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Why Nonunion Representation Is Legal in Canada

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Résumé de l'article

Nous examinons les facteurs qui ont mené à la légalité continue de la représentation collective non syndicale au Canada, contrairement à nos voisins du Sud qui ont banni telle approche. Tant au Canada qu'aux États-Unis, l'interdiction de l'ingérence patronale a rendu illégale l'existence de syndicats jaunes. Cependant, au Canada, des formes de représentation non syndicale des employés sont légales à la condition qu'elles ne soient pas délibérément implantées dans le but d'éviter l'organisation syndicale. Aux États-Unis, le recours simultané aux articles 8 (a)(2) et 2(5) du N.L.R.A. prohibe la représentation collective non syndicale (Jenero et Lyons 1992 ; Finkin 1994).

Deux thèmes majeurs différencient les approches canadienne et américaine. Le premier relève de l'influence profonde de William Lyon Mackenzie King sur à peu près toutes les lois du travail au Canada. Le second relève du cadre institutionnel dans lequel ces lois ont été adoptées. Jusqu'au moment où les Américains ont banni les syndicats de boutique en 1935, le Canada et les États-Unis suivaient des routes parallèles en termes d'étendue et de pénétration de la représentation non syndicale.

Parmi les premiers documents sur la pénétration du modèle de représentation non syndical, on souligne qu'à la mi-1919, les comités d'entreprise ou les comités paritaires représentaient environ un demi-million de travailleurs américains alors qu'ils en représentaient quelque 145 000 au Canada. Proportionnellement, sur une base per capita, la pénétration de systèmes non syndicaux était le double au Canada de celle prévalant aux États-Unis.

La diffusion de telle forme de représentation au Canada était large, se retrouvant tant dans le secteur public que dans le privé. La fonction publique canadienne s'était pour sa part inspirée d'une application bâtarde du British Whitley Committee Plan. Durant les années 30, le mouvement syndical canadien a suivi avec attention et intérêt l'adoption du Wagner Act et a endossé profondément ses paramètres de reconnaissance, de négociation obligatoire et ses explications des pratiques interdites. Le gouvernement fédéral canadien fut apathique dans sa réponse aux pressions syndicales et a laissé les provinces pendre l'initiative d'écrire des « mini-lois Wagner ».

Les délais dans l'adoption des lois du travail sont très significatifs. Alors que les Américains ont adopté leur principale loi du travail au cours d'une période de réforme suite à la dépression, le Canada a retardé l'adoption de sa loi pour cinq raisons : (1) les facteurs constitutionnels et la compétence très limitée du fédéral s'en suivant ; (2) le scepticisme de Mackenzie King quant à la possibilité de transplanter le Wagner Act et ses mécanismes au Canada ; (3) la préoccupation gouvernementale étant alors le chômage, on ne concevait pas l'adoption de lois pro-travailleurs comme instrument de planification économique ; (4) les alliances politiques-affaires ont conduit les gouvernements à éviter des lois qui forceraient les entreprises à reconnaître et à négocier avec ces syndicats radicaux du COI ; (5) après 1937, et de façon plus importante, la préoccupation gouvernementale envers la Seconde Guerre mondiale. Alors, quand le temps fut venu au Canada d'adopter une législation du travail d'ensemble, les environnements politique et économique étaient fort différents de ceux qui avaient prévalu aux États-Unis.

Mackenzie King a finalement agi au milieu des années 40 lorsqu'il s'est vu menacé de non-réélection suite à l'alliance entre le CCF et le mouvement syndical. Ce dernier s'est senti trahi par la Commission d'enquête sur les différends industriels et sa malhabileté constante dans quatre conflits difficiles (C.G.E., National Steel Car, Canada Packers et Kirkland Lake). Dans ces quatre cas, la Commission a encouragé la substitution des syndicats par des forums non syndiqués afin de mettre fin à des grèves de reconnaissance syndicale. Mackenzie King a ultimement répondu avec le C. P. 1003. Cependant, le C. P. 1003 n'incluait pas une interdiction explicite des formes non syndicales de représentation des employés. Nous retenons cinq explications de ce fait: (l) l e premier ministre était un grand adepte des formes non syndicales de représentation ; (2) la Seconde Guerre mondiale a suscité des appels à la coopération entre syndicats et entreprises, ce que les formes non syndicales de représentation ne favorisaient pas selon les perceptions ; (3) les tenants du syndicalisme de boutique ont été convaincants en 1943 tant devant un Comité de la législation ontarienne que devant le Conseil des relations du travail en temps de guerre. Ils ont référé à la liberté d'association, à la crainte de domination par des syndicats étrangers et ont pointé le succès de plusieurs entreprises non syndiquées ; (4) plusieurs des syndicats canadiens les plus conservateurs se préoccupaient de savoir comment obtenir une protection légale pour les syndicats « responsables ».

Le CTC ne s'opposait pas aux syndicats de boutique comme on aurait pu s'y attendre ; (5) de grandes compagnies opérant des entreprises non syndiquées ont fait de généreuses contributions à la campagne du Parti libéral du Canada.

Nous avons analysé les lois canadiennes du travail. L'emphase y est clairement mis sur l'identification du syndicat comme agent approprié de négociation, sur l'exigence que ces syndicats déposent leur constitution, règlements et autres documents présentant leurs objectifs et sur le dépôt de leurs états financiers. On ne reconnaît pas comme agent de négociation approprié un syndicat dominé par l'employeur et alors, on ne l'accréditera pas. Les lois fédérales et provinciales anglophones interdisent l'accréditation d'organisations d'employés dominées par l'employeur mais ne contiennent aucune disposition défendant leur existence ou donnant le pouvoir aux commissions de relations du travail d'ordonner leurs dissolution. Seul le *Code du travail* du Québec, à son article 149, prévoit que telle association peut être dissoute par le Tribunal du travail.

Un examen de la jurisprudence indique une application constante de quatre prémisses de base: (l)des associations dominées par l'employeur ne peuvent pas être accréditées ; (2) seules les organisations dotées de constitution, de règlements et d'élections de dirigeants dans le but de la négociation collective peuvent être accréditées ; (3) les syndicats *bona fide* capables d'obtenir une accréditation peuvent marauder en tout temps une association non accréditée dominée par l'employeur (la période habituelle de non-maraudage ne s'applique pas ici) ; (4) les commissions des relations du travail n'ordonnent pas la dissolution d'associations non syndicales. Le résultat pratique est que les entreprises canadiennes peuvent opérer librement avec des associations formelles non syndicales. Et, même s'il existe des documents écrits qui lient les parties (ressemblant à une convention collective), ils n'ont aucun statut légal, tel une convention collective, et ils ne sont sujets à aucune contrainte, telle l'arbitrage des griefs. Ces accords non syndicaux ne donnent aucunement droit à la grève ou à l'action concertée. Plusieurs de leurs dispositions sont cependant réputées être incorporées aux contrats individuels de travail et, par conséquent, sont exécutoires.

Des organisations non syndiquées continuent donc d'exister en marge des régimes légaux de relations du travail et constituent une composante importante du paysage des relations industrielles. Alors que ce sujet est très litigieux aux États-Unis, il ne constitue pas un sujet de discussion chez les Canadiens.

Why Nonunion Representation Is Legal in Canada

DAPHNE GOTTLIEB TARAS

This study examines the factors which led to the continued legality of nonunion collective representation in Canada, in contrast to the American approach which banned formal nonunion plans. It is argued that the delay in the passage of Canadian labour laws allowed a constellation of pressures to emerge which supported the continued use of nonunion plans within both private and public sectors. Further, the influence of William Lyon Mackenzie King, and his prior support for a particular nonunion approach were influential in Canada. Canadian statutory mechanisms and subsequent labour board interpretations are presented. The practical result is that nonunion plans continue to persist outside of the statutory regimes governing union-management relations, and may form an important component of the industrial relations landscape.

This study draws attention to the public policy and legal treatment of nonunion forms of employee representation in Canada. Although rarely examined by industrial relations scholars in Canada, nonunion representation is significant for two reasons. First, the majority of employees in both Canada and the United States are not unionized and thus are not protected by the collective bargaining statutory regimes. The ability of nonunion employees to seek a collective voice mechanism where unions have not, for whatever reasons, proved to be a viable option, is of considerable interest as management philosophies have moved in the direction of greater inclusion and participation by employees. How far can managers and employees move in the direction of formalized representation systems without incurring legal roadblocks in the form of prohibitions against unfair labour practices? In both Canada and the United States, restrictions against management

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domination have outlawed true company "sham" unions.[1] This article will demonstrate that in Canada, however, formal nonunion forms of employee representation are lawful, provided they are not deliberately designed to thwart union organizing. They continue to exist today, alongside a viable union presence, and without legal challenge under Canada's collective bargaining statutes.

The second contribution this research makes involves the contrast between the Canadian and American approaches at a time where Americans are fiercely debating the continued relevance of the Wagner Act ban on formal nonunion representation. In the U.S. the combination of section 8(a)(2) and section 2(5) of the 1935 Wagner Act (1935, 49 Stat. 449) prohibits nonunion collective representation. This issue is well documented in the American literature (e.g., Jenero and Lyons 1992, Finkin 1994). It reached a zenith after the contentious NLRB *Electromation* decision (309 NLRB 1992, at 990). Nonunion representation became one of the most difficult items examined by the Dunlop Commission (1994), which was unable to reach a consensus. The arguments were laid out starkly by both proponents and opponents of the Teamwork for Employees and Management (TEAM) Act proposal to loosen 8(a)(2) restrictions against nonunion representation, which was vetoed in 1996 by President Clinton (Flynn 1996: 70–74). Through this extremely turbulent examination, there was little knowledge or examination of the Canadian approach.

What explains this discrepancy between the two countries? It will be demonstrated in this paper that the company union movement was at least as significant in Canada as it was in the U.S. in the years prior to the passage of the Wagner Act. Deliberate, but subtle, adjustments to the Wagner model allowed company unions to flourish in Canada. The array of factors that fostered the design of Canadian laws relating to the company union question will be described. The precise statutory mechanisms that allow the persistence of nonunion forms will be presented and analysed.

Two major themes that differentiate Canadian approaches from American run through this paper. These themes involve human agency and institutional context. First is the profound influence of William Lyon Mackenzie

1. Though true company unions no longer are lawful in either Canada or the U.S., discussion of formal nonunion representation in the U.S. continues to be known as the "company union" debate, as it was termed in both Canada and the United States over 50 years ago. Thus, while technically incorrect in the contemporary setting, the term has modern currency and recognition. When the term is used in this article, it is not meant to imply that a truly company-dominated union can achieve certification and legal status. There is a broad spectrum of nonunion representation forms: a "sham" company union which mimics an independent trade union for the purposes of preventing union organizing and subsequent certification is only one of many possible nonunion forms.

King, architect for over forty years of Canadian labour policy. He was the preeminent presence in the field, having studied labour relations at Harvard and eventually receiving a Ph.D. He was Canada's first Deputy Minister of Labour and the author of labour legislation policy from 1901 to 1907, labour consultant to the American Rockefeller interests and author of the famous Rockefeller/Colorado nonunion plan in 1915, head of the federal Liberal Party after 1919, and long-serving Prime Minister of Canada from 1921 to 1930 and from 1935 through 1948.

The reader is forewarned however, that to enter the realm of Mackenzie King's thinking is fraught with danger. In an accurate character sketch, Gitelman discussed King's "exceptional capacity for rationalizing his actions. With no trace of cynicism or deceit, he could transform the dross of self interest into the finest gold of reasoned humanitarianism" (1987: xiv). Mackenzie King both fascinates and baffles: a Canadian political scientist concluded that "It was not always possible for lesser mortals to sort out the tangled complexity and subtlety of Mackenzie King's political genius" (Whitaker 1977: 129). His biographers are intrigued and repelled (Ferns and Ostry 1955). Nevertheless, understanding the origins of the Canadian nonunion approach requires an appreciation of Mackenzie King's pivotal though convoluted influence.

The second theme involves the institutional setting for the passage of labour laws. The decade that intervened between the adoption of the American Wagner Act and Canada's federal attempt at comparable legislation brought a basic realignment of economic and political forces. These years were characterized by the emergence of union organizing along industrial (Congress of Industrial Organizations [CIO] affiliated) lines, which threatened business and political interests. Preoccupation with Canadian participation in World War II meant a fierce emphasis on uninterrupted productivity, at precisely a point when industrial unrest reached a peak (MacDowell 1978: 176). The constellation of forces which had an impact on the drafting of Canadian laws were different than the pressure points which underpinned the Wagner Act.

NONUNION FORMS PRIOR TO THE WAGNER ACT

In 1903, William Lyon Mackenzie King authored a Royal Commission report on Coal Mines and Railways in British Columbia, which first articulated some of the distinctive features of the Canadian approach, including an emphasis on conciliation and a distaste for industrial unrest (Martin 1954: 197). The next few years brought considerable labour strife in the Canadian coal mines, and King acted as government conciliator.

While consistently sympathetic to unions' calls for justice and better conditions for workers, he began to harbour a distaste for unions' insistence on formal recognition, which he felt led to unacceptable violence (*Mackenzie King Diaries*; Rudin 1972: 48). He privately felt that the first step towards labour-management cooperation was to ensure that workers were collectively represented in their dealings with management, and that initially such representation should come from within the companies' workforces rather than from distrusted outsiders in the trade unions. Though Mackenzie King expressed an outpouring of paternalistic affection for the working man, the plight of immigrants, and the disenfranchised, it was clear that he felt a visceral distaste for those in the trade union movement who assumed the mantle of leadership by dealing charismatically with working people. He felt that these leaders (e.g., Eugene Debbs and members of the British Socialist movement) were manipulating, and perhaps duping their followers to achieve their own needs for glorification (*Diaries*, 15 June 1897; 5 September 1897; 6 September 1897).

Mackenzie King began to intellectualize the notion of nonunion representation. This might have occurred as early as 1897, since he was acquainted with Mr. Filene, author of the Filene's department store employee nonunion plan (*Diaries*, 19 October 1897; La Dame 1930). Certainly, by the time he was approached by the Rockefellers in 1914 to act as their labour relations consultant in the aftermath of the Ludlow Colorado disaster, his ideas had crystallized. The Ludlow "massacre" arose when the mine workers of the Rockefeller-owned Colorado Fuel and Iron Company struck, primarily over the issue of union recognition. The death toll of that strike is estimated at over 200 people, including women and children who suffocated when company militia set the strikers' tent colony ablaze. Mackenzie King formulated a nonunion plan, which he described to Rockefeller in a letter of August 6, 1914 (National Archives of Canada) prior even to visiting Colorado. The Colorado Fuel and Iron Company adopted Mackenzie King's plan in 1915, and it was called the Joint Industrial Council (JIC).

The JIC plan spread throughout North America, and became the most widely practised among a host of alternative nonunion plans of the day. Though he considered the JIC an excellent plan, and touted its virtues in some of the more obscure portions of his impenetrable 1919 treatise *Industry and Humanity*, Mackenzie King feared that his association with the Rockefellers might hinder his chances of election in the Canadian political arena. He wrote of these fears in his diaries: "Once associated in any way with the Rockefeller concern, my future in politics would be jeopardized" (MacGregor Dawson 1958: 230). When he became leader of the Liberal party, he rarely spoke of his association with Rockefeller although privately his admiration for Rockefeller bordered on the fawning, and this sentiment was mutual

(Gitelman 1987). Decades later, Rockefeller took the unusual step of bequeathing $100,000 in shares to Mackenzie King upon his retirement from politics "with a heart full of admiration, devotion and affection to ease any financial problem I might have in the years that lay ahead" (Ferns and Ostry 1955: 215).

In 1919 the federal government convened a National Industrial Conference to examine the recommendations of the 1919 Royal Commission on Industrial Relations with respect to joint councils. Tom Moore, president of the Trades and Labour Congress (TLC), cautiously endorsed JICs with the stipulation that they include rather than replace trade unions (Logan 1948: 512). Mackenzie King, returned to Canada after his Rockefeller consultancy, argued that there was a natural evolution on a continuum from no representation to formal unions. Management must be taught to work with labour first, he argued. JICs were "an initial step to condition employers to the necessity of giving representation to employees... as a final step extend the employees recognition through their trade union organizations" (quoted by Martin 1954: 256). The Department of Labour embarked on a policy to encourage JICs, but remained silent on whether JICs should include or bypass trade unions.

Until the Wagner Act ban eliminated the U.S. company union movement, Canada and the U.S. were running on parallel tracks in terms of the scope and penetration of nonunion representation. In fact, it might be argued that, in terms of the proportion of the workforce covered, Canada witnessed greater penetration of formal nonunion forums than did the U.S. The early reports of nonunion plan penetration documented that by mid-1919 about half a million American workers were covered by works councils or joint councils (U.S. Conference Board 1919: 1). A comparable figure for Canada was that by July 1920, the number of Canadian workers coming within the scope of joint councils and committees was approximately 145,000, and growing rapidly (Canada Department of Labour 1921: 6). On a *per capita* basis, the penetration of nonunion systems in Canada was about twice that of the U.S.

The diffusion of nonunion plans in Canada was broad, with documentation of the creation of joint councils or committees in many industries, including abattoirs, agricultural implements, automobiles, bridge and structural iron, brush manufacturing, building and construction, the Saskatchewan civil service, clothing, engineering, oil, packing, railways, rubber, telephones, and woollen goods. Such major companies as Bell Telephone of Canada, Imperial Oil, International Harvester of Canada, Kerr Lake Mining, Manitoba Bridge & Iron Works, and Massey Harris were ardent practitioners of nonunion plans, and proudly testified as to the benefits of their various plans to the 1919 Canadian Royal Commission on Industrial Relations.

In some cases, the plans had spread directly to Canada from the U.S. due to Rockefeller ownership of Canadian companies (Gitelman 1987; Taras 1994).

In Canada, as in the U.S., some nonunion plans were born of management paternalism but worked to foster genuine worker representation, whereas other nonunion plans clearly were an attempt to side-step the necessity for union representation using a smokescreen of benevolent cooperation (Douglas 1921: 92-93). The difference between the two motives is obscured in Canada because of the impact of American ownership of major Canadian firms. For example, the JIC was installed in some large companies many years before the emergence of a viable Canadian union organizing threat (e.g., Imperial Oil implemented the JIC in 1918, but did not face a union threat until the oil industry was targeted by the Canadian district of the Oil, Chemical and Atomic Workers Union in the early 1950s [Roberts 1990]). While the parent company might have been warding off union drives in the U.S., the same need not have been true in Canada. Thus, the effects of cross-border ownership were an important factor in the development of nonunion practices in Canada, just as the international union movement affected the development of Canadian unions (Abella 1973).

While the private sector in Canada took its cue from south of the border, the burgeoning Canadian civil service drew its model from a bastardized application of the British Whitley Committee Plan, first promulgated in 1917 and adopted by the British civil service in 1919 (Seymour 1932; White 1933). British Whitleyism was intended to spread through various industries to ensure labour-management consultation, and the intent of the British Government was that

> the Councils will be recognized as the official standing consultative committees to the Government on all future questions affecting the industries which they represent and that they will be the normal channel through which the opinion and experience on an industry will be sought on all questions with which the industry is concerned. It will be seen, therefore, that it is intended that Industrial Councils should play a definite and permanent part in the economic life of the country... (Canada, Department of Labour, 1921: 13).

British Whitleyism incorporated union participation, but in Canada the model was promoted as a substitute for unions. Further, the adoption of Whitleyism in Canada was confined primarily to the civil service (which until the mid-1960s did not have the right to unionize), and despite considerable interest, actual implementation did not occur until the final years of the Second World War.

Mackenzie King had difficulty reconciling the dual roles of government as both employer and rule-maker. To offer employees representation but avoid collective bargaining, he became a consistent advocate of Whitleyism.

Speaking as leader of the opposition in the 1926 general election campaign, King announced that

> I have always advocated joint councils in matters of industry, and I think that in the relations of the Civil Service and the Government a council of which there would be representatives of the Civil Service to speak directly to members of the Government, or to take up with heads of departments matters of interest to all government departments, could be of the utmost service to all concerned. (Barnes 1974: 18–19, quoting from *The Institute Bulletin* October 1926).

When the Liberals were returned to office, they immediately were lobbied by the Civil Service Federation for support in "expeditiously" setting up these councils (*The Civil Service Review*, 21, Sept. 1928). Delays came from breaches that developed within the Public Service (outlined in Barnes 1974: 22–24; Frankel 1960: 370–371). The Liberal Government stalled on this proposal and left office before implementing the National Joint Council (NJC), and ultimately it was the Conservative Party which approved the NJC in principal, although without bringing it into practice. The outbreak of war overshadowed NJC concerns. The NJC met for the first time in June of 1944. Mackenzie King defanged the NJC, however, by ensuring that it had neither the authority to deal with wage and salary issues nor a mechanism to enforce its decisions. It was to have an advisory and consultative role only, a major departure from the British Whitley Council mandate (Barnes 1974: 101; Frankel 1960: 382).[2]

In the 1930s, the Canadian labour movement noted with considerable interest the passage of the Wagner Act, and heartily embraced its guarantees of recognition, compulsory bargaining, and explication of unfair labour practices. The Canadian federal government, however, was sluggish in its response to union pressures, and allowed the provinces to take the lead in drafting "mini-Wagner" statutes (Woods 1973: 25–28 and 83–85).

WHY DID CANADA DELAY? THE CHANGE IN INSTITUTIONAL CONTEXT

The delay in the passage of labour law statutes is highly significant, particularly in the face of such a well-defined model to the South. While the U.S. enacted its principal labour law during a period of domestic reform on the heels of the depression, various factors caused delays in Canada. When finally Canada prepared a federal Wagner Act equivalent, the political

2. When the public sector finally was given the right to unionize in the Public Service Staff Relations Act of 1967, the nonunion forms which permeated the civil service were transformed immediately into unions and gave an enormous boost to Canadian union density (Ponak and Thompson 1995).

environment was profoundly altered, rendering the company union debate quite distinguishable from that experienced in the U.S.

There are five explanations for Canada's procrastination in drafting comprehensive labour laws. First, the whole field of labour relations became muddied by constitutional issues in the aftermath of the unanticipated 1925 decision of the British Privy Council in *Toronto Electric Commissioners v. Snider* (A.C. 396) that severely limited federal jurisdiction over labour. Federal powers quickly devolved, so that the vast majority of employed Canadians and business undertakings fell within multiple provincial jurisdictions. Constitutional issues meant pressures were more diluted. Provinces did not start innovating until in 1937 Nova Scotia enacted legislation based on TLC lobbying (Trade Union Act) and British Columbia passed the Industrial Conciliation and Arbitration Act. Alberta, Saskatchewan, Manitoba, and New Brunswick followed, but no province provided machinery of enforcement until British Columbia took small steps in this direction in 1943. Ontario enacted stronger legislation in 1943, and adapted the Wagner Act principles (Woods 1973: 84–85), but largely as the direct result of the "socialist" Canadian Commonwealth Federation (CCF, later the New Democratic Party) electoral successes.

Second, after 1935 Prime Minister William Lyon Mackenzie King seems to have felt that the Wagner Act's elaborate machinery would have been difficult to transport to Canada (Coates 1973: 54), particularly during an era of vigorous management resistance to CIO-style industrial organizing (Abella 1973, 1975). King's tendency to find the expedient solution led him to encourage the TLC to seek provincial adoption of Wagner-type legislation before tackling the potential constitutional hurdles involved in the passage of federal labour laws. His personal contacts with TLC leaders also were employed to postpone the federal reckoning (Coates 1973: 54). Political scientist Gad Horowitz constructs an alternative argument for these years. From a macro perspective, he posits that the development of overt socialism in Canada forced King's Liberal Party into a more centrist position on the political spectrum where he had to distinguish his party from the CCF platform, whereas Roosevelt could enact the New Deal without being threatened by a socialist movement and could avoid the pitfalls of engaging in a debate over political ideology (Horowitz 1968: 29–40).

Third, the government was preoccupied with unemployment and did not see the passage of pro-labour laws as an instrument of macroeconomic planning (as was the case in the U.S. [Kaufman 1996]). Indeed, there is no evidence from Mackenzie King's Diaries or his *Industry and Humanity* that he ever viewed labour policy as anything other than a moral imperative. Rather, Canada was more inclined to favour strong state intervention which tended to sideline the union movement (MacDowell 1978; Rudin 1972).

Fourth, the lobbying of organized labour was held in the deepest suspicion by various political-business alliances during the era of industrial organizing (Abella 1973, 1975). There was considerable pressure on governments to avoid any legislation that would force management to recognize and deal with "radical" unions. In particular, CIO organizing efforts were feared, and efforts made to bypass any recognition of CIO unions.

Fifth, and after 1937 most important, the Government became completely preoccupied with Canada's entry into World War II and the management of foreign and domestic affairs arising from Canada's war participation.

Thus, for years, and despite his expertise, King adopted a dodge and weave approach to the demands for labour statutes which would guarantee fundamental rights for labour. It was not until 1944 that pressures built to break this inertia.

THE CONSTELLATION OF FORCES

A host of reasons for the passage of labour statutes in the 1940s is detailed by MacDowell (1978), Martin (1954), Coates (1973) and Fudge (1987). The two most critical seem to be the rise of the CCF and organized labour's disagreement with the government's approach to solving labour disputes. To some extent, they are entangled, since the CCF was drawing its vitality through an alliance with disaffected labour.

In Prime Minister King's view, the alliance between labour and the CCF was potentially disastrous to Liberal party fortunes (Pickersgill 1960: 571). The sharp rise in support for the socialist CCF justifiably terrified the Liberal government. In the 1943 Ontario provincial election, the CCF fell just four seats short of overtaking the Conservative party to form the government. The provincial Liberals were frozen out. The CCF Official Opposition in Ontario consisted of 34 members of whom 19 were trade unionists (MacDowell 1978: 193). Five days after the shocking Ontario election, four federal Liberal candidates were defeated in by-elections. King became apoplectic when in late September a national Gallup poll showed the CCF leading public opinion across the country (Whitaker 1977: 137). He lamented that "What I fear is we will begin to have defection from our own ranks in the House to the CCF" (quoted in Pickersgill 1960: 571).

King was under enormous pressure to satisfy labour's demands for statutory protection, demands which seemed to have the endorsement of the majority of voters. Early in 1944 Gallup asked both Americans and Canadians: "Most people believe the government should not be controlled by any one group. However, if you had to choose, which would you prefer to have control of the government – big business or labour unions?"

	United States	Canada
Big Business	63 percent	35 percent
Labour Unions	37 percent	65 percent

Obviously, the Canadian electorate was poised to shift towards the CCF/ labour union alliance (Whitaker 1977: 138) and Mackenzie King was an astude reader of the public sentiment. Mackenzie King confessed in his diaries that "I think, in the end, Labour can win the most by returning a Liberal Government, but I know much work will have to be done to effect that end."

The labour movement felt it was being betrayed by the federal Industrial Disputes Inquiry Commission's (IDIC, created in June 1941) consistent mishandling of four contentious struggles (at Canadian General Electric, National Steel Car (NASCO), Canada Packers and Kirkland Lake). The IDIC intervened in the General Electric case by attempting to persuade union representatives of the advisability of bypassing union recognition in favour of a one-plant employee committee. Commenting on the similar NASCO intervention, MacDowell said that "Not only was the government unprepared to support union recognition... it also had condoned the establishment of an employer dominated committee which had been used to undermine the existing union [United Steelworkers, which ultimately certified the plant in 1945]" (1978: 183). The IDIC then broke the Canada Packers strike by bypassing the union and mandating elections of worker representatives to meet in a Committee of Employees (Cohen 1941: 92). The IDIC's Kirkland Lake solution was equally odious to organized labour: "That each company respectively will enter into a signed agreement to be negotiated between the officers and a committee of employees of each company to govern the rates of pay and working conditions of the employees of the said company, exclusive of superintendents, foremen, technical staff and office staff" (quoted in Cohen 1941: 90). The Commission's approach of substituting nonunion forums in place of trade unions to end recognition strikes was viewed as an assault on the legitimate trade union movement (Martin 1954: 341-344; Cohen 1941: 59). Kirkland Lake became a call to arms for organized labour, which began fervently clamouring for the passage of Wagner-style protective legislation to guarantee union recognition. As Cohen put it, "Whatever the cause or the authority for that policy [of fostering nonunion representation], the Inquiry Commission appears to be assiduously attempting to remove the matter of trade union recognition and collective bargaining from the arena of labour disputes by cultivating acquiesence of workers to one-plant employee committees, the employers' idea and model of labour relations." (1941: 53-54).

Mackenzie King was aware that organized labour was irate at the attitudes of most of his ministers, which in his diaries he admitted were "reactionary to Liberal principles and policies" particularly in regard to labour policy. He knew that "what our men are doing is simply handing over the future of the country to the CCF" (*Diaries* 14 January 1943). He had to act quickly. Under the War Measures Act (R.S.C. 1927, c. 206), the federal government could draft comprehensive legislation. In 1944, after the National War Labour Board (NWLB) Hearings were held, the Wartime Labour Relations Regulations, commonly referred to as PC 1003, were promulgated (Feb. 17, 1944). A landmark in Canadian labour policy, it contained many features of the U.S. Wagner Act, alongside Mackenzie King's traditional emphasis on conciliation and dispute resolution. Because of the federal government's sweeping wartime powers, PC 1003 covered most areas of economic activity in Canada, superseding provincial jurisdiction. When the wartime powers of the federal government ended, the main elements of PC 1003 were adopted by most provinces (and eventually by all) and set the basic framework for a common approach to labour law across the country.

WHY NO COMPANY UNION BAN?

While enormous pressure was brought to bear in support of comprehensive labour legislation modelled on the Wagner Act, PC 1003 did not lead to a ban on nonunion forms of employee representation. Five explanations are reviewed.

First, the Prime Minister was not merely a figurehead in this debate, but had a strong vested stake in perpetuating his own invention. Though he maintained a strangely atypical silence on this matter in his Diaries, it can be inferred from his silence in the wake of the contentious recommendations of the IDIC, his endorsement of a nonunion forum for the civil service, and his well-known authorship of the private sector JIC plan, that he had not changed his early sentiments favouring nonunion representation. In a number of provinces, and particularly Ontario, the governments of the day were fearful of powerful international unions. Thus, while in the U.S., Senator Wagner was a staunch adversary of company unions, and had a strong hand in drafting legislation that reflected his antipathy (Kaufman 1996), similar backing for a company union ban did not emerge in Canada.

Second, World War II brought about calls for greater cooperation between labour and management. World War I spurred both the U.S. National War Labor Board and the Canadian 1919 Royal Commission to encourage employee representation. World War II had the same effect in Canada. The first agitation to have joint production committees apparently occurred in 1942 at the August convention of the TLC, where a resolution was passed requesting

that the government establish Labour Management Production Committees (Logan 1948: 527). According to the Department of Labour, "Official sponsorship of labour-management production committees began in Canada with the wartime need for all-out production. In the early years of the war the Department of Munitions and Supply and National Selective Service endorsed the idea of joint committees of employers and employees to deal with production problems" (*Labour Gazette* March 1948). These *ad hoc* efforts ultimately were formalized in February 1943, with a permanent Interdepartmental Committee on Labour-Management Committees and an Industrial Production Cooperation Board. Joint committees were struck in the unionized essential war industries such as steel, and also in the nonunionized realm of agriculture (and the TLC's NWLB submission lists other joint committees representing nonunion workers [1944: 65]). During the war, any form of worker-management participation was encouraged.[3] A ban on nonunion forms would only act to impede these measures. When the civil service won the right to be represented through the NJC, Mackenzie King commented that "it was becoming increasingly difficult to deny the requests of the civil service that the government, in its role of employer, should make available to its own staff the procedures and approaches which, in its legislative and executive roles, it was advising or even directing industry to follow" (Barnes 1974: 27).

Third, proponents of company unions were able to make persuasive cases as they provided evidence to both the Select Committee of the Legislative Assembly of Ontario Hearings of 1943 and the National War Labour Board inquiry of 1943. There were a number of themes that seemed to recur:

Freedom of Association: In Ontario, "Fear was expressed [by employers' organizations and by employee representatives of 'inside unions'] that a blanket prohibition against 'company' unions... would catch not only company-dominated associations of employees but also independent unaffiliated organizations of employees, and would thus be a negation of freedom of association" (Laskin 1943: 685). At the NWLB the Canadian Manufacturers Association (CMA) grounded their position in terms of the freedom of association, arguing that employees had the right to join independent unions and that it would "be most unwise to make it impossible for such machinery to continue to be used by employers and employees who have learned how to make it work satisfactorily" (Canada 1943: 164). A corollary

3. The War Labour Board ceased to exist following the expiry of wartime emergency powers in May 1947, but within the Industrial Relations Branch of the Department of Labour the approach continued. Plant-level joint committees were formally promoted, "separate from the collective bargaining process" in "those enterprises where recognized bargaining agents exist" (Canada, Department of Labour, 1965: 10–11; 1970). After the war, efforts were focused on soliciting cooperation between certified bargaining units and management.

argument by the CMA was that employers had the right to speak freely to their employees under freedom of expression doctrines.

Foreign Domination: At the NWLB Hearings, the Ontario Mining Association (OMA) made a plea to encourage "independent company unions" (Ibid.: 11) in preference to foreign-controlled (American) unions which might disrupt Canadian industries to their own advantage. The OMA fostered the orderly development of nonunion "men's committees" to oppose foreign-controlled unions (Ibid.: 12, 1315). The Canadian Car and Foundry Company Association of Employees concurred (Ibid.: 263). These arguments carried some weight at the time (Abella 1973). By contrast, in the U.S., Senator Wagner did not have to give serious credence to the notion that it was a patriotic duty to use company unions to avoid the unsettling "alien" forces of unionism originating in another country.

Don't Tamper with Success: The Wagner Act's disbanding of "several excellent organizations," such as International Harvester's JIC system, was criticized at the NWLB Hearings (Canada 1943: 269). A number of companies and nonunion plans described their records of achievement using nonunion systems, including the Ontario Mining Association, The Board of Trade for the City of Toronto (Ibid.: 857), The Steel Company of Canada (Ibid.: 951), Otis-Fensom Elevator (Ibid.: 981), Arvida Aluminium Employees Syndicate (Ibid.: 1093–4) and Imperial Oil (Ibid.: 1106–9). The Workmen's Cooperative Committee of the Consolidated Mining and Smelting Company claimed that "the so-called company union... have on record over a period of 20 years more concessions, higher wages that any similar industry, more disputes of employees settled... than any union in Canada" (Ibid.: 356).

These arguments did not go unchallenged. *Canadian Tribune* (the labour newspaper) spoke out at the hearings with examples of the companies that used company unions to avoid genuine labour unions, including National Steel and Car Corporation of Hamilton, de Havilland Aircraft of Toronto, Welland Chemical Works of Niagara Falls, Underwood Elliott Fisher of Toronto, Atlas Steel of Welland, Otis-Fensom of Hamilton, Aluminum Company of Kingston, Sawyer-Massey Ltd. of Hamilton, Canadian Marconi of Montreal, and Stelco and Inco of Sudbury (Canada 1943: 227–231). Throughout the hearings, other companies were named, including Taylor Electric Company of London, Commonwealth Electric of Welland, Robbins & Meyers of Brantford, Parker Pen of Toronto, a number of logging companies in the Queen Charlotte Islands, Dominion Bridge, and the Canadian Broadcasting Corporation (Ibid.: 1296–1303).

Strong arguments against company unions and employer domination of labour organizations were also made by the International Association of Machinists (Ibid.: 116–117), the Canadian Congress of Labour (Ibid.: 120–123), the Canadian and Catholic Federation of Labour (Ibid.: 150) the

International Association of Mine, Mill and Smelter Workers (Ibid.: 566), and a host of other international union affiliates.

The employer arguments proved more persuasive to the National War Labour Board commissioners. Their majority report criticized the "new type of labour leader," who irresponsibly refused to represent the long-term interests of his constituents and who preferred to stoke his ambition by attempting "to organize quickly by stirring up labour unrest" (NLRB Report in *Labour Gazette* February 1944: 4). The concept of union responsibility guided the future statutory provisions that required unions to demonstrate their financial accountability, their legal status, and their purpose of bargaining with employers to effect agreement rather than foment revolution. In the laborious process of drafting the legislation, Mackenzie King was able to scrutinize and comment on various drafts. At a late stage in the drafting, it was clear that the emphasis was on certification procedures of trade unions that could show their finances, purpose, and legal status. The Wagner-type prohibition on company unions was diluted. At the same time, the certification of trade unions that were influenced or dominated by management was prohibited.

The fourth reason for Canada's failure to ban nonunion forms of representation was that some of the more conservative Canadian unions were preoccupied by the issue of how to achieve statutory protection for "responsible" unions. The TLC was not as opposed to company unions as might be expected. According to MacDowell (1983), in 1937, the TLC responded to the pressure of its industrial unions for protective legislation by drafting a "Model Bill" and presenting it to various provincial governments. The Bill was criticized at TLC conventions because it did not compel collective bargaining, did not prohibit company unions, and did not include a mechanism to determine the bargaining agent. The TLC expelled CIO-affiliated unions in 1939, but remained wary of the company union issue. It seems reasonable to speculate that the TLC was ambivalent about banning company unions because that might have given organizing momentum to its bitter rival, the CIO-affiliated Canadian Congress of Labour. Company unions clearly were more of a substitute for industrial unions than traditional craft unions.

The TLC's submission to the 1943 NWLB Hearings included the TLC policy on company unions. It focused, with hard rhetoric, on barring company unions from certification and collective bargaining rights. A close reading reveals that the TLC did not advocate an outright ban on their existence (as in the Wagner Act).

> Only bona fide trade unions or genuine employees' organizations should be accorded benefits under any proposed collective bargaining legislation. We are

> firm in our view that the counterfeit species of so-called employee-organization, usually known as the 'company union' (and also known as a plant council or works council, or employees' committee), should be denied any standing under a collective bargaining act. The company union (the phrase incidentally is a contradiction in terms) is a device for forestalling or undermining genuine trade union organization. In one aspect, it is the application of the principle of the yellow dog contract on a large scale... (Canada 1943: 69)

The TLC went on to state that collective bargaining status should be denied to nonunion plans:

> It is essentially a parasitic organization enjoying and feeding on the gains of genuine trade unionism and seeking to camouflage its real purposes by imitating trade union organization and techniques... A collective bargaining act cannot by its very nature, if truly a collective bargaining act, give any status to any group of employees in the organization and activities of which the employer is directly or indirectly concerned. We cannot have true collective bargaining between an employer and his shadow... (Ibid.: 71).

By contrast, the more radical, less influential CCL unions called for a total ban on company unions "and effective penalties for the culprits and compensation for the victims should be provided." (Ibid.: 1013–14). Company unions obviously were more of a substitute to industrial organizing, and hence a greater threat to the CCL than to the TLC. In the end, the TLC approach prevailed.

A fifth and extremely circumstantial case might be made that powerful companies sought to buy influence from politicians. Many ardent practitioners of nonunion plans were significant players on the electoral stage, through generous contributions to political campaigns. It might indeed be significant that the top 16 funders of the federal Liberal Party in 1940 (accounting for 60 percent of the total campaign purse) included the great mining companies. Mackenzie King's minister of Mines and Resources, T. A. Crerar, "had been an indefatigable champion of the mining companies' point of view in the King cabinet" (Whitaker 1977). A number of companies cited in the War Labour Board's hearings as operating nonunion plans, or thwarting union organizing attempts, funded the Liberal campaign. Among the top seven companies, which pledged between $25,000 and $30,000 each and accounted for almost 35 percent of funds raised, were Eaton's, Dominion Foundries and Steel, Imperial Oil, International Nickel, Hamilton Bridge, and Canada Packers (Whitaker 1977: 123–125). Significant practitioners of nonunion employee representation appear on this list, as do companies which had mounted aggressive campaigns against union organizing. There is absolutely no proof of any connection between monetary contributions and labour policy; it is mentioned as more of an intriguing possibility than an assertion of fact.

HOW WERE CANADIAN STATUTES CONSTRUCTED?

To avoid banning nonunion forms of employee representation, Canadian lawmakers concentrated on creating narrow and structural definitions of labour organizations. In most statutes, a labour organization is a trade union, and the terms are used synonymously in the majority of codes. The earliest provincial legislation, the Nova Scotia Trade Union Act (1937) defined trade unions and required them to file constitutions, rules and by-laws and other documents containing their objectives (s. 9), provide yearly financial statements to the provincial government (s. 10) and offer "a just and true" statement of accounts upon demand by the union membership (s. 11). In subsequent labour legislation, it was common that to demonstrate trade union status and seek protection in the collective bargaining statutes, a labour organization was required to have a constitution, by-laws, officers, and file financial statements, and exist for the primary function of bargaining with management over terms and conditions of employment. Where legislation was silent on these matters, as a practical matter the various labour boards used them as tests of union *bona fides* prior to issuing certification. The 1943 Ontario Collective Bargaining Act (1943), a precursor to PC 1003, defined a collective bargaining agency as "any trade union or other association of employees which has bargaining collectively among its objects" and which is not dominated, coerced, or improperly influenced by an employer [s. 1(b)]. Federal and English-Canadian provincial statutes bar the *certification* of any employee organization which is influenced or dominated by management, but have no provisions prohibiting their existence or empowering the labour boards to order their dissolution. Among the many jurisdictions, only the Quebec Labour Code (R.S.Q., c. C-27) specifies (in section 149) that where employers interfere in the formation or activities of an association of employees, the Labour Court may order a dissolution of the association after giving it an opportunity to present arguments. Even Quebec defines "Association of employees" as a professional syndicate, union, brotherhood or other group whose object is the promotion of the interests of its members, particularly in the negotiation and application of collective agreements. Section 2(n) of the Public Service Staff Relations Act (R.S.C., c. P-35) defines "employee organization" as meaning "any organization of employees the purposes of which include the regulation of relations between the employer and its employees for the purposes of this Act," the latter phrase most often interpreted by the Public Service Staff Relations Board to mean the authority to enter into a collective agreement.

By contrast, section 2(5) of the Wagner Act defines a labour organization broadly to include not only labour unions but "any organization of any kind or any agency or employee representation committee or plan" that features employee participation, employee representation, and deals with

the employer regarding any traditional subjects of collective bargaining. When section 8(a)(2) is invoked in tandem with the definitions section, there is a clear prohibition on the continued existence of any company-dominated labour organization, and the NLRB can order the disbanding of a nonunion plan. The U.S. law has a reach and sweep that in Canada was severely curtailed.

By mid-1943, the implications of the wording of both the federal and Ontario statutes were made clear in two important Ontario cases. In the *U.A.W. v. Massey-Harris,*[4] the company's joint nonunion council was not considered an independent body, but it was not ordered to disband since it was not seeking certification. However, the Labour Court ordered that only the trade union should appear on the ballot of a subsequent employee vote for certification. In *U.E.R.M.W.A. v. Atlas Steel,*[5] the employer attended and provided company space and time for an organizing meeting of an independent union, and this was not found to be improper domination.

Thus, within a few months of the passage of the Ontario act, it could be concluded with confidence that the Canadian and American approaches to the company union issue were diverging. As Bora Laskin, the eminent legal scholar and future Chief Justice of the Supreme Court, clearly foresaw at the time of the early cases, "Even allowing for the different wording of the comparable clause in the American National Labor Relations Act, exoneration of the independent union from the taint of employer domination would be most unlikely at the hands of the National Labor Relations Board" (Laskin 1943: 695).

In PC 1003, the existence of a section 8(a)(2) equivalent obscured the fuzziness of the treatment of nonunion forums. The union movement, and particularly the TLC, had achieved such significant fundamental guarantees in the creation and diffusion of PC 1003 that the omission of an outright ban on all nonunion forms of representation sparked little criticism. Besides, the impact of the precise wording of PC 1003 was quite murky on the company union issue. Commented Laskin,

> The extent to which the purpose can be realized of course, depends on the administrative strength of the Regulations. It may be argued that while an employer's domination of or interference with an employees' organization properly subjects him to punishment, it does not affect the organization's right to represent the employees if it offers proof of support by a majority of them. Such an

4. *U. A. W. v. Massey-Harris Co. Ltd. and Industrial Council of the Employees of Massey-Harris Co. Ltd.*, decided September 7, 1943 by Justice Barlow, (1943) 43 *Labour Gazette* at 1421.

5. *U. E. R. M. W. A. v. Atlas Steel, Ltd. and Atlas Workers Independent Union,* decided September 4, 1943 by Justice Kelly, (1943) Ontario Labour Court.

> argument could not be made under the Ontario Collective Bargaining Act which disqualified company dominated unions by definition. Nor can it succeed under the National Labor Relations Act of the United States, since the Board constituted thereunder has authority to take affirmative action to effectuate the policies of the act, and may hence direct the disestablishment of company dominated unions. It is a pity that the Wartime Labour Relations Regulations are not entirely clear on this important issue (1944: 792).

A review of relevant cases in the five decades since labour laws were first passed in Canada reveals a fairly consistent application of these basic premises: (1) employer dominated employee associations cannot be certified; (2) only organizations which have constitutions, by-laws, election of officers performed in a fair manner, and which exist for the purposes of collective bargaining can be certified; (3) *bona fide* unions capable of achieving certification can conduct organizing campaigns against noncertified employer dominated associations at any time: the usual no-raid period does not apply, even when these associations have entered into agreements with employers; and (4) labour boards issue decisions which prevent certification but do not order the dissolution of nonunion associations.[6]

THE PRACTICAL RESULT

The practical result has been that Canadian companies which so desire may freely operate formal nonunion plans. These plans may include many or all of the characteristics that were specifically targeted for eradication in the U.S. (e.g., having worker elections to select worker representatives, meeting on company time and company premises, having significant representation by management within the plan and in decision-making roles, formally discussing wages and working conditions, and drawing up documents which on their face strongly resemble collective agreements). But even if binding written documents are applied to all employees, they do not enjoy the legal status which true collective agreements have under labour relations legislation, nor are they subject to the constraints (such as the requirement of mandatory grievance arbitration provisions and, in some

6. Cases which examine the status of employer dominated organizations include *Society of Ontario Hydro Professional and Administrative Employees v. Ontario Hydro* (1989), Ontario Labour Relations Board, 89 CLLC para. 16,039; *Association des employés du Métro Réal Lanctôt v. Union des employés de Commerce, Local 500*, Quebec Labour Court, 81 CLLC para. 14,129; and more recently *Construction and General Workers et al. and Sie-Mac Pipeline Contractors et al.* (1991), Alberta Labour Relations Board, Alta. LRBR para. 847. Under the federal Public Service Staff Relations Act, the relevant cases are *Public Service Alliance of Canada and Treasury Board et al.* (1967), PSSRB File No. 146-2-5, and *Treasury Board and Windsor and District Branch of Customs and Excise Union and PSAC* (1971), PSSRB File No. 192-2-12.

provinces, mandatory union dues checkoffs) that apply to true collective agreements. Nonunion agreements do not confer any right to strike or engage in a concerted work stoppage, and there is no lawful means for nonunion employees to strike (except where health and safety is a serious concern). Many of their terms, however, are considered to be incorporated into individual contracts of employment, and are enforceable as part of those individual contracts.

Nonunion employee representation has never vanished from Canadian industrial relations practices. The JIC continues to be the dominant form of representation throughout Imperial Oil, where it has existed without interruption since 1918. The Royal Canadian Mounted Police uses a nonunion plan outside Quebec. Not only are some of the older firms continuing to foster their nonunion systems, but there are no barriers to entry of new practitioners. In the last ten years, a number of employers have initiated such plans, including the Town of Banff and the Unocal branch operating in Canada. Industry giants such as Petro-Canada and Nova (Alberta) continue to operate nonunion vehicles for employee participation for their nonunion workforce, often alongside significant union penetration of their companies, and without incurring labour board complaints by unions. For a union to mount a successful legal challenge, it would need to demonstrate that the company has an anti-union animus and operates the plans to thwart employees' ability to exercise their rights under various labour codes. These cases are extremely rare, and are aimed at the renegade, overtly anti-union employer rather than at companies which operate sophisticated nonunion systems as part of their elaborate human resource management practices.

Much of the attention in the U.S. is focused on the impact of section 8(a)(2) of the NLRA, and concerted attempts have been made to amend that section, most recently through the TEAM Act lobby. Yet Canada has virtually the identical provisions in its various labour codes, without encountering the same difficulties as those in the U.S. What was different in Canada?

The critical section is not, as it is most frequently argued in the U.S., section 8(a)(2), but rather NLRA section 2(5), which defines labour organizations broadly and functionally. In Canada, the definitions section is used to confine the jurisdictional reach of labour boards to matters affecting *bona fide* unions. Nonunion forms of representation exist in the realm of individual contracts of employment. Unions are free to raid nonunion plans at any time, as any agreements reached between management and its nonunion workers cannot be used as a shield against union organizing. Many Canadian unions (e.g., Steelworkers, Communication Energy and Paperworkers) have been successful in courting nonunion plans and winning union certification. Thus, in contrast to the contentious debate raging in the U.S., Canadians by and large view nonunion employee representation as a non-issue.

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RÉSUMÉ

Pourquoi la représentation non syndicale est légale au Canada

Nous examinons les facteurs qui ont mené à la légalité continue de la représentation collective non syndicale au Canada, contrairement à nos voisins du Sud qui ont banni telle approche. Tant au Canada qu'aux États-Unis, l'interdiction de l'ingérence patronale a rendu illégale l'existence de syndicats jaunes. Cependant, au Canada, des formes de représentation non syndicale des employés sont légales à la condition qu'elles ne soient pas délibérément implantées dans le but d'éviter l'organisation syndicale. Aux États-Unis, le recours simultané aux articles 8 (a)(2) et 2(5) du N.L.R.A. prohibe la représentation collective non syndicale (Jenero et Lyons 1992 ; Finkin 1994).

Deux thèmes majeurs différencient les approches canadienne et américaine. Le premier relève de l'influence profonde de William Lyon Mackenzie King sur à peu près toutes les lois du travail au Canada. Le second relève du cadre institutionnel dans lequel ces lois ont été adoptées.

Jusqu'au moment où les Américains ont banni les syndicats de boutique en 1935, le Canada et les États-Unis suivaient des routes parallèles en termes d'étendue et de pénétration de la représentation non syndicale. Parmi les premiers documents sur la pénétration du modèle de représentation non syndical, on souligne qu'à la mi-1919, les comités d'entreprise ou les comités paritaires représentaient environ un demi-million de travailleurs américains alors qu'ils en représentaient quelque 145 000 au Canada. Proportionnellement, sur une base per capita, la pénétration de systèmes non syndicaux était le double au Canada de celle prévalant aux États-Unis. La diffusion de telle forme de représentation au Canada était large, se retrouvant tant dans le secteur public que dans le privé. La fonction publique canadienne s'était pour sa part inspirée d'une application bâtarde du British Whitley Committee Plan.

Durant les années 30, le mouvement syndical canadien a suivi avec attention et intérêt l'adoption du Wagner Act et a endossé profondément ses paramètres de reconnaissance, de négociation obligatoire et ses explications des pratiques interdites. Le gouvernement fédéral canadien fut apathique dans sa réponse aux pressions syndicales et a laissé les provinces pendre l'initiative d'écrire des « mini-lois Wagner ».

Les délais dans l'adoption des lois du travail sont très significatifs. Alors que les Américains ont adopté leur principale loi du travail au cours d'une période de réforme suite à la dépression, le Canada a retardé l'adoption de sa loi pour cinq raisons : (1) les facteurs constitutionnels et la compétence très limitée du fédéral s'en suivant ; (2) le scepticisme de Mackenzie King

quant à la possibilité de transplanter le Wagner Act et ses mécanismes au Canada ; (3) la préoccupation gouvernementale étant alors le chômage, on ne concevait pas l'adoption de lois pro-travailleurs comme instrument de planification économique ; (4) les alliances politiques-affaires ont conduit les gouvernements à éviter des lois qui forceraient les entreprises à reconnaître et à négocier avec ces syndicats radicaux du COI ; (5) après 1937, et de façon plus importante, la préoccupation gouvernementale envers la Seconde Guerre mondiale. Alors, quand le temps fut venu au Canada d'adopter une législation du travail d'ensemble, les environnements politique et économique étaient fort différents de ceux qui avaient prévalu aux États-Unis.

Mackenzie King a finalement agi au milieu des années 40 lorsqu'il s'est vu menacé de non-réélection suite à l'alliance entre le CCF et le mouvement syndical. Ce dernier s'est senti trahi par la Commission d'enquête sur les différends industriels et sa malhabileté constante dans quatre conflits difficiles (C.G.E., National Steel Car, Canada Packers et Kirkland Lake). Dans ces quatre cas, la Commission a encouragé la substitution des syndicats par des forums non syndiqués afin de mettre fin à des grèves de reconnaissance syndicale. Mackenzie King a ultimement répondu avec le C. P. 1003.

Cependant, le C. P. 1003 n'incluait pas une interdiction explicite des formes non syndicales de représentation des employés. Nous retenons cinq explications de ce fait : (1) le premier ministre était un grand adepte des formes non syndicales de représentation ; (2) la Seconde Guerre mondiale a suscité des appels à la coopération entre syndicats et entreprises, ce que les formes non syndicales de représentation ne favorisaient pas selon les perceptions ; (3) les tenants du syndicalisme de boutique ont été convainquants en 1943 tant devant un Comité de la législation ontarienne que devant le Conseil des relations du travail en temps de guerre. Ils ont référé à la liberté d'association, à la crainte de domination par des syndicats étrangers et ont pointé le succès de plusieurs entreprises non syndiquées ; (4) plusieurs des syndicats canadiens les plus conservateurs se préoccupaient de savoir comment obtenir une protection légale pour les syndicats « responsables ». Le CTC ne s'opposait pas aux syndicats de boutique comme on aurait pu s'y attendre ; (5) de grandes compagnies opérant des entreprises non syndiquées ont fait de généreuses contributions à la campagne du Parti libéral du Canada.

Nous avons analysé les lois canadiennes du travail. L'emphase y est clairement mis sur l'identification du syndicat comme agent approprié de négociation, sur l'exigence que ces syndicats déposent leur constitution, règlements et autres documents présentant leurs objectifs et sur le dépôt de leurs états financiers. On ne reconnaît pas comme agent de négociation approprié un syndicat dominé par l'employeur et alors, on ne l'accréditera pas. Les lois fédérales et provinciales anglophones interdisent l'accréditation

d'organisations d'employés dominées par l'employeur mais ne contiennent aucune disposition défendant leur existence ou donnant le pouvoir aux commissions de relations du travail d'ordonner leurs dissolution. Seul le *Code du travail* du Québec, à son article 149, prévoit que telle association peut être dissoute par le Tribunal du travail.

Un examen de la jurisprudence indique une application constante de quatre prémisses de base : (1) des associations dominées par l'employeur ne peuvent pas être accréditées ; (2) seules les organisations dotées de constitution, de règlements et d'élections de dirigeants dans le but de la négociation collective peuvent être accréditées ; (3) les syndicats *bona fide* capables d'obtenir une accréditation peuvent marauder en tout temps une association non accréditée dominée par l'employeur (la période habituelle de non-maraudage ne s'applique pas ici) ; (4) les commissions des relations du travail n'ordonnent pas la dissolution d'associations non syndicales.

Le résultat pratique est que les entreprises canadiennes peuvent opérer librement avec des associations formelles non syndicales. Et, même s'il existe des documents écrits qui lient les parties (ressemblant à une convention collective), ils n'ont aucun statut légal, tel une convention collective, et ils ne sont sujets à aucune contrainte, telle l'arbitrage des griefs. Ces accords non syndicaux ne donnent aucunement droit à la grève ou à l'action concertée. Plusieurs de leurs dispositions sont cependant réputées être incorporées aux contrats individuels de travail et, par conséquent, sont exécutoires.

Des organisations non syndiquées continuent donc d'exister en marge des régimes légaux de relations du travail et constituent une composante importante du paysage des relations industrielles. Alors que ce sujet est très litigieux aux États-Unis, il ne constitue pas un sujet de discussion chez les Canadiens.