inconsistent amalgamation of central Wagner principles with the constitutional right to collectively bargain made it difficult to predict the extent to which court decisions would alter the balance of power between unions and employers. The first post-*BC Health Services* decision was a response to the legislation crafted after *Dunmore*. In *Ontario v. Fraser* (2011), the court was asked to rule on the Conservative government's new farm workers' legislation, the *Agricultural Employees Protection Act*, 2002 (AEPA). The AEPA excluded farm workers from Ontario's *Labour Relations Act* (as they had mostly been since 1943), thus denying them access to a Wagner-inspired collective bargaining process. In its place, the Ontario government created the AEPA, which granted farm workers' associations, "a reasonable opportunity to make representations respecting the terms and conditions of employment of one or more of its members who are employed by that employer" (AEPA, c. 16, s. 5 (1)). For their part, employers were required to "listen to the representations if made orally, or read them if made in writing" (c. 16, s. 5 (6)) and, if made in writing, "shall give the association a written acknowledgement that the employer has read them" (c. 16, s. 5 (7)). Beyond outlining vague notions of "listening" and "acknowledgment," the AEPA did not mention good faith consultation or require a duty to bargain.

The AEPA's ambiguity on *bona fide* collective bargaining proved to be a significant obstacle for workers. Notwithstanding the fact that close to 70 percent of workers had joined a UFCW local, employers refused to recognize or bargain with the union (*Ontario v. Fraser* 2011, at paras 8–9). The union's response was to challenge the constitutionality of the AEPA, claiming that it "substantially impairs farm workers' freedom of association by providing no statutory protection for collective bargaining" (*Ontario v. Fraser* 2011, Factum of the Respondents, at para 4).

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Although unsuccessful in the Ontario Court of Justice, the Court of Appeal had the benefit of the Supreme Court's guidance in *BC Health Services* and ruled in favour of the workers. The Supreme Court, however, disagreed on the substance of collective bargaining. For the court, freedom of association only protects against laws or government action "that make it impossible to achieve collective goals [and] *have the effect* of limiting freedom of association, by making it pointless" (*Ontario v. Fraser* 2011, at para 46, emphasis in the original). To which the court added that the now "derivative" (or secondary) right of collective bargaining really only protects the ability to make "collective representations" and to have those representations "considered in good faith (at para 51). Relying on these pared-down notions of *bona fide* collective bargaining, the court focused on the rudimentary process that the AEPA outlined to guide employer/employee interaction. The court concluded that the AEPA's requirement to have employers "listen to or read employee representations" met its new constitutional threshold of "good faith" negotiations, notwithstanding the fact that not a single union had been recognized by employers in Ontario's farm sector (at para 103; 108–09).

Notwithstanding the union loss in *Fraser,* unions continued to chip away at the opening made by *BC Health Services*, especially as conservative governments persisted in using their legislative powers to undermine core Wagner freedoms. Such a scenario occurred in 2007, immediately following the provincial election of the Saskatchewan Party. Very early in its tenure, the government passed Bill 5, *The Public Service Essential Services Act* (2008) (PSESA). The PSESA was a sweeping essential services legislation that effectively legislated away the legal ability of most public sector workers to strike. The province's union movement (led by the Federation of Labour) responded by launching a constitutional challenge, claiming that the unilateral withdrawal of employees' freedom to strike substantially interfered with their right to a meaningful process of collective bargaining and therefore was a violation of the Charter (*SFL v. Saskatchewan* 2015, at para 2).

To the surprise of many, the Supreme Court sided with the unions and ruled that the right to strike was a stand-alone freedom and "not merely derivate of collective bargaining" (*SFL v. Saskatchewan* 2015, at para 3). In arriving at that conclusion, the court built on a broad epistemological understanding of freedom of association that it had outlined a week earlier in *MPAO* (2015). In *MPAO* the court brushed aside its hesitations in *Fraser,* arguing that freedom of association in the labour context is meant to "preserve collective employee autonomy against the superior power of management and to maintain equilibrium between the parties" (at para 82). For the balance of power to be preserved, workers had to have a significant degree of choice and independence from management for collective bargaining to be considered meaningful. While the notion of "choice and independence from management" are two important attributes of Wagnerism, the court again made clear that it was not prioritizing a specific model of labour relations (at paras 92–99).

The court further clarified in *SFL v. Saskatchewan* that the legal ability to strike was "the 'powerhouse' of collective bargaining [that] promotes equality in the bargaining process" (at para 55). In other words, while strikes do not guarantee a specific outcome, they do promote a process based on equilibrium between the

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participants (at para 57). The court then determined that the legal ability to strike was a stand-alone freedom but nevertheless was also "vital to protecting the meaningful process of collective bargaining within s. 2(d)" (at para 24). To which the court also affirmed that without a freedom to strike, the constitutional right to collective bargaining is essentially "meaningless" (at para 24).

Having structurally connected the associational freedom to meaningful collective bargaining with the legal capacity to strike, the court performed a rudimentary historical analysis to demonstrate that strikes had occurred in Canada long before the establishment of Wagnerism in the 1940s (at paras 38–46). The court was also sympathetic to the notion that Canada's international law commitments had long recognized the ability of workers to withdraw their labour (at paras 67–75). In so doing, the court made clear that constitutional acceptance of strikes was nothing more than a reflection of collective action that had been occurring since employers first hired groups of workers. Yet workers' freedom to strike and maintain their employment is tightly regulated by Wagner-style labour laws. In fact, under the pillars of Wagnerism, strikes by responsible unions can only legally occur after the expiration of collective agreements and after a breakdown in the collective bargaining process. Even then, numerous jurisdictions restrict workers' capacities to strike by imposing mandatory conciliation or cooling off periods before strikes can occur. The statutory curtailment of workers' collective freedoms allowed the court to determine that strikes were a weapon of "last resort" and were therefore "critical components of the promotion of industrial—and therefore socio-economic—peace" (at paras 47, 48).

Workers' strike activity, however, cannot easily be packaged into well-ordered historical boundaries. Prior to the implementation of Wagner-style labour laws, strikes occurred for a variety of reasons—for recognition, for political purposes, or to challenge management power (Fudge and Tucker 2010). When those strikes occurred, workers' capacities to win a strike were entirely dependent on their collective strength, while employers were under no legal obligation to rehire workers engaged in strike activity. Employers were also free (as most are today) to hire replacement workers to further marginalize striking workers. In many ways, the history of workers' strike activity prior to Wagnerism demonstrates a contradictory freedom: while workers were free to strike over virtually any workplace issue, employers were under no corresponding legal duty to rehire striking workers. Under the Supreme Court's logic, this history demonstrates a universal acceptance of strikes as a democratic tool in the workplace while seemingly ignoring the corresponding legal trade-offs that unions made to win Wagner freedoms in the 1940s. Within the context of the current labour relations environment, it is the existing restrictions on workers' capacity to strike that have not been answered by the court and thus continue to linger in the aftermath of *SFL v. Saskatchewan* (Fudge and Jensen 2016, 104–05).

The friction between the Wagner model of labour relations and the court's constitutional jurisprudence on collective bargaining and the right to strike was further amplified in *British Columbia Teachers' Federation v. BC* (2016, hereafter *BCTF* 2016). In siding with the teachers' union, the Supreme Court reaffirmed its earlier conclusions that workers have the constitutional right to good faith bargaining.

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BCTF 2016 originated with the BC Liberal government's 2002 decision to unilaterally impose Bill 28 on the province's teachers. Bill 28 declared void numerous aspects of existing teacher collective agreements while also restricting bargaining on certain aspects of teachers' working conditions (e.g., classroom size). When the BC Supreme Court ruled that Bill 28 violated teachers' freedom to collectively bargain in 2011, the BC government's response was to introduce Bill 22, the *Education Improvement Act,* in 2012, after pugnacious consultations with the BCTF. Except for placing a time restriction on the issues that could be legally bargained, Bill 22 was a virtual replication of Bill 28. The BCTF argued that Bill 22 violated their constitutional freedom to bargain because the government continued to restrict the workplace issues that could be bargained. Moreover, the union claimed that the consultation process was nothing more than "surface bargaining," in which the government merely went through the motions of consultation without a good faith intention to reach an agreement.

Building on *BC Health Services*, the court accepted the minority decision in the BC Court of Appeal, which was decided over the question of what constituted "good faith" negotiations in the collective bargaining process (2015). The minority opinion by Justice Donald argued that constitutional protection of good faith negotiations had to examine the "content of bargaining positions" to determine the intent of the parties during the bargaining process. While such an activity is certainly consistent with Wagner style labour laws, he believed that it was not strictly determined by Wagnerism. Yet, in citing the Supreme Court's ruling in *Royal Oak Mines* (1996), Justice Donald inevitably leaned on Wagner principles to determine that constitutional protection for "good faith negotiations" had to include the following: first, the parties are required to meet and "engage in meaningful dialogue where positions are explained and each party reads, listens to, and considers representations made by the other." Second, parties engaged in collective bargaining must "not be inflexible and intransigent" and third, must "honestly strive to find a middle ground" (at para 334). While Donald recognized that these principles are meant as a general template and are "always context specific and fact-based," the argument relies strongly on Wagner definitions of good faith bargaining. In so doing, he made it difficult to now determine where the constitutional principles begin and the Wagner style labour policy ends.

"This is a courageous decision, one that all Canadians should celebrate:"[5] Union Strategies After *SFL v. Saskatchewan*

The court's constitutional jurisprudence on freedom of association has certainly shifted the terrain in how government interacts with its workers. No longer can government easily legislate away workers' freedom to effectively bargain or strike in the public sector and not end up in court. These court decisions transfer an important element of due process to public sector labour unions (and to farm workers in the private sector) that were otherwise vulnerable to the legislative whims of governments. Within the current economic context, the court's decision

[5] Yussuff 2015.

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to read good faith bargaining into the constitution will certainly have repercussions for governments that seek to unilaterally erode the ability of unions to collectively bargain and to strike. While the Supreme Court has been clear that the constitutional freedoms to bargain and strike do not guarantee an outcome, they do protect a process that can benefit public sector workers over time (*SFL v. Saskatchewan* 2015, para 57). To be sure, that process may be uneven, but it is significant that, immediately following the Supreme Court's decision in *BCTF* 2016, the Liberal government was obligated to spend upwards of $548 million in the hiring of new teachers to rectify its unconstitutional actions (Bailey 2017).

Notwithstanding these broad victories, workers and union leaders in the public sector have struggled to internalize the material benefits of these rights. According to one federal public union official, the constitutional rights to collectively bargain and to strike meant virtually "nothing" because the union leader "didn't realize we didn't already have the right to strike" (Interview 1-17 with public sector labour leader, 21 November 2017).[6] Such an opinion was echoed by numerous union leaders, most of whom believed "that we have always had the right to and the ability to take strike action and have done so numerous times" (Interview 5-17 with public sector union staff negotiator, 14 November 2017). Another public sector union negotiator, in the education sector, whose union did not have a rich history of taking strike action, believed that "the ruling is a confirmation of the fundamental rights of employees" and likely reinforced the core Wagner principles with regard to "respecting the balancing of the power relationship with the employer" (Interview 11-17 with public sector union staff negotiator, 15 November 2017).

Other labour officials in the public sector were more enthusiastic about the court's decision. One provincial labour leader acknowledged that the constitutional right to strike was particularly important because it would make the "union more confident when entering bargaining with the employer" and if it meant that "governments cannot implement 'back-to-work' legislation, it could shift the balance of power in a noticeable way for public sector unions" (Interview 9-18 with public sector union leader, 6 February 2018). That same public sector union leader was equally enthusiastic about the elevation of international worker rights to constitutional protection:

> It is awesome that the courts have affirmed that workers have a constitutionally protected right to strike. Article 23 of the UN Declaration of Rights states: "Everyone has the right to form and to join trade unions for the protection of his interests." This implies that they should also have the right to do collective bargaining and the right to strike (Interview 9–18 with public sector union leader, 6 February 2018).

These comments were echoed by other public sector union leaders, who almost universally believed that the newfound right to strike "crystalizes" union power at

[6] Interviews were coded by number and year (e.g., 1–17 refers to the interviewee first contacted and the year that interview took place (2017)).

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"important stages of negotiations" (Interview 12-18 with public sector union leader, 12 January 2018). A union staffer in the health field perhaps summarized these observations most eloquently, stating that the day the ruling came out,

> was one of the happier days of my working life in the labour movement, because it sends a clear message to the government that its conduct in the labour relations field is subject to the *Charter*. It completes the triumvirate of interconnected/interdependent labour rights: to organize, to bargain, and to strike (Interview 6-17 with public sector union staff representative, 13 December 2017).

Just as succinctly, a federal union leader highlighted that their goal has long been to "bargain in good faith," and that the rulings by the Supreme Court awarded labour another "important tool to accomplish that goal" (Interview 14-18 with federal public sector labour leader, 16 January 2018).

Private sector union leaders were far less enthusiastic about the Supreme Court's constitutional recognition of the right to strike. According to one national leader, "there has been no noticeable shift in the balance of power for our union, nor has it added any strength for growth for our organization" (Interview 10-17 with national union leader, 4 December 2017). While many private union leaders were willing to concede that the ruling gave an added "confidence" to members, there continued to be a presumption that governments "continued to lean so much to the employer" that the ruling was not capable of "altering the balance of power between workers and employers" (Interview 16-18 with private sector union local president, 16 January 2018). One private sector union president highlighted this cynicism well, arguing,

> we are a private sector union. The [ruling] had no effect on our union. The balance of power has always been with employers because they have the ability to scab us when we are in labour dispute. That balance of power would shift to the workers … if there was anti-scab legislation (Interview 18-17 with private sector labour leader, 4 December 2017).

Another national private sector union leader was somewhat more optimistic, stating that the right to strike sent a strong message to employers before bargaining began, "because without the right to strike, the company would not have the will to negotiate a fair collective agreement," and the court's decisions avoids "tilting collective bargaining in favour of the employer" (Interview 17-17 with national private sector union leader, 3 December 2017). Almost universally, however, private sector union leaders reflected on the erosion of federal and provincial labour relations codes as the true culprit in undermining union power over the past three decades. In fact, the real concern, in their view, were negative reform to labour relations acts that weakened "their ability to organize and continues to be the biggest road block to successful organizing to date" (Interview 18-17 with private sector labour leader, 4 December 2017).

One question that dominated national interest following the Supreme Court's ruling in *SFL v. Saskatchewan* was whether or not constitutional "benediction" of the right to strike made it more likely for unions to aggressively use that weapon

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for broader social purposes. This fear was put to rest somewhat by Canadian Labour Congress President Hassan Yussuff, when he asked rhetorically if the ruling meant "more strikes?" To which he concluded, "of course not. No union goes into bargaining looking to send their members on strike" (2015). Numerous union leaders and union staffers echoed Yussuff's restraint-centred politics, stating that "nobody really likes to have to go on strike. It really is a last resort in the process. I don't know that the Supreme Court recognizing workers' constitutional right to strike would make a union MORE willing to strike" (Interview 9-18 with public sector union leader, 6 February 2018, emphasis in the original). Other union leaders dismissed the idea that there was a connection between judicial decisions and their decision to strike. One private sector union leader agreed that strikes are always "a last resort to dealing with a difficult round of negotiations and [we] generally try every method of reaching an agreement," adding,

> we average a strike every two years and have had over forty in our history. Since we have always proceeded as though we had the right, and since that right has never been challenged by any of the employers we have dealt with since 1938, the ruling will not make us any less or more apt to strike (Interview 4-17 private sector union leader, 27 November 2017).

One public sector leader echoed the above sentiments, highlighting the view that "taking members off is always a last resort" and that "having a right" is not the same as "using it" (Interview 2-17 with public sector labour leader, 18 November 2017). Echoing these sentiments, a leader of a national umbrella union concluded that the constitutional right to strike was not a proactive tool but that "the labour movement, as a whole, considers striking as a last resort" (Interview 8-17 with national umbrella union, December 14 2017).

Does the "arc" bend "increasingly towards workplace justice?"[7]

The union responses highlighted above reflect a growing divide between public and private sector unions. On the one hand, public sector unions view the decisions positively, seeing the cases as limiting the government from using certain legislative tools to restrict their abilities to collectively bargain and to strike. One union leader summarized this well, arguing that if the effect of decisions such as *BC Health Services* and *SFL v. Saskatchewan* "means that governments cannot implement back-to-work legislation, it should shift the balance of power in a noticeable way for the public sector unions" (Interview 9-18 with public sector union leader, 6 February 2018). By contrast, private sector unions felt almost overwhelmingly that they "always had and will continue to use the strike weapon," notwithstanding anything decided by the court (Interview 8-17 with national umbrella union leader, 14 December 2017). Yet notwithstanding these conflicting opinions, almost all of the interviewees recognized that since 2015, there has been an "increased pride in being a union member" and, more materially, they think that the rulings give "labour organizations across the country more confidence when they go into bargaining" (Interview 16-18 with private sector union local president, 16 January 2018).

[7] *Saskatchewan Federation of Labour v. Saskatchewan*, [2015] 1 S.C.R. 245, para 1.

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Recognizing these divergent thoughts, and reflecting on the ambiguity surrounding the Supreme Court regarding the future of Wagnerism, what are the long-term implications of the decisions themselves? Interestingly, there are several concrete principles emerging from the court's jurisprudence that provide guidance to address the continuing segmentation of workers' rights in Canada. First, in *Dunmore* (2001), the court stated that workers have a right to access institutions that represent their collective interests. Second, *MPAO* (2015) determined that workers' choices for collective representation must be respected and that the institutions that emerge from those choices must be significantly independent from the power of management. Third, *BC Health Services* (2007) and *BCTF* 2016 suggest that all Canadian workers have a constitutional freedom to use good faith collective bargaining, which includes reasonable consultation and protection from surface bargaining. Fourth, *SFL v. Saskatchewan* (2015) made clear that workers have a constitutional right to withdraw their labour to pursue collective goals.

These four principles are useful guidance to rethink labour policies for unions and workers unable to access Wagner-style protections. Such a worker-centred policy framework would have to take seriously the court's emphasis on creating the institutional realities to address the material balance of power between workers and employers. Some legal scholars have suggested the court's rationale could open the door to new forms of legal organization such as minority unionism or a tiered structure of freedom of association, where a small group of workers in a workplace may legally organize and be recognized by an employer without majority support in a workplace (Braley-Rattai 2014; Doorey 2013; Adams 2008). While these new forms of unionism would certainly expand the freedom-of-association freedoms of workers, concerns have been raised that such institutions could weaken existing unions for fear of anti-union workers unproblematically embracing company positions, becoming a *de facto* company union (Compa 2014; Walchuk 2016).

Still relatively unexplored are the implications of the court's acknowledgment that the strike weapon can further the ability of workers to challenge employers. Indeed, the union leaders interviewed above have suggested that the central collective tool to offset employer power at the bargaining table continues to be the ability to strike. That being the case, it seems that the Supreme Court's recognition of a constitutional right to strike can have material influence if the freedom to strike is recognized and supported. Given the weakness of unions in the current era it is not clear how such a freedom can be exercised without corresponding duties on employers to not eliminate the employment of workers exercising that right. This is especially vital for workers in sectors traditionally void of union protection, in smaller industries, in the service sector, or in precarious employment relationships that are not tied directly to single employers. Justice Abella's emphasis in *SFL v. Saskatchewan* that the associational ability to strike also empowers "vulnerable groups" to "right imbalances in society" in order to "make possible a more equal society," suggests that the freedom is not simply tied to collective bargaining (2015, para 53, citing Justice Dickson in the *Alberta Reference*; Fudge and Jensen 2016, 105). Rather, such a notion implies that the freedom to strike is a tool designed to empower workers collectively. This rationale seems to be highlighted

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by workers themselves, although there continues to be a reluctance on behalf of unions to see the strike as anything but a tool of last resort in the collective bargaining process. Yet, the court's decision certainly leaves open the possibility for workers to strike for political purposes or to challenge a recalcitrant employer unwilling to recognize workers seeking to be recognized for collective bargaining purposes. At the root of these observations is the conclusion that the freedom to strike is the central pillar in the constitutional arc of workplace justice. Such changes in law, policy, or to workers' attitudes regarding the strike can only implement broader change if workers and unions are willing to utilize their collective freedoms to reach across economic sectors to ease the existing segmentation of workers' rights (Tucker 2014a, 472–73). The ongoing question is whether unions will remain cautious in approaching these new freedoms or use them to expand their collective power against governments utilizing back-to-work legislation or employers refusing to bargain in good faith with unions themselves.

Conclusions: What Future for Workers' Rights in Canada?

The Supreme Court's newfound interest in workers' associational freedoms has led to a series of questions for workers seeking access to collective forms of workplace representation. At the centre of the Supreme Court's new associational jurisprudence has been the notion, as Justice Abella opined in obiter in *SFL v. Saskatchewan,* that the constitutional arc is bending increasingly to workplace justice. Interview data suggests that Abella's observation carries immediate resonance with public sector workers, whose decades-long struggles have resulted in a pronounced reversal of the Supreme Court's constitutional jurisprudence on freedom of association for workers. Between 2007 and 2016, the Supreme Court has recognized that workers have a constitutional right to good faith bargaining and to strike. While claiming that these decisions are distinct from Canada's system of Wagner-inspired labour law, the emphasis on good faith bargaining and the current restrictions on the freedom to strike are heavily influenced by Wagnerism. The selective use of these labour laws has created a confused body of jurisprudence that seems to extend rights to a subset of Canadian workers while seemingly disregarding the clear majority of workers in the private labour market.

Yet, what does this mean for workers in the future? Do these Charter victories, as Harry Arthurs has argued, mean very little for the material conditions of workers themselves (2010, 375–76)? In some ways, the answer is unclear. To date, the record suggests that governments will continue to restrict the ability of many public sector unions to strike, even when the reasons for doing so are vague and unclear. For instance, the Harper government was quick to threaten, and then impose back-to-work legislation against postal workers in 2011 (later found unconstitutional) and against private sector workers at Air Canada in 2011 and 2012 (Stevens and Nesbitt 2014). Moreover, the Trudeau Liberals did not hesitate to use back-to-work legislation against striking postal workers in December 2018, notwithstanding the fact that the strike occurred on a rotating basis and was clearly designed by the union to have minimal economic implications. While the

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government's actions have (and will) surely end up before the courts, any future decision will occur long after the dispute has passed and will minimize the economic and political implications of the actually existing material dispute. In the end, the postal workers' decision to follow the back-to-work legislation in 2012 and 2018 rather than challenge it directly through ongoing job action—even in the face of punitive fines or imprisonment—weakened the constitutional freedom, suggesting that the constitutional rights come with numerous internal restrictions. Moreover, the now frequent use of the Charter's notwithstanding clause by governments (as occurred in Saskatchewan with regard to public schooling in 2017 and Ontario's threat of using the clause with regard to municipal elections in 2018) might further weaken this constitutional freedom.

Thus, governments still have legislative tools to weaken public sector workers' newfound constitutional freedoms. For workers outside the public sector or in already existing unions, the barriers to access the collective freedoms championed by the court are significant. Workers in non-standard, precarious positions have little capacity to ask for, let alone attain, good faith collective bargaining or to strike and retain their employment. Moreover, unions' interpretation of those freedoms, while generally positive, continues to see the strike as a tool of last resort. That interpretation is generally tied to how strikes themselves have been packaged under Wagnerism and thus continue to be limited beyond the sectors in which they occur. What is clear amongst union responses to the Supreme Court's series of cases is that the material divides between workers having constitutional freedoms and implementing (and acting) on those freedoms will continue to be an ongoing challenge. As the brief history since 2015 demonstrates, governments will continue to use back-to-work legislation if the only concern is that they may lose in court several years in the future. While the decade-long jurisprudence certainly provides some guidance for governments to create more worker-centred labour policies, the court decisions alone will not be a strong enough impetus to expand union freedoms. Rather, such initiatives will rise or fall with workers grasping their newfound constitutional freedoms—especially the freedom to strike—to challenge the existing balance of power in the workplace and in society more generally.

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