

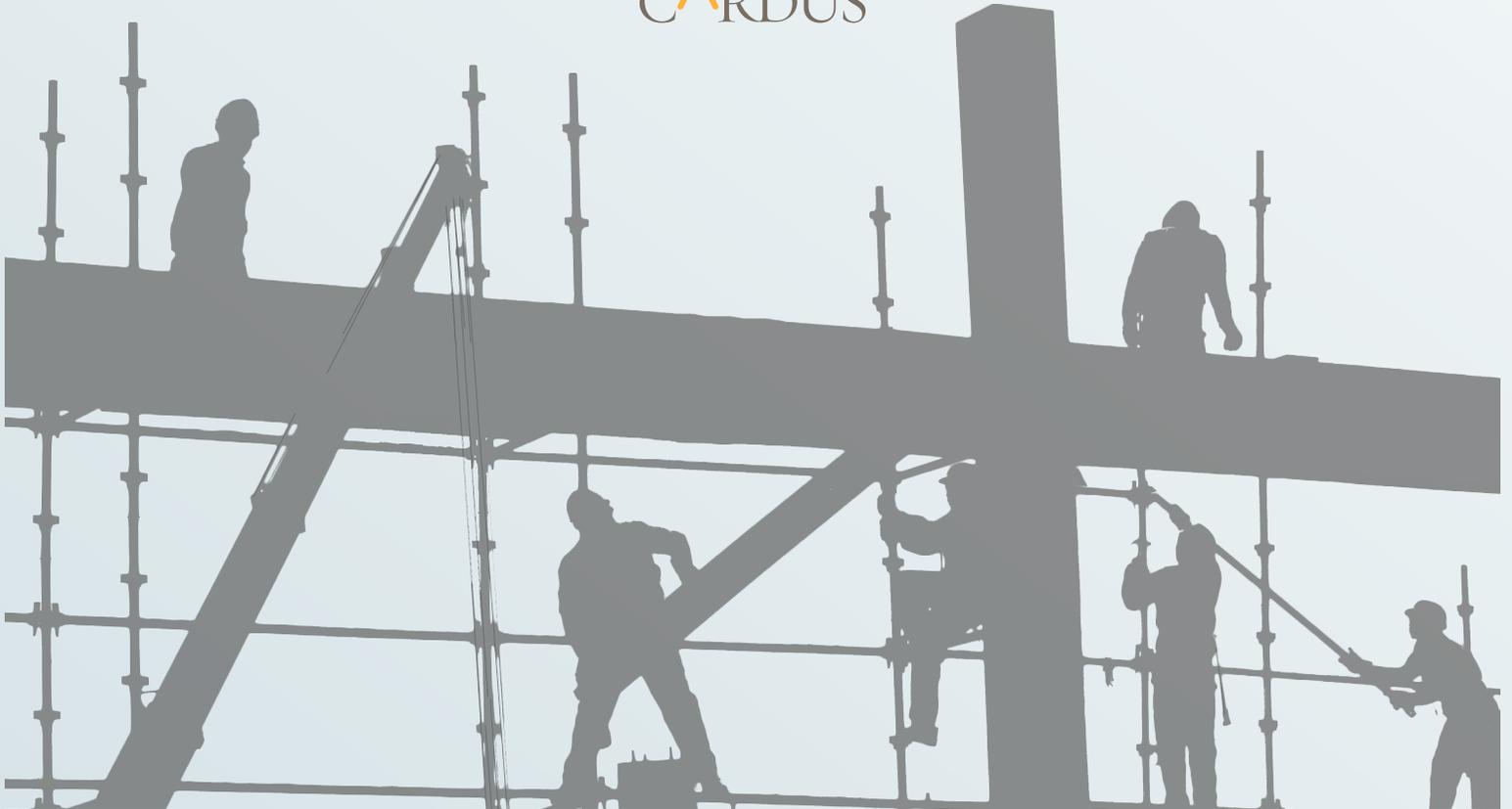
COMPETITION AND COOPERATION:

Small Steps Towards Reforming Canadian Labour Relations

By **Brian Dijkema**

A Research Paper by

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EXECUTIVE SUMMARY

Canadian labour relations needs reform, but before such reform takes place, policy makers should adjust their framework for *how* they reform labour relations. In the current paradigm, both the left and right use the tools of government to swing labour relations policy either in favour of business or unions while ignoring more diverse realities on the ground. This creates an unstable environment for both businesses and unions with each new mandate, whether from the right or the left.

This paper notes that there is a wide spectrum of means for organizing workers, many of which do not fit into typical union or non-union categories. These means include: individual employment contracts, collective bargaining with alternative unions, passive collective bargaining by corporate HR departments, pooled labour and benefit plans by employers, and traditional, mainline bargaining; and we argue that *all* of these should be provided equal space within our economy. We argue that a lack of consensus on key questions—including the relationship of unions to macro questions on economic vitality, fiscal policy, or basic rights—should lead to a principled stance which recognizes this broad diversity.

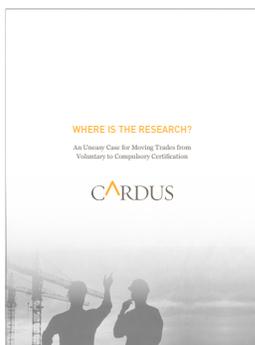
A first step in the reform of labour relations would be to recognize the pre-political nature of collective bargaining while enacting policy that encourages the greatest amount of competition among these various means of organizing workplaces. In short, the ideal would be a policy regime wherein the state encourages the positive aspects of workplace organization where there is a high degree of consensus, while attempting to remain neutral about the ways workers choose to organize themselves.

A policy regime working within this framework would attempt to move along parallel tracks. It would remove legislated protections that favour one group over another—closed tendering clauses for instance—and any legislation that inhibits workers from moving from one means of organizing their workplace to another. It would eliminate policies which unreasonably diminish competition among unions and foster a competitive environment more conducive to labour relations innovation. The resulting diverse and competitive environment would lead to a more stable and more prosperous labour market.

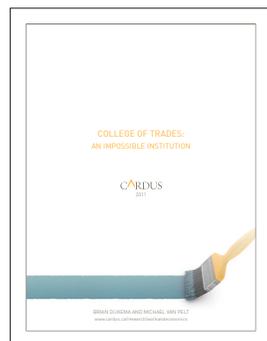
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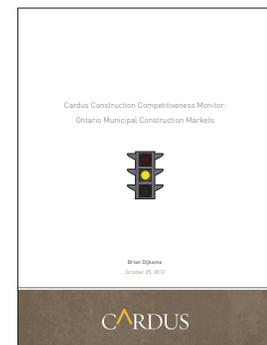
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1. RUMBLINGS IN THE WORLD OF LABOUR RELATIONS: A REVIEW OF THE FIELD

The world of labour relations in Canada involves a policy discussion where you can almost trace the inverse relationship between the inflated rhetoric and the actual facts on the ground.

Despite claims that “the last decade has seen profound and far-reaching changes in Canada’s labour market, perhaps more dramatic than any others during the post-war period”¹ or that unions “weaken our economy and suck government treasuries dry,”² debates surrounding labour relations in Canada have stuck to a similar script for years. And it is not only the debates that remain static. The legal framework for labour relations in Canada has remained largely unchanged for decades. Yet while the debate about the effects of Canadian unions on both the well-being of the Canadian working class and Canada’s overall economy boils, Canada’s union density, employment, wages and the like have chugged along largely in step with trends in Western countries.

It is fair to say that when it comes to unions in Canada there has been a lot of talk, but no real action.

However, after years of taunts and challenges from within the comfortable boundaries of group lines in this debate, it appears that forces are shifting which might produce some significant action in the world of labour relations. Policy proposals and actual policy change are being offered at various levels in the Canadian context—provincially, federally, and within the union movement itself.

Provincially, there are a few notable proposals and actual changes. In Saskatchewan, the passing of Bill 80 by the Wall government allowed for new models of labour unions to represent workers in its construction industry.³ In Ontario, a private members’ bill, Bill 73, attempted to break open sections of the construction industry to greater competition, while the opposition Progressive Conservatives floated the idea that “no clauses in any provincial legislation, regulation or collective agreement should require a worker to become a member of a union or pay union dues as a condition of employment”⁴—a challenge to the long standing “Rand” formula.

“Canadian labour relations needs reform, but before such reform takes place, policy makers should adjust their framework for how they reform labour relations.”

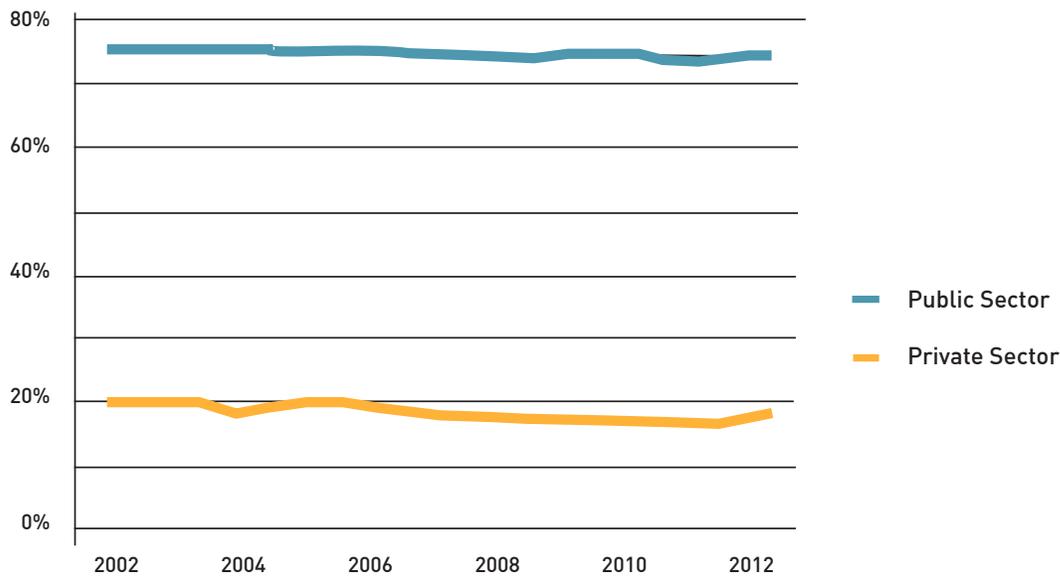
The federal government has largely refrained from addressing labour relations, but two private members’ bills—Bill C-377⁵ and C-525⁶—and the noting of upcoming changes to the Public Service Labour Relations Act in the recent throne speech signal that, at the very least, there is an increased appetite for addressing labour relations at the federal level.

But it is not only the political lines that are shifting. There are also a number of notable shifts within the

1. “Unemployment Insurance and Labour Market Deregulation,” CAW, accessed November 28, 2013, <http://www.caw.ca/en/about-the-caw-policies-and-papers-unemployment-insurance-and-labour-market-deregulation.htm>. Note: this was written prior to the current conservative government.
2. Jesse Kline, “Re-examining the Labour Movement,” *National Post*, June 9, 2012, accessed November 28, 2013, <http://fullcomment.nationalpost.com/2012/09/06/jesse-kline-re-examining-the-labour-movement/>
3. For a review of Bill 80’s effect on the construction industry, see: Richard Gilbert, “Unions ready for competition with passage of Saskatchewan’s Bill 80,” *Daily Commercial News*, July 22, 2010, accessed November 28, 2013, <http://dconl.com/article/id39799>. Full text of the changes to Saskatchewan’s *Construction Industry Labour Relations Act, 1992*, brought about by Bill 80, can be found here: “Construction Industry Labour Relations Amendment Act, 2010,” *Legislative Assembly of Saskatchewan*, 2010, accessed November 28, 2013, <http://www.qp.gov.sk.ca/documents/english/Chapters/2010/Chap-7.pdf>
4. Ontario Progressive Conservative Caucus White Paper, “Paths to Prosperity: Flexible Labour Markets,” accessed November 28, 2013, <http://timhudakmpp.com/wp-content/uploads/Flexible-Labour-Markets.pdf>.
5. Private Member’s Bill, “Bill C-377: An Act to Amend the Income Tax Act,” June 2, 2011 to September 13, 2013, accessed November 28, 2013, <http://www.parl.gc.ca/LEGISINFO/BillDetails.aspx?billId=5295287&Language=E&Mode=1>.
6. Private Member’s Bill. “Bill C-525: An Act to Amend the Canada Labour Code, the Parliamentary Employment and Staff Relations Act and the Public Service Labour Relations Act,” June 2, 2011 to September 13, 2013, accessed November 28, 2013, <http://www.parl.gc.ca/LegisInfo/BillDetails.aspx?Language=E&Mode=1&billId=6199370>

world of unions as well. The first trend is the relatively constant decline of union density. While much has been made about the trend of declining union density, this is largely in line with global trends. As noted by the OECD, the decline of union density appears to be a common trend among most developed countries, even in countries with widely disparate levels of density and with very different labour relations models.⁷ In Canada in particular, the decline in density overall masks the consistent gap between union density in the

FIGURE 1: Union Density by Sector



Statistics Canada. See Footnote 8

public sector⁸—now at approximately 75%—and the private sector, which currently sits at approximately 18%⁹ (Figure 1).

A less discussed reality is the increased consolidation of unionized workers within a small number of very large unions. Canada’s labour program noted already in 2012, but also in previous years: “Unionized workers are highly concentrated in a small number of large unions [...] 46.6% of covered workers in national and international unions belong to just eight unions each covering at least 100,000 workers.”¹⁰ The recent merger of the CEP and CAW into UNIFOR, Canada’s largest private sector union, means that there are now seven unions, with at least one covering approximately 300,000 workers. The United Steelworkers in Canada, which is the third largest private sector union, is also a product of major mergers, gaining almost 150,000 new members in five mergers since 1995.¹¹ As noted below, 4% of the total number of unions in Canada represent almost half

7. “Trade Union Density,” Chart, *OECDStat Extracts*, accessed November 28, 2013, <http://stats.oecd.org/Index.aspx?QueryId=20167>.

8. “Table 282-0078: Labour force survey estimates (LFS), employees by union coverage, North American Industry Classification System (NAICS), sex and age group, annual (persons),” *Statistics Canada*, accessed, November 25, 2013. CANSIM. <http://www5.statcan.gc.ca/cansim/a26?lang=eng&retrLang=eng&id=2820078&paSer=&pattern=&stByVal=1&p1=1&p2=38&tabMode=-dataTable&csid=>

9. *ibid.*

10. Government of Canada, Labour Program, “Union Coverage in Canada, 2012,” April 5, 2013. Accessed November 13, 2013, http://www.labour.gc.ca/eng/resources/info/publications/union_coverage/union_coverage.shtml

11. See, for instance: “A Partnership for the Future,” *Telecommunications Workers Union*, <http://www.slideshare.net/unitedsteelworkers/usw-presentation-to-twu>. For a presentation compiled for USW’s merger with the Telecommunications Workers Union. This merger failed to achieve the necessary 66 2/3% approval: “TWU: Steelworkers Merger Falls Just Short of 66 2/3% Approval Threshold,” *Telecommunications Workers Union*, accessed November 28, 2013, <http://www.twu-stt.ca/en/twu-steelworkers-merger->

(47%) of the unionized workforce in Canada. If measured to include the second tier of unions, a dominant majority emerges: 11% of the unions in Canada represent 72% of the unionized workforce (Table 1).¹²

In light of the discussions of union density trends, it is important to note that of those seven unions with membership of over 100,000, the majority represent workers employed predominantly in the public sector and that the largest union in Canada is in the public sector.

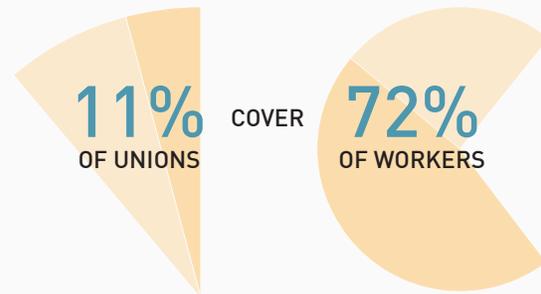
Typically, the rationale for this trend has focused on the need for increased power in a global marketplace. The arguments for union consolidation can be reduced to the mantra: “more people, more power”. Usually this has meant using the union’s power to influence politics.¹³ In the world of Canadian labour relations, the trend towards union consolidation has resulted in the hardening of what we have described as the anti-conservative monolith. As we noted last year,

The challenge to our [union] system’s democratic credibility arises when union membership attracted in the context of local bargaining unit issues is used to endorse a broad social and political agenda. This system lacks credibility in ensuring that unions are speaking with a voice that is truly representative of their membership

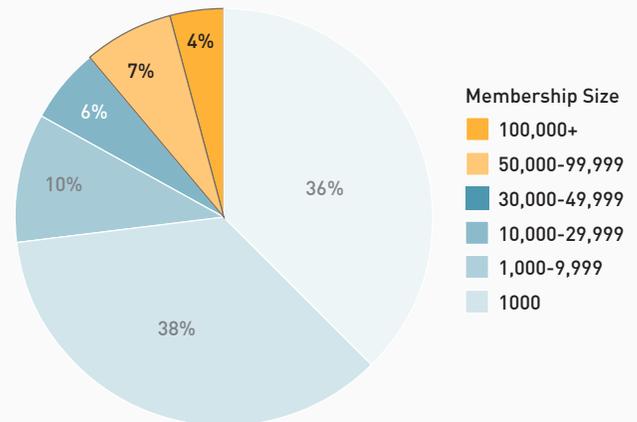
A monolithic structure cannot capture the interests of even all unionized workers, let

falls-just-short-66-23-approval-threshold.
 12. Government of Canada, Labour Program, “Union Coverage in Canada, 2012,” Workplace Information Division, Strategic Policy, Analysis, and Workplace Information Directorate. April 30, 2013, accessed October 4, 2013, http://publications.gc.ca/collections/collection_2013/rhdcc-hrsdc/HS22-1-2013-04-30-eng.pdf
 13. Tony Van Alphen, “New super-union Unifor’s first president vows to start pushing back if governments, employers don’t heed,” *Toronto Star*, August 31, 2013, accessed December 3, 2013, http://www.thestar.com/news/gta/2013/08/31/new_superunion_unifor_elects_first_president.html The opening speech of Jerry Dias, first president of UNIFOR, is a perfect example of this: “UNIFOR is here because it’s time to stop playing defense and start playing offence [...] It’s time to stop reacting and time to start acting. It’s time to set the agenda [...] We have to show our collective power.”

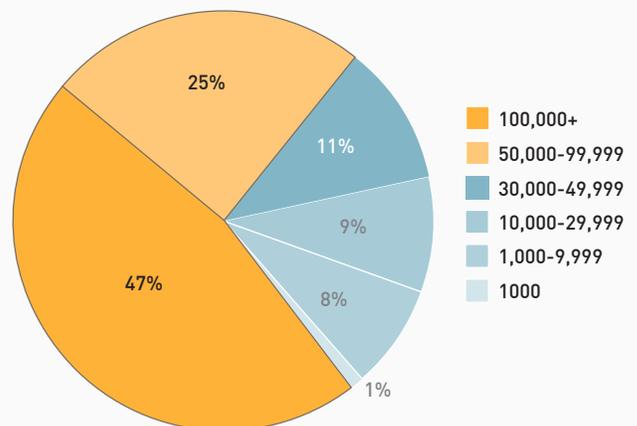
TABLE 1: Distribution of Unions and Unionized Workers¹²



Number of Unions (by membership size of union)



Number of Workers (by membership size of union)



alone the majority of the workforce who have chosen not to join a union. For too long we have preferred to avoid this debate, but we would suggest that a basic rethinking of what is understood by “worker democracy” is a healthy and necessary prerequisite to a revitalized labour relations system. The government should look for ways to encourage unions to compete with one another for their members’ support.¹⁴

And there is evidence of unions which will compete for their members’ loyalties. While there are different motivations for this competition, it has emerged as a theme in recent years.

Sometimes competition comes as a natural outgrowth of the consolidation trend. Certain sectors that have traditionally experienced relatively high rates of unionization – construction and health care for instance – have attracted the attention of unions that have not yet represented workers in these industries. The entrance of industrial unions, such as the CEP (now UNIFOR), into the construction market in Alberta and Saskatchewan is one example of this, while CAW’s entrance into the long-term care sector in 2000 is another.¹⁵

In these cases, the competing unions work outside of the non-compete clauses currently dominating many Canadian union confederations. The constitution of the Canadian Labour Congress, for instance, strictly forbids its member unions from trying to persuade (or “raid” as it is known in union circles) other unions’ members to leave their current union and join another. They go so far as to outline procedures for disciplining such actions. This “no-raid” clause is summarized succinctly as follows:

“When it comes to unions in Canada there has been a lot of talk, but no real action.”

Each affiliate respects the established collective bargaining relationships of every other affiliate. No affiliate will try to organize or represent employees who have an established bargaining relationship with another affiliate or otherwise seek to disrupt the relationship.¹⁶

It is notable that during the period in which CAW was entering the health-care sector, it was not a member of the CLC and thus was not subject to such clauses.

Some independent unions take a different tack on the question of competition. Unions such as the Christian Labour Association, the Labourers International Union, and professional associations such as the Ontario Nurses Association, compete on the principle that workers should be free to choose the union that best serves their interests, regardless of its affiliation with a confederation. As such, they raid and are raided by CLC based unions on a regular basis.

But unions themselves are facing competition from a third, unexpected, source, one that recognizes the pragmatic worth of collective bargaining: human resource departments. The rise of human resource departments and human resource workers as a recognized profession has effectively normalized a process of passive collective bargaining in the Canadian economy. Many companies that do not have unions present in their workplace nonetheless provide comprehensive labour relations programs for their employees, including dispute resolution processes, wage grids, and increased employee participation in labour force decisions.¹⁷ As we have noted previously, the organizing of the unorganized through the creation of pooled benefit plans and hiring pools is a trend deserving greater attention in Canadian labour relations.

14. Ray Pennings, Brian Dijkema and John Sikkema, “Competition or Regulation? Reforming Labour Relations in Canada,” *Cardus Policy in Public*. June 22, 2012. Accessed November 28, 2013, http://www.cardus.ca/policy/archives/3295/#Canadian_Labour_Relations_System_B

15. “Health Care,” CAW, accessed November 28, 2013, <http://www.caw.ca/en/sectors-health-care.htm>

16. Constitution of the Canadian Labour Congress, “Article 5: Federations of Labour and Labour Councils,” May 2011, accessed November 26, 2013, <http://www.canadianlabour.ca/sites/default/files/pdfs/constitution-english-2011.pdf>

17. Nicole Stewart and Elyse Lamontagne, “Compensation Planning Outlook 2014,” *The Conference Board of Canada*, October 2013, <http://www.conferenceboard.ca/e-library/abstract.aspx?did=5737>

These are just a few examples of a Canadian labour relations environment that is quite diversified. While the light-switch metaphor (union or non-union) remains dominant in our public conversation, it is no longer accurate to speak of union and non-union labour relations environments as exclusive categories. The “on the ground” reality in Canadian labour relations more closely resembles a spectrum in which the typical union and non-union categories represent only two possible positions among many.¹⁸ And, increasingly, this competition is framed in terms suggested in a recent paper: as a “competing for the right to cooperate.”¹⁹ In each case unions make the case that their particular approach will provide their members with better service.

Interestingly, the way in which unions interact with employers at the level of collective bargaining is increasingly marked by a cooperative attitude by both parties. Recent statements by the Ontario Building Trades suggesting increased interest in “no strike, no lockout” protocols are increasingly not the exception, but the rule.²⁰ Statistics show that the incidences of labour disruption due to strikes and lockouts have been on the decline for some time.²¹ This does not, of course, minimize the effects of strikes when they happen – recent wildcat teachers’ strikes in Ontario are an example of this – but it does suggest that both labour and employers are recognizing the value of cooperation in collective bargaining, which policy makers should acknowledge.

“The way in which unions interact with employers at the level of collective bargaining is increasingly marked by a cooperative attitude by both parties.”

To conclude, a number of key themes emerge from the developments in Canadian unionism and the approach that various governments take towards labour relations policy.

Among the union movement, a number of key themes frame the following policy discussion:

- Declining overall union density combined with an increasing of the already large gap between union densities in the public sector versus those of the private sector.
- Increasing consolidation of unionized workers into fewer, but larger, trade unions via mergers and acquisitions.
- Emerging competition within the union movement as marked by the emergence of alternative unions, such as the Christian Labour Association of Canada, and industrial unions into jurisdictions formerly dominated by service or construction unions.
- Rising passive bargaining among employers and the organization of non-union actors in ways previously employed by unions.
- Increased activity by professional associations and colleges which regulate professions, and which, even incidentally, affect wages, bargaining, and labour standards.
- Increasing evidence of a cooperative approach to collective bargaining taken by unions, as marked by the decrease in time lost due to work stoppages from strikes and lockouts.

18. For a taxonomy of seven approaches to labour relations in the construction industry see: Ray Pennings, “Competitively Working in Tomorrow’s Construction,” *Cardus Policy in Public*, July 2002, accessed November 2013, <https://www.cardus.ca/store/689/>

19. Paul H. Rubin, “Emporiophobia (Fear of Markets): Cooperation or Competition?” Presidential Address, Southern Economic Association, Tampa, FL, November 23, 2013.

20. Kelly Lapointe, “OCS sees bargaining and project improvements,” *Daily Commercial News*, November 8, 2013, <http://www.daily-commercialnews.com/article/id57760/--ocs-sees-bargaining-and-project-improvements#.Un0CfkhJwm8.twitter>

21. Employment and Social Development Canada, “Table 221,” *Labour Force Historical Review*, Statistics Canada, 2012, <http://www4.hrsdc.gc.ca/.3ndic.1t.4r@-eng.jsp?iid=14>

2. POLICY STRATEGIES ADDRESSING THESE CHANGES

With regard to policymakers' attempts to regulate trade unions properly, two distinct categories of regulation emerge:

In the first category, the state directly regulates and impacts the way unions engage with individual workers.

Without evaluating the import of the various proposals, the federal bills C-377 and C-525, and the Ontario Progressive Conservative²² and Wildrose Party's²³ "right-to-work" proposals use regulation to *directly shape how unions and individual workers—and even non-members—interact*; either via the way in which dues are collected, how workers can join a union, or how and to whom unions should report their financial transactions.

In the second category, the state uses regulation to level the playing field in which a plurality of methods of organizing workers compete for the loyalty of individual workers and for work. Examples of this can be seen in the Saskatchewan government's Bill 80, as well as a private member's bill in Ontario (Bill 73) in Ontario. This is made possible *by removing barriers* which favour one particular method of organizing workers over another and by creating regulations which promote the competition between different methods of worker organizations.

As noted in our paper "Competition or Regulation: Reforming Canadian Labour Relations":

We ought to move toward industrial relations policy and practice that makes forming, joining, and leaving a union easier, that ensures fair campaigns in which unions can compete for worker support, and that discourages the sorts of arrangements that result in virtual monopoly representation for unions in a particular sector. We regulate predatory pricing and collusive activities in the corporate sector where oligopolies and monopolies exist; it would be helpful to consider dealing with similar anti-competitive practices as they exist on the labour front.²⁴

3. BEHIND THE LABOUR DEBATES: MULTIPLE LEVELS, POLICY GOALS, AND STORIES

The bifurcation of public debate on labour relations in Canada belies the possibility of a broader range of policy options that are available to policy makers. As we have noted previously, much of the debate surrounding unions is imported from the United States. Ray Pennings suggests that Canadian labour relations since the 1940's have been dominated by American labour relations discussions, especially the Wagner Act of 1935. Indeed many of today's union debates still revolve around the assumptions of this system, including recent "right to work" discussions. But these assumptions are just that: assumptions of principle, rather than an argument for why we should accept them as norm. We note,

The root problem of the Wagner model as it has evolved in Canada rests in its assumed adversarialism, its unnecessary limits on worker choice, the effective provision of union monopoly in certain sectors, and the inherent resistance to change that the system breeds.²⁵

22. Ontario Progressive Conservative Caucus White Paper, "Paths to Prosperity: Flexible Labour Markets," June 2012, accessed November 28, 2013, <http://ontariopc.uberflip.com/i/103096/1>

23. The WRP backed away from its support of right to work legislation at its most recent AGM; see: Colby Cosh, "In Alberta Politics, it's out with the wild and in with the mild," *Maclean's Magazine*, October 30, 2013, <http://www2.macleans.ca/2013/10/30/in-alberta-politics-its-out-with-the-wild-and-in-with-the-mild/>

24. Ray Pennings, Brian Dijkema and John Sikkema, "Competition or Regulation? Reforming Labour Relations in Canada," *Cardus Policy in Public*, June 22, 2012. Accessed November 28, 2013, http://www.cardus.ca/policy/archives/3295/#Canadian_Labour_Relations_System_B

25. Ray Pennings, "Has Harris Really Changed Things?" *Cardus*, May 2001, accessed November 28, 2013, <http://www.cardus.ca/comment/article/738/has-harris-really-changed-things/>

The debate about labour policy in Canada at the macro level tends to circle around three key questions, to which the answers will depend on whether one falls into either the pro-union or the individualist camp. This section of the paper will focus on the conflicted policy responses to the following questions:

1. What is the relationship of labour unions and macro-economic vitality?
2. What is the relationship of labour unions to fiscal policy?
3. How do labour unions relate to basic and fundamental questions of what it means to be human, to work, and the rights and responsibilities inherent therein?

We argue that while the debate on these issues is heated, we have not been able to achieve broad consensus on any of them. We argue that the devolution of the debate into taking either pro-union and anti-union sides

“The best policy response will recognize the diversity on the ground, and will provide workers with the ability to vote with their feet.”

stands in stark contrast to realities on the ground. We suggest that the best policy response will recognize the diversity on the ground, and will provide workers with the ability to vote with their feet.

4. UNIONS AND MACRO-ECONOMIC VITALITY

There is little debate in Canada about the contribution of unions to the wages of individual workers. The data shows that unions almost always bring a wage advantage their members; sometimes a significant advantage.²⁶ There are very few on either side of the debate who feel that this advantage, and the advantage that comes through a collective agreement between two equal parties, is worth contesting.

The heated debates tend to center on the effects of unions on macro-economic questions. Are unions a barrier to economic growth and competition? Or, are they a major driver of economic equality and a boon to the middle class which is the key to a healthy economy?

The answer you get to these questions depends on whom you ask. The right tends to answer the former question in the affirmative while downplaying the latter.

Take, for instance, the rationale put forth by a recent paper produced by the Fraser Institute; a rationale embodied in the PCPO's White Paper on Labour. The Fraser Institute notes that “the scholarly literature generally finds that RTW [Right to Work] laws reduce the percentage of workers covered by union contracts, and [...] increase economic growth by about 1.8% and employment by about 1%”²⁷ The paper suggests that similar growth would be in store for Ontario and British Columbia were they to introduce RTW legislation: “RTW policy would increase total economic output in British Columbia by \$3.9 billion (about \$844 per capita) and total employment by a bit less than 19,000. The respective figures for Ontario are \$11.8 billion (about \$874 per capita) and almost 57,000.”²⁸

But the power of the paper to recommend policy remains in question. It fails to account for the wide variety of factors that impact economic outcomes: labour supply, skill levels, corporate tax rates, and other factors that contribute to economic vitality. In fact, the paper acknowledges the limits of its method; they note:

26. For a brief review of studies outlining this advantage, see: Sharanjit Uppal, “Unionization 2011,” Statistics Canada, <http://www.statcan.gc.ca/pub/75-001-x/00902/4168247-eng.html> ; or, Karla Thorpe, “The State of Canadian Unions: Down but Not Out,” *The Conference Board of Canada*, January 31, 2013, http://www.conferenceboard.ca/topics/humanresource/commentaries/13-01-31/the_state_of_canadian_unions%E2%80%94down_but_not_out.aspx

27. Benjamin Zycher, Jason Clemens, and Neils Veldhuis, “The Implications for US Labour Choice Laws for British Columbia and Ontario,” *Fraser Institute*, September 2013, <http://www.fraserinstitute.org/uploadedFiles/fraser-ca/Content/research-news/research/publications/implications-for-US-worker-choice-laws-for-BC-and-ON.pdf>

28. *ibid.* 4.

It is difficult in statistical analysis to control correctly for all of the central factors determining geographic differences in economic conditions, this literature is not conclusive. But the weight of the evidence is strongly suggestive.²⁹

The paper does not provide a compelling case for overturning a long established judicial decision—the Rand Formula—on economic grounds, it does, perhaps inadvertently, open the door to another option. It contains an implied assumption that all unions will seek to use government policy to limit competition rather than working cooperatively with employers to create value for the company, its shareholders, and workers. In economic terms, it conflates all labour unions with rent-seeking³⁰ (the use of government policy by firms and unions rather than the production of superior goods or services to make a business or union more successful).³¹ But this assumption is assumed rather than argued for; it ignores the possibility that unions can be—and there are many cases where they are—effective partners in wealth creation. But it does point out an important insight: eliminating monopolies which prevent the full variety of means of organizing workplaces to compete for work is a more effective policy response to the negative impacts of trade unions in Canada than painting all unions with the same brush.³² In doing so, it substantially hampers the ability of innovative unions to succeed.

It is worthwhile to note that the loss of London’s Electro Motive Diesel plant to Indiana, one of the major cases used by those advocating for RTW laws in Ontario, was motivated, at least in part, by \$30 million dollars of tax incentives provided by Indiana’s government.³³ While the decision to move the plant was largely hailed (or lamented, depending on one’s position) as a result of RTW, the impact of corporate welfare on EMD’s decision should not be discounted.

And while the Fraser Institute’s paper suggests that the evidence in favour of RTW indicates positive economic benefits, a paper produced by the Ontario Federation of Labour cites a wide range of academic research which suggests precisely the opposite: RTW leads to lower wages, lower health benefits, lower pensions, lower median wages, etc.³⁴ Citing a wide range of papers, the OFL suggests that “while the data is not conclusive, the best evidence available demonstrates that right-to-work legislation does not boost employment.”³⁵ It also cites evidence showing a decline in manufacturing employment in two RTW states, Oklahoma and North Carolina, indicating that other factors might be more influential.

The fact that there are mixed results is evident, which leaves academics and policy makers with an empirical haze. As noted by deputy editor of *Canadian Business*, “Right-to-work laws generate plenty of debate, but no clear results.”³⁶ This is the same conclusion that the Congressional Research Service reached in its review of RTW legislation:

Difficulties associated with rigorously studying the relationships between RTW laws and various outcomes are likely to continue to make it difficult to generate definitive findings about these relationships. As such, the ongoing debate on RTW may be driven by factors other than rigorous empirical evidence.³⁷

29. *ibid.* 7.

30. *ibid.* 6.

31. John Black, “rent-seeking,” *Oxford Dictionary of Economics*. Oxford University Press, 2009. 399.

32. In fact, many of the policies recommended by Cardus (Bill 80 in Saskatchewan, Bill 73 in Ontario) are aimed at specific instances of eliminating legal situations that encourage such rent-seeking. See also Brian Dijkema, “Cardus Construction Competitiveness Monitor,” *Cardus Policy in Public*, October 25, 2012, <http://www.cardus.ca/research/workandeconomics/publications/>

33. Mike Moffat, “Caterpillar closes plant because of economics, not unions,” *Canadian Business*, February 15, 2012, accessed November 28, 2013, <http://www.canadianbusiness.com/business-strategy/caterpillar-closes-plant-because-of-economics-not-unions/>. The irony of this is that such “incentives” are exactly the type of policy response recommended by unions that represent workers in the manufacturing sector. See: Brian Dijkema, “Condemnations, Contradictions, and Rich Ironies,” *Cardus Daily Blog*, February 24, 2012, accessed November 28, 2013, <http://www.cardus.ca/blog/2012/02/condemnations-contradictions-and-rich-ironies>

34. “Working for Less: The Coming Threat to Union Security in Ontario,” Ontario Federation of Labour, February 2013, <http://ofl.ca/wp-content/uploads/2013.02.10-Work4Less-Report-Web.pdf>

35. *ibid.* 13.

36. James Cowan, “Letting Employees Opt out of Unions Sounds Good, but it doesn’t Help,” *Canadian Business*, September 17, 2013, <http://www.canadianbusiness.com/blogs-and-comment/right-to-work-is-wrong/>

37. Benjamin Collins, “Right to Work Laws: Legislative Background and Empirical Research,” *Congressional Research Service*, Decem-

It is probably more accurate to suggest that debate on RTW is, in fact, driven by rigorous empirical evidence, but that *there is no consensus among economists or policy makers on the assumptions that provide the basis and building blocks for producing such evidence*.³⁸ It also suggests the need for further micro-economic case studies of the effects of RTW on actual firms—including unions.

This lack of consensus suggests that “the pendulum of pro-labour and pro-business labour reforms [that] has swung since the Wagner model became the standard for North American labour law in the 1930s”³⁹ is still the norm.

It is also notable that much debate around RTW legislation tends to focus on industrial output and employment, particularly in the manufacturing sector.⁴⁰ Yet the reason for such a focus, while obvious in terms of electoral politics in manufacturing heartlands, tends to ignore broader global trends which indicate both a global decline of manufacturing employment as a result of increased technological development⁴¹ and a resurgence of manufacturing in the very manufacturing heartlands these proposals are targeting.⁴² Such a focus also fails to justify why policy makers should be so focused on manufacturing as opposed to construction⁴³ or other economic drivers.

On the pro-union side, unions are also touted as institutions standing in the way of gross social inequality. Indeed, the OFL paper cited above, drawing on studies by the World Bank and the International Labour Organization, suggests that “higher union density and greater coverage of collective bargaining agreements tend to be associated with lower levels of inequality [and] that higher rates of union density and bargaining coverage correlate negatively with labour earnings inequality.”⁴⁴ Yet while there certainly is evidence to suggest a link between unionization and inequality,⁴⁵ it is also true that the strength of that link is debatable. Again, much depends on one’s assumptions.⁴⁶

ber 6, 2012, <http://www.fas.org/sfp/crs/misc/R42575.pdf>

38. Kevin Rinz, “The Effects of ‘Right to Work’ Laws on Wages: Evidence from the Taft-Hartley Act of 1947,” Paper (Under Review), University of Notre Dame, Department of Economics, 2013, accessed November 28, 2013, http://www3.nd.edu/~krinz/Rinz_RTW.pdf. This thorough and empirically sound paper from the University of Notre Dame’s Department of Economics notes that “Theoretically, the sign of [RTW laws’] effect on wages is ambiguous” and notes the difficulty represented by various endogenous variables inherent in the discussion. In response, the paper adopts an assumption which “solves” for this: the “use of variation induced by the federal Taft-Hartley Act of 1947... The fact that these states adopted RTW laws as soon as they could (or sooner) suggests that they would have had the laws in place much earlier had federal law permitted. The change in federal law and the immediate adoption of state RTW laws during this period do not appear to have been caused by the same underlying factors, so the timing of the introduction of RTW laws in these states is arguably exogenous” (p3). Note that this paper is highly sophisticated and empirical, and yet is based upon an assumption which, while plausible, does not, on its face, come close to settling the debate, and might in fact raise even more questions than it settles.
39. Ray Pennings, “Has Harris Really Changed Things?” *Cardus*, May 2001, accessed November 28, 2013, <http://www.cardus.ca/comment/article/738/has-harris-really-changed-things/>
40. Both the Fraser Institute paper, and the Progressive Conservative Party of Ontario white paper focus heavily on the impact of Right To Work on manufacturing; something shared by many papers on this topic. See Fraser Paper (13) and PCPO paper, (7-8).
41. James Manyika, Jeff Sinclair, Richard Dobbs, Gernot Strube, Louis Rasse, Jan Mischke, Jaana Remes, Charles Roxburgh, Katy George, David O’Halloran and Sreenivas Ramaswamy, “Manufacturing the future: The next era of global growth and innovation,” *McKinsey and Corporation*, November 2012, http://www.mckinsey.com/insights/manufacturing/the_future_of_manufacturing
42. Gordon, Stephen. The Canadian Manufacturing Sector, 2002-2008: Why Is It Called Dutch Disease? <http://policyschool.ualgary.ca/?q=content/canadian-manufacturing-sector-2002-2008-why-it-called-dutch-disease>
43. Brian Dijkema, “Hewers of Wood and Drawers of Water, or a Land Flowing with Milk and Honey?” *Cardus Policy in Public*. November. 2012, <http://www.cardus.ca/policy/archives/3771/> See also Cardus’s forthcoming paper (Jan. 2014) “Canada’s New Industrial Revolution”
44. “Working for Less: The Coming Threat to Union Security in Ontario,” Ontario Federation of Labour, February 2013, <http://ofl.ca/wp-content/uploads/2013.02.10-Work4Less-Report-Web.pdf>
45. See, for instance: David Card, Thomas Lemieux, and W. Craig Riddell, “Unionization and Wage Inequality: A Comparative Study of the U.S., the U.K., and Canada,” NBER Working Paper No. 9473, January 2003.
46. See for instance Stephen Gordon’s (admittedly limited) post which suggests that the “link - either in theory or in the data - between unionization rates and increases in inequality across occupations. (Inequality within an occupation is a different story)” is tenuous: Stephen Gordon, “What is the link between unionization and equality?” *Worthwhile Canadian Initiative: A Mainly Canadian Economics Blog*, September 2013, http://worthwhile.typepad.com/worthwhile_canadian_initi/2013/09/what-is-the-link-between-unionisation-and-inequality.html

It would appear that the companies and unions that adapt best in the competitive environment of our global economy thrive, while those who do not are likely to lose. At the end of the day, the “Rand” formula does not dictate the level of sophistication of a union and its officers in dealing with these challenges, nor does the presence of a union necessarily diminish a company’s ability to compete.

5. UNIONS AND FISCAL POLICY

We noted above that the highest union density is found in the public service. It is unsurprising given the labour costs of the public service that debates about unions will tend toward their relationship to fiscal policy.

Unions tend to focus on public service jobs as “public investment” which raises the welfare of all Canadians. A typical contribution of this sort can be found in CUPE’s submission to the 2012 Budget Consultations. They note:

Quality public services are critical for sustaining shared prosperity and a high standard of living for all Canadians. Research has shown that public services provide an annual benefit equivalent to \$41,000 for the average Canadian family and \$17,000 for each individual. Cuts to public spending not only damage the economy, but they also diminish the living standard of all Canadians—and particularly the most vulnerable.

It’s a myth that public sector deficits were caused by rising rates of public spending. Federal spending as a share of the economy recently plummeted to the lowest level since at least 1961. Total government spending of all levels of government also recently declined to the lowest rate since 1975. The increase in the past two years is solely because of weakness in the private sector economy and higher social benefits as a result of the recession—and not because of unsustainable spending growth.⁴⁷

And yet a whole section of the recent speech from the throne was dedicated to addressing public sector employee costs, noting in particular the government’s intent to ensure that “public service pay and benefit levels will be reasonable, responsible, and in the public interest.”⁴⁸ Key points here include the reform of pensions, sick-days, disability entitlements, and hiring restraints, as well as amendments to the Public Service Labour Relations Act.

In its recently commissioned Drummond Report, the government of Ontario notes that:

Although temporary wage moderation may be necessary to meet short-term fiscal targets, longer-term action will require co-operative approaches that can drive the institutional and system-level change recommended in this report. Ultimately, moderation in total compensation will require that wage restraint give way to a reduction in the size of the workforce, supported by increased productivity and improved service delivery.⁴⁹

Intriguingly, this section of the report is introduced by noting that:

47. “Canadian Union of Public Employees Submission to the House of Commons Standing Committee on Finance for the 2012 Federal Budget Consultations,” *CUPE*, August 2011, accessed November 28, 2013, http://www.parl.gc.ca/Content/HOC/Committee/411/FINA/WebDoc/WD5138047/411_FINA_PBC2011_Briefs%5CCanadian%20Union%20of%20Public%20Employees%20E.pdf

48. Government of Canada, “Seizing Canada’s Moment: Prosperity and Opportunity in an Uncertain World,” *Speech from the Throne*, October 16, 2013, http://speech.gc.ca/sites/sft/files/sft-en_2013_c.pdf

49. Ontario Ministry of Finance, “Labour Relations and Compensation,” *Public Service for Ontarians: A Path to Sustainability and Excellence*, 2012, <http://www.fin.gov.on.ca/en/reformcommission/chapters/ch15.html#ch15-a>

[The] high level of unionization [in Ontario's public service] produces a two-way street that requires joint oversight to foster effective union-management relationships. Any government or organization that wants to change the way in which services are delivered must work with the people who deliver those services and with the unions that represent those people.⁵⁰

The key question in the debate about unions in the public sector is the extent to which they represent workers as an employer like any other, or whether there is anything unique about the relationship between public sector unions and their counterparts.

While public sector unions often stress the fact that governments are also employers, it does not stand to reason that the employment relationship between the state and its employees should be treated the same way as employers in the private sector.

The differences are summarized by Brian Lee Crowley:

Private sector and public sector employers are simply not the same animal. Governments exercise a monopoly over the provision of many vital services in a way that virtually no private sector employer ever can...

Companies face the discipline of the bottom line: they must make money selling goods or services that people want to buy at prices they are willing to pay. If private employers fail this test, they go out of business. Governments cannot go out of business. They pay their bills through taxation, which means they need not trouble themselves too much about whether people think they are getting good value for their tax dollars...

The customers for public services, people using hospitals and schools, for instance, don't pay the full cost of labour settlements the way customers of private sector firms do. The costs of public sector settlements fall on all taxpayers, and those costs are all tangled up in a complex tax burden rather than a straightforward bill for a private service that consumers can understand.⁵¹

One can be opposed to, in favour of, or indifferent towards Crowley's argument for the removal of public employee's right to strike while still agreeing with the necessity of addressing public sector unions in a radically different way than their private sector counterparts. The recent financial contributions of \$5,393,382.42 towards various campaigns in the October 6, 2011 general elections in Ontario by a group of public sector unions—including teachers' unions which engaged in wildcat strikes early in 2013—only underscores this reality.⁵² The effect of these contributions can be equated with political action committees of the type normally seen south of the border. Yet even here, the influence of a plurality of unions ameliorated an otherwise contentious situation. The teachers' strike in Ontario was settled after the Catholic, and Francophone teachers' unions, two of the unions involved in negotiations, opted to settle voluntarily. Those settlements eventually set the pattern for striking unions later that year.

50. *ibid.*

51. Brian Lee Crowley, "Public Sector workers should not have a right to strike," *The Macdonald-Laurier Institute*, January 10, 2013, accessed November 2013, <http://www.macdonaldlaurier.ca/mli%E2%80%99s-crowley-in-postmedia-newspapers-public-sector-workers-should-not-have-a-right-to-strike/>

52. Elections Ontario reports that public sector unions contributed \$5,393,382.42 towards various campaigns in the October 6, 2011 general elections in Ontario. For details see: Elections Ontario. "Third Party Reports TPAR-1," accessed December 10, 2013, <http://www.elections.on.ca/en-CA/Tools/FinancialStatementsandContributions/FilingStatus/2011Third+Party+Reports.htm> This issue is likely best addressed through policies aimed at political financing laws – similar to those passed at federal level – rather than at the labour relations level.

6. UNIONS AND RIGHTS: SHIPS PASSING IN THE NIGHT

But for many in this debate, economic matters are only secondary to the relationship of trade unions to basic human rights. Indeed, this is where the debate acquires its greatest heat and sheds its greatest light on how policy makers should proceed.

There are voices suggesting that current laws and practices impede an individual's right to choose, as an individual, rather than as part of a group of individuals which decide by majority vote, whether or not they wish to be part of a trade union. There are specific practices which frustrate those who view workplaces primarily as a series of individual contracts entered rationally in the interest of each party.⁵³ Chief among these is the enforcement of dues payments for workers who find themselves on the minority of a group of workers who have chosen a union.

There are other voices who suggest that “free collective bargaining is a human right” and that “Canadians have seen a serious erosion of a fundamental and universal human right, their right to organize into a union and engage in full and free collective bargaining” and that “Canada’s record with respect to the number of complaints submitted to the International Labour Law’s (ILO) Freedom of Association Committee is one of the worst of all of the ILO’s 183 member States.”⁵⁴

It is interesting to note, on a global scale, the significant overlap between countries with a high degree of freedom of association and a high degree of economic freedom. In many cases, while they decry the poverty of their own positions, both the left and right are almost always talking about the same context.⁵⁵

While a basic working consensus in both law⁵⁶ and on the ground is present, the difference in perspective on these issues is another instance where highly opposed groups make significant claims derived from diverse worldviews about the nature of work and the workplace, and the relationship of workers to their employers and colleagues. Indeed, such diversity appears alive and well in Canada. We have groups representing the more libertarian individualist views of the workplace,⁵⁷ more socialist views of the workplace,⁵⁸ Christian democratic views of the workplace,⁵⁹ and others who simply do not fit into typical categories. Yet it is not just industry and labour groups that are represented. Canadian workers themselves are increasingly finding themselves in a wide-variety of structures within their workplaces – from a highly rigid unionized environment, to the passive-collective bargaining undertaken by human resource departments in major firms, to strict individual contracts, and everywhere in between.

Also, even within various groups, a significant amount of diversity exists. There have been, for instance, robust defenses of collective bargaining from within both the conservative⁶⁰ and libertarian⁶¹ camps.

53. Cf. “Guiding Principles,” *Labour Watch*, accessed December 10, 2013, <http://www.labourwatch.com/about/principles>

54. “Labour Rights under Attack,” Canadian Foundation for Labour Rights, accessed December 10, 2013, <http://www.labourrights.ca/>

55. Compare, for instance, “Freedom of Association: Trade Union Rights Worldwide,” Map, *ICTUR*, 2012, accessed December 10, 2013, <http://www.ictur.org/pdf/ICTUR-FOA-map-2012.pdf> and “Trade Union Density,” Chart, *OECDStat Extracts*, accessed November 28, 2013, <http://stats.oecd.org/Index.aspx?QueryId=20167>. with “Economic Freedom Map,” Economic Freedom Network, accessed December 10, 2012, http://www.freetheworld.com/ef_map.html

56. The legal framework surrounding freedom of association and collective bargaining remains unsettled. The rulings that have been made offer some support for our policy framework – state neutrality on the manner of collective bargaining. Commentators note that “meaningful good faith bargaining right [does] not require the importation of Wagner model notions of exclusivity and majoritarianism or a statutory mechanism for resolving bargaining impasses and disputes regarding the interpretation or administration of any collective agreement arrived at.” See: Paul E. Broad, “The Fraser Decision: The Supreme Court of Canada Revisits Chartered-Scope of Collective Bargaining Rights,” *Hicks Morley*, May 2011, accessed November 28, 2013, <http://www.hicksmorley.com/index.php?name=News&file=article&sid=941>

57. Merit Canada, Union Transparency, <http://www.meritcanada.ca/meritcms/>

58. Canadian Union of Postal Workers (CUPW), <http://www.cupw.ca/1/4/2/4/6/index1.shtml>

59. Christian Labour Association of Canada (CLAC), A Union that Works, <http://clac.ca/>

60. See, for instance, Ray Pennings, “Collective Representation: a Conservative Defense,” *Comment*, September 1, 2004, accessed December 10, 2013, <http://www.cardus.ca/comment/article/233/collective-representation-a-conservative-defense/>

61. For an example here, see: Jacob Levy, “Thoughts on Unions,” *Bleeding Heart Libertarians: Free Markets and Social Justice*, June 6,

7. ANALYSIS

In light of the lack of consensus on many of the key questions pertaining to unions, and in light of the facts on the ground in the world of Canadian labour relations, is there any way to move forward productively on labour relations?

As my colleague Ray Pennings noted in *Beyond Talking: Practical Steps Towards Cooperative Labour Relations*:

Moving towards cooperative labour relations is not a matter of picking up the road map, following the directions, and arriving at some mythical destination called labour-management cooperation. As in all human relationships, it is a dynamic process that has its ups and downs. It must deal with the quirks of individuality and complicating factors beyond anyone's immediate control.⁶²

The constant temptation in this discussion is to simply adopt the position of the party ascendant in power at any given time. Yet, as Cardus has noted previously, “labour law that is passed to please one set of stakeholders’ interests will throw us back to the ‘might makes right’ days. It’s just that political might will have replaced economic might.”⁶³ The danger is that political power, while it might last for considerable periods of time, is never fully secure, but swings from side to side like a pendulum. What is considered sound policy at one point is likely to be reversed at another. The coincidental hope and fear of various parties in the most recent British Columbian elections are a classic example of this. A win for the NDP would spell glory days for unions, but weeping and gnashing of teeth for business interests. The replacement of the NDP Bill 40 – introduced by the Rae government – by Bill 7 by the Progressive Conservative government of Mike Harris is a case in point.

The use of political power to please one particular group of stakeholders can have unintended consequences in the future. Current discussions of Bill C-377 are notable in this regard. While the bill’s aim for increased financial accountability of unions is noble, the logic behind the bill could set a precedent for increased state surveillance of other civil society organizations which receive a tax benefit from the government and do not meet the government of the day’s approval. It might also work directly contrary to its purpose of making unions more accountable. The costs of the requirements of the bill—especially the detailed reporting of union expenditures—are likely to move unions towards a consolidation which, as we have noted, increases the space between bargaining unit work and the union’s structure. In addition the larger, more consolidated unions are likely to place a heavier emphasis on political action than smaller, focused unions.⁶⁴ Bill C-525 is another example. While it is likely to be applauded and understood primarily as an act which restored the secret ballot vote to public sector labour relations, its changes to the threshold needed for both unionizing and decertifying a bargaining unit (the threshold far exceeds any other democratic threshold, including that needed to attain political power) are more likely to ossify the existing realities of federal bargaining units than anything else. The high threshold for entrance and exit will add rather than remove friction from groups of workers choosing to join or leave a union. It will make competition more difficult, not less.

Likewise, the implications of the legal logic used by certain parties’ to overturn the “Rand” formula can have deleterious effects on other instances of freedom of association, perhaps even the freedom of religion.⁶⁵ Cer-

2012, accessed December 10, 2013, <http://bleedingheartlibertarians.com/2012/06/3087/>

62. Ray Pennings, “Beyond Talking: Practical Steps Towards cooperative Labour Relations,” *Comment*, September 1, 2001, accessed November 28, 2013, <http://www.cardus.ca/comment/article/1292/beyond-talking-practical-steps-towards-cooperative-labour-relations/>

63. Ray Pennings, “A Road Map Through Ontario Employment Law” *Comment*, March 1, 2000, accessed November 28, 2013, <http://www.cardus.ca/comment/article/1419/a-road-map-through-ontario-employment-law/>

64. Brian Dijkema, “Conservative Bill Forcing Union Disclosure is Costly and Inefficient,” *Globe and Mail*, November 2012, <http://www.cardus.ca/columns/3682/> and Brian Dijkema, “When it Comes to Unions Big isn’t Always Better,” *Calgary Herald*, January 10, 2013, <http://www.cardus.ca/columns/3841/>

65. Cf. <http://www.mcgill.ca/prpp/> and Douglas Farrow, “On the Ethics and Religious Culture Program,” Report from Expert Witness, January 2010, http://www.mcgill.ca/prpp/sites/mcgill.ca/prpp/files/Farrow_ERC_Report.pdf p.14-15 in which many of

tainly precedents set in one area of law do not act directly on others, but allowing individuals or the state to dramatically affect the internal workings of an organization which is required to include and represent them even as they are opposed to it, contains the potential to drastically undermine the ability of institutions—of whatever sort—to direct their own affairs.

“What is considered sound policy at one point is likely to be reversed at another.”

The most likely result of this approach is a flurry of legislative effort that will be quickly overturned the moment the next party is in power. In a policy discussion marked by such extremes, the likeliest result is a decade-to-decade swinging of the pendulum. As noted by Pennings, “part of the purpose of labour law is to provide for industrial stability and to protect society and the economy from the costs and uncertainty that stems from any change.”⁶⁶ In other words, while changes might appear to be significant on the surface, they are more likely to be disruptive to both the economy and workers without achieving anything except “intensifying an already hostile labour relations atmosphere.”⁶⁷

8. SMALL POLICY STEPS TOWARDS A MUCH BETTER WORLD OF LABOUR RELATIONS: A FRAMEWORK

In light of the high degree of dissensus in labour policy, we might ask if there is a way forward. Our preferred option for labour policy emerges from a few areas where our history and our political culture have attained a degree of consensus.

The first is the very existence of trade unions. It is important to note that collective action undertaken by workers emerged with or without state regulation and approval. As noted by Jacob Levy:

Whatever one’s complaints against the regime of employment relations created by positive legislation such as the Wagner Act, unionization comes first, before the state action and initially in spite of state action.⁶⁸

This is true not only in the North American context, but also in emerging economies. While China boasts of the world’s largest trade union, collective bargaining in China is a rare occurrence. The result is an increasing array of strikes and labour unrest.⁶⁹ The action of Solidarnosch in Poland is similar; it emerged in spite of state action. In Canada, as in China, collective action from workers appears to be inherent to economic life. In Canada, we have a system of labour relations marked by peaceful, civil, and stable labour relations. No doubt the abuses of this system are manifold, but it need not require a massive swing in policy direction to destabilize that system. As Levy notes:

There’s a temptation to look at the person in front of you whose freedom is being violated and respond with a massive restriction on the authority of the group doing the violating. And sometimes that’s warranted. But, *even when it is*, you need to pay attention to later dynamic effects of the change, and whether they leave people even more vulnerable to future violations of freedom.⁷⁰

Our approach recognizes that the major changes in the world of labour relations *are already underway under*

the concerns pertaining to group rights, the role of the state to impose one particular view on a particular group, and the role of individuals are analogous to some of the discussions occurring on the question of the Rand formula.

66. Ray Pennings, “Has Harris Really Changed Things?” *Comment*, May 1, 2001, <http://www.cardus.ca/comment/article/738/has-harris-really-changed-things/>

67. *ibid.*

68. Jacob Levy, “Thoughts on Unions,” *Bleeding Heart Libertarians: Free Markets and Social Justice*, June 6, 2012, accessed December 10, 2013, <http://bleedingheartlibertarians.com/2012/06/3087/>

69. “China Labour Bulletin,” Map, accessed December 10, 2013, <http://www.numble.com/PHP/mysql/clbmape.html>

70. Jacob Levy, “Thoughts on Unions,” *Bleeding Heart Libertarians: Free Markets and Social Justice*, June 6, 2012, accessed December 10, 2013, <http://bleedingheartlibertarians.com/2012/06/3087/>

our current regime without government intervention. In many, though obviously not all, cases, unions have been successful in their decades long struggle to get many basic freedoms and privileges ensconced in the everyday practice of employers in many facets of our economy. While certainly there remain many unscrupulous employers, unions can take pride in the fact that passive collective bargaining is commonplace in many workplaces that are not unionized. And, increasingly, unions which recognize that they can bring value to their members through cooperative efforts alongside the employer are thriving. Where they do not, many workers are choosing to vote with their feet and move on.

If we assume and affirm the continued existence of some form of collective workplace advocacy from workers, our policy response should be to maximize the positive aspects of unions while minimizing the negative aspects. What is needed more urgently is a *revolution of perspective* which recognizes these realities, alongside principled, incremental policy changes. A much better, more stable approach to policy would favour measured steps which would lead to a competitive, innovative, world of labour relations.

We suggest that labour policy should focus on three parallel tracks:

1. That, insofar as possible, government refuse to craft policies which deliberately favour a particular method of workplace organization, labour worldview, or labour organization at play in Canadian economic life. Rather, government should enact policy which levels the playing field between the competing views and let civil society determine the most appropriate method. More succinctly, we suggest that government remove barriers which deliberately penalize one method of organizing workers—whether that be individual contracts, traditional trade union arrangements, alternative unions, or employee associations—and let workers vote with their feet. As we noted above, workers and the union movement are already adapting to these new realities and unions which favour both competition and cooperation, while minimizing efforts spent on extra-curricular activities, appear to be thriving.
2. That the government reevaluate the labour relations regime which currently oversees public sector bargaining, with a view to re-asserting the primary role of the state as government rather than employer in situations where a necessary state monopoly exists. The government should consider *its* role in the creation of the labour monopolies which exacerbate their fiscal concerns—health care and education for instance—rather than trying to use labour relations policy to solve what are, in effect, unnecessary government monopolies.
3. That the government concentrate on improving and easing the ability of existing workers’ organizations to work towards policy goals where there *is* a modicum of consensus. Both the right and left agree that workplaces should involve workers as much as possible—i.e. be democratic—while also being accountable primarily to their members. This should be true for all methods of organizing workers, union or otherwise.

“What is needed more urgently is a revolution of perspective which recognizes these realities, alongside principled, incremental policy changes.”

9. THE GOAL: COMPETITION AND COOPERATION

A policy platform that best fits the framework described above will evaluate each policy through the binoculars of competition and cooperation. The approach should operate particularly at three separate but related levels: entrance and exit into and out of various workplace organizations, accountability of various workplace organizations, and collective bargaining reform.

I. Entrance, Exit, and Transition

The emphasis of this particular set of proposals should be on reducing the friction for workers to join or leave a given workplace organization. Note that this applies to both union and non-union workplaces. A labour law which demands high costs of time, knowledge, or money to enter or exit a particular means of organizing workers will not be dynamic, competitive, or innovative. A labour relations regime in which there are a variety of labour options which must innovate and compete for the loyalties of their members is preferred to that which places two blocs against one another – one union bloc held in solidarity by “non-compete clauses” versus large employer groups advocating for individual employee relations. Again, this approach allows the organization which provides the best value to the worker and the employer to gain more market share while refusing to tip the scale in favour of one particular method of organizing workers by government interference. It has the added benefit of minimizing the ability of one particular group to unduly influence policy via political action. The cooperation of various competing businesses within industry associations suggests that, likewise, unions can compete for members while maintaining the ability to cooperate on issues of common concern.

A few examples of small and specific policies which might fit into this rubric can be taken from Ontario.

- i. Clarify the freeze of “terms and conditions” in union displacement or union decertification situations. Currently, workers in a union displacement situation receive only a freeze of “terms and conditions” rather than a freeze of all provisions of current contracts. The lack of this clause opens the door to the potential dropping of existing grievances by the employer without recourse by the employee or the union. This places workers in an insecure situation in cases where they wish to join another union or to decertify their current union. This works as an impediment to choice.
- ii. Ensure that “just cause” is the standard for dismissal during union organizing campaigns, union displacement campaigns, and union decertification campaigns. The lack of this language gives greater leeway to employers to act with impunity during campaigns, and provides unions with the means to threaten workers who wish to change unions or leave a union. Currently, the insecurity brought on by the lack of these items strengthens the hand of the incumbent union or the employer, allowing them to artificially ward off competitive threats, and thereby reduce the competitive environment around unions. Such provisions already exist in the Canadian labour code.
- iii. Include geographical considerations in the definition of a “community of interest” for the purpose of labour relations. Currently there are large bargaining units (in the health care industry in particular) which are comprised of large numbers of workers spread across a variety of workplaces in a variety of geographic locations. In many cases, small workplaces are “absorbed” into bigger workplaces, and acquire the union/bargaining relationship held by the larger entity in a way that undermines the ability of the smaller group of workers to maintain autonomy over their affairs. Such geographical considerations would limit the ability of unions to artificially guard themselves against raids (and thus avoid accountability) or decertification campaigns by creating large “fortress” bargaining units. It would also enable actual communities of workers to make real choices.
- iv. Alter the definition of the bargaining unit on construction certifications so that it includes a representative sample of actual employees. The current method by which two employees, if they are the only employees working on a given day, can unionize a company which just days prior and following

would employ (many) multiples of these two, runs contrary to basic principles of democratic justice.⁷¹ We are cognizant of the rationale for instituting the current requirements and support the principle of preventing gerrymandering of voters' lists *by employers*. However, the current situation effectively allows the gerrymandering of voters' lists *by unions*. In all circumstances, the goal should be for a “democratic testing” of the workplace which does not place an unreasonable threshold on either the employer or the union.

- v. Initiate something akin to the “Office of the Worker Advisor” which could offer unbiased technical advice about both certification and decertification of unions. The current cost and technical burden of these processes for any individual or small group of employees is extremely high. Such an office would give workers ready access to the information needed to educate themselves on the options available and to take action if desired. At the very least, all sides should agree to the conspicuous posting of government produced material relating to the rights and processes for certifying, displacing, or decertifying a union.

II. Accountability

Accountability of both employers and unions to their workers is a key driver of a competitive labour relations environment. In order for a fair playing field, all parties must play by rules that are recognized and equal in both measure and scope. A lack of accountability for one side with a strictly enforced accountability for the other side will unfairly advantage one method of workplace organization over another.

A few examples of small but specific policies that fit into this rubric:

- i. The “coercion” test, aimed to prevent coercion by employers or unions, should be made equal—*de facto* as well as *de jure*—for both employers and unions.⁷² The goal is to apply an equal test that recognizes the potential power imbalances between employers and workers, and also unions and workers.
- ii. Donations by unions, businesses, and industry associations, to electoral third-parties should be restricted to the same level that they may give to political parties. Alternatively, a hard cap should be placed on a combination of both political parties and electoral third parties. This would limit one particular group's ability to influence state policy in ways that would tip the balance of the state's neutrality on labour relations policy.
- iii. Public disclosure of a workers' organization's (union's or industry/employer associations which provides broad member services to workers) financial details should be set at the same level as charities or publicly traded companies. While it is misguided to suggest that the “Rand” formula requires complete public disclosure of minute financial details,⁷³ some level of public awareness would assist potential members to make an informed decision to join a union. Again, the emphasis should be placed on a fair and equitable standard that does not favour one particular method of organizing a workplace.

71. That this occurred in both Hamilton and Waterloo, and led to the creation of labour monopoly of hundreds of millions of dollars of public construction work only underscores the affront to democracy represented by such practices. See: Brian Dijkema, “Cardus Construction Competitiveness Monitor,” Cardus, 2012.

72. Currently there are equal penalties for coercion but the jurisprudence, established over time, has effectively created different tests for coercion, at least in the case of Ontario.

73. For the rationale behind efforts to make detailed public expenditures public, see: Brian Dijkema, “Conservative Bill Forcing Union Disclosure is Costly and Inefficient,” *Globe and Mail*, November 2012, <http://www.cardus.ca/columns/3682/> and, Louis Fourtin, Yourri Chasin, and Michel Kelly Gagnon, “The Financing and Transparency of Unions,” *Montreal Economic Institute*, October 2011, accessed December 10, 2013, http://www.iedm.org/files/cahier1011_en.pdf, especially pp. 25-27. We address these arguments in full here: Ray Pennings, Brian Dijkema and John Sikkema, “Competition or Regulation? Reforming Labour Relations in Canada,” *Cardus Policy in Public*, June 22, 2012, accessed November 28, 2013, http://www.cardus.ca/policy/archives/3295/#Canadian_Labour_Relations_System_B

In all cases, the law should require the ability of members to acquire detailed information, and unions to submit to, and publish the results, of audits performed by neutral third parties.

- iv. Consideration should be given to lowering the bar for religious exemption to the level of clearly defined issues of conscience. The current test requires that one's religious community as a whole be opposed to unions and forces some union members into abetting causes taken on by unions which the religious community might deem contrary to its teaching. This solution would prevent "free-riding" by having objectors dues move to charity, while providing a penalty to unions which deliberately overstep their bounds; it would hold them accountable to advocate on issues common to the workplace. Careful consideration should be made to ensure an adherence to basic principles of tolerance and respect for confessional differences. Conscientious objection should be leveled against specific actions. This would ensure that the union would be accountable to act in such a way as to respect other basic freedoms.

III. Collective Bargaining

The emphasis on reform should be aimed at achieving exactly the purposes of Ontario's *Labour Relations Act*:

1. To facilitate collective bargaining between employers and trade unions that are the freely-designated representatives of the employees.
2. To recognize the importance of workplace parties adapting to change.
3. To promote flexibility, productivity and employee involvement in the workplace.
4. To encourage communication between employers and employees in the workplace.
5. To recognize the importance of economic growth as the foundation for mutually beneficial relations amongst employers, employees and trade unions.
6. To encourage co-operative participation of employers and trade unions in resolving workplace issues.
7. To promote the expeditious resolution of workplace disputes.⁷⁴

A few examples of small but specific policies that will help to achieve this purpose:

- i. As stated in note 20 above, collective bargaining in Canada largely achieves these goals. Strikes are increasingly rare, and as unions adjust to market realities, many are moving towards a partnership model which attempts to use the competitive advantages of organized labour—training, safety, dispute resolution, and stability—to enhance productivity. That said, while strikes are rare, it is important to ensure that each party stands an equal chance at winning or losing when such strikes occur. As strikes are the equivalent of economic warfare,⁷⁵ the state should, insofar as possible, set rules that maintain equilibrium between management and labour. Pursuant to this, the use of replacement workers, which allows an employer effectively to side-step and default to an individual contract model rather than defeat a union, should be prevented by law.
- ii. Likewise, the ability of public sector unions to enforce their will upon an entire populace should be significantly restricted, though not necessarily by the removal of the right to strike. Governments should introduce policies which create additional friction to public sector union's ability to strike, including a requirement to make the case in front of a third party for the validity of a strike. In any case, forced arbitration, unless it is tied to the ability of the state to pay, is not the panacea for fiscal

74. Provincial Government of Ontario, "Labour Relations Act, 1995," *Service Ontario*, 1995 – 2009, accessed December 10, 2013, http://www.e-laws.gov.on.ca/html/statutes/english/elaws_statutes_95l01_e.htm#BK2

75. Brian Dijkema, "Labour Storms," *Cardus Daily Blog*, September 2012, accessed November 28, 2013, <http://www.cardus.ca/blog/2012/09/labour-storms>

woes faced by governments. Again, the emphasis here should be less on massive “sledgehammer” policy approaches, and aimed more directly at diminishing the hold of one particular union over massive bargaining units which could bargain more effectively at a local level, allowing both government flexibility and proper compensation and benefits fitting a local, geographic level.

- iii. The current ability in some provinces for certain unions to acquire an effective monopoly over publicly funded construction projects should be removed and prevented by law. In Ontario, for instance, removal of “construction employer status” from public employers like municipalities and school boards would open public tendering to contractors associated with a wide range of labour pools rather than being forced to choose from contractors associated with only one labour pool. This norm should be present in all provinces and also at the federal level.⁷⁶

10. CONCLUSION

Canadian labour relations need reform, but before such reform takes place, policy makers should adjust their framework for *how* they reform labour relations. In the current paradigm, both the left and right use the tools of government to swing labour relations policy either in favour of business or unions while ignoring more diverse realities on the ground. This creates an unstable environment for both businesses and unions with each new mandate, whether from the right or the left.

Policy should proceed with recognition of a wide spectrum of means for organizing workers, many of which do not fit into typical union or non-union categories. These means include: individual employment contracts, collective bargaining with alternative unions, passive collective bargaining by corporate HR departments, pooled labour and benefit plans by employers, and traditional, mainline bargaining; and we argue that *all* of these should be provided equal space within our economy.

The facts on the ground suggest that the world of labour relations is changing even in the absence of proposed revolutionary changes such as the removal of the Rand formula. What is needed is not policy which aims to tear down or ensconce unions as they are currently formed, but policy which allows the worker the greatest leeway to choose the labour relations environments which serve their individual and collective interests best. A policy encourages the greatest amount of competition among these various means of organizing workplaces would lead to much more innovation in the world of labour relations than any proposal looking to maintain the status quo, or which aims to upset it by revolutionary measures such as right to work. In short, the ideal would be a policy regime wherein the state encourages the positive aspects of workplace organization where there is a high degree of consensus, while attempting to remain neutral about the ways workers choose to organize themselves.

“What is needed is policy which allows the worker the greatest leeway to choose the labour relations environments which serve their individual and collective interests best.”

Currently many unions have an unhealthy fear of markets and categorically deny the possibility of a vital union movement in which competition is present. They note that employers will inevitably take advantage of a competitive union world. But unions, like employers, need to come to terms with that competition and cooperation – between employers and unions, between a variety of unions, and between a variety of employers – are integrally linked. As noted by economist Paul Rubin: “Cooperation is the heart of economics;

76. Brian Dijkema, “Statement to the Standing Committee on Transport, Infrastructure and Communities” Cardus, May 21, 2013, <http://www.cardus.ca/organization/news/176/>

competition is a tool for obtaining better cooperation.”⁷⁷

Our framework and policy proposals suggest a way forward for labour relations in Canada. Such an approach would see the state allow the full range of players in the labour relations “market”—including the variety of labour relations models present on the ground today—to compete toward the goal of greater innovation, greater productivity and a fair distribution of the wealth generated by economic activity.

77. Paul H. Rubin, “Emporiophobia (Fear of Markets): Cooperation or Competition?” Presidential Address, Southern Economic Association, Tampa, FL, November 23, 2013.

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