

# Unions in Court

Organized Labour and  
the Charter of Rights and Freedoms

LARRY SAVAGE AND  
CHARLES W. SMITH



**UBC**Press · Vancouver · Toronto

Sample Material © UBC Press 2017



## **Law and Society Series**

*W. Wesley Pue, General Editor*

The Law and Society Series explores law as a socially embedded phenomenon. It is premised on the understanding that the conventional division of law from society creates false dichotomies in thinking, scholarship, educational practice, and social life. Books in the series treat law and society as mutually constitutive and seek to bridge scholarship emerging from interdisciplinary engagement of law with disciplines such as politics, social theory, history, political economy, and gender studies.

*A list of recent titles in the series appears at the end of the book.*

*For a complete list, see the UBC Press website, [www.ubcpres.ca/books/series\\_law.html](http://www.ubcpres.ca/books/series_law.html).*

© UBC Press 2017

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted, in any form or by any means, without prior written permission of the publisher, or, in Canada, in the case of photocopying or other reprographic copying, a licence from Access Copyright, [www.accesscopyright.ca](http://www.accesscopyright.ca).

### Library and Archives Canada Cataloguing in Publication

Savage, Larry, author

Unions in court : organized labour and the Charter of Rights and Freedoms / Larry Savage and Charles W. Smith.

(Law and society series)

Includes bibliographical references and index.

Issued in print and electronic formats.

ISBN 978-0-7748-3538-1 (hardcover). – ISBN 978-0-7748-3540-4 (PDF)

ISBN 978-0-7748-3541-1 (EPUB). – ISBN 978-0-7748-3542-8 (Kindle)

1. Canada. Canadian Charter of Rights and Freedoms. 2. Labor laws and legislation – Canada. 3. Labor unions – Canada. I. Smith, Charles W., author II. Title. III. Series: Law and society series (Vancouver, B.C.)

KE3109.S38 2017

344.7101

C2016-908171-0

KF3320.ZA2S38 2017

C2016-908172-9

---

### Canada

UBC Press gratefully acknowledges the financial support for our publishing program of the Government of Canada (through the Canada Book Fund), the Canada Council for the Arts, and the British Columbia Arts Council.

This book has been published with the help of a grant from the Canadian Federation for the Humanities and Social Sciences, through the Awards to Scholarly Publications Program, using funds provided by the Social Sciences and Humanities Research Council of Canada.

Set in Sabon and Myriad by Marquis Interscript

Copy editor: Joyce Hildebrand

Indexer: Margaret de Boer

Cover designer: David Drummond

UBC Press

The University of British Columbia

2029 West Mall

Vancouver, BC V6T 1Z2

[www.ubcpress.ca](http://www.ubcpress.ca)

Sample Material © UBC Press 2017

# Contents

Acknowledgments / vii

List of Abbreviations / ix

Introduction: Law, Workers, and Courts / 3

1 Labour Rights in the Pre-Charter Era / 21

2 Disorganized Labour and the Charter of Rights / 53

3 Canadian Labour and the First Era of Charter Challenges / 71

4 A Legal Response to Neoliberalism / 108

5 The Possibilities and Limitations of Constitutional Labour Rights / 145

6 A New Era of Constitutional Labour Rights / 177

Conclusion: Which Way Forward for Labour? / 207

Notes / 221

References / 228

Index / 254

# Introduction

## Law, Workers, and Courts

On 9 April 1987, the Supreme Court of Canada ruled in a series of cases dubbed the “labour trilogy.” At the centre of the labour trilogy was the Canadian labour movement’s attempt to breathe life into the *collective* nature of the guarantee of associational freedoms enshrined in the Charter of Rights and Freedoms. Much to the labour movement’s dismay, however, the Supreme Court ruled that freedom of association was an individual freedom; therefore, workers had no constitutional right to strike. Fresh from that stinging defeat, the leadership of the Canadian Labour Congress (CLC) told a parliamentary committee examining the Meech Lake proposals on constitutional reform that the country’s largest labour organization was not interested in seeing workers’ rights to bargain collectively or to strike enshrined in the Charter. Constitutionalized labour rights, they argued, would become subject to uncertain legal interpretation by a conservative judiciary. Instead, they reasoned, the labour movement was far better positioned to secure workers’ rights in the political arena (Special Joint Committee 1987, 12–17).

The Supreme Court’s refusal to recognize a constitutional right to strike seemed to close the door on the potential for the constitution to protect the collective rights of workers. As Peter McCormick recently observed, the “heavy lifting” in this area of Charter jurisprudence seemed to be over and the most that labour could expect from future

litigation would be a tinkering of the “subtle details” over minor constitutional principles (McCormick 2015, xx). McCormick’s observation, however, may have been premature. Between 2001 and 2015, the Supreme Court of Canada slowly shifted its thinking on freedom of association and the constitutional rights of workers, becoming far more hospitable to the labour movement than most provincial and federal governments. In late 2001, the court ruled in *Dunmore v. Ontario* (2001, para. 48) that it was now reasonable to conclude that the exclusion of a particular subset of vulnerable agricultural workers from legislative protection “substantially interferes with their fundamental freedom to organize” as guaranteed by freedom of association protection in the Charter.

Building on the confined but important *Dunmore* precedent, the Supreme Court stunned the country’s political establishment in 2007 by constitutionalizing the right to collective bargaining as part of its landmark decision in *Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia* (*BC Health Services*). The court then departed completely from its labour trilogy jurisprudence, extending constitutional protection for the right to strike in *Saskatchewan Federation of Labour v. Saskatchewan* (2015). Union leaders and activists, who had warmed up considerably to the idea of constitutionalized labour rights during the preceding decades, were ecstatic with the court’s decisions. Speaking at a celebratory conference immediately following the *SFL* decision, James Clancy, president of the National Union of Public and General Employees (NUPGE), declared, “Our chief justices have clearly affirmed that unions matter to our country and our communities. They have once again recognized the importance of labour rights as a cornerstone of Canada’s democracy” (Canadian Foundation for Labour Rights 2015, 1).

How did Canada’s labour movement, within the span of three decades, go from being indifferent, if not openly hostile, to the prospect of constitutionally protected labour rights in the 1980s to being strong proponents – and in some cases, champions – of constitutionally protected collective rights for workers? The story of the evolving relationship between the Charter of Rights, the Supreme Court, and the Canadian labour movement is the subject of this book.

While organized labour played a key role in advancing human rights protections in the immediate postwar era and was an early supporter of a constitutional bill of rights (Patrias 2011), unions were late to embrace the Charter revolution of the 1980s. The enactment of the Canadian Charter of Rights and Freedoms in 1982 fundamentally altered Canada's judicial landscape and ushered in a political and legal tidal wave of rights claims from a wide range of social movements (M. Smith 1999, 2005, 2014). Canada's labour movement initially treated the Charter very cautiously, fearing its impact on the country's labour relations regime and casting doubt on its progressive potential to defend, let alone strengthen, the legal rights and freedoms of workers. In the late 1980s and throughout the 1990s, however, the rise of neoliberal political parties and policy frameworks ushered in an unprecedented rolling back of the postwar statutory and regulatory protections of Canada's labour law regime (Panitch and Swartz 2003). These changes severely undermined the relative power and influence of organized labour, forcing unions to reconsider their relationship to the courts and governments, and to politics more generally (Smith 2012). That response was very much a defensive strategy, initiated to maintain and protect the well-established postwar labour relations regime created in the 1940s in the face of an increasingly hostile political and economic environment. Labour's strategic reorientation towards Charter-based politics has led the labour movement to gradually embrace both the Charter and rights discourse as part of a political and legal project to transform labour rights into more concrete and inalienable human rights.

The primary objective of this book is to document this evolution of the labour movement's engagement with the Charter of Rights and Freedoms. To that end, we set out to explain why the labour movement, historically hostile to judicial involvement in labour relations, has come to embrace constitutionalized labour rights and Charter-based litigation. Our secondary objective is to explain how and why that evolution took place, all with a view to making sense of the union movement's strategic shift in the realm of judicial politics. We take the position that while constitutional protections for workers' collective rights undoubtedly expand the zone of legal tolerance for organized

labour, legitimizing certain collective actions within the existing regime of labour relations, such constitutional protections also come with tightened boundaries of legal constraint which demand that labour act responsibly in order to receive legal protection. Thus, while unions may win legal challenges at the Supreme Court from time to time, the balance of class forces within contemporary capitalism is hardly disrupted, and our system of labour relations continues to fail most workers seeking a modicum of workplace justice. Our final objective is geared towards answering a more fundamental question of strategy: If Charter-based litigation is not an effective tool for achieving social transformation, what are workers' options in the current era of neoliberalism? While the answer to this question is complex, it must begin with a reintroduction of labour's historical recognition that the law and judicial interpretation rarely advance workers' collective rights when those rights challenge the dominant class relations in society.

### **Law, Workers, and Courts in Liberal Capitalist Societies**

Any analysis of workers' rights within a capitalist society must begin with an examination of the social relations embedded within the workplace. In their earliest stages, laws regulating labour relations emerged as a form of contractual relations between individual workers, who sell their labour for a wage, and individual employers, who purchase that labour power. As the law developed alongside the transition to capitalism in the nineteenth century, first in England and later in Canada, workers entered into contracts of employment freely and without legal constraint. Under early capitalist labour relations, the contract was not simply a declaration of ownership (or property) but rather "an instrument for protecting against changes in supply and price in a market economy" (Horwitz 1974, 937). Recognizing the centrality of the contract in early employment relations, Harry Glasbeek (1985, 282–301) argues that the sovereignty of the individual worker was at the centre of the contractual employment relationship and was thus closely tied to the liberal values of individual freedom. In liberal society, rights, privileges, and duties of the individual are not dependent on historical privilege. Rather, these rights arise from the capacity of sovereign individuals to maximize their potential in a competitive labour market



free from government interference. In other words, workplace rights at the centre of capitalist labour relations are secured through individual contracts of employment and characterized by the normative claim that there is structural “inequality of bargaining power” between individual employees and individual employers (Langille 2011, 106). Although the individual employment contract promised liberty through a free exchange of labour, it also reinforced the power of employers to shape, control, and demand specific output from human labour. The state reinforced these unequal bargaining relationships by severely restricting collective forms of worker resistance. In short, individual market freedom took precedence over any form of collective workplace justice.

Viewed historically, the tension between workers’ associational rights and the labour movement’s collective hostility towards judicial intervention in labour relations reveals the class nature of legal interpretation and demonstrates the fact that power within the institutions that administer and apply the law in liberal capitalist societies – namely, courts, judges, and administrative tribunals – is political, and thus contested (Fudge and Tucker 2001; Hutchinson and Monahan 1984). The contested nature of law allows us to explain the alleged contrast between the ideological character of legal decision-making and claims to judicial impartiality in the realm of workplace relations. Such an approach to the law and workers’ rights seeks to “reconstruct the ideological content and political and institutional implications of collective rights” by examining them in their social and historical setting (Klare 1981, 451). In our view, adopting these assumptions with respect to the law in liberal capitalist democracies implies that the Supreme Court’s interpretation of constitutional associational rights cannot be divorced from the law’s historical relationship to workplace regulation.

The entire history of capitalism is intertwined with a variety of legal constructs, including individual rights of property, ownership, tort, contract, criminality, conspiracy. Indeed, it would be impossible for a capitalist economy to function without such state-imposed legal instruments defending the rights of capital (Teepie 2004). Given that both capital and labour will lay claim to specific human rights within different phases of capitalism, both groups inevitably “seek to establish their interests, ideologically and legally in terms of rights the state recognizes: the

[individual] rights of property and managerial prerogative on the one hand, and on the other, the [collective] right of association and the right to strike” (Panitch and Swartz 2003, 10). Therefore, structural tensions between workers and employers are contested through all levels of the state, including courts, legislatures, and the formal content of the law itself. Acknowledging the interconnections among the state, law, and capitalist social relations, however, does not suggest that the law is a simple instrument protecting the power of the ruling classes. Rather, we take the position that the law is, as Bryan Palmer (2003, 466) has argued, “a malleable construct, a changing set of understandings that demands to be appreciated historically.”

Describing the law as a “malleable construct” suggests that it is not fixed but rather a broader reflection of class forces. In its nineteenth-century form, the rule of law was premised on “limited” government, the creation of a private sphere of individual market liberty, and the rigorous defence of private property (Hutchinson and Monahan 2001, 344). Throughout this period, the law constructed rigid boundaries of constraint that limited workers’ ability to collectively challenge employer power (Tucker 1991b). By the middle of the twentieth century, however, the law’s social and legal zones of toleration had changed to support workers’ collective rights to organize, bargain, and strike. Yet in accepting this new legal regime, workers also had to respect the boundaries of constraint that prioritized the employer’s individual right to manage the workplace free from industrial conflict (Fudge and Tucker 2001). Tracing this history, we find that resistance to what the law tolerated (the zone of toleration) and what it did not (the boundaries of constraint) was very much defined by workers’ collective challenges to the form, content, and structure of the law. These often occurred through broad and collective forms of civil disobedience, which included violating existing legal norms. Inasmuch as these struggles about the nature and content of the law are actually over economic and political power, workers’ challenges to the law’s limitations should be understood as “both imposed and internalized; [as] a wall of silence and an articulation of political economy’s material and hierarchical ordering of society around its concepts of property and propriety, and expression of cultures that have, from antiquity to the present day, valued rank

whatever the evolving rhetoric of equality” (Palmer 2003, 466). In this way, the “cobweb-like confinements” of the law (475) act as barriers to furthering the collective rights of workers because they challenge society’s core values of individual market rights. Nevertheless, in specific instances, the law can be expanded, stretched, and broken by challenging the boundaries of constraint that are equally structured around ideological and legal means.

While Canadian courts may recognize certain rights of labour, those rights are typically constrained by the institutional limits of Canada’s version of postwar industrial pluralism. As we demonstrate in Chapter 1, Canada’s Wagner/PC 1003 model of labour relations both outlined the ability of workers to act collectively and limited those rights, especially with regard to strike action. In critically examining the interconnection between Canada’s system of labour relations and workers’ collective constitutional rights, we argue in this book that elevating Canada’s system of labour relations to the Charter’s protection of associational rights ignores the real boundaries of constraint that the system already places on workers’ collective freedom. Those limitations include severe restrictions on the ability of workers to strike and impose internal demands on the union leadership to construct conditions necessary for “responsible unionism” to flourish. Since the mid-1940s, responsible unionism has become a cornerstone of Canada’s system of labour relations, one that requires unions to police the negotiated collective agreement while discouraging responses to workplace disputes that fall outside of the narrow confines of the law.

While the Wagner/PC 1003 model of labour relations imposes strict limitations on the collective rights of workers, liberal legal discourse and the politics of constitutional rights impose others. Too often, for instance, arguments surrounding liberal human rights are co-opted by business and the political Right. While those on the Right tend to conceptualize rights differently than do those on the Left, their judicially based claims to liberal individual rights will often find greater sympathy in the courts than will arguments seeking collective rights protection (Petter 2010, 93–94). We maintain that the flood of researchers who are now promoting the “labour rights as human rights” legal agenda have all but ignored the tension between individual and collective

rights in Canada's liberal constitutional regime. We conclude that a liberal human rights-based approach to understanding workers' rights threatens to depoliticize and ultimately undermine traditional collective and class-based strategies for advancing labour rights that are premised on the notion that rights flow from power, and not vice versa. In this age of neoliberalism, rights-based litigation alone does not offer the labour movement the kind of transformative political power it needs to assert its enduring demands for class-based economic equality and social justice. Rather, to be transformative, labour's strategies must take seriously those historical moments of struggle and civil disobedience when the law was stretched, broken, and reworked through collective forms of struggle.

While a wide variety of academics have written about these issues, there has been very little dialogue between labour law scholars, political scientists, and labour studies researchers studying the Charter of Rights and Freedoms. In fact, unlike other sections of the Charter, legal scholars have dominated the discussion of labour rights. Within this area, scholars have largely maintained a strict institutional focus on how Charter interpretation benefits or weakens Canada's Wagner/PC 1003 model of labour relations. Labour law scholars generally fall within three broad categories: Charter romantics, pragmatic pluralists, and realist skeptics (Etherington 1991, 1992). For Charter romantics, the possibility of constitutional protection for Canada's system of labour relations affords a counterweight to neoliberal forces attempting to restructure legislative protections related to collective bargaining (Adams 2003, 2006, 2008, 2009a; Beatty 1987; Bilson 2009; Doorey 2013). Pragmatic pluralists believe that labour relations is best left to the actors and institutions of postwar industrial pluralism, including labour relations boards, labour board chairs, and other experts in the complex labour policy field (J. Weiler 1986; P. Weiler 1990).

In contrast, traditional Charter skeptics suggest that constitutional protection of the labour relations system offers little hope for altering the balance of power in the workplace (Langille 2010a, 2010b) and cannot offer workers long-term protection (Arthurs 2009). More radical skeptics suggest that judicial decision-making in this area offers little

hope for workers because Charter jurisprudence is rooted in a liberal notion of individual rights that is inherently antagonistic to collective rights in particular and to workers' interests more generally (Fudge 2008a; Mandel 1994; Tucker 2008). In our view, the sometimes highly technical legalistic nature of these debates – while essential for understanding the long-term trajectories in legal decision-making – have not adequately explained the historical, political, and economic contexts surrounding the labour movement's interaction with the Canadian legal system.<sup>1</sup> Organized labour's renewed interest in constitutional rights raises a series of important questions that go far beyond technical disputes over legal reasoning. For instance, can legal institutions promote the type of social transformation that organized labour is seeking? Do legal institutions exist independently of the social struggle in the workplace, or are they influenced by such struggles? Moreover, how does a labour movement that is ontologically connected to a collective sense of rights and freedoms engage with legal institutions that have historically served capitalist notions of individual economic and political freedoms?

### **Critical Institutionalism**

The historical tension between how workers and unions understand the law, on the one hand, and how it is interpreted by courts and judges, on the other, both reflects and reproduces important social struggles revolving around disputes concerning the common law, the primacy of individual rights of property, and the nature of workplace regulation. To fully explain the nature of these tensions, including their emergence and their evolution over time, requires a critical institutionalist analysis. Critical institutionalism is an interdisciplinary theoretical approach that draws on strands of critical legal and historical institutional theory to focus on the dialectical interplay between institutional structures and social dynamics over time (Pilon 2013, 26).

Critical institutionalism views judicial interpretations of workers' rights as inseparable from the political struggles and class tensions that underpin Canadian society. In other words, applying this approach allows us to analyze “the interrelationships between the particular

capitalist relations and attributes of civil society in Canada, on the one hand, and its law and legal institutions, on the other” (Bartholomew and Boyd 1987, 213). As part of her historical research on Canada’s judicial system, Miriam Smith (2002, 20) persuasively argues that “decisions of courts (and the work of judges in making judicial decisions) must be placed within a broader sociological context that takes into account the economic, political and social environment in which litigation occurs.” Institutions are not static. Rather, they are shaped and transformed by broader political and economic forces and by the social relations that they both reflect and reproduce. Unlike various strands of conventional institutional analysis, critical institutionalism does not necessarily privilege structure over agency, or vice versa, but rather maps institutions and institutional relationships themselves as sites of social struggle. In the words of Dennis Pilon (2015b, 6), it is critical institutionalism’s “focus on relations – and the power inequities they embody – that allows us to explore why things are happening, why critical junctures are emerging when they do, or why paths remain dependent for various actors.”

Consistent with this approach, and specific to the field of legal studies, H.C. Pentland (1979, 9) encourages us to reach beneath the “letter of the law” in order to examine how “interpretation and enforcement by public authorities and judicial actors shapes the system of industrial relations” and, in turn, shapes the broader political environment in which actors themselves respond politically. In short, a critical institutionalist approach allows us to focus on the courts as a terrain of class struggle itself (Panitch 1995, 166). At the centre of this analysis is the realization that

class power is not independent of institutions, but neither are institutions independent of class power. Workers and employers struggle to shape the institutional and legal environment in which their relations will be conducted. Once established, this environment has, to varying degrees, a life of its own that mediates the effect of future shifts in the balance of economic and political power between labour and capital. (Tucker and Fudge 1996, 82–83)

Applying a critical institutionalist lens to the study of the relationship between organized labour and the courts therefore allows us to carefully assess the broader contextual evolution without losing sight of the conflict-laden social dynamics that colour and give life to the relationship.

More concretely, critical institutionalism allows us to demonstrate how labour's strategic orientation vis-à-vis the courts is not only shaped by broader economic and political forces but also deeply intertwined with struggles to expand the zone of legal toleration and the very nature of workers' rights in a capitalist democracy. Such an analysis, which Colin Hay terms the "strategic-relational" approach to political analysis, moves beyond the structure-agency debates within orthodox institutionalism and focuses instead on "strategic actors and the strategic context in which they find themselves" (2002, 128). This approach

acknowledges that agents both internalize perceptions of the context and consciously orient themselves towards that context in choosing between potential courses of action. Strategy is intentional conduct oriented towards the environment in which it is to occur. It is the intention to realize certain outcomes and objectives which motivates action. Yet for that action to have any chance of realizing such intentions, it must be informed by a strategic assessment of the relevant context in which strategy occurs and upon which it subsequently impinges. (129)

Hay's strategic-relational analytical approach provides us with the tools to explain why different labour movement actors approached the question of constitutionalized labour rights in different ways and in different contexts over several different periods. Consistent with a critical institutionalist theoretical framework, labour movement actors were pushed and pulled in different strategic directions by a combination of three factors: political and economic pressures and opportunities, internal social dynamics, and, most importantly, the relationship of those actors to the judicial system – specifically, to judicial outcomes, which sometimes expanded the zone of legal toleration or reinforced the boundaries of legal constraint.

## **Labour Politics and Strategy**

Contextualizing the labour movement's strategic shift towards rights-based legal activism also requires a discussion of organized labour's strategic approach to politics in Canada more generally. Labour strategy is often examined in connection with a set of frames, repertoires, and internal organizational practices associated with two broad categories of union orientation: business unionism and social unionism (Ross 2012).

Business unionism, or what is typically referred to as pure and simple unionism, is narrowly concerned with securing the best possible economic deal for workers through collective bargaining and workplace representation. This orientation is widely associated with Samuel Gompers, the founding president of the American Federation of Labor. While Gompers conceded that capitalists and workers do have some conflicting interests, he was well known for his political pragmatism; he rejected outright suggestions that the capitalist system needs to be replaced or that workers need an independent labour party to promote their interests more effectively (Hoxie 1914; Reed 1966). In the realm of electoral politics, Gompers argued that labour could strengthen its economic clout in the workplace by employing a strategy of "rewarding friends and punishing enemies" (Ross et al. 2015, 11). In the words of Stephanie Ross (2012, 37), Gompersists, or "business unionists will mobilize their members to support politicians with a labour-friendly record, but will work to shift that support if those politicians do not deliver for labour." Generally, Gompersist political strategy is geared towards the narrow interests of a specific group of union members rather than towards social justice issues with broader implications for the working class as a whole (Ross 2012). Although business unionist strategies did unquestionably result in real material gains for some unionized segments of the construction, craft, and industrial working class in the immediate postwar period, the economic and political conditions that made such advances possible – namely, rapid economic growth and the postwar "compromise" – have altered the strategic terrain for unions (Ross et al. 2015, 177). Today's unions operate in an economic and political system that has abandoned Keynesian-inspired economic planning in favour of neoliberal policy measures designed to reduce the power of organized labour and strengthen the profit-making potential



of capitalist interests, leading to widening income inequality and growing economic uncertainty.

A significantly altered political and economic terrain has led some researchers and many union activists to offer up social unionism as an alternative orientation to business unionism. Social unionism offers a much broader understanding of the labour movement's goals, purpose, and politics. As Sam Gindin (1995, 268) points out, while collective bargaining and workplace representation are central labour activities, unions can also act as vehicles to lead "the fight for everything that affects working people in their communities." In other words, because the challenges facing workers cannot always be resolved at the bargaining table, unions must be politically engaged beyond the workplace. For example, affordable housing and climate change are not direct bargaining issues, but both have a tremendous impact on workers' quality of life. Advocates of social unionism typically argue that unions have an important political role to play in organizing, educating, and mobilizing working-class people around social justice issues that transcend the workplace (Kumar and Murray 2006; Ross 2012).

While some of the literature on labour politics, in part, equates social unionist political activism with partisan electoral support for social democratic parties like the New Democratic Party (NDP) (Kumar and Murray 2006, 28; Robinson 2000, 114), social unionist political strategy has, in fact, been much broader and can often take on a more radical tone. Social unionists routinely engage in extraparliamentary activities like direct actions, demonstrations, civil disobedience, public awareness campaigns, and coalitions with social movement organizations, all in an effort to pressure governments and employers (Black 2012; Coulter 2012). Because social unionist frames tend to be conceived around issues of social justice and economic equality, it is not uncommon to see social unionists take up causes ranging from anti-racism to homelessness. These campaigns often intersect with the agendas and priorities of social democratic parties, but one is certainly not dependent on the other.

Against the backdrop of the ascendancy of neoliberal public policy frameworks in the early 1980s and 1990s, a general consensus has emerged among labour movement researchers that social unionist strategies are necessary "both to contest policies that harm working-class

people and to bring into existence the political economic arrangements that will sustain a socially just and equitable society” (Ross et al. 2015, 177). As such, they have become central to debates concerning union renewal in general and labour strategy specifically (Kumar and Schenk 2006).

For its part, as a particular political strategy for the labour movement, legal activism does not fit clearly within either social unionism or business unionism, the two broad categories of union orientation. In much the same way that electoral political engagement can take on both social unionist and business unionist dimensions (Savage 2012), so too can judicial-based political action. On the one hand, legal activism shares much in common with business unionism in terms of internal organizational practices insofar as legal activism does not rely on mobilizing or activating rank-and-file union members. Instead, this approach relies heavily on outside experts (i.e., lawyers) who are hired to defend the membership’s interests in court. On the other hand, the call for the courts to embrace a “labour rights as human rights” approach to judicial decision-making clearly frames union struggles in social unionist terms. Moreover, depending on the nature of the legal battle itself, legal activism may achieve one of the central goals of social unionism – namely, extending greater rights and freedoms to the labour movement or working-class people as a whole. The point here, following Ross, is to highlight the fact that established conceptual dichotomies typically fail to appreciate the degree to which labour unions are “complicated hybrids” (Ross 2007, 22).

If the business unionist/social unionist typology can only get us so far in understanding union strategies, how then do we conceptualize legal activism as a particular strategic repertoire for the labour movement? Applying the critical social movement theory concept of political opportunity structures is useful here insofar as it allows us to account for shifts in strategic orientation in specific directions and in specific periods (McAdam, McCarthy, and Zald 1996; Tarrow 1998). Sidney Tarrow argues that the relative success or failure of social movements is significantly determined by political opportunity structures, which he defines as “consistent – but not necessarily formal, permanent, or national – dimensions of the political struggle that encourage people to

engage in contentious politics” (1998, 19–20). Conceptualizing union strategy in this way helps to reveal both the strategic constraints faced by unions and the opportunities made available at key moments during the Charter era. Taken together with Hay’s strategic-relational analytical approach to political analysis, this conceptualization helps to clarify why the Canadian labour movement abandoned its critique of legalized politics and instead embraced a Charter-based rights discourse.

In short, the Canadian labour movement changed its strategic thinking in relation to legal activism as a result of shifting political opportunity structures, which narrowed a number of traditionally viable strategic routes while opening up opportunities on the judicial front. Specifically, the crisis of social democratic electoral politics in the 1990s – combined with the rise of neoliberalism, so-called Charter values, and human rights discourse – helped to push unions back into the legal arena as a last resort, despite the movement’s long-standing distrust of the courts. Once that defensive strategic choice was validated with a series of nominally pro-union Charter decisions, culminating with the *Dunmore* decision in 2001, the ideological apparatus to support labour-led legal activism was marshalled, along with the language of “labour rights as human rights,” to justify the new strategic approach. Over this period, the courts became a virtue rather than a last resort in the eyes of many union leaders and activists, and the union movement’s well-established distrust of the judicial system increasingly fell by the wayside with each Charter victory.

It is clear that since the turn of the twenty-first century, Charter-based legal activism has emerged as a significant political strategy within the Canadian labour movement. Political scientists, however, have not been able to explain effectively the labour movement’s embrace of Charter-based activism, partly because the labour movement has been largely absent from scholarly examinations of the Charter of Rights and Freedoms (see for instance the absence of labour unions in MacIvor 2013, discussion of social movements and the Charter, 179–98).<sup>2</sup> Given the voluminous scholarship on social movements’ interactions with the Charter, the lack of a detailed examination of labour’s constitutional challenges is surprising for several reasons. First, labour unions have, more or less, monopolized legal debates surrounding the Charter’s

guarantee of freedom of association (Sharpe and Roach 2009, 183–93). Second, organized labour was among the first groups to challenge the substantive meaning of association and equality rights in the Charter. The movement's judicial losses in the 1980s led many Charter skeptics to argue that the constitution as a legal institution was incapable of challenging private power structures within capitalist society (Mandel 1994; Petter 2010, 102). Third, few social movements have the organizational and financial reach of the Canadian labour movement. Although the movement's political influence has waned in recent decades, labour continues to help shape political discourse in most provinces while also maintaining a steady stream of membership dues to organize, bargain, and agitate. Organized labour's resource capacity has allowed unions to go to court frequently to test the institutional boundaries of Canada's legal rights protection.

### **Organization of the Book**

We have organized the book chronologically. Labour's tense relationship with the law and legal institutions prior to the enactment of the Charter in 1982 is the subject of Chapter 1. This chapter examines how the construction of modern labour law – and particularly the Wagner/PC 1003 model of labour relations – was itself contested by both labour unions and employers. Through an overview of the injunction battles in the late 1950s and 1960s and the anti-inflation fight in the 1970s, we explain why organized labour, despite its strong leadership in the realm of human rights, developed a deep mistrust of the Canadian judicial system.

Chapter 2 tells the story of the labour movement's decision to disengage from the process used to create and shape the content of the proposed Charter of Rights and Freedoms in the early 1980s. Here, we challenge long-held assumptions about why the Canadian labour movement seemingly turned its back on years of human rights advocacy. A historical investigation of the relevant constitutional episodes demonstrates that organized labour was acutely aware that the Charter could have an important impact on collective bargaining, and on labour rights more generally, but strategically decided to sit on the sidelines for

fear of alienating its allies in the federal NDP (which strongly favoured the Charter) and the Quebec Federation of Labour (which strongly opposed the Charter). This strategic decision was, of course, made easier by the labour movement's long-standing distrust of the courts.

Chapter 3 reviews the first era of Charter decisions related to organized labour, paying specific attention to the political and economic climate that framed the Supreme Court's interpretation of the Charter's guarantee of freedom of association. This chapter demonstrates how the first era of Charter challenges seemingly confirmed the labour movement's worst fears about the judiciary's perceived anti-union bias, thus preventing organized labour from becoming swept up in the "Charter revolution" of the period.

In Chapter 4, we document the labour movement's change of heart about Charter litigation around the turn of the twenty-first century. We detail organized labour's newfound judicial success, beginning with an easing of the limits on secondary picketing and increased support for the rights of agricultural workers to organize into associations. Our case summaries, which chronicle the evolving relationship between labour and the courts, are embedded within a broader political analysis. More specifically, the ascendancy of neoliberalism and the elevation of "rights consciousness" among social movements in Canada are offered as key explanatory variables for why unions' traditional class-based critiques of the courts dissolved during this period.

Chapter 5 details the Supreme Court's landmark 2007 decision in *BC Health Services*, which extended constitutional protection to collective bargaining and, in the process, virtually evaporated the labour movement's long-lived critique of the Canadian judiciary. We criticize the mainstream labour movement's euphoric reaction to *BC Health Services*, detailing the ways in which the labour movement overstated the court's finding that freedom of association included a right to collective bargaining. The chapter goes on to review a number of Charter cases that followed on the heels of *BC Health Services*, cases that revealed both unresolved tensions in the Court's legal reasoning and the legal limits and possibilities of the union movement's judicial push to transform labour rights into human rights.

Chapter 6 focuses on the landmark *Saskatchewan Federation of Labour v. Saskatchewan* (2015) case, in which the Supreme Court constitutionalized the right to strike. We examine this watershed moment in Canadian labour history in detail with a view to making sense of this new era of constitutional labour rights. Specifically, we argue that by tying a constitutional right to strike to a legalistic collective bargaining process, the court reinforced important boundaries of constraint while simultaneously expanding the zone of legal toleration for workers. In the book's conclusion, we summarize our research findings and critique the use of recent pro-union Charter decisions to justify greater emphasis on judicial-based strategies to build union power in the future. After reviewing some of the cases that have made their way through the courts since the ground-breaking *SFL* decision, we argue that the Canadian judiciary is unlikely to ever interpret the Charter in a way that facilitates transformational political change for organized labour. We ultimately conclude that narrow efforts to advance labour's interests via the courtroom are not only ineffective but also potentially harmful to the union movement in the long term insofar as they can serve to demobilize rank-and-file workers.

While the focus of this book is on the labour movement and the Charter of Rights and Freedoms, our findings have broader implications for a host of social movements and for the politics of rights discourse more generally. The book demonstrates how rights-based claims can serve to both empower and undermine organizations seeking constitutional protection. Moreover, we show that while social movements are certainly shaped by politics and the law, the relationship is reciprocal. As Simeon and Robinson (1990, 159) remind us, "the evolution of the Canadian state has always been shaped by the changing balance of class power." Class is often ignored in discussions of rights, but the two are intrinsically linked in capitalist democracies. The case of the Canadian labour movement's engagement with the Charter demonstrates how this relationship works to consolidate and entrench elite power even while seemingly expanding workers' rights, in the same way that an expanded zone of legal toleration brings with it new and more powerful boundaries of constraint.