

# THE RAND FORMULA REVISITED: UNION SECURITY IN THE *CHARTER* ERA

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It is more than sixty years since Supreme Court of Canada Justice Ivan Rand was appointed as sole arbitrator to bring an end to the ninety-nine day Ford Windsor strike in 1945-46.<sup>1</sup> The interests of thousands of workers, including many returning from the war, and of companies intent on returning to the pre-war era of greater control over workers collided on the picket lines. At its height, 19,000 workers were on strike, the streets of Windsor were blockaded with cars, and hundreds of R.C.M.P. officers were called into the area.<sup>2</sup> A key demand was “union security,”<sup>3</sup> including requirements that all workers be union members and that Ford deduct union dues from workers’ paycheques (“dues check-off”). The company bitterly opposed both mandatory union

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<sup>1</sup> *Ford Motor Co. v. United Automobile, Aircraft and Agricultural Implement Workers of America (U.A.W./C.I.O.)* (1946) reprinted in 1 *CCH Canadian Labour Law Reporter*, at ¶1250, page 1366 [Ford].

<sup>2</sup> H. Colling, *Ninety-Nine Days: The Ford Strike in Windsor, 1945* (Toronto: NC Press, 1995).

<sup>3</sup> Canadian labour laws follow the American *Wagner Act* model in which unions act as exclusive bargaining agents for employees in particular bargaining units. The concept of “union security” (compelled union membership or compelled payment of union dues) is therefore more important in North America than in Europe, where exclusive bargaining is not the model. Union security arrangements include the *closed shop* (requiring potential employees to be union members before being hired), the *union shop* (requiring employees to become members in order to keep their jobs, but not limiting hiring to union members), *maintenance of membership* (requiring employees who have joined a union to remain members) and the *agency shop* or *Rand formula* (not requiring union membership but requiring payment of union dues of all employees): M. MacNeil, M. Lynk and P. Engelmann, *Trade Union Law in Canada* (Toronto: Canada Law Book, 1994 with loose-leaf updates), chapter 2 “Union Security.”

membership and dues check-off. The strike finally ended with Justice Rand finding a compromise between the two positions.

The “Rand formula” – denying the union’s call for mandatory union membership but requiring the employer to deduct union dues from all workers, whether union members or not – has become a bedrock principle of collective bargaining in Canada. Labour legislation in all Canadian jurisdictions permits,<sup>4</sup> or even requires,<sup>5</sup> dues check-off on the Rand model and many union leaders consider it essential to the survival of unions.<sup>6</sup> The Supreme Court of Canada has upheld the Rand formula as a “reasonable limit” on the individual freedom of association of workers who oppose having their compelled union dues used to fund political causes supported by the union. Yet a 2002 poll found that 76% of Canadians supported the statement that “employees should not be legally required to pay dues to a union that they don’t want to join.”<sup>8</sup>

Opposition to union security clauses is cast in the language of “individual freedom,” specifically the “freedom to *not* associate” as part of the guarantee of freedom of association in section 2(d) of the *Canadian Charter of Rights and Freedoms*. The first two decades of *Charter*<sup>9</sup> litigation by and against unions were not particularly favourable to union interests. Until recently, the Supreme Court of

<sup>4</sup> *Trade Union Act*, R.S.N.S. 1989, c. 475, s. 60 (1) (permitting parties to a collective agreement to negotiate a dues check-off provision, but requiring that employees individually authorise dues check-off).

<sup>5</sup> *Labour Relations Act*, C.C.S.M. c. L10, s. 76(1) (Manitoba; requiring that every collective agreement contain a dues check-off provision). British Columbia, Saskatchewan, Ontario, Quebec, Newfoundland, and the federal jurisdiction have incorporated similar provisions into their labour legislation.

<sup>6</sup> For example, when a leaked document from the Ontario Conservative government’s Red Tape Commission recommended repeal of a law mandating the Rand formula, Sid Ryan, Ontario President of the Canadian Union of Public Employees (CUPE), said “It’s basically about the survival of the labour movement and if he took [the Rand formula] away, the labour movement in Ontario would simply die.” See J. Stevenson, “Ontario labour leaders rally against leaked labour report,” *Canadian Press*, 27 July 2000.

<sup>7</sup> *Lavigne v. Ontario Public Service Employees Union*, [1991] 2 S.C.R. 211 [*Lavigne*].

<sup>8</sup> “Freedom, Cherished But Not Unfettered,” A COMPAS/National Post Poll (2 December 2002), available at <[www.compas.ca](http://www.compas.ca)>. As with any poll, results vary with the question asked. For example, responses might be different if Canadians were asked, “Should people be allowed to benefit from higher wages and benefits without having to pay for the collective bargaining that gained those benefits?” In a similar vein, a 1997 poll reported that 67.9% of Canadians favoured cutting taxes “a lot” or “somewhat”, yet when asked to consider that “cutting taxes means cutting social programmes,” only 26.8% favoured cutting taxes. See: Select Public Opinion Trends Series, “Taxes and Deficit,” Canadian Opinion Research Archive, Queen’s University, available at <[www.queensu.ca/cora/trends/tables/TaxesandDeficit.htm](http://www.queensu.ca/cora/trends/tables/TaxesandDeficit.htm)>.

<sup>9</sup> B. Etherington, “An Assessment of Judicial Review of Labour Laws Under the Charter: Of

Canada had largely interpreted freedom of association as an individual right that does not protect key union activities such as the right to bargain collectively,<sup>10</sup> to strike<sup>11</sup> or even to form a trade union at all.<sup>12</sup> The Court has openly struggled with how to reconcile the collectivist aspects of Canadian labour law with the individual nature of rights in a liberal democracy. The “freedom to not associate” cases, *Lavigne*<sup>13</sup> and *Advance Cutting*,<sup>14</sup> involving challenges to union security agreements or laws, represent successes for unions in *Charter* litigation which were rare at the time they were decided. More recently, the Supreme Court of Canada has accorded more constitutional protection to labour rights than followers of its earlier jurisprudence would have thought possible. In a 2007 decision, the Court held that “the section 2(d) guarantee of freedom of association protects the capacity of members of labour unions to engage in collective bargaining on workplace issues.”<sup>15</sup>

This article begins by briefly highlighting key aspects of the *Ford* decision. It next examines the Supreme Court of Canada decisions upholding union security provisions in the face of *Charter* challenges by dissenting workers, noting the lasting appeal of various aspects of the Rand compromise, including his deliberate attempt to balance individual and collective interests and his requirement that unions be responsible and democratic. The paper concludes by looking at some recent legislative initiatives and developments that indicate that the Rand formula, while not under direct attack, is by no means sacrosanct in the political realm.

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Realists, Romantics, and Pragmatists (1992) 24 *Ottawa Law Review* 685 and D. Pothier, “Twenty Years of Labour Law and the *Charter*” (2002) 40 *Osgoode Hall Law Journal* 369.

<sup>10</sup> *Professional Institute of the Public Service of Canada v. Northwest Territories (Commissioner)*, [1990] 2 S.C.R. 367 at 369 [PIPS].

<sup>11</sup> *Reference Re Public Service Employees Relations Act (Alta)*, [1987] 1 S.C.R. 313, at 315 and 390 [Alberta Reference].

<sup>12</sup> *Delisle v. Canada (Deputy Attorney General)*, [1999] 2 S.C.R. 989, at 1075 (rejecting the claim that the government’s exclusion of RCMP officers from federal labour relations legislation amounted to a violation of s. 2(d)). But see *Dunmore v. Ontario (Attorney General)*, [2001] 3 S.C.R. 1016 at 1047 [Dunmore] accepting an argument that the exclusion of agricultural workers from Ontario labour relations legislation amounted to a violation of s. 2(d) by denying agricultural workers the “freedom to organize,” but stopping short of finding a right to inclusion in labour legislation.

<sup>13</sup> *Lavigne*, *supra* note 7, at 344.

<sup>14</sup> *R. v. Advance Cutting & Coring Ltd.*, [2001] 3 S.C.R. 209 [Advance Cutting].

<sup>15</sup> *Health Services and Support - Facilities Subsector Bargaining Assn. v. British Columbia*, [2007] 2 S.C.R. 391 at para. 2 [BC Health Services]. While the ground-breaking *BC Health Services* decision has been celebrated by union leaders and their advocates, concerns have been expressed about the extent to which, in Judy Fudge’s words, “law is replacing politics as the vehicle for articulating needs, interests, and rights in the public sphere”: “Brave New Words: Labour, the Courts and the Canadian Charter of Rights and Freedoms” forthcoming in (2010) 28 *Windsor Yearbook of Access to Justice*, available at SSRN: <<http://ssrn.com/abstract=1522545>>.

## THE RAND COMPROMISE

Justice Rand staked out a middle ground between the positions of the union and the employer over union security, based on a view of organised labour as a counterweight to capital in a regulated system of collective bargaining. He said,

... the power of organised labour, the necessary co-partner of capital, must be available to redress the balance of what is called social justice; the just protection of all interests in an activity which the social order approves and encourages.<sup>16</sup>

However, Justice Rand was no labour radical.<sup>17</sup> In the third paragraph of the *Ford* decision, he stated:

Any modification of relations between the parties here concerned must be made within the framework of a society whose economic life has private enterprise as its dynamic.<sup>18</sup>

Justice Rand believed that if unions were to have any hope of acting as effective “co-partners” of capital, they would need resources. Therefore, he decided that a system of dues check-off was necessary to ensure financial stability and to prevent free-riders. According to Justice Rand,

...the employees as a whole become the beneficiaries of union action, and I doubt if any circumstance provokes more resentment in a plant than this sharing of the fruits of unionist work and courage by the non-member... It would not then as a general proposition be inequitable to require of all employees a contribution towards the expense of maintaining the administration<sup>19</sup> of employee interests, of administering the law of their employment.

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<sup>16</sup> *Ford*, *supra* note 1, at 1368. Rand’s father was an early labour leader of a railroad workers’ union. See J. E. Belliveau, “The Gentle and Generous Side of Ivan C. Rand,” *The Globe & Mail* (6 January 1969) at 7, cited in R. P. Balcome, E. J. McBride and D. A. Russell, *Supreme Court of Canada Decision-Making: The Benchmarks of Rand, Kerwin and Martland* (Toronto: Carswell, 1990) at 78.

<sup>17</sup> Balcome, *et al.*, *ibid.*, at 92. While practicing law, Rand had acted for railway companies in labour matters: Colling, *supra* note 2, at 173-74.

<sup>18</sup> *Ford*, *supra* note 1, at 1367.

<sup>19</sup> *Ibid.*, at 1371.

Justice Rand was also a civil libertarian<sup>20</sup> who wrote a number of influential decisions that came to embody the so-called “Implied Bill of Rights”<sup>21</sup> in the pre-*Charter* era. He was against the idea of compelled union membership, saying:

...it would deny the individual Canadian the right to seek work and to work independently of personal association with any organized group. It would also expose him even in a generally disciplined organization to the danger of arbitrary action of individuals and place his economic life at the mercy of the threat as well as the action of power in an uncontrolled and here an unmaturred group.<sup>22</sup>

The Rand formula offered an individual/collective rights compromise in the liberal democratic tradition. It was an integral part of the post-war model of Canadian labour relations.<sup>23</sup> In this model, capitalism is taken for granted and, in a liberal political democracy, labour and capital are “juridical equals”<sup>24</sup> and partners in a regulated system of collective bargaining. Dissenters are free to opt out of union membership, but they can be compelled to pay for the collective goods gained by the union. In exchange for the financial stability gained by dues check-off, unions must be responsible and democratic.<sup>25</sup>

<sup>20</sup> Balcome, *et al.*, *supra* note 16, chapter 3: “The Civil Libertarian.”

<sup>21</sup> For example, *Switzman v. Elbling* [1957] S.C.R. 285, *Saumur v. City of Quebec*, [1953] 2 S.C.R. 299; while these cases were formally decided on federalism grounds, they discuss the importance of freedoms of expression and religion in a parliamentary system of government.

<sup>22</sup> *Ford*, *supra* note 1, at 1371.

<sup>23</sup> By “post-war model” I mean the model of labour relations embodied in federal Order-in-Council PC 1003 (1944), implementing an American *Wagner Act* of regulated collective bargaining that attempts to balance the interests of capital and labour in the pursuit of “industrial peace” within a free market system. The post-war model is usually understood to include the following key elements: union certification on the basis of majority support, exclusive bargaining rights for certified unions, union security, duties owed by employers and unions to bargain in good faith, prohibition of strikes and lockouts during the term of a collective agreement as well as prohibition of specified unfair labour practices, labour relations boards to administer labour laws, and arbitration of disputes arising under collective agreements. For a critical discussion of the hegemony of this model in Canadian labour relations, see J. Fudge and H. Glasbeek, “The Legacy of PC 1003” (1995) 3 *Canadian Labour & Employment Law Journal* 357.

<sup>24</sup> J. Fudge, “Labour, the New Constitution and Old Style Liberalism” (1988) 13 *Queen’s Law Journal* 61, at 109, she describes the significance of this concept: “[c]ritical to the notion of liberal political democracy is the separation of political rights from economic rights. This is not a flaw in liberalism, but an essential feature of it. Inequality in the economic sphere does not vitiate the juridical equality in the political sphere. Thus, both employer and employee, capital and labour, are treated as juridical equals.”

<sup>25</sup> In *Ford*, *supra* note 1, at 1368, Justice Rand wrote, “The organization of labour must in a civilized manner be elaborated and strengthened for its essential function in an economy of private enterprise. For this there must be enlightened leadership at the top and democratic control at the bottom.” The decision provided for penalties against the union for wildcat

Justice Rand developed some of these themes in his speeches and articles on labour law,<sup>26</sup> as well as in his work as Commissioner of the Royal Commission Inquiry into Labour Disputes.<sup>27</sup> For example, to remedy what he considered the “irrationality of barbarism” in labour disputes of the day, he expanded his idea of responsible unionism,<sup>28</sup> to require, among other measures, a secret ballot vote before a union could take strike action.<sup>29</sup>

Justice Rand’s legacy can be found throughout Canadian labour law and in collective agreements across the country. In the decades following the *Ford* decision, the Rand formula became a common feature of many collective agreements and, by the 1980s, was included in a number of labour codes.<sup>30</sup>

## THE *CHARTER* AND UNION SECURITY

Following entrenchment of the *Canadian Charter of Rights and Freedoms* in 1982, opponents of union security clauses attempted to test their constitutionality against the freedom of association guarantee found in section 2(d) of the *Charter*. However, the courts dismissed those early challenges on the basis that the union security provisions were not the result of government action (the private sector unions and employers were not government actors and the legislation only permitted, rather than mandated, union security clauses).<sup>31</sup>

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strikes and made the union responsible for the actions of its members. Depending on the infraction, the union could lose its check-off dues for a particular period.

<sup>26</sup> I. C. Rand, “The Law and Industrial Relations” (1962) 17 *Industrial Relations* 389, written while Dean of Law, University of Western Ontario, following his retirement from the Supreme Court of Canada.

<sup>27</sup> *Report of the Royal Commission Inquiry into Labour Disputes* (Ottawa: Queen’s Printer, 1968), I. C. Rand, Commissioner.

<sup>28</sup> I. C. Rand, “Responsibility of Labour Unions” (1954) *Law Society of Upper Canada Lectures* 27.

<sup>29</sup> Rand, “The Law and Industrial Relations,” *supra* note 27, at 396-397.

<sup>30</sup> For example, in 1983, the federal Liberals amended the *Canada Labour Code* to require that the Rand formula be included as a minimum union security measure in all collective agreements: Colling, *supra* note 2, at 174-177.

<sup>31</sup> *Bhindi v. B.C. Projectionists, Local 348*, [1988] B.C.J. No. 486 (Q.L.) at 86-87, an unsuccessful challenge to a closed shop clause in a collective agreement and to the B. C. legislation that permitted such a provision.

**LAVIGNE v. ONTARIO PUBLIC SECTOR EMPLOYEES UNION**

In *Lavigne v. OPSEU*<sup>32</sup> (1991), the Supreme Court of Canada considered a *Charter* challenge to the use of dues collected under the Rand formula. Did freedom of association include a negative “freedom not to associate” and, if so, does that right render some union security arrangements unconstitutional? In a lawsuit financed by the National Citizens’ Coalition,<sup>33</sup> the Court considered whether freedom of association was infringed by provincial legislation permitting a Rand formula dues check-off clause to be included in a collective agreement between public community colleges and college employees.<sup>34</sup> Mervyn Lavigne, a community college instructor, objected to the fact that a portion<sup>35</sup> of his union dues to the Ontario Public Service Employees’ Union (OPSEU) were used to support campaigns for abortion rights, striking mine workers in the United Kingdom, and the New Democratic Party, all causes he opposed. Lavigne did not challenge the constitutionality of deducting union dues for collective bargaining purposes, but only the use of “his” money for “non-collective bargaining purposes.”

To the relief of unions across Canada,<sup>36</sup> the Supreme Court of Canada unanimously dismissed the *Charter* challenge,<sup>37</sup> although its three opinions revealed differing reasons for reaching that conclusion. In considering the scope of the “freedom to not associate,” all seven members of the Court agreed that deducting union dues for collective bargaining purposes did not violate associational freedom,

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<sup>32</sup> *Supra* note 7, at 231-32.

<sup>33</sup> The National Citizens’ Coalition (NCC) is a right-wing lobby group opposed to unions as part of an overall goal of “more freedom through less government”: <<http://nationalcitizens.ca>>. Paul Cavalluzzo has argued that *Lavigne* “represents the politicization of the judicial process brought about by the [*Charter*]” and that the courts were “used as a pawn in the political adventures of the [National Citizens’ Coalition]”: “Freedom of Association – It’s Effect Upon Collective Bargaining and Trade Unions” (1988) 13 *Queen’s Law Journal* 267, at 292.

<sup>34</sup> Unlike *Bhindi*, *Lavigne* was a *Charter* case because the employer, the Ontario Council of Regents for Colleges of Applied Arts and Technology, was found to be a government actor.

<sup>35</sup> The portion of Lavigne’s annual union dues allocated to social and political causes amounted to about two dollars.

<sup>36</sup> The trial judge had found in Lavigne’s favour, ordering the union to undertake a complex arbitration process to separate “political” expenditures from “collective bargaining” expenditures, but the Ontario Court of Appeal had overturned that decision before it was appealed to the Supreme Court of Canada: *Lavigne v. OPSEU* (1986) 55 O.R. (2d) 449 (S.C.), rev’d (1989) 67 O.R. (2d) 536 (C.A.).

<sup>37</sup> None of the justices followed the approach taken by the U.S. Supreme Court in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), holding that the use of dues for “non-collective bargaining purposes” violated dissenting workers’ freedom to not associate (a freedom which has been recognised as implied in the First Amendment). See especially Justice Bertha Wilson’s discussion of this approach which she noted had “given rise to an endless train of disputes in the United States,” *Lavigne*, *supra* note 7, at 256-262.

even where employees objected to it or to unions generally. In an opinion written by Justice Wilson, three rejected the notion that section 2(d) included a negative freedom to not associate at all.<sup>38</sup>

Justice La Forest, on behalf of himself and two others,<sup>39</sup> held that freedom of association included a freedom from “compelled association” going beyond the kind of forced association that is “necessary and inevitable” in a democracy.<sup>40</sup> The mandatory deduction of union dues to fund collective bargaining activities was a form of compelled association that furthered the collective social good and did not violate section 2(d). Nevertheless, the fact that a small amount of the mandatory dues was directed to political and social causes not directly related to collective bargaining did violate section 2(d). However, section 1 justification analysis saved the infringement as a reasonable limit on associational freedom to allow unions to play a role in Canadian political, social and economic life and to promote union democracy.<sup>41</sup>

Justice McLachlin (as she then was) preferred to leave open the question of whether section 2(d) included a “freedom to not associate” since the Rand formula, requiring only dues payment and not union membership, did not involve “enforced ideological conformity.”<sup>42</sup> Lavigne could disassociate himself from the union’s political activities by refusing to become a member of the union, so there was no violation of section 2(d), even assuming it included such a negative right.

While the union successfully fended off this constitutional attack on the integrity of the Rand formula, the decision, particularly the key opinion of Justice La Forest, revealed support for a broad, individualised “freedom *from* association.” However, in challenges brought by unions alleging that rights to strike and bargain collectively are guaranteed by the *Charter*, Justice La Forest rejected a more collectivist “freedom *to* associate.”<sup>43</sup> In those cases, the Court favoured an “individual analogy” approach to freedom of association, meaning that the freedom protected individuals’ right to do in concert what they had rights to do individually, thereby rejecting rights

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<sup>38</sup> *Lavigne*, *supra* note 7, at 259 *per* Wilson J. (Cory and L’Heureux-Dubé JJ. concurring).

<sup>39</sup> Sopinka and Gonthier JJ., concurring.

<sup>40</sup> La Forest J. cited the payment of taxes as one such necessary and inevitable form of compulsion. *Lavigne*, *supra* note 7, at 320-21. McLachlin J. also considered the payment of union dues under the Rand formula to be analogous to taxes: “By analogy with government, the payor [of union dues] is paying by reason of an assumed or imposed obligation arising from this employment, just as a taxpayer pays taxes by reason of an assumed or imposed obligation arising from living in this country.” *Ibid.*, at 347; also 260-261 *per* Wilson J.

<sup>41</sup> *Lavigne*, *supra* note 7, at 335.

<sup>42</sup> *Ibid.*, at 344. The requirement of ideological conformity became significant in *Advance Cutting*, discussed *infra* text accompanying notes 52-55.

<sup>43</sup> Etherington, *supra* note 9, at 696 *et seq.*, discussing *Alberta Reference* and *PIPS*.



to strike and bargain collectively as inconsistent with an individualised nature of the freedom.<sup>44</sup>

### **R. v. ADVANCE CUTTING AND CORING LTD.**

The Supreme Court of Canada revisited the Rand formula and its approach to union security clauses more generally in *Advance Cutting and Coring*<sup>45</sup> (2001). In that case, the Court faced a constitutional challenge to a Quebec law requiring that all construction workers be members of one of five trade unions in order to obtain a competency certificate to work in the construction industry. The legislation made it an offence for employers to hire workers who did not possess such a certificate and for individuals to work without one.<sup>46</sup> While the Rand formula at issue in *Lavigne* only mandated the payment of union dues, the construction labour law in *Advance Cutting* mandated membership in one of five government-approved unions. Five employers were charged with hiring individuals who did not possess competency certificates. The individuals hired were also charged with having performed construction work without competency certificates.<sup>47</sup> Justice LeBel, a former labour lawyer in Quebec, admitted that the Quebec law “presents a more difficult problem than the application of the Rand formula canvassed in *Lavigne*.”<sup>48</sup> He ultimately found no *Charter* infringement in the legislative regime.

A divided Court upheld the Quebec union shop<sup>49</sup> law by a narrow 5-4 margin. Four members concurred in finding no violation of section 2(d). Only Justice

<sup>44</sup> *PIPS*, *supra* note 10, at 401-402 *per* Sopinka J. For a cogent critique of that approach, see Pothier, *supra* note 9, at paras. 16-31.

<sup>45</sup> *Supra* note 14.

<sup>46</sup> *An Act Respecting Labour Relations, Vocational Training and Manpower Management in the Construction Industry*, R.S.Q., c. R-20, s. 28 (providing that construction workers could only obtain a competency certificate by joining one of five trade unions designated in that section) and s. 119.1 (prohibiting employers from hiring workers, and workers from performing work in the construction industry, without a competency certificate). See also sections 30, 32-36, 38-39, 85.5, 85.6 and 94 of the *Act* which set out additional elements of this closed shop legislation.

<sup>47</sup> A driving force behind the *Charter* challenge was an anti-union lobby group in Quebec, the Association for the Right to Work (“Association pour le Droit au Travail” or “ADAT”). See ADAT website at <<http://www.adat.ca/adat/index-en.php>>. See also B. Stewart, “Hammering Away at Injustice” (2002) 10 *Open Mind* 35, available at <[http://www.meritalberta.com/new/openmind\\_pastissues.php](http://www.meritalberta.com/new/openmind_pastissues.php)>. According to the website: “*Open Mind* is a periodical published once per year by the Merit Contractors Association. Its aim is to represent the interests of the open shop construction industry.”

<sup>48</sup> *Advance Cutting*, *supra* note 14, at 324.

<sup>49</sup> Justice LeBel described that law as creating “a form of union shop,” (*ibid.*, at 306) since all construction workers in the province must become and remain union members to work in the industry. Others described the regime as mandating a “closed shop”, presumably

L'Heureux-Dubé maintained the minority position of Justice Wilson in *Lavigne*, that section 2(d) did not include a negative “freedom not to associate” and therefore did not constrain compelled association.<sup>50</sup> For Justice LeBel and two others,<sup>51</sup> the legislative scheme incorporating mandatory union membership did not violate section 2(d) because, in his words, the “bare obligation to belong to a union”<sup>52</sup> did not require “ideological conformity” of the kind contemplated in Justice McLachlin’s minority opinion in *Lavigne*.

Four dissenting justices, including Chief Justice McLachlin, took a different view of the meaning of “ideological conformity.” Led by Justice Bastarache, these four found the legislative requirement of union membership to infringe construction workers’ freedom of association unjustifiably, because union membership entailed ideological conformity. According to Justice Bastarache,

...the interpretation of ideological conformity must be broader and must take place in context. In this case, this context would take into account the true nature of unions as participatory bodies holding political and economic roles in society which, in turn, translates into the existence of ideological positions. To mandate that an individual adhere to such a union is ideological conformity.<sup>53</sup>

For these judges, this was a “clear situation of government coercion,”<sup>54</sup> the “ultimate forced association”<sup>55</sup> that “markedly infringed” the freedom to not associate.<sup>56</sup>

Finally, Justice Iacobucci’s plurality opinion for himself alone was significant as the “swing vote” upholding the law. He agreed with Justice Bastarache that

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since union membership was actually a pre-condition of being hired for a construction job. See, e.g., “At Long Last, Supreme Court of Canada Grants Unions Charter Rights,” (2002) 11 *Nelligan O’Brien Payne Newsletter* (Labour Law) 107-108 (Q.L.) which referred to the Quebec construction industry as a “true closed shop.” However, under the *Act*, unions were not permitted to operate hiring halls (ss. 104 and 119 of the *Act*), usually a defining feature of closed shop industries.

<sup>50</sup> Among other things, she expressed concern about the “tainted pedigree” of the freedom to not associate, noting that it originated with opponents of labour unions: *Advance Cutting*, *supra* note 14, at 269-70.

<sup>51</sup> Gonthier and Arbour JJ. concurred with LeBel J.

<sup>52</sup> *Advance Cutting*, *supra* note 14, at 330. For LeBel J., “[t]he obligation remains, nevertheless, a very limited one. It boils down to the obligation to designate a collective bargaining representative, to belong to it for a given period of time, and to pay union dues. The Act does not require more.” *Ibid.*, at 329.

<sup>53</sup> *Ibid.*, at 227.

<sup>54</sup> *Ibid.*, at 249.

<sup>55</sup> *Ibid.*, at 252.

<sup>56</sup> *Ibid.*, at 249.

mandatory union membership violated the freedom not to associate, but he thought the idea of “ideological conformity” too narrow. He conceived of a broader right not to associate. However, in a decidedly pragmatic turn, Justice Iacobucci upheld the law for the reasons given by Justice LeBel under section 1. This decision became the “lowest common denominator” of *Advance Cutting*.

## THE RAND FORMULA AS GOLD STANDARD

In her concurring opinion in *Lavigne*, Justice McLachlin called the Rand formula a “carefully crafted balance between the interest of the majority in the union and individuals who do not wish to belong to the union.”<sup>57</sup> She said that the “whole purpose” of the Rand formula was to allow employees to dissociate themselves from the union if they wished to do so.<sup>58</sup> She approved of the balance struck between individual liberties and collective interests, a task well known to judges in the *Charter* era. In a manner that also recalled Justice Rand’s attempt to be even handed in balancing the interests of labour and capital, Justice Wilson had rejected Lavigne’s argument for a freedom to not associate,<sup>59</sup> in part because the Court had earlier rejected claims by unions for constitutional protection of their fundamental associational activities, striking and bargaining collectively. She stated her concern:

Mr. Lavigne submits, however, that while the objects of an association are irrelevant to the claims of collectivities of working people, they may legitimately be taken into account when assessing the claim of an individual who objects to being associated with the objects of such a collectivity. *I do not believe it is open to the Court to engage in one-sided justice of this kind.*<sup>60</sup>

While not directly in issue, the Rand formula played an important role in *Advance Cutting* in the sense that its disaggregation of dues payment from union membership became the standard against which union security arrangements were measured. Both Justices LeBel and Bastarache defended their opposing decisions in *Advance Cutting* by relating their reasoning to the classic Rand compromise. Justice Bastarache cited extensively from the *Ford* decision, particularly noting Justice Rand’s opposition to compulsory union membership, while Justice LeBel took pains to explain why the regime in Quebec is not so different from the Rand formula, particularly because unions have circumscribed roles in this union shop regime.<sup>61</sup>

<sup>57</sup> *Lavigne*, *supra* note 7, at 346.

<sup>58</sup> *Ibid.*, at 347.

<sup>59</sup> This is not to suggest that Justice Rand would have necessarily decided Lavigne’s *Charter* challenge in the way Justice Wilson did.

<sup>60</sup> *Lavigne*, *supra* note 7, at 264 [emphasis added].

<sup>61</sup> In *Advance Cutting*, *supra* note 14, at 329-330, LeBel J. noted: “...the Act provides protection against past, present and potential abuses of union power. Unions are deprived of any direct

The opinions differed sharply in interpreting *Lavigne* and its implications. Justice LeBel cited Justice La Forest in *Lavigne* for the proposition that “an obligation to join a union whose purposes would be limited to collective bargaining would not even trigger the application of s. 2(d).”<sup>62</sup> Justice Bastarache openly objected to this assessment, stating “this inference, in my view, is not consistent with the fact that La Forest J.’s discussions of constitutional issues in *Lavigne* had nothing to do with mandatory membership.”<sup>63</sup> The fact that the union membership was voluntary was, for the four dissenters, an essential part of the Rand compromise. Five other justices apparently disagreed.

Jamie Cameron has described *Advance Cutting* as a “significant victory for labour unions,”<sup>64</sup> and further noted:

*Advance Cutting*’s retreat from the Rand formula implies that when a choice must be made between collective and individual interests, the collective can be expected to prevail.<sup>65</sup>

Cameron argued that *Advance Cutting* actually undermined the liberal compromise inherent in the Rand formula. It upheld a union security arrangement that compelled union membership where Justice Rand had noted the importance of allowing workers to separate themselves from the union as non-members while not allowing them to be “free-riders” either. Cameron said, “[w]hether *Advance Cutting* will undermine the Rand formula in other contexts remains to be seen.”<sup>66</sup>

It is true that a narrow majority of the Court recognised that union security could be about more than preventing “free-riders” and that it was constitutionally

control over employment in the industry. They may not set up or operate an office or union hall (ss. 104 and 119 of the Act). No discrimination is allowed against the members of different unions. Provided they hold the required competency certificates, all workers are entitled to work in the construction industry without regard to their particular union affiliation. Specific guarantees against discrimination are found in ss. 94 and 102. Section 96 grants members clear rights of information and participation in union life.”

<sup>62</sup> *Ibid.*, at 321.

<sup>63</sup> *Ibid.*, at 239. Bastarache J. further commented that this dispute over the La Forest opinion was not “relevant... because the association [in *Advance Cutting*] goes beyond the purpose of collective bargaining,” *ibid.*, at 239.

<sup>64</sup> J. Cameron, “The ‘Second Labour Trilogy’: A Comment on *R. v. Advance Cutting, Dunmore v. Ontario*, and *R.W.D.S.U. v. Pepsi-Cola*” (2002) 16 *Supreme Court Law Review* (2d) 67 at 79.

<sup>65</sup> *Ibid.*, at 96. Essentially, Cameron’s point was that the principles in *Advance Cutting* and the two other union *Charter* “successes” in recent years cannot be translated into other areas of *Charter* law. She said that subsequent cases have “reinforce[d] the impression that the Court established special rules for unions in these cases,” *ibid.*, at 98.

<sup>66</sup> *Ibid.*, at 79.

permissible for a government to decide that the Rand formula was not always sufficient to ensure industrial peace. However, in addition to the fact that the decision might have little practical application outside Quebec, due to the unique nature of Quebec's construction labour regime, *Advance Cutting* did not depart far from the Rand model of labour relations. Justice LeBel described the law as an acceptable legislative response to the complex and, at times, violent history of labour relations in Quebec and defended his approach as consistent with the Court's pattern of deference to legislative choices and compromises in this area.<sup>67</sup>

While the result in *Advance Cutting* narrowly upheld the union shop law, the existence of a right to be free from compelled association, particularly in the labour context, was recognised by all but one of the nine justices. There had been only minority support in *Lavigne* for the existence of such a right as an aspect of the s. 2(d) freedom of association. In this way, *Advance Cutting* continued the Court's tradition of interpreting freedom of association as a largely individual right.

## UNIONS AS RESPONSIBLE MINI-DEMOCRACIES

For Justice Rand, the idea of compulsory membership was inconsistent with his notion of "responsible unionism" and the protection of individual liberties: the idea of unions as "mini-democracies" was important. Justice Rand stated:

An irresponsible labour organization has no claim to be clothed with authority over persons or interests. ...The protection which the law in general now affords against an irresponsible organization as a bargaining agent is the power of the employees to choose a new agent.<sup>68</sup>

This understanding of unions was instrumental in the various opinions in *Lavigne*, where the political activities of unions were in issue. The fact that unions were conceptualised as representative democracies,<sup>69</sup> where members of the bargaining unit had political rights to elect and oust leaders, seemed to make the mandatory payment of union dues, even for political purposes, an acceptable policy choice.<sup>70</sup> Justice Wilson

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<sup>67</sup> *Advance Cutting*, *supra* note 14, at 339-340. However, only a few months after releasing his opinion in *Advance Cutting*, lauding a deferential approach, LeBel J. signed on to the majority decision in *Dunmore*, declaring unconstitutional the Ontario legislature's decision to exclude agricultural workers from labour relations legislation: *supra* note 12.

<sup>68</sup> *Ford*, *supra* note 1, at 1369.

<sup>69</sup> Wilson J. referred to "the mini-democracy of the workplace," *Lavigne*, *supra* note 7, at 260.

<sup>70</sup> All three opinions drew analogies between union dues and the payment of taxes in a democracy: *supra* note 40.

emphasized that “with [union] authority comes a great deal of responsibility,”<sup>71</sup> and that “the entire process of union representation carries the hallmark of democracy.”<sup>72</sup>

Justice La Forest also talked about the importance of union democracy, accepting the argument made by the union that allowing dissenting employees to “opt out” would actually discourage debate and democratic deliberation. He accepted the notion that the Rand formula furthered the valid government objective of “encouraging healthy democratic decision-making and debate within unions.”<sup>73</sup>

The importance of responsible, democratic unionism emerged again in *Advance Cutting*. The two factions on the Court, led by Justices LeBel and Bastarache respectively, differed over whether the Quebec construction unions were democratic. Justice Bastarache, for the dissent, said that unions “must be constituted democratically to conform to s. 2(d)”<sup>74</sup> and that the Quebec construction unions at issue were not properly constituted or democratically run because membership was mandatory.<sup>75</sup> On the other hand, Justice LeBel took pains to point out elements of the law that promoted what Justice Rand would call “responsible unionism”, by limiting potential abuses of union power and granting members clear rights of information and participation. In his view, “the compulsion to join a union in this case is carefully embedded in a democratic process which safeguards each member’s right to support or withdraw from a particular union at regular intervals.”<sup>76</sup> Justice LeBel defended his decision to uphold the Quebec union shop law on the grounds that “democracy is not primarily about withdrawal, but fundamentally about participation in the life and management of democratic institutions like unions.”<sup>77</sup> In a key passage, he explained why he was convinced that the Quebec union shop law embodied democratic values and represented an acceptable balance of individual and collective interests:

In fact, democracy undergirds the particular form of union security provided for by the Construction Act. Throughout the conflicts and difficulties that marred the history of the construction industry, a critical flaw of the regime appeared to be the lack of participation in the life of unions and the need to re-

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<sup>71</sup> *Lavigne*, *supra* note 7, at 302.

<sup>72</sup> *Ibid.*, at 302. Wilson J. listed some of the democratic features of the union security scheme at issue. She noted that “the Union may only compel the payment of dues from each member of the bargaining unit after a majority of those employees have exercised their choice to be represented by the Union; all employees are free to join the Union or not, and the bargaining agent may not discriminate against any member of the bargaining unit on the basis of union membership; and if the members of the bargaining unit are unhappy with their bargaining representative, they may take a vote to decertify the Union.” *Ibid.*, at 301-02.

<sup>73</sup> *Ibid.*, at 338.

<sup>74</sup> *Advance Cutting*, *supra* note 14, at 247.

<sup>75</sup> *Ibid.*, at 247.

<sup>76</sup> *Ibid.*, at 346.

<sup>77</sup> *Ibid.*, at 325.

establish and maintain control over their affairs. *While it also facilitated the evaluation of the representativeness of the unions, the obligation to choose and join a union answered this critical need in a way that a different union security arrangement, like the Rand formula would not have addressed.* The dues check-off system, like the Rand formula system, disposes of the free rider problem, but the employee remains outside the life of the union. In other security arrangements, a member may choose to remain aloof and refrain from attending meetings, voting for union officers and taking part in discussions. Affiliation means that he or she has, at least, gained the ability to influence the life of the association whether or not he or she decides to exercise this right.<sup>78</sup>

An aspect of responsible unionism that became important in *Lavigne* and *Advance Cutting* was the degree to which unions were understood as “political” or “ideological.” In concluding that compelled union membership *per se* amounted to enforced ideological conformity and therefore a violation of associational freedoms, Justice Bastarache drew on the liberal view articulated in *Lavigne* that unions were legitimate political actors (*i.e.*, they have a role in contributing to the marketplace of ideas).<sup>79</sup> He said that one cannot ignore the important political roles played by unions and used that reality to bolster his conclusion that individuals must not be compelled to be members of such ideological organizations:

The recognition of the union movement as a fundamental institution is implicit here precisely because it is a participant in the political and social debate at the core of Canadian democracy. To suggest that the unions in the present case are not associated with any ideological cause is to ignore the history of the union movement itself.<sup>80</sup>

While Justice Bastarache cited numerous examples of Quebec labour unions’ involvement in politics,<sup>81</sup> Justice LeBel stated that “[o]ur Court would have to presume that, because they take part in social debate, unions in Quebec or elsewhere act in breach of the democratic values of our society, and of the liberty interests and the freedom of opinion and expression of their members.”<sup>82</sup> To do so would “evidence

<sup>78</sup> *Ibid.*, at 334-335 [emphasis added].

<sup>79</sup> In the *Ford* dispute itself, Justice Rand was apparently aware that some portion of the union dues collected by the UAW would be used for political purposes, namely to support the Co-operative Commonwealth Federation (CCF), a predecessor of the New Democratic Party. See *Lavigne*, *supra* note 7, at 284 *per* Wilson J.

<sup>80</sup> *Advance Cutting*, *supra* note 14, at 237. Bastarache J. cited, with approval, David Wright’s point that “...trade union support for organized political parties has been a prominent part of labour’s activities throughout most of the century,” at 239, citing D. Wright, “Unions and Political Action: Labour Law, Union Purposes and Democracy” (1998) 24 *Queen’s L. J.* 1, at 7.

<sup>81</sup> *Ibid.*, at 239-242.

<sup>82</sup> *Ibid.*, at 330-331.

stereotypes about the union movement as authoritarian and undemocratic, and conjure up images of workers marching in lock step without any free choice or will, under the watchful eyes of union bosses and their goon squads.”<sup>83</sup>

Essentially, Justice LeBel had to deny the “presumed ideological bent” of unions,<sup>84</sup> and in doing so, downplay their political roles. In one sense, Justice LeBel was right about the lack of political/ideological leadership demonstrated by unions. For example, he noted that union members did not necessarily vote NDP<sup>85</sup> and that, particularly in Quebec, “[u]nion members seem to act very independently from their union when it comes to the expression of their political choices and, even more so, to their voting preferences, come election time.”<sup>86</sup> However, it is possible to understand the lack of political cohesion among unionized workers, and Justice LeBel’s view of it, as a predictable result of the separation of economic rights from political rights as an “essential feature” of the liberal post-war model of labour relations,<sup>87</sup> of which Justice Rand’s 1946 *Ford* decision was a significant part.

## THE FUTURE OF THE RAND FORMULA?

In an article discussing twenty years of *Charter* litigation involving unions, Dianne Pothier commented that “[p]olitics still explains much more about labour law than constitutional law does.”<sup>88</sup> Of the *Lavigne* decision, she wrote:

The Rand Formula, even the expenditure of monies for non-collective bargaining purposes, is too close to the core of our current system of collective bargaining<sup>89</sup> for the Supreme Court of Canada to be willing to upset the apple cart.

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<sup>83</sup> *Ibid.*, at 334.

<sup>84</sup> *Ibid.*, at 332.

<sup>85</sup> *Ibid.*, at 333.

<sup>86</sup> *Ibid.*, at 335.

<sup>87</sup> J. Fudge, “Labour, the New Constitution...,” *supra* note 24, at 109. Fudge and Eric Tucker have elsewhere critiqued the way that “business unionism” developed under the post-war model, meaning that “unions saw their role as obtaining the best deal for their specific constituencies rather than as leading a broader social movement to obtain better economic equality for working people as a whole.” See J. Fudge and E. Tucker, *Labour Before the Law: The Regulation of Workers’ Collective Action in Canada, 1900-1948* (Toronto: Oxford University Press, 2001) at 307.

<sup>88</sup> Pothier, *supra* note 9, at para. 74.

<sup>89</sup> *Ibid.*, at para. 77.



While union security provisions have been upheld in the courts, they have not been constitutionalised. The *Charter* has not been the undoing of union security, but the Rand formula remains vulnerable to legislative repeal or weakening.

Commenting on the *Advance Cutting* decision, anti-union activist Jocelyn Dumais has said, “We may have lost our battle to free the Quebec construction industry from union dictatorships but we have won the war against forced unionization in Canada.”<sup>90</sup> This may just be rhetoric, but the Dumais statement reflects the reality of challenges to union security in the political arena. In 1996 and 1997, the Fraser Institute, a conservative think-tank, held conferences<sup>91</sup> to promote the idea of “Right-to-Work” laws in Canada that would make the Rand formula, and other forms of union security clauses, illegal.<sup>92</sup> So far not even Alberta, with its low level of union density<sup>93</sup> and dynastic conservative majority in government, has been prepared to abolish the Rand formula,<sup>94</sup> often seen as the “sacred cow” of Canadian labour law.<sup>95</sup>

Conservative governments in a number of provinces have recently put reform of labour laws on the political agenda. Judy Fudge has described changes to labour

<sup>90</sup> Stewart, *supra* note 47, at 38.

<sup>91</sup> The papers presented at the June 1996 conference in Toronto, entitled “Right-to-Work Laws: The Key to Job Creation,” were collected into a book, F. Mihlar, ed., *Unions and Right-to-Work Laws: The Global Evidence of Their Impact on Employment* (Vancouver: The Fraser Institute, 1997). See also L. Spink, ed., *Bad Work: A Review of Papers from a Fraser Institute Conference on “Right-to-Work” Laws* (Toronto: York University Centre for Research on Work and Society, Working Paper Number 16, 1997), in which a number of academics and lawyers took issue with the research and conclusions put forward in the Fraser Institute publication.

<sup>92</sup> Twenty-one American states (primarily in the south and southwest) have such laws. While labour law is within federal jurisdiction, the 1947 *Labour Management Relations Act*, 29 U.S.C. Sec. 141-197 (the “Taft-Hartley Act”) gave states the right to enact laws relating to union security.

<sup>93</sup> Alberta’s rate of union density, 21.7% in 2004, is the lowest in Canada: R. Morissette, G. Schellenberg and A. Johnson, “Diverging Trends in Unionization” (2005) 6:4 *Perspectives on Labour and Income* 5, at 8.

<sup>94</sup> In 1995, the Alberta government established a joint review committee of the Alberta Economic Development Authority, led by former Conservative labour minister Elaine McCoy, to study the economic benefits of “right-to-work” laws. After hearing from both management and labour, the committee concluded that there was no economic justification for introducing “right-to-work” laws in Alberta: D. Sheremata, “Right-to-work gets pink slip: an Alberta committee says optional unionism won’t help anyone” (1995) 23 *Alberta Report* 15.

<sup>95</sup> When a Tory-appointed Red Tape Commission recommended abolishing the Rand formula in Ontario, Wayne Samuelson, president of the Ontario Federation of Labour, called the proposal “a declaration of war” and Tory Labour Minister Chris Stockwell sought to distance himself from the recommendation, saying that it was a “freelance piece.” See “Sheehan proposals would restrict labour union power in Ontario, document shows,” *Canadian Press*, 27 July 2000.

laws that favour employers, including public sector employers, as “government action designed to signal to the private sector that the political settlement between labour and capital constructed after the Second World War is no longer sacrosanct.”<sup>96</sup> A number of these changes are focused on union security. For example, shortly after the Supreme Court of Canada decision in *Lavigne* -- and in response to it -- a Conservative government in Manitoba amended the *Labour Relations Act* to require unions to “develop and implement a process for consulting with each employee... about whether they wish their union dues to be used for political purposes.”<sup>97</sup> A law of this kind imposes high costs on unions because they have to establish a consultation process as well as campaign to urge members not to opt out.<sup>98</sup> Unions in Manitoba perceived the law as an underhanded attack on the Rand formula and launched a public campaign against it. In vehement opposition to the law, unions became more political, focusing efforts and resources on electing an NDP government that ultimately repealed the law in 2000.<sup>99</sup>

Labour reform under the Ontario Conservative government was undertaken with the stated goal of promoting workplace democracy, union accountability and workers’ rights.<sup>100</sup> In addition to earlier amendments to the *Labour Relations Act*, such as requiring employers in unionised workplaces to post instructions for de-certifying a union,<sup>101</sup> the government’s 2003 pre-election platform included a “Workers’ Bill of Rights” that would, among other things, require a vote on “major decisions,” including the expenditure of funds for political purposes.<sup>102</sup> While not abolishing the Rand formula, the legislation would no doubt have made it more difficult for unions to operate.

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<sup>96</sup> Fudge, “Labour, the New Constitution...,” *supra* note 24, at 110.

<sup>97</sup> *Labour Relations Amendment Act*, S.M. 1996, c. 32, s. 15, adding s. 76.1 (since repealed).

<sup>98</sup> Wright, *supra* note 80, at 31.

<sup>99</sup> *Labour Relations Amendment Act (2)*, C.C.S.M. 2000, c. L10, s. 17. See “Beating Back Right to Work in Manitoba,” audio clip of a speech by Rob Hilliard of the Manitoba Federation of Labour at a Canadian Labour Congress Conference, “The Right to Work (for Less),” at <<http://web.archive.org/web/20021016064304>> <[http://www.makingthelinksradio.ca/Main\\_Page/clc\\_audi](http://www.makingthelinksradio.ca/Main_Page/clc_audi)>.\_The issue re-emerged in the 2003 provincial election campaign when the Conservative leader, Stuart Murray, vowed to repeal the changes made by the NDP and bring back the requirement that unions consult with each employee about the use of union dues for political purposes. See S. Edmonds, “Conservatives Drag Right-Wing Agenda Out Late in Campaign: Labour Leader” (26 May 2003) *Portage Daily Graphic* at 6.

<sup>100</sup> For example, an amendment to the *LRA* removing the Labour Board’s power to order union certification due to employer unfair labour practices was called the “Workplace Democracy Act.”

<sup>101</sup> *Labour Relations Act*, 1995, S.O. 1995, c. 1, Sched. A, s. 63.1.

<sup>102</sup> C.B.C., “Ontario Votes 2003”, available at <[http://www.cbc.ca/ontariovotes2003/features/platform\\_economic.html](http://www.cbc.ca/ontariovotes2003/features/platform_economic.html)>.

In a number of provinces, the trend is toward weaker labour laws. Pro-labour legal scholars like Judy Fudge and Harry Glasbeek have maintained that the post-war model is unable to alter the balance of power between labour and capital meaningfully, due to structural limitations, such as fragmented bargaining and the promotion of a form of responsible unionism, that make unions “managers of discontent” and prevent the use of economic power for political purposes.<sup>103</sup> The challenges posed by the proliferation of small employers, as well as increases in “precarious employment”<sup>104</sup> and global competition, only exacerbate these tensions and create an increasingly inhospitable climate for unions’ survival and growth. At the same time, the increasing participation in union leadership of women and other historically under-represented groups has led to calls for reform from within unions.<sup>105</sup>

It is in this context, with union density at historically low levels and a globalized, neo-liberal world of work that seems ill-suited to the North American post-war model of labour relations, that the Supreme Court of Canada has recently recognized labour rights as constitutional rights.<sup>106</sup> Following the 2007 *BC Health Services* decision, which found a right to collective bargaining with the s. 2(d) freedom of association,<sup>107</sup> unions have turned to the courts, seeking constitutional protection for various aspects of the post-war labour relations model which are under attack, including the Rand formula itself. Of particular note is a November 2009 decision of the Alberta Labour Relations Board which held that the absence of a legislative provision requiring employers to agree to “dues check-off” on the Rand model violated s. 2(d) of the

<sup>103</sup> J. Fudge and H. Glasbeek, “The Legacy of PC 1003,” *supra* note 23. For these reasons, Fudge and Glasbeek (at 358-59) “believe it is a serious error for unions to concentrate their efforts on attempts to gain the ground they feel they have lost in respect of statutory collective bargaining and to attempt to polish and improve the PC 1003 model, rather than change it radically.”

<sup>104</sup> “Precarious employment” describes “forms of employment involving atypical employment contracts, limited social benefits and statutory entitlements, job insecurity, low job tenure, low earnings, poor working conditions and high risks of ill health” and is often associated with work done by women and other marginalized groups such as recent immigrants. See C. J. Cranford, L. F. Vosko and N. Zukewich, “The Gender of Precarious Employment in Canada,” forthcoming in (2003) *Relations Industrielles/ Industrial Relations* at 1, available at <<http://www.genderwork.ca/precarious/papers/cranford.2003.gender.pdf>>.

<sup>105</sup> See, e.g., L. Briskin and P. McDermott, eds., *Women Challenging Unions: Feminism, Democracy, and Militancy* (Toronto: University of Toronto Press, 1993) and C. A. B. Yates, “Expanding Labour’s Horizon: Union Organizing and Strategic Change in Canada” (2002) 1 *Just Labour* 31.

<sup>106</sup> J. Fudge, “Brave New Words,” *supra* note 15. In *Fraser v. Ontario (Attorney General)*, [2006] O. J. No. 45, a follow-up case to *Dunmore*, the Ontario Court of Appeal decided that agricultural workers’ s. 2(d) rights were violated by the legislative sequel to *Dunmore*, the *Agricultural Employees’ Protection Act*, S.O. 2002, c. 16 which provided no legislative protection to their right to bargain collectively. The decision in *Fraser* has been appealed to the Supreme Court of Canada and a decision is expected in 2010.

<sup>107</sup> *Supra* note 15.

*Charter*.<sup>108</sup> Should this decision stand on appeal, it would effectively constitutionalise the Rand formula. However, it is unclear how far the Supreme Court of Canada will take its reasoning in *BC Health Services*, particularly given the insistence of Chief Justice McLachlin and Justice LeBel that the right to bargain collectively is not a right to a “particular form of labour relations”.<sup>109</sup> Whatever the outcome, it is clear that Justice Rand’s long shadow continues to extend over Canadian labour law, as does his insight that organised labour plays an important role in “redress[ing] the balance of what is called social justice.”<sup>110</sup>

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<sup>108</sup> *United Food and Commercial Workers Union Local No. 401 v. Old Dutch Foods Ltd.* (2009) A.L.R.B. File No. GE-05611. The Alberta government was given one year to amend its labour law to comply with the ruling. The decision has been appealed.

<sup>109</sup> *B. C. Health Services*, *supra* note 15, at para. 91.

<sup>110</sup> *Ford*, *supra* note 1, at 1368.