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The Pitfalls of Embracing Minority Unionism

Brad Walchuk[1]

Abstract

In a series of recent cases involving the right to bargain collectively, the Supreme Court of Canada asserted that Wagner Act model, or a model of unionism which is both exclusive and majoritarian, need not be the only model available to workers in Canada (as is currently the case). Although the possible move away from Wagner Act unionism toward some form of minority unionism has received some support, this article argues that there are far too many dangers associated with minority unionism, namely, that it will be a corollary for right-to-work laws, will cause infighting between unions, and will divide and fragment workers' sense of solidarity, and that the supposed benefits that may be attained through constitutionally protected minority unionism can, and should, be attained without it.

Keywords

minority unionism, Wagner Act model, majoritarianism, exclusivity, Canada, labor rights

Introduction

In a series of recent decisions at the Supreme Court of Canada, the rights to bargain collectively (*Health Services and Support—Facilities Subsector Bargaining Assn v. British Columbia* and *Mounted Police Association of Ontario [MPAO] v. Canada*, 2015) and strike (*Saskatchewan Federation of Labour v. Saskatchewan*, 2015) have been expanded under the *Canadian Charter of Rights and Freedoms*. Interestingly though, in another recent decision (*Fraser v. Ontario*, 2011), the Court found that the province of Ontario's framework for governing workers in the agricultural sector was constitutional, despite not actually providing any meaningful constitutional protection for collective bargaining (Faraday, Fudge, & Tucker, 2012). While there is certainly some shifting jurisprudence regarding the rights of organized labor, there is also a potential shift in the very way that unions are constructed, and the door appears to have been opened—problematically this article asserts—to some form of minority unionism, or unionism that is non-majoritarian in nature.

In speaking of the decision in *Fraser v. Ontario* (2011), Alison Braley-Rattai (2013) wonders ". . . what can be made of the Supreme Court's rejection of majoritarian exclusivity in *Fraser, 2011* . . ." and ". . . the implications it carries for minority unionism" (p. 322). Simply put, one possible outcome of the ruling is that it may require governments to facilitate a model of labor relations under which workers can exercise their freedom of association rights in a manner other than through exclusive and majoritarian representation (the Wagner Act model). These decisions seem to have made it clear that non-exclusive, non-majoritarian representation is, at the very least, consistent with the *Canadian Charter of Rights and Freedoms*, even though this form of representation is not formally mandated by it. This article focuses on the implications of that decision and situates them in the broader jurisprudence and legislation surrounding freedom of association in Canada, a vital area of labor relations that is undergoing a dramatic shift.

This article argues that recent decisions by the Supreme Court of Canada have increased possibility for some form of minority unionism to become a reality, and its prospects will be problematic for organized labor. It goes on to outline the potential pitfalls of minority unionism, many of which observers are not fully cognizant of. It concludes that labor should not embrace a shift toward minority unionism, even if the Court formally mandates that this become a part of the Canadian system of labor relations (as of the present, it has not yet mandated this but suggested that it is legislatively permissible).

In fact, in light of recent attacks on labor rights and the very open discussion of making Ontario Canada's first right-to-work province (Brennan, 2013), this article asserts that minority unionism in Canada would be particularly damaging

[1]Brock University, St. Catharines, Ontario, Canada

Corresponding Author:
Brad Walchuk, Non-Tenured Sessional Faculty, Centre for Labour Studies, Brock University, 1812 Sir Isaac Brock Way, Plaza 340, St. Catharines, Ontario, Canada L2S 3A1.
Email: bwalchuk@brocku.ca

to Canada's already fragmented and defensive labor movement. After all, in much of the industrialized world, where minority unionism is an option, so too is the option to refrain from the payment of union dues altogether, or at the very least the option to pay a reduced "agency fee" to the union (granted the entire system of industrial relations is drastically different throughout Europe, New Zealand, and elsewhere). Despite the fact that the party proposing right-to-work legislation in Ontario was defeated at the polls, it remains a real threat (and can happen rather quickly, as was the case in Michigan), and its re-emergence cannot be overlooked in the long term by the labor movement. As this article illustrates, minority unionism may actually help to make the re-emergence of right-to-work legislation a reality.

This article begins with an overview of the Wagner Act model, a structure of trade unionism that has existed in Canada since the 1940s. The next part of the article briefly examines freedom of association for unions at the Supreme Court of Canada, focusing primarily on the possibility of minority unionism in the aftermath of the Supreme Court of Canada's recent decisions, in which they ruled that unionism in Canada need not be restricted to exclusivity and majoritarianism. The concluding section asserts not only that any of the supposed benefits of minority unionism can occur independently of actually legislating some element of minority unionism, it goes on to further assert that minority unionism has many pitfalls, especially in a political climate in which right-to-work legislation remains a real possibility.

In this sense, the article builds on a growing field of jurisprudence emanating from the Supreme Court of Canada, and engages with an increasing field of literature on alternative forms of unionism and serves as a response to a growing number of authors (Adams, 2006; Braley-Rattai, 2013; Doorey, 2013) who have called for some form of unionism that differs from the prevailing Wagner Act model that exists in Canada and the United States. It instead suggests that a move away from the Wagner Act model cannot happen in and of itself (without a drastic overhaul of the existing labor law) and that, more importantly, if it were to happen, it would have important consequences for already unionized workers.

Wagner Act Model: Exclusivity and Majoritarianism

The Wagner Act model came to Canada in 1944 with the implementation of PC 1003, an executive order-in-council passed by the federal government during World War II, which was then followed up upon by provincial governments in the post-war era. It is simply legislated, and the *Constitution* makes no mention of the type of labor relations system which needs to be in place. For its part, the Wagner Act model "represented a significant progression, ushering in a new, stable era of labour relations policy that would prove to be transformative for the labour movement as well as for the conduct of labour-management relations" (Chaykowski, 2012, para. 8). Despite various legislative and constitutional changes to labor law since then, "the basic framework [has] remained unchanged" (Chaykowski, 2012, para. 12).

Under the Wagner Act model, there exist two separate yet equally important principles: exclusivity and majoritarianism (Adams, 2008). Exclusivity refers to the fact that a single trade union exists to represent the entire bargaining unit, and that all members of the bargaining unit are covered by this single union and the collective agreement that it negotiates. In other words, there are no competing unions for workers to pick and choose from, and all workers in a bargaining unit are represented by a single union.

Second, and relatedly, in most jurisdictions, this bargaining unit is certified only if a majority of workers show support for the union, generally through a vote in a secret-ballot election. It is a winner-take-all model in which the majority rules. If a majority of workers decide to unionize, then all those employed in the bargaining unit are covered by the union of the majority's choosing and the resulting collective agreement. Conversely, if a majority of workers elect not to unionize, then no one in the bargaining unit can be represented by a union or covered by a collective agreement. Indeed, in all 10 Canadian provinces, as well as at the federal level, legislation required the twin principles of exclusivity and majoritarianism to receive the legal rights attached to the various labor relations acts that govern bona fide union–management relations.

If a typical North American union, or a bona fide union, is recognized by the state as a legal bargaining for all workers (exclusivity) and only after a majority of workers show support for it (majoritarianism), what, then, is meant by a minority union? The type of minority union that this article focuses on (and is critical of) is one which represents workers in their dealings with management that is recognized by the state and employer as a legal bargaining agent, that management is under a legal obligation to bargain with, but which does not fully represent all workers, or perhaps not even a majority of them. In some instances, employees can fully opt out of the union and the payment of dues and union services, whereas in other instances, employees pay a smaller portion of dues related only to collective bargaining expenses, depending on how legislation is constructed. This article asserts that both types are problematic as they adversely affect union solidarity and the influence of organized labor, albeit less so when the payment of a reduced agency fee is still mandated. Although some form of minority union exists in most other Western industrialized countries, they were expressly prohibited under the prevailing legislative framework in Canada. Where these unions legally exist elsewhere, there are often (though not always) multiple unions in the same workplace representing the same group of workers, and workers can switch affiliations (or be unaffiliated altogether).

There are, of course, other types of worker organizations that could be considered minority unions, some of which operate or have operated in Ontario. It is possible for organizations

that lack exclusivity and/or majoritarianism to represent workers in dealings with management, though management is under no legal obligation to recognize them, and they lack the full gambit of rights available to those unions recognized by statute, notably the right-to-strike (see, for example, Adams, 2006, 2010). These, too, could be considered minority unions, though are not the main subject of criticism in this article.

However, as James Clancy, the president of the National Union of Public and General Employees (NUPGE), has noted, virtually the entirety of the Canadian labor movement is strongly supportive of the majoritarianism and exclusivity of the prevailing model of North American industrial relations (Clancy, 2010). This article echoes Clancy's sentiments of the desirability of majoritarian and exclusive unions.

The particular model of organizing that predominates in North America, based on the *Wagner Act* (and hence the Wagner Act model), is unique to specifics of North American industrial relations and is not replicated elsewhere in the world. As Braley-Rattai (2013) notes, "It is true that in much of the world minority unionism is the norm," though she rightly adds the caveat that "it is also the case that most places have very different labor relations and political environments than those found in Canada and the United States" (p. 329). In the model that exists in much of the remainder of the industrialized Western world, or, as Adams (2008) refers to it as, i-MODE, neither the twin principles of exclusivity or majoritarianism apply. In short, multiple unions compete for the loyalties of workers within the same bargaining unit, and workers can switch membership from union to union and, in many cases, opt not to join a union or pay fees or dues. A union supported by only a minority of workers, as low as two in Sweden, is permitted legal bargaining rights (Adams, 1995). Elsewhere, Adams (1995, chap. 3) has referred to the Wagner Act model and its twin principles as North American exceptionalism.

The fact that the exclusive and majoritarian model is not the only model of union organizing available to Canadian unions has been noted for some time (Adams, 1974), but calls for expanded and new forms of union organizing have certainly increased in recent years (Doorey, 2013; Harcourt & Haynes, 2011; Harcourt & Lam, 2009). Drawing from the New Zealand experience, in which minority unionism (with unions who compete with one another for members) exists, Harcourt and Haynes (2011) have suggested that New Zealand's experience with minority and pluralist unionism could provide an effective model for a reformed system of Canadian industrial relations.

More recently, noted labor law scholar David Doorey (2013, p. 515) has argued that a "graduated freedom of association" model should exist in Canada, in which a "thinner" scheme of rights would be available to non-majoritarian unions. These forms of organizing, they argue, are consistent with International Labour Organization (ILO) norms, to which Canada is a signatory, and would more easily allow workers to realize their right to organize than what is currently possible under the Wagner Act model.

The concern, however, with a move toward minority unionism is not simply that it is different from the prevailing North American model or that it will have adverse impacts on unions. Its potential impacts are much broader. Simply put,

> The key idea is this: we have a coherent legal system of employee freedom of association, or workplace democracy, involving a series of complex tradeoffs of preexisting rights and freedoms of both employees and employers. The crucial word is *system*. As every legal system must, it yields answers to all of our legal questions. Its parts interrelate in complex ways, but it is coherent, comprehensive and carefully constructed. Because it is a system, if one of the parts is removed, other parts will have to be adjusted to avoid system failure. In other words, politicians and judges cannot simply cherry-pick the parts they like. (Langille & Mandryk, 2012, p. 4)

The point, quite simply, is to suggest that moving toward any form of minority unionism will necessitate a much broader shift in the entire system of labor relations that currently exists in Canada. As Langille and Mandryk (2012) aptly note,

> Only in a legal fantasy world can one think that it would be possible to have it both ways—to have majoritarianism for some, and minoritarianism for others. You can't do that. Legally. What you end up with is minoritarianism for all. (p. 20)

This suggests that openness for minority unionism would necessitate other changes, including the legal right to not join a union. Although a discussion of a broad overhaul of labor law falls outside the scope of this article, the fact is that the potential opening for minority unionism created by *Fraser v. Ontario* (2011) is fundamentally problematic for organized labor and is deserving of much more attention.

A Brief History of Labor and the Supreme Court in the Charter Era

Before any understanding of the Canadian system of industrial relations is possible, a brief overview of the country's political system is required, particularly its constitutional framework. The structure and operation of the Canadian political system is outlined in the *Constitution Act, 1982*, a document which also includes a constitutional bill of rights known as the *Canadian Charter of Rights and Freedoms*. Section 91 and 92 of the *Constitution* divide powers between the federal government and provincial governments (MacIvor, 2013). In so doing, it assigns the bulk of the labor relations framework to the provinces (save those workers specifically regulated by the federal government, roughly 10% of the labor force).

All levels of government are bound by the *Canadian Charter of Rights and Freedoms*, which specifically enumerates the basic rights enjoyed in Canada and protects them from unreasonable government influence. For organized

labor (and unorganized workers seeking to join a union), Section 2(d) of the *Charter*—dealing with fundamental freedoms—is especially important. Section 2(d) provides for freedom of expression, freedom of peaceful assembly, and freedom of association (among others), which have all been used by organized labor to advance the right to organize, bargain collectively, and, most recently, strike. Although Canada's constitutional enshrines rights to freedom of association, it has not always been interpreted by the Supreme Court in such a way that fosters unionization or collective bargaining. Although organized labor was relatively unsuccessful in utilizing the *Charter* in the 1980s and early 1990s to secure bargaining rights, there was a change in the late 1990s in which organized labor was increasingly successful enshrining constitutional protection for labor rights, which has in turn led to further litigation by unions, with a fair amount of success (Savage, 2009).

The first major case involving the right to bargaining collectively heard by the Supreme Court of Canada after the passage of the Charter occurred in 1987 in the Alberta Reference. In it, the Court was tasked with determining if the Charter constitutionally protected the right to bargain collectively. Writing for the majority, LeDain J. asserted simply that "the rights for which constitutional protection is sought—the modern rights to bargain collective and to strike . . . are not fundamental rights or freedoms. They are the creation of legislation" (Reference Re Public Service Employee Relations Act (Alta), 1987, para. 144), whereas McIntyre J. added that "people, by merely combing together, cannot create and entity which has greater constitutional rights and freedoms than they, as individuals, posses. Freedom of association cannot therefore vest independent rights in the group" (Reference Re Public Service Employee Relations Act (Alta), 1987, para. 155). As such, the Court was quite clear that there existed no constitutional right to bargain collectively in Canada and that a workers' ability to bargain was simply a product of legislation (which could be repealed or otherwise amended).

While this precedent remained for two decades, the Supreme Court of Canada made an about-face turn in 2007 in *Health Services and Support—Facilities Subsector Bargaining Assn v. British Columbia* (2007). In this decision, the Court asserted that "one of the fundamental achievements of collective bargaining is to [correct] the historical inequality between employers and employees" and added that "the right to bargain collectively with an employer enhances the human dignity, liberty and autonomy of workers . . ." (paras. 82 and 84). Following this ruling, collective bargaining was constructed as a right that was constitutionally protected, providing a major boost to unions.

In recent years, after determining the collective bargaining is a constitutionally protected right, increased litigation has also provided the Court with the opportunity to re-examine the demands of legislation which mandates that Canadian unionism is both exclusive (a single bargaining agent for all workers covered by the collective agreement) and majoritarian (an approach that mandates that either all workers are no workers are covered by a collective agreement, subject to a majoritarian vote), especially in light of finding the Charter guarantees the right to bargain collectively.

For example, in *Fraser v. Ontario* (2011), another case involving agricultural workers, the Court's majority opinion sought to clarify the constructional right to collective bargaining, arguing that ". . . s. 2(*d*) [of the Charter] does not require a particular model of bargaining, nor a particular outcome. What s. 2(*d*) guarantees in the labour relations context is a meaningful process" (para. 42). In responding to the lower-level Appeals Court, it found that its belief that the law mandated ". . . a full-blown Wagner system of collective bargaining . . . overstates the ambit of the s. 2(*d*) right" (*Fraser v. Ontario*, 2011, para. 44-45). Speaking for the majority, McLaughlin C. J. and LeBel J. asserted that it is not necessary for the government to

> . . . enact laws that set up a uniform model of labour relations imposing a statutory duty to bargain in good faith, statutory recognition of the principles of exclusive majority representation and a statutory mechanism for resolving bargaining impasses and disputes regarding the interpretation or administration of collective agreements. (*Fraser v. Ontario*, 2011, para. 47)

They concluded that "what is protected is associational activity, *not a particular process or result*" (emphasis added, *Fraser v. Ontario*, 2011, para. 47).

More recently, in *MPAO v. Canada* (2015; involving bargaining rights for Royal Canadian Mounted Police officers), the Court asserted that while the *Charter* guarantees the right of employees to meaningfully associate in the pursuit of collective workplace goals, "that right is one that guarantees a process rather than an outcome *or access to a particular model of labour relations*" (para. 67, emphasis added). They went on to state that "the Wagner Act model, however, is not the only model capable of accommodating choice and independence in a way that ensures meaningful collective bargaining" (*MPAO v. Ontario*, 2015, para. 95). This article focuses heavily on the implications of these decisions as they relate to an expanded conception of unionization—most notably minority unionism—and its implications for the labor movement.

An Opening for Minority Unionism?

The twin principles of majoritarianism and exclusivity—long the standard North American model for bona fide trade unionism—and the potential shift away from them by the Supreme Court of Canada are increasingly apparent in many of the Court's recent decisions. In light of these decisions, it would appear that a minority union, which is neither supported by a majority of workers nor the sole voice of workers within that bargaining unit, is permissible under Canadian

law. Before this could happen, however, legislation would need to be amended as current legislation mandates that all unions are majoritarian in nature. Although the Court does not state as much, it is perhaps implied not as a result of the conditions that must exist for meaningful bargaining within Canadian labor law, but rather, by illustrating that the principles of exclusivity and majoritarianism are not mandated, suggesting that something else—such as minority unionism—may reasonably exist, perhaps even be constitutionally protected, and potentially be mandated to exist at some point (though the Court has, thus far, stopped short of mandating an overhaul of labor law to ensure that minority unionism exists).

Arguably, the Supreme Court has ruled that workers may have the ability to exert their freedom of association rights independent of exclusive, majoritarian Wagner Act unionism, though the specifics—and boundaries—of these alternative forms of representation are not entirely clear. At the very least, one can make a reasonable argument that minority unionism appears to be constitutionally allowed. There are two ways that proponents of minority unionism can secure it. One is through the creation of new legislation that would facilitate minority unionism, while the other option is for the Supreme Court to more forcefully strike down an existing labor relations scheme that prevents and rule that minority unionism must be made an option. This would be consistent with, but more forceful than, previous rulings that have opened the door for minority unionism. The outcome of both options is the same, which this article argues is undesirable. Either way, "Canadian trade unions stand to be profoundly affected" (Chaykowski, 2012, para. 44), and organized labor must tread carefully as a result.

Improved Labor Law Without Constitutional Protection for Minority Unionism

As Braley-Rattai (2013) notes, "It is the hope among most proponents of minority unionism that minority unions will lead to majority unions because workers will see some value in them . . ." (p. 329). Furthermore, it is assumed that should a majority union result from the original minority union, it will be stronger than traditional majority unions ". . . because only those who genuinely want to be members will be" (Braley-Rattai, 2013, p. 329). In the event that this is true, there is no reason why this snowball approach would require constitutional protection.

That a small, vocal minority of workers would band together with the goal of securing support from a majority of their co-workers, and achieving a collective bargaining relationship with their employer mirrors the strategy of many union drives. That said, David Doorey (2013), himself a proponent of "graduated freedom of association (GFA)" rights for non-majoritarian unions, notes that while ". . . occasionally parlay advocacy efforts by 'employee associations' [turn] into successful union organizing campaigns and statutory certification. But that is not the objective of the GFA model, *nor realistically is that likely to occur very often*" (p. 544, emphasis added). Certainly, the scope of what this minority could do without reprisal from their employer would be expanded under any vision of minority unionism, but a small minority looking to secure majority support and a collective bargaining relationship is already protected under law Section 72 of *Ontario Labour Relations Act (OLRA*; 1995).

While the *OLRA* does provide legal protection to those seeking to certify their workplace into a traditional majority union, it covers only activity related to the organizing itself. This includes actions such as taking with co-workers about the union. The scope of protected activity is limited, however, and certainly does not include protection for things such as making collective representations to their supervisor. Likewise, such protections are not afforded to workers under the *Employment Standards Act* (*ESA*; 2000). This leaves Ontario's workers vulnerable, especially in comparison with their American colleagues.

In the United States, Section 7 of the *National Labor Relations Act (NLRA)* provides workers who are engaged in "concerted activity" with their co-workers for the purposes of "mutual aid or protection" some form of legal safeguard for their actions (National Labor Relations Board [NLRB], 2014). While what constitutes "concerted activity" and "mutual aid or protection" varies, Section 7 of the *NLRA* has provided workers with legal protection for activities for which they would have been legally terminated in Ontario.

There is little doubt that employment law for non-unionized workers in Ontario is quite thin, especially in relation to Section 7 of the *NLRA* in extending legal protections for activities related to improving workplace conditions other than forming a union, such as making a collective representation to a supervisor or picketing a workplace during non-working hours. In fact, as Donald Swartz (2014) notes, "ironically, farm workers [in the USA] currently have more options for collective action that they would have had under the Canadian 'Wagner' Model . . ." (p. 449). There is also no reason, however, why this level of protection, or something nearing it, could not be included in an amended *OLRA* and *ESA*.

It should also be noted that the perceived benefits (or drawbacks) for some form of minority unionism are likely to differ between workers currently not organized and without any form of collective representation and those currently organized into a bona fide union. Although some form of minority unionism would offer more benefits to currently unorganized workers, its results for individual workers who are already unionized—and organized labor as a whole—would be, on the balance, a bad deal. Here, the interests of organized labor and individual non-unionized workers may be distinguished. The concern in this article is the impact of minority unionism on organized labor. That said, individual workers desiring a stronger voice at workplace and some form of collective voice can

still realize with this simple amendments to existing legislation, and not a wholesale change to the system and the introduction of minority unionism.

While organized labor often pushes for reforms of the *OLRA* to include anti-scab provisions or card-check certification instead of a mandatory secret-ballot vote, there is also no reason why labor could not also push for expanded political protections for non-unionized workers making political representations to their employer under either the *OLRA* or the *ESA*.[1] While such an amendment to labor and employment law may not be easy, there is no reason why it could not be pushed for. It is worth noting that, at the present time, the political conditions for such an overhaul of the *ESA* are not present, particularly a political partner capable of forming government and willing to enact such reforms. That said, Ontario did witness a major labor-friendly overhaul of workplace law in the early 1990s when a pro-labor party held office, and labor must continue to push for such statutory changes. The point, simply, is that while the expanded protections for concerted activity are lacking and needed, there is no reason why these need to occur in the form of minority unionism.

In recent years, there has certainly been a push by labor to rely on the legal system to constitutionally protect its rights, a point conceded by both its supporters (Adams, 2006; Fudge, 2006) and its detractors (Savage, 2008). Statutory protections, such as concerted activity, even if eventually won, are then subject to the whims of a newly elected government, which can either repeal them or simply choose to ignore them. As the Court's decision in *Fraser v. Ontario* (2011) illustrated, however, something that is constitutionally protected—or at least was thought to be—in this case collective bargaining, is just as subject to changes and new developments as statutory protections. Neither statutes enacted by the legislature, nor rights constitutionally protected by the judiciary, are ever fully secure. As such, labor must consider the strategies that best advance its agenda and the rights and collective strength of its members.

The Drawbacks of Minority Unionism

One major concern with minority unionism that has yet to be fully examined in the literature is that the logical corollary to it are right-to-work to laws. As opposed to the winner-take-all, majority rules approach of traditional unionism, minority unionism carves out space for a strong but vocal minority (or minorities). For those of the left, this means that a strong but vocal group of pro-labor activists could be awarded some sort of non-traditional bargaining relationship with an employer. Under the Wagner Act model of majoritarian exclusivity, the voice of the minority is, for all practical purposes, overridden by the voice of the majority. Under minority unionism, however, the voice of the minority is calculated and given representation in some sort of bargaining relationship. Although this is not problematic, per se, the problem arises if, and likely when, the political right-wing and the opponents of unions push for right-to-work laws as a result.

If the voice of the minority is counted in establishing a non-traditional minority union, the political right would certainly argue that the voice of the minority wishing to disassociate itself from the majority should likewise be counted. The likely form of this disassociation would be the ability to not pay union dues, or to pay a much-reduced agency fee, as a result of the passage of right-to-work laws. This issue, to some degree, however, has already been decided by the Supreme Court of Canada, which ruled that the mandatory payment of union dues does not consist of a violation of freedom of association, and is therefore constitutional (*Lavigne v. Ontario Public Service Employees Union*, 1991). While the mandatory payment of union dues is not unconstitutional, meaning that legislation which mandates their payment is legal, it would be constitutional to amend the legislation to make their payment optional (right-to-work legislation).

This is not to suggest that right-to-work laws should be attached to the development of minority unions, but it certainly is an argument that the political right would put forward, and one that unions would have an uphill battle contending with. After all, the political right-wing would argue, recognizing the voices of the minority is a two-way street, and that if the rights of a minority wishing to associate with a collective voice at the workplace are recognized and protected, then the rights of a minority wishing to disassociate from a collective voice at the workplace should also be recognized and protected.

The concern with the adoption of minority unionism and the logical extension of right-to-work legislation has been noted by Lance Compa (2014), who asserts that

> one cannot open the door to minority unionism without opening the door to no unionism—the ability of anti-union workers, of whom there are many, in any given workplace, to abjure representation and go it alone with management in the hope of favourable treatment. (p. 457)

If this opportunity presents itself in North America, it could deal a significant blow to organized labor, especially in a political climate in which right-to-work legislation is increasingly being championed by conservative politicians and think tanks.

Many of these problems exist in New Zealand, a country whose collective bargaining regime includes minority unionism. A corollary, as expected, is that ". . . this includes the freedom to not associate, often denied to workers in unionized workplaces under the North American framework" (Harcourt & Haynes, 2011, p. 78). This freedom *from* association is a concern that North American unionists considering minority unionism must be aware of. When people can elect to not associate (but still gain benefits from the existence of the union, as is the case in many American right-to-work states), there exists considerable amounts of "free-riders" who would pay either a

reduced agency fee or nothing at all, depending upon how the legislation is constructed. To what degree they would still receive representation from the union varies as well. It is reasonable, however, to expect that if given the option, some amount of Canadian workers would disassociate themselves from majoritarian unions and cease paying dues or begin to pay only agency fees (see, for example, Harcourt & Haynes, 2011).

That said, other studies have shown that many non-unionized Canadian workers desire union representation (Lipset & Meltz, 2004; Raykov & Livingstone, 2014), perhaps making stronger calls for some form of minority unionism. That said, when people desire union representation, they generally think of the bona fide Wagner Act unionism that they are familiar with, at least in Canada, and not a form of unionism which they are likely wholly unfamiliar with. Even if non-unionized Canadian workers are comfortable with some form of minority unionism, it still presents major concerns to those who are already organized, which should cause organized labor to pause and seriously consider the implications of minority unionism. This is certainly not to suggest that unions should shy away from organizing non-union workers, but rather, there is no reason to suggest that they need to move away from majoritarian unionism to successfully do so.

While right-to-work laws are not a foregone conclusion if minority unionism is introduced in Canada, a comparative example from New Zealand (and much of Europe) would suggest that it is a likely corollary. It is also reasonable to suggest that if a minority voice in favor of union representation is recognized and protected by the state, then the anti-union right-wing would surely push to ensure that a minority voice *against* union representation is likewise recognized and protected by the state. As has already been seen in Ontario, Wisconsin, Michigan, and elsewhere, right-to-work laws remain a reasonable threat even when there are not corresponding proposals to make unionization easier. If unionization were to be facilitated through a change in how recognition is calculated, one can be reasonably sure that conservatives would be in a strong position to put forward right-to-work laws as a corollary to minority unionism. As Lance Compa (2014) aptly notes, "Anyone who thinks this would not happen does not appreciate the individualistic, me-first, strain in American working class culture that is held at bay by the *Wagner Act*" (p. 258).

Under the current Wagner Act model, there exists a certain degree of consistency and fairness, at least inasmuch as the majority threshold goes (to be sure, the model is far from fair in most other respects). The cutoff to certify and decertify a union is 50% + 1% of ballots cast in most Canadian jurisdictions. The majority wins. Either 100% of the bargaining unit is covered by a collective agreement and pay union dues in exchange for union services and coverage by (and benefits from) a collective agreement, or no one is covered by a collective agreement and no one pays union dues. To include space for a minority union, in which less than a majority support it, pay union dues or agency fees, and are covered by a collective agreement would certainly be seen as evidence by the political right of the balance being tipped toward labor, and a likely response would be the introduction of right-to-work laws to ensure that the minority who is opposed to collective representation would have their voices and political wishes heard at the workplace. After all, Ontario has recently witnessed discussions of implementing right-to-work legislation without any discussion of minority unionism. One can only imagine how the political right would respond if minority unionism became a reality in Ontario, and it certainly would not be a kind response.

The high threshold of majoritarian support being required before anyone can enjoy the benefits of unionization under the Wagner Act model (at which point exclusive representation would kick in and all would enjoy the right) should not be seen as a barrier to workers enjoying their freedom of association rights, but rather, as a necessary means to facilitate the enjoyment of those freedoms (Barrett, 2012). The threshold of majoritarian and exclusive bargaining not only facilitates the enjoyment of rights but also helps to protect them. As Stephen Barrett (2012, para. 8) asserts, "It is doubtful that exclusivity if a barrier to unionization rather than a vehicle to protect it." In her dissenting opinion in *Fraser v. Ontario* (2011), Justice Abella asserted that "majoritarian exclusivity has remained a defining principle of the Canadian labour relations model" and elaborated that "the reason for the protection is grounded in common sense and the pre-1944 experience" (para. 345-346).

A lack of exclusivity allows an employer to promote rivalry and discord among multiple employee representatives to "'divide and rule the work force', using tactics like engaging in direct negotiations with individual employees to undercut 'the credibility of the union . . . at the bargaining table'" (*Fraser v. Ontario*, 2011, para. 345-346; see also Weiler, 1980, p. 126). Rather than promoting freedom of association and expanding workers' rights, unionism that is neither majoritarian nor exclusive—minority unionism—may actually serve to weaken and limit workers' influence at the bargaining table and in the workplace. At the very least, it will certainly divide them.

Of course, examples of this occurring are rare, in that they have generally not been legally possible since the Wagner Act model was brought to Canada in the 1940s. Under the *Agricultural Employees Protection Act* and unrestrained by the legal requirement to bargain only with one bargaining agent, Rol-Land Farms devised its own "employee association" in direct competition with the United Food and Commercial Workers (UFCW), which had the workers' majority support. Justice Abella, in her dissent in *Fraser v. Ontario* (2011), critically notes,

> that is precisely the kind of conduct that Bora Laskin identified in 1944 as the flaw in Canada's then existing labour legislation,

> namely that "it neither compelled employers to bargain collectively with the duly chosen representatives of their employees nor did it prohibit them from fostering company-dominated unions." (para. 347; see also Laskin, 1944)

It was this very type of employer tactic to frustrate the bargaining process that "led Canada's labour ministers that same year to include exclusivity among what were considered to be indispensable protections for collective bargaining rights" (*Fraser v. Ontario*, 2011, para. 347).

Indeed, this "divide and rule" is precisely one of the main criticisms against the promotion of minority unionism. Although much of this article has focused on the introduction of right-to-work legislation as a major criticism against minority unionism, a fractioning of the labor movement through multiple, competing unions (and potentially even ones that are implicitly supported by management) represents another problem associated with minority unionism. For a popular movement in which strength in numbers and solidarity is a necessary tool to attempt to rectify the power imbalance between workers and management, a clear fractioning of the labor movement that would exist with minority unionism is quite problematic. It follows, logically, that if a minority of workers were entitled to some form of representation, a separate minority of workers (and perhaps even another separate minority of workers) would likewise be entitled to some different form of representation and dues structure.

By virtue of Ontario's (and North America's) long history of the representation that is majoritarian and exclusive save for the Rol-Land farm example cited by Justice Abella in her dissenting opinion in *Fraser v. Ontario* (2011, para. 347), there are not any meaningful examples of competing unions who are able to represent the same workers in their employment relationship. However, jurisdictional disputes have arisen in Ontario between competing unions seeking to represent already organized workers through displacement procedures, most notably the former Canadian Auto Workers (CAW; now Unifor) and the Service Employees International Union (SEIU; Pearson Education, 2014).

Likewise, in the construction and trades industries, where union membership can be more fluid and different unions often represent different members doing the same work in the same area, a dispute between "arch-rivals" Laborers' International Union of North America (LIUNA) Local 183 and the United Brotherhood of Carpenters and Joiners (UBCJ) Local 1030 is well known (Humphreys, 2014). Of course, this is not to suggest that these disputes would occur frequently under minority unionism (though it remains a distinct possibility), but it does highlight the problems that arise when unions struggle against each rather than struggle against management. Such jurisdictional disputes between unions over members would occur more frequently under minority unionism than they do under the Wagner Act model.

In his analysis of the applicability of Wagner Act model unionism to ILO principles, Lance Compa (2014) notes that the introduction of minority unionism into North America would have significant adverse impacts on the cohesiveness of unionism, stating that

> in the United States and Canada . . . multiple minority unions would likely devolve into craft unions, Anglo unions, Latino unions, immigrants' unions, French-speaking unions, English-speaking unions, and unions based on other fault lines in the working class of both countries. And, at least in the United States, a significant "no union" option. (pp. 458-459)

He goes on to state that one of the significant advantages of the current model of majoritarian exclusivity is that it "makes unions confront and overcome internal divisions to forge unity in support of union goals" (Compa, 2014, p. 259). This is a laudable goal, and forging unity among workers is far more important than introducing a model that would serve to divide them.

One may be tempted to look to Europe for guidance on what might occur between unions under minority unionism, but doing so would not be overly helpful. While unions do "compete" with one another for the loyalties of workers and, ultimately, their membership, the situation does not mirror the inter-union disputes such as the one between the former CAW (now Unifor) and the SEIU or between the LIUNA and the UBCJ. That said, the European model is drastically different, as multiple unions often bargain directly with the leading employer federation, and the resulting collective agreements contain similar provisions (Adams, 1995). The point, simply, is that any sort of harmony that may exist between European unions under minority unionism cannot be transplanted to North America as the entire industrial relations model is different. While inter-union disputes can, and certainly do, occur under the Wagner Act model, they will become more frequent if minority unionism is an option in Ontario, and that fraction in solidarity will not bode well for workers.

Of course, all of the above is merely theoretical as minority unionism, although arguably constitutional in Canada, has yet to be implemented. That said, Ontario, like many other jurisdictions in North America, has already witnessed a heightened attack on organized labor. That attack would surely intensify if minority unionism were introduced into law. There are certainly legal reasons to champion minority unionism. Roy Adams (2008), for example, has long asserted that the Wagner Act model is a violation of international labor law. More recently, Braley-Rattai (2013) has suggested that the Supreme Court of Canada has opened space for minority unionism in the *Fraser v. Ontario* (2011) decision. On a more practical, on-the-ground level, there is reason to worry that an introduction of minority unionism would bring about a swift response from the political right, and that right-to-work laws would be the logical corollary, and that the political right could construct an effective argument to introduce them in light of minority unionism. To be sure, they have been recently introduced, although not without challenge, in Indiana, Michigan, and Wisconsin without the introduction of minority unionism.

This is not to suggest that labor should not fight to achieve something worthwhile, even in the event that the political right is likely to challenge it. The left should not back away from a reasonable proposal just because a conservative challenge to it is likely. That said, more practical and worthwhile benefits, such as an expansion of protection for non-unionized workers engaging in some form of concerted activity for mutual aid or protection and the snowball effect of a minority of workers banding together to facilitate a larger and more traditional union, can be achieved independently of minority unionism. These are both achievable with a focused program of political engagement and represent a more desirable path for labor than minority unionism.

A major concern minority unionism in Canada is that it is done in isolation of other important variables and institutions that prevail in the places where it exists and is successful. Although there are certainly examples of jurisdictions in which minority unions exist and in which union density is high and coverage by collective agreements is even higher (Adams, 1995), to simply promote minority unionism as a reasonable option in North America independently of other institutional features and collectivist and pro-union political culture is problematic, as Langille and Mandryk (2012) have noted.

One such example is the "European proposition [is] that all employees have a right and should have the means to participate in the making of relevant collective decisions" that affect them at the workplace (Adams, 1995, p. 61). Bargaining in instances in which minority unions exist tends to be highly centralized and covers a majority of the workforce in which collective agreements apply "to all of the employees of a certain class who work for any employer who is a member of an employer's association" (Adams, 1995, p. 72). Furthermore, "such agreements are typically negotiated between one or more unions . . . [and] sometimes such agreements are applicable across the whole country" (Adams, 1995, p. 72). The point here is to suggest that minority unionism is but one feature of a highly developed—and highly distinct—industrial relations scheme which, quite simply, is foreign to the North American mindset. While both minority unions and the equivalent of right-to-work laws exist across Europe, they exist in conjunction with other institutions and a dramatically different political culture that mitigates against the problems that this article foresees them having in North America.

Non-Traditional Unionism in Action

While this article does suggest that Canadian unions should champion the exclusive and majoritarian model of unionism envisioned by the Wagner Act model when seeking to organize workers into a union that will engage in formal collective bargaining with an employer, it should not be read as closing the door on any model of organizing workers that differs from its mantra of exclusivity and majoritarianism. That said, while this article has firmly argued that minority unionism—a non-majoritarian and non-exclusive model such as the one that exists in New Zealand (see Harcourt & Haynes, 2011), much of Europe (Adams, 1995), and championed by Braley-Rattai (2013) and Doorey (2013)—is problematic for Canadian unions, other innovative forms of organizing, including non-bargaining locals that do not seek to obtain traditional, bona fide bargaining rights, represent a much-needed innovation for organized labor.

There are many important examples of non-traditional, minority forms of collective representation that are helping to reinvigorate the labor movement and provide important gains for workers. As Israel (2014) notes,

> While the structures of these groups vary, each is pushing for higher wages, better working conditions, and other issues that benefit not just them but others in their communities. The groups are not competing with traditional unions, but rather working alongside them and in tandem.

The worry with minority unionism is that its organizing model will compete with Wagner Act unions and in turn cause existing unions to heighten their competition with one another, alongside other adverse impacts, such as facilitating right-to-work legislation and encouraging employers to divide workers between various bargaining agents. These non-traditional worker organizations, which do not seek to organize workers into a bargaining unit and engage employers in direct collective agreement negotiations, can work alongside unions and, in some cases, are supported or financed by traditional unions.

Indeed, Braley-Rattai cites one such example, the UFCW-backed OUR Walmart movement (2013). As the organization itself states,

> UFCW and OUR Walmart have the purpose of helping Walmart employees as individuals or groups in their dealings with Walmart over labor rights and standards and their efforts to have Walmart publicly commit to adhere to labor rights and standards. UFCW and OUR Walmart have no intent to have Walmart recognize or bargain with UFCW or OUR Walmart as the representative of its employees. (OUR Walmart, 2014)

While the campaign does have specific workplace demands, including providing affordable health care, creating dependable and predictable work schedules, making full-time jobs available for those who want them, and increasing wages, it seeks to achieve these not through a collective bargaining relationship with Wal-Mart and representing only a fraction of the total number of workers, but rather, through lobbying and public pressure campaigns, most notably "strikes" and walkouts on Black Friday (Eidelson, 2012). Such campaigns are important for worker self-organizing and capacity building but lack the power in numbers to compel a traditional collective bargaining relationship, which is not their goal to begin with. Other non-traditional forms of workplace organizing, but not minority unionism, include efforts to organize workers where collective bargaining is not an option, such as

with taxi cab drivers (especially in New York City), who are viewed as independent contractors, and domestic workers, who are often a single employee living and working in a family home (Israel, 2014).

One final example of innovative, non-minority bargaining workplace organizing is Unifor's proposed non-bargaining local at the Toyota plant in Woodstock, Ontario, and the United Auto Workers's (UAW) non-bargaining local at Volkswagen (VW) in Chattanooga, Tennessee. In both instances, the organizations are linked to formal union drives that lack majoritarian support but serve as a middle-ground that offers some representation for members (at the workplace and in the community) without engaging in a full-blown collective bargaining relationship for a minority of employees, though a traditional majoritarian and exclusive bargaining relationship remains the goal should membership numbers warrant a traditional certification. It should be noted that neither are legally recognized minority unions that this article cautions against, and both desire to one day achieve status as a traditional Wagner Act majoritarian union. While a successful model for retaining the support of workers and offering them some advantages of collective representation (though well short of formalized collective bargaining), they differ from minority unions that would represent workers in a traditional collective bargaining relationship. As the UAW/VW Chattanooga example shows, they also illustrate the type of concerns that this article brings to light regarding minority unionism.

One of the goals of Unifor, formed in 2013 from a merger of the former CAW and the Communications, Energy and Paperworkers Union, was to provide new forms of workplace representation. Although they have tried to undertake a traditional (exclusive and majoritarian) organizing drive of the Toyota plant in Woodstock, Ontario, the application for certification was put on hold in April, 2014 until more union cards could be signed. Recently, however, Unifor President Jerry Dias has alluded to the union's openness to a non-bargaining local for employees before it has applied for a certification vote, adding that "there are different ways that we can do that, but we will very likely formalize something in the next couple of months" (Simone, 2014). Dias sees a non-bargaining local for as a possible step toward a union, but one whose activities will be different from those of a union, mainly in that they are not proposing anything resembling a bargaining relationship with the employer.

Dias has explained that "part of the focus will be on the organizing drive, but it is also about what type of role they would like to play in their communities in Woodstock and in Cambridge," noting that some of the Toyota workers are already involved in traditional union-related activities outside of the workplace, such as education and social action programs, and adding that the members might want to get involved in an environment committee or a health and safety committee, or participate in community events and initiatives under the union banner (Simone, 2014). Although such a relationship may help the union in its ultimate goal of an exclusive and majoritarian bargaining, it does not seek to represent a minority of workers in a bargaining relationship with Toyota.

Somewhat similarly, the proposed voluntary union local, UAW Local 42, at the VW plant in Chattanooga, Tennessee (which would operate closer to a German style works council and have formal input in the employment relationship), serves as an innovative form of non-traditional unionism and what proponents of minority unionism may have in mind. Following an unsuccessful NLRB vote in February, 2014—in which the UAW lost 712 to 626—the union established Local 42, which seeks to offer ". . . workers the opportunity for a voice in the workplace through the German automaker's 'works council' approach to employee engagement. Volkswagen's business model is premised on employee representation, and Local 42 will represent any interested employees who join the local as members. No employees will be required to join" or pay union dues (UAW, 2014).

While the long-term goal is certainly to represent VW workers in a more traditional bargaining relationship, under the current arrangement, the UAW hopes that membership in Local 42

> . . . will grow to a size that gives it weight in representing workers' concerns at the plant. No formal agreement exists with Volkswagen regarding the local, but a 'consensus' exists that allows the local to work with the company in the future. (Atkins, 2014, emphasis added)[2]

Similar to the Toyota local in Canada, UAW 42 stems out of an unsuccessful organizing drive (insofar as majoritarian support is the ultimate goal) and may serve as a placeholder until a more traditional bargaining arrangement can be secure. UAW Local 42, however, unlike the Toyota local in Canada, has some sort of representational voice within the workplace, albeit outside the formal bargaining relationship.

The possibility of this is perhaps reflective of the German manufacturer's familiarity with unionism (and the pressure put on VW by its European unions). While certainly providing an alternative voice for workers, and seemingly serving as an example of "both creative advocacy and new forms of collective organization" that are a much-needed part of a revitalized Canadian labor movement, according to David Doorey (2013: 544), it also illustrates many of the pitfalls of minority unionism that, by its very nature, does not offer a majoritarian and exclusive bargaining and that this article has been critical of throughout.

In early 2015, anti-union forces at the Chattanooga VW's plant won a victory following the automaker's announcement that in addition to Local 42, it would also recognize another worker's group, the American Council of Employees (ACE), as a voice of workers outside of a traditional bargaining relationship (Stangler, 2015). According to Stangler (2015), estimates suggest that ACE has enrolled roughly 15% of the shop floor and will therefore be meeting with VW, albeit less frequently than the UAW does. Nevertheless, its voice alongside—or

perhaps more problematically in opposition to—the UAW Local will also be represented in the decision-making process at the VW plant.

Chris Brooks, a pro-UAW activist in Chattanooga alleges that ACE is a company union (or yellow dog union), or an illegal form of a workers' organization that is used by employers as an alternative to a traditional union and to divide workers against each other. Brooks states that "this is, no doubt, a yellow union funded by corporate interests for the sole purpose of preventing the UAW from achieving exclusive representation" (Stangler, 2015). Regardless of exactly what ACE is or is not, it certainly has divided workers at the plant and serves as a competing voice to the UAW, jeopardizing the all-important sense of solidarity that workers must display when confronting management. In fact, the Chattanooga VW experience highlights many of the pitfalls of minority unionism that this article has identified outside of the right-to-work argument. It fragments and divides workers, thereby hampering a sense of shared solidarity and providing management with a major bargaining chip.

Conclusion

While the Supreme Court's decision in *Fraser v. Ontario* (2011) does not erase the Wagner Act model as the predominant model unionism in Canada, it certainly challenges its place as the only model of unionism in Canada. As such, space has been opened up, though not yet mandated, for non-exclusive and non-majoritarian models of trade unionism.

This article has argued that any embrace of minority unionism is both unnecessary and problematic. While the concept of minority unionism may work elsewhere outside North America, and the confines of Wagner Act model of majoritarian exclusivity are not the only model of workplace representation that can work in Canada, the political left—and unions themselves—should not embrace minority unionism. Although minority unionism (and competing unions within the same workplace) is the norm in much of the industrial world, the system of labor relations where minority unionism is viable is drastically different than that of Ontario, the rest of Canada, and the United States. In fact, Braley-Rattai (2013) recognizes as much, noting that "such differences are relevant to the potential for the success of minority unionism" (p. 329).

As this article has argued, the supposed benefits that may come from minority—a snowball effect of unionizing and expanded protection for "concerted activity" akin to that provided by the *NLRA*—can and should be achieved independently of minority unionism. Furthermore, the existence of minority unionism is likely to be seen by the political right-wing as a corollary for right-to-work legislation and will divide and fragment workers, effectively weakening their sense of solidarity. Unions will therefore be forced to compete with one another and will therefore have fewer resources (especially with reduced union dues) to focus on challenging management and defending workers' interests. Just because minority unionism works elsewhere, and just because the Supreme Court of Canada has opened the door to it, it does not mean that it is worth pursuing in Ontario.

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Notes

1. It should be noted that a combination of protections for concerted activity and an exclusive/majoritarian certification process, which both exist in the United States, does not guarantee organizing successes, as the sorry state of union density in the United States (a mere 11.1% in 2014) illustrates (Bureau of Labor Statistics, 2014). That said, increased rights, such as an expanded scope of concerted activity protections, for non-unionized workers, would be an important and welcomed addition to Canadian workers.
2. In early December 2015, a group of roughly 160 skilled trade workers won a National Labor Relations Board (NLRB) certification vote to become a bona fide, stand-alone bargaining unit at the VW plant, though the employer has announced it will be appealing the vote (see Ramsey, 2015).

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Author Biography

Brad Walchuk works in the Centre for Labour Studies at Brock University and often teaches an introductory labor studies course, as well as upper-year courses on collective bargaining and labor politics. His work has previously appeared in the *Journal of Workplace Rights, Labor Studies Journal*, and the *Canadian Political Science Review*. He is active in his own union, the Canadian Union of Public Employees.