**Labor Rights, Human Rights and the Law: Lessons from the Canadian Experience**

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Over the course of the last decade, a number of U.S. scholars (Gross 2003; Swepston 2003; Alston 2005; Compa 2003, 2005; Macklem 2006) have championed an argument that elevates the idea of workers' rights to the level of human rights. The "labor rights as human rights" perspective, which draws heavily on international labor standards and conventions, is meant to influence the attitudes of policymakers, politicians and the judiciary while also rebuilding the American labor movement in the face of an unprecedented assault on the rights and freedoms of unions. This largely theoretical debate in the U.S. has been concretized in the Canadian context thanks to recent Supreme Court decisions confirming that the Canadian Charter of Rights and Freedoms protects the right to collective bargaining. As a result, the movement to proclaim workers’ rights as human rights has gained unprecedented attention within the Canadian labor movement and union-friendly academic circles. Indeed, since the *BC Health Services* decision (2007), the Canadian labor movement's conception of workers’ rights as human rights has formed the dominant basis for pursuing judicial strategies to combat a number of recent anti-union encroachments on labor rights with a view to ultimately expanding constitutionally protected rights and freedoms for workers.

While the judicial system is properly understood as a terrain of struggle where workers can legitimately challenge the power of employers and governments, we ultimately argue that there remains an unresolved tension between judicially-enforced individual rights of association and organized labor's pursuit of collective worker power. We further argue that the flood of researchers who are now promoting the “labor rights as human rights” legal agenda have all but ignored these tensions, let alone the pitfalls of such a strategy. Finally, we conclude that a liberal human rights-based approach to understanding workers’ rights threatens to depoliticize and ultimately undermine traditional collective and class-based strategies for advancing labor rights that are premised on the notion that rights flow from power, and not vice versa.

**Context**

Cornell University Industrial Relations professor Lance Compa is often credited with kick-starting the academic effort to link workers’ rights and human rights in an effort to shift the debate about the nature of labour relations in the North American context. His influential report (2000), *Unfair Advantage: Workers Freedom of Association in the United States under International Human Rights Standards*, argued thatU.S. labor law should be reformed by infusing it with an international human rights perspective that would not only protect, but enhance workers’ rights to freedom of association. Compa’s effort was eventually bolstered by a chorus of academics echoing his argument that workers should not be viewed as economic interests, but rather as bearers of fundamental human rights (Macklem 2006; Adams 2006; Compa 2004; Swepston 2003; Gross 2003 and 1999; McIntyre and Bodah 2006; Friedman 2001). There is a certain appeal to the workers’ rights as human rights approach. Indeed, the normative weight associated with human rights discourse in liberal democratic societies has made it a popular political tool for social movements looking to press their demands.

While the labor rights as human rights perspective has received a warm reception in academic and union circles, policymakers in the U.S. have all but ignored this approach. The demise of the Employee Free Choice Act in 2009, despite Democratic majorities in the House and Senate, underscores the level of resistance in the U.S. to any sort of meaningful pro-union labour law reforms.

In the Canadian context, however, unions, despite experiencing their own legislative setbacks, have played a central role in political and judicial debates concerning the relationship between workers’ rights, international labor standards and domestic labor law. The United Food and Commercial Workers Canada (UFCW) and the National Union of Public and General Employees (NUPGE) have been at the forefront of promoting the workers’ rights as human rights agenda in Canada. Their campaign has highlighted Canada’s dismal record at the International Labour Organization’s (ILO) Committee on Freedom of Association in a bid to embarrass the federal and provincial governments into complying with international labor rights (Fudge 2005: 65). In 2007, the National Teachers’ Federation and the Canadian Professional Police Association joined these unions in calling on the federal and provincial governments to respect the right to organize and bargain collectively as elaborated by the ILO.

The work of these unions appeared to pay off when in 2007, the Supreme Court of Canada reversed years of jurisprudence by constitutionalizing the right to collectively bargain in its landmark *BC Health Services* decision. Our paper critically anlayzes the BC Health Services decision, evaluates its potential to align domestic labor law with international human rights norms and considers the limits of the decision by examining more recent jurisprudence, especially in the *Plourde* case of 2009 and the *Fraser* case of 2011.

**BC Health Services**

Prior to the 2007 *BC Health Services* decision, the Supreme Court of Canada was adamant there was no constitutional right to collective bargaining. This matter had been resolved in the 1987 "Labour Trilogy" cases when the Court rules there was no right to strike or collectively bargain in the country's relatively new Charter of Rights. However, a string a cases in the late 1990s and early 2000s had allowed for an extremely limited expansion of Charter rights for workers, thereby elevating the hopes of some union leaders and prompting some academics to assert that governments “just can’t run roughshod over workers’ rights” (MacCharles 2001). It was therefore not surprising that public sector unions quickly turned to the courts to challenge a unilateral decision by the BC Liberal government to remove collective bargaining rights from healthcare workers in 2002.

In 2002, the BC government passed the Health and Social Services Delivery Improvement Act, which radically altered labour relations in the province’s healthcare system by allowing employers to reorganize work without meaningful negotiations with healthcare unions or strict adherence to signed collective agreements. In fact, the law invalidated some provisions of existing agreements and precluded bargaining on several aspects of the employment relationship (Camfield 2006).

The Hospital Employees Union (HEU) responded with an unsuccessful grassroots mobilization that included the threat of a general strike (which ultimately was never pursued). The union simultaneously pursued a legal strategy, filing a complaint with the ILO and launching a Charter challenge to Bill 29 on the grounds that the law violated the Charter’s equality provisions and guarantee of freedom of association.

In March 2003, the ILO’s Committee on Freedom of Association upheld the HEU’s complaint, but the BC government essentially ignored the ruling. In typical Canadian fashion, BC Premier Gordon Campbell simply stated that his government would not be swayed by the ILO’s findings, affirming further, “I feel no pressure whatsoever. I was not participating in any discussion with the UN” (Steffenhagen 2003).

Several months after the ILO’s Committee on Freedom of Association passed judgment on Bill 29, the union’s domestic Charter challenge was rejected by a lower court based on the "Labour Trilogy" jurisprudence that held that freedom of association did not protect the right to bargain collectively. The lower court also rejected the union’s claim that Bill 29 violated the Charter’s equality rights provision (BC Health Services 2004). The HEU appealed the ruling, but the BC Court of Appeals upheld the trial judge’s ruling. Undeterred, the union appealed its case to the Supreme Court of Canada, which finally rendered a decision in June 2007.

In a landmark ruling, the Court majority declared that the Charter “protects the capacity of members of labour unions to engage, in association, in collective bargaining on fundamental workplace issues” (BC Health Services 2007: ¶19). In coming to this conclusion, the Court unexpectedly overturned previous jurisprudence, stating that collective bargaining is integral to peaceful relations in the workplace and should thus be protected by the Charter. The Court's 6-1 majority decision, was summarized as follows:

Our conclusion that s. 2(d) of the Charter protects a process of collective bargaining rests on four propositions.  First, a review of the s. 2(d) jurisprudence of this Court reveals that the reasons evoked in the past for holding that the guarantee of freedom of association does not extend to collective bargaining can no longer stand.  Second, an interpretation of s. 2(d) that precludes collective bargaining from its ambit is inconsistent with Canada’s historic recognition of the importance of  collective bargaining to freedom of association.  Third, collective bargaining is an integral component of freedom of association in international law, which may inform the interpretation of Charter guarantees.  Finally, interpreting s. 2(d) as including a right to collective bargaining is consistent with, and indeed, promotes, other Charter rights, freedoms and values (BC Health Services 2007: ¶29)

In effect the Court majority's decision rested on its understanding of evolving “Charter values” (BC Health Services 2007: ¶82-4). In language that would certainly legitimize any union struggle for basic rights, the Court stated that the right to “bargain collectively with an employer enhances 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” (BC Health Services 2007: ¶82).

The fact that the *BC Health Services* decision effectively wiped out earlier anti-labor jurisprudence meant that unions, for the first time, came to see the Charter as a sword of justice rather than an unreliable shield. Immediately upon hearing about the ruling, labor leaders and lawyers both conceded that the judicial victory in *BC Health Services* was unforeseen and unexpected, given the Court’s tendency to defer to legislatures on issues on labor relations. BC labor lawyer Arvay Finlay, who represented the appellant unions, could barely temper his enthusiasm. “I’m too excited to talk like a normal human being.  This is going to change the landscape for collective bargaining for every union across the country” (Finlay 2007).

While the BC Health Services decision was undoubtedly significant, it was certainly not a revolutionary cure-all. In the words of Panitch and Swartz, the decision "was widely – and rather incautiously – interpreted as having finally secured labour’s right to collective bargaining... But expectations that this ruling would halt or reverse the assault on union rights rested on a misunderstanding of the manner in which the Court used the term 'collective bargaining'" (Panitch and Swartz 2013 forthcoming). In the Court's own words:

the Charter protects the capacity of members of labour unions to engage, in association, in collective bargaining on fundamental workplace issues. This protection does not cover all aspects of “collective bargaining”, as that term is understood in the statutory labour relations regimes that are in place across the country. Nor does it ensure a particular outcome in a labour dispute, or guarantee access to any particular statutory regime. What is protected is simply the right of employees to associate in a process of collective action to achieve workplace goals (BC Health Services 2007: ¶19).

Loathe to entrench a specific regime of labor relations into the Charter, the Court opted instead to frame its understanding of collective bargaining as a “consultative” process completely divorced from the formal legal mechanisms that govern labor relations in Canada. However, the Court also noted that there were instances where governments would not even need engage in consultations, legal, formal or otherwise.

If the matters affected do not substantially impact on the process of collective bargaining, the measure does not violate s. 2(d) and, indeed, the employer may be under no duty to discuss and consult. There will be no need to consider process issues. If, on the other hand, the changes substantially touch on collective bargaining, they will still not violate s. 2(d) if they preserve a process of consultation and good faith negotiation.

In narrowly protecting a procedural right to collective bargaining, in the form of "consultations", the Court was able to justify upholding a number of the BC government’s reforms that were challenged by the union. The Court also dismissed the equality claim.

Commentary on the BC Health Services decision has been mixed. Savage (2009) argued that the decision would “likely force anti-union governments to rethink their overzealous approach to labor relations, but it does not prevent them from pursuing antiunion agendas by stealth.” While Savage and others (Smith 2013; Tucker 2009; Bartkiw 2010) have expressed reservations about the *BC Health Service*'s progressive potential, others saw promise in the Court's ruling, arguing that it could be used as a base from which to build up workers' rights that under constant assault from governments and employers (Adams 2008; Walchuk 2010).

Steven Barrett, a lawyer for the CLC, argued that “we have seen 20 years of governments running roughshod over collective bargaining rights.  The Court has recognized that, without constitutional protection, governments are simply going to disrespect collective agreements” (Barrett 2007). Barrett’s observation, perhaps unintentionally, underlines the Canadian labour movement’s declining political power since the onset of neoliberalism in the mid to late 1970s. Although the CLC and its lawyers were undoubtedly thrilled by organized labour’s Supreme Court victory in *BC Health Services*, the fact that organized labor must rely on the courts, rather than the legislatures, to protect collective bargaining is, in fact, a sad commentary on the political clout of unions in an era of neoliberalism. As such, the decision in BC Health Services showcased organized labor’s weakness, not its strength. And if, as Eric Tucker has argued, “judicial protection of workers’ collective rights is premised on a view of unions as victims, it suggests that the moment that courts perceive unions to be powerful actors they will find ways to limit the rights they have recognized” (Tucker 2008, 173).

For their part, many unions cast aside these and other caveats and instead strategically used the decision to launch “workers’ rights as human rights” campaigns in an effort to resist anti-union labor law reforms in various Canadian jurisdictions. The decision also emboldened organized labor to pursue an even more aggressive judicial strategy including legal challenges to back-to-work legislation, public sector austerity programs, and laws restricting union membership and collective bargaining rights. For example, in Saskatchewan, the province’s Federation of Labour mounted a human rights-laden publicity campaign in an effort to resist the provincial government's anti-labour legal reform agenda. And when the Ontario provincial government passed a law allowing it to unilaterally impose collective agreements in the education sector in the Fall of 2012, the Canadian Union of Public Employees (CUPE), the province’s largest union, distributed pins that read “Collective bargaining is a Charter right” in conjunction with an announcement that it would challenge the constitutional validity of the government’s actions.

The Supreme Court’s decision to extend constitutional protection to collective bargaining was undoubtedly an important judicial victory for the labor movement. By reversing earlier jurisprudence and leaving the door open to a constitutional re-interpretation of a wider ambit of union rights, including the right to strike, the Supreme Court raised the hopes of many union activists intend on reframing labor rights as human rights. It would not take long, however, for the limitations of such a strategy to become apparent.

**Plourde v. Wal-Mart Canada Corp.**

In August 2004, the UFCW made history by organizing workers at a Wal-Mart in Jonquière Quebec, making it the very first Wal-Mart store in North America to become unionized. The successful certification campaign became national news given Wal-Mart's well-documented reputation for using aggressive and effective union avoidance strategies Six months later, after months of fruitless contract negotiations, Wal-Mart made even bigger headlines by announcing that it would be closing its Jonquière location, leaving the newly-unionized workers both outraged and unemployed. Wal-Mart claimed the store closure was strictly a business decision, unrelated to the union activity of its employees at the Jonquière location, but the timing of the store closure coincided with the decision of Quebec's Minister of Labour to refer the dispute to first-contract arbitration (Murray and Cuillerier 2009).

Under the Quebec Labour code, in the absence of agreement on a first contract, either the union or the employer can request that the Ministry of Labour impose compulsory interest arbitration on the parties. According to Murray and Cuillerier (2009: 82) "The objective of this policy is simple: incite the parties to reach an agreement on their first contract without conflict and thereby help the parties towards a stable bargaining relationship." In the case of Wal-Mart, however, there was obviously little interest in having any relationship, let alone a stable relationship with the UFCW.

In response to the store closure, Wal-Mart worker Gaétan Plourde and a number of his co-workers filed complaints under the Quebec Labour Code seeking reinstatement as restitution for losing their jobs due to union activity. The Quebec Labour Relations Commission dismissed the complaints on the basis that reinstatement would require Wal-Mart to re-open its permanently closed store in Jonquière, thus rejecting Plourde's argument that the Charter's guarantee of Freedom of Association could be invoked to reverse the permanent closure of a business.

Unsatisfied, Plourde and the UFCW filed an application for judicial review which was later dismissed by the Québec Superior Court. An application to appeal the Court's decision was refused by the Québec Court of Appeal. However, Plourde's leave to appeal to the Supreme Court of Canada was granted in August 2008.

Just a few months later, in October 2008, Wal-mart closed the unionized Tire & Lube department at a store in Gatineau Quebec, two months after a first contract was imposed through arbitration. (Murray and Cuillerier 91). It was clear that Wal-Mart had no intention of allowing the law to interfere with its business model. And as the Supreme Court of Canada would demonstrate a year later, the judiciary had no intention of punishing Wal-Mart for its indiscretions in the realm of labour relations.

In 2009, the Supreme Court dismissed Plourde's appeal (Plourde v. Wal-Mart Canada Corp., 2009), arguing that the workers who had been left jobless due to a permanent store closure could not seek reinstatement as a remedy through Quebec's Labour Code, regardless of why the employer decided to close shop. In attempting to utilize the Charter's guarantee of Freedom of Association to stop an aggressive anti-union action by the world’s largest private sector employer, the Court reprimanded Plourde and the UFCW because the union’s faith in labour rights in the Charter

extends the reasoning in Health Services well beyond its natural limits. In that case the state was not only the legislator but the employer. Here the employer is a private corporation … [C]are must be taken not only to avoid upsetting the balance the legislature has struck in the Code taken as a whole, but not to hand to one side (labour) a lopsided advantage because employees bargain through their union (and can thereby invoke freedom of association) whereas employers, for the most part, bargain individually (Plourde v. Wal-Mart Canada Corp., 2009: ¶55-6).

The Supreme Court did note, however, that its decision was specific to the existing recourses under the Québec Labour Code, which put the burden of proof on the employee to demonstrate that the employer had closed shop in direct response to unionization. This prompted CLC President Ken Georgetti to argue that the ruling will not apply in the rest of Canada. “In other provinces the onus would have been on the company,” he said in a statement to media (Kary and Deslongchamps 2009). Striking a similar tone, UFCW Canada's National President, Wayne Hanley, argued that Wal-Mart had "squeezed by on a technicality" and that the Court's decision had in fact opened a "new door" to assist workers in advancing their collective rights in other provinces (UFCW 2009).

While many on the left were content searching for silver linings, the *Plourde* decision demonstrated in very real terms the limits of a "labor rights as human rights" judicial agenda, especially in the realm of private sector labor relations. In *Plourde*, the Court affirmed that it would not interpret Charter rights to advance the cause of labour unions as a challenge to private sector employers. In doing so, the Court fell back on a traditional interpretation of individual rights in a capitalist society, placing the individual rights of corporations above the collective rights of workers and their unions.

**Ontario (Attorney General) v. Fraser**

Despite the *Plourde* decision, UFCW officials were confident that the union would find success at the Supreme Court in Ontario (Attorney General) v. Fraser[[1]](#footnote-1). In that case, it was the Ontario government that decided to appeal the decision of the Ontario Court of Appeal to strike down the province's Agricultural Employees Protection Act (AEPA) (2002) for violating the Charter's guarantee of Freedom of Association.

The AEPA was passed by the Ontario Progressive Conservative government in 2002 in response to the Supreme Court's 2001 decision in *Dunmore v. Ontario (Attorney General)*. In that case the Court ruled that excluding agricultural workers from the province’s *Labour Relations Act* violated their freedom of association. In order to comply with the Supreme Court ruling without actually providing any meaningful rights to agricultural workers, the provincial government created the AEPA, which established an institutional structure that allowed agricultural workers to join an employee association and make representations to their employer. Unlike the *Ontario Labour Relations Act*, however, the AEPA did not require farm employers to negotiate with a certified union nor did it allow farm workers to strike.

Unimpressed with the Conservative government's legislative maneuver, the UFCW challenged the constitutional validity of the AEPA on the grounds that it did not provide agricultural workers with meaningful rights to organize or bargain collectively. Specifically, the union argued that the AEPA imposed no obligation on employers to engage in any prescribed form of bargaining with the employee association, let alone a duty to bargain in good faith with agricultural workers. The union further argued that the AEPA contained no statutory mechanism for resolving disputes arising from any agreement that may be reached by the parties through bargaining, additionally pointing out that the Agriculture, Food and Rural Affairs Appeal Tribunal, the body responsible for enforcing the AEPA, was not required to have any members who have an have any expertise in labor relations. The UFCW also argued that the AEPA allowed for multiple competing employee associations in a single workplace and therefore eschewed the principle of exclusive representation that is cornerstone of the Wagner model of labor relations. Finally, the union also claimed that the AEPA was inconsistent with the Charter’s equality rights provision because it denied to agricultural workers access to the same labor relations regimes as other types of workers.

While the UFCW pursued its legal challenge, the political landscape began to shift. However, the defeat of the Ontario Progressive Conservative government in 2003 did not change the provincial government's attitude towards collective bargaining in the agricultural sector. The newly elected McGuinty Liberal government made clear its support for the AEPA during the 2003 provincial election campaign and underscored that support when it decided to appeal the Court of Appeal's November 2008 decision to strike down the law on the basis that it "provides no statutory protections for collective bargaining" and therefore "substantially interferes" with Freedom of Association for agricultural workers.

The Court of Appeal held that, at a minimum, the right to collective bargaining must include a statutory duty to bargain in good faith, recognition of the principles of majoritarianism and exclusivity in terms of representation, and a statutory mechanism for resolving disputes arising from the interpretation of collective agreements. In other words, the Court of Appeal interpreted the *BC Health Services* decision to mean that specific aspects of Wagner-model of labor relations had been constitutionalized by the Supreme Court in an effort to make collective bargaining a meaningful Charter right.

However, in a stunning rebuke, the Supreme Court upheld the constitutional validity of the AEPA in its long awaited *Fraser* decision on April 29, 2011. In siding with the government, the majority of Supreme Court Justices clarified that *BC Health Services* only required “the parties to meet and engage in meaningful dialogue” and thus “protects the right to a general process of collective bargaining” (Ontario (Attorney General) v. Fraser, 2009: ¶41). Writing for the majority, Chief Justice Beverley McLachlin and Justice Louis LeBel held that the Court of Appeal decision “overstate[d] the ambit” of the Charter’s protection of freedom of association, arguing that it was never the Court's intention to constitutionalize the "full-blown Wagner system of collective bargaining" in *BC Health Services*. Under the Charter, "no particular type of bargaining is protected," they argued. “In every case, the question is whether the impugned law or state action has the effect of making it impossible to act collectively to achieve workplace goals.”

“What s. 2(d) guarantees in the labour relations context is a meaningful process” of “good-faith bargaining on important workplace issues” they explained. Despite the fact that the AEPA did not contain a requirement that agricultural employers negotiate in good faith, the Court majority reasoned that because the AEPA, “by implication,” imposes a requirement on employers to “consider employee representations in good faith” and because the Act “provides a tribunal for the resolution of disputes”, the statute does not violate the freedom of association afforded to agricultural workers via section 2(d) of the Charter. In other words, the Court suggested that the mere act of “listening to” a group of workers was meaningful enough to pass the *BC Health Services* threshold despite the fact that the UFCW had been unable to sign a single collective agreement in the farm sector. The Supreme Court's refusal to recognize the power imbalance between agricultural workers and their employers reinforced the notion that labour rights in the Charter would not fundamentally challenge employer power.

In a detailed minority decision, Justice Marshall Rothstein (writing for himself and Justice Charron) argued that the precedent in *BC Health Services* should be reversed, calling it a "wrongly decided" decision and an “imprudent departure” from previous judicial decision-making in the field of labour law and fell “far outside [s. 2(d)’s] linguistic, philosophical and historical context." This was a surprising outcome given that neither government nor employer counsel had specifically asked for the Court to reconsider its decision in *BC Health Services*.

In a dissenting judgment, Justice Rosalie Abella, the only Supreme Court justice with a background in labour law, held that the AEPA failed to protect meaningful collective bargaining, arguing that the law merely required agricultural employers to listen to, read and acknowledge receipt of representations from farm workers’ associations. “No response is required,” she pointed out, arguing that the APEA fell short of providing a mechanism that guaranteed that submissions by agricultural worker associations would be considered in good faith by employers.

Labour lawyers and leaders expressed profound disappointment with the majority decision. Echoing Justice Abella's dissent, Steven Barrett, the lawyer representing the CLC, argued the majority's reasoning had missed the point:

“At the end of the day it’s naïve to think that agricultural workers or anyone else can engage in meaningful collective bargaining without many of the traditional protections that virtually all other workers have. There isn’t a democratic society in the world where protection for collective bargaining stops at the duty of good faith, and that’s because everyone understands that collective bargaining works only if the employer and the employee have the right to engage in economic sanctions” (Fraser decision reveals judicial debate over bargaining rights" Julius Melnitzer Financial Post May 3, 2011)

UFCW Canada's National President, Wayne Hanley argued that "the Supreme Court decision failed agriculture workers, many of whom are further victimized as migrant workers and are some of the most vulnerable workers in Canada." Hanley highlighted the irony of the Court's logic in deferring to the elected legislature on the issue of collective bargaining for farm workers, arguing that "many agriculture workers are migrant and temporary foreign workers who do not have Canadian voting rights." Even so, he pledged that his union would "be using every tool available... to make farm worker rights an important election issue" in the upcoming Ontario election. In an even more ironic twist, however, the UFCW chose to join the Working Families Coalition in advance of the 2011 provincial election. Ostensibly a union-backed soft-money coalition with the aim of preventing the election of Progressive Conservative candidates, the UFCW indirectly helped to shore up support for the very same McGuinty government that had appealed the Ontario Court of Appeal's decision to strike down the AEPA.

While the UFCW expressed disappointment with the majority decision in *Fraser*, employer groups expressed understated appreciation for the Supreme Court's judgment. “Regardless of whether Health Services is eventually reversed, employers are breathing a sigh of relief that the protection afforded to collective bargaining is not as broad as the Court of Appeal suggested," argued John Craig of Heenan Blaikie Toronto office, who represented the Ontario Federation of Agriculture in the case. (Fraser decision reveals judicial debate over bargaining rights Julius Melnitzer Financial Post May 3, 2011). Peter Gall of Heenan Blaikie's Vancouver office, who represented the Coalition of B.C. Businesses and the British Columbia Agriculture Council, also applauded the Supreme Court decision, explaining:

What was intended in Health Services was a procedural obligation of...good faith consultation, but nothing else; and no obligation to reach a particular conclusion or a result as a result of these good faith discussions/negotiations, and no entitlement to any other features of collective bargaining legislation that might be thought to complement or enforce that duty or obligation to negotiate/bargain in good faith, such as the right to strike. So I think all of that has been clarified. (quoted in Schmitz 2011).

The *Fraser* decision has not extinguished Canadian labor's interest in Charter litigation. In the Fall of 2012, the Ontario Liberal government adopted Bill 115, the *Putting Students First Act* which virtually extinguished meaningful collective bargaining rights for the province's teachers, restricted the right to strike, gutted previously negotiated sick days and imposed a two-year wage freeze. The three unions impacted directly by the legislation (OSSTF, ETFO and CUPE) all announced they would challenge the constitutional validity of the law in court, trumpeting the connection between workers' rights and human rights in the press and among members. In a largely symbolic move, the provincial government, after having imposed contracts using the terms of Bill 115, repealed the law in January 2013 amid widespread anger and protest. However, the repeal of Bill 115 has not halted the legal challenges. Those cases are currently making their way through the Canadian judicial system.

**Labour Rights as Human Rights**

While the Supreme Court of Canada has not entirely rejected the International Labor Organization's international human rights framework for understanding and interpreting freedom of association, nor has it embraced. Instead, the labor rights as human rights framework has seemingly been invoked in an ad hoc manner, depending on the case and the exact rights and freedoms in question. The unresolved tensions in the judicial interpretation of freedom of association have important implications for labor's political strategy.

On an organization level, the labor movement, unlike corporate Canada, has never successfully developed a coordinated approach to Charter litigation. Every attempt to do so has been met with failure. This is partly explained by the reactive nature of labor unions as organizations that have become accustomed to fighting defensive rather than proactive battles. It as also explained by the fact that individual unions may have different strategic priorities, may belong to competing union centrals and their leaders may have contrasting views on the usefulness of Charter litigation.

Organizational considerations aside, a liberal human rights-based approach to understanding and promoting workers’ rights threatens to depoliticize and ultimately undermine traditional collective and class-based strategies for advancing labor rights that are premised on the notion that rights flow from power, and not vice versa. Canada’s union movement has a long history of resisting the economic and political power of employers. The current regime of industrial pluralism is a product of the labor movement’s long history of class struggle against the worst excesses of 19th and 20th century capitalism. In fact, industrial pluralism’s zone of legal toleration exists only because workers were willing to break exploitative laws through civil disobedience, sit-down strikes and mass protest. The preservation of these capacities had little to do with success in court. On the contrary, courts often used injunctions to limit the ability of unions to challenge employer power. This class tension led to a long history of labor hostility to judicial intervention in labor disputes.

Once labor won the legal right to bargain collectively, however, the regime of industrial pluralism constructed boundaries of constraint that weakened labor’s capacity to resist government and employer power when the material forces underpinning that system were altered. Initially, some labor unions went to court to enshrine union rights in the newly minted Charter. More recently, unions have gone back to court simply to protect past gains and legitimize their own activities in the face of continued government and employer challenges. Although courts were initially unwilling to extend constitutional freedoms to unions, this seemed to change with the Supreme Court's decision in *BC Health Services*. Yet, the decisions in *Plourde* and *Fraser* should act as warnings for all unions seeking to advance or alter Canada’s system of labor relations. At best, court decisions have been mixed, and labor’s legal strategies have served as defensive efforts to preserve a small component of the post-war labor regime. To be sure, these decisions have opened small spaces of resistance, giving labor tools to extend spaces of legitimation, but Charter-based strategies for advancing workers' rights have also undermined the capacity of unions to build a movement which is able to challenge the boundaries of liberal democracy. Therefore, in contemplating future litigation, it is useful to remember that judicial interpretation of existing laws have opportunities as well as limitations

In assessing the potential pitfalls of the labor rights as human rights approach, McCartin has observed, "in many respects, anti-union forces have become adept at using the language of human rights, and especially the right of freedom of association, to attack unions as enemies of individual freedom. Indeed, sophisticated antiunionists have developed a rights talk of their own that places freedom from union coercion at the pinnacle of workers’ rights" (McCartin: 153) The right to bare arms, the right to private property, the right not to associate, and the "right to work" are all examples of how right-wing forces deploy the language of rights in support of their political objectives. These competing rights claims are dangerous for labour because the Charter, despite its guarantee of freedom of association, remains firmly committed to the individualist principles of liberal rather than socialist democracy.

Labour’s strategic shift towards embracing judicial rights discourse as a political strategy is unquestionably linked to its unprecedented post-war weakness. On paper, the Canadian labor movement looks healthy and vibrant, particularly when compared with its American counterpart. However, higher levels of union density, expedited certification votes, the absence of right-to-work laws, and the existence of card-based union certification and anti-scab laws in some provincial jurisdictions mask some significant challenges facing workers and their unions in Canada. In particular, the pressures of deindustrialization and neoliberal globalization have inflicted severe damage to private sector unions, while government austerity programs and privatization schemes continue to threaten high levels of public sector union density. In short, organized labor’s political clout has diminished considerably over the course of the last few decades.

A new focus on a legalistic brand of rights discourse, which privileges legal institutions like the ILO’s Committee of Freedom of Association and the Supreme Court will not reassert labour's political power. This is not to suggest that Charter litigation is always a dead-end strategy for organized labor or that unions cannot pursue legal strategies and working- class political mobilizations simultaneously. Indeed, health care unions in BC did just that. However, a judicial strategy, which relies on “joint legal research, communications strategies and financial support on the key cases” (Fudge and Brewin 2005: 83) as proposed by the NUPGE, for example, does very little to politicize or organize the grassroots in any meaningful way. Instead, such approaches place greater emphasis on lawyers, judges, and elite-driven legal responses to neoliberalism.

Although promoting workers’ rights as human rights has yielded symbolic victories along the way, it has done very little to change the balance of class forces in Canada. And although the *BC Health Services* decision proved that the Charter does have some progressive potential in the realm of labor law, in the end, no constitutional document, however progressive, can replace the need for sustained political struggle to protect and enhance workers’ rights. Although a liberal rights-based strategy may yield limited positive results in the short term, over the long term, operating within the Canadian judiciary's zone of legal toleration may turn out to be the quickest path to irrelevancy for a labor movement that continues to tread water in an era of neoliberal globalization.

1. After the SCC finished hearing the case, Wayne Hanley, President of UFCW Canada told the media, "Agricultural workers here in Ontario have been denied a fundamental right that is recognized by the United Nations. We're confident that the Supreme Court of Canada will recognize it as well." (Globe and Mail Betting the farm on a Charter ruling. Jeff Gray Dec 8, 2010, B11). [↑](#footnote-ref-1)